

Case No.: 20-55622

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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J.K.J, individually, and successor in interest to the Deceased Aleah Jenkins, by and through his guardian-ad-litem Jeremy Hillyer

*Plaintiff-Appellant,*

vs.

CITY OF SAN DIEGO, et al.,

*Defendants-Appellees.*

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Appeal from the District Court for Southern District of California,  
Case No. 3:19-cv-02123-CAB-RBB  
Honorable Cathy Ann Bencivengo United States District Judge

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**Petition for Panel Rehearing and Rehearing En Banc**

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## INTRODUCTION

Appellant J.K.J petitions for rehearing and rehearing *en banc* of the Opinion (Doc. 37-1) of November 15, 2021 entering judgment in favor of Appellees and affirming the decision of the District Court of the Southern District of California. A panel rehearing is appropriate when a material point of law was overlooked in the decision, Fed. R. App. P. 40 (a)(2). An *en banc* hearing is appropriate when (1) consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or (2) the proceeding involves a question of exception importance. Fed. R. App. P. 35 (b); 9th Cir. R. 35-1.

On May 9, 2019, due to San Diego Police Officers Lawrence Durbin (hereinafter "Durbin") and Jason Taub's (hereinafter "Taub") failure to summon immediate medical care for Aleah Jenkins (hereinafter "Ms. Jenkins") after she vomited, repeatedly plead for assistance saying she was "sick", screaming "help me please...help me...I'm telling you I can't", and exhibiting clear and unambiguous signs of a serious medical need at the scene of her arrest, during the entirety of the over one hour drive while handcuffed in the back of Durbin's patrol vehicle and while at the San Diego Police Department Headquarters ("Headquarters"), Ms. Jenkins needlessly died. Revealingly, while still at the scene of the arrest after observing Ms. Jenkins vomit, dry-heave, be visibly disoriented, and hunching over while handcuffed Taub made the call for paramedics, however,

Durbin deliberately and recklessly—while faced with clear signs of Ms. Jenkins’ serious medical need—shouted to Taub “don’t worry about it”, to get Taub to cancel the paramedics, which Taub immediately did. Under the totality of the circumstances, both Durbin and Taub knew that Ms. Jenkins needed immediate medical attention yet acted deliberately indifferent to her medical needs.

As demonstrated on Durbin’s bodycam footage (which was incorporated by reference into the Appellant’s First Amended Complaint and here<sup>1</sup>), for the entire duration of over one-hour drive from the scene the arrest until arriving at the Headquarters, Durbin knowingly demonstrated deliberate indifference toward Mr. Jenkins’ serious medical needs. The same is true once at the headquarters, Ms. Jenkins’ displayed obvious signs of medical needs when she could no longer stand and instead lay on the ground face first in and out of consciousness, panting, body twitching and shaking, and despite this Durbin made the deliberately indifferent decision to place her back in the patrol car handcuffed and face down for *eleven minutes and thirty seconds* only to return and find her no longer breathing.

In the judgment of counsel, a panel rehearing or an en banc hearing is appropriate to secure or maintain uniformity of the Court’s decisions and the

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<sup>1</sup>The publicly available body cam video incorporated by reference into Plaintiff’s FAC: [https://www.youtube.com/watch?v=-cx5dQ\\_u04k&has\\_verified=1](https://www.youtube.com/watch?v=-cx5dQ_u04k&has_verified=1)

proceeding involves a question of exception importance. Appellant therefore respectfully petitions for rehearing, or rehearing *en banc*, on the grounds that the majority's ruling both conflicts with Ninth Circuit precedent, is appropriate to secure or maintain uniformity of the Court's decisions and the proceeding involves a question of exception importance. In a particular, Appellant maintains that in light of this Court's ruling in *Sandoval v. County of San Diego*, 985 F.3d 657 (9th Cir. 2021) the majority in this matter should not have held that Appellee Lawrence Durbin and Jason Taub are entitled to qualified immunity. Moreover, the majority in this matter improperly applied the standard under the Fourteenth Amendment and espoused in *Sandoval*—as highlighted in the dissent—that the standard applied under the Fourteenth Amendment in denial of medical care cases is “whether the officer's actions were objectively reasonable under the circumstances.” (Dkt. 37-1, p. 37).

Furthermore, as emphasized in the dissent, the district court and the majority opinion improperly offered a truncated and “highly sanitized” version of the facts giving rise to the lawsuit. (Dkt. 37-1, p. 26). Moreover, as the stated in the dissent it is well-established precedent in this Circuit that a mistake of fact that is unreasonable does not shield an officer by way of qualified immunity. (Dkt. 37-1, p. 45). Here, as the facts were alleged in the complaint before the District court and before this Court on appeal, both set forth plausible and well set forth facts that

Officer Durbin made an unreasonable mistake of fact as to Aleah Jenkin's serious medical needs and, as such, a factual issue that a jury must resolve. (Dkt. 37-1, p. 46). *See Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003).

Overall, this case demonstrates the need for clear guidance on cases involving these issues from this Court.

