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APPENDIX A

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

NO. 21-13994

JESSICA N. ROGERS,
As personal representative of the estate of
Jose F. Escano-Reyes and as parent and
natural guardian of Y.C., a minor child,

Plaintiff-Appellee,

versus

SHERIFF OF SANTA ROSA COUNTY, FLORIDA,
In his official and individual capacity,

Defendant-Appellant,

JOHN GADDIS,
In his official and individual capacity,

Defendant,

MICHELLE BAUMAN,
In her official and individual capacity,

Defendant.

App. 2

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 3:18-cv-00571-TKW-EMT

(Filed Mar. 20, 2023)

Before LAGOA and BRASHER, Circuit Judges, and BOULEE,* District Judge.

BOULEE, District Judge:

This case arises from the suicide of an inmate, Jose Francisco Escano-Reyes, at Florida's Santa Rosa County Jail. Jessica Rogers, the mother of Escano-Reyes' minor child, brought claims under 42 U.S.C. § 1983 against John Gaddis and Michelle Bauman, deputies employed the Santa Rosa County Sheriff's Office, alleging deliberate indifference to medical needs in violation of the Fourteenth Amendment. Rogers also sued Bob Johnson, the Sheriff of Santa Rosa County, in his official capacity under § 1983 and *Monell v. Department of Social Services*, 436 U.S. 658 (1978), asserting that the suicide-monitoring practices at the Santa Rosa County Jail violated Escano-Reyes' constitutional rights. The matter proceeded to trial.

After Rogers rested her case, the Sheriff moved for judgment as a matter of law on the grounds that the evidence failed to show that the Jail's policies, practices, or customs were deliberately indifferent to the risk of suicide. The district court denied the motion.

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* Honorable J. P. Boulee, United States District Judge for the Northern District of Georgia, sitting by designation.

After the evidence closed, the jury determined that the deputies were not liable under § 1983. More specifically, the jury found that the deputies were aware of and deliberately indifferent to the risk that Escano-Reyes would commit suicide but that their deliberate indifference did not cause his death. The jury found that the Sheriff, however, was liable under *Monell*.

Following the verdict, the Sheriff renewed his motion for judgment as a matter of law, again asserting that the evidence was insufficient to show that the Jail's policies, practices, or customs were deliberately indifferent to the risk of suicide. The Sheriff moved in the alternative to amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. Without a finding that the deputies were individually liable under § 1983, the Sheriff argued that Rogers' *Monell* claim necessarily failed and that he should be removed from the judgment as a liable party. The district court denied relief on both grounds.

Upon *de novo* review, we find sufficient evidence in the record showing that the Jail's policies constituted deliberate indifference to the risk that Escano-Reyes would commit suicide. Moreover, we have previously considered the question of whether individual liability under § 1983 is a necessary component of *Monell* liability, and in *Barnett v. MacArthur*, 956 F.3d 1291, 1301 (11th Cir. 2020), we held that it is not. In light of *Barnett*, the district court did not abuse its discretion by denying relief under Rule 59(e). With the benefit of oral argument, we affirm the district court on all grounds.

I. FACTUAL BACKGROUND

A. Escano-Reyes' Arrest and Detention

On January 3, 2016, the Okaloosa County Sheriff's Office arrested Escano-Reyes for driving without a license. Escano-Reyes, a Honduran citizen, was in the country illegally, and on January 7, 2016, he was placed in the custody of the Santa Rosa County Sheriff's Office and detained at the Santa Rosa County Jail (the "Jail") pending removal proceedings.

Escano-Reyes' mental health deteriorated while in custody, and on April 2, 2016, he informed Jail officials that he wanted to die and planned to kill himself. Medical staff at the Jail transferred Escano-Reyes to the medical unit and placed him on a suicide-watch protocol. Inmates on suicide watch are provided with a suicide-prevention garment, or "suicide smock." Suicide smocks are ordinarily stiff and unpliable but can become more flexible with time and wear. Escano-Reyes was provided with a suicide smock; however, the Jail did not evaluate the condition of the smock given to Escano-Reyes, nor did it know how old the smock was.

B. The Jail's Suicide-Watch Protocol

The Jail's suicide-watch protocol requires supervising deputies to comply with a number of the Jail's written policies. The Jail's standard operating procedure, for example, provides that suicidal inmates must be under "direct visual observation by a deputy/nurse 24 hours a day." The Florida Model Jail Standards, with which the Jail must comply, define "direct observation"

as "continuous visual observation 24 hours each day." Additionally, supervising deputies at the Jail are expected to follow General Order O-030II(D), which requires suicidal inmates who are housed in a single cell to be "under direct continuous observation with documented staggered 15-minute physical checks." Deputies must complete a close-watch form to certify that they checked on the inmate in question every fifteen minutes. Jail staff are expected to comply with the suicide-watch protocol whether the inmate is housed in the medical unit or elsewhere.

In reality, though, the Jail followed certain customs and practices for monitoring suicidal inmates that differed from these written policies. For instance, the Jail did not require deputies to continuously or directly observe a suicidal inmate to confirm his safety, nor did the Jail require deputies to physically walk to the door of an inmate's cell to look inside the window and check on him. Instead, being in the general area of the inmate such that the deputy was "available" and "capable" of performing the staggered fifteen-minute check was deemed sufficient. The Jail also considered a solely visual check to constitute an adequate physical check on the inmate's safety. More specifically, a deputy, even if seated some distance away, could comply with the Jail's customs by glimpsing some part of an inmate through the exposed portion of a cell window.

Suicidal inmates who were disruptive to the medical staff were often moved to the Admissions, Classification, and Release ("ACR") Unit. Cell one of the ACR unit, or ACR-1, was the only cell in the ACR unit with

a metal partition on which a ligature could be fastened; nonetheless, ACR-1 was used to house suicidal inmates. ACR-1 was not far from the Jail's booking desk, but the deputies who monitored the ACR unit from that desk had only an obscured view of ACR-1. The Jail covered the main windows of the ACR cells (including ACR-1) with curtains and the bottom half of the cells' smaller windows, which were positioned along the length of the door, with plastic bags.[1] In sum, curtains and bags concealed much of ACR-1's interior from outside view. That, combined with the cell's position relative to the Jail's booking desk, meant that a deputy would have to physically walk to the door of ACR-1 and look through the portion of the smaller windows left uncovered to see fully inside the cell. The Jail's booking desk and the interior of ACR-1 were recorded by video cameras and audio equipment, but the video feed inside ACR-1 was not visible from the booking desk. Instead, that video feed was displayed in a central control room where one person watched hundreds of other monitors.

