CASE NO. 12-56829

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONATHAN MICHAEL CASTRO,

Plaintiff-Appellee.

v.

COUNTY OF LOS ANGELES, ET AL.

Defendants-Appellants,

APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

On Appeal From The United States District Court
For The Central District of California
District Court Case 2:10-CV-05425-DSF-JEM

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INTRODUCTION

Sergeant David Valentine and Custody Assistant Christopher Solomon, the defendants-appellants ("defendants") in *Castro v. County of Los Angeles,* Case No. 12-56829 (Gilman, J.) (Callahan, J., concurring) (Graber, J., concurring in part and dissenting in part), respectfully seek a rehearing by the Panel or en banc of the portion of the opinion denying qualified immunity to the officers, in this 42 U.S.C. § 1983 action based upon deliberate indifference in the failure to protect the plaintiff from harm caused by another inmate.

The Panel's published opinion holds deliberate indifference claims are analyzed differently than other types of claims of official misconduct, which contradicts the Supreme Court's decision in *Saucier v. Katz*, 533 U.S. 194, 201 [121 S.Ct. 2151] (2001). The Panel holds a reviewing court should determine whether the law was clearly established based upon broad principles of law, rather than the specific context of the case and the circumstances confronting the officers at the time of the incident. (Op, p. 11 ("Instead, the right at issue is construed simply as the right [under *Farmer v. Brennan*, 511 U.S. 825 [114 S.Ct. 1970] (1994)] to be protected from attacks by other inmates. This is in stark contrast with the qualified-immunity analysis for other types of claims, such as excessive force, in which analogies to prior cases play a much stronger role."). The Panel's

holding creates a direct conflict with *Estate of Ford*, 301 F.3d 1043 (9th Cir. 2002), where the Ninth Circuit specifically held that in analyzing qualified immunity in deliberate indifference claims based upon the failure to protect an inmate from harm by another inmate, a reviewing court must determine whether the law was clearly established in light of the specific context of the case, and not as a broad general proposition of law. *Id.* at 1051 ("it is not sufficient that *Farmer* clearly states the general rule that prison officials cannot deliberately disregard a substantial risk of serious harm to an inmate").

In addition, the Panel essentially finds that if a jury reaches a verdict against an officer on a deliberate indifference claim based upon the failure to protect an inmate from harm, qualified immunity cannot be granted in his favor on a renewed motion for judgment as a matter of law brought under *Federal Rules of Civil Procedure*, Rule 50(b), if there is sufficient evidence to support the verdict. However, a finding that the defendant committed a constitutional violation is only the first prong of the qualified immunity analysis and despite a jury's finding of subjective intent, an officer is entitled to qualified immunity if a reasonable officer in his position could have believed his conduct did not amount to deliberate indifference, based upon the state of the law. *See Norwood v. Vance*, 591 F.3d 1062, 1066, 1068, 1070 (9th Cir. 2010), cert. denied 131 S.Ct. 1465 (2011) (following a jury verdict in favor of the plaintiff on his deliberate indifference

claim, the Ninth Circuit found the officers were entitled to qualified immunity as, based upon a "highly context sensitive" inquiry, the law was not clearly established such that every reasonable officer would understand the defendant's actions were unlawful "in the situation he confronted").

The Panel relied upon *A.D. v. State of Cal. Highway Patrol*, 712 F.3d 446 (9th Cir. 2013), cert. denied 134 S.Ct. 531 (2013), to support its conclusion that it could not disturb the jury's findings that the officers subjectively knew of a substantial risk of serious harm, on qualified immunity grounds. However, in *A.D.,* the Ninth Circuit determined qualified immunity in a "purpose to harm" case, and held that where a jury finds that an officer purposefully kills an individual without any legitimate law enforcement objective, the wrong is so "obvious" that there is no scenario under which it could be said that a reasonable officer in the position of the defendant could have believed his conduct to be lawful. *Id.* at 454. Thus, a purpose to harm claim is one of the *rare* occasions in which clearly established law need not be based upon the specific context of the case—no matter the circumstances the officer confronted, a reasonable officer would never believe it is acceptable to kill a suspect without a legitimate reason. *Id.* at 455.

However, the Ninth Circuit in *A.D.* specifically distinguished deliberate indifference cases, as understanding when *a* risk of harm turns into a *substantial* risk of serious harm is not "obvious" to a reasonable officer, but must be developed

by precedent analyzing the propriety of actions by officers in prior cases under similar circumstances to which the defendant was confronted. *Id.* at 455, fn. 4.

Following a jury verdict against an officer in a deliberate indifference case, which has a purely objective element to prove a constitutional violation, qualified immunity must be analyzed by determining whether the law is clearly established such that *every* reasonable officer in the position of the defendant, faced with the situation the defendant confronted, would have known there was a *substantial* risk, versus *a* risk, of serious harm to the inmate. As the Panel erred by failing to apply the proper test to analyze the defendants' entitlement to qualified immunity, defendants respectfully submit a rehearing should be granted.

A REHEARING EN BANC SHOULD BE GRANTED

Pursuant to Rule 35 of the *Federal Rules of Appellate Procedure* and Circuit Rule 35-1, defendants respectfully submit en banc review must be undertaken to secure uniformity of decision, as the decision creates an irreconcilable conflict with *Estate of Ford*, *supra*, 301 F.3d 1043, and other precedents in the Ninth Circuit regarding the proper analysis to undertake in determining entitlement to qualified immunity in a deliberate indifference case. *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (the appropriate mechanism for

resolving an irreconcilable conflict is an en banc decision). In addition, the opinion fails to follow the Supreme Court's holding in *Saucier* regarding the proper manner in which to analyze qualified immunity.

If reviewing courts decides whether the law was clearly established simply based upon the broad proposition that officers were on fair notice that inmates have a right to be free from deliberate indifference in the failure to protect them from harm by another inmate, rather than based upon analogous cases to flesh out at what point *a* risk of harm becomes a *substantial* risk of harm, officers will be improperly denied the defense of qualified immunity in deliberate indifference cases. Entitlement to qualified immunity is a matter of exceptional importance which warrants review in this case.

Furthermore, by analyzing the constitutional right at issue too broadly, the Panel essentially finds qualified immunity cannot be granted on behalf of an officer in a deliberate indifference case by way of a renewed motion for judgment, if the evidence is sufficient to support a constitutional violation, which is only the first prong of the qualified immunity analysis.

A REHEARING BY THE PANEL SHOULD BE GRANTED

For the reasons set forth above, defendants respectfully submit the Panel

made a mistake of law in its qualified immunity analysis, and rehearing is needed under Rule 40 of the *Federal Rules of Appellate Procedure*.

ARGUMENT

I. WHEN ANALYZING QUALIFIED IMMUNITY FROM A CLAIM FOR DELIBERATE INDIFFERENCE IN THE FAILURE TO PROTECT AN INMATE FROM HARM, A REVIEWING COURT ERRS IN DETERMINING WHETHER THE LAW WAS CLEARLY ESTABLISHED BASED UPON BROAD PRINCIPLES OF LAW.

Of course, there are two steps a court must decide in evaluating whether qualified immunity exists: (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) whether that right was "clearly established" by law at the time of the incident. *Saucier*, *supra*, 533 U.S. at 201. In analyzing the second prong, the Supreme Court has repeatedly held the relevant, dispositive inquiry is "whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Id.* at 202 (emphasis added). The factor is determined not as a broad proposition of law, but based upon the specific context of the case and the circumstances facing the defendant. *Id.* at 201-02. The right must have been "clearly established" in a more particularized,

and hence more relevant, sense. *Id.*; *Anderson v. Creighton*, 483 U.S. 635, 640 [107 S.Ct. 3034] (1987).

Notably, the Supreme Court stated its holding that a reviewing court is not to determine whether a right was clearly established based upon broad propositions of law was not limited to a certain type of constitutional claim, but applied "*across the board*" to any type of claim of official misconduct. *Saucier*, *supra*, 533 U.S. at 203 (citing *Anderson*, *supra*, 483 U.S. at 642) (emphasis added). In fact, the Supreme Court has repeatedly admonished the Circuit Courts, *the Ninth Circuit in particular*, not to define clearly established law at a high level of generality based upon broad principles of law rather than the specific circumstances facing the officer at the time of the incident. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084 (2011); *see also Anderson*, *supra*, 483 U.S. at 639. Otherwise, an officer would virtually never be entitled to qualified immunity. *Anderson*, *supra*, 483 U.S. at 639. So is the effect of the Panel's decision in this case.

Following *Saucier*, in *Estate of Ford*, *supra*, 301 F.3d 1043, the Ninth Circuit analyzed qualified immunity in a claim for deliberate indifference to an inmate's safety in failing to protect him from harm caused by another inmate. *Id.* at 1045. The Court stated that prior to *Saucier*, it held that a finding of deliberate indifference necessarily precluded a finding of qualified immunity. *Id.* at 1045. However, following *Saucier*, irrespective of a finding of a constitutional violation

and notwithstanding the subjective component of a deliberate indifference claim, there must be a separate, *additional inquiry* into whether a reasonable officer would have understood that his decision was impermissible under the Eighth Amendment. *Id.* The Court stated:

> In the Fourth Amendment context, the Supreme Court rejected the view that the inquiries merge because a reasonable officer could not possibly think it was reasonable, *i.e.*, lawful, to use unreasonable force. The Fords make essentially the same argument in the Eighth Amendment context, that a reasonable officer could not possibly think it was reasonable, *i.e.*, lawful, to be deliberately indifferent to a substantial risk of serious harm. *However, it is no less true for purposes of the Eighth Amendment than it was in* Saucier *that the qualified immunity inquiry "has a further dimension."*

Id. at 1049 (quoting *Saucier*, *supra*, 533 U.S. at 205) (emphasis added); *compare to Marquez v. Gutierrez*, 322 F.3d 689 (9th Cir. 2003), cert. denied 540 U.S. 1073 (2003) (irrespective of the subjective element of a claim, in determining qualified immunity, the reviewing court must look at the situation as a reasonable officer could have perceived it).

In *Estate of Ford,* the Ninth Circuit found that although the Supreme Court held in *Farmer v. Brennan* that an official may be liable if he knows of and disregards an excessive risk to inmate safety, for the purposes of analyzing qualified immunity, the reviewing court must determine whether the law was clearly established in *light of the specific context of the case. Id.* at 1050-51. Thus,

the Court held the officers were entitled to qualified immunity based upon the specific facts of the case and the information known to the officers, as not every reasonable officer would have clearly understood the risk of serious harm was so high that housing the inmates together should not have been authorized. *Id.* at 1053. *Compare to Dunn v. Castro*, 621 F.3d 1196, 1205 (9th Cir. 2010) (in deciding qualified immunity by analyzing the constitutional right implicated by the prisoner too broadly, the "district court erred by defining the question at too high a level of generality and evaluating that question without regard to the relevant fact-specific circumstances"); *George v. Edholm*, 752 F.3d 1206, 1221 (9th Cir. 2014) (in granting qualified immunity to the defendants, the Ninth Circuit stated the plaintiff "has not identified a single case finding a Fourteenth Amendment violation under circumstances like those here"); *see also Dale v. Betancourt*, 2006 U.S. Dist. LEXIS 17129, *20-21 (N.D. Cal. 2006); *Titus v. City & County of San Francisco*, 2014 U.S. Dist. LEXIS 176400, *9 (N.D. Cal. 2014); *and Jordan v. Chapnick*, 2011 U.S. Dist. LEXIS 15097, *14 (E.D. Cal. 2011) (adopted by *Jordan v. Chapnick*, 2011 U.S. Dist. LEXIS 30824 (E.D. Cal. 2011)).

The Ninth Circuit indicated that irrespective of the subjective element, deliberate indifference claims have an objective component, and qualified immunity should be granted where a reasonable officer in the position of the defendant, who knows the facts known by the defendant, could reasonably

perceive the exposure in any given situation was not that high. *Estate of Ford*, *supra*, 301 F.3d at 1049-50. ***The relevant analysis considers whether the authorities on the situation have fleshed out at what point a risk of inmate assault becomes sufficiently substantial.*** *Id.* at 1051; *compare to A.D.*, *supra*, 712 F.3d at 454-55, fn. 4 (distinguishing the rare cases involving "obvious" constitutional violations, such as purpose to harm cases, for which prior analogous cases may not be necessary, from deliberate indifference cases which involve a "fact-bound inquiry" to determine whether all reasonable officers would have known of a *substantial* risk of *serious* injury); *compare to Sanderson v. Green*, 2011 U.S. Dist. LEXIS 16669, *9 (S.D. Ga. 2011) (adopted by *Sanderson v. Green*, 2011 U.S. Dist. LEXIS 33685 (S.D. Ga. 2011)) (a defendant is only on "fair notice" for the purpose of qualified immunity if there are prior cases in the relevant jurisdiction which are factually similar *or* where the risk is so "obvious" that any reasonable officer would know the conduct be unlawful); and *Alexander v. City of Muscle Shoals*, 766 F.Supp.2d 1214, 1241 (N.D. Ala. 2011) (in determining clearly established law for the purpose of qualified immunity, minor variations between cases may prove critical in the context of deliberate indifference claims, where the threshold to determine deliberate indifference is connected to combinations of diverse interdependent facts) (citing *Youmans v. Gagnon*, 626 F.3d 557, 563 (11th Cir. 2010)).

In the opinion, the Panel specifically holds that, unlike in an excessive force case, in analyzing qualified immunity in a deliberate indifference claim, it need not consider whether prior analogous cases placed the officer on notice that his conduct was unlawful under the circumstances he confronted; rather, it is sufficient to state the right of an inmate to be protected from attacks by other inmates was clearly established. (Op., p. 11.) In essence, the Panel is holding an inmate's right to be protected from harm caused by other inmates is so "obvious" that every reasonable officer would understand the parameters of the right without analogous cases to provide fair notice of the law. The Panel's holding was specifically rejected in *Estate of Ford*, as recognized in subsequent Ninth Circuit authority, because without prior analogous cases, it is not clear to a reasonable officer when *a* risk of harm, turns into a *substantial* risk of harm. *Supra.*

Instead, the Panel was required to determine whether the law was clearly established based upon the specific context of this case, i.e., whether the law was clearly established such that *every* reasonable officer in the position of the defendants would be on fair notice that there was a *substantial* risk of *serious* harm from an inmate-on-inmate attack if he or she: (1) failed to respond to the plaintiff's banging on the door of a detoxification cell; or (2) placed the plaintiff in the same cell as an inmate who had hit a mirror and who threatened to spit on an officer prior to arriving at the jail, *but who did not display any violent behavior toward*

any person on the night of the incident.[1]

As the Panel did not engage in the proper qualified immunity analysis and failed to consider whether the law was clearly established based upon the specific context of this case and the conduct attributed to the defendants, the officers were improperly denied qualified immunity. Moreover, the published decision now holds that deliberate indifference cases are analyzed differently than other types of claims, based on broad propositions of law.

II. IN A DELIBERATE INDIFFERENCE CASE FOR FAILING TO TAKE MEASURES TO PREVENT AN INMATE-ON-INMATE ATTACK, QUALIFIED IMMUNITY IS NOT FORECLOSED AS A MATTER OF LAW FOLLOWING A JURY VERDICT AGAINST THE DEFENDANT OFFICER.

The Panel addressed whether the evidence was sufficient to support the verdict, but failed to separately determine qualified immunity, stating the jury's verdict finding there was substantial risk of serious harm to the plaintiff of which the officers were *subjectively* aware, foreclosed the possibility of awarding

[1] The facts were undisputed at trial the inmate who attacked plaintiff had not been physically assaultive with any persons on the night of the incident. (RT 6/6/12, 60:2-25, 89:10-90:10; 6/7/12 195:11-198:20.) Rather, he was listed as "combative" on a form because he had threatened to spit at an officer prior to arriving at the station. (RT 6/6/12, 32:13-33:9, 90:11-91:5.)

qualified immunity on appeal. (Op, p. 17 ("a jury has already weighed in and found that Valentine was aware of and disregarded not merely a risk of some harm, but a substantial risk of serious harm to Castro").)

In *Norwood v. Vance*, *supra*, 591 F.3d 1062, as in this case, the jury returned a verdict in favor of the plaintiff as it found the defendants were deliberately indifferent to plaintiff's rights in violation of *Farmer v. Brennan*. *Id.* at 1066. Thus, the jury necessarily found the defendants had the subjective state of mind required for a finding of deliberate indifference. However, on appeal, the Ninth Circuit found a reasonable officer in the position of the defendants, viewed from a "highly context-sensitive" analysis, would not necessarily have known his conduct to be unlawful based on the specific situation the officers confronted. *Id.* at 1068, 1070. Accordingly, post-judgment, the officers were entitled to qualified immunity, despite the jury's verdict finding of deliberate indifference.

In *Luckert v. Dodge County*, 684 F.3d 808 (8th Cir. 2012), cert. denied 133 S.Ct. 865 (2013), the jury found in favor of the plaintiff on a deliberate indifference claim, and the Eighth Circuit granted the officer's Rule 50(b) renewed motion for judgment as a matter of law based upon qualified immunity. *Id.* at 816, 820. The Court stated that in analyzing qualified immunity, although the law was clearly established that jailers must take measures to prevent inmate suicides, *the law was not established with any clarity as to what those measures must be*. *Id.* at

819. While the district court denied the officer's motion as it found the evidence was sufficient to support the verdict, the Court stated the proper manner in which to analyze qualified immunity was to review the evidence that is deferential to the verdict, and determine whether, even if the defendant knew of the risk to the inmate and the harm occurred, a reasonable official could have believed the defendant's conduct did not amount to deliberate indifference. *Id.* at 819-20.

In other words, following a jury verdict against a defendant officer, while deference is given to the version of the facts supported by the evidence as presented by the plaintiff, an officer is still entitled to qualified immunity unless *every* reasonable officer in the position of the defendant would have been on fair notice that his conduct amounted to deliberate indifference based upon those facts and the circumstances he confronted.

In *A.D.*, *supra*, 712 F.3d 446, relied upon by the Panel, the Ninth Circuit considered the impact of the jury's finding against the defendant as to the subjective requirement that the officer acted with a purpose to harm in violation of the plaintiffs' rights to familial association, in considering whether the officer was entitled to qualified immunity based upon his renewed motion for judgment as a matter of law. *Id.* at 452. The Court acknowledged that it had been warned by the Supreme Court to stop defining "clearly established" law too generally. *Id.* at 455. However, the Ninth Circuit concluded that irrespective of whether prior cases

addressing the illegality of shooting a civilian with a purpose to harm unrelated to a legitimate objective were factually distinguishable, the constitutional rule was "obvious"—every reasonable officer would know that killing a person with no legitimate law enforcement purpose violates the Constitution. *Id.* at 454-55 ("This is one of those *rare* cases in which the constitutional right at issue is defined by a standard that is so 'obvious' that we must conclude—based on the jury's finding—that qualified immunity is inapplicable, even without a case directly on point.") (emphasis added). Conversely, the Ninth Circuit distinguished *Estate of Ford* and deliberate indifference cases, as the qualitative difference between the degree of risk that will result in liability, and that which will not, "***is a fact-bound inquiry***." *Id.* at 455, fn. 4 (emphasis added).