### STATEMENT OF MATERIAL FACTS

On November 27, 2018, at approximately 3:52 p.m., Ms. Aleah Jenkins was the backseat passenger in a Cadillac vehicle pulled over by Officers Nicholas Casciola ("Casciola") and Taub for having expired registration. (1-ER-119:2-28.) Officer Lawrence Durbin ("Durbin") arrived soon after to provide cover for Casciola and Taub. (*Id.*) The front seat of the vehicle was occupied by two males who both had prior convictions for narcotics sales. (*Id.*) After being pulled out of the vehicle and while being handcuffed, the driver told the officers about his arrest/conviction for heroin sales. (*Id.*; video at 0:19-0:24<sup>2</sup>.) At the time, while seated upright in the back seat, Ms. Jenkins was alert, responded to questioning from the officers and complied with their request to provide her name, date of birth, and informed them of her probation. (1-ER-119:13-120:19; video at 1:13-1:43.) After the search and

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<sup>2</sup> The publicly available body cam video incorporated by reference into Plaintiff's FAC: [https://www.youtube.com/watch?v=-cx5dQ\\_u04k&has\\_verified=1](https://www.youtube.com/watch?v=-cx5dQ_u04k&has_verified=1)

the questioning of the occupants of the vehicle, the information known to Casciola, Taub and Daub included: knowledge that the male occupants had prior arrests and/or convictions for narcotics sales, Ms. Jenkins' warrant, a saran wrap-like plastic (commonly used for narcotics sales); and a wallet with a lot of cash. (1-ER-119:13-120:19; video at 7:37-7:45.)

### **Cancellation of Paramedics Call**

When being walked to Durbin's vehicle she was able to walk without assistance and without issue. (*Id.*) When Durbin returned to his patrol car some moments later, Ms. Jenkins, who was handcuffed in the back seat at the time, gestures to Durbin from inside the car for help and Durbin then notices that she has vomited on herself in the back seat of the patrol car. (*Id.*; video at 11:20-11:41.) Durbin then opened the back door of the vehicle and asking, "why are you throwing up" and she responded, "I'm sick" as she is vomiting. (*Id.*) Durbin then asked her again "why" and she again responds, "I'm sick" as she is vomiting. (1-ER-121:12-20; video at 11:54-12:20.) While she continued to dry heave and vomit, Durbin asked her if she was "withdrawing", and Taub stated if she was "detoxing", to which she responds, "No, I'm sick my stomach is turning." (*Id.*) Durbin then tells her to "stick your head out" as she continues to vomit and dry heave leaning out of the car door while handcuffed. (*Id.*) She then tells Durbin that she is pregnant while she is continuing to vomit. (*Id.*)



At 11:41 of the video footage from the body cam it indicates “Officer prepares to request medics respond”. (1-ER-121:21-22.) When Durbin first noticed the vomiting, he requested that Taub call the paramedics. (1-ER-121:23-122:4; video at 11:54-12:22.) Despite continuing to vomit, dry-heave, visibly disoriented, exhibiting signs of distress by hunching over while handcuffed, deterioration of her condition from moments prior when she was walking and standing, having glossy eyes, trouble speaking, and incoherent statements, Durbin yells to Taub, who had already placed the call to paramedics, “don’t worry about it”, to get Taub to cancel the paramedics, which Taub immediately did. (1-ER-121:23-122:12.)

Durbin made the deliberately indifferent decision to instruct Taub to cancel the call to paramedics despite the obvious serious medical emergency Ms. Jenkins was suffering from. (1-ER-121:23-122:12.) Reasonable officers, in the position of officers like Durbin and Taub, based on their Police Officer Standards and Training (hereinafter “POST”) and San Diego Police Department (hereinafter “SDPD”) policies and training know that it is their duty to ensure the safety of ill or injured persons, to evaluate emergency situations, and to take necessary actions for the well-being of the ill or injured person. (*Id.*) At approximately 4:05 p.m. (one hour after the traffic stop), Durbin closes the rear door on Ms. Jenkins and begins driving toward the headquarters. (1-ER-124:19-26.)

### **Ms. Jenkins' Condition Takes a Serious Turn for the Worst**

From approximately minute forty-five (45:00) of Durbin's body cam, Ms. Jenkins' condition takes a turn for the worst and her continual groaning, screaming, and panting increasing becomes louder. (1-ER-125:16-25; video 45:00-1:04.) In response to a loud scream, Durbin asks, "what's going on" and "Ms. Jenkins you still want water?" to which Decedent does not respond. (*Id*; video 46:34-47:25.) After a few moments go by, Durbin again says "Ms. Jenkins" and she responds by gasping and groaning. (*Id*; video 46:34-47:25.) Her unresponsiveness to questioning at times is an objective sign that she was experiencing a medical emergency and is contrary to Durbin's training and policy to not request immediate medical attention. (1-ER-125:26-126:3.) Durbin continues to drive and ignore the repeated groans, screams, panting, abnormally rapid rate of breathing and objective signs of medical distress and overdosing. (1-ER-126:4-17.) While at times Durbin attempts to engage in conversation, by informing her she can "sleep" and that they are "stuck in traffic", her barely audible responses, screams, and unresponsiveness, amounts to objective signs that her condition is deteriorating and needed immediate medical attention. (*Id*; video 45:00-1:04.)

At approximately 1:04 (one hour and four minutes) of Durbin's body cam footage, she begins screaming very loudly and pleading, "please help me, please

help me”. (1-ER-126:4-17; video at 1:04-1:06.) Durbin responds, “what’s going on”, Ms. Jenkins who is panting and screaming, does not give audible responses but screams, “oh my god, please stop, stop, stop”. (*Id.*; video at 1:05:10.)