C. Escano-Reyes' Suicide

On April 6, 2016, following a period of erratic behavior, Escano-Reyes—who remained on suicide watch—was moved from the medical unit to the ACR unit, where he was housed in ACR-1. On April 7, 2016, around 6:45 AM, deputies Gaddis and Bauman began their

[1] The Jail explained that the purpose of this practice was to conceal, particularly from the view of female deputies, inmates who were naked or masturbating.

shifts at the Jail. During their daily briefing that morning, Gaddis and Bauman were informed that Escano-Reyes was on suicide watch and that they were responsible for supervising him.

Video footage from inside ACR-1 shows that Escano-Reyes woke up on April 7, 2016, around 8:15 AM. Forty-five minutes later, he removed his suicide smock and tied it into a knot around the cell's metal partition. He removed the smock from the partition a few minutes later and put it on before, again, taking it off and tying the smock to the partition to create a ligature. Naked and agitated, Escano-Reyes then paced his cell while yelling in Spanish. The deputies could hear him shouting for over an hour, but because they did not speak Spanish, they could not understand what he was shouting.[2]

The close-watch form for Escano-Reyes on April 7, 2016, has fifteen entries. At trial, Gaddis admitted that he falsified the close-watch form by documenting checks—specifically, the first five entries—that he did not, in fact, perform. The next two entries indicate that a deputy checked on Escano-Reyes and that he was lying down. Five entries have a code that Escano-Reyes was "shouting," but notably, the Jail did not permit solely auditory checks. The final three entries on the close-watch form, at 9:32 AM, 9:45 AM and 10:00 AM, read "DOOR," presumably indicating that the deputies could see flashes of movement through the exposed

[2] Although the Jail recorded audio and video of ACR-1, the audio portion of the recording from April 7, 2016, is unavailable.

portion of ACR-1's window, pursuant to the Jail's policy of permitting solely visual checks. Importantly, Gaddis and Bauman remained seated at the booking desk between 9:30 AM and 10:25 AM. At no point during this period did either deputy physically walk to the door of ACR-1 to check on Escano-Reyes.

Between 9:30 AM and 10:25 AM, Escano-Reyes placed his head into the ligature created with the suicide smock at least five times. He tried to hang himself at least nine times. At 10:25 AM, Escano-Reyes was able to hang himself. His body was not discovered for twenty minutes. At 10:45 AM, a member of the Jail's janitorial staff walked by Escano-Reyes' cell, looked through the portion of the exposed window and informed the deputies that Escano-Reyes was "hanging."

II. PROCEDURAL HISTORY

Rogers filed an action in the Northern District of Florida as the personal representative of Escano-Reyes' estate and on behalf of her and Escano-Reyes' minor child. Rogers brought claims under 42 U.S.C. § 1983 and the Fourteenth Amendment for deliberate indifference to serious medical needs[3] against Gaddis and Bauman in their individual capacities and a § 1983 claim under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), against the Sheriff of Santa

[3] There is no dispute in this case that inmates on suicide watch have a serious medical need.

Rosa County in his official capacity.[4] Rogers also brought state-law claims for negligence against Gaddis and Bauman. The Sheriff moved for summary judgment, as did the deputies on the grounds of qualified immunity. The district court denied both motions.[5]

Rogers' § 1983 claim against the Sheriff (and her § 1983 and state-law claims against Gaddis and Bauman) proceeded to a jury trial. Rogers presented evidence that the Jail had the following policies: (1) permitting the covering of two of the three windows of ACR-1; (2) housing suicidal inmates in ACR-1, although the cell contained a metal partition and its interior could not be fully viewed from the Jail's booking desk; and (3) allowing deputies to perform visual checks on suicidal inmates by glimpsing the inmate through a cell window while the deputy remained seated at the booking desk.[6]

Both parties presented witnesses to provide evidence about the Jail's policies. Captain Barbara Stearns testified as the representative of the Jail. James Upchurch, a corrections professional with a forty-five-year

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[4] Because "a suit against a public official in his official capacity is considered a suit against the local government entity he represents," *Owens v. Fulton County*, 877 F.2d 947, 951 n.5 (11th Cir. 1989), we refer to "the Sheriff" and "the Jail" interchangeably in this opinion.

[5] The deputies filed an interlocutory appeal of the denial of qualified immunity, and we affirmed the district court's ruling. *See Rogers v. Santa Rosa Cnty. Sheriff's Off.*, 856 F. App'x 251, 256 (11th Cir. 2021).

[6] We refer to these three practices as "the Jail's policies."

career and the former Assistant Secretary of Institutions for the State of Florida, testified as an expert for Rogers.[7]

Stearns testified that placing a suicidal inmate in a cell with partially concealed windows impeded adequate monitoring and posed an obvious risk. Stearns conceded that the Jail followed certain practices when monitoring suicidal inmates that differed from its written policies, specifically regarding the obligation to provide direct and continuous observation of inmates on suicide watch. Stearns also explained that under the Jail's policies, a "physical" check on an inmate could occur if a deputy, even one seated some distance away, simply glimpsed some part of the inmate through a cell window.

Upchurch opined that placing a suicidal inmate in a cell with a metal partition (like the one in ACR-1) and obstructing the windows of cells used to house suicidal inmates did not show regard for human life. According to Upchurch, permitting deputies to monitor inmates from a distant seated position—rather than requiring direct, continuous observation—would have "negative consequences" for preventing inmate suicide. Similarly, Upchurch explained, allowing checks that consisted solely of momentarily seeing the inmate through a window were not only insufficient to ensure the inmate's safety but dangerous as a matter of practice.

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[7] The Sheriff did not proffer an expert witness.