Furthermore, a purpose to harm claim does not have an objective element of the claim separate and apart from the subjective component element. Rather, in *A.D.*, the jury was tasked with determining whether the officer acted with a bad motive/purpose to harm *or* with a legitimate law enforcement purpose. As the jury found the officer acted with a bad motive, the Ninth Circuit did not want to disturb the finding. *A.D.*, *supra*, 712 F.3d at 453, 456. In contrast, deliberate indifference claims contain a completely separate objective element, in addition to a subjective

element.[2] Because a reasonable officer in the position of the defendants could have failed to realize there was a *substantial* risk of *serious* harm based upon the facts as viewed in favor of the plaintiff, the defendants are entitled to qualified immunity. *See Riccardo v. Rausch*, 375 F.3d 521, 526 (7th Cir. 2004), cert. denied 544 U.S. 904 (2005).

Here, the Panel distinguished *Estate of Ford* but did not discuss prior analogous cases which would show defendants were on fair notice that their conduct on the night of the incident violated plaintiff's rights. (Op., pp. 16-18.) As the point at which some risk of harm amounted to a *substantial* risk of harm was not "obvious," the law could not be "clearly established" without prior similar cases. In fact, because *Ford* found the law has not fleshed out what point the risk of some harm to an inmate from an attack by another inmate becomes a *substantial* risk of harm, "a very high level of particularity" was necessary. *Hope v. Pelzer*, 536 U.S. 730, 740-41 [122 S.Ct. 2508] (2002).

Indeed, the law is not clearly established such that *every* reasonable officer

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[2] Even in claims involving only subjective elements, an officer is still entitled to qualified immunity despite a jury's findings, where the law is not clearly established that the conduct at issue violated the plaintiff's constitutional rights. *Crawford-El v. Britton*, 523 U.S. 574, 589, 592-93 [118 S.Ct. 1584] (1998) (even when the general constitutional rule of law is clearly established, a defendant will still be entitled to qualified immunity in the presence of an unconstitutional motive, where there "may be doubt as to the illegality of the defendant's particular conduct").

would be on fair notice that he could not house two arrestees together in the detoxification cell, where the undisputed evidence shows neither inmate was physically assaultive toward any person on the night of the incident. To the contrary, a number of cases actually reach the opposite view. *Estate of Ford*, *supra*, 301 F.3d at 1052; *see also Berry v. Sherman*, 365 F.3d 631, 633-34 (8th Cir. 2004) (viewed objectively, the officials were entitled to qualified immunity from deliberate indifference for the failure to protect an inmate from harm by another inmate; although the inmate threatened violence prior to the incident, the threats were directed at other inmates, not to the plaintiff); and *Pagels v. Morrison*, 335 F.3d 736, 740-42 (8th Cir. 2003) (defendant entitled to qualified immunity from plaintiff's claims based on an assault by his cellmate, as defendant did not have any specific knowledge of a propensity for violence by the attacking cellmate).

Moreover, a reasonable officer in the position of the defendants could have failed to respond to banging on a door by an inmate in the detoxification cell. Again, rather than placing an officer on fair notice that the foregoing conduct amounts to deliberate indifference, case law supports the opposite position. In *Tucker v. Evans*, 276 F.3d 999 (8th Cir. 2002), the decedent-inmate was beaten to death by his cellmate and prior to the assault, there was an alleged argument between the decedent and his cellmate. *Id.* at 1002. On appeal, the Court reversed the denial of qualified immunity, as there was no evidence the deceased was the

target of an impending *physical attack* by the cellmate. *Id.* Thus, a reasonable official in position of the defendants at the time the attack occurred would not have believed that his actions violated the decedent's clearly established constitutional rights. *Id.* at 1003.

In sum, while the general constitutional rule of law was clearly established that an officer cannot be deliberately indifferent to an inmate's right to be free from harm caused by another inmate, the defendants are entitled to qualified immunity irrespective of the jury's finding of deliberate indifference as, assuming all facts in favor of the plaintiff, the law is not clearly established and there is doubt as to the illegality of the defendants' conduct in this case. Accordingly, a rehearing as to the officers' entitlement to qualified immunity should be granted.

CONCLUSION

For the foregoing reasons, defendants respectfully request a rehearing of the issues identified above, and/or rehearing en banc.

DATED: May 15, 2015 HURRELL CANTRALL LLP

By: /S/ Melinda Cantrall
MELINDA CANTRALL
Attorneys for Defendants-Appellants,
COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, CHRISTOPHER SOLOMON and DAVID VALENTINE

Form 11. Certificate of Compliance Pursuant to

Circuit Rules 35-4 and 40-1

Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer (signature block below)

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

X__ Proportionately spaced, has a typeface of 14 points or more and contains 4,125 words (petitions and answers must not exceed 4,200 words).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _____words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

DATED: May 15, 2015 HURRELL CANTRALL LLP

By: /S/ Melinda Cantrall
MELINDA CANTRALL
Attorneys for Defendants-Appellants, COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, CHRISTOPHER SOLOMON and DAVID VALENTINE

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, appellants are not aware of any related cases pending in this Court.

DATED: May 15, 2015 HURRELL CANTRALL LLP

By: /S/ Melinda Cantrall
MELINDA CANTRALL
Attorneys for Defendants-Appellants,
COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, CHRISTOPHER SOLOMON and DAVID VALENTINE

ADDENDUM FOR STATUTES AND CONSTITUTIONAL PROVISIONS SUBMITTED PURSUANT TO CIRCUIT RULE 28-2.7

CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983 (Civil action for deprivation of rights)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Eighth Amendment to the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment to the United States Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

EXHIBIT "A"

(CIRCUIT RULE 40-1(C)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JONATHAN MICHAEL CASTRO, *Plaintiff-Appellee*, v. COUNTY OF LOS ANGELES; LOS ANGELES SHERIFF'S DEPARTMENT; CHRISTOPHER SOLOMON; DAVID VALENTINE, Sergeant, aka Valentine, *Defendants-Appellants*.	No. 12-56829 D.C. No. 2:10-05425-DSF OPINION

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted
December 11, 2014—Pasadena, California

Filed May 1, 2015

Before: Ronald Lee Gilman,* Susan P. Graber,
and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Gilman;
Concurrence by Judge Callahan;
Partial Concurrence and Partial Dissent by Judge Graber

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* The Honorable Ronald Lee Gilman, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

SUMMARY**

Civil Rights

The panel affirmed in part and reversed in part the district court's judgment, entered following a jury trial, in an action brought under federal and state law by a pretrial detainee who was attacked by another arrestee and suffered serious harm.

Affirming the judgment in favor of plaintiff against the individual defendants, the panel held that defendants were not entitled to qualified immunity because the right to be free from violence at the hands of other inmates was well established and there was sufficient evidence for a jury to find that the officials were deliberately indifferent to a substantial risk of harm to plaintiff. The panel further found that there was sufficient evidence for the punitive damages award.

Reversing the judgment in favor of plaintiff against the County of Los Angeles and the Los Angeles Sheriff's Department, the panel held that plaintiff's claim under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–71 (1978), was legally viable but insufficiently proven. The panel held that although the entity defendants instituted a formal policy under *Monell* with regard to designing the jail's sobering cell, there was insufficient evidence that they had actual knowledge of the risk to plaintiff's safety.

The panel affirmed the jury's future-damages award, determining that plaintiff presented sufficient evidence

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

regarding the amount of his past damages from which a jury could reasonably calculate the amount of future damages.

Concurring, Judge Callahan agreed that the judgment of the district court against the individual defendants should be affirmed and the judgment against the entity defendants should be reversed. She wrote separately to explain that she did not think that plaintiff had shown that the design of the West Hollywood Station constituted a policy for purposes of liability under *Monell.*

Concurring in part and dissenting in part, Judge Graber joined the majority opinion as to the liability of the individual defendants. She dissented from the holding that there was insufficient evidence from which the jury could have concluded that the entity defendants were deliberately indifferent to the risk that plaintiff would be harmed by a fellow inmate.

COUNSEL

Melinda Cantrall (argued) and Thomas C. Hurrell, Hurrell Cantrall LLP, Los Angeles, California, for Defendants-Appellants.

John Burton (argued), Law Offices of John Burton, Pasadena, California; Maria Cavalluzzi, Cavalluzzi & Cavalluzzi, Los Angeles, California; and Lawrence Lallande, Lallande Law PLC, Long Beach, California, for Plaintiff-Appellee.

OPINION

GILMAN, Senior Circuit Judge:

In October 2009, Jonathan Castro was arrested for being drunk in public. He was housed in a "sobering cell" at the Los Angeles Sheriff's West Hollywood Station where, a few hours after his arrest, he was savagely attacked by another intoxicated arrestee who had been placed in the cell with him. The officer on duty at the jail failed to respond to Castro's pounding on the cell door despite evidence that the officer was well within range to hear the pounding. Castro suffered serious harm, including a broken jaw and traumatic brain injury.

This lawsuit was filed by Castro in the United States District Court for the Central District of California in July 2010. He brought both federal- and state-law claims against the County of Los Angeles, the Los Angeles County Sheriff's Department, and a number of John Doe defendants who were later identified as two of his jailers. After a six-day trial, the jury returned a verdict for Castro against both the individual and entity defendants, awarding him over $2.6 million in past and future damages.

The defendants then renewed their joint motion for judgment as a matter of law, arguing that there was insufficient evidence to support the verdict, that the individual defendants were entitled to qualified immunity, and that Castro's theory of liability against the County and the Sheriff's Department (these two entities being hereinafter collectively referred to as the County) was simply untenable. The district court denied the defendants' motion without a written opinion. They now appeal. For the reasons set forth

below, we **AFFIRM** the judgment of the district court against the individual defendants but **REVERSE** the judgment against the County.

I. BACKGROUND

A. Assault on Castro

Castro was arrested late in the evening of October 2, 2009 for public drunkenness. The arresting officers reported that Castro was staggering, bumping into pedestrians, and speaking unintelligibly, so they arrested him "for his safety." He was transported to the West Hollywood Station and placed in a fully walled sobering cell that was stripped of objects with hard edges on which an inmate could hurt himself if he lost his balance. The cell contained only a toilet and a series of mattress pads on the floor. A short time later, Jonathan Gonzalez was arrested after punching out a window at a nightclub. The officers brought Gonzalez to the West Hollywood Station, where he was placed in the same sobering cell that housed Castro. Gonzalez's intake forms indicated that he was "combative" at the time he was placed in the cell.

Shortly after Gonzalez was placed in the cell, Castro approached the door and pounded on the window in the door for a full minute, attempting to attract an officer's attention. No one responded. A community volunteer at the jail, Gene Schiff, came by approximately 20 minutes later. He noted that Castro appeared to be asleep and that Gonzalez was "inappropriately" touching Castro's thigh, the latter circumstance being in violation of jail policy. Schiff did not enter the cell to investigate. Instead, he reported the contact to the supervising officer, Christopher Solomon. Solomon took no action until he heard loud sounds six minutes later.

He rushed to the sobering cell and saw Gonzalez making a violent stomping motion. Solomon immediately opened the door and discovered that Gonzalez was stomping on Castro's head. Solomon ordered Gonzalez to step away from Castro. Seeing that Castro was by then lying unconscious in a pool of blood, Solomon called for medical assistance.

When the paramedics arrived, Castro was still unconscious, in respiratory distress, and turning blue. He was hospitalized for almost a month, then transferred to a long-term care facility, where he remained for four years. He currently suffers from severe memory loss and permanent cognitive impairments. Even after his release from the long-term care facility, Castro remains incapable of performing simple life functions, such as cooking and maintaining hygiene. His family is responsible for his basic care to this day.

B. District court proceedings

After his complaint was filed, Castro substituted Solomon and Solomon's supervisor, Sergeant David Valentine, for the John Doe defendants named in the original complaint. Solomon was the jail's officer on duty on the evening in question and Valentine was the watch sergeant in charge of the jail as a whole. Castro's basic theory of liability under 42 U.S.C. § 1983 was that both the County and the individual defendants were deliberately indifferent to the substantial risk of harm created by housing him in the same sobering cell as Gonzalez and by failing to maintain appropriate supervision of the cell. The complaint also set forth a variety of state-law claims, not one of which is raised by any party to this appeal.

The individual defendants moved to dismiss the claims against them on the ground of qualified immunity, but the district court rejected their arguments. It concluded that a jury could find that placing an actively belligerent inmate in an unmonitored cell with Castro constituted deliberate indifference to a substantial risk of harm, in violation of Castro's constitutional rights.

The case proceeded to trial. After Castro rested his case, the defendants moved for judgment as a matter of law on three grounds: (1) insufficient evidence that the design of a jail cell constitutes a policy, practice, or custom by the County that resulted in a constitutional violation; (2) insufficient evidence that a reasonable officer would have known that housing Castro and Gonzalez together was a violation of Castro's constitutional rights; and (3) insufficient evidence for the jury to award punitive damages. The district court denied the motion in its entirety. Five days later, the jury returned a verdict for Castro on all counts and awarded him $2,605,632.02 in damages. Based on the jury's findings, the parties later stipulated to $840,000 in attorney fees, $12,000 in punitive damages against Valentine, and $6,000 in punitive damages against Solomon.

After trial, the defendants timely filed a renewed motion for judgment as a matter of law. The trial court denied the renewed motion without issuing a written opinion. This timely appeal followed.

II. ANALYSIS

A. Standard of review

We review de novo the district court's denial of a motion for judgment as a matter of law. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1005 (9th Cir. 2004). A renewed motion for judgment as a matter of law is properly granted only "if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). "A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Id.*

In making this determination, the court must not weigh the evidence, but should simply ask whether the plaintiff has presented sufficient evidence to support the jury's conclusion. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227–28 (9th Cir. 2001). Although the court must review the entire evidentiary record, it must view all the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in the favor of the nonmover, and disregard all evidence favorable to the moving party that the jury is not required to believe. *Id.* at 1227.

The defendants raise a number of issues on appeal, ranging from discrete legal questions to disputed matters of evidence. We first address the arguments raised by the individual defendants, then move on to those presented by the County.

B. Neither Solomon nor Valentine is entitled to qualified immunity

Both individual defendants—Solomon and Valentine—argue that the judgment against them should be reversed because they are entitled to qualified immunity. The doctrine of qualified immunity shields government officials from civil liability under 42 U.S.C. § 1983 if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

To determine whether an officer is entitled to qualified immunity, a court must evaluate two independent prongs: (1) whether the officer's conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the incident. *Id.* at 232. These prongs may be addressed in either order. *Id.* at 236.

The constitutional right at issue in this case is the right to be free from violence at the hands of other inmates. This right was first recognized by the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825 (1994). In *Farmer*, a male-tofemale transgender person was placed in male housing in the federal prison system, where she was beaten and raped by another inmate. *Id.* at 830. She brought a civil rights action for damages and an injunction, alleging that the corrections officers had acted with deliberate indifference to her safety, in violation of the Eighth Amendment. *Id.* at 830–31. The

Supreme Court agreed with her, holding that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners" because corrections officers have "stripped [the inmates] of virtually every means of self-protection and foreclosed their access to outside aid." *Id.* at 833 (internal quotation marks omitted). This court has since clarified that the right to be free from violence at the hands of other inmates extends to inmates housed in state or local custody. *See Cortez v. Skol*, 776 F.3d 1046, 1049–50 (9th Cir. 2015) (recognizing a claim based on *Farmer* brought by a state prisoner).

Both Solomon and Valentine acknowledge that the duty to protect Castro from violence was clearly established at the time of the incident. But they argue that such a broad definition of that duty is too general to guide this court's analysis. Moreover, they contend that Castro failed to present substantial evidence to establish that they violated their duty to protect him.

"To determine that the law was clearly established, we need not look to a case with identical or even 'materially similar' facts." *Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739–41 (2002)). The question instead is whether the contours of the right were sufficiently clear that a reasonable official would understand that his actions violated that right. *Id.*; *see also Saucier v. Katz*, 533 U.S. 194, 202 (2001).

Following the Supreme Court's 1994 decision in *Farmer*, this court has considered over 15 different failure-to-protect claims stemming from inmate-on-inmate violence. In each case, the court has recited the standard established by *Farmer*, then proceeded to apply that standard to the facts of

the case before the court. The similarity of the facts—or the lack thereof—to other post-*Farmer* cases has rarely entered the discussion. *See, e.g.*, *Robinson v. Prunty*, 249 F.3d 862, 866–67 (9th Cir. 2001).

Instead, the right at issue is construed simply as the right to be protected from attacks by other inmates. This is in stark contrast with the qualified-immunity analysis for other types of claims, such as excessive force, in which analogies to prior cases play a much stronger role. *See Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1082–83 (9th Cir. 2013); *Winterrowd v. Nelson*, 480 F.3d 1181, 1185–86 (9th Cir. 2007); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056–61 (9th Cir. 2003). In sum, *Farmer* sets forth the contours of the right to be free from violence at the hands of other inmates with sufficient clarity to guide a reasonable officer. Solomon and Valentine's argument on this point is therefore without merit.

They next question the sufficiency of the evidence supporting Castro's claim of deliberate indifference. Because Castro was a pretrial detainee, his right to be free from violence at the hands of other inmates arises from the Fourth Amendment rather than the Eighth Amendment. *Pierce v. Multnomah County*, 76 F.3d 1032, 1042–43 (9th Cir. 1996). Despite those different constitutional sources, the "deliberate indifference" test is the same for pretrial detainees and for convicted prisoners. *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1242–43 (9th Cir. 2010). Thus, in order to prove that his right to be free from violence at the hands of another inmate was violated, Castro was required to show by a preponderance of the evidence that (1) he faced a substantial risk of serious harm, (2) the defendants were deliberately indifferent to that risk, and (3) the defendants'

failure to act was a proximate cause of the harm that he suffered. *See Farmer*, 511 U.S. at 847. A defendant is deemed "deliberately indifferent" to a substantial risk of serious harm when he knew of the risk but disregarded it by failing to take reasonable measures to address the danger. *Id.* On the verdict form, the jury specifically found that both Solomon and Valentine were deliberately indifferent to Castro's plight.

Castro noted several different ways in which Solomon and Valentine were deliberately indifferent to his risk of harm: both decided to house him in a fully walled sobering cell with a "combative" inmate; Solomon failed to respond to Castro's banging on the window in the door of the cell; Solomon failed to respond fast enough to Gonzalez's inappropriate touching; and Solomon erred in delegating the safety checks to a volunteer. We conclude that the jury could have found Solomon and Valentine liable based on the substantial evidence presented in support of one or more of these theories.

1. The jury could have found that Solomon was deliberately indifferent to a substantial risk of harm to Castro because he disregarded Castro's pounding on the cell door

Castro's most persuasive theory of deliberate indifference with respect to Solomon stems from Solomon's failure to respond when Castro pounded on the door after Gonzalez was placed in the cell. Video footage presented at trial established that Castro pounded on the door for a full minute after Gonzalez entered the cell. Solomon was near the cell at the time, but testified that he did not hear the pounding. Solomon also contends that the video footage of the event shows that

he "did not appear to hear any banging on the door by plaintiff." Three other witnesses, however, including two jail employees, testified that one could hear simple talking from inside the sobering cell, such that pounding would have been easy to hear from where Solomon was standing.

