In the

Supreme Court of the United States

Alexsey Predybaylo, Petitioner,

v.

Sacramento County, California, et al,

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

Petition for Writ of Certiorari

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Questions Presented

1. Is an officer's intentional use of substantial and aggressive force against a pre-trial detainee in response to mere *passive* resistance to a strip search an example of a "rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances" precluding qualified immunity?

2. Is a municipality liable for an injury caused by its official policy that allows the use of substantial and aggressive force against a pre-trial detainee for mere *passive* resistance to a strip search?

Parties To The Proceeding

Petitioner

Alexsey Predybaylo.

Respondents

Sacramento County, California, a county government and the operator of the Sacramento County Sheriff's Department (hereafter, "SCSD"),

Deputy Jarrod Hopeck;

Deputy Benjamin Gonzales;

Deputy Robert Ranum; and

Deputy Jeffrey Wilson.

Related Cases

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Petition for a Writ of Certiorari

Alexsey Predybaylo respectfully petitions the United States Supreme Court for a writ of certiorari to review the denial by the United States Court of Appeals for the Ninth Circuit of a Petition for Rehearing *En Banc* of decision of the United States Court of Appeal for the Ninth Circuit affirming a judgment of dismissal by the United States District Court for the Eastern District of California in the matter of *Alexsey Predybaylo v. Sacramento County, California*, et al (C.A. Case No. 22-15972; Civil Case No. 2:19-CV-01243-MCE-CKD)

Opinions Below

The Decision of the United States Court Of Appeal for the Ninth Circuit denying a Petition for Rehearing *En Banc* was filed January 24, 2024. Appendix 3. The Decision of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court for the Eastern District of California was filed August 10, 2023. Appendix 4-6. The Judgment of Dismissal of the United States District Court for the Eastern District of California was filed on June 17, 2023. Appendix 87. The Decision and Order of the United States District Court for the Eastern District of California was filed on June 17, 2023. Appendix 88-107.

Jurisdiction

The jurisdiction for this petition for a writ of certiorari is based upon 28 U.S.C. §1257(a).

Relevant Constitutional Provisions

Fourth Amendment

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.

The Federal Issues Were Raised In The Appellate Court

The two federal questions presented regarding the application of the Fourth Amendment to the United States Constitution correspond to the two legal claims in the Second Amended Complaint and have been raised by Petitioners at every stage of proceedings in the courts below.

STATEMENT OF THE CASE

The Second Amended Complaint

Petitioner's Second Amended Complaint ("SAC") contains two causes of action under 42 U.S.C. § 1983. The First Cause of Action is against Respondent Deputies Hopeck, Ranum, Gonzales, and Wilson for unlawful use of force under the Fourth Amendment. The Second Cause of Action is against Sacramento County for municipal liability under *Monell v. Department of Social Services of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (*"Monell"*) for having a use of force policy for strip searches that permits the unlawful use of force under the Fourth Amendment, with attendant claims of failure to train, monitor and supervise.

The Cross Motions for Summary Judgment

On November 3, 2021, Petitioner and Respondents filed respective motions for summary judgement under Federal Rule of Civil Procedure ("FRCP") Rule 56(a).

The District Court's Ruling

On June 17, 2022, the District Court issued its Memorandum and Order denying Petitioner's Motion for Summary Judgment on both causes of action and granted Respondents' Motion for Summary Judgment on both causes of action. Appendix 88-107. The basis for this decision was the ruling by the District Court that the use of force by the Respondent deputies was "de minimis", and therefore, there was no constitutional violation. The absence of any constitutional violation was then used as the basis to dismiss the SAC's Count Two alleging municipal liability.

Notice of Appeal Timely Filed

Petitioner filed a Notice of Appeal on June 24, 2022, within the thirty day time limit of FRAP 4(a)(1)(A).

Decision of the Ninth Circuit Court of Appeal

The Ninth Circuit Court of Appeal issued a Memorandum ruling on August 8, 2023, that found that the District Court had erred in ruling that the Respondent Deputies' use of force was "de minimis". Instead, it held that there was a genuine question of material fact as to whether the Deputies use of force was constitutional under SAC Count One. Appendix 5-6. However, the Court of Appeals then ruled that the Respondent Deputies were entitled to qualified immunity because "the unlawfulness of the Deputies' conduct was not clearly established" at the time of the strip search. Appendix 6.

With regard to SAC Count Two, municipal liability for an unconstitutional policy that led to the use of excessive force, the Court of Appeal upheld the dismissal of this claim on the alternative ground that there "is inadequate evidence to demonstrate that Sacramento County had an unconstitutional policy or custom that resulted in the repeated use of excessive force in the collection of evidence from pretrial detainees." Appendix 6.

Petitioner timely filed for a rehearing *en banc* on August 24, 2023, but this was denied on January 24, 3024, without statement of reason. Appendix 3. This Petition followed.

Factual Summary

On July 5, 2017, Petitioner was arrested, transported, and taken through the booking process at the Sacramento County Main Jail by Sacramento Police Department ("SPD") Sgt. Hall.[1]

After booking, Petitioner was taken by the Respondent deputies to a safety cell to collect his clothing as evidence. As he was brought in by the officers, Petitioner saw a sticky note over a camera that was in an upper corner of the room. Petitioner was told to face the wall. He complied, but then recalls turning his head to the left. Deputy Gonzales testified that he asked Petitioner if he had any drugs and that Petitioner probably turned his head to answer the question.

Petitioner did not resist the search and cooperated by taking off his shirt, shoes, and socks as requested. This was corroborated by SPD Sgt. Hall who stood outside the open cell door and watched the entire search. Sgt. Hall testified that Petitioner "cooperated in a relatively normal manner with the strip search" and that he did not remember Petitioner "being angry or fighting or uncooperative or resisting."

Respondent deputies also admitted that Petitioner was cooperative and took off his shirt, shoes, and socks. Petitioner testified that Deputy Hopeck then told him to put his hands behind his back and he complied. Deputy Hopeck wrapped his hands around Petitioner's thumbs. While Petitioner

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1 The Factual Summary is taken from Petitioner's Opening Brief. Appendix 9-12.

stood with his hands held behind his back by Deputy Hopeck, Deputies Gonzales and Ranum simultaneously pulled Petitioner's legs out from under him. Then Deputies Hopeck, Gonzales, and Ranum let go, causing Petitioner to fall face first onto the concrete floor. Because Deputy Hopeck held onto Petitioner's hands behind his back, Petitioner was unable to use his hands to brace his fall onto the concrete floor. He was able to turn his head to the side to avoid a face first impact, and instead, he landed on the side of his head. Deputy Hopeck then dropped his knee onto Petitioner's right temple. At this point, Petitioner lost consciousness for what he estimated to be 5-15 seconds.

Deputy Hopeck testified that he put Petitioner into this "control hold" and took him to ground because Petitioner was not being cooperative by turning his face away from the wall, thereby supposedly creating a safety issue for the deputies.[2]

After he regained consciousness, Petitioner remembers being on the floor with Deputy Hopeck's leg on the upper portion of his back and neck and his knee on Petitioner's head. Deputy Gonzales held Petitioner by his legs in a hog tied fashion with ankles crossed and lower legs bent back up towards his head, while Deputy Ranum held Petitioner's arms. Petitioner did not resist and repeatedly yelled stop, but all three deputies kept applying force. Deputies Hopeck, Gonzales, and Ranum removed Petitioner's pants and underwear.

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[2] Only Deputy Hopeck testified that Petitioner was uncooperative at this point by turning his head against the call. The other three deputies and SPD Sgt. Hall did not corroborate Hopeck's account of the incident, instead they testified that Petitioner did not physically resist the search.

Deputy Jeffrey Wilson entered the search room about twenty seconds after Petitioner first entered the cell and stayed there until the strip search was completed. Petitioner alleged in the SAC that contends that Deputy Wilson participated in the use of unnecessary and excessive force and/or failed to intervene to stop the wrongful conduct of Deputies Hopeck, Ranum and Gonzales.

The Deputies then gave Petitioner paper jail clothing and left. Petitioner was later escorted back to the booking area. He underwent a second strip search at the time of his "dressing out" that was part of the normal jail booking process. There was no use of force for this second strip search.

Although Petitioner was in pain and somewhat disoriented from the face first fall to the floor, he was not allowed to stop and check his injuries until after he was placed in a regular cell on the 5th floor. Petitioner filed a medical request and was sent to the infirmary on July 6, 2017, where he was held for five days. He had bruises and abrasions and was diagnosed with a mTBI that caused vomiting, blurred vision, unequal pupil dilation, ringing in ears, depression, headaches, irritability, and sensitivity to light. Symptoms of headache and sensitivity to light persisted over the next several years.

ARGUMENT

I. Introduction and Summary

The Ninth Circuit Court of Appeal's Memorandum decision conflicts with the long-established rule that law enforcement may not use substantial and aggressive force when facing mere *passive* resistance. In addition, it applied an incorrect legal standard regarding municipal liability for Sacramento County's policy for conducting strip searches that permitted the use of substantial and aggressive force for mere *passive* resistance.

Respondents admitted that Petitioner never *physically* resisted the strip search and voluntarily took off his shirt, shoes, and socks. Respondents justified their use of force by claiming Petitioner then *passively* resisted by turning his head away from the cell wall. The District Court did not conduct an in-depth factual analysis to resolve the disputed facts because it found that the use of force was de minimis, and therefore, there was no constitutional violation.

Assuming for purposes of this Petition that Petitioner did turn his head away from the wall, the take-down maneuver employed by Respondents to complete the removal of Petitioner's pants was unnecessary, dangerous, and grossly excessive for such mere *passive* resistance.

Indeed, a very similar or identical maneuver was used by law enforcement in *Rice v. Morehouse*, 989 F.3d 353 (9th Cir. 2021) ("*Rice*"), where the Ninth Circuit found such use of force to be "substantial and aggressive", not deminimis, and clearly excessive for mere *passive resistance* under

long-established precedent. Accordingly, it denied qualified immunity to the officers in *Rice*.

As for the Second Cause of Action for municipal liability, the District Court failed to make any factual inquiry about the relevant evidence regarding Sacramento County's strip search use of force policy. Instead, it relied upon its finding that the use of force by the Deputies was de minimis and constitutional, and thus, there was no basis for municipal liability.

Examination of the factual evidence reveals that Sacramento County admitted that it had abandoned its *written* strip search use of force policy that required that *non-force means* be employed before any use of force to complete a search. Further, Sacramento County admitted that it operated under an *unwritten* policy that allowed the use of substantial and aggressive force to effect a strip search when the pre-trial detainee was merely *passively* resistant. This unwritten policy admittedly had *no specific criteria* for when force could be used in strip search. Its unwritten policy was clearly unconstitutional and was undoubtedly the direct cause of Petitioner's injury.

The Ninth Circuit's ruling on Petitioner's municipal liability claim was based upon an erroneous statement of the law under *Monell.* The Court ruled that there was inadequate evidence of an unconstitutional policy that resulted in the *repeated use of excessive force* in the collection of evidence from pretrial detainees. However, *Monell* only requires evidence of a *single instance*, not multiple instances, of harm resulting from a municipality's *official* policy. Multiple instances of harm are only necessary to be proved when the existence of the alleged unconstitutional policy is in

question. *Rodriguez v. County of Los Angeles*, 891 F.3d 776, 802-803 (2018). Simply put, the Court of Appeal erred by finding that there was insufficient evidence of *multiple instances of injury to prove the existence of a policy, practice or custom*, when under the law it only needed to find a *single instance of harm* from an *admitted policy,* which is exactly what Petitioner's evidence proved.

II. The Excessive Use of Force to Collect Petitioner's Clothing for Evidence

A. The Balancing of the Intrusion Against the Government's Interest in Collecting Clothing for Evidence

Evaluating the Constitutionality of police use of force during a Fourth Amendment pre-trial seizure requires "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)(quoting *Garner*, 471 U.S. at 8, 105 S.Ct. 1694)("*Graham*"). The reasonableness of a particular use of force must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

In this case, the government interest was the collection of Petitioner's clothing for evidence. There

was no urgency to this task and there were a variety of non-force options that the Deputies could have employed if Petitioner resisted.[3] Thus, the central issue for the District Court was whether the type and amount of force used by the Deputies to collect Petitioner's clothing was appropriately balanced under the totality of the circumstances. If the amount of force was appropriate, then there was no constitutional violation.

B. The Deputies Used Substantial and Aggressive Force to Overcome Mere Passive Resistance

All of the Deputies and SPD Sgt. Hall testified that Petitioner did not physically resist the strip search and that he voluntarily removed his shirt, shoes, and socks and gave them to the Deputies. Appendix 28-29.

1. The Unresolved Factual Dispute

Petitioner testified that he fully cooperated during the search, including putting his hands behind his back when requested by Deputy Hopeck. Deputy Hopeck testified that, although Petitioner did not physically resist the search, Petitioner created a "safety concern" when he turned his head away from the wall. The District Court, ignored Petitioner's direct testimony about what happened, Appendix 17, as well as significant circumstantial evidence and contradictory testimony by Deputy Gonzales, Appendix 32-34, and SDP Sgt.

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[3] Indeed, the SCSD Written Policy for strip searches required SCSD deputies to first use non-force means to gain compliance before resorting to the use of force. Appendix 34.

Hall. Appendix 28-29. Instead, the District Court held that Petitioner did not "explicitly dispute" that he turned his head away from the wall and created a safety concern, and that this safety concern was a sufficient basis for the use of force.[4] Appendix 21-23.

2. There Was No Logical Reason For Any Control Hold

Deputy Hopeck testified that Petitioner created a "safety concern" by turning his head away from the wall. However, there was no testimony as to how Petitioner was going to be able to take off his pants without doing this.

Further, the Deputies did not explain how Petitioner could have previously taken off his shirt, shoes, and socks without having turned his face away from the wall. In fact, it would seem impossible to have removed these articles of clothing without doing this multiple times. The Deputies, who had conducted many of these searches, should have anticipated that Petitioner would turn his face from the wall to remove these articles of clothing. Moreover, if as admitted, Petitioner only needed to remove his pants to complete the search, there is was no logical reason for dropping Petitioner face first onto the hard floor for merely turning his head away from the wall.

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4 On appeal, Petitioner factually rebutted the District Court's holding on this issue. Petitioner also argued that the District Court failed, as required by law, to draw all inferences and view all evidence in the light most favorable to Petitioner, and that there was a clear factual dispute over the central factual issues which required the case to be sent to a jury under the Seventh Amendment. Appendix 14, 16-17, 55. The Court of Appeals never addressed this issue.

3. Assuming There Was Passive Resistance, Dropping Petitioner On His Face Was Grossly Excessive

Assuming for purposes of this Petition that Petitioner did "passively resist" by turning his head away from the wall, the Sacramento County Sheriff's Department written strip search policy expressly states that deputies were to employ non-force options to obtain compliance. Appendix 38. None of the non-force techniques were used by the Deputies.

The next logical action by the Deputies would have been to ask Petitioner to take off his pants and, like the other articles of clothing, hand them to the Deputies. However, there was no evidence or testimony that they did this.

There is no dispute that, after voluntarily removing his shirt, shoes, and socks, Petitioner complied with Deputy Hopeck's command to put his hands behind his back and that Deputy Hopeck took hold of them. This established effective control over Petitioner who the Deputies admitted did not physically resist. Appendix 13, 22, 90n5.

After taking control of Petitioner, who stood with his legs spread, Deputy Hopeck then tightened his grip on Petitioner's hands. Without warning, Deputies Gonzales and Ranum simultaneously pulled Petitioner's legs out from under him, lifting Petitioner horizontally into the air. In coordination with each other, the three deputies let go, causing Petitioner to fall face first onto the concrete floor. Petitioner was unable to put his hands out in front to block his fall because Deputy Hopeck held onto his hands as he let go, making it impossible for Petitioner to get his hands

out in front of his face in time. Fortunately, Petitioner was able to turn his head to the side to prevent his face from striking squarely against the floor. Deputy Hopeck then dropped his knee onto Petitioner's right temple. Petitioner lost consciousness for an estimated 5-15 seconds. Deputy Hopeck then shifted his knee onto Petitioner's neck. Appendix 10-11.

Obviously, the speed and coordinated action in this maneuver indicates that it had been practiced and used by Respondents many times before.

4. Humans Instinctively Know to Protect Their Heads From Impact

No citation is needed for the fact that humans instinctively use their hands to brace themselves from injury. In particular, humans use their hands to protect their face and head when they fall. Further, most children understand that holding another's hands behind their backs while someone else hits them or they are pushed into or onto something is cruel and dangerous. Thus, there is every reason to assume that Respondents were fully aware of the cruelty and the dangerousness of the three-point pickup and drop maneuver.

Although Petitioner was only briefly knocked out and suffered only a mild-moderate brain injury, this "control hold" maneuver could have easily caused a subdural hematoma/brain bleed which could have been seriously debilitating or even fatal.

C. Qualified Immunity for Use of Excessive Force

Assessing whether a law enforcement officer

is entitled to qualified immunity for the use of excessive force requires the court to first ask whether, taken in the light most favorable to the party asserting the injury, the alleged facts show that the officer's conduct violated a constitutional right. If they do, then the court must then inquire whether that particular use of force, in light of the specific context of the case, had previously been *clearly established* as unconstitutional by existing precedent. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011); *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

Clearly established does not require a precedential case directly on point; only that such case makes the lawfulness of the particular use of force beyond debate. *D.C. v. Wesby*, 583 U.S. 48, 138 S. Ct. 577, 590, 199 L.Ed.2d 453 (2018)("*Wesby*").

The *Wesby* decision, citing to *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*), also held that there can be an "obvious case" where the unlawfulness of the officer's conduct is sufficiently clear without existing precedent addressing similar circumstances such that the officer will not be entitled to immunity. *Wesby*, 543 U.S. at 64.

The Supreme Court's decision in *City of Escondido, California v. Emmons*, 586 U.S. 38, 139 S.Ct. 500, 202 L.Ed.2d 455 (2019) ("*Emmons*") reminded the Ninth Circuit that "[q]ualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

However, the *Emmons* decision, 586 U.S. at 41, also acknowledged that persons are to be "free from the application of non-trivial force for engaging in mere passive resistance....", citing to the Ninth Circuit's decision in *Gravelet–Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir.2013). Moreover, this Court did not qualify or modify the Ninth Circuit's *Gravelet–Blondin v. Shelton* decision by holding that it was limited to any particular type of force or location. Thus, it seems settled law that, if a pre-trial detainee is merely passively resisting, a law enforcement officer may only use trivial force, not "substantial and aggressive" force, regardless of the location or other circumstances.

D. It is an Uncontested Fact That Petitioner Only Engaged in Passive Resistance, and Thus, Only Trivial Force Could Be Used by Respondents

The factual record, although contested in regards to whether Petitioner did or did not turn away from the wall thereby creating a "safety concern", is uncontested and clearly established that Petitioner, at most, engaged in mere passive resistance. Therefore, Respondent Deputies were on notice that they could not apply more than trivial force to make Petitioner stop turning away from the wall. The use of the very aggressive and highly dangerous three-point take down maneuver was plainly over-the-top in the application of force to complete the strip search.

E. There Was Also Existing Precedent That Clearly Established the Particular Take down Maneuver Used by Respondents Was Excessive Force and Unconstitutional

In his Motion for Summary Judgement Reply Brief,[5] Petitioner cited to *Rice* where the Ninth Circuit Court of Appeal held that it had clearly established as far back as 2001 that persons being detained have a "right to be free from the application of non-trivial force for engaging in mere passive resistance," quoting from its decision in *Gravelet-Blondin v. Shelton* at 1093.

Petitioner brought the *Rice* decision, and many others of similar nature, to the attention of the Ninth Circuit in his Opening Brief, Appendix 18-19, 25-27, and in his Reply Brief, Appendix 66, 69, and then again in his Petition for Rehearing. The Ninth Circuit's Memorandum Decision never mentioned the *Rice* decision, although it does cite to *Gravelet-Blondin v. Shelton* for the proposition that non-trivial force may not be used by law enforcement in cases of mere passive resistance. This was a clear error because the use of force in *Rice* involved a very similar *three-point take down maneuver* used on a detainee on the side of the road after the officers had pulled Mr. Rice from his car when he refused their command to exit the vehicle. Mr. Rice landed face first on the pavement and suffered extreme pain. The Ninth Circuit characterized the take down maneuver as a substantial and aggressive use of

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5 The District Court did not address qualified immunity because it erroneously found that there was only a de minimis injury that did not amount to a constitutional violation.

force and held that it was unjustified. Further, it held that a reasonable jury could find that the officers did not face an emergency situation that required such rapid and aggressive assertion of force.

Petitioner, at most, failed to keep his head facing the cell wall after fully cooperating with strip search and taking off his shirt, shoes, and socks and giving them to the Deputies. The mere turning of his head, which is a strongly contested fact, in no way threatened the Deputies or created any emergency situation that required that he be lifted into the air and then dropped on his face with his hands held behind his back.

The use of force by the Deputies in this case was grossly excessive and they knew better.

III. Municipal Liability

In *Monell*, this Court held that a municipality can be found liable under 42 U.S.C. §1983 when its policy, customs, or practices cause the deprivation of a constitutional right.[6] *Monell* at 690-694. Most cases brought under a *Monell* theory involve a plaintiff trying to prove that there was a municipal policy that caused the plaintiff's injury. However, in this case, Sacramento County *admitted* that it had a use of force policy for conducting strip searches that allowed the use of substantial and aggressive force in response to a pre-trial detainee's mere passive resistance to a strip search.

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6 However, the municipality is only liable for its own illegal acts and is not vicariously liable. *Connick v. Thompson*, 563 U.S. 51, 60 (2011).

The District Court was able to bypass Petitioner's evidence about Sacramento County's use of force policy for conducting strip searches because, having ruled that the use of force was de minimis, it dismissed the municipal liability claim for lack of an "underlying constitutional violation." Appendix 106.