At approximately 1:14 (one hour and fourteen) of Durbin’s body cam, he decides to pull over his vehicle because Ms. Jenkins has not responded to his questions or comments for approximately ten (10) minutes since she last screamed “oh my god, please stop, stop, stop”. (1-ER-126:18-22; video at 1:14:10.) Durbin pulls over, walks around to the back door, opens it, and finds her body laying down on the back seat, and part of her body falls out of the car door. (1-ER-126:23-127:14; video at 1:14:26-1:14:38.) At this moment, Ms. Jenkins is displaying objective signs of a serious medical, including, but not limited to panting, abnormally rapid rate of breathing, listless body, and unresponsiveness for approximately ten (10) minutes. (*Id.*) Durbin then says, “I need you to stay awake” and he places his hand on her to push her back into the car—a clear indication that he has an understanding that she is in distress by asking her to stay awake—and as he is pushing her back into the car she pleads with him “I’m sick” as he slams the door shut. (*Id.*; video at 1:14:26-1:14:38.)

After slamming the door on her listless body, Ms. Jenkins screams “Help!” as Durbin walks back to the driver door saying, “Knock it off”. (1-ER-128:8-16; video at 1:14:39-1:15:22.) Demonstrating his conscious and deliberate indifference

again, Ms. Jenkins pleads “help me please” and Durbin says “you’re fine” after having done nothing to evaluate her condition despite objective signs she was overdosing. (*Id.*) As Durbin continues to drive, Decedent continues to scream “help me.... I’m telling you I can’t”. (*Id.*) During the over one-hour drive to the Headquarters, Ms. Jenkins condition objectively continued to deteriorate, displaying obvious signs of extreme physical distress and a serious medical need. (1-ER-128:17-22.)

### **San Diego Police Department Headquarters**

Upon arriving at the station and opening the back door, Ms. Jenkins was lying face down in the back seat handcuffed, panting loudly, breathing at an abnormally rapid rate, demonstrating clear and objective signs she was overdosing and exhibiting a serious medical need. (1-ER-129:3-23; video 1:17:18-1:17:55.) As Durbin continues to stand over her, she continues to pant profusely, breath at an abnormally rapid rate and her body begins twitching and shaking while lying face down in the back seat. (*Id.*; video 1:17:18-1:18:29.) At this juncture, despite the totality of the circumstances and the aforementioned objective signs of a serious medical need Durbin made no effort to summon paramedics, medical care, or have Jenkins evaluated by medical staff that was present at the station. (*Id.*)

Durbin then pulls her listless body out of the back of car, she screams in distress again, and continues to pant excessively and breathe in an abnormally rapid manner. (1-ER-129:24-130:6; 1:18:30-1:19:00.) He then lays her on the concrete ground as she again pleads “Help me”, which prompts Durbin, who ignores her pleas for help, to say to the approaching DOE officer that “she doesn’t want to go to jail”. (*Id.*; video 1:19:00-1:19:10.) Durbin converses with the officer about fingerprinting Ms. Jenkins, as she shakes and twitches on the ground, screams in distress appearing to go in and out of consciousness. (*Id.*; video 1:19:00-1:19:35.)

While Durbin is standing over Ms. Jenkins, he asks her if she wants water, as the other officer fingerprints her, to which she does not respond, nevertheless, Durbin states, “Ok, sounds good, no water”. (1-ER-130:7-16; video 1:19:55-1:20:47.) While Durbin and the officer are standing over Ms. Jenkins as she lay on the ground her body continues to twitch and shake displaying clear and objective signs that she is overdosing and in need of a serious medical attention. (*Id.*) Durbin and the officer take no action to address the serious medical needs of Decedent as she lay on the ground overdosing. (*Id.*; video 1:19:55-1:22:05.)

After the results of the finger printing, Durbin and the other officer attempt to lift her off the ground and place her in the back seat of the patrol car. (1-ER-130:7-26; video 1:23:02-1:24:02.) Her body is listless, she continues to go in and out of consciousness, her body twitches and shakes, and her breathing is at an abnormally

rapid rate. (*Id.*) Instead of summoning medical care Durbin begins to threaten her and says “if you start resisting us there is an extra charge” and yelling “Stand up...stop faking it”, to which she helplessly mumbles “I am not”. (1-ER-130:7-26.) Durbin then lifts her entire body up and places her listless body face first on the back seat of his patrol car, as the other officer pulls her body from the other side of the vehicle. (*Id.*; video 1:23:02-1:24:02.) Durbin then closes the door and walks away, while Decedent is locked in the backseat face down and handcuffed, in need of medical attention. (1-ER-130:27-131:12.)

Durbin returns sometime later<sup>3</sup> and opens the back door and as she lay face down handcuffed and attempts to shake her with his hands as she is unresponsive. (1-ER-130:27-131:12; video 1:24:07-1:24:33.) Durbin then walks around to the other side of car to pull her body out of the car and lays her on the ground again. (*Id.*; video 1:24:32-1:25:15.) He repeatedly says, “Ms. Jenkins wake up” as she is completely unresponsive, and attempts to take her pulse saying, “I can’t tell if she is breathing or not”. (*Id.*; video 1:24:32-1:27:16.) While attempting to revive her, he states to the other officers that now arrived that she was responsive “seconds ago”, which is untrue, as by Defendants own statement in their motion Durbin had last left her in the vehicle *eleven minutes and thirty seconds*. (*Id.* Video 1:26:19-

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<sup>3</sup> Appellants admitted in their Motion to Dismiss that Durbin left Ms. Jenkins in the patrol car back seat for eleven minutes and thirty seconds. (1-ER-158:14-15).