After Rogers rested her case, the Sheriff moved for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure, arguing that none of the Jail's policies were unconstitutional. The district court found sufficient evidence in the record to support a jury finding that the Jail's policies were deliberately indifferent to the risk that Escano-Reyes would commit suicide, and thus the court denied the Sheriff's motion. The deputies also moved for judgment as a matter of law, and the district court likewise denied their motions. The jury returned a verdict for Rogers on the *Monell* claim and for the deputies on the individual § 1983 claims.[8]

Although the verdict as to Gaddis and Bauman is not on appeal, some of the jury's findings specific to the deputies (such as the jury's answers on the verdict form) are relevant to our analysis of the Sheriff's liability under *Monell*. We thus review those findings now.

To find Gaddis or Bauman liable under § 1983, the verdict form required the jurors to conclude that (1) Gaddis or Bauman had subjective knowledge of the risk that Escano-Reyes would commit suicide; (2) Gaddis or Bauman were deliberately indifferent to that risk; and (3) their deliberate indifference caused his suicide. Therefore, the jury had to answer "yes" to all three of these questions to find that either Gaddis or Bauman were individually liable under § 1983.

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[8] The jury found for Rogers on the state-law claims against Gaddis and Bauman and awarded her $1,762,500 in damages.

However, to reach the issue of the Sheriff's liability under *Monell*, the verdict form only required the jurors to answer "yes" to questions one and two: that Gaddis or Bauman (1) had subjective knowledge of the risk that Escano-Reyes would commit suicide and (2) were deliberately indifferent to that risk.

In the end, the jury answered "yes" to questions one and two on the verdict form. In other words, the jury found that Gaddis and Bauman had subjective knowledge of the risk that Escano-Reyes would commit suicide and that they were deliberately indifferent to that risk. However, the jury did not find that their deliberate indifference caused Escano-Reyes' death and therefore determined that Gaddis and Bauman were not liable under § 1983. But the jury made the requisite finding on the verdict form to address the Sheriff's liability under *Monell*, and as we noted, it returned a verdict for Rogers on that claim.

After trial, the Sheriff renewed his prior motion for judgment as a matter of law under Rule 50(b). In the alternative, the Sheriff sought relief under Rule 59(e), asking the district court to remove him from the judgment. Before these motions were decided, the Sheriff timely appealed to this Court.

In his Rule 50(b) motion, the Sheriff argued that Rogers failed to introduce evidence that the Jail's policies were deliberately indifferent to a known or obvious risk of suicide. The Sheriff contended that he should otherwise be removed from the judgment under Rule 59(e). According to the Sheriff, the jury's finding

that Gaddis and Bauman were not individually liable under § 1983 constituted a determination that Escano-Reyes' constitutional rights were not violated. And without a constitutional violation, the Sheriff argued, an element of *Monell* liability was missing, and the judgment should be amended to remove him as a liable party. The district court denied relief, finding "no basis . . . to set aside the verdict or the resulting judgment against the Sheriff under Rule 50(b) or Rule 59(e)." The Sheriff then amended his notice of appeal to include the denial of his post-trial motions.

III. STANDARDS OF REVIEW

A. Judgment as a Matter of Law

"A Rule 50 motion for judgment as a matter of law is reviewed *de novo*, and this Court applies the same standards employed by the district court." *Abel v. Dubberly*, 210 F.3d 1334, 1337 (11th Cir. 2000). "In deciding a motion for judgment as a matter of law, we review all the evidence, drawing all reasonable inferences in favor of the nonmoving party." *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 724 (11th Cir. 2012). However, "the nonmovant must put forth more than a mere scintilla of evidence suggesting that reasonable minds could reach differing verdicts." *Abel*, 210 F.3d at 1337. Accordingly, granting a motion under Rule 50 is only "proper when the evidence is so weighted in favor of one side that that party is entitled to succeed in his or her position as a matter of law." *Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1266 (11th Cir. 2006).

B. Amending a Judgment

"We review the denial of a Rule 59 motion for abuse of discretion." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). Importantly, "Rule 59(e) allows courts to alter judgments only where there is 'newly-discovered evidence or manifest errors of law or fact.'" *Samara v. Taylor*, 38 F.4th 141, 149 (11th Cir. 2022) (quoting *EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1349 (11th Cir. 2016)).

IV. ANALYSIS

A. The Sheriff's Motions for Judgment as a Matter of Law

The Sheriff contends that the evidence at trial failed to show that the Jail's policies constituted deliberate indifference to a known or obvious consequence of suicide. He thus claims that the district court should have granted his motions for judgment as a matter of law. Having reviewed the evidence *de novo*, we do not agree.

To succeed on a § 1983 claim under *Monell*, a plaintiff must prove, by a preponderance of the evidence, "(1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004); *see also Monell*, 436 U.S. at 694. In a jail suicide case, a § 1983 claim under the Fourteenth Amendment requires the plaintiff to show that the

defendant "displayed 'deliberate indifference' to the prisoner's taking of his own life." *Edwards v. Gilbert*, 867 F.2d 1271, 1274-75 (11th Cir. 1989). "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 410 (1997). More specifically, the deliberate indifference standard "requires a strong likelihood rather than a mere possibility that the self-infliction of harm will occur." *Popham v. City of Talladega*, 908 F.2d 1561, 1563 (11th Cir. 1990).

The record in this case contains sufficient evidence that the Jail's policies constituted deliberate indifference to Escano-Reyes' constitutional rights. The Jail knew that Escano-Reyes was suicidal. Nonetheless, the Jail's policies allowed Escano-Reyes to be placed in a cell with a metal partition on which a ligature could be tied and with the majority of its windows concealed by curtains or other coverings. And contrary to the Jail's written procedures, its custom allowed deputies to monitor Escano-Reyes by performing a solely visual check—in this case, merely seeing flashes of movement—from the booking desk rather than confirming that he was safe. While liability is inappropriate where only "the mere opportunity for suicide, without more," exists, *Tittle v. Jefferson Cnty. Comm'n*, 10 F.3d 1535, 1540 (11th Cir. 1994), the evidence in this case established far more than the mere possibility that Escano-Reyes would inflict self-harm.