The Ninth Circuit, although reversing the District Court's de minimis finding, inexplicably ignored the extensive evidence submitted by Petitioner in support of his summary judgment motion, and summarily held that there was insufficient evidence to "demonstrate that Sacramento County had an unconstitutional policy or custom that resulted in the repeated use of excessive force in the collection of evidence from pretrial detainees." Appendix 6.

Petitioner presented extensive and un-refuted evidence that Sacramento County had: (1) admittedly abandoned its constitutional *written strip search policy*; and (2) actually operated under an *unwritten strip search policy* that allowed its jail deputies to routinely use substantial and aggressive force against pre-trial detainees for mere *passive resistance* to strip searches, including the same aggressive and dangerous maneuver used against Petitioner.

A. Sacramento County Abandoned Its Constitutionally Sound Written Strip Search Policy

Ironically, Sacramento County had a constitutionally acceptable written policy for how to conduct strip searches on pre-trial detainees, but it abandoned this in favor of an "unwritten policy" that allowed its deputies to use excessive force against passively resisting detainees. Appendix 40-41.

The written policy provided that if a detainee refuses to cooperate with the strip search, deputies were to first employ *non-force means* to gain compliance as follows:

> After a cursory search of a refusing inmate, the inmate shall be placed in an isolation cell with the water turned off and a supervisor will be notified. Such an inmate shall not be housed, allowed access to a phone or released until a strip search is completed. Appendix 40.

If this non-force approach had been employed with Petitioner after his purported creation of a safety concern, there would have been no need for the three-point maneuver that landed Petitioner on his face. Instead, the Respondent Deputies would have simply left Petitioner in the isolation cell until he took off his pants and put them into the paper collection bag.

Petitioner's use of force expert, David Sweeney,[7] opined that the written use of force policy was constitutional because it followed the

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7 Mr. Sweeney, a 35 year veteran of the Seattle Police Force, observed that "none of the five officers ... described conduct in their depositions that warranted the use of force ...." Further, he observed that "[a]part from the turning of Plaintiff's head away from the wall (which is a minor thing), there is no testimony by these deputies, or by Sacramento Police Sgt. Hall, about any conduct by Mr. Predybaylo that would have warranted taking him to the ground or the use of control holds once he was on the ground." He concluded that "[t]he force used was not objectively reasonable."

Graham factors, namely that the policy "progresses by utilizing non-force methods in order to gain compliance" and force is only allowed if those steps are unsuccessful. Appendix 44.

Even more poignant was Mr. Sweeney's professional observation that the Deputies could have collected Petitioner's clothing by simply "placing Mr. Predybaylo in the room by himself and asking him to take off his clothes, put them into a bag, and change into the jail uniform." Appendix 30.

B. Sacramento County's Unwritten Policy Had No Criteria for the Use of Force In Strip Searches

Petitioner took the deposition of SCSD Lieutenant Orlando Mayes.[8] He testified that the *written policy was not the actual policy* of the SCSD for the use of force in a strip search, but that the SCSD's operational policy was unwritten. He then testified that the progression of non-force means described in the written policy was *unnecessary* and deputies could go directly to the use of force to gain compliance. When Lt. Mayes was asked what criteria an SCSD deputy had to follow in deciding whether to use force in a strip search, he was unable to state any objective criteria for deputies to follow. Appendix 41.

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8 Lt. Mayes was Sacramento County's designated witness under FRCP 30(b)(6) regarding its strip search policy.

C. There Was No Training In Non-Force Means To Conduct Strip Searches

Chief Deputy Freeworth testified that she was generally familiar with the SCSD written policy, but she did not have any training in the written policy, nor did she recall any training for other deputies in the written policy. Chief Deputy Freeworth further testified that she did not recall if the deputies under her command at the Sacramento County main jail were trained in non-force means to gain compliance with a strip search as set forth in the written Policy. Appendix 41-42.

Chief Deputy Freeworth agreed that the language of the written policy was clear about what and how non-force means were to be employed to gain compliance with a strip search. She also agreed that the written policy was correct in requiring that non-force means be employed before using force to gain compliance with a strip search.

SCSD Captain Eric Buehler, commander of the main jail, also confirmed his understanding that the *unwritten policy* allowed deputies to use force without following the written policy's four part directive. When asked hypothetically what force could be used if an inmate refused a strip search, Captain Buehler testified that the deputies could use "whatever force necessary to overcome his resistance, yes." This included a situation where the arrestee simply says "I'm not going to take off my clothes". Appendix 43.

The testimony of the Respondent Deputies, especially that of Deputy Hopeck, confirmed that they did not follow the written policy. Rather, they were allowed to, and did in fact routinely use, substantial and aggressive force in cases of mere passive resistance, including the same three-point maneuver applied to Petitioner. Appendix 45-51.

D. There Was No Policy for Medical Staff to Report Excessive Force

During discovery, Petitioner inquired whether the medical staff that treated him in the jail infirmary ever reported his injury and the use of force against him, to supervisory jail staff. The answer was a clear no. When Lt. Mays was asked about this, he confirmed that there was no policy requiring medical staff to report to correctional staff allegations by inmates of an excessive use of force.

Furthermore, SCSD Correctional Health Services physician Dr. Janet Abshire testified that voluntary reporting by medical staff would depend not upon finding injuries, but upon *whether the medical personnel thought the inmate was truthful*. Appendix 51.

E. The Applicable Law Is Clear

As already discussed above in Section II.C, the law regarding the use of force against a mere passively resisting detainee appears to be settled: substantial and aggressive force may not be used against a pre-trial detainee for mere passive resistance. Sacramento's written policy appears to have been written in light of the long-standing precedent on this issue.

It is equally clear that Sacramento County's written policy that required deputies to try to gain compliance with *non-force means* before escalating to the use of force, was knowingly abandoned in favor of an expedient, operational policy that had no defined criteria for the use of force in a strip search context. Such an undefined and unlimited use of force policy for strip searches was the immediate cause of Petitioner's injuries and is obviously unconstitutional.

CONCLUSION

The decision of the Ninth Circuit Court of Appeal marks a significant shift from long-established constitutional principles regarding the use of force against pre-trial detainees in the conduct of strip searches. Its decision allowed the use of substantial and aggressive force against Petitioner, a pre-trial detainee, solely for alleged passive resistance.

Not only did the decision in this case grant immunity for conduct that established precedent informed law enforcement many years ago was excessive, it granted immunity when any adult would agree that such a use of force was outrageous, dangerous, and totally unnecessary. Simply stated: every adult understands that dropping someone on their face with their hands held behind their back is not a de minimis use of force and creates a serious risk of harm or even death. Such substantial and aggressive use of force should only be used when officers reasonably believe that they face an immediate threat of serious harm from the detainee. The Respondent Deputies in this case never came close to experiencing such a threat.

What is equally hard to understand in this case is the decision of the Ninth Circuit that a municipality's official policy allowing substantial and aggressive force in the context of mere passive resistance in a strip search could be constitutional. No municipal strip search use of force policy should ever allow officers to immediately escalate to the use of substantial and aggressive force to complete a search in the face of mere passive resistance. A municipal policy must require officers to first employ non-force means to accomplish a strip search as was stated in Sacramento County's written policy.

Further, the Ninth Circuit's decision erroneously misstates the premise of the SAC's Second Cause of Action. This claim was for *a single incident of injury* that was the direct result of an *acknowledged official policy* that allowed the use of substantial and aggressive force against pre-trial detainees that merely passively resisted a strip search. Because the operational policy was the acknowledged, official policy, Petitioner did not have to prove multiple instances of injury to pre-trial detainees.

Based upon the foregoing, Petitioner requests that this Court grant his Petition for Certiorari.

Respectfully Submitted,

s/ Patrick H. Dwyer
Patrick H. Dwyer
Counsel of Record for
Petitioner

CERTIFICATE OF COMPLIANCE

Alwxsey Predybaylo,

Petitioner

v.

Sacramento County, California,

Deputy Jarrod Hopeck;

Deputy Benjamin Gonzales;

Deputy Robert Ranum; and

Deputy Jeffrey Wilson.

Respondents

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains not more than 5,820 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 23, 2024

s/ Patrick H. Dwyer
Patrick H. Dwyer, counsel
for Petitioners

PROOF OF SERVICE

I hereby certify under penalty of perjury that I caused three copies of the Petition For Writ Of Certiorari in the matter of *Alexsey Predybaylo v. Sacramento County*, *et al*, to be served upon each of the following according to Supreme Court Rule 29.3:

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I declare under penalty of perjury under the laws of the State of California that the foregoing certification is true and correct.

Date: April 23, 2024

s/ Patrick H. Dwyer
Patrick H. Dwyer, Counsel
for Petitioner

In The

Supreme Court Of The United States

Alexsey Predybaylo, Petitioner,

v.
County of Sacramento, California, et al,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

Appendix to the

Petition for Writ of Certiorari

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April 23, 2024

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Alexsey Predybaylo, Plaintiff-Appellant,

v.

Sacramento County; et al., Defendants-Appellees.

FILED JAN 24 2024 MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS
Case No. 22-15972

D.C. No. 2:19-cv-01243-MCE-CKD
Eastern District of California, Sacramento

ORDER

Before: SILER,* WARDLAW, and M. SMITH, Circuit Judges.

Judges Wardlaw and M. Smith vote to deny the petition for rehearing en banc, and Judge Siler so recommends (Dkt. 42). The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

IT IS SO ORDERED.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Alexsey Predybaylo,	)	No. 22-15972
Plaintiff-Appellant,	)	
v.	)	D.C. No.
Sacramento County, et al.,	)	2:21-cv-01243-MCE
Defendants-Appellees.	)	

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding
Argued and Submitted July 20, 2023
San Francisco, California

Before: SILER,** WARDLAW, and M. SMITH, Circuit Judges.

Alexsey Predybaylo appeals the district court's order granting summary judgment in favor of Deputies Hopeck, Gonzales, Ranum, and Wilson ("Deputies") and Sacramento County (collectively, "Defendants"). Predybaylo brings two causes of action: individual liability for unlawful use of force under 42 U.S.C. § 1983 against the Deputies,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.
** The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

and municipal liability against Sacramento County. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court erred in concluding that the Deputies' use of force was "de minimus" because there is a genuine question of material fact as to whether the Deputies' use of force was constitutional. However, we affirm the district court's grant of summary judgment in favor of the Deputies because under the circumstances here, the unlawfulness of the Deputies' conduct was not clearly established. See *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1076 (9th Cir. 2015) (holding that an appellate court can affirm a district court's decision "on any ground raised below and fairly supported by the record" (citation omitted)).

"[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violate[] a federal statutory or constitutional right, and (2) the unlawfulness of their conduct [is] 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

As a general rule, we have held that there is a right to be free from the application of non-trivial force while engaging in passive resistance. See *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013). But clearly established law does not address the situation here, where the pre-trial detainee was arrested for dangerous crimes and appeared to be resisting the Deputies' collection of evidence. Here, Predybaylo was detained after his arrest for possession of controlled substances, and

resisting arrest; Cal. Pen. Code §§ 29800(a)(1)); 30305; 148(a)(1)). The Deputies subjected him to a control hold that ultimately resulted in a minor traumatic head injury while he appeared to be resisting the collection of his clothes to find further evidence of drugs or weapons. Therefore, existing precedent does not "place the lawfulness of" the Deputies' conduct "'beyond debate.'" *Wesby*, 138 S. Ct. at 589–90 (quoting *Ashcroft v. al-Kidd,* 563 U.S. 731, 741 (2011)).

2. The district court did not err in granting Defendants' motion for summary judgment as to Predybaylo's municipal liability claim against Sacramento County. See *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690–91 (1978). There is inadequate evidence to demonstrate that Sacramento County had an unconstitutional policy or custom that resulted in the repeated use of excessive force in the collection of evidence from pretrial detainees. See *Gordon v. Cty. of Orange*, 6 F.4th 961, 974 (9th Cir. 2021) (noting that for an unwritten policy to be the basis of municipal liability, it must be the "traditional method of carrying out policy" and "may not be predicated on isolated or sporadic incidents" (quoting *Trevino v. Gates,* 99 F.3d 911, 918 (9th Cir. 1996)).

AFFIRMED.

C.A. Case No. 22-15972

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Alexsey Predybaylo, Plaintiff – Appellant

vs.

Sacramento County, et al., Defendants – Appellees.

Appeal From the United States District Court,
Eastern District Of California,
The Honorable Morrison C. England
Civil Case No. 2:19-CV-01243-MCE-CKD

APPELLANTS' OPENING BRIEF

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Appendix 7

Statement of the Issues Presented for Review

The issues presented for review are:

1. Whether the District Court erred when it ruled that holding Appellant's hands behind his back and simultaneously pulling his legs out from under him, thereby dropping Appellant face first onto a concrete floor, was a "de minimis"use of force.

2. Whether the District Court's findings that Appellant failed explicitly to contradict Defendants' safety concerns and that the Deputies first used non-force means, were factually erroneous.

3. Whether the District Court erroneously held that the use of force by Appellees Hopeck, Ranum, and Gonzales was objectively reasonable.

4. Whether the District Court erred when it found that Appellant's claims against Deputy Wilson for failure to intervene and Appellant's Monell claim against Sacramento County failed because there was no underlying Fourth Amendment violation.

Statement of Relevant Facts

On July 5, 2017, Appellant was arrested, transported, and taken through the booking process at the Sacramento County Main Jail by SPD Sgt. Hall. Although Appellees contend that Appellant was not cooperative during the booking process, Sgt. Hall testified that Appellant was processed through booking without incident. [ER-V.3, 475; Hall Depo. 15:5-17] Appellant's expert, David Sweeney, reviewed all of the video footage of Appellant being processed through the various booking stations and agrees with Sgt. Hall that Appellant was fully cooperative. [ER-V.5, 1057-1058; Sweeney Rpt., pp. 17-18]

After booking, Appellant was taken by the Deputies to a safety cell to collect his clothing as evidence. As he was brought in by the officers, Appellant saw a sticky note over a camera that was in an upper corner of the room. [ER-V.2, 261-262; Predybaylo Depo., 125:8 to 126:24] When Appellant was first brought into the cell he was told to face the wall. Appellant complied, but then recalled turning his head to the left to ask, or respond to, a question. Appellant cooperated when the Deputies turned his head back to the wall. [ER-V.2, 258-264; Predybaylo Depo., 122:25 to 128:12; Composite-Video 5:26:10|5:26:20] Deputy Gonzales testified that he asked Appellant if he had any drugs and that Appellant probably turned his head to answer the question. [ER-V.4, 834-835; Gonzales Depo., 45:12 to 46:3]

Appellant complied with all other orders and requests from the four officers while he was in the cell. Appellant did not engage in any active or even passive resistance. [ER-V.2, 211-213, 216, 230-232; 259-264; Predybaylo Depo., 75:18 to 77:3; 80:10-12; 94:19 to 96:16; 123:22 to 128:12.] This was corroborated by SPD Sgt. Hall who stood outside the open cell door and watched the entire search. [Composite-Video 5:25:40|5:30:00] He testified that Appellant "cooperated in a

relatively normal manner with the strip search". [ER-V.3, 475-476, 483, 486; Hall Depo., 15:18 to 16:10, 23:19-25, 26:3-6] And further, that he did not remember Appellant "being angry or fighting or uncooperative or resisting." [ER-V.3, 476; Hall Depo. 16:6-10]

Appellees admitted that Appellant was cooperative and took off his shirt, shoes, and socks. [ER-V.1, 7, first ¶, citing to Defendants' SUF No. 36 at ER-V.1, 53] Deputy Hopeck then told Appellant to put his hands behind his back. Appellant complied and then Deputy Hopeck wrapped his hands around Appellant's thumbs and said "relax your thumbs." Appellant complied and said "I am relaxing my thumbs." Deputy Hopeck then yelled: "I fucking said relax your thumbs." Appellant tried to relax his thumbs even more, but Deputy Hopeck became more angry. [ER-V.2, 199-200; Predybaylo Depo. 63:22 to 64:15]

While Appellant was continuing to stand with his legs spread and hands behind his back, Deputies Gonzales and Ranum simultaneously pulled backwards on each of Appellant's legs, causing Appellant to fall face first onto the concrete floor. [ER-V.2, 200; Predybaylo 64:11-20] Appellant was unable to put his hands out in front to block his fall because Deputy Hopeck still had hold of his hands behind his back. [ER-V.2, 204-205; Predybaylo Depo., 68:16 to 69:23] Fortunately, Appellant was able to turn his head to prevent his face from striking squarely on the floor. Deputy Hopeck then dropped his knee onto Appellant's right temple. [ER-V.2, 205, 214-215; Predybaylo 69:13 to 69:23; 78:17 to 79:8] At this time, Appellant lost consciousness for 5-15 seconds. [ER-V.2, 207, 236-237; Predybaylo Depo., 71:9-14, 100:16 to 101:8] After an unknown amount of time, Deputy Hopeck shifted his knee to Appellant's neck. [ER-V.2, 206-207, 214-215; Predybaylo Depo., 70:8 to 71:3; 78:20 to 79:9]

After he regained consciousness, Appellant remembers being on the floor with Deputy Hopeck's leg on the upper portion of his back and neck and his knee on Appellant's head. [ER-V.2, 214-215; Predybaylo Depo., 78:17 to 79:10] Deputy Gonzales held Appellant by his legs in a hog tied fashion with ankles crossed and lower legs bent back up towards his head, while Deputy Ranum held Appellant's arms. [ER-V.2, 213-214; Predybaylo 77:17 to 78:3] Appellant was not resisting and he repeatedly yelled stop, but all three officers kept applying force. [ER-V.2, 213; Predybaylo Depo., 77:10-16] Finally, Deputies Hopeck, Gonzales, and Ranum removed Appellant's pants and underwear. [ER-V.2, 207-208; Predybaylo Depo., 71:15 to 72:20]

Deputy Jeffrey Wilson entered the search room about twenty seconds after Appellant first entered. Deputy Wilson stayed inside the room until the strip search was completed. [Composite-Video 5:25:45|5:30:05] Appellant alleges that Deputy Wilson participated in the use of unnecessary and excessive force on Appellant and/or failed to intervene to stop Deputies Hopeck, Ranum and Gonzales with their wrongful conduct.

The Deputies then gave Appellant paper jail clothing and left. [Composite-Video 5:30:5|5:31:05] Appellant was later escorted back to the booking area. He then underwent a second strip search at the time of his "dressing out" that was part of the normal jail booking process. There was no use of force for this search. [ER-V.2, 195-196, 216-217; Predybaylo Depo., 59:21-60:14, 80:21 to 81:11] Although Appellant was in pain and somewhat disoriented from the face first fall to the floor, he was not allowed to stop and check his injuries until after he was placed in a regular cell on the 5th floor. [ER-V.2, 216-217, 218-219; Predybaylo Depo., 80:16 to 81:14, 82:22-83:17] Appellant filed a medical request and was sent to the infirmary on July 6,

2017. He was diagnosed with a mTBI, bruises and abrasions, and was held in the infirmary for five days before returning to the general population. [ER-V.5, 1014-1019, 1073-1081; P Ex. 14, Jail Medical Record; P Ex. 19, Raphaelson Rpt.]

Statement of the Relevant Procedural History

A. The Second Complaint

The Second Amended Complaint ("SAC") contains two causes of action under 42 U.S.C. § 1983. The First Cause of Action against Appellee Deputies Hopeck, Ranum, Gonzales, and Wilson is for unlawful use of force under the Fourth Amendment. The Second Cause of Action against Sacramento County is for municipal liability under Monell for having an unconstitutional use of force policy for strip searches, with attendant claims of failure to train, monitor and supervise. [ER-V.5, 1098-1100; SAC 33-48]

B. The Cross Motions for Summary Judgment

On November 3, 2021, Appellants and Appellees filed respective motions for summary judgement under Federal Rule of Civil Procedure ("FRCP") Rule 56(a). [ER-V.2, 76-135; Plaintiff's MSJ]

C. The District Court's Decision and Final Judgment

The District Court issued its Memorandum and Order denying Appellant's MSJ on both causes of action and granted Appellees MSJ on both causes of action in the SAC. [ER-V.1, 3-16]

SUMMARY OF THE ARGUMENT

The Force Used Was Substantial, Not De-Minimis

The District Court's Decision is premised upon a finding that the amount of force used against Appellant was de-minimis. This finding is contrary to established precedent that classifies comparable uses of force as "intermediate" or "substantial" and sufficient to support a Fourth Amendment claim. In addition, the finding ignores the uncontested factual evidence proving that Appellant's injuries were far more than de-minimus. Accordingly, the District Court's determination of the level of force used was clearly erroneous.

Appellant Explicitly Contradicted the Deputies About Whether There Was a Safety Issue and that Non-Force was Tried First

The District Court's factual findings that Appellant did not explicitly contradict the Deputies' assertion that there was a safety concern or that they first employed non-force means ignored the contrary evidence. Appellant's evidence explicitly showed that he was fully cooperative, never presented a safety concern, and that force was used for no purpose. Indeed, Appellees admitted that: (1) Appellant voluntarily handed over his shirt, shoes and socks; and (2) he never physically resisted.

Appellees contend that Appellant passively resisted and created a safety concern by turning his head away from the cell wall more than once. However, even this minimal adverse account of what happened is contradicted by the testimony of the most reliable and unbiased witness to the incident, SPD Sgt. Hall, who testified that Appellant "cooperated in a relatively normal manner with the strip search" and he did not remember Appellant "being angry or

fighting or uncooperative or resisting." The District Court's factual findings on these two items disregarded the overwhelming contrary evidence in the record.

Furthermore, the District Court failed, as required by established law, to draw all inferences and view all evidence in the light most favorable to Appellant. If it had done this, the District Court would have had to, at a minimum, send the issue of the reasonableness of the Deputies' use of force to a jury.

The District Court's Methodology for Balancing the Interest of the Government's Use of Force Against Appellee's Constitutional Rights Was Deeply Flawed

The District Court never defined the government's interest in using force. It should have started its analysis with the simple fact that the government's sole interest was to collect Appellant's clothing for evidence. Next, the District Court never evaluated how much and what type of force would be appropriate to this end.