1:26:30.) As the attempts to revive her continue, Durbin is asked if it was a narcotics arrest—as it was obvious she was overdosing—and he states “yes...she was surrounded by narcotics...she has a warrant for narcotics...but she is not a 11-5...she may have ingested something.” (*Id.* Video 1:26:30-1:27:12.) After repeatedly attempting to unsuccessfully wake Ms. Jenkins to no avail, paramedics were finally summoned. (*Id.*) Ms. Jenkins proceeded to go into a coma and died on December 6, 2018. (1-ER-131:13-27.) Durbin first encountered Ms. Jenkins at approximately 3:52 and at approximately 6:14, for the nearly two and half hours (2.5 hours) that Durbin was interacting with her, he continually and repeatedly ignored objective signs that she was in serious need of medical attention. (*Id.*)

### **Argument**

#### **I. The Majority Overlooks a Material Point of Law Resulting in a Conflict with Another Decision of this Court So That Rehearing or Rehearing *En Banc* is Necessary to Secure Uniformity of This Court’s Decisions**

As the dissent aptly pointed out, the majority’s decision here ignored the recent decision from this Court in *Sandoval v. County of San Diego*, 985 F.3d 657 (9th Cir. 2021). In *Sandoval* this Court stated that the under the Fourteenth Amendment the elements of a claim against an individual defendant for denial of medical care are: “(i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the

plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff’s injuries.” 985 F.3d at 699. A medical need is serious “if the failure to treat the [detainee’s] condition could result in further significant injury or the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). It has long been settled that deliberate indifference is shown where an official “purposefully ignore[s] or fail[s] to respond to a prisoner’s pain or *possible* medical need.” *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992) (reversed on other grounds) (emphasis added). Lastly, this Court has clarified that, in the context of pretrial detainees protected by the Fourteenth Amendment, deliberate indifference is interpreted solely from an objective perspective, and has no subjective component. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1069–70 (9th Cir. 2016) (en banc).

In the two-hours and twenty-two minutes (2:22) Ms. Jenkins was in Durbin’s custody, from the time of the arrest through the moment she completely stopped breathing and fell into a coma, all objective facts point to one conclusion—Decedent was overdosing, a serious medical need, and Durbin exhibited a high degree of deliberate indifference toward her serious medical



needs. the FAC and the body cam footage reveal further sufficient and plausible facts that for the entirety of the over one-hour drive from the scene of the arrest to the police headquarters Ms. Jenkins pled for help, exhibited an abnormally rapid rate of breathing, including screaming very loudly and pleading, “*please help me, please help me*”, “*I’m sick*”, and “*help me...I’m telling you I can’t*”. (1-ER 126:6-8; 128:8-16; video at 1:04-1:06.) (emphasis added). At one point after hearing no response from Ms. Jenkins for ten (10) minutes Durbin to pulls his car over, walks to the back and opens the back door causing Ms. Jenkins’ listless body to fall half-way out of the door. (1-ER-126:18-127:14; video at 1:14:26-1:14:38.) The same holds true for the alleged facts and undisputed evidence of the body cam while at the Headquarters, which further demonstrate the plausible inference that Durbin knew that Ms. Jenkins needed immediate medical attention and failed to summon such care. After the fingerprinting is done, Durbin and another officer lift her listless body and place her in the back of the patrol car, face down, handcuffed and windows up for *eleven minutes and thirty seconds*. (1-ER-130:27-131:12; video 1:23:02-1:24:11).

As the dissent points out, Officer Durbin’s actions were objectively unreasonable and thus violated the Fourteenth Amendment standard and the Fourth Amendment standard of objective unreasonable. (Dkt. 37-1, p. 39-43).

The same holds true with regards to the majority's analysis of qualified immunity. As the dissent, points out this Court has on numerous times held that an officer cannot claim qualified immunity when an unreasonable mistake of fact—such as the one in this instance occurs wherein Officer Durbin believed that Ms. Jenkins was “faking it” despite all the objective signs of a serious medical need. (Dkt. 37-1, p. 43-45, 47). An officer's mistake of fact must be reasonable under the circumstances. (Id.); *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Demuth v. County of Los Angeles*, 798 F.3d 837, 839 (9th Cir. 2015). When an officer's mistake of fact is unreasonable he is not entitled to qualified immunity. *See Jones v. Treubig*, 963 F.3d 214, 230-231 (2d. Cir. 2020); *Demuth*, 798 F.3d at 839. Instead, the majority however, found that at the time of the incident the law of providing medical care was not clearly established to put Officer Durbin on fair notice. (Dkt. 37-1, p. 23). However, this Court has stated that “persons in custody ha[ve] the established right to not have officials remain deliberately indifferent to their serious medical needs.” *Gibson v. Cty. of Washoe, Nev.*, 290 F.3d 1175, 1187 (9th Cir. 2002) (reversed on other grounds). It has long been settled that deliberate indifference is shown where an official “purposefully ignore[s] or fail[s] to respond to a prisoner's pain or *possible* medical need.” *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9<sup>th</sup> Cir. 1992) (reversed on other grounds) (emphasis added).