We are not persuaded by the Sheriff's arguments that the circumstances were insufficient to create a known or obvious risk of suicide. The Sheriff contends, for instance, that he lacked notice of the risk that Escano-Reyes would commit suicide with the suicide smock. But the United States Supreme Court has held that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).[9] Here, the Jail's own representative conceded at trial that the practice of housing suicidal inmates in a cell with a partially concealed interior both impeded adequate monitoring and posed an obvious risk. Moreover, an official need not have knowledge of the precise risk that ultimately materializes; awareness of "an obvious, substantial risk to inmate safety" is enough. *Id.* at 843. In this case, the evidence at trial showed that the Jail's policies—placing an inmate in a cell with partially concealed windows and with a partition on which a ligature could be tied, and allowing deputies to monitor that inmate by catching momentary glimpses of him through a window—created an obvious risk of suicide.

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[9] *Farmer* concerned a claim for deliberate indifference under the Eighth Amendment. 511 U.S. at 828-29. Although Rogers' *Monell* claim arises under the Fourteenth Amendment, *Farmer* remains relevant for our analysis. *See Tittle*, 10 F.3d at 1539 (noting that "[w]hether the alleged violation is reviewed under the Eighth or Fourteenth Amendment is immaterial" because, in either posture, a plaintiff in a prisoner suicide case must show that a jail official acted with deliberate indifference).

Our task is to "determine 'whether or not reasonable jurors could have concluded as this jury did based on the evidence presented.'" *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997) (quoting *Quick v. Peoples Bank*, 993 F.2d 793, 797 (11th Cir. 1993)). We have reviewed the record *de novo*, and we conclude that Rogers presented sufficient evidence of deliberate indifference to require submitting this matter to a jury in the first instance and to support the jury's ultimate verdict. As such, the Sheriff was not entitled to judgment as a matter of law, and the district court did not err by denying his Rule 50 motions.

B. The Sheriff's Motion to Amend the Judgment

The Sheriff asserts that the jury was required to find either Gaddis or Bauman liable under § 1983 as an element of *Monell* liability. He is incorrect.

We begin by briefly explaining the Sheriff's argument. As stated previously, a plaintiff bringing a *Monell* claim must show (1) the violation of a constitutional right, (2) that a municipality had a custom or policy of deliberate indifference to that right and (3) that the custom or policy caused the violation. *McDowell*, 392 F.3d at 1289. In the Sheriff's view, the first component—a constitutional violation—requires a plaintiff to establish the same elements that form an individual § 1983 claim. That is, to show a constitutional violation for the purposes of *Monell* liability, a plaintiff must establish, as to an individual, "(1) a substantial risk of serious harm; (2) the [individual's]

deliberate indifference to that risk; and (3) causation." *Hale v. Tallapoosa County*, 50 F.3d 1579, 1582 (11th Cir. 1995). But in this case, the jury found only (1) and (2) as to Gaddis and Bauman and attributed (3), causation, to the Sheriff instead. According to the Sheriff, because the jury found that Gaddis and Bauman were not liable under § 1983, no constitutional violation occurred, and Rogers' *Monell* claim necessarily failed.

The issue before us, then, is whether individual liability under § 1983 is a necessary element of municipal liability under *Monell*. We addressed this question in *Barnett v. MacArthur*, 956 F.3d 1291 (11th Cir. 2020). In that case, a deputy arrested the plaintiff for driving under the influence and transported her to jail. *Id.* at 1295. The jail's hold policy required detaining a DUI arrestee for eight hours, even in the absence of positive test results and even if the arrestee posted bond. *Id.* Two breath samples showed no alcohol or drug content, and the plaintiff posted bond—but she was nonetheless detained for eight hours pursuant to the jail's hold policy. *Id.* at 1295-96. The plaintiff sued the arresting deputy under § 1983 and the sheriff under § 1983 and *Monell*, alleging against both the violation of her Fourth Amendment rights. *Id.* at 1293. The district court granted summary judgment to the sheriff on the *Monell* claim, and later, a jury returned a verdict in favor of the deputy. *Id.* The plaintiff appealed, and we reversed the district court's summary judgment ruling. *Id.*

On appeal, the sheriff argued that he could not be liable because "the jury verdict mean[t] that there was

no Fourth Amendment violation, and without a Fourth Amendment violation there cannot be municipal liability under *Monell*." *Id.* at 1301. We rejected this "superficially seductive" "syllogism" and reiterated our prior holding that "*Monell* . . . and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on local government." *Id.* (alteration in original) (quoting *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985)). Indeed, "municipal liability can exist if a jury finds that a constitutional injury is due to a municipal policy, custom, or practice, but also finds that no officer is individually liable for the violation." *Id.*

Such is the case here. The jury's verdict represents a finding that the Jail's policies—not the actions of the individual deputies—were the " 'moving force' [behind] the constitutional violation." *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (alteration in original) (quoting *Monell*, 436 U.S. at 694). The Sheriff conflates the elements of a § 1983 claim against an individual officer with *Monell*'s requirement of a constitutional violation. They are not one and the same. *Barnett* forecloses the Sheriff's argument, and accordingly, we find no abuse of discretion in the district court's denial of relief under Rule 59(e).[10]

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[10] The Sheriff also contends that the verdict form was incorrect because it allowed the jurors to reach the question of *Monell* liability without finding all three elements of individual § 1983 liability as to either Gaddis or Bauman. He did not, however, raise this issue while the jury was still empaneled. To the extent that the Sheriff's argument sounds in verdict inconsistency, he likely

V. CONCLUSION

We have reviewed the record in this case and found no error in the district court's denial of the Sheriff's motions for judgment as a matter of law. Likewise, the district court did not abuse its discretion by denying the Sheriff's motion to amend the judgment under Rule 59(e).

AFFIRMED.