The District Court also never considered alternatives to the use of force. In addition, the District Court never considered whether the Deputies use of force increased the risk of injury to Appellant and to the Deputies. These analytical failings show that the District Court's "balancing" of the interests was lacking in both methodology and consideration of all of the factors required for a totality of the circumstances analysis.

The Court's Dismissal of Appellant's Monell Claim Was Baseless

The District Court's dismissed Appellant's Monell claim because it found no violation of Appellant's Fourth

Amendment rights.

Appellant's evidence for this claim is overwhelming. The SCSD officially disavowed its Written Policy in favor of its unwritten policy, practices and training. The testimony of SCSD senior officers and the Deputies proved the unconstitutionality of the unwritten policy by allowing deputies to use force to gain compliance with a strip search request without first employing reasonable non-force means.

The evidence shows that Appellant's injuries were the result of the unwritten policy that allowed immediate use of force. The Deputies violently took Appellant to the ground for ostensibly turning his head away from the cell wall. This was despite the admission that up to that point, Appellant had cooperated and voluntarily removed his shirt, shoes, and socks.

The evidence is undisputed that SCSD deputies were trained in the unconstitutional methodology of the unwritten policy and that this was the basis for SCSD senior officer supervision and enforcement. The same unwritten policy permeated the jail medical staff policies on reporting suspected incidents of excessive force. The working presumption of medical staff was that inmates did not tell the truth, and thus, their complaints of excessive force were not referred to senior SCSD personnel.

ARGUMENT OF THE CASE

I. Applicable Law

A final judgment pursuant to FRCP 56(a) motion for summary judgment of an action under 42 U.S.C. §1983 is reviewed *de novo*. *Rice v. Moorehouse*, 989 F.3d 1112, 1120 (9th Cir. 2021).

A. **Motions for Summary Judgment Under FRCP 56**

The purpose of a FRCP 56(a) motion is to determine whether there are any triable issues of fact that remain to be decided at trial. The court is not a substitute for a jury. Instead, its role is to draw all inferences and view all evidence in the light most favorable to the nonmoving party and decide if it is possible for a rational trier of fact to find in their favor. If the court finds that a rational trier of fact could find for the nonmoving party, then summary judgment must be denied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008).

The moving party bears the initial burden of demonstrating that there is no genuine issue of material fact. The non-moving party must then submit admissible evidence to show that a genuine dispute does exist. *Anderson* at 247-48; Matsushita at 586.

B. **The Reasonableness of the Use of Force Is a Jury Question**

In excessive force cases, the courts have consistently denied summary judgment motions when there are disputed facts regarding whether the use of force was objectively reasonable. When there are disputed facts, the court must allow the jury to decide the issue. The Ninth Circuit made this very clear in *Glenn v. Washington County*, 673 F. 3d 864, 871 (9th Cir. 2011). In holding that there were genuine issues of material fact about the use of deadly force that a jury should decide, the court in Glenn stated that "[b]ecause [the excessive force inquiry] nearly always requires a jury to sift through disputed factual contentions, and to draw

inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly," quoting from *Smith v. City of Hemet*, 394 F. 3d 689, 701(9th Cir. 2005). See also, *Lam v. City of Los Banos*, 976 F. 3d 986, 997 (9th Cir. 2020) (Citing its prior decisions, the Court found that because questions about the reasonableness of the use of force are "not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury").

C. **Use of Force Analysis: The Totality of Circumstances**

The Supreme Court's decision in *Graham v. Conner*, 490 U.S. 386), 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) ("*Graham*") sets forth the analysis to be used to determine whether the use of force by an officer is objectively reasonable. Under Graham, a multi-part test that considers the "totality of circumstances" surrounding the use of force to evaluate whether the use of force was reasonable. The Graham analysis highlights three factors to consider first: "(1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resisted arrest or attempted to escape." *S.B. v. County of San Diego*, 864 F.3d 1010, 1013 (9th Cir. 2017) (citing *Graham*, 490 U.S. at 396). In a Fourth Amendment context, the officer's actions must be evaluated against an objectively reasonable standard in *view of the facts and circumstances confronting the officers. Graham* at 397.

In addition, Graham made clear that the three factors it highlighted are not exclusive and other factors should be evaluated as circumstances require. See e.g., *Glenn v. Washington. County* at 872. Indeed, "[t]he question is not simply whether the force was necessary to accomplish a

legitimate police objective; it is whether the force used was reasonable in light of all the relevant circumstances." Smith v. Hemet, 394 F.3d 689, 701 (9th Cir. 2005)(en banc) ("Smith"), quoting from *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (emphasis in original).

II. The District Court Erroneously Found that the Amount of Force Applied to Appellant Was De-Minimis

The premise for the District Court's granting of Appellees' MSJ was the erroneous finding that "the force used in this case was de minimis." [ER-V.1, 13] To begin, this finding ignores this Court's decisions holding that the use of force comparable to that used against Appellant is not de minimis, but "intermediate" and/or "substantial". Second, this finding did not consider any of Appellant's un-controverted evidence of his physical injuries which included a mTBI, abrasions and bruises, followed by headaches and other longer term medical consequences.

A. Relevant Ninth Circuit Cases on Use of Force Under Fourth Amendment

There is no precise formula for placing various types of force into categories like "de-minimus" or "intermediate". However, the following cases explored uses of force comparable to that used against Appellant and found that they violated the Fourth Amendment.

1. Andrews v. City of Henderson

In *Andrews v. City of Henderson*, 35 F. 4th 710, 715-716 (9th Cir. 2022) ("Andrews"), this Court held that a "physical tackle that results in severe injury may constitute a significant use of force." The Court observed, citing to *Rice v. Moorehouse*, 989 F.3d at 1121, that a police

maneuver that caused a suspect or detainee to fall face first onto pavement with resulting pain and need for medical treatment constituted "substantial" and "aggressive" use of force. The Court then found that the tackling of the suspect, Andrews, with enough force to fracture his hip was "substantial" and had to be justified by a specific need to use that level of force.

2. **Rice v. Morehouse**

The appellate decision that is factually most similar to this case is *Rice v. Moorehouse*, 989 F.3d 1112 (9th Cir, 2921). This was a de novo review of a summary judgment in favor of two police officers in which this Court considered if a "take down" by the defendant officers constituted actionable excessive force. The take down went as follows: the officers held the suspect Rice "in a ‘police lead' position ... [whereby] they tripped Rice so that he would fall to the ground as they held his arms behind his back." Rice stated in his declaration that "he was tripped and ‘forcibly' thrown to the ground, face-first onto the pavement." Rice further declared that he suffered "extreme pain" after the take down and had "long-term physical pain for which he received medical treatment." This Court held that "assuming Rice's version of the material facts viewed in the light most favorable to him, ... we agree with the district court that [the officers'] ... take-down involved a ‘substantial' and ‘aggressive use' of force."

The take down in *Rice* is very is very similar to what happened to Appellant and he cited this decision to the District Court. As held by this Court in Rice, the use of this level of force in a situation where the suspect was passively, not actively, resisting, violates the Fourth Amendment. The District Court did not address Appellant's citation.

3. **Briceno v. Williams**

A recent memorandum decision by this Court in *Briceno v. Williams*, 2022 WL 1599254 (9th Cir. 2022) further illustrates a use of force above a de-minimus level. The appellant, Briceno, was suspected of being drunk in public. The arresting officer alleged that Briceno resisted arrest by refusing to be handcuffed. Briceno was then tackled face-first to the ground and punched in the head. The offending officer contended that Briceno's alleged resisting arrest and his public drunkenness was sufficient cause to use such force. This Court, citing *Young v. County of Los Angeles,* 655 F.3d 1156, 1161 & n.6 (9th Cir. 2011) and Glenn v. Washington County, 673 F.3d at 871, ruled that punching a face-down suspect constitutes significant force.

B. **The Amount of Force Used Against Appellant Was Substantial and Serious**

1. **The Holding Cell Take-Down**

Deputy Hopeck began the excessive use of force by wrapping his hands around Appellant's thumbs. Deputies Gonzales and Ranum then each grabbed one of Appellant's legs and simultaneously pulled backwards. Deputy Hopeck held onto his thumbs lifting Appellant into the air. The Deputies then let go of Appellant. Because his hands were held behind his back, Appellant was unable to put his hands out in front to block his fall and he fell head first onto the cell floor. Fortunately, Appellant was able to turn his head to prevent his face from striking squarely. Deputy Hopeck then dropped his knee onto Appellant's right temple and Appellant lost consciousness.

Appellant thinks he lost consciousness for about 5-15 seconds. When he awoke, Deputy Hopeck's leg went across Appellant's upper back with Deputy Hopeck's knee on

Appellant's head. Deputy Gonzales held Appellant by his legs in a hog tied fashion with ankles crossed and lower legs bent back up towards his head, while Deputy Ranum held Appellant's arms. Appellant did not resist and repeatedly yelled to stop, but all three officers kept applying force. Finally, the deputies stopped applying force and removed Appellant's pants and shorts.

2. **Appellant's Medical Injuries**

As substantiated by the jail medical records and described in detail in Section IX, below, Appellant sustained a mTBI, facial bruising, and abrasion, swelling, and a small cut and abrasion behind his right ear. Appellant was kept in the jail infirmary for about six days.

C. **Conclusion**

The District Court ignored the judicial authority cited by Appellant showing that the nature and level of force used by the deputies against Appellant was far greater than de-minimus. Further, it is uncontested that Appellant suffered significant medical injury, some of which lasted for over two years. The District Court's holding that the use of force was "de-minimus" was clearly erroneous. Furthermore, since the "de-minimus" determination was the basis for the rest of the District Court's Memorandum and Order dismissing Appellant's claims, the entire decision is invalid.

III. **The District Court Erroneously Found that Appellant Did Not Provide Evidence Contradicting Appellees' Safety Concerns**

The District Court made a clearly erroneous factual finding that Appellant "does not explicitly dispute Defendants' contentions that Appellant, who was out of

handcuffs, attempted to turn his body towards the deputies despite their repeated instructions to face the wall." (Emphasis added.) [ER-V.1, 13; Decision p. 11:24-26]

To the contrary, as set out in the Statement of Relevant Facts, Appellant explicitly testified that he complied with all orders and fully cooperated. Even more specifically, Appellant testified that when he first entered the cell, he turned his head to ask a question. The deputies then simply turned his head back towards the back wall of the cell. This is corroborated by the video evidence. That was the totality of the purported "unsafe" behavior that Appellees contend justified their use of serious force.

What makes this finding by the District Court so illogical is that the District Court acknowledged the Appellees' admission that Appellant gave the Deputies his shirt, shoes, and socks without incident. This had to have happened after Appellant turned his head back towards the wall as shown in the video, but before Appellant was forcibly taken down.

Further, the District Court's finding ignores the testimony of all of the Deputies that Appellant never physically resisted. [ER-V.2, 25-27; SUF 25-30, 32]. In particular, Deputy Ranum testified that Appellant would not have been let out of the safety cell within such a short time if Appellant had been "fighting us or was uncooperative in some way or I didn't feel like it was safe, I would not have released him from that cell." [ER-V.4, 749; Ranum Depo at 18:8-10 (emphasis added)] Ranum's testimony disproves the District Court's finding that Appellant somehow created a "safety" issue.

Appellant unequivocally and explicitly disputed the Deputies' contention that he repeatedly disobeyed their instruction to face the wall. Moreover, the evidence proves

that Appellant did not create any "safety" issue. The Court's finding is simply contrary to the evidence.

IV. The District Court Erred in Concluding That Appellant Did Not Dispute the Deputies' Contention that They First Used Non-Force Means

The District Court made another clearly erroneous factual finding: that Appellant did not dispute that the Deputies "attempted other means before deploying the force in question." [ER-V.1, 14; Decision at 12:23-24]

Appellant admitted that he turned his head when he was first brought into the cell, but this was to ask a question, not to resist the search. Appellees admitted that Appellant voluntarily took off his shirt, shoes and socks, but then without cause the deputies forcibly took Appellant to the cell floor head first.

The District Court simply ignored all of Appellant's testimony about the incident showing that he was fully compliant with the search and no use of force was necessary: i.e., he turned away from the wall when he first entered to ask or answer a question. Despite this direct and explicit contrary evidence, the District Court concluded that "Plaintiff has not expressly disputed that he turned away from the wall despite instructions [not] to do so." In addition to Appellant's testimony, the District Court also ignored: (a) the testimony of Deputy Gonzales that Appellant may have turned from the wall in response to his question about having any drugs; and (b) the testimony of SPD Sgt. Hall that Appellant did not resist and was cooperative.

V. The District Court's Methodology for Balancing the Interest of the Government's Use of Force Against Appellee's Constitutional Rights Was Deeply Flawed

The District Court then proceeded with a perfunctory balancing of the interests under the Fourth Amendment, comparing the government's interest in using force versus the Appellant's right to be free of excessive force. The District Court concluded that "[i]n balancing the nature of the force with the governmental interests at stake, the Court concludes that, based on the undisputed evidence and viewing it in a light most favorable to Plaintiff, the force used by Hopeck, Ranum, and Gonzales was objectively reasonable under the circumstances."

Not only was this balancing test factually erroneous, the District Court's legal methodology was seriously flawed.

A. The Court Did Not Define the Government's Interest

To begin, the District Court did not define what the government's interest was in conducting the search, which rendered its analysis meaningless. There was no dispute that the search of Appellant was done at the request of SPD Sgt. Hall for the purpose of collecting Appellant's clothing as possible evidence. The Deputies did not do any other type of search, such as a cavity search. Thus, the collection of Appellant's clothing for evidence was the "government interest" that had to be weighed against the need for using force upon Appellant.

B. The Court Failed to Evaluate How Much Force Was Appropriate to Collect the Clothing

The District Court was supposed to evaluate how

much force was appropriate to accomplish the government's interest. In doing so, the District Court needed to evaluate what threat, if any, Appellant actually presented to the Deputies while in the safety cell. The District Court observed that Appellees admitted that Appellant was not physically resistive and voluntarily gave up his shirt, shoes, and socks. Moreover, the District Court then failed to acknowledge that Appellant explicitly contradicted Appellees' assertion that he was passively resisting the removal of his pants and underwear by turning away from the cell wall more than one time. Appellant testified that he was fully cooperative. while the Deputy Hopeck said he kept turning around: i.e., that is an explicit denial that he created any "safety concern".

1. **Applicable Law**

The legal question is how much force may law enforcement officers use to collect clothing from a detainee when the detainee is not physically resisting, or assuming arguendo as alleged by the Deputies, is passively resisting. This question must be answered in the context of the totality of the circumstances test established under *Graham v. Connor*, 490 U.S. at 396.

As already discussed in Section II.A.2, the factual case most similar to this is *Rice v. Moorehouse*, 989 F.3d 1112. In *Rice,* the plaintiff had purportedly committed a traffic offense and the officer that pulled him over suspected that plaintiff was driving under the influence. The officer asked Rice to exit his vehicle, but Rice refused. This Court found that the suspected offenses, as well as the refusal to get out of the vehicle, were minor offenses. Rice at 1122-1123. The Court also found that Rice's alleged refusal to get out of the car did not present an immediate threat to the safety of the officers. *Rice* at 1123. Next, the Court observed that a jury could find that Rice was not

trying to flee. Ibid. Finally, the Court observed that Rice's refusal to exit his car was closer to the purely passive protestor who refuses to leave the scene of a demonstration than to an active protester that was fighting to resist arrest. Ibid. Based upon these criteria, the Court found that "[a]bsent an emergency, the state's interests [in using force] ... are insubstantial", and further, that "a reasonable jury could find that the state had a minimal interest in the use of substantial force against Rice". Ibid.

In summation, the Court observed that "[l]ong before Rice's arrest, we clearly established one's "right to be free from the application of non-trivial force for engaging in mere passive resistance", quoting from *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013). Indeed, the Court observed that there were cases as far back as 2001 that established that the use of "non-trivial force" against mere "passive resistance" were excessive. *Rice* at 1125-1126.

2. **Application to Appellant**

In Appellant's case, he was brought to a safety cell in handcuffs by four deputies, all of whom were larger, stronger and armed. This was after Appellant had been through the booking process, which included a pat down and x-ray scan for weapons. Moreover, SPD Sgt. Hall, who escorted Appellant through booking, testified that Appellant had been cooperative through the process. Based upon these facts, Appellant presented a very nominal safety risk to the Deputies, and thus, any force needed to gather his clothing for Sgt. Hall should have been minimal.

C. **Alternatives to the Use of Force**

In *Rice*, this Court further observed that the officers did not consider what alternative methods could be employed to effect the arrest. Rice at 1123-1124. This

Court observed that "[a]lthough officers 'need not avail themselves of the least intrusive means of responding to an exigent situation,' their failure to consider 'clear, reasonable and less intrusive alternatives' to the force employed 'militates against finding the use of force reasonable.'" (quoting from *Glenn*, 673 F.3d at 876).

In this action, the District Court completely ignored the non-force options that are set forth in the Written Policy. For example, the Deputies could have placed Appellant in the safety cell by himself and directed him to take off his clothes and place them into a bag to be either handed out the cell door to a deputy or left in the cell for subsequent retrieval. This very point was made by Appellant's UOF expert, Mr. Sweeney, who stated in his report that the Deputies could have retrieved Appellant's clothing for SPD Sgt. Hall "by simply placing Mr. Predybaylo in the room by himself and asking him to take off his clothes, put them into a bag, and change into the jail uniform." SPD Sgt. Hall could have then just picked up the bag and left. [ER-V.3, 532-534; Sweeney Depo., 29:5 to 31:15] [ER-V.5, 1057; Sweeney Rpt., p. 17]

Another non-force alternative set out in the Written Policy is to simply leave a non-compliant detainee in an isolated cell until the detainee agrees to be comply. This alternative was never presented to Appellant. Instead, the Deputies went immediately to the use of force and forcibly dropped Appellant head first onto the cell floor.

D. **The Use of Force Increased the Risk of Harm to Appellees**

The District Court failed to consider that the use of force by the Deputies unnecessarily increased the risk of injury to both Appellant and to the Deputies. This point was also made by Appellant's expert, Mr. Sweeney, who stated

that the "use of force not only led to the injury of Plaintiff, it unnecessarily increased the risk of injury to the four deputies." [ER-V.3, 529-530; Sweeney Depo. 26:15 to 27:5] [ER-V.5, 1057; Sweeney Rpt., p. 17]

VI. The District Court Ignored Appellant's Evidence Proving that the Use Of Force Was Objectively Unreasonable

The District Court not only ignored Appellant's direct testimony contradicting the Deputies purported "safety" concerns, it never mentioned any of Appellant's other evidence proving that the use of force was unnecessary. There are four categories of this evidence: (a) the testimony of SPD Sgt. Hall; (b) the analysis and testimony of Appellant's UOF expert, David Sweeney; (c) the admissions of Appellees; and (d) contradictions in the testimony of the Appellees.

A. The Testimony of SPD Sgt. Hall

As discussed above, SPD Sgt. Hall testified that before the search incident, he took Appellant through the booking process without incident and that Appellant was cooperative with the process. After going through the booking process, the Composite-Video shows the arresting officer, Sgt. Hall standing directly outside the open door of the safety cell where Appellant had his clothes forcibly removed. [ER-V.3, 486; Hall Depo. 26:13-18; Composite-Video 5:25:40|5:30:00] Sgt. Hall testified that he did not observe Appellant fight or be uncooperative with the Deputies and that Appellant "cooperated in a relatively normal manner with the strip search". [ER-V.3, 475-476, 483, 486; Hall Depo., 15:18 to 16:10, 23:19-25, 26:3-6] Indeed, Sgt. Hall testified that he did not remember Appellant "being angry or fighting or uncooperative or resisting." [ER-V.3, 476; Hall Depo. 16:6-10] Further, Sgt.

Hall did not remember any drugs being found on Appellant. [ER-V.3, 475-476; Hall Depo., 15:18 to 16:1]

Sgt. Hall then testified that he did not know of any reason why the search of Appellant could not have been done with just one or two officers, rather than four. [ER-V.3, 480; Hall Depo., 20:3-25] Sgt. Hall also testified that there might be reason to use a control hold if the detainee was not doing what they were told. However, he had no specific memory of that ever happening in any search he witnessed, including the search of Appellant. [ER-V.3, 483; Hall Depo., 23:2-25]

When he was asked if he knew of any reasons why a detainee might be taken to the ground during a search, he said "[i]f they're physically resistive, that would be a reason." (Emphasis added.) [ER-V.3, 485; Hall Depo., 25:10-14] And when asked again if he remembered Appellant "refusing or not doing something he was asked to do" and he answered "[n]o, I do not." [ER-V.3, 486; Hall Depo., 26:3-6]

SPD Sgt. Hall is not a party and not a member of the SCSD. Along with the Composite-Video, his testimony is the best evidence about whether Appellant was uncooperative or physically resisted the search. It is very clear from his testimony that Appellant did nothing to warrant the use of force by Appellees.

B. **Appellant's Expert Found No Basis for Any UOF**

Appellant retained David Sweeney, as an expert to review the use of force in the search. Mr. Sweeney read all of the testimony, reviewed all of the SCSD policies, and reviewed all of the video, including the video of Appellant being taken through all of the stations in the booking

process. Based upon this review of all the evidence and his decades of police experience, Mr. Sweeney noted that the Deputies could have collected Appellant's clothing simply by "placing Mr. Predybaylo in the room by himself and asking him to take off his clothes, put them into a bag, and change into the jail uniform." [ER-V.5, 1057; Sweeney Rpt.p.17]

Mr. Sweeney also observed that "none of the five officers ... described conduct in their depositions that warranted the use of force against Mr. Predybaylo." Even further, he observed that "[a]part from the turning of Plaintiff's head away from the wall (which is a minor thing), there is no testimony by these deputies, or by Sacramento Police Sgt. Hall, about any conduct by Mr. Predybaylo that would have warranted taking him to the ground or the use of control holds once he was on the ground." [ER-V.5, 1057; Sweeney Rpt., p. 17] Mr. Sweeney concluded with a totality of the circumstances analysis and found that "[t]he force used was not objectively reasonable." [ER-V.5, 1057; Sweeney Rpt., p. 17]

C. **The Discrepancies & Contradictions in Appellees' Testimony**

1. **The Search Was Routine: There Was No Safety Issue**

Deputy Wilson was asked to describe the typical strip search process. He testified that if someone is being fully cooperative it would be normal for the search to take 3-4 minutes and that if a search was completed in that amount of time it would indicate that there was no "serious problem". [ER-V.5, 877; Wilson Depo., 26:12-18] A review of the time stamp on the Composite-Video indicates that it took from 5:26:20 pm (sticky note placed on cell camera) to 5:31:00 to complete the search. This is four minutes, forty seconds.