Here, based on the allegations and the body cam video incorporated by reference, Officer Durbin's mistake of fact as to Ms. Jenkins' serious medical needs fails to meet the standard for qualified immunity. This Court has held that when analyzing qualified immunity an officer's subjective beliefs are "irrelevant". *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007). Here, under the totality of the circumstances present there is no other way to interpret the numerous and multiple times she pled, "I'm sick", her multiple pleas and screams of "Help me!", "please help me, please help me", "oh my god, please stop, stop, stop", and "help me.... I'm telling you I can't", but a person screaming for help and medical assistance. This coupled with Durbin and Taub's decision to cancel paramedics at the scene of the arrest, Ms. Jenkins' obvious sign of physical distress when she could stand up at the initiation of the traffic stop but could not stand or sit and lay on the ground face first in and out of consciousness when arriving at the station; her loud panting, obvious abnormal breathing rate, body twitching and shaking while she lay face down in the back seat of the patrol car and on the ground at the station; the decision to leave her handcuffed and face down in the patrol car for *eleven minutes and thirty seconds* after all the above obvious signs of a serious medical need—all demonstrate deliberate indifference toward Ms. Jenkins' serious medical needs. Moreover, this was not a mistake of law but rather an unreasonable mistake of fact on Officer Durbin's part and should not have been dismissed at the motion at the





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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**J.K.J., individually and successor in interest to Deceased Aleah Jenkins,  
by and through his guardian ad litem Jeremy Hillyer,**

**Plaintiff-Appellant,**

**vs.**

**CITY OF SAN DIEGO, LAWRENCE DURBIN and JASON TAUB**

**Defendants-Appellees.**

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**On Appeal from Judgment of the  
United States District Court for the  
Central District of California  
Hon. Cathy Ann Bencivengo, United States District Judge  
Case No. 3:19-cv-02123-CAB (RBB)**

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**RESPONSE TO PETITION FOR REHEARING EN BANC**

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## **I. INTRODUCTION**

Appellant ignores large portions of his own pleading to seek rehearing en banc, specifically Aleah Jenkins' denial that she had ingested any drugs, her repeated representations that she was nauseous from pregnancy, and Officer Lawrence Durbin's repeated inquiries regarding her well-being before she became non-responsive, at which point he immediately summoned medical care and attempted to revive her himself. The Panel correctly held that Officer Durbin's conduct was reasonable in view of the objective evidence available to him and rejected Appellant's attempt to apply a standard resting upon 20/20 hindsight unavailable to Officer Durbin at the time, namely that Ms. Jenkins had in fact ingested a large quantity of illegal drugs and was overdosing. The Panel decision is consistent with Supreme Court and Ninth Circuit precedent such that there is no issue worthy of *en banc* reconsideration, and this petition should be denied.

## **II. BACKGROUND**

Appellees offer the following summary of the relevant facts for context, and refer the Court to their Answering Brief for a complete discussion of the pertinent record supporting dismissal, which is drawn from Appellant's First Amended Complaint and the video footage expressly incorporated by reference therein. (Dkt. 19.)

On November 27, 2018, Aleah Jenkins was detained on an outstanding warrant for a missed court date. After she was handcuffed and placed in the back of Officer Lawrence Durbin's patrol vehicle, she threw up on herself. When Officer Jason Taub asked her if she had ingested anything, and when Officer Durbin asked her if she was withdrawing, she denied both and stated that she was sick and her stomach was turning because she was pregnant.

Officer Durbin proceeded to drive Ms. Jenkins to headquarters to fingerprint her before booking her, because Ms. Jenkins had previously been detained on a warrant for her twin sister. Due to heavy traffic, the trip took roughly one hour. Less than seven minutes into the drive, Ms. Jenkins told Officer Durbin that she hates going to jail, because "every time" she goes, she "has to go to the safety cell."

Shortly after expressing her strong desire to avoid jail, Ms. Jenkins began making intermittent soft grunts and groans, consistent with someone with a sick stomach who had recently thrown up. Shortly thereafter, she gave two sharp, louder cries, in response to which Officer Durbin asked her, "Aleah, what's going on?" Ms. Jenkins cried out again and asked for water, and Officer Durbin told her he would get her some water as soon as they reached their destination. Ms. Jenkins quieted down in response, but

continued to make soft noises consistent with someone experiencing stomach pain.

Roughly ten minutes later, Ms. Jenkins gave another sharp cry, and Officer Durbin again asked her, “What’s going on?” When she didn’t respond, Officer Durbin repeated, “Ms. Jenkins? You still want water. What’s going on?” She still did not respond, and Officer Durbin repeated, “Ms. Jenkins?” She responded, “huh?” Officer Durbin thanked her for her response, and told her “Just making sure you’re okay.” Less than a minute later, she told Officer Durbin she needed to use the restroom, and he told her he would get her to a restroom as soon as they arrived, so she could wash the vomit out of her hair. Shortly after that, Ms. Jenkins again gave two short, sharp cries, prompting Officer Durbin to again ask, “What’s going on?” She did not respond, but moaned a few times before becoming quiet again.

As the drive proceeded, Ms. Jenkins continued to make intermittent soft grunts and groans, punctuated at times by sharper cries and loud breathing. In response to those sharper cries, Officer Durbin continued to inquire, “What’s going on?” At one point, Officer Durbin asks Ms. Jenkins, “Why are you screaming?” Ms. Jenkins told Officer Durbin that she didn’t want to go to jail, and he repeated her statement and told her that he understood. Shortly after that exchange, Ms. Jenkins began screaming again, and cried out, “Oh

my god, please stop, stop, stop!” Officer Durbin again asked her what she was doing. Ms. Jenkins groaned again and then calmed down and was quiet for several minutes.