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waived it by failing to timely assert the issue. *See Reider v. Philip Morris USA, Inc.*, 793 F.3d 1254, 1259 (11th Cir. 2015) (explaining that "[a] party must object to a verdict as inconsistent before the jury has been dismissed" and that "failure to object to an inconsistent verdict before the jury is excused forfeits the objection"). But because *Barnett* is dispositive of the relationship between individual liability under § 1983 and liability under *Monell*, we assume without deciding that the Sheriff did not waive this argument.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE
COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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May 19, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 21-13994-CC
Case Style: Jessica Rogers v. Sheriff of Santa Rosa County Florida
District Court Docket No: 3:18-cv-00571-TKW-EMT

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

General Information: 404-335-6100	Attorney Admissions: 404-335-6122
Case Administration: 404-335-6135	Capital Cases: 404-335-6200
CM/ECF Help Desk: 404-335-6125	Cases Set for Oral Argument: 404-335-6141

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 21-13994-CC

JESSICA N. ROGERS,
as personal representative of the Estate of
Jose F. Escano-Reyes and as parent and
natural guardian of Y C a minor child,

Plaintiff - Appellee,

versus

SANTA ROSA COUNTY SHERIFFS OFFICE,
WNDELL HALL,
in his official and individual capacity,
RUSSELL WRIGHT,
in his official and individual capacity,
et al.,

Defendants,

SHERIFF OF SANTA ROSA COUNTY FLORIDA,
in his Official and Individual capacity,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed May 19, 2023)

BEFORE: LAGOA and BRASHER, Circuit Judges, and BOULEE,* District Judge.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

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* Honorable J. P. Boulee, United States District Judge for the Northern District of Georgia, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JESSICA N. ROGERS, etc.,

Plaintiff,

v. **Case No. 3:18cv571-TKW-EMT**

SHERIFF BOB JOHNSON, et al.,

Defendants. /

ORDER DENYING POST-JUDGMENT MOTIONS

(Filed Dec. 16, 2021)

This case is before the Court based on the post judgment motions filed by the Sheriff (Doc. 242) and Plaintiff (Doc. 244) and the responses in opposition (Docs. 260, 273). Upon due consideration of these filings and the entire record, the Court finds no merit in either motion.

The jury in this jail suicide case returned an extremely generous verdict for Plaintiff (on behalf of her minor son) after deliberating for more than 14 hours. The jury found in favor of Plaintiff on both the federal *Monell* claim against the Sheriff and the state law claims against the deputy defendants, but it found in favor the deputies on the federal claims against them. The amount of the verdict was a bit of a surprise, but the remainder of the verdict was not.

The Court entered judgment in accordance with the verdict, *see* Doc. 239, and the Sheriff thereafter appealed the judgment against him to the Eleventh Circuit, *see* Doc. 243. The appeal is "suspended" pending disposition of the parties' post-judgment motions. *See Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 745-46 (11th Cir. 2014).

The Sheriff's motion asks the Court to set aside the judgment against him under Rule 50(b) and/or Rule 59(e). Plaintiff's motion asks the Court to enter judgment in her favor on the federal claim against one of the deputies, Deputy Gaddis, under Rule 50(b). The deputies did not file post -judgment motions, and they have not appealed (and do not plan to appeal) the judgment against them on the state law claims.

It is undisputed that the unchallenged judgment against the deputies on the state law claims is covered by the Sheriff's Risk Management Fund, and based on the discussions at a hearing last week, it is expected that the judgment against the deputies will soon be paid by the Fund. *See* Doc. 259. That payment will also satisfy the judgment against the Sheriff (because the defendants' liability is joint and several), leaving only the issue of attorney's fees under 42 U.S.C. § 1988 (and costs) to be determined.[1] That issue has been deferred

[1] At the hearing last week, the Court expressed skepticism (but an open mind) as to whether Plaintiff will be entitled to anything close to the amount of attorney's fees that her counsel suggested to the press he would seek after the verdict, but the Court has no doubt that the fee and cost award will be substantial (and quite possibly more than the amount of the judgment) because

at the parties' request until after the Sheriff's appeal is decided. *See* Docs. 241, 250.

Plaintiff's motion was somewhat surprising because a judgment against Deputy Gaddis on the federal claim against him will not change the amount of the judgment and Plaintiff's son will be made whole (and then some)[2] by the unchallenged judgment on the

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this case has already spanned 3½ years of active litigation, including extensive discovery, full summary judgment briefing, an interlocutory appeal, and a seven-day trial. That said, both sides still face substantial risks if they continue to litigate this case—for example, Plaintiff risks losing her entitlement to fees if the judgment against the Sheriff is reversed on appeal, and even if the judgment is affirmed, she risks receiving considerably less fees than she hopes if the Court has to scrutinize her counsel's billings and hourly rates; the Sheriff risks having to pay a substantial fee award that will increase by virtue of the appeal if, as is likely, the judgment is affirmed; and post-judgment interest is continuing to accrue on the judgment. Thus, it would seem to be in the parties' (and the public fisc's) collective best interests to pay the judgment and settle the fee and cost issues sooner rather than later, although that will require both sides to be more realistic and reasonable in their valuations than they have been thus far. *See* Doc. 168, at 10 (explaining six months ago that "both sides have an incentive to reasonably value the case so it can be amicably resolved rather than rolling the dice at a two-week jury trial in hopes of obtaining (or avoiding) a larger award of damages and/or fees in a judgment that likely would be subject to a costly and time-consuming appeal").

[2] Even if Plaintiff ultimately does not recover her attorney's fees from the Sheriff under § 1988, the record establishes that the net amount she will receive after her attorneys deduct their substantial contingent fees and costs will more than compensate her son for the "loss" he suffered when the biological father with whom he had minimal contact and essentially no ongoing relationship (and whose surname he did not originally share and whose family he never met until after the father's death) committed suicide

state law claims that will likely be paid soon. Thus, the motion is either an effort to further run-up attorney's fees or an attempt to set up a cross-appeal for the sole purpose of preserving Plaintiff's entitlement to attorney's fees under §1988 in the (unlikely) event that the judgment against the Sheriff is reversed on appeal.

The Court sees no need for an extensive discussion of the issues raised in the motions because the responses do a good job in explaining (and, in some respects, over-explaining) why the motions should be denied. Therefore, in the interest of judicial efficiency and a prompt ruling, the Court simply adopts the rationale in the responses as the grounds for the Court's rulings on the motions.

Specifically, with respect to the Sheriff's motion, the Court agrees with Plaintiff that the verdict against the Sheriff on the federal *Monell* claim was amply supported by the evidence and controlling case law. There is no basis for the Court to set aside the verdict or the resulting judgment against the Sheriff under Rule 50(b) or Rule 59(e).

And, with respect to Plaintiff's motion, the Court agrees with Deputy Gaddis that there was sufficient conflicting evidence on the issue of causation that, in the light most favorable to him, supports the jury's verdict on the federal claim against him. The Court has no

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after pleading guilty to a federal immigration violation before he could be sentenced and removed (for the fifth time) from the country.

authority to reweigh the evidence to conclude otherwise, nor would the Court do so even if it could.