Deputy Wilson testified that he had no memory of the incident with Appellant. [ER-V.5, 902-905; Wilson Depo., 51:21 to 54:7] Wilson then further testified that he did not have any memory of the incident because there was no significant event during the search. [ER-V.5, 905; Wilson Depo., 54:8-20]. Wilson did not remember anything that Appellant did or said that caused the use of control holds or how Appellant ended up naked on the cell floor with Hopeck on top of him. [ER-V.5, 909; Wilson Depo., 58:2 to 62:4]

Deputy Ranum testified that Appellant would not have been let out of the safety cell within such a short time if Appellant had been "fighting us or was uncooperative in some way or I didn't feel like it was safe, I would not have released him from that cell." [ER-V.4, 749; Ranum Depo., 18:6-10] This is an express admission that Appellant did not create any "safety" issue for the Deputies, negating the District Court's factual finding. The following excerpt from the Ranum Deposition is quite revealing:

> [ER-V.4, 749-750; Ranum Depo., 18:3 to 19:19]
> Q. Hold on a second. You let him out of the safety cell within a couple of minutes?
> A. Yeah, I believe so.
> Q. And you said you would never have done that if he had been uncooperative?
> A. *Yes. So if he was fighting us or was uncooperative in some way or I didn't feel like it was safe, I would not have released him from that cell.* (Emphasis Added.)
> Q. So my question again is, what did my client do to end up in a control hold, pressed to the floor of the cell when he -- there's nothing in the video or record anywhere that anyone has testified to about giving him the option of "We're going to put you in this isolation cell until you agree to cooperate"?

A. So what I was trying to say is I believe he did agree to cooperate once he realized the seriousness of this. That happens quite often.· People will come in and they'll be angry that they're being arrested, they'll be angry at the arresting officer, and they'll be -- even they'll be angry at us.· It really transcends just because we're wearing a badge.· And we try to talk and say, "Hey, I don't know what happened out in the field, but we have nothing to do with that." And I don't remember my conversation with him, but I'm inferring that at some point he was just like, "Okay. This is serious. I need to listen to these guys," and then that's why the rest of the search was – he was cooperative during that time.
Q. Well, according to the records, you were in the cell, the safety cell, during the strip search process. You have no recollection of some event or something he did or said that led to the almost immediate use of force?
A. I don't remember the incident. It was -- I mean, I guess it was unmemorable. I'm just going off the video that I saw. It was a few years ago.
Q. Well, if my client had been, you know, violent or started to take a swing at somebody or wrestle, I mean, that would be something you'd remember, right?
A. Yes.
Q. So he didn't do anything like that.
A. No.

Deputy Gonzales corroborated Deputy Ranum's testimony that Appellant did not physically resist and, in fact, was cooperative. Here are pertinent excepts from his deposition:

[ER-V.4, 800-801; Gonzales Depo. 11:19 to 12:15]

Q. And then down on line 301, 302, Sergeant Culp [from IA] is specifically asking you about the incident here with my client, and he kind of is asking you, well, this incident with Mr. Predybaylo does not stand out in your mind because nothing that unusual happened, correct?
A. Correct.
Q. So neither physically nor verbally was there anything particularly remarkable about Mr. Predybaylo that day, correct?
A. That's correct.
Q. Do you -- can you tell me what you recall right now about your participation in the strip search in the safety cell. So starting with going down the hallway towards safety cell -- I think it was number 2 -- do you have any recollection of going into the cell or seeing my client go into the cell?
A. Prior to watching the video, I had -- I had almost zero recollection of that incident. After seeing the video, it's still fuzzy in my mind. But the way I responded and the way that other deputies responded -- I can't speak on their behalf -- it all seemed fairly routine now.

Deputy Hopeck testified that he used a "control hold" on Appellant when he turned his head away from the back wall. However, when he was questioned about this more carefully, his answers were vague and implausible.

[ER-V.4, 656-657; Hopeck Depo. 14:10 to 15:12]

Q. Looking at the last couple of questions and answers starting at line 169 through line 177, I think that Sergeant Culp was trying to ask you there about, you know, the human memory and

that, you know, if nothing unusual happens that's -- you know, that's significant that you usually don't remember doing a strip search on a particular arrestee but you might have a memory if something significant happened.

A. Yeah.

Q. Is that correct?

A. Correct.

2. **Appellant Turned His Head To Answer a Question, Not to Evade Removing His Clothes**

Deputy Gonzales testified that when Appellant and the Deputies first entered the cell, he had Appellant look at the camera and then he asked Appellant if he had brought in any contraband. [ER-V.4, 832-833; Gonzales Depo., 43:18 to 44:20] Consistent with this, the Composite-Video shows Appellant entering the cell with Appellant facing the back wall, then turning his head to the left and then back. [Composite-Video 5:26:10|5:26:20]

Appellees have used this single head turning as the foundation of their entire defense: i.e., that this shows that Appellant was passively resisting and creating a "safety" issue by turning his head. However, when deputy Gonzales was asked to explain what happened in the Composite-Video, Deputy Gonzales testified that Appellant may not have been passively resisting by turning his head, but instead, merely turned his head to answer his question about having any drugs. Here is the testimony:

[ER-V.4, 834-835; Gonzales Depo., 45:10 to 46:3]

Q. .... [by defense counsel] How would you describe his -- it looks like he's turning his body partially away from the

wall.· Can you describe to me from your hundreds if not thousands of searches that you've done sort of what that symbolizes or means to you?

A. Yeah. They're -- he's just basically being passive resistive at that point.· We have them face the wall for everyone's safety.· And we'll ask them questions and they're able to answer those questions. And then pushing back into us and not facing the wall, not following directions is just -- it's a sign of being uncooperative, which it looks like is going on in the video.
We also -- I mean, I understand that I'm asking him a question, so he may turn away from the wall to answer my question, but we ask them not to turn away from the wall. (Emphasis Added.)

3. **The Order of Events**

The following order of events in the cell was not just admitted, but asserted, by Appellees in support of their Motion for Summary Judgment [ER-V.2, 53-55; Plaintiff's SUF in Opposition to Defendants' MSJ, Nos. 36-47]:

a. Appellant voluntarily took off his shirt and shoes without incident;

b. Appellant next needed to remove his pants and underwear;

c. Appellant was approximately one foot away from the wall;

d. Deputy Hopeck ordered Appellant to put his hands behind his back;

e. Appellant put his hands behind his back;

f. Deputy Hopeck then grabbed and controlled Appellant's thumbs and ordered Appellant to relax his thumbs;

g. Deputy Hopeck used a control hold so that an arrestee cannot spin around if the arrestee does not comply;

h. Appellant continued to turn his body and feet towards deputies Ranum and Hopeck once his Handcuffs were removed.

At this point, however, Appellees did not explain how Appellant could have continued to "turn his body and feet towards deputies Ranum and Hopeck" if he was being held in a thumb control hold by deputy Hopeck. Continuing on with the admissions/assertions:

i. Appellant's actions by turning around in the safety cell were an indicator to the deputies that Appellant presented safety concerns and he may try to harm deputies.

Appellees then fail to explain how Appellant was supposedly turning around and presenting a safety concern when Deputy Hopeck had Appellant's thumbs in a control hold. Appellees' admissions continued with these facts:

j. Deputy Hopeck ordered Appellant a second time to relax his thumbs;

k. Deputy Ranum and Gonzales then grabbed Appellant's pant legs from underneath him and pulled him on the ground;

l. Deputy Hopeck controlled Appellant's thumbs for part of the descent and then let go.

Appellees fail to explain why Deputy Hopeck would tell Appellant to relax his thumbs if Hopeck was using Appellant's thumbs for controlling Appellant's movements to minimize a safety concern. Even more disturbing, Appellees fail to explain why Deputy Hopeck let go of Appellant's thumbs while Appellant was in the air while Deputies Gonzales and Ranum each pulled a leg out from under Appellant, causing Appellant to fall face first onto the hard floor.

4. **Deputy Hopeck's Explanation Contradicts the Appellees' Admitted Statement of Facts for Their Motion for Summary Judgment**

Deputy Hopeck gave a version of events that none of the other Deputies corroborated. In fact, his statements failed to make sense from the perspective of the time line in the cell. Furthermore, his testimony does not provide any justification for using force against Appellant. Here is, perhaps, the most salient excerpt from his testimony:

[ER-V.4, 728; Hopeck Depo., 86:5-17]

Q. Okay. So my understanding of your last answer is that the problem was he was not keeping his head against the wall and -- when he first was brought in, and consequently you –
A. He wasn't facing the wall.
Q. Wasn't facing –
A. Not his head against the wall.
Q. Wouldn't stay facing the wall.
A. Yeah.

Q. So based upon that, you put him in a control hold and then you put him to the ground and took off his clothes.
A. Yes.

VII. **The SCSD Search Policy Was Unconstitutional**

The District Court dismissed the Second Cause of Action under Monell because it had found no constitutional injury to Appellant. [ER-V.1, 15] This was clearly erroneous because as shown above, Appellant suffered a substantial constitutional injury.

A. **The Written Policy Was Acceptable**

The Second Cause of Action alleges that the SCSD failed to have policies, practices, and procedures that are constitutionally adequate to prevent the use of excessive force against inmates during strip searches. The specific details are set out in the SAC. [ER-V.5, 1095-1096, 1098; SAC ¶¶ 23-26, 34-37] In addition, the claim also alleges that the SCSD failed to adequately train, supervise, and monitor its personnel regarding the use of unnecessary or excessive force against inmates during strip searches. [ER-V.5, 1098; SAC ¶¶ 35- 37]

It is further alleged that the SCSD failed to have complementary policies and procedures that required SCSD medical personnel to report inmate allegations of the use of excessive force by correctional officers to senior SCSD staff. [ER-V.5, 1098; SAC ¶38] Additionally, the SAC alleged that the SCSD failed to train, supervise, or monitor its medical personnel regarding inmate allegations of excessive force to senior SCSD staff. [ER-V.5, 1098; SAC ¶39-40] Lastly, the SAC alleged that the SCSD allowed a failure in its chain of command such that excessive use of force incidents that caused physical injury are not communicated

to senior SCSD staff. [ER-V.5, 1099; SAC ¶41-43]

As was explained to the District Court, these policy failures led directly to the injuries suffered by Appellant.

1. **The Applicable Law**

The law was established in the landmark decision of Monell v. Department of Social Services of New York, 436 U.S. 658 (1978) ("*Monell*"). That decision held that a municipality can be held liable under 42 U.S.C. §1983 when its policy, or its custom or practices, cause the deprivation of a constitutional right. *Monell* at 690-691. However, the municipality is only liable for its own illegal acts and is not vicariously liable. *Connick v. Thompson*, 563 U.S. 51, 60 (2011). As explained in *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 802-03 (9th Cir. 2018), there are only three possible basis to hold a municipality liable:

> (1) when execution of official policies or established customs inflict a constitutional injury;
>
> (2) when omissions or failures to train amount to a local government policy of "deliberate indifference" to constitutional rights; or
>
> (3) when a local government official with final policy-making authority ratifies a subordinate's unconstitutional conduct.

In this case, the facts prove that the SCSD has a constitutionally inadequate policy regarding the use of force in strip searches and that this inadequate policy was the direct cause of Appellant's harm.

B. **The SCSD Strip Search UOF Policy is Unconstitutional**

The Written Policy provides that, although prisoners do not have the right to refuse a strip search, if the prisoner refuses, a deputy is required to employ non-force means before using force to gain compliance. Specifically, the Written Policy states that:

> After a cursory search of a refusing inmate, the inmate shall be placed in an isolation cell with the water turned off and a supervisor will be notified. Such an inmate shall not be housed, allowed access to a phone or released until a strip search is completed. [ER-V.5, 1027; Subsection II.3.k.(2)]

Appellant does not challenge the constitutional sufficiency of the Written Policy. To the contrary, Appellant asserts that had the Written Policy been implemented by the SCSD, the Deputies would never have used any force against Appellant.

Moreover, as discussed in more detail below, the SCSD admitted on the record that the SCSD had abandoned its Written Policy, and instead, adopted an unwritten policy that allows for the use of force in strip searches without first trying non-force means to gain compliance. Furthermore, the unwritten policy has no specific guidelines or criteria for deputies to follow in applying force. Appellant contends that without "objective" criteria for when deputies may use of force, the SCSD unwritten policy is unconstitutional.

1. **The Unwritten Policy**

In response to Appellant's FRCP 30(b)(6) deposition notice regarding jail strip search policies, the SCSD designated Lieutenant Orlando Mayes as its

representative. During the deposition, SCSD representative Lt. Mayes testified that the Written Policy was not the actual policy of the SCSD with regard to the use of force to conduct a strip search. [ER-V.3, 300-301, 304-305; Mayes Depo., 26:14 to 27:25; 30:17 to 31:21] In fact, he testified that the actual policy was now unwritten, and further that, depending upon the circumstances, the progression of non-force means to gain compliance (as had been required in the Written Policy) was unnecessary and officers could go directly to the use of force. [ER-V.3, 306-309, 312, 325-326; Mayes Depo., 32:5 to 33:3; 33:17 to 35:21; 38:13-20; 51:13 to 52:4] When Lt. Mayes was asked what criteria an SCSD officer need to follow in deciding whether to use force in a strip search under the unwritten policy, Lt. Mayes was unable to state any objective criteria for deputies to follow. [ER-V.3, 305-310, 324-325; Mayes Depo., 31:22 to 33:3; 33:21 to 36:11; 50:8 to 51:12]

2. **Chief Deputy Freeworth**

The deposition of SCSD Chief Deputy Jennifer Freeworth made it very clear that: (a) the Written Policy was not used by the SCSD; (b) there was no training in any strip search policy; and (c) the SCSD did not take the matter seriously.

Chief Deputy Freeworth testified that the Written Policy, like all other policies, would have been subject to the review and final approval of the Sheriff. [ER-V.3, 364-365; Freeworth Depo., 35:23 to 36:6] When asked to state some of the criteria that deputies would use to decide whether to use force, Chief Deputy Freeworth was unable to identify any specific rules or guidelines. Instead, she stated that deputies are taught to adhere to the General Order on Use of Force. However, that document does not have any specific criteria or guidelines for using force in a strip search. [ER-V.3, 372-373; Freeworth Depo., 43:7 to

44:4]

Chief Deputy Freeworth testified that she was generally familiar with the SCSD Operations Order for Prisoner Searches, but she did not have any training in the Written Policy. [ER-V.3, 351-360; Freeworth Depo. 22:16 to 24:2; 25:13 to 31:15;] Chief Deputy Freeworth next testified that she did not recall any training for herself or other deputies about the Written Policy. [ER-V.3, 370-371; Freeworth Depo., 41:13 to 42:3] Chief Deputy Freeworth further testified that she did not recall if the correctional officers under her command were trained in non-force means to gain compliance with orders, such as is required by the Written Policy. [ER-V.3, 360; Freeworth Depo., 31:16-24]

Chief Deputy Freeworth testified that she agreed that the language of the Written Policy was clear about what and how non-force means were to be employed to gain compliance with a strip search. [ER-V.3, 366-370; Freeworth Depo., 37:9 to 41:12] Chief Deputy Freeworth also testified that the Written Policy was correct in requiring that non-force means be employed before using force. [ER-V.3, 371-373; Freeworth Depo., 42:5 to 44:6]

With regard to Appellant's situation, Chief Deputy Freeworth testified that she did not think the Written Policy was applicable to his search by the Defendant deputies. [ER-V.3, 366; Freeworth Depo., 37:4-8] Chief Deputy Freeworth testified that her formal review of the IA investigation of Appellant's complaint did not list or discuss the Written Policy as one of the departmental documents used in her review that exonerated the four Defendants. Further, Chief Deputy Freeworth's testimony shows that she never analyzed the IA report using the specific procedures in the Written Policy. [ER-V.3, 379-488; Freeworth Depo., 50:13 to 59:22]

3. **Captain Buehler**

SCSD Captain Eric Buehler also confirmed that the unwritten policy allowed deputies to use force without following the Written Policy's four part directive. When asked hypothetically what force could be used if an inmate refused a strip search, Captain Buehler testified that the officers could use "whatever force necessary to overcome his resistance, yes." This included a situation where the arrestee simply says "I'm not going to take off my clothes". [ER-V.3, 425-427; Buehler Depo. 27:10 to 29:18]

When asked why the Written Policy was not followed, Captain Buehler stated " I think there are certain circumstances where that would be practical. I believe that there are certain circumstances that this is not practical." [ER-V.3, 429-430; Buehler Depo., 31:21 to 32:18.] When he was then asked if the failure to enforce the Written Policy was due to operational problems and whether that justified the use of force without first employing non-force means, Captain Buehler testified that physical limitations at the jail was one aspect, but that where deputies already had physical control, it was best for them to employ force and get the search done. [ER-V.3, 432-433; Buehler Depo., 34:23 to 35:10]

However, when Captain Buehler was asked why couldn't theDeputies have just told Appellant that he was going to stay inside the safety cell unless he complied, Captain Buehler stated "[a]nd maybe on a day when, I don't know, its practical to do so, that is certainly – it could be an option." [ER-V.3, 433-434; Buehler Depo., 35:24 to 36:13] When asked if the normal practice in situations of uncooperative behavior by detainees was to contact a supervisor to get permission to use force, Captain Buehler answered "[o]fficers are able to use force when they need to use force. They don't have to await a permission, per se,

from a supervisor." [ER-V.3, 435-436; Buehler Depo. 37:21 to 38:2] Then, referring to Appellant's purported lack of cooperation, Captain Buehler was asked "couldn't they have·just either left him in the handcuffs or just simply closed the door on him and called the supervisor?" Captain Buelher responded "[s]o that is a possibility ..." [ER-V.3, 436-437; Buehler Depo., 38:8 to 39:25]

C. Appellant's Expert Review of the Strip Search Use of Force Policy

Appellant's expert on the use of force, David Sweeney, reviewed the Written Policy and found that, in his opinion, it was constitutional because it followed the Graham factors. Specifically, he found that it "progresses by utilizing non-force methods in order to gain compliance" and force is only allowed if those steps are unsuccessful. [ER-V.5, 1059-1060; Sweeney Rpt., pp. 19-20] [ER-V.3, 528, 533-534, 556-558, 562, 574-578; Sweeney Depo., 25:20-25; 30:8 to 31:15; 53:13 to 55:11; 59:10-20; 71:11 to 75:22]

David Sweeney concluded that Lt. Mayes acknowledged that the SCSD had officially abandoned the Written Policy and that the actual policy of the SCSD was to allow officers to move directly to the use of force. He observed that Lt. Mayes testified the SCSD's reasons for not following the Written Policy were "that using force for the strip search would be the proper course of action, primarily due to officers being busy in the jail, overcrowding, and/or the lack of isolation cells." Further, Mr. Sweeney noted that when he was asked at his deposition to state what the criteria were for deciding whether to use force, Lt. Mayes could not name any criteria that would meet the Graham test. [ER-V.5, 1046-1047, 1059-1060; Sweeney Rpt., pp. 6-7, 20] [ER-V.3, 559-560, 574-578; Sweeney Depo. 56:1 to 57:2; 71:11 to 75:22]

D. **The Deputies Were Improperly Trained and Did Not Follow the Written Policy**

The testimony of Deputy Hopeck shows that the Written Policy for strip searches was never enforced. Further, his testimony shows that SCSD deputies are not trained to first employ non-force means to obtain compliance with a strip (or clothing collection) search. They are trained to immediately use force.

1. **Hopeck Testimony on UOF for Strip Search**

The following are excerpts from Deputy Hopeck's deposition showing that deputies operated under the unwritten, not the Written Policy. [ER-V.4, 662-663; Hopeck Depo., 20:25 to 21:16]

> Q. And that -- can I just stop you right there, because that's what I'm trying to get to. So in your training, if they turn away from the wall, are you trained to then apply a control hold?
> A. Usually we were trained to intercede some sort of way. It's not a black and white "You will go use a control hold." You know, it's our discretion, like, is this something that I can verbally, say, place my hand on his back, you know, "Hey, stop. You need to do that," or is this somebody who, you know, I can just verbally do it? Every person, you know, we read differently. They're -- it's not a black and white thing. But, yes, in training, if they refuse to stay facing the wall, we are trained to react in some sort of way. A lot of the way that we react is our discretion based off of how the arrestee is at that time.

[ER-V.4, 684-685; Hopeck Depo., 42:9 to 43:3]

Q. Okay.· What I'd like to do is get some explanation from you as to what level of failure to cooperate an arrestee has to exhibit in order for you to decide to put them on the ground. Do you understand my question?

A. I understand your question. It's very -- you know, like I said, it's not a black and white thing. We don't follow it check by check by check. Depends on the size of the guy. Depends on how high he is. Depends how uncooperative he is. Generally we will try to give them an opportunity -- place them in a control hold, you know, up against the wall, give them an opportunity to follow directions. *If they continue to not -- you know, continue to talk, continue to turn their head, turn their body, multiple different things, you know, different signs that they do, if we feel like he's not going to follow our directions, then we will, yeah, place them on the ground and have them finish the strip search*. (Emphasis added.)