As he exited the freeway, Officer Durbin informed Ms. Jenkins that they were nearly to their destination, and asked if she needed water and a bathroom. When she did not respond, Officer Durbin continued to inquire of her, at one point stopping, looking into the rear seating area, and shining a flashlight into the rear of the car, because night had fallen by that point. Officer Durbin noted that Ms. Jenkins was breathing and continued driving.

After another minute passed, Officer Durbin informed Ms. Jenkins that he would arrange for a female officer to escort her to the restroom and inquired if she still needed a restroom. Ms. Jenkins responded affirmatively, and Officer Durbin said, “Okay,” warning her to “watch it,” because the plastic in the rear seating area was “kind of unforgiving.”

A few minutes later, Officer Durbin asked if Ms. Jenkins would like some water, and when she did not respond he pulled the vehicle over and opened the rear passenger door to examine her. It appeared that Ms. Jenkins was sleeping, so Officer Durbin woke her up and asked her to stay awake. She did not respond but began panting loudly. Officer Durbin told Ms. Jenkins to “knock it off,” and she replied that she was sick. Officer Durbin

then instructed Ms. Jenkins to “watch her head” as he closed the door, and she complied by sitting upright.

As Officer Durbin returned to the driver’s seat, Ms. Jenkins gave two short, sharp cries, and Officer Durbin told her to “knock it off.” She continued to cry out and asked for help, and Officer Durbin told her they were nearly to their destination, where he would provide her with water. Ms. Jenkins again quieted down, and they arrived at police headquarters shortly thereafter.

After arriving at headquarters, Officer Durbin once again checked on Ms. Jenkins, opening the door to observe Ms. Jenkins lying face down on the rear seat of the vehicle. Officer Durbin aroused Ms. Jenkins, and she cried out and began hyperventilating. Officer Durbin told her to “stop hyperventilating, you’re doing that to yourself,” and Ms. Jenkins complied, slowing her breathing. Officer Durbin then asked Ms. Jenkins if she would like to get out of the vehicle and drink some water. When she didn’t respond, he informed her that he would slide her out of the car.

Officer Durbin turned Ms. Jenkins on her side and began to slide her out of the car. As he did so, she cried out and Officer Durbin asked her what was going on. Ms. Jenkins did not reply, and Officer Durbin slid her to the floor of the parking garage, laying her on her side. When he learned that a

mobile fingerprint scanner was available, he assisted another officer in obtaining Ms. Jenkins' fingerprints. When fingerprinting was completed, Officer Durbin asked Ms. Jenkins if she would still like some water, and she replied, "Yes." However, as soon as the assisting officer confirmed her identity, Ms. Jenkins began screaming. Officer Durbin and the assisting officer lifted Ms. Jenkins back into the rear seat of Officer Durbin's vehicle. Ms. Jenkins made no attempt to stand or otherwise cooperate in reentering the vehicle, which Officer Durbin interpreted as resistance, presumably based on Ms. Jenkins' repeated insistence that she did not want to go to jail and cries of distress upon being identified as the person in the subject warrant.

Approximately 11 minutes later, Officer Durbin opened the rear door of his vehicle to find Ms. Jenkins non-responsive to his repeated inquiries. He removed her from the car and summoned medical assistance. When another officer arrived with a breathing device, Officer Durbin noted that Ms. Jenkins had been responsive shortly before and had asked for water. Another officer arrived with a breathing aid, and Officer Durbin began CPR. Paramedics arrived within minutes, but Ms. Jenkins fell into a coma despite their efforts and died nine days later.

The Panel affirmed the District Court's dismissal of the First Amended Complaint. Relying on the "objective deliberate indifference standard" as

applied to the well-pled facts and incorporated video recording, the Court held that Appellant did not plead facts alleging objective unreasonableness or deliberate indifference to a non-obvious medical emergency as to Officer Durbin, based on the totality of circumstances and without the benefit of 20/20 hindsight. The Panel further found no authorities clearly establishing that Officer Durbin's was objectively reasonable or deliberately indifferent in the face of a non-obvious medical emergency.

### **III. ARGUMENT**

#### **A. The Panel's Determination that There Was No Clearly Established Right to Immediate Medical Care in the Event of a Non-Obvious Medical Emergency Does Not Rest on an Unreasonable Unilateral Mistake of Fact.**

Appellant ignores the Panel's conclusion that there was no clearly established precedent requiring an officer to summon immediate medical care when confronted by a non-obvious medical emergency, and instead argues that the "material facts" – in other words, only those favorable to his position despite the fact that he pled all facts at issue – demonstrate a "unilateral" mistake of fact by Officer Durbin. Neither this Circuit nor any other has concluded that an officer's acceptance of an arrestee's representations about the cause of her medical distress, which are consistent with the symptoms of that medical distress, constitutes a "unilateral" mistake of fact. This is confirmed by the authorities Appellant cites. See *Demuth v. County of Los*

*Angeles*, 798 F.3d 837 (9<sup>th</sup> Cir. 2015); *Liberal v. Estrada*, 632 F.3d 1064 (9<sup>th</sup> Cir. 2011); *Wilkins v. City of Oakland*, 350 F.3d 949 (9<sup>th</sup> Cir. 2003); *Rosenbaum v. Washoe County*, 663 F.3d 1071 (9<sup>th</sup> Cir. 2011).