Faced with this evidence, the jury could have reasonably concluded that Solomon heard the pounding and elected not to respond. "[A] jury may properly refuse to credit even uncontradicted testimony." *Guy v. City of San Diego*, 608 F.3d 582, 588 (9th Cir. 2010) (citing *Quock Ting v. United States*, 140 U.S. 417, 420–21 (1891)). Here, the jury was presented with circumstantial evidence that undermined Solomon's assertion that he did not hear the pounding.

But Solomon contends in his brief that we are free to "disregard inferences in favor of the prevailing party where they are belied by a video account in the record," citing *Scott v. Harris*, 550 U.S. 372, 380–81 (2007). In this case, however, the video footage neither confirms nor refutes Solomon's account. The jury had the opportunity to review both the footage and the testimony in context, and to perform a full assessment of each witness's credibility. Given the testimony of three other witnesses, the jury had sufficient evidence to conclude that Solomon heard but ignored Castro's attempts to attract attention. On appeal, we "may not substitute [our] view of the evidence for that of the jury." *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001).

We thus reach the question of whether Solomon's failure to respond to Castro's banging constituted deliberate indifference. The jury determined that it did. This court has long held that whether or not a prison official's actions

constitute deliberate indifference is a subjective inquiry and a question of fact. *Grenning v. Miller-Stout*, 739 F.3d 1235, 1239 (9th Cir. 2014) (citing *Johnson v. Lewis*, 217 F.3d 726, 734 (9th Cir. 2000)). Because questions of fact are uniquely the province of the jury, *see Santos v. Gates*, 287 F.3d 846, 852 (9th Cir. 2002), its determination must stand when supported by substantial evidence, *see Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002).

This leads to the issue of whether Solomon's deliberate indifference was both an actual and a proximate cause of Castro's harm. *See Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013) (holding that "plaintiffs alleging deliberate indifference must also demonstrate that the defendants' actions were both an actual and proximate cause of their injuries"). Actual causation is "purely a question of fact," *Robinson v. York*, 566 F.3d 817, 825 (9th Cir. 2009), and the jury determined that Solomon's deliberate indifference was in fact one of the causes of Castro's harm.

But Solomon argues that this finding is unsupported by the evidence because Castro did not appear to be injured during a safety check performed 22 minutes after the pounding stopped. His proposed restriction on the relevant timeline for causation, however, does not comport with this court's prior rulings. *See, e.g.*, *Conn v. City of Reno*, 591 F.3d 1081, 1098–1101 (9th Cir. 2010)) (holding that a corrections officer's failure to respond to warnings of harm could be an actual cause of that inmate's suicide 48 hours later), *vacated*, 131 S. Ct. 1812 (2011), *reinstated in relevant part*, 658 F.3d 897 (9th Cir. 2011). Because Solomon has presented no compelling reason to adopt his proposed arbitrary time limitation, we decline to do so. The jury's

verdict on actual causation is supported by sufficient evidence to remain undisturbed.

"'Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury.'" *Id.* at 1100 (quoting *White v. Roper*, 901 F.2d 1501, 1506 (9th Cir. 1990)). A corrections officer will be held legally responsible for an inmate's injuries if the officer's actions are a "moving force" behind a series of events that ultimately lead to a foreseeable harm, even if other intervening causes contributed to the harm. *Id.* at 1101. If reasonable persons could differ over the question of foreseeability, that issue should be left to the jury. *Id.*

This court's prior cases are instructive. In *Conn*, for example, this court found that a corrections officer's failure to respond to an inmate's attempt to choke herself and to her subsequent threats of suicide could be considered a proximate cause of her suicide two days after the threats, even though she was subjected to several medical examinations between the time of the threats and the time of her death. *Id.* at 1101–02. The question of foreseeability was left to the jury. *Id.* Similarly, the court in *White* concluded that a corrections officer's decision to forcibly place an inmate (the plaintiff) into a cell with another, violent inmate could be considered a "moving force" behind the injury that the plaintiff suffered when he attempted to run, such that the question should have been sent to a jury. *White*, 901 F.2d. at 1506. Here, the jury found that Solomon's deliberate indifference was one of the causes of Castro's harm. Leaving that decision to the jury is in concert with this court's prior opinions.

Farmer clearly established that a corrections officer has a duty to act to protect one inmate from violence at the hands of another. The jury was presented with sufficient evidence to find that Solomon was aware of but disregarded Castro's attempts to alert Solomon to the danger faced by Castro. And the jury determined that Solomon's deliberate indifference was both an actual and a proximate cause of Castro's harm. Even if we might have reached a different conclusion when considering the totality of the circumstances, there is sufficient evidence to support the jury's verdict on this issue.

2. The jury could have found that Valentine was deliberately indifferent to a substantial risk of harm to Castro when he placed Gonzalez in Castro's cell

We next turn to Sergeant Valentine. The parties agree that Valentine may be held liable only for his own actions. Vicarious liability does not apply to claims brought under § 1983, so Valentine may not be held independently responsible for the actions of his subordinates. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Valentine was not in the immediate vicinity of the sobering cell for most of the events at issue in this case. The only relevant event for which he was present was the initial decision to house Gonzalez in the sobering cell with Castro, so we will focus our analysis on that decision.

Valentine argues that he is entitled to qualified immunity because a reasonable officer at the time of the incident would not have known that housing Gonzalez in the same cell as Castro would violate Castro's constitutional rights. He relies heavily on *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043 (9th Cir. 2002), to support this argument. In *Ford*, a group of prison officials decided to house the plaintiff with another

inmate who had been classified as a "predator" after several past incidents of assault on his cellmates. *Id.* at 1046–47. Two days later, the "predator" inmate attacked and killed the plaintiff. *Id.* at 1047.

The predatory inmate in *Ford*, however, "had been successfully double-celled for years with other inmates" and had not been recommended for "single-celling" by the prison staff. *Id.* at 1051. Moreover, the plaintiff and the predator in *Ford* consented to be housed together. *Id.* at 1047. They had previously been housed together without incident, and there was no history of violence between them. *Id.* Based on that history, this court found that "it would not be clear to a reasonable prison official when the risk of harm from double-celling . . . changes from being *a* risk of *some* harm to a *substantial* risk of *serious* harm." *Id.* at 1051. (emphases in original). The court therefore held that the official was entitled to qualified immunity. *Id.* at 1053.

Ford's central holding is that an officer is entitled to qualified immunity when the transition from *a* risk of *some* harm to a *substantial* risk of *serious* harm would not have been clear to a reasonable prison official. "[T]he qualitative difference between the degree of risk that will result in liability under the Eighth Amendment's standard, and that which will not, is a fact-bound inquiry," requiring deference to the trier of fact. *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 455 n.4 (9th Cir. 2013). Here, a jury has already weighed in and found that Valentine was aware of and disregarded not merely a risk of some harm, but a substantial risk of serious harm to Castro.

Ford was not a case of two intoxicated strangers being thrown together in the middle of the night, but rather a calm,

reasoned decision made with the input of all the affected parties. Faulting a prison official for disregarding some risk of harm is difficult when the victim himself consented to the risk. Castro, on the other hand, did not consent to being housed with Gonzalez. Gonzalez and Castro had no history together, so Valentine had no basis to conclude that the risk of an altercation was minimal. Although Gonzalez had a lesser history of violence in general than the predator inmate in *Ford*, Gonzalez's combative nature when placed in the cell was in no way mitigated by any prior interaction with Castro.

At the end of the day, this is a fact-specific inquiry. The jury heard evidence that Gonzalez presented a sufficient threat to cause him to be supervised by two officers at all times following his arrest, one of whom was consistently in contact with him. They also heard that, pursuant to jail policy, combative inmates such as Gonzalez were to be housed separately from inmates like Castro, specifically to avoid this type of altercation. The jury was further informed that separate cells were available but left unused that evening.

This evidence was sufficient to allow the jury to find that Valentine knew of but disregarded a substantial risk of serious harm to Castro, and we find no reason to disturb that finding. *See id.* at 459 ("[P]ost-verdict, a court must apply the qualified immunity framework to the facts that the jury found (including the defendant's subjective intent)."). Such a conclusion does not run afoul of this court's holding in *Ford* because of the key factual differences between the two cases.

As with Solomon, the final question then becomes whether Valentine's actions were both an actual and a proximate cause of Castro's harm. The jury determined that they were and, for the reasons discussed above, we will not

set aside that determination. Valentine is therefore not entitled to qualified immunity and may be subjected to liability for his personal involvement in the decision to house Gonzalez and Castro together.

C. For the purpose of awarding punitive damages, no additional evidence is required to make a finding of "reckless disregard" when a finding of "deliberate indifference" has been made

The individual defendants cursorily argue that the district court's award of punitive damages must be reversed because the evidence does not support such an award. Although the parties stipulated to the eventual amount of the punitive damages entered ($12,000 against Valentine and $6,000 against Solomon), the defendants argued in both their pre- and post-verdict motions for judgment as a matter of law that there was insufficient evidence to support a punitive-damages award. Castro counters that, after hearing the officers testify, the jury might have determined that they demonstrated callousness by their lack of remorse.

Punitive damages may be assessed in § 1983 actions "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). "[T]his threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness," *id.*, because to award punitive damages, the jury must make both a factual determination that the threshold was met and "a moral judgment" that further punishment was warranted, *id.* at 52–53 (recognizing that where the underlying standard of liability is recklessness, a tortfeasor may be subject to both

compensatory and punitive damages without any additional culpable conduct). The decision to impose such sanctions is "within the exclusive province of the jury." *Runge v. Lee*, 441 F.2d 579, 584 (9th Cir. 1971).

The precise distinction between "deliberate indifference" and "reckless or callous indifference" remains an open question. As discussed above, "deliberate indifference" is defined in this circuit as "the conscious choice to disregard the consequences of one's acts or omissions." *See* 9th Cir. Civ. Jury Instr. 9.7 (2007). Furthermore, when the Supreme Court articulated the deliberate-indifference standard for failure-to-protect claims in *Farmer*, it defined the standard as one of criminal recklessness. *See Farmer*, 511 U.S. at 837–39. The circular nature of these definitions gives rise to the inference that the terms are synonymous. Juries in these cases thus have the discretion to impose punitive damages if they believe further punishment above and beyond compensatory damages is appropriate, without having to make any additional factual findings. *See Smith*, 461 U.S. at 56.

As described above, the jury heard sufficient evidence here to find that both individual defendants were deliberately indifferent. Accordingly, it was also free to find that the individual defendants' actions constituted reckless or callous indifference, opening up the possibility of punitive damages. The jury rendered such a judgment here. Because this decision is "within the exclusive province of the jury" so long as the legal prerequisites are met, we will allow the lower court's punitive-damage award to stand. *See Runge*, 441 F.2d at 584.

D. Castro's *Monell* claim is legally viable but insufficiently proven

We turn next to the issues raised by the County in this appeal. The County argues that the verdict against it should be reversed for the following three reasons: (1) the Eleventh Amendment bars a finding of liability; (2) if Castro's theory of liability is based on the County's having an informal policy that violated his constitutional rights, then his theory fails because there was no evidence presented of any similar prior incidents; and (3) if Castro's theory of liability is based on the County's having a formal policy that violated his constitutional rights, then his theory is legally untenable.

We begin our analysis by addressing a few fundamental points regarding municipal liability under 42 U.S.C. § 1983. The first point is that although § 1983 imposes liability only on "persons" who, under color of law, deprive others of their constitutional rights, the Supreme Court has construed the term "persons" to include municipalities such as the County. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978). A municipality is responsible for a constitutional violation, however, only when an "action [taken] pursuant to [an] official municipal policy of some nature" caused the violation. *Id.* at 691. This means that a municipality is *not liable* under § 1983 based on the common-law tort theory of respondeat superior. *Id.* On the other hand, the official municipal policy in question may be either formal or informal. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 131 (1989) (plurality opinion) (acknowledging that a plaintiff could show that "a municipality's actual policies were different from the ones that had been announced"); *id.* at 138 (Brennan, J., concurring) (stating that municipal policies may be formal or informal).

A formal policy exists when "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion). When pursuing a *Monell* claim stemming from a formal policy, a plaintiff must prove that the municipality "acted with the state of mind required to prove the underlying violation." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143–44 (9th Cir. 2012) (internal quotation marks omitted) (explaining that the plaintiff must prove that the municipal defendants acted with deliberate indifference, the same standard that a plaintiff has to establish in a § 1983 claim against an individual defendant).

An informal policy, on the other hand, exists when a plaintiff can prove the existence of a widespread practice that, although not authorized by an ordinance or an express municipal policy, is "so permanent and well settled as to constitute a custom or usage with the force of law." *Praprotnik*, 485 U.S. at 127 (internal quotation marks omitted). Such a practice, however, cannot ordinarily be established by a single constitutional deprivation, a random act, or an isolated event. *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999). Instead, a plaintiff such as Castro must show a pattern of similar incidents in order for the factfinder to conclude that the alleged informal policy was "so permanent and well settled" as to carry the force of law. *See Praprotnik*, 485 U.S. at 127.

The County's first two arguments can be quickly and easily addressed. First, the claim that the County is protected from suit by the Eleventh Amendment was squarely considered and rejected by this court in *Jackson v. Barnes*,

749 F.3d 755, 764–65 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 980 (2015) (holding that a sheriff's department is a county actor when it investigates crime and supervises a jail, and thus is not protected by the Eleventh Amendment's blanket of immunity for state officials). The County therefore cannot seek refuge behind the Eleventh Amendment. Second, and in the County's favor, the record is devoid of any similar incident to that suffered by Castro. He thus failed to establish that the County had an informal policy in relation to the sobering cell that caused him harm. The County's liability thus hinges on its final argument, which boils down to (1) whether the design of the sobering cell constitutes a formal County policy and, if so, (2) whether the County was deliberately indifferent to the harm that befell Castro as a result of that formal policy.

1. The jail's design was a deliberate choice by the County and thus a formal policy

We cannot envision how a municipality can design a jail without making "a deliberate choice . . . from among various alternatives." *See Pembaur*, 475 U.S. at 483. Construction projects of any variety involve a series of such choices based on aesthetics, functionality, budget, and other factors. One would assume that for any given construction project, including jails, the municipality's governing body—or a committee that it appoints to act in its stead—reviews bids, considers designs, and ultimately approves a plan for the facility and allocates funds for its construction. These choices are sufficient, in our opinion, to meet the definition of a formal municipal policy as set forth in *Pembaur*.

We are unpersuaded by the cases cited by the County in support of its argument to the contrary. *See Molton v. City of*

Cleveland, 839 F.2d 240, 246 (6th Cir. 1988); *Elliott v. Cheshire Cnty.*, 750 F. Supp. 1146, 1156 (D. N.H. 1990), *aff'd in part and vacated in part*, 940 F.2d 7 (1st Cir. 1991); *Shouse v. Daviess Cnty.*, No. 4:06-cv-144-M, 2009 WL 424978, at *8 (W.D. Ky. Feb. 19, 2009) (unpublished); *Richardson v. Dailey*, No. 925996, 1994 WL 879483, at *3 (Mass. Super. Ct. Sept. 29, 1994) (unpublished), *aff'd*, 424 Mass. 258 (1997). Of these cases, *Molton* is the only one to provide more than a cursory analysis of the jail-design-as-policy issue.

In *Molton*, an inmate hung himself by his shirt in his cell while his fellow inmates screamed for help. 839 F.2d at 242–43. The administrator of the decedent's estate sued the city under § 1983, alleging that the jail was defectively designed, creating a substantial risk of suicides. *Id.* at 243. The jury returned a verdict in favor of the estate. *Id.* On appeal, the city argued that the estate had failed to prove the existence of a municipal policy that caused the suicide. *Id.* at 247. The estate responded by pointing out several factors contributing to his injury that were "inherently matters of city policy," including the operation of a jail with a cell block that was too remote for easy supervision, the failure to install an audio communication system between the cell block and the office area, and the failure to modify cell architecture to make suicides less likely. *Molton*, 839 F.2d at 246.

In ruling against the estate, the Sixth Circuit found two problems with the estate's argument: (1) Supreme Court caselaw requires a plaintiff to identify a "deliberate and discernible city policy" rather than a series of vague issues with the way the city runs its jail, and (2) the evidence produced by the estate supported, at most, a finding that the city acted negligently in designing the jail. *Id.* The court in

Molton concluded that the city's "failure to build a suicide-proof jail cell" did not constitute "a deliberate choice to follow a course of action" that would be required to impose *Monell* liability. *Id.* (internal quotation marks omitted). *Elliott*, *Shouse*, and *Richardson* relied on *Molton* in reaching similar conclusions.

Molton, however, did not address the series of deliberate choices made by the city that went into the design of the jail itself. *See id.* The Sixth Circuit instead considered the "deliberate choice" question only with regard to whether the design was deliberately indifferent to a risk to the inmates (as opposed to whether the design was simply negligent). *Id.*

To the contrary, we conclude that the question of whether the design of a jail can lead to a constitutional violation (i.e., whether it constituted deliberate indifference on the part of the municipality) is a separate question from the issue of whether the design can be considered a formal policy for *Monell* purposes (i.e., whether the design was a deliberate choice made by a policymaker among a series of alternatives). With all due respect to our sister circuit, we cannot ignore the plethora of deliberate choices that a municipality makes in designing a jail, and we conclude that those choices render the design a formal municipal policy for the purpose of *Monell* liability.

The design of a jail, in sum, is the result of a series of deliberate choices made by the municipality that built it. In this case, the County does not contest that it was responsible for the design and operation of the West Hollywood Station. We therefore hold that the County instituted a formal policy under *Monell* with regard to the jail's sobering cell.

2. To find that a municipality was deliberately indifferent to a risk, a plaintiff must prove that the municipality had actual knowledge of that risk

Having determined that the County's design of the West Hollywood Station's sobering cell constituted a formal municipal policy, we turn next to the issue of whether that policy violated Castro's constitutional rights. Castro alleged that the County's policy deprived him of the same constitutional right that was violated by the individual defendants—his right to be free from violence at the hands of other inmates. As with the individual defendants, Castro must demonstrate that (1) he faced a substantial risk of serious harm, (2) the County, knowing of the risk, showed deliberate indifference by failing to take reasonable corrective measures, and (3) the County's failure to mitigate the risk was a proximate cause of the harm that he suffered. *See Farmer*, 511 U.S. at 828, 842.

The critical question in this case is whether the County had knowledge of the risk. At trial, Castro presented evidence establishing that the state of California had in place a regulation aimed at preventing the very type of harm suffered by Castro. Title 24 of California's Minimum Standards for Local Detention Facilities defines a "sobering cell" as "an initial 'sobering up' place for arrestees who are sufficiently intoxicated from any substance to require a protected environment to prevent injury by falling or *victimization by other inmates*." Cal. Code Regs. tit. 15, § 1006 (emphasis added). In addition, California's Minimum Standards for Adult Detention Facilities provides that "there shall be an inmate- or sound-actuated audio monitoring system in . . . sobering cells . . . *which is capable of alerting*

personnel who can respond immediately." *Id.* tit. 24, § 1231.2.22 (emphasis added).

The plain text of this regulation clearly indicates that the state regulators were concerned about inmate-on-inmate violence and required counties to install a compliant audio-monitoring system in order to ensure that the inmates could easily summon help. West Hollywood Station's sobering cell did not have such an audio-monitoring system in place.