2. **Hopeck Testimony on Strip Search Training**

Deputy Hopeck was asked about his training for conducting strip searches. His answers were clear and they repudiated the Written Policy and admitted that he had been trained since 2006 to proceed with the use of force as already described in the unwritten policy.

[ER-V.4, 685; Hopeck Depo., 43:4 to 43:12]

Q. Okay. Have you had any training to try some other nonforce means, like if they're not cooperating, just tell them "You're not

cooperating and you're staying in the cell without food and water until you do cooperate" and then you just leave the cell and come back later and see if they're going to be cooperative?

A. We -- not really training. And our operations order sometimes say to -- say to do that, but every situation does not dictate that.

[ER-V.4, 692-694; Hopeck Depo., 50:24 to 52:19]

Q. Do you recall when you had training on strip searches?
A. Well, that would be when I started at the Sheriff's Department booking training. That was in two thousand- -- or 2006. Yeah. Around 2006. I think it was June, in June 2006 is when I started, and I think I -- I think booking was the very first -- I think that was my first trainee assignment.
Q. And do you recall what training you had regarding strip searches?
A. I don't recall much of the training, but it's how we perform our duties now. You know, that's what we -- that's what I was taught, that's what, you know, we teach other trainees.
Q. So since 2006 to the present time there really hasn't been any change in the strip search policies, practices, how you actually do it.
[Objection by defense counsel]
Q. Well, I'm going to ask you again, has there been any change, noticeable change, in how you do strip searches since 2006 to the present time?
[Objection by defense counsel]
THE WITNESS:· Yeah, not -- not that I'm aware that there's been a major drastic change.
Q. My question to you is a simple one. You personally are doing strip searches basically the

same way you learned how to do them in 2006.

A. Yes.

Q. Okay.· Have you ever had any specific training or any memos come down or conferences or whatever where there were specific instructions from the Sheriff Department management about the use of force with stripsearches?

A. Not that -- not that I recall, any memos or anything like that, no.

3. **Hopeck Testimony On Actual SCSD Search Practices and Procedures**

Deputy Hopeck's testimony described the day-to-day policies and practices in conducting strip searches. This testimony made clear that deputies routinely go immediately to the use of force before trying meaningful non-force means.

[ER-V.4, 685; Hopeck Depo., 43:13 to 43:22]

Q. Well, have you ever done that? Have you ever, you know, told the arrestee, "Look, you're being uncooperative, and we're going to leave you in here. And when you decide to cooperate, then we'll finish the strip search.· And other -- if you don't want to cooperate, we're going to leave you in here until you do"? Have you ever done that

A. *I don't recall actually, honestly, ever digressing and leaving somebody in there. No. Usually we -- once we engage, we handle it at that time*. (Emphasis Aded.)

[ER-V.4, 688-690; Hopeck Depo., 46:21 to 48:16]

Q. Okay. My hypothetical was prior to that. You've brought them into the cell, they're facing the wall, and they say "I'm not going to take off

my clothes. I'm not going to do a strip search."· What happens?

A. Like I said, we will try and negotiate with them. You know, "Hey, you need to do this." The clothing and stuff, you know, if they don't do it -- a lot of times the clothing -- we will put them on the ground, you know, if we have to remove their clothing. But to actually perform the strip search, there's a – there's a difference between taking off the clothing and actually doing a strip search.· So we take people's clothes off all the time in property and don't perform a strip search.· The actual strip search is, you know, lifting up their genitalia, spreading their anus, all that. So –

Q. Okay. Are there occasions where the officers remove the clothing rather than the arrestee taking off the clothing and handing it to you?

A. Yes.

Q. How often does that occur?

A. I don't know. I mean, at least a couple times a week where we actually have to remove the clothing.

....

Q. Can you describe the process of how you remove the clothing when they refuse.

A. We place them on the ground on their belly –

Q. With their clothes on.

A. Correct. Yeah. And one of us usually will place them into some sort of a control hold.· And this depends on how -- how resistive they are; you know, if they're actively really -- actively combatively resisting or if they're just actively resisting or if they're passively resisting. But a normal situation, we'll place in a control hold, one officer will do one side by taking the shirt off, then he'll switch the control

hold, the other officer will do the other side, pull the shirt off. We have an officer down at the feet, controlling the feet, pulling the pants, whatever they're wearing.

[ER-V.4, 702; Hopeck Depo., 60:1-18]

Q. What I'm trying to understand, is there somewhere in this document that I'm missing that would apply if the arrestee, such as my client, said "I don't want to take my clothes off"?
A. It's not my -- I'm not aware of any separate operations order on somebody refusing to take their clothes off.· But those were evidence, so, you know, we were trying to get them off for evidence too.
Q. Okay. If an inmate refused to take their clothes off, are you allowed to use force to take them off?
A. For evidence, yes. It falls within our -- our use-of-force policy.
Q. Okay. And I believe you described earlier the process of using control holds, put them on the ground, and you described a process of removing their shirt and removing their pants; is that correct?
A. Yes.

[ER-V.4, 703-704; Hopeck Depo., 61:20 to 62:2]

Q. Okay. So -- and my example is you -- they said "I don't want to take my clothes off" and you give -- you talk to them, some verbal judo, 15, 20 seconds, 30 seconds, they still say "I refuse."· Are you then authorized under policy to use control holds and take them to the ground and remove their clothing?

A. We're authorized to use force to take the clothing, yes. (Emphasis added.)

E. There is No Policy for Medical Staff to Report Excessive Force

Lt. Mayes also testified that there is no policy requiring medical staff to report to correctional staff allegations by inmates of an excessive use of force. [ER-V.3, 287; Mayes Depo., 13:16-24] Any reporting by medical staff of suspected excessive force is entirely voluntary. [ER-V.3, 289-290; Mayes Depo., 15:16 to 16:6] Furthermore, as stated in her deposition, SCSD Correctional Health Services physician Dr. Janet Abshire said that voluntary reporting would depend not upon finding injuries, but upon whether the medical personnel thought the inmate was truthful. [ER-V.5, 964-966, 979-980; Abshire Depo., 24:22 to 26:19; 39:2 to 40:15]

Dr. Janet Abshire further testified that medical staff are only supposed to record "medical facts" and there is no policy that they should report alleged instances of excessive force to correctional staff. [ER-V.5, 958-961; Abshire Depo., 18:19 to 21:14] Dr. Abshire further testified that there is no training of medical personnel to report possible instances of excessive force. [ER-V.5, 970-973; Abshire Depo., 30:24 to 33:8]

Dr. Abshire testified that the medical staff did not report Appellant's injuries to correctional staff, even though Appellant told them how they came about. [ER-V.5, 978-979; Abshire Depo., 38:1 to 39:21]

F. SCSD Search Policy: Summary and Argument

The facts are unequivocal: the SCSD was not operating under its Written Policy at the time of Appellant's

strip search. Instead, the SCSD had substituted an unwritten policy that allowed the deputies to bypass non-force means to gain compliance and go directly to the use of force. This unwritten policy is unconstitutional because: (a) it does not require the use of non-force means first; and (b) there are no specific criteria or procedures that SCSD deputies need to follow before using force.

The unwritten policy led directly to the unnecessary use of force against Appellant. There was no discernable reason for the use of force: i.e, Appellant did not physically resist or fight with the Deputies. Nonetheless, Appellant was violently taken to the ground face first, hands behind his back, causing a concussion and other injuries.

It is clear from the testimony of Chief Deputy Freeworth that there was no meaningful training of deputies in the use of force in a strip search context. It is also clear from the testimony of Chief Deputy Freeworth, Captain Buehler, and Lt. Mayes that there was no enforcement of a constitutional policy for the use of force during strip searches.

Lastly, Defendant SCSD admitted that there was no policy requiring the Sacramento County Correctional Health Services staff to report to SCSD corrections suspected instances of unnecessary or excessive force. Such a policy is imperative so that there is a feedback system that provides checks for senior officers to use for monitoring and enforcing constitutional use of force in the strip search context.

IX. **Damages**

As shown above, Appellant sustained a concussion, facial bruising and abrasion, swelling, and a small cut and abrasion behind his right ear as a result of the unnecessary force. Appellant's jail medical records substantiate his

injuries, including his mTBI diagnosis six day stay in the infirmary.

These injuries are consistent with the admitted use of force: Deputy Hopeck held Appellant's hands behind his back and Deputies Ranum and Gonzales each pulled a leg to the rear and out from under Appellant. Appellant was unable to put his hands out in front of his head to brace the fall.

Initially, the mTBI, caused Appellant to experience vomiting, blurred vision, unequal pupil dilation, ringing in ears, depression, headaches, irritability, and sensitivity to light. These were moderate at first and, fortunately, have diminished over time. Occasional mild symptoms of headache and sensitivity to light persisting to the present time. [ER-V.2, 217-220, 223-226, 237-239; Predybaylo Depo., 81:18 to 84:23; 87:21 to 90:9; 101:13 to 103:22.] Appellant retained Dr. Marc Raphaelson, MD, a neurologist, to: (a) review his injuries and medical file to confirm the consistency of the medical records with Appellant's account of how he sustained such injuries; and (b) confirm the nature and extent of Appellant's injuries.

Dr. Raphaelson made the following findings:

(1) Mr. Predybaylo's account of his injury corresponds with jail medical records and is consistent with the evidence.

(2) Mr. Predybaylo suffered a mild traumatic brain injury (mTBI) on 7/05/2017 during his strip-search. Concussion and mTBI are terms used often interchangeably to describe the symptoms resulting from head trauma. Mr. Predybaylo's injury meets consensus criteria to be diagnosed as a concussion and as mTBI.

(3) The mTBI and concussion should have been

diagnosed immediately after the event, because Mr. Predybaylo had brief loss of consciousness. Dr. Abshire's assertion is incorrect, when she states, in her deposition at p. 66:7-12, that it was "[i]t was too early to tell."

(4) Based on history elicited on 8/21/2021, CT head was indicated within two days of the injury, according to each of three clinically validated decision trees. Mr. Predybaylo reports that he vomited on two consecutive days. This is discussed below. If Mr. Predybaylo is accurate, it would have been standard medical practice to order a CT scan of his brain.

(5) Close observation was indicated for some period of time and was performed by the medical staff.

(6) I agree with Dr. Abshire's testimony on p. 43:6-25, and on p. 67:18 to 68:21, that symptoms may persist for "sometimes weeks, months, or years." Mr. Predybaylo suffers from ongoing headaches and sleep disturbances as a result of the mTBI on 7/05/2017. Symptoms are improving slowly and are likely to persist for some time.

[ER-V.5, 1073-1074; Raphaelson Rpt., pp.1-2] [ER-V.4, 604-637; Raphaelson Depo., 21:14 to 54:12] In addition to his physical injuries, Appellant was emotionally and psychologically injured, including experiencing helplessness, anxiety, humiliation, and the loss of a sense of security and dignity. [ER-V.2, 220-222, 268-269; Predybaylo Depo., 84:24 to 86:17; 132:5 to 133:25] Appellant demanded general and punitive damages.

VIII. **Conclusion**

The District Court's finding that the use of force was de-minimus is clearly wrong as a matter of established precedent. Moreover, Appellant's significant injuries, which included a concussion, prove that the use of force was substantial.

The evidence in support of Appellant's version of events is so strong that no reasonable jury could find that any use of force was objectively reasonable. Third party witness SPD Sgt. Hall stood in the doorway watching the entire search and stated that Appellant "cooperated in a relatively normal manner with the strip search" and that he did not remember Appellant "being angry or fighting or uncooperative or resisting." This was after he also testified that Appellant had been fully cooperative during the booking process.

Assuming, arguendo, that Appellant was slightly uncooperative by turning his head away from the cell wall more than once, that would not justify lifting Appellant into the air and dumping him head first onto the cell floor. Appellant could have been seriously injured, even killed. From any perspective, the Deputies' use of force was grossly excessive.

The unnecessary and excessive force used by the Deputies was the obvious result of the SCSD failure to have a constitutional policy. The unwritten policy has no practical limitations on the use of force. There is no proper training and no real supervision. Strip searches are conducted with whatever amount of force deputies want to use. The unwritten policy is clearly unconstitutional. Moreover, a reasonable jury would find that the unwritten policy was the cause of Appellant's injury.

Based upon the evidence submitted by Appellant, the decision of the District Court should be set aside in its entirety and judgment entered in favor of Appellant on both counts of the SAC. At a minimum, however, any factual questions that this Court feels have not been proven by a preponderance of the evidence should be left for a jury to decide.

Respectfully Submitted,

/s/ Patrick H. Dwyer
Patrick H. Dwyer, counsel for Appellant

C.A. Case No. 22-15972

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Alexsey Predybaylo, Plaintiffs – Appellants

vs.

Sacramento County, et al., Defendants – Appellees.

Appeal From the United States District Court,
Eastern District Of California,
The Honorable Morrison C. England
Civil Case No. 2:19-CV-01243-MCE-CKD

APPELLANTS' REPLY BRIEF

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February 22, 2023

REBUTTAL ARGUMENTS

I. Introduction

By the Deputies' own admissions, Mr. Predybaylo never presented cause for the use of force. When he first entered the holding cell, the Composite Video[1] shows that Predybaylo turned to his left to answer a question by Deputy Gonzales, and then turned back to face the wall (5:26:18). The Deputies further admitted that he next took off his shirt, shoes, and socks and put his hands behind his back as instructed. None of the deputies remember Predybaylo physically resisting and this was corroborated by Sgt. Hall of the SPD, who stood quietly at the cell door watching. The Composite Video shows a bag of clothes being handed out to Sgt. Hall at 5:28:52, and the search ending with Sgt. Hall leaving with this same bag of clothes at 5:30:05. If Appellant resisted, why did it only take 2:34 minutes to collect and hand his clothes to Sgt. Hall?

The Deputies attempt to argue that Predybaylo, after being cooperative up to the point where he put his hands behind his back as ordered by Deputy Hopeck, suddenly began *passively* resisting by turning his head away from the wall. They contend that this justified lifting him into the air by his thumbs (held behind his back), sweeping his legs out from under him, then dropping him head first onto the hard floor. However, with four large Deputies surrounding him, and after having been fully cooperative up to that point, there is no

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[1] Docket Entry 12 ordered the Composite Video into the record. It did not specify any particular ER reference.

credible explanation why Predybaylo would suddenly start even *passively* resisting.

Mr. Predybaylo's concussion was diagnosed by jail medical. He spent a week in the infirmary and his symptoms included vomiting, blurred vision, unequal pupil dilation, ringing in ears, depression, headaches, irritability, and sensitivity to light. These injuries prove that the force used was very substantial, not *de-minimis*.

These unconstitutional acts happened for a simple reason: the SCSD's *unwritten policy* on the use of force in a strip search permitted, indeed encouraged, deputies to forego reasonable non-force means and immediately use substantial and aggressive force, even when there was no active physical resistance to a search.

II. Appellees Mis-Characterizations of the Factual Record

A. There is No Evidence of Any Conduct by Appellant Warranting his Violent Takedown

The Deputies argue that Predybaylo's turning of his head away from the wall to ask a question created a legitimate government interest in using force to complete the strip search. AB at 12. The facts prove the opposite.

The Composite Video shows that when Predybaylo turned his head to answer Officer Gonzales' question about having any contraband, Appellant gave his answer (no) and then turned his

head back to the wall as instructed. Deputy Gonzales confirmed this fact. [ER-V.4, 832-833; Gonzales Depo., 43:18 to 44:20] Obviously, *no use of force was necessary* because of Appellant's head turn.

Next, when Mr. Predybaylo obeyed the orders to remove his shirt, shoes, and socks, he would have had to turn his head away from the wall to do these things. However, the Deputies admitted that Predybaylo was fully cooperative and removed these articles as directed. [ER-V.2, 53-55; Plaintiff's SUF in Opposition to Defendants' MSJ, Nos. 36-47] Furthermore, the Deputies *admitted* that Predybaylo never *actively* resisted. [ER-V.2, 20-21; Defendants' Response to Plaintiff's SUF in Opposition to Plaintiff's MSJ, Nos. 7-8].

Without logical explanation and in contradiction to the admission about Mr. Predybaylo voluntarily taking off his shirt, shoes, and socks, the Deputies inexplicably allege that he kept turning his head away from the wall, thereby creating a "safety concern". None of the Deputies could explain this contradiction. Sgt. Hall testified that he did not observe Predybaylo fight or be uncooperative with the Deputies and that he "cooperated in a relatively normal manner with the strip search". OB at 37. Officer Wilson testified that he did not have any memory of the incident because there was no significant event during the search. OB at 41. Deputy Ranum testified that Predybaylo would not have been let out of the safety cell within such a short time if Appellant had been "fighting us or was uncooperative in some way...". OB at 41-43. Deputy Gonzales corroborated Deputy Ranum's testimony

that Mr. Predybaylo did not physically resist and, in fact, was cooperative. OB at 43-44. Deputy Hopeck, when questioned about what exactly Predybaylo did (and when) to justify taking him to the ground, had no memory of anything significant being done by Predybaylo. OB at 44. Morever, Deputy Hopeck's testimony contradicted the testimony of the other deputies, including their admission that Predybaylo had taken off his shirt, shoes, and socks as ordered. OB at 48-49.

Most importantly, Mr. Predybaylo expressly testified that *he never resisted and obeyed every command,* including the command to face the wall. [ER-V.2, 21; Defendants' Response to Plaintiff's SUF in Opposition to Plaintiff's MSJ, No. 8] Simply put: there has never been *any justification for the use of any force*.

Appellant's overwhelming evidence *directly refutes* the District Court's finding that he did not *explicitly* dispute the Deputies' factual premise for using force: i.e., that he refused to face the wall.

B. Appellant's Injuries Were Substantial

The Deputies repeatedly misstate the evidence regarding Mr. Predybaylo's injuries in an attempt to prop-up the District court's clearly erroneous finding that the amount of force used against him was *de- minimis*. The jail medical records are clear: Predybaylo sustained a concussion, facial bruising and abrasion, swelling, and a small cut and abrasion behind his right ear. Mr. Predybaylo experienced vomiting, blurred vision, unequal pupil dilation, ringing in ears, depression,

headaches, irritability, and sensitivity to light. Fortunately, these diminished with time, but he has continued to experience occasional mild headaches and sensitivity to light to the present time. OB at 68-71.

The Deputies have not provided any contrary medical evidence to show that Predybaylo's injuries were insignificant or that the force used to inflict the injuries was *de-minimis*.

C. The Type and Amount of Force Was Substantial

The Deputies repeatedly suggest that they were gentle with Mr. Predybaylo. This is false on its face. For example, the Deputies falsely and repeatedly assert throughout the AB that Predybaylo was dropped onto a "padded" floor. See e.g., AB at 8-9. To the contrary, however, Appellees's AB cited no evidence in the appellate record that the floor was padded. The Composite Video proves that the cell floor was not "padded", but merely painted. The drain in the middle of the floor has no offset from any "padding" and the floor paint shows significant wear, revealing the concrete underneath. If the floor was "padded" in any meaningful regard, one would see the deputies' feet depress into the floor and then rebound when the foot was lifted. The Composite Video proves that it was a typical hard jail cell floor.

Next, the Deputies imply throughout their AB that the amount of force generated by Predybaylo's head-first fall was insignificant. It is common experience, which this Court should judicially notice,

that hitting one's head on hard surface, from even a few inches, is quite painful and dangerous. We have all learned about concussions in the last 20+ years and it is common knowledge that any force directed at the head is to be avoided. The Deputies, however, imply that dropping Mr. Predybaylo onto his head was simply routine and nothing to be concerned about.

The jail medical record tells the truth: that being intentionally dropped onto one's head is *very serious*. The medical evidence in this case is uncontroverted and proves beyond any doubt that the Deputies' use of force against Predybaylo was substantial and very dangerous. OB at 68-71. Mr. Predybaylo could have had a brain bleed, stroke, swelling on the brain, and other life threatening injuries. The Deputies were quite lucky that Mr. Predybaylo was not more seriously injured.

D. The Use of Force Was Purposeful and Intentional, Not Accidental

The Deputies repeatedly make unsupported factual assertions and seriously mis-characterize the evidence about what happened. For example, at AB 12-13 they make the false, *unsupported assertion* that: "Plaintiff's own testimony indicates that the contact was inadvertent and not the result of an intentional blow. One deputy lost his grip while the other two deputies each grabbed one of Plaintiff's pantlegs."

The Deputies did same thing again in the AB at 20, by stating, without evidentiary citation: "[t]he deputies may have been negligent in executing the

strip search, but did not violate Plaintiff's constitutional rights with a purposeful application of force to harm him." This is an attempt, made for the first time on appeal and unsupported by the evidence, to frame the Deputies' use of force against Predybaylo as a merely reflexive, negligent act.

First, this is improper argument because it is not supported by citation to the ER. Second, that is not what happened and the Deputies admitted in the filing of their MSJ that their takedown of Predybaylo was *intentional and purposeful*. Indeed, the Deputies' primary argument has always been that they needed to take Mr. Predybaylo to the ground in the brutal and aggressive manner that they employed because he was being *passively* uncooperative by turning his head away from the wall.

In the Deputies' MSJ Statement of Ultimate Facts, they admitted that they *purposefully* placed Mr. Predybaylo in a control hold and then *intentionally* took him to the ground by holding Appellant's thumbs behind his back and then pulling his legs out from under him. [ER-V.2, 53-55; SUF 39-42, 46-47] These admissions prove this was no accident. Moreover, Predybaylo went through all of the evidence about how and why the takedown was made and his testimony comports with the factual evidence. See OB at 40-49.

Elsewhere in their AB, the deputies use these same facts to justify why they violently took Predybaylo to the ground, thereby completely contradicting themselves about the *purposefulness* of their actions. See AB at 7-8. The Deputies cannot

have the same "facts" simultaneously prove that they purposefully took Predybaylo to the ground because of their purported "safety concerns", while also claiming that they were merely negligent and accidently dropped Appellant.