In *Demuth*, a courtroom deputy arrested a public defender when she refused to return to court as ordered by a courtroom referee. This Court reversed a judgment after trial in favor of the deputy, finding that the deputy “could not have reasonably believed that he had one of the usual Fourth Amendment justifications for the arrest” because he had no warrant, the public defender was not suspected of a crime, he was not “in hot pursuit,” and the referee’s order did not authorize him to seize the public defender. *Demuth, supra*, 798 F.3d at 839. Moreover, this Court rejected the deputy’s argument that the public defender’s sarcastic response (“you’ll have to arrest me”) could remedy these deficiencies, because consent is not a substitute for probable cause. *Id.* There is no similar issue in this case, nor can there be because that would require this Court to conclude that an arrestee’s representations about her physical condition are irrelevant in applying qualified immunity under these circumstances.

In *Liberal*, this Court upheld the denial of summary judgment, finding that an officer lacked probable cause to detain a suspect based on the officer’s belief that the front windows of his vehicle were tinted in violation of the



California Vehicle Code, which was contradicted by Plaintiff and therefore irrelevant for purposes of summary judgment. *Liberal*, 632 F.3d at 1076-1077.

There are no such considerations here because Officer Durbin's conclusion that Ms. Jenkins was not suffering a medical emergency was based on Ms. Jenkins' plausible statements about the cause of her symptoms, her responsiveness to questioning, and her repeated insistence that she did not want to go to jail.

In *Wilkins*, the Court affirmed the denial of summary judgment on qualified immunity, holding that two officers' mistaken belief that a plain-clothes officer's arrest of a suspect at gunpoint was in fact an assault with a deadly weapon by a civilian required resolution by a fact-finder, based on evidence that other officers at the scene verbally identified the decedent as a fellow officer. On that basis the Court expressly found that genuine issues of material fact existed regarding the officers' mistaken belief, which prompted them to shoot the decedent nine times without ever instructing him to drop his weapon or otherwise issue a warning. *Wilkins, supra*, 350 F.3d at 956. There are no such facts pled here. The only information available to Officer Durbin consisted of Ms. Jenkins' statements, his observation of her symptoms, her continued responses to his questions about her condition, and her repeatedly expressed, strong motivation to avoid jail.

Finally, in *Rosenbaum*, much like *Demuth*, officers arrested a man selling promotional tickets outside a county fair. This Court reversed summary judgment in favor of the officers, because there was no “anti-scalping” law, the officers failed to identify any other laws to support their arrest at the time of the arrest, and no other reasonable officer would have understood that probable cause existed under the circumstances. *Rosenbaum, supra*, 663 F.3d at 1078-1079. *Rosenbaum* does not address an officer’s reasonable reliance on statements made by an arrestee.

Contrary to Appellant’s characterization, the Panel decision does not rest on a “chimera created by an officer’s imagining,” such as the rolled-down window in *Liberal* that precluded a reasonable belief that the officer had probable cause to detain. Ms. Jenkins’ statements about her condition are not the product of Officer Durbin’s imagination, nor are her continued responses to his repeated inquiries as to her condition, or her repeated, impassioned cries when confronted with the fact that she was going to jail. There is no portion of the record in which Ms. Jenkins, or anyone for that matter, informs Officer Durbin that Ms. Jenkins in fact was not pregnant, but rather had ingested a large quantity of illegal drugs and was overdosing.

Similarly, the Panel decision does not rest on a mistaken analysis of this Court’s mistake-of-fact jurisprudence, because there are no clearly established

authorities governing when an arresting officer must disregard an arrestee's representations about her physical condition to conclude that a non-obvious medical emergency requires immediate medical care. See *Torres v. City of Madera*, 648 F.3d 1119, 1127 (9<sup>th</sup> Cir. 2011). Unlike the circumstances presented in *Torres*, the facts of this case do indeed "fall in the hazy border" between acceptable and unacceptable conduct "as a legal matter," in that there are no decisions which impose on an arresting officer the duty to second-guess an arrestee's statements about her own medical condition, and instead conclude that symptoms consistent with those statements are in fact the signs of a medical emergency such that he must immediately summon medical care. *Id.* at 1127-1128, citing *Brosseau v. Haugen*, 543 U.S. 194, 201, quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001). To the contrary, this Court has confirmed that officers are entitled to take an arrestee's conduct at face value in the absence of information to the contrary. See *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9<sup>th</sup> Cir. 2002) (jail personnel were not deliberately indifferent to arrestee's undisclosed mental health condition, despite arrestee's peculiar mood swings and dramatic shifts from combativeness to compliance).

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**B. The Panel’s Conclusion that There Is No Clearly Established Right to Medical Care for a Non-Obvious Medical Emergency Is Consistent with Ninth Circuit and Supreme Court Precedent.**

While Appellant need not point to a case “on all fours” with this case, both the Supreme Court and this Court have repeatedly concluded that courts should “not analyze whether rights are clearly established at a high level of generality.” *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018); *Rico v. Ducart*, 980 f.3d 1292, 1298 (9<sup>th</sup> Cir. 2020). Nor may courts refuse to evaluate whether a right is clearly established based on a purported “mistake of fact” on the part of the official seeking qualified immunity, because objective reasonableness is “measured by reference to clearly established law.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Appellant ignores these controlling authorities, relying instead on general statements of law from factually distinguishable cases that nowhere address whether a government official is required to summon immediate medical care in the face of a non-obvious medical emergency that has been explained by the arrestee as resulting from non-emergency causes.