Castro argues that, because of the regulation, the County knew of the risk that inmates in a sobering cell face from other inmates but disregarded that risk by failing to take the precautions required by the regulations. The County, on the other hand, argues that there was no evidence presented at trial establishing that it was aware of the regulation. In the absence of such evidence, the County contends that no reasonable jury could have concluded that it knew of the risk to Castro.

Both sides have muddled the issue of knowledge by failing to distinguish between actual and constructive knowledge. The courts have long recognized a critical distinction between the knowledge that a reasonable person *should have had* in a given situation and the knowledge that a particular defendant *did in fact have* in the same situation. *See, e.g.*, *Han v. United States*, 944 F.2d 526, 530 (9th Cir. 1991) (reversing the grant of summary judgment in favor of the IRS because the taxpayer had only constructive knowledge rather than actual knowledge of a lien on his property); *McGinn v. City of Omaha*, 352 N.W.2d 545, 547 (Neb. 1984) (per curiam) (holding that a city could be held liable for personal injuries sustained as a result of its

negligence, even in the absence of actual knowledge, if it had the knowledge that a reasonable person would have possessed under the circumstances). Constructive knowledge is an objective standard, *see Rost v. United States*, 803 F.2d 448, 451 (9th Cir. 1986), whereas actual knowledge is a subjective standard, *see Bus. Guides, Inc. v. Chromatic Commc'ns Enterps., Inc.*, 892 F.2d 802, 810 (9th Cir. 1989), *aff'd*, 498 U.S. 533 (1991).

We fully agree with Castro that a municipality should be aware of (and abide by) applicable state regulations governing its conduct. Although the Supreme Court has concluded that individual officers are not deemed to have knowledge of the "voluminous, ambiguous, and contradictory" regulations governing their on-the-job conduct, *Davis v. Scherer*, 468 U.S. 183, 196 (1984), the reasoning behind that conclusion does not apply to municipalities with equal force. The *Davis* Court was concerned with protecting officers who "must often act swiftly and firmly," without the time or luxury for "an extensive inquiry into . . . the applicability and importance of the rule at issue" and "the possible legal consequences of their conduct." *Id.* at 195–96.

A municipality's decision-making process will, in contrast, rarely if ever be so time-sensitive or pressured. Expecting municipal entities to take the time to become aware of applicable state regulations is essential to effective governance. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 696–97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law[.]"). The County may therefore be deemed to have constructive knowledge of the risk that Castro faced in this case because there was a state regulation in effect that clearly identified the

risk and required certain steps to mitigate the potential for danger.

Under *Farmer*, however, the constructive-knowledge standard, based on an objective look at what a reasonable person should have known, is insufficient to support a finding of deliberate indifference. The Court specifically rejected such a test for knowledge of a risk under the Eighth Amendment, opting instead for an inquiry into the subjective state of mind of the defendant. *Farmer*, 511 U.S. at 838.

In order to be deemed "deliberately indifferent," the Court concluded that an official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. In other words, "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838. The same reasoning applies to a municipality.

Farmer recognized that "conceptual difficult[ies may] attend any search for the subjective state of mind of a governmental entity," *id.* at 841, but these difficulties are not insurmountable. A plaintiff could take any of several paths to prove that a municipality had actual knowledge of a substantial risk of serious harm to inmates. For example, where, as here, there is an applicable regulation that should have put the municipality on notice of the risk, a plaintiff could offer evidence that the municipality had been notified that it was out of compliance with the regulation. Other evidence, such as meeting minutes or other records, that the regulation was discussed at planning meetings would also suffice, as would evidence that similar incidents had occurred

and been brought to the municipality's attention. Regardless of its form, however, some evidence of actual knowledge is required to find that a municipality had the requisite "consciousness of a risk" to be held deliberately indifferent. *Id* at 840.

No such evidence was presented in this case. As the County points out, the only evidence proffered by Castro to establish that the County knew of the risk to Castro's safety was the existence of the state regulation. But this evidence, for the reasons discussed above, establishes only constructive knowledge on the part of the County. Per Castro's own brief, he decided for "tactical reasons" not to present evidence of similar incidents in the past, and he offered no evidence that the regulation in question had ever been specifically brought to the County's attention.

Nor are we persuaded by our dissenting colleague's argument that the County Council's wholesale adoption of numerous chapters of the California Building Code, one of which contains the state regulation in question, "provides even more evidence that the county knew of that risk." Dissenting op. at 38. In the absence of any proof that this particular regulation was ever brought to the attention of a County policymaker with authority over the jail, the fact that no one found this proverbial "needle in a haystack" simply confirms our view that we are dealing with constructive knowledge rather than actual knowledge on the part of the County.

The question of what constitutes deliberate indifference is one of fact, such that we generally owe the jury's conclusion substantial deference. *Grenning v. Miller-Stout*, 739 F.3d 1235, 1239 (9th Cir. 2014) (citing *Johnson v. Lewis*,

217 F.3d 726, 734 (9th Cir. 2000)). But without any evidence whatsoever that the County had actual knowledge of the risk to Castro's safety, the verdict against the County cannot stand.

E. Castro presented sufficient evidence regarding the amount of his past damages from which the jury could reasonably calculate the amount of future damages

The defendants' final argument is that the jury's future-damages award of $600,000 should be reversed because it was based on pure speculation as to the amount of such damages. We find this argument to be without merit.

The parties agree that California law applies for purposes of calculating damages in this case. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 256 (1969) (directing lower courts to "look to state law to find appropriate remedies when the applicable federal civil rights law is 'deficient in the provisions necessary to furnish suitable remedies'" (quoting 42 U.S.C. § 1988(a))). Under California law, an award of damages may include an amount to compensate for related expenses that are "certain to result in the future." Cal. Civ. Code § 3283. "However, the 'requirement of certainty . . . cannot be strictly applied where prospective damages are sought, because probabilities are really the basis for the award.'" *Behr v. Redmond*, 123 Cal. Rptr. 3d 97, 111 (Cal. Ct. App. 2011), *as modified* Mar. 25, 2011 (quoting 6 Witkin, Summary of Cal. Law Torts, § 1552 (10th ed. 2005)).

The defendants' repeated assertions that Castro has "set forth no admissible evidence to establish any foundation whatsoever for the amount of future expenses" are simply not supported by the record. Castro submitted the billing records

from both his cognitive assistant and his treating psychologist, and he also submitted a chart detailing the charges for the almost $1 million in medical expenses that he had already incurred. He also proffered several medical experts who testified to his need for ongoing medical care and described the approximate scope of that care.

California courts have consistently approved damage awards for future medical expenses based on this type of evidence. *See, e.g.*, *id.* at 113 (approving a future-damages award based on the cost of a medication as established by past records multiplied by the plaintiff's estimated life span); *Cooper v. Chambi*, No. G028318, 2002 WL 31086128, at *3 (Cal. Ct. App. Sept. 9, 2002) (unpublished) (finding that past bills for psychological services totaling $125 per week could provide a jury with reasonable certainty as to the future cost of psychological services, but could not alone sustain a $1.5 million future-damages award).

The defendants also object to the future-damages award because they argue that it was not reduced to present value. They have a point to the extent that such an award is subject to a present-value reduction. *See Fox v. Pac. Sw. Airlines*, 184 Cal. Rptr. 87, 89 (Cal. Ct. App. 1982) (holding that "recovery for lost future benefits must be discounted to present value") (citing *Bond v. United R.R.s of S.F.*, 113 P. 366, 372 (Cal. 1911)). But they overstate the role of experts in establishing the appropriate discount. The California Civil Jury Instruction that they cite simply states that expert testimony is "usually" required to accurately establish present values, and *Niles v. City of San Rafael*, 116 Cal. Rptr. 733, 740 (Cal. Ct. App. 1974), on which they rely, similarly observes that actuarial testimony is "frequently" used for this purpose.

However common the use of experts may be, no California court has ever held that expert testimony is an absolute requirement in order to establish the present value of a future-damages award. The district court instructed the jury to reduce its award of future damages to present value according to the Ninth Circuit's Model Civil Jury Instructions, and we have no reason to believe that the jury ignored that instruction, particularly because the jury awarded only slightly more than half of the amount requested.

In sum, although no expert testified as to the precise rate of reduction to be applied, the court instructed the jury to reduce its award for future damages to present value, and "we must assume that the jury followed the court's instructions." *See Gray v. Shell Oil Co.*, 469 F.2d 742, 752 (9th Cir. 1972). Our assumption seems fully justified by the fact that the future damages awarded to Castro reflected a 42 percent discount from the amount requested. Particularly in light of this discount, we are not persuaded that this is the appropriate case in which to make the use of experts to establish the present value of future damages an absolute requirement under California law. We therefore decline to disturb the award for future damages.

III. CONCLUSION

For all the reasons set forth above, we **AFFIRM** the judgment of the district court against the individual defendants but **REVERSE** the judgment against the County. Each party shall bear its own costs.

CALLAHAN, Circuit Judge, concurring:

I agree with the majority that the judgment of the district court against the individual defendants should be affirmed and the judgment against the County reversed. I write separately to explain that I do not think that Castro has shown that the design of the West Hollywood Station constitutes a policy for purposes of liability under *Monell v. Department of Social Services of New York.*, 436 U.S. 658 (1978).

I do not deny that pursuant to *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986), the design of a jail in some circumstances, might be held to constitute a deliberate choice or policy. However, I disagree with the suggestion that the fact that the jail was constructed is sufficient in itself to "meet the definition of a formal municipal policy." Maj. at 23. Rather, I agree with the Sixth Circuit's approach in *Molton v. City of Cleveland*, 839 F.2d 240, 246 (6th Cir. 1988), that "*Pembaur*[] require[s] proof of a deliberate and discernible city policy to maintain . . . inadequately designed and equipped jails; not mere speculation that such matters are 'inherently matters of city policy.'"

Here, the record contains no evidence to suggest that the design and construction of the West Hollywood Station implicated a relevant policy choice. The record indicates that the West Hollywood Station is many decades old. Municipal facilities are built to suit the needs of their times, according to the then existing applicable statutes and regulations. Other than their mere existence, there is no evidence in this record to indicate that the relevant design features of the West Hollywood Station were policy choices of the County. Although both the County and Castro presented evidence of measures that could be taken to increase supervision in the

sobering cell, no evidence was presented that the County specifically considered these measures or made a deliberate choice to reject them at the time of the facilities' construction, or even at any time thereafter. Nor was any evidence presented, such as past instances of injury or modifications made since the Station's construction, that might support an inference that the County considered but rejected such design features.

Accordingly, I would hold that Castro has failed to show that the design of the West Hollywood Station constituted a formal policy under *Monell*, 436 U.S. 658. Nonetheless, I concur in the opinion as I agree that even if there was a formal policy, Castro has failed to show the requisite deliberate indifference for *Monell* liability. *See* Maj. at 23–31.

GRABER, Circuit Judge, concurring in part and dissenting in part:

I join the majority opinion, with the exception of Part D.2. I respectfully dissent from the holding that there was insufficient evidence from which the jury could have concluded that the entity Defendants were deliberately indifferent to the risk that Plaintiff would be harmed by a fellow inmate.

In *Farmer v. Brennan*, 511 U.S. 825, 841 (1994), the Supreme Court acknowledged that "considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a

governmental official." This case squarely presents that considerable conceptual difficulty.

We previously have acknowledged that certain types of evidence could show that an entity possesses subjective knowledge:

> First, it is certainly possible that a municipality's policies explicitly acknowledge that substantial risks of serious harm exist. Second, numerous cases have held that municipalities act through their policymakers who are, of course, natural persons, whose state of mind can be determined.

Gibson v. County of Washoe, 290 F.3d 1175, 1188 n.10 (9th Cir. 2002). But those two types of evidence are not the *only* kinds of evidence that can show such knowledge. Here, as the majority explains, state regulations applicable to the County identify the risk of the precise harm that befell Plaintiff in this case and mandate a particular audio-monitoring system in order to prevent that harm. I would hold, as a matter of law, that entities have actual knowledge of state regulations governing their conduct.

The majority contends that such a holding impermissibly equates actual knowledge with constructive knowledge. Maj. op. at 27–28. It is true that the Supreme Court has written that, in actions against individuals and entities alike, a plaintiff must establish that the defendant possessed the "state of mind required to prove the underlying violation." *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 405 (1997). But I do not think that the Court meant that we must ignore salient

differences between individuals and entities. Because an entity does not have an actual mind, the question of what the entity "knows" is different from the question of what an individual "knows." *Cf. United States v. 7326 Highway 45 N.*, 965 F.2d 311, 316 (7th Cir. 1992) ("As a legal fiction, a corporation cannot 'know' like an individual 'knows.'"').[1] The majority persuasively explains why entities should be held to a higher standard than individuals when it comes to knowledge of the law governing their conduct. Maj. op. at 27–28. I would hold that where, as here, positive law applicable to the entity speaks directly to the risk of harm that befell a plaintiff, the entity defendant has the requisite knowledge of that risk to disregard it deliberately.

At the time of the attack at issue in this case, the Los Angeles County Code "adopted by reference and incorporated into . . . the Los Angeles County Code as if fully set forth below" certain chapters of the California Building Code, including chapter 12, which includes the regulation requiring that sobering cells be equipped with an audio-

[1] Were we writing on a blank slate, one possible resolution of the conceptual difficulty here would be to hold that entities cannot be held liable for constitutional violations when the underlying violation requires *subjective* intent. Indeed, the Supreme Court has taken that course in a different context. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (holding that punitive damages cannot sensibly be assessed against a governmental entity because the entity "can have no malice independent of the malice of its officials"). But that option is not open to us, because the Supreme Court clearly has stated that municipalities can have subjective knowledge and intent for the purposes of § 1983 liability. *See Brown*, 520 U.S. at 405 (holding that "proof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably").

monitoring system.[2] L.A. County Code, tit. 26, ch. 1, § 100 (2007). That incorporation was an affirmative act by the County's legislative body. As explained above, I would not require such an affirmative act to show that an entity possesses the requisite knowledge to support a finding of deliberate indifference; I would hold, as a matter of law, that governmental entities, as distinct from individuals employed by those entities, know the statutes and regulations governing their conduct. But in this case, the County Council's affirmative adoption of a regulation aimed at mitigating the risk to individuals housed in sobering cells provides even more evidence that the County knew of that risk. *See Brown*, 520 U.S. at 405–06 (describing *Owen v. City of Independence*, 445 U.S. 622 (1980), and *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), as municipal liability cases involving "no difficult questions of fault" because they involved "formal decisions of municipal legislative bodies").

For the foregoing reasons, I would affirm the jury's verdict against the entity defendants. I therefore dissent from Part D.2.

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[2] Even though the county code provision was not in evidence in the district court, we may take judicial notice of it because it is "not subject to reasonable dispute" and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 (9th Cir. 2006); *see id.* at 1026 n.2 (holding that local ordinances are "proper subjects for judicial notice").

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CASE NO. 12-56829

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONATHON MICHAEL CASTRO,
Plaintiff-Appellee.

v.

COUNTY OF LOS ANGELES, ET AL.
Defendants-Appellant,

APPELLANTS' SUPPLEMENTAL BRIEF RE: KINGSLEY V. HENDRICKSON

On Appeal From The United States District Court
For The Central District of California
District Court Case 2:10-CV-05425-DSF-JEM

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INTRODUCTION

Defendants submit the following Supplemental Brief regarding the effect, if any, of *Kingsley v. Hendrickson*, 2015 U.S. LEXIS 4073 (2015), on the liability of the defendants in this case. In *Kingsley*, the Supreme Court analyzed the standard to determine direct claims of excessive force by pretrial detainees against custodial officers, and did not address the standard to analyze deliberate indifference in claims based upon the failure to protect an inmate from harm by another inmate, which has an objective and subjective component.

However, the *Kingsley* case is pertinent with respect to the proper manner in which to analyze qualified immunity. In fact, following the decision in this case, the Supreme Court has continued to emphasize the qualified immunity inquiry must be tailored to the specific context of the case and not decided based upon broad principles of law, including in cases involving the failure to protect an inmate's health or safety. This Court's opinion conflicts with those decisions.

I. *KINGSLEY* ADDRESSES THE STANDARD TO REVIEW DIRECT EXCESSIVE FORCE CLAIMS BROUGHT BY A PRETRIAL DETAINEE, AND DOES NOT CHANGE THE STANDARD TO EVALUATE DELIBERATE INDIFFERENCE IN FAILURE TO PROTECT CLAIMS.

Supreme Court decisions are only precedential as to the issues actually decided in the opinion. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 n.5 (1992). Moreover, it is improper for courts to conclude recent Supreme Court

cases have, by implication, overruled an earlier precedent, as the lower courts must leave this prerogative to the Supreme Court. *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1200 (9th Cir. 2000).

In *Kingsley*, the Supreme Court considered whether a *direct claim of excessive force* by a pretrial detainee should be analyzed under solely an objective standard or whether a subjective standard should also apply requiring proof the officer acted with a malicious and sadistic intent. *Kingsley*, 2015 U.S. LEXIS 4073, at *9. Review was granted in light of disagreement among the Circuits addressing the proper way to analyze direct claims of excessive force by pretrial detainees. *Id.* The Supreme Court held a pretrial detainee's direct claims of excessive force are analyzed under the Fourteenth Amendment,[1] and an objective

[1] This Court has previously held a *pre-arraignment* pretrial detainee's claims of *direct excessive force* were decided under the Fourth Amendment, while a *post-arraignment* pretrial detainee's claims of *direct excessive force* were decided under the Fourteenth Amendment. *Pierce v. Multnomah Cnty., Or.*, 76 F.3d 1032, 1043 (9th Cir. 1996); *Young v. Wolfe*, 2012 U.S. App. LEXIS 8027, at *4-5 (9th Cir. 2012) (unpublished). While *Kingsley* holds such claims are analyzed under the Fourteenth rather than the Fourth Amendment, the Fourth Amendment only applies to *direct excessive force claims* in any event, and has never been applied to deliberate indifference claims for the failure to protect an inmate from harm. *Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175, 1196-97 (9th Cir. 2002) (holding Due Process Clause of Fourteenth Amendment and *Farmer* analysis applies to a pre-arraignment pretrial detainee's claim based upon deliberate indifference to medical needs, while the Fourth Amendment applies to his direct claims of excessive force); *compare Barrie v. Grand Cnty.,Utah*, 119 F.3d 862, 866 (10th Cir. 1997) (unlike direct excessive force claims, deliberate indifference claims are analyzed under the Due Process Clause of the Fourteenth Amendment irrespective of whether the plaintiff has been arraigned). Thus, defendants respectfully submit

standard is used to determine whether the force was excessive based upon the perspective and knowledge of the defendant, which nevertheless gives deference to policies and practices needed to maintain order and institutional security. *Id.* at *12, 16. In *Kingsley*, the Supreme Court did not address or change the standard for analyzing *deliberate indifference* in failure to protect claims brought by a pretrial detainee, which requires an objective and subjective showing. *See Roberts v. C-73 Med. Dir.,* 2015 U.S. Dist. LEXIS 91072, *8 n.3 (S.D.N.Y. 2015) (*Kingsley* dealt only with excessive force claims, and a claim of deliberate indifference by a pretrial detainee stills requires proof of subjective intent unless the Supreme Court changes the standard); *Kennedy v. Bd. of Cnty. Comm'rs for Okla. Cnty.*, 2015 U.S. Dist. LEXIS 87155, *4-5, n.6 (W.D. Okla. 2015) (deliberate indifference to a pretrial detainee's medical needs involves an objective and subjective component and this standard was not disturbed by *Kingsley*).