E. Appellees Confuse the Factual Record By Falsely Describing Appellant's Behavior in the Booking Process and then Conflating that False Description With the Strip Search in the Holding Cell

Unable to show any behavior by Mr. Predybaylo in the holding cell where the strip search was conducted that justified any use of force, the Deputies move back in time to falsely allege that Predybaylo was uncooperative in the booking process. See AB at 5. Sergeant Hall was the officer that processed Mr. Predybaylo through the booking process and he stated unequivocally that he was cooperative for the whole process. Further, Appellant's expert, David Sweeney, reviewed all video footage and confirmed Sergeant Hall's testimony. See OB at 9.

The Deputies next contend in their AB at 5 that Predybaylo was shown in video footage[2]

[2] Appellees never moved any of the subject video (which is not the same as the Composite Video) into evidence, and therefore, their argument is unsupported by any evidence.

attempting to move his right arm and pull away from Deputy Hopeck. Mr. Predybaylo was asked about this video footage in his deposition. He explained that his leg was injured, his belt had been taken, and his pants were falling down. [ER-V.2, 182-183, 187-188, 251, 255-256; Predybaylo Depo., 46:21 to 47:3, 51:19 to 52:2, 115:4-11, 120:3 to 120:25] Predybaylo's testimony proves that he was being cooperative, just as Sgt. Hall testified, and there was never any "safety concern".

III. Applicable Law

A. Substantial Force Defined

This court has already found in prior decisions that the very same manner of applying force as seen in this case was a "substantial" and "aggressive" use of force. Appellant cited to and discussed *Rice v. Moorehouse*, 989 F.3d 1112 (9th Cir. 2921) ("*Rice*") in his OB at 23-24. Appellees in their AB attempted, but failed to address Appellant's citation to *Rice*. Appellants specifically cited to *Rice* because the officers used the same (or very similar) technique for subduing the person. Here is the description in *Rice* at 1121:

> Morehouse and Shaffer [two of the LEOs] executed the take-down maneuver while holding Rice in a "police lead" position; that is, they tripped Rice so that he would fall to the ground as they held his arms behind his back.

The *Rice* court then held that "assuming

Rice's version of the material facts viewed in the light most favorable to him, see *Tuuamalemalo v. Greene*, 946 F.3d 471, 478 [(9th Cir. 2019)], we agree with the district court that Morehouse and Shaffer's take-down involved a "substantial" and "aggressive use" of force." *Rice* at 1121.

Numerous other judicial decisions have held that method and levels of force similar to those used against Mr. Predybaylo were more than *de-minimis*. Here are just some of them:

Supreme Court cases:

– An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury. *Wilkins v, Gaddy*, 559 U.S. 34, 38-39, 130 S.Ct. 1175, 175 L.Ed.2d 995 (2010).

– Blows which caused bruises, swelling, loosened teeth, and a cracked dental plate, are not *de-minimis*. *Hudson v. McMillian*, 503 U.S. 1, 9–10, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

Ninth Circuit cases:

--Suspect was "slammed" face-down on the ground, then struck by the officers in the head and kneed him in the ribs. *Briceno v,. Williams* (9th Cir. May 20, 2022), 2022 WL 1599254.

– Officer used excessive force when he

punched older suspect who was passively resisting arrest, forcing suspect to the ground. *Orr v. Plumb*,884 F.3d 923 (9th Cir. 2018).

– Burns, blisters, and skin irritation that persisted for three or four days" were "moderate" injuries and not *de-minimis*. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013).

– Both pepper spray and baton blows may cause serious injury and are considered "intermediate force". *Young v. Cnty. of Los Angeles,* 655 F.3d 1156, 1158 (9th Cir. 2011).

--Officers "gang-tackled him" and took suspect to the ground, then punched him several times, supposedly to "distract" the suspect so he would momentarily relax and release his "arms out from underneath him [to allow the officer to] secure the handcuffs." *Blankenhorn v. City of Orange*, 485 F.3d 463, 478 (9th Cir. 2007).

– It was clearly established that twisting and injuring an arrestee's arm while handcuffing her and forcibly throwing her to the ground was unreasonable when she was passively resisting. *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003).

District Court Cases:

– Officers disregarded inmate medical "chrono" for spinal condition by cuffing inmate behind her back instead of in front, causing

inmate sever pain. *Caruso v. Soloria* (E.D. Cal. Dec. 7, 2017) 2017WL6055823, p. 5.

—Officer placed inmate in a chokehold and took the inmate to the ground, while another officer placed his knee on inmate's head and pulled his arms up, a third officer pushed inmate's legs up, and a fourth officer jumped on the inmate's back, causing severe pain. *Solano v. Davis,* 2014 WL 6473651, at *3, 9-10 (C.D. Cal. Nov. 17, 2014).

– The forcible removing of a ring piercing from the skin on the underside of a penis was more than de-minimis. *Alvarez v. Iniguez* (C.D. Cal. Sept. 5, 2008) 2008WL4382752, p. 6-7.

B. The Amount of Force Used Was Grossly Disproportionate

The Deputies conceded that, if Mr. Predybaylo was resisting at all, he was *passively* resisting. None of the Deputies alleged that Predybaylo was actively resisting. See OB at 10, 45-46. Even assuming, *arguendo*, that Mr. Predybaylo did turn his head away from the wall more than once, the amount of force used was *grossly disproportionate* to the his alleged head turning. As discussed in Appellant's OB at 33-34, the *Rice* Court observed that the constitutional "right to be free from the application of non-trivial force for engaging in mere passive resistance" has been established for a long time. *Rice* at 1125-1126.

IV. Sacramento County's Unconstitutional Policy, and Practices

A. The SCSD Operations Order—Prisoner Searches (k)(1)-(4)

The Deputies admit that Lt. Mayes testified under a FRCP 30(b)(6) deposition that the Written Policy[3] was the *applicable* SCSD jail search policy document. AB at 10. However, they completely ignore the further testimony of Lt. Mayes that: (1) the SCSD had abandoned its Written Policy; and (2) instead, had adopted an *unwritten policy* that allows for the use of force in strip searches without first trying non-force means to gain compliance. See OB at 52-53. Lt. Mayes further testified that under the *unwritten policy*, there were no criteria for SCSD officer to follow in deciding whether to use force in a strip search. Finally, Lt. Mayes was *unable to state in his deposition any criteria that deputies would need to follow before resorting to the UOF* to effect a search. OB at 53-54.

B. The Unwritten Policy Is Unconstitutional

The Deputies try to argue that there is no basis for a *Monell* claim because Mr. Predybaylo has not shown a custom or pattern of practice. AB at 26. The problem with this argument is that a plaintiff does not need to show a pattern of behavior (i.e., multiple events) when there is an *acknowledged*

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[3] SCSD Operations Order for Prisoner Searches. [ER-V.5, 1021-1034; P Ex. 15].

unconstitutional policy, which is the undisputed fact in this case. See *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 602-603 (9th Cir. 2019), reciting the long established law that "municipalities may be liable under § 1983 for constitutional injuries pursuant to (1) *an official policy*; (2) a pervasive practice or custom; (3) a failure to train, supervise, or discipline; or (4) a decision or act by a final policymaker." (Emphasis added.) Appellant has proven that the SCSD has an "official policy" that fails to set out any criteria for the UOF in a strip search context and that allows deputies to use force without first employing non-force means to gain compliance. The SCSD *unwritten policy* is an unconstitutional policy on its face and Appellant has met its burden of proof in this regard.

C. The Unwritten Policy Caused the Constitutional Injury

The Deputies next contend that "[t]here also must be a close causal connection between the alleged constitutional deficient policy and the resulting injury." AB at 30. This ignores the thorough analysis of the causal connection between the unwritten policy and the violation of Predybaylo's constitutional right to be free of unnecessary force presented by Mr. Predybaylo in the OB at 67-68.

The Deputies simply refused to discuss the facts proving the causal connection between the unwritten policy and the harm to Predybaylo. Instead, they try to divert the Court's attention onto the non-existent issue of proving a pattern of similar conduct.

Mr. Predybaylo established that there was no discernable reason for the use of force against him to complete the search for his clothing. The Deputeis admitted that he voluntarily removed his shirt, shoes, and socks. *But for* the unprovoked and completely unnecessary use of force to dump Mr. Predybaylo head first onto the hard floor, he would have proceeded to remove his pants and underpants and hand those to the Deputies.

Mr. Predybaylo turned his head away from the wall *once* to respond to Deputy Gonzales' question. Then he proceeded to remove his articles of clothing without incident. The Deputiues testified that Predybaylo did not *actively* resist their search, but then contradict themselves by claiming that he turned his head away from the wall again and that is why they violently took him to the ground.

The nexus between the *unwritten policy* and the harm to Mr. Predybaylo is clear: the unwritten policy permitted the deputies to use force without first employing reasonable non-force means to obtain Predybaylo's clothing. If, in fact, Predybaylo was *passively* resisting by turning his head from the wall, then the deputies were required under the Constitution to first use non-force means to obtain his compliance. The Deputies have admitted that they did not do this, but instead, immediately escalated to using aggressive force.

D. The Testimony of Mayes, Freeworth, Buehler, and Hopeck Proved that the SCSD's Unwritten Policy Had Been and Remains the Day-to-Day Operating Procedure

The Deputies utterly fail to address the testimony of the key SCSD personnel responsible for the day-today operation of the SCSD in conducting strip searches. See OB 54-59. This testimony solidly established that no one in the chain of command had any working knowledge of the Written Policy and that deputies were free under the unwritten policy to use force in conducting strip searches without any criteria for doing so. In particular, neither superior officers nor deputies were aware of the Written Policy's requirement that force should not be used to complete a search unless and until all practical non-force means had been tried.

E. The Testimony of Deputy Hopeck Proved the Failure to Train SCSD Deputies in Constitutional Procedures for Strip Searches

As laid out in the OB at 59-66, the testimony of Deputy Hopeck is very clear: he and other SCSD deputies did not follow the Written Policy and they were never trained in the procedures in the Written Policy. The Deputies try to get around this by citing to Deputy Hopeck's statement that the Written Policy only applies to body cavity searches and not to searches for a detainee's clothing. AB at 10-11.

The first problem with this excuse is that the Written Policy *nowhere divides the authorized means for conducting strip searches* into searches for body cavities and searches for clothing. Indeed, Lt. Mayes, as the designated SCSD representative testified that the Written Policy was the correct General Order for the search of Mr. Predybaylo. [ER-

V.3, 296-299; Lt. Mayes Depo., p. 22:14 to 25:23] The second problem is that Deputy Hopeck's testimony acknowledged that he had only been trained in the *unwritten policy*. And, the third problem is that Deputy Hopeck's testimony made it very clear that SCSD deputies followed the *unwritten policy* and used force to obtain compliance as they saw fit, and not after having exhausted non-force means to gain compliance. OB at 59-61, 63-66.

V. Clearly Established Law Precludes Qualified Immunity

To decide if qualified immunity should be granted in a given case, the court must determine: (1) whether a public official has violated a plaintiff's Constitutionally protected right; and (2) whether the particular right that the official has violated was clearly established at the time of the violation. *Kirkpatrick v. Cty. of Washoe*, 843 F.3d 784, 788 (9th Cir. 2016) (*en banc*).

A. There Was a Constitutional Violation

As set forth in the OB and in this Reply Brief, Appellant has firmly established that his constitutional right to be free of excessive force was violated. As discussed in Section I.C, above, the use of force was anything but *de-minimis*, and the mere turning of Predybaylo's head away from the cell wall to ask a question hardly presented any significant "safety concern" for the four large Deputies who surrounded him. In fact, the Deputies admitted that Mr. Predybaylo voluntarily took off his shoes, shirt, and socks without any problem, and further, that he voluntarily gave Deputy Hopeck his hands behind

his back, which Hopeck then proceeded to grab by the thumbs. Furthermore, the Deputies admitted that Predybaylo at most, *passively* resisted.

Evaluating the Constitutionality of police use of force during a seizure requires "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)("Graham") (quoting Garner*, 471 U.S. at 8, 105 S.Ct. 1694). Indeed, the Supreme Court has expressly ruled that the appropriate standard to evaluate a pre-trial detainee's excessive force claim is whether the use of force was objectively reasonable. *Kinsley v. Hendrickson*, 576 U.S. 389 (2015), 135 S.Ct. 2466, 192 L.Ed.2d 416.

In Mr. Predybaylo's case, the interest of the government was the collection of his clothing. There was no urgency to this task and there were a variety of *non-force options* that the Deputies could have used if Predybaylo, did in fact, resist. Indeed, laying out the non-force options for SCSD officers was the whole point of the Written Policy. The Written Policy recognized that a detainee had no practical choice but to non-violently comply with the search, and further, that if a detainee did refuse to cooperate, there were non-force means that the Deputies could use before resorting to the use of force.

Furthermore, analyzing the facts of this case under the *Graham v. Connor* totality of the circumstances test, it is unquestionable that

Appellant *never presented any imminent threat* to the Deputies for which the Deputies were entitled to use the dangerous techniques of lifting and then dropping Mr. Predybaylo head first onto the floor. Balancing the government's interest in collecting the clothing versus the lack of any *active resistance* by Predybaylo, can result in only one conclusion: the Deputies' use of any force was unnecessary and disproportionate.

B. The Appellees Were On Notice That Excessive Force In a Strip Search Was Unconstitutional

The Deputies premise their argument that they are entitled to qualified immunity on the basis that there was no clearly established law at the time of the events that put them on notice that their conduct would have violated Predybaylo's rights." AB at 31-35. The argument fails because, contrary to the this assertion: (a) the SCSD Written Policy clearly put them on notice as to what manner and amount of force could be used; (b) there is a long judicial history holding that the use of excessive force in a pre-trial detainee strip search is a constitutional violation; and (c) there is an even longer judicial history that informed the Deputies about the general contours of use of force in a Fourth Amendment context such that any reasonable officer would have understood that the Deputies' use of force against Mr. Predybaylo was objectively unreasonable.

1. Applicable Law For Qualified Immunity

"A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (*per curiam*) ("*Rivas*") (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (*per curiam*)). Indeed, it is not necessary that there has been a previous appellate decision "directly on point". However, "existing precedent must have placed the statutory or constitutional question beyond debate." *Rivas*, quoting *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548, 551, 196 L.Ed.2d 463 (2017). The inquiry depends on the specific facts of the case and their similarity to caselaw in existence at the time of the alleged violation. *Rivas* at 7.

In the Fourth Amendment excessive force context when there are *unique* factual circumstances about what method and/or amount of force are objectively reasonable for an officer to employ, the Supreme Court has stated that there must have been prior caselaw that informed the officers that their conduct would not be objectively reasonable. *Rivas* at 7-8. However, the *converse is also true*: in situations in which there are *no unique* factual circumstances as to the method and/or amount of force to be used, then general standards about the use of force in prior caselaw are sufficient to be deemed to have informed the officers on the boundaries of their actions under the Fourth Amendment. *Rivas* at 8, referring to *Graham*, 490 U.S. at 396, and *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*)).

Moreover, even in situations where there is no

caselaw on point and there is a new set of circumstances "there can be the rare 'obvious case,' where the unlawfulness of the conduct is sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, —— U.S. ——, 138 S. Ct. 577, 590, 199 L.Ed.2d 453 (2018) (citing *Brosseau*, 543 U.S. at 199, 125 S.Ct. 596); see also *Ziglar v. Abasi*, — U.S.— ,137 S. Ct. 1843, 1867, 198 L.Ed.2d 290 (2017)("[A]n officer might lose qualified immunity even if there is no reported case 'directly on point.' But 'in the light of pre-existing law,' the unlawfulness of the officer's conduct 'must be apparent' " (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).[4]

2. **Prior Caselaw Informed Appellees That Their Use of Force Was Unconstitutional**

There are numerous decisions by the Supreme Court and the Ninth Circuit Court of Appeals that long ago established that using unreasonable force in conducting a strip search of a pre-trial detainee was a violation of the Fourth Amendment. Most appellate decisions in this regard begin their analysis with *Bell v. Wolfish*, 441 U.S. 520, 558-560 (1979)("*Bell*"), where the Supreme Court analyzed whether a strip search, by itself, violated the Constitution. The Supreme Court found

[4] This Court observed that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Bonivert v. City of Clarkston*, 883 F.3d 865, 872 (9th Cir. 2018).

that when there were valid security concerns, strip searches were Constitutionally permissible. However, the Supreme Court cautioned that "on occasion a security guard may conduct the search in an abusive fashion ... [and that] such searches *must be conducted in a reasonable manner*." *Bell* at 560. In other words, there has to be a valid reason for the strip search and officers must not use excessive force in conducting it.[5]

Long before Appellant was strip searched, it was clearly established by the Supreme Court that custodial officials could not subject inmates to unjustified and excessive force. *Hudson v. McMillian,* 503 U.S. 1, 8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). Thus, as held in *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)), "[b]eing violently assaulted in prison is simply 'not part of the penalty that criminal offenders pay for their offenses against society.'" Under these Supreme Court decisions, Appellees were fully informed that they could only use such reasonable force as necessary to collect Appellant's clothing.

3. Prior Ninth Circuit Rulings on the Use of Force on Pre-Trial Detainees in a Search and Seizure Context

This Court has issued several well known decisions that informed the Appellees that the use of excessive force in conducting a search was unconstitutional. First, in *Michenfelder v. Sumner*,

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[5] This includes body cavity searches and searches to take the detainee's clothing.

860 F.2d 328, 332 (9th Cir. 1988), the Court held that the Fourth Amendment guarantees "[t]he right of the people to be secure ... against unreasonable searches" and that this right "extends to incarcerated prisoners." Next, in *Headwaters Forest Def. v. County of Humboldt*, 240 F.3d 1185, 1199 (9th Cir.2001) this Court explained that the Fourth Amendment's requirement that a seizure be reasonable prohibits more than just the unnecessary strike of a nightstick, sting of a bullet, and thud of a boot.

This decision was soon followed by *Fontana v. Haskin*, 262 F.3d 871, 879 (9th Cir. 2001), where this Court explained that a "seizure" of a pre-trial detainee under the Fourth Amendment begins with the initial arrest and continues through trial. Further, the Court again instructed officers that "[a]ssessing the Constitutionality of police action during a seizure involves "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396. Returning to its decision in *Headwaters*, this court then emphasized that "[W]here there is no need for force, *any force* used is constitutionally unreasonable." *Headwaters Forest,* 240 F.3d at 1199 (emphasis in original). Finally, in concluding its Fourth Amendment analysis, this Court made it very clear for law enforcement officers that the acceptable standard for using force in a search and seizure context is that the use of force must be limited to only that necessary and that "[g]ratuitous and completely unnecessary acts of violence by the police during a seizure violate the Fourth Amendment." referring to *McDowell v.*

Rogers, 863 F.2d 1302, 1307 (6th Cir.1988). Moreover, this Court firmly stated that "we do not believe that a serious or permanent injury is a prerequisite to a claim under Section 1983", citing to *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir.1992). *Fontana*, 262 F.3d at 880.

4. Example Prior Case Law

Another good example of the denial of qualified immunity for officers using excessive force in a strip search is explained in *Alvarez v. Iniguez* (C.D. Cal. 2008) 2008WL4382752, p. 6-7. Here, the District Court found that the tearing out of a piercing from the genitals of a pre-trial inmate during a strip search was a clear example of a situation in which a reasonable officer under similar circumstances would have recognized that the force used was unreasonable, and accordingly, that qualified immunity should not be granted. The District Court acknowledged that the circumstances were new and unique, but held that the "contours of the allegedly violated right were sufficiently clear that a reasonable officer would understand that what he [was doing] violated that right" (quoting *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir.1996)).

C. Duty to Intervene to Stop Excessive Force Was Clearly Established

With regard to Deputy Wilson, there was an unambiguous duty to intervene to stop the excessive force used by the other Deputies because the physical risk to Mr. Predybaylo was quite foreseeable. This duty was established long ago and Deputy Wilson is not entitled to qualified immunity.

Bracken v. Okura, 869 F.3d 771, 779 (9th Cir. 2017); *Lawrence v. United States*, 340 F.3d 952, 957 (9th Cir. 2003) (when an officer's affirmative conduct creates a foreseeable risk of harm to the plaintiff, the officer will be liable for failing to intercede if the officer demonstrates "deliberate indifference" to the plaintiff's plight); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000) (there is duty to intercede where there conduct on the part of an officer places the plaintiff in danger); *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir.2000); *Motley v. Parks*, 383 F.3d 1058, 1071 (9th Cir. 2004)(court denied qualified immunity to officers that failed to intervene where the use of force was excessive).

D. Qualified Immunity Summary

The Deputies have been informed by case law going all the way back to *Bell* that any strip search must be conducted in a reasonable, non-abusive manner. The subsequent cases clearly spelled out that any use of force in a strip search context must be necessary, reasonable, and proportional. In addition, the many cases in Section II.A, above, fully informed the Deputies that the dropping of a detainee on his head is a substantial and dangerous use of force.

The Deputies admitted that there was, if any, only passive resistance. They were never threatened or in danger and they knew that there was no need for using *any force* to complete the search. Finally, they knew that the excessive force applied to Mr. Predybaylo was wrongful and violated his Constitutional rights.

VI. Appellant Properly Appealed From the Decision On Cross Motions for Summary Judgement

A. This Court Has the Power to Grant or Deny Either Cross-Motion for Summary Judgment

Appellees assert that Appellant cannot appeal the denial of his motion for summary judgment and request judgment in his favor. AB at 35. This is not the law. The Court of Appeals reviews cross-motions for summary judgment *de novo*, with review of each motion separately, giving the non-moving party the benefit of all reasonable inferences. Moreover, the Court of Appeals shall grant summary judgment to either movant if the standard under FRCP 56 is met. *Center for Bio–ethical Reform, Inc., et al v. Los Angeles County, et al.*, 533 F.3d 780, 786 (9th Cir. 2008). The Court can rule with any combination of affirmation, reversal, remand, or entry of judgment for either movant. See e.g., *Comcast of Sacramento I, LLC v. Sacramento Metropolitan...*, 923 F.3d 1163 (9th Cir. 2019)(court vacated summary judgment on complaint and ordered District Court to dismiss the complaint)*; Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016)(court affirmed in part, reversed in part, and remanded); *White v. Operating Engineers Health and Welfare Trust Fund*, 185 F.3d 872 (9th Cir. 1999)(court affirmed in part, reversed in part, and remanded.