Accordingly, for the reasons stated above, it is **ORDERED** that the parties' post judgment motions (Docs. 242, 244) are **DENIED**.

DONE and ORDERED this 16th day of December, 2021.

/s/ T. Kent Wetherell, II
T. KENT WETHERELL, II
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JESSICA N. ROGERS, etc.,

Plaintiff,

v.

SHERIFF BOB JOHNSON, et al.,

Defendants. /

Case No. 3:18cv571-TKW-EMT

VERDICT FORM

(Filed Oct. 13, 2021)

We, the Jury, unanimously return the following verdict:

Federal Claim Against Defendant Gaddis

1. Did Defendant Gaddis have subjective knowledge of the risk that Mr. Escano-Reyes would commit suicide?

YES X NO ___

If your answer to Question 1 is "NO," please proceed to Question 4. If your answer is "YES," please proceed to Question 2.

2. Was Defendant Gaddis deliberately indifferent to the risk that Mr. Escano-Reyes would commit suicide?

YES _X_ NO ___

If your answer to Question 2 is "NO," please proceed to Question 4. If your answer is "YES," please proceed to Question 3.

3. Did Defendant Gaddis' deliberate indifference cause Mr. Escano-Reyes' death?

YES ___ NO _X_

If your answer to Questions 1, 2, or 3 is "NO," your verdict is for Defendant Gaddis on the federal claim against him. If your answer to Questions 1, 2, and 3, is "YES," your verdict is for Plaintiff on this claim and you will need to determine the damages to be awarded against Defendant Gaddis. But, first, proceed to Question 4.

Federal Claim Against Defendant Bauman

4. Did Defendant Bauman have subjective knowledge of the risk that Mr. Escano-Reyes would commit suicide?

YES _X_ NO ___

If your answer to Question 4 is "NO," please proceed to Question 7. If your answer is "YES," please proceed to Question 5.

5. Was Defendant Bauman deliberately indifferent to the risk that Mr. Escano-Reyes would commit suicide?

YES _X_ NO ___

If your answer to Question 5 is "NO," please proceed to Question 7. If your answer is "YES," please proceed to Question 6.

6. Did Defendant Bauman's deliberate indifference cause Mr. Escano-Reyes' death?

YES ___ NO _X_

If your answer to Questions 4, 5, or 6 is "NO," your verdict is for Defendant Bauman on the federal claim against her. If your answer to Questions 4, 5, and 6, is "YES," your verdict is for Plaintiff on this claim and you will need to determine the damages to be awarded against Defendant Bauman.

Federal Claim Against Defendant Johnson in his Official Capacity

If your answers to Questions 1 and 2 **and/or** Questions 4 and 5 are "YES," please proceed to Question 7. Otherwise, skip Question 7 and proceed to Question 8.

7. Did the Santa Rosa County Sheriff's Office have an official policy or custom that violated Mr. Escano-Reyes' constitutional rights and was the moving force behind his death?

YES _X_ NO ___

If your answer to Questions 7 is "NO," your verdict is for Defendant Johnson on the official capacity federal claim against him. If your answer to Question 7 is "YES," your verdict is for Plaintiff on this claim and you will need to determine the damages to be awarded against him. But, first, proceed to Question 8.

State Law Claim Against Defendant Gaddis

8. Did Defendant Gaddis act in a manner exhibiting wanton and willful disregard for the life or safety of Mr. Escano-Reyes?

YES _X_ NO ___

If your answer to Question 8 is "NO," please proceed to Question 10. If your answer is "YES," please proceed to Question 9.

9. Was Defendant Gaddis' conduct a substantial factor in causing Mr. Escano-Reyes' death?

YES _X_ NO ___

If your answer to Questions 8 or 9 is "NO," your verdict is for Defendant Gaddis on the state law claim against him. If your answer to Questions 8 and 9 is "YES," your verdict is for Plaintiff on this claim and you will need to determine damages against Defendant Gaddis. But, first, proceed to Question 10.

State Law Claim Against Defendant Bauman

10. Did Defendant Bauman act in a manner exhibiting wanton and willful disregard for the life or safety of Mr. Escano-Reyes?

YES _X_ NO ___

If your answer to Question 10 is "NO," please proceed to Question 12. If your answer is "YES," please proceed to Question 11.

11. Was Defendant Bauman's conduct a substantial factor in causing Mr. Escano-Reyes' death?

YES _X_ NO ___

If your answer to Questions 10 or 11 is "NO," your verdict is for Defendant Bauman on the state law claim against her. If your answer to Questions 10 and 11 is "YES," your verdict is for Plaintiff on that claim and you will need to determine damages against Defendant Bauman.

Damages

If your verdict was for Plaintiff on any of the above claims, proceed to Question 12. If your verdict was for the Defendants on all of the claims, your deliberations are complete and you should skip the remaining questions on the verdict form and your foreperson should sign and date the form.

12. What is the total amount of damages that Mr. Escano-Reyes' son, Yandel, has sustained and will sustain in the future for lost parental consortium,

instruction, and guidance and for mental pain and suffering as a result of Mr. Escano-Reyes's death?

$1,762,500.00

Please proceed to the next set of questions.

Punitive Damages against Defendant Gaddis

If your verdict was for Plaintiff on the federal claim against Defendant Gaddis, answer Question 13. If not, proceed to Question 14 if your verdict was for Plaintiff on the state claim against Defendant Gaddis. If your verdict was for Plaintiff on both the federal and state claims against Defendant Gaddis, answer both Questions 13 and 14. If your verdict was for Defendant Gaddis on both the federal and state claims, skip Questions 13 and 14.

13. Did Defendant Gaddis act with reckless indifference to Mr. Escano-Reyes' federally protected rights such that the imposition of punitive damages is warranted?

YES ___ NO ___

14. Do you find, by clear and convincing evidence, that Defendant Gaddis is liable for intentional misconduct or gross negligence, which was a substantial cause of Mr. Escano-Reyes' death, such that the imposition of punitive damages is warranted?