To show deliberate indifference in a failure to protect claim under the Eighth Amendment, a plaintiff must prove the subjective mindset of the defendant, by showing that he was aware of a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The Supreme Court has applied the same

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the statement in the published opinion that the plaintiff's claims arise under the Fourth Amendment is an inaccurate statement of the law as plaintiff has not alleged any *direct claims of excessive force*, but the panel nevertheless applied the appropriate deliberate indifference standard.

standard to show deliberate indifference in the failure to protect an inmate's health or safety, brought by a pretrial detainee under the Due Process Clause of the Fourteenth Amendment. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998). This Court has likewise applied the Eighth Amendment standards to such claims.[2] In fact *all* the Circuit Courts have applied a subjective element to deliberate indifference claims by pretrial detainees.[3]

In general, a failure to act reasonably does not amount to a deprivation of liberty in violation of the Due Process Clause. In *Daniels v. Williams*, 474 U.S.

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[2] *See Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1242-43 (9th Cir. 2010) (although the Eighth Amendment may provide a minimum standard of care for pretrial detainees' rights, neither the Supreme Court nor the Ninth Circuit have departed from those standards in considering pretrial detainees' claims that government officials violated their Fourteenth Amendment rights by failing to prevent harm); *Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010); *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998); *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1440-43 (9th Cir. 1991), *abrogated on other grounds by Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

[3] *Thomas v. Cumberland Cnty.*, 749 F.3d 217, 223 n.4 (3d Cir. 2014); *Goodman v. Kimbrough*, 718 F.3d 1325, 1331-32 (11th Cir. 2013); *Schoelch v. Mitchell*, 625 F.3d 1041, 1046 (8th Cir. 2010); *Mosher v. Nelson*, 589 F.3d 488, 493-94 (1st Cir. 2009); *Spears v. Ruth*, 589 F.3d 249, 254 (6th Cir. 2009); *Caiozzo v. Koreman*, 581 F.3d 63, 72 (2d Cir. 2009); *Hardy v. D.C.*, 601 F. Supp. 2d 182, 188-89 (D.C. Cir. 2009); *Brown v. Budz*, 398 F.3d 904, 909-13 (7th Cir. 2005); *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 302-03 (4th Cir. 2004); *Lopez v. LeMaster*, 172 F.3d 756, 759-61 (10th Cir. 1999); *Scott v. Moore*, 114 F.3d 51, 54 (5th Cir. 1997) (distinguishing between claims based upon jail conditions or policies where intent is not at issue versus specific episodes, where subjective intent must be proven). That every Circuit applies the same standard is relevant as the Supreme Court stated its holding in *Kingsley* was consistent with the law as applied in several Circuits. *Kingsley*, 2015 U.S. LEXIS 4073, at *15.

327 (1986), in discussing the *state of mind* required to constitute a "deprivation" within the meaning of the Due Process Clause, the Supreme Court held that negligent acts do not violate the Constitution. *Id.* at 330. The word "deprive" connotes more than a negligent act without an affirmative abuse of power. *Id.* Thus, mere *lack of due care* by a state official does not violate due process, as it suggests no more than negligence and the failure to measure up to the conduct of a *reasonable person*. *Id.* (jailers may owe a special duty of care to those in their custody under state tort law, but this concept is not embraced by the Fourteenth Amendment); *Lewis*, 523 U.S. at 848-49. Without a subjective component to measure liability in a deliberate indifference claim, an officer may be liable simply for failing to recognize a substantial risk of serious harm, which equates to negligence and is beneath the threshold to establish a substantive due process violation. *Id.* In *Kingsley*, the Supreme Court did not overturn *Daniels* or hold a deprivation of liberty could be determined by a failure to act reasonably, outside of a direct excessive force claim.[4]

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[4] Any change in the standards to establish deliberate indifference against the defendants would warrant a new trial or the entry of judgment as the individual defendants would be entitled to qualified immunity, as the law was not clearly established at the time of the incident. Moreover, the opinion indicates the individual defendants could not be granted qualified immunity post-trial because of the finding by the jury on the subjective inquiry. Op., at pp. 13-14, 18. Also, the opinion addressing the *Monell* claim was not challenged as the judgment was reversed. However, the opinion improperly states the County "does not contest" that it was responsible for the *design* and operation of the jail, and thus "the County

In *Kingsley*, the Supreme Court held that as a threshold matter, a pretrial detainee suing for direct excessive force must first establish intent by the defendant to commit the volitional act resulting in the force–the use of force must be deliberate, i.e., purposeful or knowing. *Kingsley*, 2015 U.S. LEXIS 4073, at *9. Such a requirement is necessary, as liability for negligently inflicting harm is categorically beneath the threshold of constitutional due process.[5] *Id.* at *10.

Conversely, in a deliberate indifference failure to protect claim, there is no direct physical contact between the custodial officer and no direct correlation between an individual's acts or the municipality's policy in order to show an intent

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instituted a formal policy under *Monell* with regard to the jail's sobering cell." Op., at p. 25. There was no evidence presented at trial regarding who designed the cell or how it was designed and no concession by the County in this regard, and it was clearly *plaintiff's burden to prove* a formal policy that deprived his constitutional rights under *Monell*. Nin. Cir. Model Civ. Jury Instr., § 9.4. Moreover, a "policy" is an intangible plan embracing the overall general goals and acceptable procedures of a governmental body—not unidentified blueprints for a building.

[5] In *Kingsley*, the Supreme Court references *Bell v. Wolfish*, 441 U.S. 520 (1979) regarding the manner to establish a constitutional violation in a conditions of confinement case based upon jail policies or conditions which, like intentionally used excessive force, directly caused the alleged harm to the pretrial detainee, such as visitation rights, mail procedures, beds provided for the inmates, etc. *Kingsley*, 2015 U.S. LEXIS 4073, at *14-15; *compare R.G. v. Koller*, 415 F. Supp.2d 1129, 1153-54 (D. Haw. 2006) (citations omitted) (noting cases holding the *Bell* test applies where a pretrial detainee attacks the general conditions or rules of a jail, while a pretrial detainee's claim based upon a specific incident requires a showing of deliberate indifference and a culpable state of mind in acting or failing to act). However, proof of liability in such types of cases is not at issue here, where the harm was not directly caused by either the individual or municipality defendants, but was based on a specific incident involving an inmate attack.

to bring about the injury. Rather, the claim is based upon an inmate's allegations that the defendant is *indirectly liable* for harm caused by another inmate, even though the attacking inmate's conduct was the direct cause of the harm. Accordingly, instead of proving a deliberate (versus accidental) use of volitional force, a plaintiff must prove a deliberate (versus accidental) *indifference,* in order to ensure liability does not attach for mere negligence.[6] To show deliberate indifference, a plaintiff must prove the subjective mindset of the defendant, by showing that he was aware of a substantial risk of serious harm to the plaintiff. *Farmer*, 511 U.S. at 837.[7] As acknowledged by this Court, the plaintiff must prove subjective intent based upon *actual knowledge* of a substantial risk of serious harm, regardless of whether the defendant is an individual or an entity. Op., at p. 22; *Bd.*

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[6] The law is well established that claims based upon different facets of prison are obviously analyzed under different standards. *Chess v. Dovey*, 2015 U.S. App. LEXIS 10753, *39 (9th Cir. 2015); *Hydrick v. Hunter*, 500 F.3d 978, 996-98 (9th Cir. 2007) (separately addressing three types of substantive due process claims for failure to protect from harm, conditions of confinement, and excessive force), *vacated on other grounds by* 556 U.S. 1256 (2009); *compare* Nin. Cir. Model Civ. Jury Instr., §§ 9.24, 9.25.

[7] The Supreme Court has rejected any arguments that without a solely objective test for deliberate indifference, prison officials will be free to ignore obvious dangers to inmates, as a plaintiff need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; rather, it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. *Farmer*, 511 U.S. at 842. The Court indicated it did not believe a subjective approach will present prison officials with any serious motivation "to take refuge in the zone between 'ignorance of obvious risks' and 'actual knowledge of risks.'" *Id.* The same reasoning applies here.

of Cnty. Comm'rs v. Brown, 520 U.S. 397, 405 (1997); *Farmer*, 511 U.S at 825; *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002).

Following *Kingsley*, the Tenth Circuit decided *Davis v. Wessel*, 2015 U.S. App. LEXIS 11685 (10th Cir. 2015), and held that even when there is no expressed intent to punish, a pretrial detainee suing under the Due Process Clause still has the burden to prove intent *with respect to the defendant's actions or inactions*, as negligence cannot establish a due process violation. *Id.* at *15-16. In *Davis*, the plaintiff argued his harm was caused by the unreasonable use of restraints. *Id.* at *12-13. The Court held that if the defendant officers did not subjectively consider the conduct which resulted in inflicting the harm to the detainee, there could be no liability. *Id.* at *17. Similarly, no liability may attach in a deliberate indifference failure to protect case, unless a plaintiff can show *the defendant actually knew* of a substantial risk of serious harm to the inmate based upon the facts of the case. A plaintiff may not merely show the defendant *should have known* of a substantial risk of serious harm. *Supra.*

Moreover, a factor relied upon by the Supreme Court in *Kingsley* was that an objective standard is consistent with the standard applied where officers use force against a person who, like the plaintiff in the case before it, had been accused of but not yet convicted of a crime but who, unlike the plaintiff, was free on bail. *Kingsley*, 2015 U.S. LEXIS 4073, at *15. Conversely, there is no cognizable

failure to protect from harm claim in violation of an individual's constitutional rights under 42 U.S.C. § 1983, outside the custodial setting.

II. *KINGSLEY* AND RECENT SUPREME COURT DECISIONS SHOW WHY THE QUALIFIED IMMUNITY INQUIRY MUST NOT BE FRAMED BASED UPON BROAD PROPOSITIONS OF LAW.

In *Kingsley*, the Supreme Court again stated an officer enjoys qualified immunity unless he has violated a "clearly established" right, such that it would have been clear to a reasonable officer that his conduct was *unlawful in the situation confronted by the officers*. *Kingsley*, 2015 U.S. LEXIS 4073, at *17; *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (every reasonable officer in the "shoes" of the defendant must have understood his conduct violated the constitution).

In *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam), the plaintiff filed suit under 42 U.S.C. § 1983 for deliberate indifference in failing to prevent an inmate's suicide. *Id.* at *2043. In reviewing qualified immunity, the inquiry was not posed simply as the right of an inmate to be protected from harm as found by the panel in this case; rather, the inquiry presented to the Supreme Court was framed as whether it was clearly established that the inmate had the "right to the proper implementation of adequate suicide prevention protocols." *Id.* at *2044. Nevertheless, the Supreme Court held the right was not clearly established, as it had not even discussed sufficient screening or prevention protocol, and to the

extent that a "robust consensus of cases of persuasive authority" could establish the federal right asserted, it was not clearly established at the time of the incident. *Id.*; *see also Sheehan*, 135 S. Ct. at 1775-76 (implementing fact specific inquiry and stating "nothing in our cases suggests the constitutional rule applied by the Ninth Circuit . . . We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality").

Similarly, there has been no case by the Supreme Court settling the law regarding when inmates cannot be housed in the same cell. Moreover, there is no consensus of persuasive authority showing it is clearly established that two intoxicated inmates who had not been in any physical altercations and who had not threatened each other with violence, could not be housed together.[8] Respectfully, neither plaintiff nor this Court has cited to any such case. Irrespective of whether this Court believes evidence supported a showing the defendants acted without due care/negligently, the officers are entitled to qualified immunity.

DATED: July 17, 2015

HURRELL CANTRALL LLP
By: /S/ Melinda Cantrall
Attorneys for Defendants-Appellants

[8] The plaintiff and the attacking inmate were both drunk on the night of the incident and placed in the sobering cell. While the attacking inmate was listed as combative on a jail intake form, it is undisputed the *reason* he was listed as combative was for threatening to spit at an officer, and he had not been physically assaultive with any person prior to attacking the plaintiff. Not *every* reasonable officer would believe placing the inmates together in the cell amounted to deliberate indifference in violation of the plaintiff's constitutional rights.

CERTIFICATE OF SERVICE
WHEN ALL CASE PARTICIPANTS ARE REGISTERED FOR THE
APPELLATE CM/ECF SYSTEM

I hereby certify that on July 17, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature /s/ DIANE NEFF

No. 12-56829

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JONATHAN MICHAEL CASTRO,
Plaintiff and Appellee,

v.

COUNTY OF LOS ANGELES, LOS ANGELES SHERIFF'S DEPARTMENT, DAVID VALENTINE AND CHRISTOPHER SOLOMON,

Defendants and Appellants.

Appeal from United States District Court
For the Central District of California
United States District Judge Dale S. Fischer, Presiding
C.D. Cal. Case No. CV 10-05425 DSF (JEM)

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE IN RESPONSE TO ORDER DATED JUNE 26, 2015 REGARDING EFFECT OF *KINGSLEY v. HENDRICKSON*

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I. Introduction

The individual defendants locked a "combative" inmate in a sobering cell with Plaintiff-Appellee Jonathan Castro. The jail's design violated state regulations that require jailors to be able to see and to hear inside sobering cells, in part to protect inmates from violence at the hands of other inmates. Mr. Castro tried to summon a jailor, but his pounding on the door was ignored. The other inmate first molested Mr. Castro, and then assaulted him violently, causing catastrophic head injuries that left Mr. Castro comatose for a month, and with about $1 million in medical bills.

The jury found against both individual defendants as well as the entity defendants, the County of Los Angeles and the Los Angeles Sheriff's Department (LASD). The jury determined each was "deliberately indifferent" to Mr. Castro's safety, the subjective standard required under the Eighth-Amendment to recover damages for inmate-on-inmate violence under 42 U.S.C. § 1983. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

The Court affirmed the judgment against the individual defendants unanimously, but reversed 2-1 in favor of the entities. *Castro v. Cnty. of Los Angeles*, 785 F.3d 336 (9th Cir. 2015). Judges Gilman and Graber, but not Judge Callahan, agreed the jail's design embodied municipal policy, *id.* at 351, but Judge Gilman voted with Judge Callahan to reverse the judgment against the entity defendants, writing for the Court that the evidence was insufficient to support "deliberate indifference" because Plaintiff did not produce evidence that "the regulation in question had ever been specifically brought to the County's attention." *Id.* at 355. Regardless, the County will

indemnify the individual defendants, and therefore Mr. Castro should recover all his damages, costs and attorneys' fees under the Court's current decision, including fees on appeal. *See Family PAC v. Ferguson*, 745 F.3d 1261, 1269 (9th Cir. 2014).

The individual defendants petitioned for rehearing, contending that the Court should have reversed the District Court's denial of qualified immunity. The Court has ordered the parties "to file supplemental briefs on the effect, if any, of the United States Supreme Court's June 22, 2015 decision in *Kingsley v. Hendrickson*, No. 14-6368 [192 L. Ed. 2d 416, 2015 U.S. LEXIS 4073]," addressing both "the liability of the individual and entity defendants." In the meantime, "[t]he petition for panel rehearing and rehearing en banc . . . remains pending." Docket No. 45.

Kingsley holds that "the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one," 192 L. Ed. 2d at 426-27, and therefore a § 1983 plaintiff need not prove that subjectively a jailor "'acted with reckless disregard of [the plaintiff's] rights." *Id.* at 430. *Kingsley* should not affect the individual defendants' liability, which the jury determined under the less plaintiff-friendly subjective standard.

Plaintiff urges the Court to reconsider its analysis of the entity defendants' liability, however. Because the sobering cell where this incident occurred is meant for pretrial detainees, under *Kingsley* the entities' liability should not be determined by their subjective knowledge of the jail design regulation.

Accordingly, Plaintiff asks that the Court amend Section D of its opinion to affirm the entity defendants' liability, but otherwise deny rehearing and rehearing en banc.

II. Based on *Kingsley v. Hendrickson*, the Court Should Affirm the Liability of the Individual Defendants, But Amend the Opinion to Provide For the Liability of the Entity Defendants.

A. *Kingsley v. Hendrickson* Eliminates the Requirement that a Pretrial Detainee Prove a Defendants' Subjective Awareness of an Unreasonable Risk to the Inmate's Safety, Overruling *Clouthier v. Cnty. of Contra Costa*.

Kingsley resolves a circuit split on whether a pretrial detainee's § 1983 excessive-force claim requires proof that the jailors "were *subjectively* aware that their use of force was unreasonable, or only that the officers' use of that force was *objectively* unreasonable." 192 L. Ed 2d at 423 (emphasis in original).[1] *Kingsley*'s articulation of the "objective reasonableness" standard lowers the bar for pretrial detainees asserting § 1983 claims for damages by eliminating any requirement that defendants knew subjectively that their conduct was unreasonable.

Kingsley distinguishes a "defendant's state of mind with respect to his physical acts–i.e., his state of mind with respect to the bringing about of certain physical consequences in the world," from the defendant's awareness that the conduct may be wrongful, concluding: "the relevant standard is objective not subjective. Thus, the defendant's state of mind is not a matter that a plaintiff is required to prove." *Id.* at 425.

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[1]The Ninth Circuit never addressed this issue in a published opinion, but to illustrate the circuit split *Kingsley* cites, among other cases, *Young v. Wolfe*, 478 Fed. Appx. 354, 356, 2012 U.S. App. LEXIS 8027 (9th Cir. April 20, 2012), in which this Court ruled that "a pretrial post-arraignment detainee's rights under the Fourteenth Amendment are comparable to a prisoner's rights under the Eighth Amendment," such that the "'malicious and sadistic' standard applies" to excessive-force claims.

Kingsley arose from a claim of excessive force, but its holding relies heavily on a reading of *Bell v. Wolfish*, 441 U.S. 520 (1979), that emphasizes the application of the "objective standard to evaluate a variety of prison conditions, including a prison's practice of double-bunking." 192 L. Ed. 2d at 427. According to the Supreme Court, *Bell* "did not consider the prison officials' subjective beliefs about the policy." *Id.* Thus, "as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." *Id.* In other words there is no subjective requirement.

This Court's reversal of Mr. Castro's judgment against the entity defendants, however, relied on a Ninth Circuit precedent that construed *Bell* differently:

> [T]he "deliberate indifference" test is the same for pretrial detainees and for convicted prisoners. *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1242-43 (9th Cir. 2010). . . . A defendant is deemed "deliberately indifferent" to a substantial risk of serious harm when he knew of the risk but disregarded it by failing to take reasonable measures to address the danger.