B. Appellant Properly Raised All Issues Necessary to Grant Summary Judgement for Appellant

Appellees appear to argue that Appellant failed to specifically raise the denial of his FRCP 56 motion as a ground for appeal, and thus, he has waived the right to request this Court to grant his cross-motion under FRCP 56. That is not correct.

The FRAP require an appellant to address each *issue* raised in the decision being appealed. Specifically, FRAP 28(a)(5) requires the appellant to make a statement of the issues presented for review and FRAP 28(a)(8)(A) simply requires that appellant's brief state "appellant contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."

Appellees fail to identify any specific issue that was raised in the District Court decision that was not raised and addressed in the OB. Appellant presented the four issues for appeal which go directly to the District Court's denial of Appellant's MSJ and the granting of Appellees' MSJ. OB at 8. If the District Court's findings on these issues are reversed, then this Court may enter judgment in favor of Appellant.

VII. Conclusion

Mr. Predybaylo's injury was substantial and serious, and the use of force against him was hardly *de-minimis*. The admitted facts prove that the Deputies had *no basis to use any force*: i.e.,the Deputies *admitted* that there was nothing more that *passive* resistance. Mr. Predybaylo turned his head once to answer a question, then took off his shirt, shoes, and socks as requested, and then placed his

hands behind his back as ordered. After fully complying, the Deputies held his thumbs behind his back and pulled both of his legs into the air, then dropped him onto the hard floor. There was no reasonable basis for such aggressive, dangerous force.

The SCSD *unwritten policy* is unconstitutional because: (a) it allows deputies to proceed to the use of force without first using non-force means; and (b) there are no criteria whatsoever as to when and what manner of force may be used to effect a strip search.

The testimony of senior officers Chief Deputy Freeworth, Captain Buehler, and Lt. Mayes, plus the testimony of Deputy Hopek, proved that the Written Policy was ignored in both training and operations. Under the *unwritten policy*, deputies had no restrictions on when, how, and to what amount that they used force in a stip search. This uncontroverted evidence proves that the SCSD had an unconstitutional policy that was the direct and proximate cause of Mr. Predybaylo's injuries.

The evidence proving the SCSD failure to train and supervise its deputies in the proper use of force in a strip search is uncontroverted. In addition, the evidence about the failure of the Correctional Health Services to report the use of force against Appellant to superior Main Jail Officers is also uncontested.

The decision of the District Court should be reversed and Appellant granted judgment on both counts of the Second Amended Complaint, with the

case remanded to the District Court for determination of damages.

Respectfully Submitted,

/s/ Patrick H. Dwyer
Patrick H. Dwyer, counsel for Appellant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Alexsey Predybaylo,

v.

Sacramento County, et al.,

JUDGMENT IN A CIVIL CASE

Case No: 2:19-CV-01243-MCE-CKD

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 6/17/22

Keith Holland
Clerk of Court

Entered: June 17, 2022

by: /s/ A.Coll
Deputy Clerk

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

Alexsey Predybaylo,

Plaintiff,

v.

Sacramento County, et al.,

Defendants.

No. 2:19-cv-01243-MCE-CKD

MEMORANDUM AND ORDER

Through this action, Plaintiff Alexsey Predybaylo ("Plaintiff") seeks redress from Defendants Sacramento County (the "County") and Deputies Jarrod Hopeck ("Hopeck"), Benjamin Gonzales ("Gonzales"), Robert Ranum ("Ranum"), and Jeffrey Wilson ("Wilson") (collectively with the County, "Defendants"). Plaintiff's Second Amended Complaint ("SAC"), filed November 14, 2020, alleges two causes of action: (1) Individual Liability for Violation of Plaintiff's Constitutional Rights under 42 U.S.C. § 1983 (Unlawful Use of Force) against Hopeck, Gonzales, Ranum, and Wilson; and (2) Municipal Liability for Violation of Plaintiff's Constitutional Rights (Deliberate and Callous Disregard for Repeated Acts of Excessive Force) against the County. Presently before the Court are the parties' cross-Motions for Summary Judgment, both of which have been fully briefed. ECF Nos. 53 ("Defs.' Mot."), 55, 57 ("Pl.'s Opp'n"), 58

("Defs.' Reply"), 59, 60. For the reasons set forth below, Defendants' Motion is GRANTED, and Plaintiff's Motion is DENIED as moot.[1]

BACKGROUND[2]

A. Plaintiff's Arrest and Booking at the Sacramento County Main Jail On July 5, 2017, Plaintiff was arrested by Sacramento Police Sergeant Andy Hall ("Hall") for possession of firearms and controlled substances as well as resisting arrest and was taken to the Sacramento County Main Jail ("Main Jail").[3] The booking process began with a cursory pat down and Plaintiff removing his shoelaces and belt. During this time, Hall informed Plaintiff that he needed to confiscate Plaintiff's clothes for evidence. While Hall completed the arresting paperwork, Plaintiff was examined by medical personnel. Plaintiff was taken to the medical intake screening, where he reported to

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[1] Because oral argument would not have been of material assistance, the Court ordered these matters submitted on the briefs. E.D. Local Rule 230(g).

[2] Unless otherwise indicated, the following facts are taken from Defendants' Statement of Undisputed Facts and Plaintiff's Response thereto. ECF Nos. 53-2, 57-1. Furthermore, all page citations are to the CM/ECF assigned page numbers.

[3] Plaintiff contends that Defendants' inclusion of facts surrounding his arrest are irrelevant and prejudicial in violation of the Federal Rules of Evidence. See Pl.'s Response Defs.' Statement of Undisputed Facts, ECF No. 57-1 ¶¶ 1–7. The Court only recounts what is necessary for context.

have taken Xanax and Norco and that he had scrapes along his knee from running away from Hall. See Ex. P, ECF No. 53-5, at 176–81 (medical intake form dated July 5, 2017). The medical intake form indicated that Plaintiff was detoxing from Xanax and Norco and that medical personnel should follow-up with Plaintiff once he was booked into a housing unit. Id. Plaintiff was medically cleared and was transferred into the County's custody.[4] The parties dispute whether Plaintiff was cooperative during this time and rely on a surveillance video in the booking photo area. See Ex. M, ECF No. 53-5 ("Booking Photo Video") (no audio). In the beginning of said video, Plaintiff is handcuffed and escorted by Hopeck and Ranum for his booking photo while Gonzales and Wilson operated the fingerprint machine and camera.5

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[4] Hopeck testified at his deposition that, during this same timeframe, he remembered hearing noises and yelling at the nurse's station, but he could not recall any specific threats or what was said. See Ex. B, Hopeck Dep., ECF No. 53-5, at 57. Plaintiff, however, testified that he did not remember being verbally abusive. Ex. A, Predybaylo Dep., ECF No. 53-5, at 37.

[5] According to Defendants, "[a]nytime an arrestee is handcuffed and escorted by two or more deputies for their booking photo, it indicates that the arrestee has been uncooperative." Defs.' Statement of Undisputed Facts, ECF No. 53-2 ¶ 18 (citing Ex. C, Ranum Dep., ECF No. 53-5, at 99–100; Ex. D, Gonzales Dep., ECF No. 53-5, at 124–25). In response, Plaintiff cites Hall's deposition testimony in which he testified that he did not recall Plaintiff being uncooperative; however, Hall does not appear in the Booking Photo Video. See Ex. 6, Hall Dep., ECF No. 55-4, at 344 (stating he did not see Plaintiff being uncooperative during the booking process); see generally Booking Photo Video.

Id. at 0:01–0:10. Hopeck and Ranum remain on each side of Plaintiff as photographs were taken of Plaintiff's front and side profiles. See id. at 0:10–1:27. At one point, when Plaintiff, Hopeck and Ranum's backs are facing the surveillance camera, the Booking Photo Video shows Plaintiff moving his right arm. Id. at 1:28–1:36. According to Defendants, Plaintiff attempted multiple times to move his right arm and pull away from Hopeck at his side, and that Ranum grabbed Plaintiff's left elbow because Plaintiff was continuing to move around during the photo including jerking his body and shoulder downwards.[6] See Ex. C, Ranum Dep., ECF No. 53-5, at 100–01; Ex. D, Gonzales Dep., ECF No. 53-5, at 126. On the other hand, Plaintiff counters that he did not move his elbow or shift his weight in any manner that was uncooperative or assaultive, only that he shifted his weight for a moment because his leg hurt. See Ex. A, Predybaylo Dep., ECF No. 53-5, at 21–22, 47–48. The surveillance video ends with Hopeck and Ranum escorting Plaintiff out of the booking photo area. Booking Photo Video at 1:37–1:41.

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[6] When Plaintiff attempted to move his right arm and pull away from Hopeck, Defendants claim that "Gonzales, Ranum, and Hopeck were aware and believed that Plaintiff was passively resisting, while in handcuffs, throughout the booking process, and these are early indicators for deputies that an arrestee can become violent." Defs.' Statement of Undisputed Facts, ECF No. 53-2 ¶ 23 (citing Ex. B, Hopeck Dep., ECF No. 53-5, at 71–72, 76; Ex. C, Ranum Dep., ECF No. 53-5, at 104; Ex. D, Gonzales Dep., ECF No. 53-5, at 129, 130).

B. Plaintiff's Strip Search Inside the Main Jail Safety Cell

Main Jail policy requires deputies to strip search arrestees when they are brought in for drug possession, gun charges, or violence charges.[7] After taking his booking photos, Plaintiff, who remained in handcuffs, was taken to Safety Cell #2 for a strip search by Hopeck, Ranum, Gonzales, and Wilson.[8] See Ex. F, Hall Dep., ECF No. 53-5, at 151 (stating Hall was also present during the strip search). There is a surveillance video from inside Safety Cell #2. Ex. O, ECF No. 53-5 ("Safety Cell Video") (no audio). According to Defendants, the cameras inside the safety cells are covered with post-it notes because the video is shared with non-law enforcement County employees. Deputies remove the post-it note to ask the arrestee if they have drugs or weapons and afterwards, the post-it note is placed back on the camera for privacy during the strip search. With that said, the Safety Cell Video begins with Gonzales removing the post-it note from the camera. Id. at 0:00–0:01. Plaintiff then enters Safety Cell #2 with Ranum holding his left arm and Hopeck holding his right arm. Id. at 0:01–0:05. Gonzales pointed to the

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[7] Plaintiff does not dispute the reason for the strip search or challenge the need for the strip search. See Pl.'s Opp'n at 16.

[8] Once again, Defendants assert that "[s]trip searches that involve more than two deputies usually indicate the arrestee is not cooperative." Defs.' Statement of Undisputed Facts, ECF No. 53-2 ¶ 29 (citing Ex. E, Wilson Dep., ECF No. 53-5, at 143; Ex. F, Hall Dep., ECF No. 53-5, at 152–53).

camera and asked Plaintiff if he had any additional drugs hidden on his body. Id. at 0:05–0:08 (no audio); see Ex. D, Gonzales Dep., ECF No. 53-5, at 121–22. Plaintiff apparently did not answer Gonzales' question but the Safety Cell Video shows Plaintiff talking and turning around to face the deputies. Safety Cell Video at 0:05–0:09; see also Ex. B, Hopeck Dep., ECF No. 53-5, at 81 ("Well, he's – he's talking and he's turning to the left as he's like attempting to turn around towards Deputy Ranum."); Ex. C, Ranum Dep., ECF No. 53-5, at 97–98. Gonzales then replaced the post-it note over the camera. Safety Cell Video at 0:09–0:11.

As to what transpired after the camera was covered, Defendants refer to Plaintiff's deposition testimony. It is undisputed that the deputies removed Plaintiff's handcuffs, and Plaintiff then took off his shirt, socks, and shoes without incident. See Ex. A, Predybaylo Dep., ECF No. 53-5, at 26–27. Plaintiff next needed to remove his pants and underwear and at this time, he was approximately one foot away from the wall. Id. at 30. Hopeck testified that he first used verbal commands to get Plaintiff to comply with the strip search, face the wall, and remove his pants. See Ex. B, Hopeck Dep., ECF No. 53-5, at 81 ("Well, we had told him multiple times just to walk in and, you know, stop turning around, just walk forward, and it appears there in the [Safety Cell Video] that he's continuously turning to the left . . ."). Plaintiff provides the following account as to what happened next:

> And that's when Deputy Hopeck told me to put my hands behind my back, and I was confused about it. And then

> he told me – and then he – he wrapped his hands around my thumbs –wrapped his hand – I had my hands behind my back, and he told me to relax your thumbs.[9]
>
> And then once I told him, "my thumbs are relaxed," and then he yelled, "I said, relax your f'ing [sic] thumbs." And then that's when the other two officers – I believe it was Ranum and Gonzales – they pulled my pant legs out from under me.
>
> And I went head first, and I hit my head on the ground. And then Hopeck dropped his knee – dropped his knee on my temple and then had me pinned down to the ground.[10]

Ex. A, Predybaylo Dep., ECF No. 53-5, at 26–27; but see Ex. B, Hopeck Dep., ECF No. 53-5, at 56 ("[H]e was actively resisting by, you know, pulling his

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[9] Hopeck explained that a "control hold" such as the one described by Plaintiff is used to prevent an arrestee from spinning around if the arrestee does not comply. See Ex. B, Hopeck Dep., ECF No. 53- 5, at 62.

[10] According to Defendants, Safety Cell #2 has a padded floor. Pl.'s Response Defs.' Statement of Undisputed Facts, ECF No. 57-1 ¶ 26. However, Plaintiff asserts that "the floor has nominal padding that does not prevent him from receiving a concussion and other injuries." Id.

body, you know, not following directions, moving around, pulling away from our grasp, stuff like that, but not violent."); Ex. C, Ranum Dep., ECF No. 53-5, at 93 ("There wasn't any violent encounter with him. It was just him being verbally uncooperative at the beginning. . . . He kept turning around on us. So we grabbed ahold of him and assisted him to the ground and grabbed the evidence."), 94 ("We don't place people on the ground that are cooperative. . . . He turns around on us multiple times, and that is . . . directly against what we tell him to do for our safety and his safety."); Ex. D, Gonzales Dep., ECF No. 53-5, at 123–24 ("[Plaintiff's] just basically being passive resistive at that point. We have them face the wall for everyone's safety. . . . And then pushing back into us and not facing the wall, not following directions is just – it's a sign of being uncooperative, which it looks like is going on in the [Safety Cell Video]."). Hopeck initially retained control of Plaintiff's thumbs but as Plaintiff fell, Hopeck let go. Ex. A, Predybaylo Dep., ECF No. 53-5, at 32. As a result, Plaintiff was unable to put his hands out in front of him to block his fall. Plaintiff believes he "blacked out for a little bit" because he cannot remember Hopeck shifting his knee from Plaintiff's temple to back. Id. at 33.

Hopeck, Ranum, and Gonzales then removed Plaintiff's pants and underwear. It is undisputed that during this entire process, which lasted approximately four minutes, Plaintiff was not punched or kicked by any of the deputies. Gonzales eventually removed the post-it note from the surveillance camera, which captured Plaintiff lying naked and face down on the ground with Hopeck holding Plaintiff's arms and placing his right leg on

Plaintiff's upper back. See Safety Cell Video at 4:43–49. Ranum meanwhile is holding Plaintiff's legs, with Plaintiff's ankles crossed and his lower legs bent towards his head. Id. It is undisputed that Wilson never touched or was involved in any control holds on Plaintiff.[11] After the deputies left Safety Cell #2, Plaintiff put on a paper suit, was placed into a holding cell, and eventually was moved into a housing unit at the Main Jail.

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. *Celotex*, 477 U.S. at 325.

Rule 56 also allows a court to grant summary judgment on part of a claim or defense, known as partial summary judgment. See Fed. R. Civ. P. 56(a) ("A party may move for summary judgment,

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[11] What the parties dispute is whether Wilson only stood in the doorway of Safety Cell #2 or if he entered the room. See Pl.'s Response Defs.' Statement of Undisputed Facts, ECF No. 57-1 ¶ 64; see also Ex. N, ECF No. 53-5 (surveillance video of hallway outside Safety Cell #2) (only depicting Plaintiff and the deputies entering Safety Cell #2).

identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought."); see also *Allstate Ins. Co. v. Madan*, 889 F. Supp. 374, 378–79 (C.D. Cal. 1995). The standard that applies to a motion for partial summary judgment is the same as that which applies to a motion for summary judgment. See Fed. R. Civ. P. 56(a); *State of Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (applying summary judgment standard to motion for summary adjudication). In a summary judgment motion, the moving party always bears the initial responsibility of informing the court of the basis for the motion and identifying the portions in the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968).

In attempting to establish the existence or non-existence of a genuine factual dispute, the party must support its assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits[,] or declarations . . . or other materials; or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). The opposing party must demonstrate

that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251–52 (1986); *Owens v. Local No. 169, Assoc. of W. Pulp and Paper Workers*, 971 F.2d 347, 355 (9th Cir. 1992). The opposing party must also demonstrate that the dispute about a material fact "is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. In other words, the judge needs to answer the preliminary question before the evidence is left to the jury of "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Anderson*, 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 81 U.S. 442, 448 (1871)) (emphasis in original). As the Supreme Court explained, "[w]hen the moving party has carried its burden under Rule [56(a)], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Therefore, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. at 587.

In resolving a summary judgment motion, the evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. *Anderson*, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference

may be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985), aff'd, 810 F.2d 898 (9th Cir. 1987).

ANALYSIS

A. Defendants' Motion for Summary Judgment

1. First Cause of Action against Hopeck, Gonzales, Ranum, and Wilson

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law."[12] *West v. Atkins*, 487 U.S. 42, 48 (1988). "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 394 (1989) (citation omitted). "The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard." Id. (citations omitted). In this case, the parties agree that "the Fourth Amendment sets the applicable

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[12] There is no dispute that Hopeck, Gonzales, Ranum, and Wilson were acting under color of state law.

constitutional limitations for considering claims of excessive force during pretrial detention." *Lolli v. Cnty. of Orange,* 351 F.3d 410, 415 (9th Cir. 2003); see also *Pierce v. Multnomah Cnty., Or.*, 76 F.3d 1032, 1043 (9th Cir. 1996) (stating that the Fourth Amendment governs the treatment of an arrestee up until arraignment).

Excessive force claims under the Fourth Amendment are analyzed under the "objective reasonableness" standard. See *Graham*, 490 U.S. at 395; *Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003). The crucial inquiry in such cases is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397; *Blankenhorn v. City of Orange*, 485 F.3d 463, 477 (9th Cir. 2007).

Calculating the reasonableness of the force used "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." *Graham*, 490 U.S. at 396; *Blankenhorn*, 485 F.3d at 477. The court "first assess[es] the quantum of force used," then "measure[s] the governmental interests at stake by evaluating a range of factors." *Davis v. City of Las Vegas*, 478 F.3d 1048, 1054 (9th Cir. 2007). These factors include, but are not limited to, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396; see also *Young v. Cnty. of L.A.*, 655 F.3d

1156, 1163 (9th Cir. 2011) (stating that "the most important [factor] is whether the individual posed an immediate threat to officer or public safety."). "These factors, however, are not exclusive" as the court must "examine the totality of the circumstances and consider 'whatever specific factors may be appropriate in a particular case, whether or not listed in Graham.'" *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010) (quoting *Franklin v. Foxworth,* 31 F.3d 873, 876 (9th Cir. 1994)). "Because the excessive force inquiry nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom . . . summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (en banc) (internal quotation marks and citation omitted). The Court will first address whether Hopeck, Ranum, and Gonzales' use of force was objectively reasonable, then whether Wilson had a duty to intervene.

a. **Hopeck, Ranum, and Gonzales**[13]

Regarding the type and amount of force inflicted, it is undisputed that Hopeck used a control hold by grabbing Plaintiff's thumbs and Ranum and Gonzales grabbed Plaintiff's pant legs and pulled him to the ground. See Pl.'s Opp'n at 9; Pl.'s

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[13] As previously stated, Plaintiff does not object to the strip search itself, "only to the violent force used against him" during said search. See Pl.'s Opp'n at 16.

Response Defs.' Statement of Undisputed Facts, ECF No. 57-1 ¶¶ 41, 46, 53 (undisputed that Defendants did not kick or punch Plaintiff during their encounter). In the Ninth Circuit, the uses of pepper spray, batons, and police service dogs are regarded as forms of "intermediate force that, while less severe than deadly force, nonetheless present a significant intrusion upon an individual's liberty interests." *Young*, 655 F.3d at 1161 (describing pepper spray and baton blows as "forms of force capable of inflicting significant pain and causing serious injury."); see also *Smith v. City of Hemet*, 394 F.3d 689, 701–02 (9th Cir. 2005) (stating that the police department's use of force policy "classifies the use of both pepper spray and a police service dog as 'intermediate' force."). Here, the control hold, grabbing Plaintiff's pant legs, and pulling him to the ground are not, on their own, equivalent to the intermediate uses of force described above. As such, the Court finds that the force used in this case was *de minimis*.

Next, the Court must examine the governmental interest at stake, including the Graham factors. In this case, Defendants concede that, throughout their encounter, Plaintiff was never physically violent or combative. Defs.' Reply at 3. Instead, Defendants assert that, during the strip search, Plaintiff failed to comply with verbal commands to face the wall and attempted to turn his body away from the wall. Defs.' Mot. at 17, 19. Plaintiff disputes that he engaged in any threatening or uncooperative behavior; for example, Plaintiff points out that he removed his shirt, socks, and shoes without incident and that he relaxed his thumbs when ordered to do so by Hopeck. See

Pl.'s Opp'n at 10–13, 15; Ex. A, Predybaylo Dep., ECF No. 53-5, at 26–27.