As on his original Petition for Rehearing, Appellant relies heavily on *Sandoval v. County of San Diego*, 985 F.3d 657 (9<sup>th</sup> Cir. 2021). That reliance is no more appropriate the second time around, because the Panel decision is consistent with the objective standard articulated in *Sandoval*, the facts of

which are entirely distinguishable from this case. Sandoval was arrested at his residence following a probation compliance check after deputies found a gram of methamphetamine and drug paraphernalia. However, unbeknownst to deputies he had swallowed an additional amount of methamphetamine to prevent its discovery, which was later estimated to be several hundred times the typical recreational dose. He was taken to jail, where deputies noticed that he was sweating, disoriented and lethargic. Although he claimed he was diabetic, a blood test confirmed that his blood sugar was normal. When he continued to display symptoms consistent with an overdose, deputies took him to medical for a further assessment, and advised that he needed to be monitored closely. The nurse administered another blood test which again confirmed that Sandoval's blood sugar was normal, but otherwise failed to treat Sandoval, ignoring him for the remaining six hours of his shift and failing to advise the following shift of the continuing need to monitor Sandoval.

This Court reversed summary judgment in favor of the nurse, finding that qualified immunity was unavailable to a trained medical professional who knew that Sandoval was sweating, disoriented and lethargic, and knew that, contrary to Sandoval's claims, his blood sugar was normal such that his symptoms were not reasonably attributable to his claimed diabetic condition.

*Id.* at 679. Noting numerous other cases imposing liability as a result of excessive delays in treatment, such as a four hour delay for inmates exposed to pepper spray, the Court rejected arguments that Sandoval had no clearly established right to treatment under the circumstances presented, which included an eight hour delay in providing treatment. *Id.* at 680, citing *Clement v. Gomez*, 298 F.3d 898, 905 (9<sup>th</sup> Cir. 2002). In so doing, the Court noted:

We emphasize that this is not a case where a nurse mistakenly misdiagnosed a patient after reasonably attempting to ascertain the cause of unexplained symptoms. Instead, viewing the evidence in the light most favorable to Plaintiff, Nurse de Guzman made essentially no effort to determine why Sandoval was suffering the symptoms reported by Deputy Chavez, nor did he attempt to treat those symptoms. He then abandoned Sandoval for the remaining six hours of this shift and failed to pass along any information to the nurses who relieved him. On these facts, de Guzman is not entitled to qualified immunity.

*Id.* at 680-681.

*Sandoval* is entirely distinguishable. It does not concern a police officer, but rather a trained medical professional who did virtually nothing to diagnose or otherwise determine the cause of the symptoms he was observing. This is in stark contrast to Officer's Durbin's repeated inquiries about Ms. Jenkins' condition. And, most tellingly, *Sandoval* does not address a situation where a government official relies on a plausible explanation for the visible symptoms. To the contrary, deputies informed Nurse de Guzman that they

suspected Sandoval was facing a serious medical risk, and Nurse de Guzman himself performed a blood test which cast serious doubt on Sandoval's explanation for his symptoms. Ms. Jenkins' symptoms were consistent with the explanation she gave, and she did not change her story despite Officer Durbin's repeated questions.

As noted in the Panel decision, this Court has repeatedly held that courts must evaluate existing precedent to determine whether the unlawfulness of a particular official's conduct was clearly established at the time of that conduct. (Opn., pp. 19-20, n. 4.) Thus, the reasonableness of an officer's mistaken identification of a fellow officer as a suspect has been evaluated against previous cases involving officer-on-officer shootings, and the reasonableness of an officer's misidentification of a gun as a taser has been evaluated against the misidentification of officers as suspects. See *Jensen v. City of Oxnard*, 145 F.3d 1078, 1085-1086 (9<sup>th</sup> Cir. 1998); *Wilkins, supra*, 350F.3d at 955; *Torres, supra*, 648 F.3d at 1128-1129. Evaluation of the novel issue presented by this case – whether and when an officer must summon medical care for a non-obvious medical emergency – should proceed no differently.

Appellants point to no authority which supports their argument that Officer Durbin's reliance on Ms. Jenkins' plausible explanation for her

symptoms violated clearly established constitutional standards such that no reasonable officer could have concluded that Ms. Jenkins did not require immediate medical care for a non-obvious medical emergency. Likewise, they have failed to identify any authority which holds that an officer's continued questioning regarding an arrestee's condition constitutes deliberate indifference to medical needs. Appellants make no attempt to do so, beyond their bald insistence that the constitutional violation was "obvious" in light of general authorities. However, there are no authorities that address the issue, general or otherwise, and the Panel's determination that the constitutional right to immediate medical care in the face of a non-obvious medical emergency was not clearly established is correct.

**CONCLUSION**

For the foregoing reasons, the petition for en banc rehearing should be denied.

Dated: December 23, 2022      COLLINS + COLLINS LLP



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## CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Federal Rule of Appellate Procedure 32 and Ninth Circuit Rule 40-1, the attached response is proportionately spaced, has a typeface of 14 or more and contains 3,790 words, excluding those portions specified in Federal Rule of Appellate Procedure 32(f).

Dated: December 23, 2022

By: \_\_\_\_\_

  
JAMES C. JARDEN

### CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

By: \_\_\_\_\_

  
JAMES C. JARDEN