Castro, 785 F.3d at 345-46. *Clouthier*, which arose from the jail suicide of a mentally-ill man, cannot be reconciled with the holding of *Kingsley*:

> In *Bell v. Wolfish*, the Supreme Court held that pretrial detainees had a due process right not to be punished. 441 U.S. 520, 535. . . .
>
> . . . .
>
> In cases claiming an Eighth Amendment violation "based on a failure to prevent harm," the first, objective component is met if the inmate shows that "he is incarcerated under conditions posing a

> substantial risk of serious harm." *Farmer* [*v. Brennan*], 511 U.S. [825,] 834 [(1994)]. The second component, punitive intent, is met if the claimant shows that the detention facility official's "state of mind is one of 'deliberate indifference' to inmate health or safety." *Id.* This is a subjective test in that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837. "[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838. . . .
>
> In light of the Supreme Court's rulings that conditions of confinement violate pretrial detainees' Fourteenth Amendment rights if the conditions amount to punishment, *Bell*, 441 U.S. at 535, and that failure to prevent harm amounts to punishment where detention officials are deliberately indifferent, *Farmer*, 511 U.S. at 834, we have concluded that the "deliberate indifference" standard applies to claims that correction facility officials failed to address the medical needs of pretrial detainees. . . .
>
> In this case, [the plaintiff] was a pretrial detainee . . . . Accordingly, under *Bell* and our cases, we must consider whether [the plaintiff] was subjected to punishment. This requires us to inquire into the subjective component of punishment, that is, whether [any jailor] acted with deliberate indifference . . . .

Clouthier, 591 F.3d at 1241-42.

For the reasons that follow, Plaintiff contends that *Kingsley*'s elimination of the "subjective component" should not affect the Court's denial of qualified immunity, but should change the holding on the entities' liability.

B. The Court's Denial of Qualified Immunity For the Individual Defendants Is Not Affected by *Kingsley*.

When denying the individual defendants qualified immunity, the Court defined deliberate indifference as knowledge "of the risk but disregard[ing] it by failing to take reasonable measures to address the danger," and noted "the jury specifically found that [the individual defendants] were deliberately indifferent to Castro's plight."

> [B]oth decided to house him in a fully walled sobering cell with a "combative" inmate; [the jailor] failed to respond to Castro's banging on the window in the door of the cell; [the jailor] failed to respond fast enough to [the other inmate's] inappropriate touching; and [the jailor] erred in delegating the safety checks to a volunteer. We conclude that the jury could have found [the individual defendants] liable based on the substantial evidence presented in support of one or more of these theories.

Castro, 785 F.3d at 346. That Mr. Castro would not, under *Kingsley*, have been required to prove the subjective element strengthens the Court's analysis. Indeed, were the District Court to have anticipated *Kingsley* by instructing the jury to apply an objective standard, the individual defendants might then have been entitled to assert qualified immunity on the "whether the right was clearly established at the time of the incident" prong. *See id.* at 344 (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Because the individual defendants were found liable under the higher standard, the judgment should stand.

Moreover, inmate-on-inmate violence cases based on the deliberate-indifference standard, as this Court noted, stand "in stark contrast with the qualified-immunity analysis for other types of claims, such as excessive force, in which analogies to prior cases play a much stronger role." *Id.* at 345.

Applying *Kingsley*'s objective standard, there does exist a closely analogous case, *Clem v. Lomeli*, 566 F.3d 1177 (9th Cir. 2009), decided less than five months before Mr. Castro was injured. That jailor too locked a threatening, drunken inmate in a cell with the plaintiff, and then disregarded the plaintiff's pleas for help.

Accordingly, the petition for rehearing on qualified immunity should be denied.

C. The Court Should Reconsider the Entity Defendants' Liability.

The Court summarized Plaintiff's case against the entity defendants as follows:

> Castro presented evidence establishing that the State of California had in place a regulation aimed at preventing the very type of harm suffered by Castro. Title 24 of California's Minimum Standards for Local Detention Facilities defines a "sobering cell" as "an initial 'sobering up' place for arrestees who are sufficiently intoxicated from any substance to require a protected environment to prevent injury by falling or *victimization by other inmates*." Cal. Code Regs. tit. 15, § 1006 (emphasis added). In addition, California's Minimum Standards for Adult Detention Facilities provides that "there shall be an inmate- or sound-actuated audio monitoring system in . . . sobering cells . . . *which is capable of alerting personnel who can respond immediately*." *Id.* tit. 24, § 1231.2.22 (emphasis added).

Castro, 785 F.3d at 35 (emphases and ellipses in original).

In contrast to its unanimity when denying qualified immunity to the individual defendants, the Panel filed three opinions on the entities' potential liability under *Monell v. New York Dep't of Soc. Servs.*, 436 U.S. 658 (1978). The Court's analysis begins:

> The design of a jail, in sum, is the result of a series of deliberate choices made by the municipality that built it. In this case, the County does not contest that it was responsible for the design and operation of the West Hollywood Station. We therefore hold that the County instituted a formal policy under *Monell* with regard to the jail's sobering cell.

Castro, 785 F.3d at 352. Judge Graber joined in this part of the Court's opinion. *Id.* at

357. Judge Callahan, however, "would hold that Castro has failed to show that the design of the West Hollywood Station constituted a formal policy under *Monell*." *Id.*

Nevertheless, the Court reversed 2-1 the judgment entered on the verdict against the entity defendants. The Court's analysis, following *Clouthier*, did not distinguish the claims of pretrial detainees, who are protected by the Fourth or Fourteenth Amendment, from those of convicted prisoners serving sentences, who are protected by the Eighth Amendment from "cruel and unusual punishments."

> Castro argues that, because of the regulation, the County knew of the risk that inmates in a sobering cell face from other inmates but disregarded that risk by failing to take the precautions required by the regulations. . . .
>
> The courts have long recognized a critical distinction between the knowledge that a reasonable person should have had in a given situation and the knowledge that a particular defendant did in fact have in the same situation. . . . Constructive knowledge is an objective standard, . . . whereas actual knowledge is a subjective standard . . . .
>
> . . . .
>
> . . . . The County may . . . be deemed to have constructive knowledge of the risk that Castro faced in this case because there was a state regulation in effect that clearly identified the risk and required certain steps to mitigate the potential for danger.
>
> Under *Farmer*, however, the constructive-knowledge standard, based on an objective look at what a reasonable person should have known, is insufficient to support a finding of deliberate indifference. The Court specifically rejected such a test for knowledge of a risk under the Eighth Amendment, opting instead for an inquiry into the subjective state of mind of the defendant. *Farmer*, 511 U.S. at 838.

Id. at 353-54.

Kingsley, as discussed above, holds that "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective." 192 L. Ed. 2d at 427. Plaintiff met that burden, as this Court explained: "We fully agree with Castro that a municipality should be aware of (and abide by) applicable state regulations governing its conduct." *Castro*, 785 F.3d at 354. "Expecting municipal entities to take the time to become aware of applicable state regulations is essential to effective governance." *Id.*

To establish *Monell* liability, Plaintiff was not required to prove similar incidents occurred in the sobering cell. *See Kirkpatrick v. Cnty. of Washoe*, 2015 U.S. App. LEXIS 11918, *44-*45 (9th Cir. July 10, 2015). Moreover, the jury findings show that Plaintiff satisfied the objective standard for liability by proving the entity defendants had "a long-standing custom or practice" that created a "substantial risk of serious harm to prisoners held in the West Hollywood detoxification cell," and that this "longstanding custom or practice actually cause[d] Jonathan Castro's injuries." 1 SER 670 (jury findings). The jury's additional finding of subjective deliberate indifference, which the Court held to be unsupported by evidence, is, under *Kingsley*, no longer relevant to the entities' liability determination.

Accordingly, Plaintiff requests that the Court amend Section D of its opinion to conform with *Kingsley*'s "objective reasonableness" standard. The Court should therefore affirm the judgment against the entity defendants.

III. Conclusion

For the foregoing reasons, the Court should amend Section D of its opinion to conform with *Kingsley*'s "objective reasonableness" standard. The Court should affirm, rather than reverse, the judgment against the entity defendants. The decision should be amended to award Plaintiff his costs on appeal.

The petition for rehearing and rehearing en banc should otherwise be denied.

Date: July 17, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

Castro v. County of Los Angeles
Ninth Circuit Case No. 12-56829

I hereby certify that on July 17, 2015, I electronically filed the Foregoing Supplemental Brief of Plaintiff-Appellee in Response to Order Dated June 26, 2015 Regarding Any Effect of *Kingsley V. Hendrickson* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Sandy Leonardis

Sandy Leonardis

CASE NO. 12-56829

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONATHAN MICHAEL CASTRO,

Plaintiff-Appellee.

v.

COUNTY OF LOS ANGELES, ET AL.

Defendants-Appellants,

APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

On Appeal From The United States District Court
For The Central District of California
District Court Case 2:10-CV-05425-DSF-JEM

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INTRODUCTION

Sergeant David Valentine and Custody Assistant Christopher Solomon, the defendants-appellants ("defendants") in *Castro v. City. of Los Angeles*, 2015 U.S. App. LEXIS 14132 (9th Cir. 2015) (Gilman, J.) (Callahan, J., concurring) (Graber, J., concurring in part and dissenting in part),[1] respectfully seek a rehearing by the Panel or en banc of the portion of the opinion denying them qualified immunity, in this 42 U.S.C. § 1983 action based upon deliberate indifference in the failure to protect the plaintiff from harm by another inmate, in violation of his Fourteenth Amendment rights.

The Panel's published opinion holds that in a claim based upon deliberate indifference in the failure to protect an inmate from harm by another inmate, qualified immunity is analyzed differently than in other types of claims of official misconduct. The Panel holds that a reviewing court should determine whether the right was clearly established based upon broad principles of law, rather than the specific context of the case and the circumstances confronting the officers at the time of the incident. *Castro, supra,* 2015 U.S. App. LEXIS 1432, *13 ("Instead, the right at issue is construed simply as the right to be protected from attacks by other inmates. This is in stark contrast with the qualified-immunity analysis for

[1] The original published decision was withdrawn and an amended published opinion was filed.

other types of claims, such as excessive force, in which analogies to prior cases play a much stronger role."). *There is no authority to carve out a special test for analyzing qualified immunity in failure to protect cases, and the test utilized by the Panel contradicts* Saucier v. Katz, 533 U.S. 194, 201 [121 S.Ct. 2151] (2001) *and multiple other Supreme Court decisions.* By conducting the qualified immunity analysis in an improper manner, the Panel failed to reach the vital question of whether it would be clear to a reasonable officer that the defendants' conduct violated the plaintiff's constitutional right *under the particularized context of this case*.

The Panel's holding further creates a direct conflict with *Ford v. Ramirez-Palmer (Estate of Ford)*, 301 F.3d 1043 (9th Cir. 2002), wherein the Ninth Circuit specifically held that in analyzing qualified immunity in a claim based upon deliberate indifference in the failure to protect an inmate from harm by another inmate, a reviewing court must determine whether the law was clearly established *in light of the specific context of the case*, and not as a broad general proposition of law. In *Estate of Ford,* the Ninth Circuit held that it must be determined whether the authorities have fleshed out at what point *a* risk of serious harm to an inmate from an inmate-on-inmate attack becomes a *substantial* risk of serious harm. Here, the Panel reaches the opposite conclusion and holds that no prior authorities need to be reviewed to determine entitlement to qualified immunity.

In addition, the Panel essentially finds that if a jury reaches a verdict against an officer in a claim based upon deliberate indifference in the failure to protect an inmate from harm, qualified immunity can never be granted in his favor on a renewed motion for judgment as a matter of law brought under *Federal Rules of Civil Procedure*, Rule 50(b), if there is sufficient evidence to support the verdict. However, a finding that the defendant committed a constitutional violation is only the first prong of the qualified immunity analysis and despite a jury's finding of subjective intent, an officer is entitled to qualified immunity if a reasonable officer in his position could have believed his conduct did not amount to deliberate indifference, based upon the state of the law. *See Norwood v. Vance*, 591 F.3d 1062, 1066, 1068, 1070 (9th Cir. 2010), cert. denied 131 S.Ct. 1465 (2011) (following a jury verdict in favor of the plaintiff on his deliberate indifference claim, officers were entitled to qualified immunity).

As the Panel erred by failing to apply the proper test to analyze the defendants' entitlement to qualified immunity, a rehearing should be granted.

A REHEARING EN BANC SHOULD BE GRANTED

Pursuant to Rule 35 of the *Federal Rules of Appellate Procedure* and Circuit Rule 35-1, defendants respectfully submit a rehearing en banc is necessary as the

opinion fails to follow *Saucier, supra*, 533 U.S. 194 and other Supreme Court precedent regarding the proper manner in which to analyze qualified immunity. The Supreme Court has repeatedly cautioned the Ninth Circuit not to determine qualified immunity based upon broad principles of law.

In addition, review must be undertaken to secure uniformity of decision, as the decision creates an *irreconcilable conflict* with *Estate of Ford*, *supra*, 301 F.3d 1043, and other precedents in the Ninth Circuit regarding the proper manner to determine qualified immunity in a deliberate indifference case.

If reviewing courts decide whether the law was clearly established simply based upon the broad proposition that officers were on fair notice that inmates have a right to be free from deliberate indifference in the failure to protect them from harm by another inmate, rather than based upon analogous cases to flesh out at what point *a* risk of harm becomes a *substantial* risk of harm, officers will never be entitled to qualified immunity. Entitlement to qualified immunity is a matter of exceptional importance which warrants review in this case.

Furthermore, by analyzing the constitutional right at issue too broadly, the Panel essentially finds that in deliberate indifference cases, qualified immunity can never be granted on behalf of an officer by way of a renewed motion for judgment, if the evidence is sufficient to support a constitutional violation, which is only the first prong of the qualified immunity analysis.

A REHEARING BY THE PANEL SHOULD BE GRANTED

For the reasons set forth above, defendants respectfully submit the Panel made a mistake of law in its qualified immunity analysis, and rehearing is needed under Rule 40 of the *Federal Rules of Appellate Procedure*.

ARGUMENT

I. WHEN ANALYZING QUALIFIED IMMUNITY IN A CLAIM BASED UPON DELIBERATE INDIFFERENCE IN THE FAILURE TO PROTECT AN INMATE FROM HARM BY ANOTHER INMATE, A REVIEWING COURT ERRS IN DETERMINING WHETHER THE CONSTITUTIONAL RIGHT WAS CLEARLY ESTABLISHED BASED UPON BROAD PRINCIPLES OF LAW.

There are two steps a court must decide in evaluating whether qualified immunity exists: (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) whether that right was "clearly established" by law at the time of the incident, such that "it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*."

Saucier, *supra*, 533 U.S. at 201-02[2] (emphasis added). This factor is determined not as a broad proposition of law, but based upon the specific context of the particularized case and the circumstances facing the defendant. *Id*. at 201-02. The right must have been "clearly established" in a more particularized, and hence more relevant, sense. *Id.*; *Anderson v. Creighton*, 483 U.S. 635, 640 [107 S.Ct. 3034] (1987) (the *contours* of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right); *Lane v. Franks*, 134 S. Ct. 2369, 2381 [189 L. Ed. 2d 312] (2014) (narrowly tailoring the qualified immunity inquiry); *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 [192 L. Ed. 2d 78] (2015) (per curiam).

In fact, the Supreme Court has repeatedly admonished the Circuit Courts, *the Ninth Circuit in particular*, not to define clearly established law at a high level of generality based upon broad principles of law rather than the specific circumstances facing the officer at the time of the incident. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084 (2011); *see also Anderson*, *supra*, 483 U.S. at 639. Indeed, just this past May the Supreme Court was again critical of the Ninth Circuit for analyzing qualified immunity under far too general propositions of law. *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775 [191 L. Ed. 2d 856]

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[2] Qualified immunity may only be denied where *every* reasonable officer would have acted differently. *Reichle v. Howards*, 132 S.Ct. 2088, 2093 [182 L.Ed.2d 985] (2012).

(2015). Otherwise, as the Supreme Court explained, qualified immunity is no immunity at all. *Id.*; *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 [188 L. Ed. 2d 1056] (2014) (reviewing courts are not to define clearly established law at a high level of generality, "*since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced*") (emphasis added).

*The fact that a reviewing court is not allowed to determine whether a right was clearly established based upon broad propositions of law is not limited to excessive force claims, but applies "**across the board**" to any type of claim of official misconduct.* *Saucier*, *supra*, 533 U.S. at 203 (citing *Anderson*, *supra*, 483 U.S. at 642) (emphasis added).

Following *Saucier*, in *Estate of Ford*, *supra*, 301 F.3d 1043, the Ninth Circuit analyzed qualified immunity in a claim for deliberate indifference to an inmate's safety in failing to protect him from harm caused by another inmate. *Id.* at 1045. The Court stated that prior to *Saucier*, it had held that a finding of deliberate indifference necessarily precluded a finding of qualified immunity. *Id.* at 1045. However, following *Saucier*, irrespective of a finding of a constitutional violation and notwithstanding the subjective component of a deliberate indifference claim, there must be a separate, *additional inquiry* into whether a reasonable officer would have understood that his decision was impermissible under the Eighth

Amendment. *Id.* The Court stated:

> In the Fourth Amendment context, the Supreme Court rejected the view that the inquiries merge because a reasonable officer could not possibly think it was reasonable, *i.e.*, lawful, to use unreasonable force. The Fords make essentially the same argument in the Eighth Amendment context, that a reasonable officer could not possibly think it was reasonable, *i.e.*, lawful, to be deliberately indifferent to a substantial risk of serious harm. ***However, it is no less true for purposes of the Eighth Amendment than it was in* Saucier *that the qualified immunity inquiry "has a further dimension*."

Id. at 1049 (quoting *Saucier*, *supra*, 533 U.S. at 205) (emphasis added); *compare to Marquez v. Gutierrez*, 322 F.3d 689 (9th Cir. 2003), cert. denied 540 U.S. 1073 (2003) (irrespective of the subjective element of a claim, in determining qualified immunity, the reviewing court must look at the situation as a reasonable officer could have perceived it).

In *Estate of Ford,* the Ninth Circuit found that although the Supreme Court held in *Farmer v. Brennan*, 511 U.S. 825 [114 S.Ct. 1970] (1994) that an official may be liable if he knows of and disregards an excessive risk to inmate safety and fails to protect a prisoner from harm by another prisoner, for the purposes of analyzing qualified immunity, the reviewing court must determine whether the law was clearly established in *light of the specific context of the case. Id.* at 1050-51. Thus, the Court held the officers were entitled to qualified immunity based upon the specific facts of the case and the information known to the officers, as not

every reasonable officer would have clearly understood the risk of serious harm was so high that housing the inmates together should not have been authorized. *Id.* at 1053. *Compare to Dunn v. Castro*, 621 F.3d 1196, 1205 (9th Cir. 2010) (in deciding qualified immunity by analyzing the constitutional right implicated by the prisoner too broadly, the "district court erred by defining the question at too high a level of generality and evaluating that question without regard to the relevant fact-specific circumstances"); *George v. Edholm*, 752 F.3d 1206, 1221 (9th Cir. 2014) (qualified immunity granted to the defendants as plaintiff "has not identified a single case finding a Fourteenth Amendment violation under circumstances like those here").

The Ninth Circuit indicated that irrespective of the subjective element, deliberate indifference claims have an objective component, and qualified immunity should be granted where a reasonable officer in the position of the defendant, who knows the facts known by the defendant, could reasonably perceive the exposure in any given situation was not that high. *Estate of Ford*, *supra*, 301 F.3d at 1049-50. ***The relevant analysis considers whether the authorities on the situation have fleshed out at what point a risk of inmate assault becomes sufficiently substantial.*** *Id.* at 1051.