Viewing the evidence in a light most favorable to Plaintiff, and taking all inferences in his favor, the Court finds that the Graham factors weigh against a finding of excessive force. Plaintiff does not explicitly dispute Defendants' contentions that Plaintiff, who was out of handcuffs, attempted to turn his body towards the deputies despite their repeated instructions to face the wall. See Pl.'s Opp'n at 10–12, 15–16. Aside from stating that he was not uncooperative or belligerent, Plaintiff has not provided any evidence contradicting Defendants' safety concerns.[14] On the other hand, Hopeck, Ranum, and Gonzales have all testified that Plaintiff's aforementioned actions led them to believe that "Plaintiff posed a potential larger threat if they released their control hold on Plaintiff" and that "Plaintiff may attempt to strike them because

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[14] Plaintiff asserts that Hall testified at his deposition that Plaintiff was cooperative and non-violent. See Pl.'s Opp'n at 11, 15 (citing Ex. 6, Hall Dep., ECF No. 55-4, at 344, 355). However, Hall stated that he did not remember "very many details from" Plaintiff's strip search, including why more than one officer was required, whether a control hold was used, or even why Plaintiff ended up on the ground. Ex. 6, Hall Dep., ECF No. 55-4, at 345, 349, 351, 355. Furthermore, Hall testified that, "if the person is not doing what they're told, that could be a reason to hold somebody and forcibly have to search them," but again he could not recall or remember whether Plaintiff resisted in such a way. Id. at 352–53, 355.

Plaintiff continued to turn around after being told to face the wall." Defs.' Mot. at 17, 19; see Ex. B, Hopeck Dep., ECF No. 53- 5, at 60 ("I don't know if he was dangerous, but he could possibly, you know, pose a threat because he kept turning around. But he wasn't saying 'I'm going to punch you,' anything like that. He just didn't want to follow directions for our safety."); Ex. C, Ranum Dep., ECF No. 53-5, at 103 ("[W]e want [Plaintiff] to face the wall for his safety and ours."); Ex. D, Gonzales Dep., ECF No. 53-5, at 123–24 ("We have them face the wall for everyone's safety. . . . And then pushing back into us and not facing the wall, not following directions is ... a sign of being uncooperative.").

Plaintiff contends that the deputies "could have accomplished the collection of Plaintiff's clothing by simply placing Plaintiff in the room by himself and asking him to take off his clothes, put them into a bag, and change into the jail uniform[.]" Pl.'s Opp'n at 14–15. In response, Defendants explain that "deputies are hesitant to leave arrestees alone in the safety cell if they are arrested for drug possession, have drugs in their anus, and the bag breaks—causing the arrestee to [overdose]." Defs.' Mot. at 17. Furthermore, because Hall needed Plaintiff's clothes for evidence, the "deputies were concerned Plaintiff could damage the evidence in the safety cell if he were left alone." Id. Even if an arrestee was entitled to dictate the manner in which officers effectuate a jail house search, which he is not, the Court finds Defendants' explanations persuasive. Finally, it is undisputed that Hopeck, Ranum, and Gonzales attempted other means before deploying the force in question, specifically by first using verbal commands to face the wall, then

the control hold, to gain Plaintiff's compliance before Plaintiff was pulled to the ground. As explained above, Plaintiff has not expressly disputed that he turned away from the wall despite instructions to do so.

In balancing the nature of the force with the governmental interests at stake, the Court concludes that, based on the undisputed evidence and viewing it in a light most favorable to Plaintiff, the force used by Hopeck, Ranum, and Gonzales was objectively reasonable under the circumstances. As such, summary judgment is GRANTED as to these three Defendants.

b. **Wilson**

It is undisputed that Wilson never touched or was involved in any control holds on Plaintiff. Pl.'s Response Defs.' Statement of Undisputed Facts, ECF No. 57-1 ¶ 64. As a result, Plaintiff's theory is that Wilson had a duty to intervene to stop the excessive force against Plaintiff since he witnessed the strip search. Pl.'s Opp'n at 19 (citing Cunningham v. Gates, 229 F.3d 1271, 1289 (9th Cir. 2000)). However, because there was no predicate constitutional injury, the failure to intervene claim fails. Accordingly, summary judgment is GRANTED as to Wilson.

2. **Second Cause of Action against the County**

Municipalities cannot be vicariously liable for the conduct of their employees under § 1983, but rather are only "responsible for their own illegal

acts." *Connick v. Thompson*, 563 U.S. 51, 60 (2011); see *Monell v. N.Y. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978) (stating a municipality may only be liable where it individually caused a constitutional violation via "execution of government's policy or custom, whether by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."). Because there is no underlying constitutional violation, Plaintiff's Monell claim is foreclosed. Accordingly, Defendants' Motion for Summary Judgment as to this claim is GRANTED.[15]

B. **Plaintiff's Motion for Summary Judgment**

Because the Court finds that Defendants are entitled to summary judgment on both causes of action, Plaintiff's Motion is DENIED as moot.

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[15] Because the Court finds no constitutional violation, it is also unnecessary to reach the derivative issue of qualified immunity.

CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment, ECF No. 53, is GRANTED whereas Plaintiff's Motion for Summary Judgment, ECF No. 55, is DENIED as moot. The Clerk of Court is directed to enter judgment in favor of Defendants and to close the case.

IT IS SO ORDERED.

Dated: June 16, 2022

s/ Morrison C. England
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CASE NO.: 2:19-CV-01243-MCE-CKD

Alexsey Predybaylo,

Plaintiff,

vs.

Sacramento County, California, et al

Defendants.

SECOND AMENDED COMPLAINT FOR VIOLATION OF UNITED STATES CONSTITUTIONAL AND CIVIL RIGHTS UNDER 42 U.S.C. §1983

I. INTRODUCTION

This is a civil rights action arising out of the use of excessive force by the Sacramento County Sheriff's Department ("SCSD") against Plaintiff Alexsey Predybaylo ("Plaintiff") that resulted in serious medical injury. Plaintiff, while undergoing a post booking strip search and with his hands held behind his back, was violently pulled to the concrete floor at the Main Jail, suffering a concussion. Medical personnel at the Main Jail failed to report the use of excessive force to senior SCSD personnel.

II.
JURISDICTION AND VENUE

1. Jurisdiction over the federal causes of action under Title 42 U.S.C. §1983 are proper in this Court under 28 U.S.C. §1331.

2. Venue is proper in this Court under 28 U.S.C. §1391(b) because all of the defendants reside, and the acts complained of occurred, within the territorial boundaries of this United States District Court.

3. Intra-district venue is proper in the Sacramento Division of this Court under Local Rule 120(d) because the acts and omissions that are the basis of this complaint occurred within Sacramento County.

III.
PARTIES

4. Plaintiff Alexsey ("Predybaylo") was a single male, age 24 at the time of the events alleged in this Complaint. As of the date of filing of this Complaint, Plaintiff is detained at the Wayne Brown Correction Facility in Nevada County, California.

5. Defendant Sacramento County, California, established and operates the Sacramento County Sheriff's Department ("SCSD") which is responsible for the staffing and operation of the Main Jail at 651 I Street, Sacramento, California ("Main Jail") and the Rio Cosumnes Correctional Center in Elk Grove, California ("RCCC Jail"). Plaintiff is informed and believes, and on that basis alleges, that the SCSD provides first response and day to day medical care to the inmates at the RCCC Jail and the Main Jail through its Correctional Health Services Division. The SCSD will employ outside medical contractors on an "as-needed" basis.

IV.
BACKGROUND ALLEGATIONS

Duties of Sacramento County and the SCSD

6. Defendants Sacramento County and the SCSD are obligated to have policies, practices, and procedures to prevent the unlawful use of force against detainees and inmates, in particular, during strip searches ("PPPs").

7. Defendants Sacramento County and the SCSD are obligated to adequately train their deputy sheriffs, correctional officers, and medical personnel in the PPPs to prevent the unlawful use of force against detainees and inmates, in particular, during strip searches.

8. Defendants Sacramento County and the SCSD are obligated to adequately supervise their deputy sheriffs, correctional officers, and medical personnel to verify the effectiveness and enforcement of the PPPs and training to prevent the unlawful use of force against detainees and inmates, in particular, during strip searches.

9. Defendants Sacramento County and the SCSD are obligated to have an adequate and effective "Chain of Command" so that when incidents involving the unlawful use of force occur, SCSD operational management learns about the incident and can take timely corrective action.

10. Defendants Sacramento County and SCSD personnel are obligated to prepare complete and truthful Incident Reports about the unlawful use of force against a detainee or inmate, in particular, during strip searches.

11. The obligations and duties set forth in paragraphs 9 to 11 will hereafter be collectively referred to as the "Supervisory Duties".

12. Defendants Sacramento County and the SCSD maintain a video surveillance system at the Jail ("VSS"). Plaintiff is informed and believes, and on that basis alleges, that the VSS was installed, in part, to verify that the PPPs are being followed, that training has been adequate, and that supervisors are monitoring the conduct of deputies and correctional officers. Plaintiff is further informed and believes, and on that basis alleges, that the VSS also provides a ready means for the SCSD to investigate and prepare Incident Reports about the unlawful use of force at the Main Jail.

The Unlawful Use of Force

13. On or about July 5, 2017, Plaintiff was taken to the Sacramento County Main Jail. There he was processed in the booking room and underwent an initial medical screening. Plaintiff was at all times compliant and cooperative.

14. After leaving the booking area, Plaintiff was no longer in handcuffs and he was escorted to the photo area. After having his picture taken, Plaintiff was then escorted to a room for a strip search. Plaintiff remembers a male officer telling him that Plaintiff's clothes would be taken as evidence and Plaintiff expected that he would have to remove his clothing and undergo a strip search. However, what happened next was completely unexpected.

15. Plaintiff was taken to a windowless room with the window in the door covered over. As he was brought into the room by the officers, Plaintiff saw one of them put something like a sticky note over a camera that was up on the wall of the room.

16. Plaintiff then recalls that there were three white male officers with him in this room and Plaintiff recalls that one of them had a shaved head. Plaintiff is now informed and believes, and on that

basis alleges, that this officer (previously designated as Doe 1) was SCSD Deputy Jarrod Hopeck. Deputy Hopeck then told Plaintiff to put his hands behind his back and relax his thumbs. Plaintiff complied and stood with his legs spread apart. Then Deputy Hopeck wrapped his hands around Plaintiff's thumbs again said "relax your thumbs". Plaintiff complied and said "I am relaxing my thumbs." Deputy Hopeck then yelled: "I fucking said relax your thumbs." Plaintiff tried to relax his thumbs even more, but Deputy Hopeck became more angry because Deputy Hopeck said that Plaintiff was not sufficiently relaxing his thumbs.

17. While Plaintiff was continuing to stand with his legs spread and hands behind his back, each of the other two officers grabbed one of Plaintiff's legs from behind. Plaintiff is now informed and believes, and on that basis alleges, that these officers (previously designated as Does 2 and 3) were SCSD Deputy Benjamin Gonzales and Deputy Robert Ranum. Deputy Gonzales and Deputy Ranum then simultaneously pulled backwards on each leg causing Plaintiff to fall face first onto the concrete floor. Plaintiff was unable to put his hands out in front to block his fall because Deputy Hopeck still had hold of Plaintiff's hands behind his back. Fortunately, Plaintiff was able to turn his head to prevent his face from striking squarely on the floor. Plaintiff hit the floor with the left side of his head. Immediately, Deputy Hopeck dropped his knee onto Plaintiff's right temple. At this time, Plaintiff lost consciousness. Plaintiff does not think that he lost consciousness for a long time, but he is uncertain and his best estimate is 10-30 seconds.

18. Plaintiff is informed and believes, and on that basis alleges, that approximately twenty seconds after Plaintiff was taken into the windowless room where he was strip searched as described in paragraphs 15-17, SCSD Deputy Jeffrey Wilson

(previously designated as Doe 4) entered the search room where he stayed until the strip search was completed.

19. When he awoke, Plaintiff was on the floor. Deputy Gonzales held Plaintiff by his legs in a hog tied fashion with ankles crossed and lower legs bent back up towards his head, while Deputy Ranum held Plaintiff's arms. Plaintiff was not resisting and he repeatedly yelled stop, but all three officers, Deputy Hopeck, Deputy Gonzales, and Deputy Ranum kept applying pressure. Plaintiff is informed and believes, and on that basis alleges, that Deputy Jeffrey Wilson participated in the use of unnecessary and wrongful force in the strip search of Plaintiff and otherwise aided and abetted Deputies Hopeck, Ranum and Gonzales with the conduct alleged in paragraph 15 to this paragraph 19.

20. Finally, Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson stopped pulling on Plaintiff and then took off his clothes. Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson, inspected Plaintiff and then told him to put his boxer shorts back on. Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson then gave Plaintiff his paper jail clothing and escorted Plaintiff back to the booking area. While in the booking area, some other inmates commented to Plaintiff that they heard him yelling and said that the officers, Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson, must have been "whopping your ass in there".

21. Although Plaintiff was in pain and somewhat disoriented from the fall to the floor, he was not allowed to stop and check his injuries until after he was placed in a cell on the 5th floor. Plaintiff was then able to observe that he had an abrasion behind his right ear and a cut on his right ear, the left side of his face was swollen and his wrists and left knee hurt. Plaintiff is informed and believes, and on that

basis alleges, that these injuries happened as the result of the excessive and unnecessary force used by Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson described in paragraphs 15-19.

22. Plaintiff then filed a kite for medical attention.

The Failure of Jail Medical Staff to Report Plaintiff's Injuries Caused by Excessive Force

23. Plaintiff was not seen by medical staff at the Main Jail until the late afternoon of July 6, 2017. Plaintiff complained of headaches and sharp head pains, abrasions on his head, sensitivity to light and sound, swelling of his right temple, dizziness, difficulty sleeping, some nausea and vomiting, and pain in his wrists and knee. The SCSD medical staff (RN Carl Hank) recorded these symptoms in the medical record, noting that Plaintiff reported that they resulted from the use of excessive force while undergoing a strip search at the Mail Jail. However, RN Carl Hank did not provide any further evaluation or care. Plaintiff is informed and believes, and on that basis alleges, that RN Carl Hank did not inform SCSD supervisory staff (either medical or jail), that Plaintiff claimed to have been injured by Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson in the booking process.

24. Plaintiff was seen again by medical at the Main Jail on or about the afternoon of July 7, 2017. Plaintiff reported the same medical problems as he had on July 6, 2017. This time, the SCSD medical staff (NP Maria Malasan) observed and noted these symptoms in more detail. In addition, NP Maria Malasan noted a significant difference in the size of Plaintiff's pupils and that his left wrist was tender. Plaintiff was then assigned to the medical unit (2E) for observation. Plaintiff is informed and believes, and on that basis alleges, that NP Maria Malasan

did not inform SCSD supervisory staff (either medical or jail), that Plaintiff claimed to have been injured by Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson in the booking process.

25. Plaintiff was kept in the observation unit for several days. His symptoms improved, but he continued to have bad headaches and pain in his wrists and knee. He was seen by a Dr. Janet Abshire on July 10, 2017 who observed a continued difference in pupil size and diagnosed Plaintiff with a concussion. Plaintiff was then given Elavil for his concussion and was told that he might not see all of the effects of the concussion until a later date. Plaintiff is informed and believes, and on that basis alleges, that Dr. Janet Abshire did not inform SCSD supervisory staff (either medical or jail), that Plaintiff claimed to have been injured by Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson in the booking process.

26. Despite having a concussion, Plaintiff was never examined by a neurologist and did not receive appropriate follow-up medical care for his concussion. In fact, Plaintiff was re-assigned to the general population on July 11, 2017, even though he continued to have headaches, trouble with sleep, occasional dizziness, and sensitivity to light and sound. Plaintiff's headaches became worse about two weeks after the July 5, 2017 incident and his pupils continued to differ in size.

FIRST CAUSE OF ACTION

Defendant SCSD Deputies Jarrod Hopeck, Benjamin Gonzales, Robert Ranum, and Jeffrey Wilson

Individual Liability for Violation of Plaintiff's Constitutional Rights Under 42 U.S.C. §1983 (Unlawful Use of Force)

27. Plaintiff hereby incorporates by reference

paragraphs 1-26, inclusive, as though set forth fully herein.

28. Defendants Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson committed acts of unprovoked and unwarranted excessive force against Plaintiff as alleged in paragraphs 15-21 in violation of his rights under the Fourth, Eighth and Fourteenth Amendments to the U.S. Constitution.

29. The foregoing conduct of Defendants Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson constituted acts and omissions under the color of state law that were the direct and proximate cause of the violation of the constitutional rights of Plaintiff.

30. As a direct and proximate result of the wrongful conduct of Defendants Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson, Plaintiff Predybaylo sustained general damages in excess of $200,000, according to proof, including, but not limited to the: (a) physical pain and suffering from the injuries to his body; and (b) severe emotional and mental distress caused by the use of excessive force and from the resulting physical injuries to his body, including feelings of helplessness, anxiety, humiliation, and the loss of a sense of security, dignity, and pride.

31. As a direct and proximate result of the foregoing conduct of Defendants Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson, Plaintiff has been forced to file this action under 42 U.S.C. §1983, and is entitled to recover his attorney's fees and costs under 42 U.S.C. §1988.

32. The foregoing acts and omissions of Defendants Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson were committed with malice that was despicable and done with callous disregard for Plaintiff's physical and mental

person. As a result, punitive damages should be awarded against Defendants Deputy Hopeck, Deputy Gonzales, Deputy Ranum, and Deputy Wilson.

SECOND CAUSE OF ACTION

Defendant Sacramento County and the SCSD Municipal Liability for Violation of Plaintiff's Constitutional Rights

(Deliberate and Callous Disregard for Repeated Acts of Excessive Force)

33. Plaintiff hereby incorporates by reference paragraphs 1-26, inclusive, as though set forth fully herein.

34. Defendant Sacramento County and the SCSD have failed to have PPPs (as alleged in paragraphs 7-11) that are adequate to prevent the use of excessive force against inmates during strip searches.

35. Defendant Sacramento County and the SCSD have failed to adequately train its personnel in the PPPs regarding the use of unnecessary or excessive force against inmates during strip searches.

36. Defendant Sacramento County and the SCSD have failed to adequately monitor and/or enforce the PPPs regarding the use of excessive force against inmates during strip searches.

37. Defendants Sacramento County and the SCSD have failed to adequately supervise its personnel regarding following the PPPs about the use of excessive force against inmates during strip searches.

38. Defendant Sacramento County and the SCSD

have failed to have PPPs that adequately require SCSD jail and medical personnel to report inmate allegations of the use of excessive force by correctional officers to senior SCSD staff.

39. Defendants Sacramento County and the SCSD have failed to adequately train its SCSD jail and medical personnel in the PPPs regarding the reporting of inmate allegations of excessive force to senior SCSD staff.

40. Defendant Sacramento County and the SCSD have failed to adequately supervise SCSD jail and medical personnel's adherence to the PPPs that require reporting allegations of excessive force against inmates to SCSD senior staff.

41. Defendant Sacramento County and the SCSD have allowed a failure in the "Chain of Command" for SCSD jail and medical personnel such that incidents involving the use of excessive force and the resulting medical injuries are not being properly transmitted so that senior SCSD staff can take timely corrective action; and/or

42. Defendant Sacramento County and the SCSD jail and medical personnel are not preparing complete and truthful reports about the use of excessive force against inmates or the resulting medical injuries.

43. Defendant Sacramento County and the SCSD personnel are failing to properly and/or adequately utilize the VSS (as alleged in paragraph 12) to prevent the use of excessive force against inmates.

44. Plaintiff is aware of other instances of deliberate and callous indifference by Defendants Sacramento County and the SCSD to the excessive use of force against inmates and/or the failure to provide adequate medical care for inmates, including *inter-alia*, *Mkrtchyan v. County of Sacramento*, et al., Case No. 2:17-CV-2366, and Estate of *Marshall*

Miles v. County of Sacramento, et al., Case No. 2:19-CV-00910. The deliberate and callous indifference experienced by Plaintiff demonstrates a continuing pattern of wrongful conduct by Defendants Sacramento County and the SCSD.

45. It was known and/or obvious to Defendants Sacramento County and the SCSD that the acts and omissions described in paragraphs 33-43 would be likely to cause serious violation of the constitutional rights of inmates.

46. The acts and omissions in paragraphs 33-43 were done under the color of state law and they were the direct and proximate cause of the violation of the constitutional rights of Plaintiff. These acts and omissions continued for at least a year prior to the institution of this action and Plaintiff is informed and believes, and on that basis alleges, that these acts and omissions continue until the present time. As a consequence, the acts and omissions of Defendant Sacramento County and the SCSD in paragraphs 33-43 constitute deliberate indifference to, and a callous disregard for, the constitutional rights of inmates in the Sacramento County Jails.

47. As a direct and proximate result of the wrongful acts and omissions of Defendant Sacramento County and the SCSD as set forth above, Plaintiff has sustained general damages in excess of $200,000, according to proof, including, but not limited to the: (a) physical pain and suffering from the injuries to his body; and (b) severe emotional and mental distress caused by the use of excessive force and from the resulting physical injuries to his body, including feelings of helplessness, anxiety, humiliation, and the loss of a sense of security, dignity, and pride.

48. As a direct and proximate result of the foregoing conduct of Defendant Sacramento County and the SCSD, Plaintiff has been forced to file this

action under 42 U.S.C. §1983, and is entitled to recover his attorney's fees and costs under 42 U.S.C. §1988.

PRAYER

Wherefore, Plaintiff prays for judgment against Defendants as follows:

1. For general, consequential, and special damages in the sum set forth in each count according to proof;

2. For punitive damages in a sum according to proof in Count 1;

3. For reasonable attorney's fees and costs pursuant to 42 U.S.C. §1988 in Counts 1 and 2;

4. For cost of suit herein incurred for all counts; and

5. For such other and further relief as the Court deems just and proper.

Dated: November 14, 2020

Respectfully,

By: /s/ Patrick H. Dwyer
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