YES ___ NO X

Punitive Damages against Defendant Bauman

If your verdict was for Plaintiff on the federal claim against Defendant Bauman, answer Question 15. If not, proceed to Question 16 if your verdict was for Plaintiff on the state claim against Defendant Bauman. If your verdict was for Plaintiff on both the federal and state claims against Defendant Bauman, answer both Questions 15 and 16. If your verdict was for Defendant Bauman on both the federal and state claims, your deliberations are complete and your foreperson should sign and date the verdict form.

15. Did Defendant Bauman act with reckless indifference to Mr. Escano-Reyes' federally protected rights such that the imposition of punitive damages is warranted?

YES ___ NO ___

16. Do you find, by clear and convincing evidence, that Defendant Bauman is liable for intentional misconduct or gross negligence, which was a substantial cause of Mr. Escano-Reyes' death, such that the imposition of punitive damages is warranted?

YES ___ NO _X_

SO SAY WE ALL, this 13th day of October, 2021.

[redacted]
Foreperson's Signature

APPENDIX E

U.S. Const. Amend. XIV, § 1

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

APPENDIX F

Case No.: 21-13994

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JESSICA ROGERS,

Plaintiff/Appellee

v.

SHERIFF OF SANTA ROSA COUNTY FLORIDA

Defendant/Appellant.

Appeal from the United States District Court
for the Northern District of Florida, Pensacola Division
Case No.: 3:18-cv-00571-TKW-EMT

PETITION FOR PANEL REHEARING OR FOR REHEARING EN BANC, BY DEFENDANT/APPELLANT SHERIFF

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[C1 of 2] Case No.: 21-13994

Jessica Rogers v. Sheriff of Santa Rosa County Florida

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Andrews, Crabtree, Knox & Longfellow – Counsel for Defendant/Appellant Sheriff

Andrews, Jeannette M. – Counsel for Defendant/Appellant Sheriff

Bauman (Amos), Michelle – Defendant in case below

The Brad Sohn Law Firm, PLLC – Counsel for Plaintiff/Appellee

Carothers, Alicia – Attorney for Defendants Gaddis and Bauman in case below

DeBevoise & Poulton, P.A. – Counsel for Defendant/Appellant Sheriff

Florida Sheriffs Risk Management Fund – Liability Coverage for Defendant/Appellant Sheriff

Gaddis, John – Defendant in case below

Hawkins, Jennifer, A.J. – Counsel for Defendants Gaddis and Bauman in case below

Henning Strategies – Counsel for Plaintiff/Appellee

Henning, Greg – Counsel for Plaintiff/Appellee

Johnson, Bob, Sheriff of Santa Rosa County – Defendant/Appellant

Law Office of David H. Pollack – Counsel for Plaintiff/Appellee

Longfellow, III, Joe – Counsel for Defendant/Appellant Sheriff

Pollack, David H. – Counsel for Plaintiff/Appellee

[C2 of 2] Poulton, Thomas W. – Counsel for Defendant/Appellant Sheriff

Robert L. Bronston, PLLC – Counsel for Plaintiff/Appellee

Rogers, Jessica – Plaintiff/Appellee

Santa Rosa County Sheriff's Office

The Scharf Appellate Group – Counsel for Plaintiff/Appellee

Scharf, Erik W. – Counsel for Plaintiff/Appellee

Sohn, Bradford R. – Counsel for Plaintiff/Appellee

Timothy, Honorable Elizabeth M. – U.S. Magistrate Judge in case below

Vinson, Honorable Roger – U.S. District Judge *formerly assigned case*

Warner Law Firm, P.A. – Counsel for Defendants Gaddis and Bauman in case below

Warner, Timothy M. – Counsel for Defendants Gaddis and Bauman in case below

Warner, William – Counsel for Defendants Gaddis and Bauman in case below

Wetherell, II, T. Kent – U.S. District Judge in case below

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-5, Defendant/Appellant Sheriff of Santa Rosa County Florida has no corporations to disclose.

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[i] **11th Cir. R. 35-5(c) Certification**

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

City of Los Angeles v. Heller, 475 U.S. 796 (1986)

Board of County Com'rs v. Bryan County, Okl. v. Brown, 520 U.S. 397 (1997)

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989)

Barnett v. MacArthur, 956 F.3d 1291 (11th Cir. 2020)

s/ Thomas W. Poulton

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[1] **STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION**

The panel opinion affirming *Monell* liability against the Sheriff in this case directly conflicts with the holding of the United States Supreme Court in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). In that case, the Court stated,

> **But this was an action for damages, and neither Monell** v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), **nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm.** If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.
>
> *Heller*, 475 U.S. at 799 (*emphasis added*).

In this case, the jury found in favor of the deputy defendants on the § 1983 claims against them, explicitly finding they "inflicted no constitutional harm" as in *Heller.* Because of this jury finding, *Heller* compels a judgment in favor of the Sheriff on the § 1983 claim.

The panel's reliance on its own precedent, *Barnett v. MacArthur*, 956 F.3d 1291 (11th Cir. 2020), to uphold the judgment against the Sheriff is erroneous for two reasons. First, as a basic principle of judicial

construction, to the extent *Barnett* conflicts with *Heller, Barnett* is bad law. Second, the factual backdrop of *Barnett* was substantially different than the instant matter. If *Barnett* does not conflict with [2] *Heller* it is only because it represents a unique set of circumstances not before the Supreme Court in *Heller*.

The panel opinion in this case also conflicts with the Supreme Court's frequent admonition that it is only when a policy or custom is adopted with deliberate indifference that the policy or custom can yield *Monell* liability. As the Court said in *Board of County Com'rs v. Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997):

> As our § 1983 municipal liability jurisprudence illustrates, however, it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. **That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability** and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Id., p. 404 (emphasis added).

Respectfully, the error of logic described in this passage is exactly what happened in the panel opinion in this case.

There was no official written policy at fault here; instead, the panel opinion identifies three informal customs, which evolved over time, as at fault:

"(1) permitting the covering of two of the three windows of ACR-1;

(2) housing suicidal inmates in ACR-1, although the cell contained a metal partition and its interior could not be fully viewed from the Jail's booking desk; and

[3] (3) allowing deputies to perform visual checks on suicidal inmates by glimpsing the inmate through a cell window while the deputy remained seated at the booking desk." (Slip op., p. 10, footnote omitted).