However, despite *Estate of Ford,* the Panel in this matter did not discuss any prior analogous cases to determine whether defendants were on fair notice that

their conduct on the night of the incident violated plaintiff's rights and, in fact, created a new, erroneous law which fails to follow existing Supreme Court and Ninth Circuit precedent, finding that qualified immunity in deliberate indifference cases is analyzed differently than in other cases. *Castro, supra,* 2015 U.S. App. LEXIS 1432, *12-13. The holding directly conflicts with *Estate of Ford,* which found that because neither *Farmer* nor subsequent authorities had fleshed out at which point *a* risk of serious harm becomes a *substantial* risk of serious harm, this necessarily resolved the dispositive question of whether a reasonable officer in the position of the defendants would have known his conduct violated the plaintiff's constitutional rights, and the defendants were entitled to qualified immunity as a matter of law. *Estate of Ford, supra,* 301 F.3d at 1051. In fact, because *Estate of Ford* found the law has not fleshed out what point the risk of some harm to an inmate from an attack by another inmate becomes a *substantial* risk of harm, "a very high level of particularity" was necessary. *Hope v. Pelzer*, 536 U.S. 730, 740-41 [122 S.Ct. 2508] (2002).

Indeed, relevant to this case, the law is not clearly established such that *every* reasonable officer in the position of the defendants would be on fair notice that he could not house two intoxicated pretrial detainees together in a

detoxification cell,[3] where the undisputed evidence shows neither inmate was physically assaultive toward any person on the night of the incident.[4] To the contrary, a number of cases actually reach the opposite view. *Estate of Ford*, *supra*, 301 F.3d at 1052; *see also Berry v. Sherman*, 365 F.3d 631, 633-34 (8th Cir. 2004) (viewed objectively, the officials were entitled to qualified immunity from deliberate indifference for the failure to protect an inmate from harm by another inmate; although the inmate threatened violence prior to the incident, the threats were directed at other inmates, not to the plaintiff); and *Pagels v. Morrison*, 335 F.3d 736, 740-42 (8th Cir. 2003) (defendant entitled to qualified immunity from plaintiff's claims based upon an assault by his cellmate, as defendant did not have any specific knowledge of a propensity for violence by the attacking cellmate).

Moreover, a reasonable officer in the position of the defendants could have failed to respond to banging on a door by an intoxicated inmate in the detoxification cell, or otherwise failed to respond to non-violent events in the cell.

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[3] The detoxification cell, which houses up to eight people, was used for individuals under the influence of drugs or alcohol for their own safety as, unlike a booking cell, it has no telephone or hard bench which a person could strike upon losing his balance, but only has mattress pads and a commode. (RT 6/7/12, 187:25-10; 6/6/12, 22:23-23:7.)

[4] The plaintiff and the attacking inmate were both intoxicated on the night of the incident and placed in the sobering cell. While the attacking inmate was listed as combative on a jail intake form, it is undisputed the *reason* he was listed as combative was for threatening to spit at an officer, and he had not been physically assaultive with any person prior to attacking the plaintiff. (RT 6/6/12, 60:2-25, 89:10-90:10, 32:13-33:9, 90:11-91:5; 6/7/12 195:11-198:20.)

Again, rather than placing an officer on fair notice that the foregoing conduct amounts to deliberate indifference, case law supports the opposite position. In *Tucker v. Evans*, 276 F.3d 999 (8th Cir. 2002), the decedent-inmate was beaten to death by his cellmate and prior to the assault, there was an alleged argument between the decedent and his cellmate. *Id.* at 1002. On appeal, the Court reversed the denial of qualified immunity, as there was no evidence the deceased was the target of an impending *physical attack* by the cellmate. *Id.* Thus, a reasonable official in position of the defendants at the time the attack occurred would not have believed that his actions violated the decedent's clearly established constitutional rights. *Id.* at 1003.

Of note, in the only case cited by the Panel to support its new holding that qualified immunity in deliberate indifference inmate-on-inmate attack cases is analyzed differently from excessive force cases and is based upon broad propositions of law, *Robinson v. Prunty*, 249 F.3d 862 (9th Cir. 2001), the Court actually analyzed whether the law was clearly established such that the defendants would have known *their conduct violated the inmate's rights based upon the specific context of the case.* *Id.* at 866 ("the only remaining question is whether a reasonable prison official *would have believed his or her conduct* to be lawful in light of this pre-existing law).

Regardless of whether the individual defendants knew the broad proposition

of the general principle of law that an inmate has right to be free from deliberate indifference in the failure to protect him from an inmate-on-inmate attack, this general knowledge would not have guided them with respect to whether they acted unlawfully in this case. The constitutional question should have been narrowly drawn to determine whether *every* reasonable officer would have known an inmate should not be housed in a detoxification cell with another inmate who had not been physically assaultive or threatened to be physically assaultive with any person on the night of the incident, or that, despite the fact that 30 minute safety checks were being performed, the failure to immediately respond to an intoxicated inmate's banging on a cell door or non-violent events within a cell, would amount to deliberate indifference of the inmate's right to be protected from a physical attack by another inmate. If the foregoing principles of law had been clearly established, the individual defendants would have been on proper notice that their conduct was violating the plaintiff's constitutional rights.

However, in the opinion, the Panel specifically holds that, unlike in an excessive force cases, in analyzing qualified immunity in a deliberate indifference claim, it need not consider whether prior analogous cases placed the officer on notice that his conduct was unlawful under the circumstances he confronted; rather, it is sufficient to state the right of an inmate to be protected from attacks by other inmates was clearly established. *Supra.* The Panel's holding was specifically

rejected in *Estate of Ford*, because without prior analogous cases, it is not clear to a reasonable officer when *a* risk of harm, turns into a *substantial* risk of harm. *Supra.*

As the Panel did not engage in the proper qualified immunity analysis and failed to consider whether the law was clearly established based upon the specific context of this case and the conduct attributed to the defendants, the officers were improperly denied qualified immunity. Moreover, the published decision now holds that deliberate indifference cases are analyzed differently than other types of claims, based on broad propositions of law.

II. IN A CLAIM BASED UPON DELIBERATE INDIFFERENCE IN THE FAILURE TO PROTECT AN INMATE FROM HARM BY ANOTHER INMATE, QUALIFIED IMMUNITY IS NOT FORECLOSED FOLLOWING A JURY VERDICT AGAINST THE DEFENDANT OFFICER.

The Panel addressed whether the evidence was sufficient to support the verdict, but failed to separately determine qualified immunity, stating the jury's verdict finding there was substantial risk of serious harm to the plaintiff of which the officers were *subjectively* aware, foreclosed the possibility of finding qualified immunity on appeal. *Castro, supra,* 2015 U.S. App. LEXIS 1432, *25 ("a jury

has already weighed in and found that Valentine was aware of and disregarded not merely a risk of some harm, but a substantial risk of serious harm to Castro”).)

In *Norwood v. Vance*, *supra*, 591 F.3d 1062, as in this case, the jury returned a verdict in favor of the plaintiff as it found the defendants were deliberately indifferent to plaintiff's rights in violation of *Farmer v. Brennan*. *Id.* at 1066. Thus, the jury necessarily found the defendants had the subjective state of mind required for a finding of deliberate indifference. However, on appeal, the Ninth Circuit found a reasonable officer in the position of the defendants, viewed from a "highly context-sensitive" analysis, would not necessarily have known his conduct to be unlawful based on the specific situation the officers confronted. *Id.* at 1068, 1070. Accordingly, post-judgment, the officers were entitled to qualified immunity, despite the jury's verdict finding of deliberate indifference.

In *Luckert v. Dodge County*, 684 F.3d 808 (8th Cir. 2012), cert. denied 133 S.Ct. 865 (2013), the jury found in favor of the plaintiff on a deliberate indifference claim, and the Eighth Circuit granted the officer's Rule 50(b) renewed motion for judgment as a matter of law based upon qualified immunity. *Id.* at 816, 820. The Court stated that in analyzing qualified immunity, although the law was clearly established that jailers must take measures to prevent inmate suicides, *the law was not established with any clarity as to what those measures must be*. *Id.* at 819. While the district court denied the officer's motion as it found the evidence

was sufficient to support the verdict, the Eighth Circuit stated the proper manner in which to analyze qualified immunity was to review the evidence that is deferential to the verdict, and determine whether, even if the defendant knew of the risk to the inmate and the harm occurred, a reasonable official could have believed the defendant's conduct did not amount to deliberate indifference. *Id.* at 819-20.

In other words, following a jury verdict against a defendant officer, while deference is given to the version of the facts supported by the evidence as presented by the plaintiff, an officer is still entitled to qualified immunity unless *every* reasonable officer in the position of the defendant would have been on fair notice that his conduct amounted to deliberate indifference based upon those facts and the circumstances he confronted.

The Panel relied upon *A.D. v. State of Cal. Highway Patrol*, 712 F.3d 446 (9th Cir. 2013), cert. denied 134 S.Ct. 531 (2013), to support its conclusion that it could not disturb the jury's findings that the officers subjectively knew of a substantial risk of serious harm, on qualified immunity grounds. However, in *A.D.,* the Ninth Circuit determined qualified immunity in a "purpose to harm" case, and held that where a jury finds that an officer *purposefully kills an individual without any legitimate law enforcement objective*, the wrong is so "obvious" that there is no scenario under which it could be said that a reasonable officer in the position of the defendant could have believed his conduct to be lawful. *Id.* at 454.

The Ninth Circuit acknowledged that it had been warned by the Supreme Court to stop defining "clearly established" law too generally. *Id.* at 455. However, the Court concluded that irrespective of whether prior cases addressing the illegality of shooting a civilian with a purpose to harm unrelated to a legitimate objective were factually distinguishable, the constitutional rule was "obvious"—every reasonable officer would know that killing a person with no legitimate law enforcement purpose violates the Constitution. *Id.* at 454-55. Thus, a purpose to harm claim is one of the *rare* occasions in which clearly established law need not be based upon the specific context of the case as the standard was so obvious—no matter the circumstances the officer confronted, a reasonable officer would never believe it is acceptable to kill a suspect without a legitimate reason. *Id.* at 455.

Importantly, however, the Ninth Circuit in *A.D.* specifically distinguished deliberate indifference cases, as understanding when *a* risk of harm turns into a *substantial* risk of serious harm is not "obvious" to a reasonable officer, but must be developed by precedent analyzing the propriety of actions by officers in prior cases under similar circumstances to which the defendant was confronted. *Id.* at 455, fn. 4. The Ninth Circuit stated the qualitative difference between the degree of risk that will result in liability, and that which will not, "***is a fact-bound inquiry***." *Id.* at 455, fn. 4 (emphasis added).

Furthermore, a purpose to harm claim does not have an objective element of

the claim separate and apart from the subjective component element. Rather, in *A.D.*, the jury was tasked with determining whether the officer acted with a bad motive/purpose to harm *or* with a legitimate law enforcement purpose. As the jury found the officer acted with a bad motive, the Ninth Circuit did not want to disturb the finding. *A.D.*, *supra*, 712 F.3d at 453, 456. In contrast, deliberate indifference claims contain a completely separate objective element, in addition to a subjective element.[5] Because a reasonable officer in the position of the defendants could have failed to realize there was a *substantial* risk of *serious* harm based upon the facts as viewed in favor of the plaintiff, the defendants are entitled to qualified immunity. *See Riccardo v. Rausch*, 375 F.3d 521, 526 (7th Cir. 2004), cert. denied 544 U.S. 904 (2005).

As the point at which some risk of harm amounted to a *substantial* risk of harm was not "obvious," the law could not be "clearly established" without prior similar cases, and the court erred in applying its qualified immunity analysis in this case.

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[5] Even in claims involving only subjective elements, an officer is still entitled to qualified immunity despite a jury's findings, where the law is not clearly established that the conduct at issue violated the plaintiff's constitutional rights. *Crawford-El v. Britton*, 523 U.S. 574, 589, 592-93 [118 S.Ct. 1584] (1998) (even when the general constitutional rule of law is clearly established, a defendant will still be entitled to qualified immunity in the presence of an unconstitutional motive, where there "may be doubt as to the illegality of the defendant's particular conduct").

CONCLUSION

While the general constitutional rule of law may have been clearly established that an officer cannot be deliberately indifferent to an inmate's right to be free from harm caused by another inmate, the defendants are entitled to qualified immunity irrespective of the jury's finding of deliberate indifference as, assuming all facts in favor of the plaintiff, the law is not clearly established and there is doubt as to the illegality of the defendants' conduct in the specific context of this case. Accordingly, a rehearing as to the officers' entitlement to qualified immunity should be granted, by the Panel or en banc.

DATED: August 25, 2015 HURRELL CANTRALL LLP

By: /S/ Melinda Cantrall
MELINDA CANTRALL
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COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, CHRISTOPHER SOLOMON and DAVID VALENTINE

Form 11. Certificate of Compliance Pursuant to

Circuit Rules 35-4 and 40-1

Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer (signature block below)

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

X__ Proportionately spaced, has a typeface of 14 points or more and contains 4,192 words (petitions and answers must not exceed 4,200 words).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _____words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

DATED: August 25, 2015 HURRELL CANTRALL LLP

By: /S/ Melinda Cantrall
MELINDA CANTRALL
Attorneys for Defendants-Appellants, COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, CHRISTOPHER SOLOMON and DAVID VALENTINE

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, appellants are not aware of any related cases pending in this Court.

DATED: August 25, 2015 HURRELL CANTRALL LLP

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Attorneys for Defendants-Appellants,
COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, CHRISTOPHER SOLOMON and DAVID VALENTINE

ADDENDUM FOR STATUTES AND CONSTITUTIONAL PROVISIONS SUBMITTED PURSUANT TO CIRCUIT RULE 28-2.7

CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983 (Civil action for deprivation of rights)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Eighth Amendment to the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment to the United States Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

EXHIBIT "A"

(CIRCUIT RULE 40-1(C)

CASE NO. 12-56829

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONATHAN MICHAEL CASTRO,

Plaintiff-Appellee.

v.

COUNTY OF LOS ANGELES, ET AL.

Defendants-Appellants,

APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

On Appeal From The United States District Court
For The Central District of California
District Court Case 2:10-CV-05425-DSF-JEM

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INTRODUCTION

Sergeant David Valentine and Custody Assistant Christopher Solomon, the defendants-appellants ("defendants") in *Castro v. City. of Los Angeles*, 2015 U.S. App. LEXIS 14132 (9th Cir. 2015) (Gilman, J.) (Callahan, J., concurring) (Graber, J., concurring in part and dissenting in part),[1] respectfully seek a rehearing by the Panel or en banc of the portion of the opinion denying them qualified immunity, in this 42 U.S.C. § 1983 action based upon deliberate indifference in the failure to protect the plaintiff from harm by another inmate, in violation of his Fourteenth Amendment rights.

The Panel's published opinion holds that in a claim based upon deliberate indifference in the failure to protect an inmate from harm by another inmate, qualified immunity is analyzed differently than in other types of claims of official misconduct. The Panel holds that a reviewing court should determine whether the right was clearly established based upon broad principles of law, rather than the specific context of the case and the circumstances confronting the officers at the time of the incident. *Castro, supra,* 2015 U.S. App. LEXIS 1432, *13 ("Instead, the right at issue is construed simply as the right to be protected from attacks by other inmates. This is in stark contrast with the qualified-immunity analysis for

[1] The original published decision was withdrawn and an amended published opinion was filed.

other types of claims, such as excessive force, in which analogies to prior cases play a much stronger role."). *There is no authority to carve out a special test for analyzing qualified immunity in failure to protect cases, and the test utilized by the Panel contradicts* Saucier v. Katz, 533 U.S. 194, 201 [121 S.Ct. 2151] (2001) *and multiple other Supreme Court decisions.* By conducting the qualified immunity analysis in an improper manner, the Panel failed to reach the vital question of whether it would be clear to a reasonable officer that the defendants' conduct violated the plaintiff's constitutional right *under the particularized context of this case*.

The Panel's holding further creates a direct conflict with *Ford v. Ramirez-Palmer (Estate of Ford)*, 301 F.3d 1043 (9th Cir. 2002), wherein the Ninth Circuit specifically held that in analyzing qualified immunity in a claim based upon deliberate indifference in the failure to protect an inmate from harm by another inmate, a reviewing court must determine whether the law was clearly established *in light of the specific context of the case*, and not as a broad general proposition of law. In *Estate of Ford,* the Ninth Circuit held that it must be determined whether the authorities have fleshed out at what point *a* risk of serious harm to an inmate from an inmate-on-inmate attack becomes a *substantial* risk of serious harm. Here, the Panel reaches the opposite conclusion and holds that no prior authorities need to be reviewed to determine entitlement to qualified immunity.

In addition, the Panel essentially finds that if a jury reaches a verdict against an officer in a claim based upon deliberate indifference in the failure to protect an inmate from harm, qualified immunity can never be granted in his favor on a renewed motion for judgment as a matter of law brought under *Federal Rules of Civil Procedure*, Rule 50(b), if there is sufficient evidence to support the verdict. However, a finding that the defendant committed a constitutional violation is only the first prong of the qualified immunity analysis and despite a jury's finding of subjective intent, an officer is entitled to qualified immunity if a reasonable officer in his position could have believed his conduct did not amount to deliberate indifference, based upon the state of the law. *See Norwood v. Vance*, 591 F.3d 1062, 1066, 1068, 1070 (9th Cir. 2010), cert. denied 131 S.Ct. 1465 (2011) (following a jury verdict in favor of the plaintiff on his deliberate indifference claim, officers were entitled to qualified immunity).

As the Panel erred by failing to apply the proper test to analyze the defendants' entitlement to qualified immunity, a rehearing should be granted.

A REHEARING EN BANC SHOULD BE GRANTED

Pursuant to Rule 35 of the *Federal Rules of Appellate Procedure* and Circuit Rule 35-1, defendants respectfully submit a rehearing en banc is necessary as the

opinion fails to follow *Saucier, supra*, 533 U.S. 194 and other Supreme Court precedent regarding the proper manner in which to analyze qualified immunity. The Supreme Court has repeatedly cautioned the Ninth Circuit not to determine qualified immunity based upon broad principles of law.

In addition, review must be undertaken to secure uniformity of decision, as the decision creates an *irreconcilable conflict* with *Estate of Ford*, *supra*, 301 F.3d 1043, and other precedents in the Ninth Circuit regarding the proper manner to determine qualified immunity in a deliberate indifference case.

If reviewing courts decide whether the law was clearly established simply based upon the broad proposition that officers were on fair notice that inmates have a right to be free from deliberate indifference in the failure to protect them from harm by another inmate, rather than based upon analogous cases to flesh out at what point *a* risk of harm becomes a *substantial* risk of harm, officers will never be entitled to qualified immunity. Entitlement to qualified immunity is a matter of exceptional importance which warrants review in this case.

Furthermore, by analyzing the constitutional right at issue too broadly, the Panel essentially finds that in deliberate indifference cases, qualified immunity can never be granted on behalf of an officer by way of a renewed motion for judgment, if the evidence is sufficient to support a constitutional violation, which is only the first prong of the qualified immunity analysis.

A REHEARING BY THE PANEL SHOULD BE GRANTED

For the reasons set forth above, defendants respectfully submit the Panel made a mistake of law in its qualified immunity analysis, and rehearing is needed under Rule 40 of the *Federal Rules of Appellate Procedure*.

ARGUMENT

I. WHEN ANALYZING QUALIFIED IMMUNITY IN A CLAIM BASED UPON DELIBERATE INDIFFERENCE IN THE FAILURE TO PROTECT AN INMATE FROM HARM BY ANOTHER INMATE, A REVIEWING COURT ERRS IN DETERMINING WHETHER THE CONSTITUTIONAL RIGHT WAS CLEARLY ESTABLISHED BASED UPON BROAD PRINCIPLES OF LAW.

There are two steps a court must decide in evaluating whether qualified immunity exists: (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) whether that right was "clearly established" by law at the time of the incident, such that "it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*."

Saucier, *supra*, 533 U.S. at 201-02[2] (emphasis added). This factor is determined not as a broad proposition of law, but based upon the specific context of the particularized case and the circumstances facing the defendant. *Id*. at 201-02. The right must have been "clearly established" in a more particularized, and hence more relevant, sense. *Id.*; *Anderson v. Creighton*, 483 U.S. 635, 640 [107 S.Ct. 3034] (1987) (the *contours* of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right); *Lane v. Franks*, 134 S. Ct. 2369, 2381 [189 L. Ed. 2d 312] (2014) (narrowly tailoring the qualified immunity inquiry); *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 [192 L. Ed. 2d 78] (2015) (per curiam).

In fact, the Supreme Court has repeatedly admonished the Circuit Courts, *the Ninth Circuit in particular*, not to define clearly established law at a high level of generality based upon broad principles of law rather than the specific circumstances facing the officer at the time of the incident. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084 (2011); *see also Anderson*, *supra*, 483 U.S. at 639. Indeed, just this past May the Supreme Court was again critical of the Ninth Circuit for analyzing qualified immunity under far too general propositions of law. *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775 [191 L. Ed. 2d 856]

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[2] Qualified immunity may only be denied where *every* reasonable officer would have acted differently. *Reichle v. Howards*, 132 S.Ct. 2088, 2093 [182 L.Ed.2d 985] (2012).

(2015). Otherwise, as the Supreme Court explained, qualified immunity is no immunity at all. *Id.*; *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 [188 L. Ed. 2d 1056] (2014) (reviewing courts are not to define clearly established law at a high level of generality, "*since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced*") (emphasis added).

*The fact that a reviewing court is not allowed to determine whether a right was clearly established based upon broad propositions of law is not limited to excessive force claims, but applies "**across the board**" to any type of claim of official misconduct.* *Saucier*, *supra*, 533 U.S. at 203 (citing *Anderson*, *supra*, 483 U.S. at 642) (emphasis added).

Following *Saucier*, in *Estate of Ford*, *supra*, 301 F.3d 1043, the Ninth Circuit analyzed qualified immunity in a claim for deliberate indifference to an inmate's safety in failing to protect him from harm caused by another inmate. *Id.* at 1045. The Court stated that prior to *Saucier*, it had held that a finding of deliberate indifference necessarily precluded a finding of qualified immunity. *Id.* at 1045. However, following *Saucier*, irrespective of a finding of a constitutional violation and notwithstanding the subjective component of a deliberate indifference claim, there must be a separate, *additional inquiry* into whether a reasonable officer would have understood that his decision was impermissible under the Eighth

Amendment. *Id.* The Court stated:

> In the Fourth Amendment context, the Supreme Court rejected the view that the inquiries merge because a reasonable officer could not possibly think it was reasonable, *i.e.*, lawful, to use unreasonable force. The Fords make essentially the same argument in the Eighth Amendment context, that a reasonable officer could not possibly think it was reasonable, *i.e.*, lawful, to be deliberately indifferent to a substantial risk of serious harm. ***However, it is no less true for purposes of the Eighth Amendment than it was in* Saucier *that the qualified immunity inquiry "has a further dimension*."

Id. at 1049 (quoting *Saucier*, *supra*, 533 U.S. at 205) (emphasis added); *compare to Marquez v. Gutierrez*, 322 F.3d 689 (9th Cir. 2003), cert. denied 540 U.S. 1073 (2003) (irrespective of the subjective element of a claim, in determining qualified immunity, the reviewing court must look at the situation as a reasonable officer could have perceived it).

In *Estate of Ford,* the Ninth Circuit found that although the Supreme Court held in *Farmer v. Brennan*, 511 U.S. 825 [114 S.Ct. 1970] (1994) that an official may be liable if he knows of and disregards an excessive risk to inmate safety and fails to protect a prisoner from harm by another prisoner, for the purposes of analyzing qualified immunity, the reviewing court must determine whether the law was clearly established in *light of the specific context of the case. Id.* at 1050-51. Thus, the Court held the officers were entitled to qualified immunity based upon the specific facts of the case and the information known to the officers, as not

every reasonable officer would have clearly understood the risk of serious harm was so high that housing the inmates together should not have been authorized. *Id.* at 1053. *Compare to Dunn v. Castro*, 621 F.3d 1196, 1205 (9th Cir. 2010) (in deciding qualified immunity by analyzing the constitutional right implicated by the prisoner too broadly, the "district court erred by defining the question at too high a level of generality and evaluating that question without regard to the relevant fact-specific circumstances"); *George v. Edholm*, 752 F.3d 1206, 1221 (9th Cir. 2014) (qualified immunity granted to the defendants as plaintiff "has not identified a single case finding a Fourteenth Amendment violation under circumstances like those here").

The Ninth Circuit indicated that irrespective of the subjective element, deliberate indifference claims have an objective component, and qualified immunity should be granted where a reasonable officer in the position of the defendant, who knows the facts known by the defendant, could reasonably perceive the exposure in any given situation was not that high. *Estate of Ford*, *supra*, 301 F.3d at 1049-50. ***The relevant analysis considers whether the authorities on the situation have fleshed out at what point a risk of inmate assault becomes sufficiently substantial.*** *Id.* at 1051.

However, despite *Estate of Ford,* the Panel in this matter did not discuss any prior analogous cases to determine whether defendants were on fair notice that

their conduct on the night of the incident violated plaintiff's rights and, in fact, created a new, erroneous law which fails to follow existing Supreme Court and Ninth Circuit precedent, finding that qualified immunity in deliberate indifference cases is analyzed differently than in other cases. *Castro, supra,* 2015 U.S. App. LEXIS 1432, *12-13. The holding directly conflicts with *Estate of Ford,* which found that because neither *Farmer* nor subsequent authorities had fleshed out at which point *a* risk of serious harm becomes a *substantial* risk of serious harm, this necessarily resolved the dispositive question of whether a reasonable officer in the position of the defendants would have known his conduct violated the plaintiff's constitutional rights, and the defendants were entitled to qualified immunity as a matter of law. *Estate of Ford, supra,* 301 F.3d at 1051. In fact, because *Estate of Ford* found the law has not fleshed out what point the risk of some harm to an inmate from an attack by another inmate becomes a *substantial* risk of harm, "a very high level of particularity" was necessary. *Hope v. Pelzer*, 536 U.S. 730, 740-41 [122 S.Ct. 2508] (2002).

Indeed, relevant to this case, the law is not clearly established such that *every* reasonable officer in the position of the defendants would be on fair notice that he could not house two intoxicated pretrial detainees together in a

detoxification cell,[3] where the undisputed evidence shows neither inmate was physically assaultive toward any person on the night of the incident.[4] To the contrary, a number of cases actually reach the opposite view. *Estate of Ford*, *supra*, 301 F.3d at 1052; *see also Berry v. Sherman*, 365 F.3d 631, 633-34 (8th Cir. 2004) (viewed objectively, the officials were entitled to qualified immunity from deliberate indifference for the failure to protect an inmate from harm by another inmate; although the inmate threatened violence prior to the incident, the threats were directed at other inmates, not to the plaintiff); and *Pagels v. Morrison*, 335 F.3d 736, 740-42 (8th Cir. 2003) (defendant entitled to qualified immunity from plaintiff's claims based upon an assault by his cellmate, as defendant did not have any specific knowledge of a propensity for violence by the attacking cellmate).

Moreover, a reasonable officer in the position of the defendants could have failed to respond to banging on a door by an intoxicated inmate in the detoxification cell, or otherwise failed to respond to non-violent events in the cell.

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[3] The detoxification cell, which houses up to eight people, was used for individuals under the influence of drugs or alcohol for their own safety as, unlike a booking cell, it has no telephone or hard bench which a person could strike upon losing his balance, but only has mattress pads and a commode. (RT 6/7/12, 187:25-10; 6/6/12, 22:23-23:7.)

[4] The plaintiff and the attacking inmate were both intoxicated on the night of the incident and placed in the sobering cell. While the attacking inmate was listed as combative on a jail intake form, it is undisputed the *reason* he was listed as combative was for threatening to spit at an officer, and he had not been physically assaultive with any person prior to attacking the plaintiff. (RT 6/6/12, 60:2-25, 89:10-90:10, 32:13-33:9, 90:11-91:5; 6/7/12 195:11-198:20.)

Again, rather than placing an officer on fair notice that the foregoing conduct amounts to deliberate indifference, case law supports the opposite position. In *Tucker v. Evans*, 276 F.3d 999 (8th Cir. 2002), the decedent-inmate was beaten to death by his cellmate and prior to the assault, there was an alleged argument between the decedent and his cellmate. *Id.* at 1002. On appeal, the Court reversed the denial of qualified immunity, as there was no evidence the deceased was the target of an impending *physical attack* by the cellmate. *Id.* Thus, a reasonable official in position of the defendants at the time the attack occurred would not have believed that his actions violated the decedent's clearly established constitutional rights. *Id.* at 1003.

Of note, in the only case cited by the Panel to support its new holding that qualified immunity in deliberate indifference inmate-on-inmate attack cases is analyzed differently from excessive force cases and is based upon broad propositions of law, *Robinson v. Prunty*, 249 F.3d 862 (9th Cir. 2001), the Court actually analyzed whether the law was clearly established such that the defendants would have known *their conduct violated the inmate's rights based upon the specific context of the case.* *Id.* at 866 ("the only remaining question is whether a reasonable prison official *would have believed his or her conduct* to be lawful in light of this pre-existing law).

Regardless of whether the individual defendants knew the broad proposition

of the general principle of law that an inmate has right to be free from deliberate indifference in the failure to protect him from an inmate-on-inmate attack, this general knowledge would not have guided them with respect to whether they acted unlawfully in this case. The constitutional question should have been narrowly drawn to determine whether *every* reasonable officer would have known an inmate should not be housed in a detoxification cell with another inmate who had not been physically assaultive or threatened to be physically assaultive with any person on the night of the incident, or that, despite the fact that 30 minute safety checks were being performed, the failure to immediately respond to an intoxicated inmate's banging on a cell door or non-violent events within a cell, would amount to deliberate indifference of the inmate's right to be protected from a physical attack by another inmate. If the foregoing principles of law had been clearly established, the individual defendants would have been on proper notice that their conduct was violating the plaintiff's constitutional rights.

However, in the opinion, the Panel specifically holds that, unlike in an excessive force cases, in analyzing qualified immunity in a deliberate indifference claim, it need not consider whether prior analogous cases placed the officer on notice that his conduct was unlawful under the circumstances he confronted; rather, it is sufficient to state the right of an inmate to be protected from attacks by other inmates was clearly established. *Supra.* The Panel's holding was specifically

rejected in *Estate of Ford*, because without prior analogous cases, it is not clear to a reasonable officer when *a* risk of harm, turns into a *substantial* risk of harm. *Supra.*

As the Panel did not engage in the proper qualified immunity analysis and failed to consider whether the law was clearly established based upon the specific context of this case and the conduct attributed to the defendants, the officers were improperly denied qualified immunity. Moreover, the published decision now holds that deliberate indifference cases are analyzed differently than other types of claims, based on broad propositions of law.

II. IN A CLAIM BASED UPON DELIBERATE INDIFFERENCE IN THE FAILURE TO PROTECT AN INMATE FROM HARM BY ANOTHER INMATE, QUALIFIED IMMUNITY IS NOT FORECLOSED FOLLOWING A JURY VERDICT AGAINST THE DEFENDANT OFFICER.

The Panel addressed whether the evidence was sufficient to support the verdict, but failed to separately determine qualified immunity, stating the jury's verdict finding there was substantial risk of serious harm to the plaintiff of which the officers were *subjectively* aware, foreclosed the possibility of finding qualified immunity on appeal. *Castro, supra,* 2015 U.S. App. LEXIS 1432, *25 ("a jury

has already weighed in and found that Valentine was aware of and disregarded not merely a risk of some harm, but a substantial risk of serious harm to Castro”).)

In *Norwood v. Vance*, *supra*, 591 F.3d 1062, as in this case, the jury returned a verdict in favor of the plaintiff as it found the defendants were deliberately indifferent to plaintiff's rights in violation of *Farmer v. Brennan*. *Id.* at 1066. Thus, the jury necessarily found the defendants had the subjective state of mind required for a finding of deliberate indifference. However, on appeal, the Ninth Circuit found a reasonable officer in the position of the defendants, viewed from a "highly context-sensitive" analysis, would not necessarily have known his conduct to be unlawful based on the specific situation the officers confronted. *Id.* at 1068, 1070. Accordingly, post-judgment, the officers were entitled to qualified immunity, despite the jury's verdict finding of deliberate indifference.

In *Luckert v. Dodge County*, 684 F.3d 808 (8th Cir. 2012), cert. denied 133 S.Ct. 865 (2013), the jury found in favor of the plaintiff on a deliberate indifference claim, and the Eighth Circuit granted the officer's Rule 50(b) renewed motion for judgment as a matter of law based upon qualified immunity. *Id.* at 816, 820. The Court stated that in analyzing qualified immunity, although the law was clearly established that jailers must take measures to prevent inmate suicides, *the law was not established with any clarity as to what those measures must be*. *Id.* at 819. While the district court denied the officer's motion as it found the evidence

was sufficient to support the verdict, the Eighth Circuit stated the proper manner in which to analyze qualified immunity was to review the evidence that is deferential to the verdict, and determine whether, even if the defendant knew of the risk to the inmate and the harm occurred, a reasonable official could have believed the defendant's conduct did not amount to deliberate indifference. *Id.* at 819-20.

In other words, following a jury verdict against a defendant officer, while deference is given to the version of the facts supported by the evidence as presented by the plaintiff, an officer is still entitled to qualified immunity unless *every* reasonable officer in the position of the defendant would have been on fair notice that his conduct amounted to deliberate indifference based upon those facts and the circumstances he confronted.

The Panel relied upon *A.D. v. State of Cal. Highway Patrol*, 712 F.3d 446 (9th Cir. 2013), cert. denied 134 S.Ct. 531 (2013), to support its conclusion that it could not disturb the jury's findings that the officers subjectively knew of a substantial risk of serious harm, on qualified immunity grounds. However, in *A.D.,* the Ninth Circuit determined qualified immunity in a "purpose to harm" case, and held that where a jury finds that an officer *purposefully kills an individual without any legitimate law enforcement objective*, the wrong is so "obvious" that there is no scenario under which it could be said that a reasonable officer in the position of the defendant could have believed his conduct to be lawful. *Id.* at 454.

The Ninth Circuit acknowledged that it had been warned by the Supreme Court to stop defining "clearly established" law too generally. *Id.* at 455. However, the Court concluded that irrespective of whether prior cases addressing the illegality of shooting a civilian with a purpose to harm unrelated to a legitimate objective were factually distinguishable, the constitutional rule was "obvious"—every reasonable officer would know that killing a person with no legitimate law enforcement purpose violates the Constitution. *Id.* at 454-55. Thus, a purpose to harm claim is one of the *rare* occasions in which clearly established law need not be based upon the specific context of the case as the standard was so obvious—no matter the circumstances the officer confronted, a reasonable officer would never believe it is acceptable to kill a suspect without a legitimate reason. *Id.* at 455.

Importantly, however, the Ninth Circuit in *A.D.* specifically distinguished deliberate indifference cases, as understanding when *a* risk of harm turns into a *substantial* risk of serious harm is not "obvious" to a reasonable officer, but must be developed by precedent analyzing the propriety of actions by officers in prior cases under similar circumstances to which the defendant was confronted. *Id.* at 455, fn. 4. The Ninth Circuit stated the qualitative difference between the degree of risk that will result in liability, and that which will not, "***is a fact-bound inquiry***." *Id.* at 455, fn. 4 (emphasis added).

Furthermore, a purpose to harm claim does not have an objective element of

the claim separate and apart from the subjective component element. Rather, in *A.D.*, the jury was tasked with determining whether the officer acted with a bad motive/purpose to harm *or* with a legitimate law enforcement purpose. As the jury found the officer acted with a bad motive, the Ninth Circuit did not want to disturb the finding. *A.D.*, *supra*, 712 F.3d at 453, 456. In contrast, deliberate indifference claims contain a completely separate objective element, in addition to a subjective element.[5] Because a reasonable officer in the position of the defendants could have failed to realize there was a *substantial* risk of *serious* harm based upon the facts as viewed in favor of the plaintiff, the defendants are entitled to qualified immunity. *See Riccardo v. Rausch*, 375 F.3d 521, 526 (7th Cir. 2004), cert. denied 544 U.S. 904 (2005).

As the point at which some risk of harm amounted to a *substantial* risk of harm was not "obvious," the law could not be "clearly established" without prior similar cases, and the court erred in applying its qualified immunity analysis in this case.

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[5] Even in claims involving only subjective elements, an officer is still entitled to qualified immunity despite a jury's findings, where the law is not clearly established that the conduct at issue violated the plaintiff's constitutional rights. *Crawford-El v. Britton*, 523 U.S. 574, 589, 592-93 [118 S.Ct. 1584] (1998) (even when the general constitutional rule of law is clearly established, a defendant will still be entitled to qualified immunity in the presence of an unconstitutional motive, where there "may be doubt as to the illegality of the defendant's particular conduct").

CONCLUSION

While the general constitutional rule of law may have been clearly established that an officer cannot be deliberately indifferent to an inmate's right to be free from harm caused by another inmate, the defendants are entitled to qualified immunity irrespective of the jury's finding of deliberate indifference as, assuming all facts in favor of the plaintiff, the law is not clearly established and there is doubt as to the illegality of the defendants' conduct in the specific context of this case. Accordingly, a rehearing as to the officers' entitlement to qualified immunity should be granted, by the Panel or en banc.

DATED: August 25, 2015 HURRELL CANTRALL LLP

By: /S/ Melinda Cantrall
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Form 11. Certificate of Compliance Pursuant to

Circuit Rules 35-4 and 40-1

Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer (signature block below)

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

X__ Proportionately spaced, has a typeface of 14 points or more and contains 4,192 words (petitions and answers must not exceed 4,200 words).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _____words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

DATED: August 25, 2015 HURRELL CANTRALL LLP

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, appellants are not aware of any related cases pending in this Court.

DATED: August 25, 2015 HURRELL CANTRALL LLP

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ADDENDUM FOR STATUTES AND CONSTITUTIONAL PROVISIONS SUBMITTED PURSUANT TO CIRCUIT RULE 28-2.7

CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983 (Civil action for deprivation of rights)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Eighth Amendment to the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment to the United States Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

EXHIBIT "A"

(CIRCUIT RULE 40-1(C)