None of these customs is inherently unconstitutional. There is no evidence that any of them, standing alone or together, had contributed to a suicide before. The panel opinion does exactly what *Brown* says is incorrect: it identifies three examples of conduct traceable to the Sheriff's Office and says they created a risk of suicide, skipping the requirement that the customs have been adopted with the "requisite degree of culpability," i. e. *deliberately* with knowledge of their known or obvious consequences. The panel opinion destroyed a critical pillar of *Monell* liability – it removed the requirement of culpability from *Monell* liability and replaced it with mere causation between a policy and a constitutional injury.

[4] STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION

The operative complaint named as defendants jail deputies John Gaddis and Michelle Bauman ("the deputies"), in their individual capacities, and Santa Rosa Sheriff Bob Johnson, in his official capacity. [ECF 35].

The case proceeded to trial on a 42 U.S.C. § 1983 claim of Fourteenth Amendment deliberate indifference to a serious medical need against the deputies and a *Monell* claim under § 1983 against the Sheriff. There were state law claims for negligence against the deputies, as well. Trial began on October 4, 2021, and concluded on October 13, 2021. [ECF 221, 224, 225, 226, 227, 228, 231, 234]. On the fourth day of trial, Plaintiff rested. (Trial Transcript Day 4, p. 131). Defendants moved for judgment as a matter of law under Fed.R.Civ.P. 50(a), and those motions were denied.

The jury returned a verdict in favor of the deputies on the underlying § 1983 claims against each of them but found for the Plaintiff as to the § 1983 *Monell* claim against the Sheriff. The jury returned a verdict for Plaintiff as to the state law claims against the deputies. The jury awarded Plaintiff a total of $1,762,500 in damages. [ECF 236]. Judgment was entered on October 15, 2021, in favor of Plaintiff and against the deputies and the Sheriff, jointly and severally. [ECF 239].

On November 10, 2021, Defendant Sheriff filed a motion under Fed.R.Civ.P. 50(b) renewing his Fed.R.Civ.P. 50(a) motion for judgment as a matter of law during [5] trial. In the alternative, the Sheriff

sought under Fed.R.Civ.P. 59(e) to amend the judgment so as to remove him as a judgment debtor. [ECF 242]. On November 12, 2021, the Sheriff timely filed a notice of appeal as to, among other things, the verdict and judgment. [ECF 243].

On December 23, 2021, the parties advised the trial court that the total amount of the judgment, plus interest since entry of the judgment, had been paid. [ECF 275].

On December 27, 2021, the district court entered an order denying post-trial motions and on January 10, 2021, the Sheriff filed an amended notice of appeal to include the denial of his post-trial motion. [ECF 278].

A panel of this Court on March 20, 2023, entered its opinion in this matter, affirming the denial of the Sheriff's Rule 50 and 59 post-trial motions. The opinion is attached as Exhibit A to this motion.

[6] STATEMENT OF FACT NECESSARY TO ARGUMENT OF THE ISSUES

Deputies Gaddis and Bauman had the responsibility on the morning of April 7, 2016, to monitor inmates, including inmate Jose Escano-Reyes ("Reyes"), in the Admissions, Classification, and Release (ACR) area of the Santa Rosa County Jail. Reyes had threatened suicide and was housed in Cell ACR-1. The only garment he was allowed was a suicide prevention smock. (Slip op., pp. 4-7).

The deputies were sitting at a control desk just outside of ACR-1 for almost the entire morning and were required to monitor Reyes by checking on him every 15 minutes, recording their observations in a log book. The positioning of the control desk did not allow the deputies to see all the way into ACR-1. The deputies noted their checks in the 15-minute log based on hearing him and by visualizing Reyes through a window in the cell door as he paced back and forth.

Further back in the cell and out of the deputies' view from the control desk, Reyes was in the process of tying the suicide prevention smock into a ligature tied to a metal bar. The bar was part of a metal privacy screen which had been placed in the cell as part of the jail's compliance with the federal Prison Rape Elimination Act (PREA). (Slip op., pp. 5-9; Day 3 Trial Transcript, pp. 177-78). After about 45 minutes, Reyes succeeded in creating a ligature out of the smock, tied the smock to the bar, and hung himself.

[7] It was undisputed that, prior to the date of the incident, the jail had *no knowledge or reason to believe* that it was even possible for an inmate issued only a suicide prevention smock to commit suicide in ACR-1 or any other cell, nor did the jail staff have any reason to believe that the suicide prevention smock itself could be used to commit suicide. (Id., pp. 179-180).[1]

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[1] The panel opinion states that the jail did not inspect the specific suicide prevention smock given to Reyes and that over time they "can become more flexible." (Slip op., p. 5). That the smocks "can" become more flexible over time collapses mere risk of suicide with a substantial risk of suicide. *Farmer v. Brennan*,

There was no evidence it had ever happened before. (Trial Transcript Day 3, pp. 161-62; 179-80).

Rogers, on behalf of the Estate of Reyes, sued the deputies under § 1983 for violating the constitutional rights of Reyes. She sued the Sheriff under *Monell*, premised on the notion that the Sheriff's official policies or customs caused the deputies to violate Reyes' rights.

At trial, there was extensive discussion between the district court and counsel for the parties concerning the verdict form. The Sheriff's attorney asked that the jury be required to find § 1983 liability as to the corrections deputies as a precondition to finding *Monell* liability against the Sheriff. The defense warned that allowing the jury to find no constitutional violation by the deputies – but allowing [8] it to find liability against the Sheriff – would violate basic *Monell* principles. The district court agreed that the Plaintiff had explicitly tied the *Monell claim* to an underlying constitutional violation by the named deputies, but nonetheless submitted a verdict form that allowed the jury to find in favor of the deputies, but against the Sheriff, on § 1983 claims. (Trial Transcript Day 5, pp. 11-21).

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511 U.S. 825, 842 (1994). And, the panel opinion fails to note that the jail had the smocks cleaned by a contractor such that they were repaired or removed from service if they developed problems. (Day 3 trial transcript, pp. 179-80). Further, there is no evidence that the deputies were on notice that the smock in question had been worn, as he had been issued the smock by deputies from a prior shift.

The jury returned a verdict finding that the deputies did not violate the decedent's constitutional rights. Specifically, the jury found that the deputies were deliberately indifferent to the risk of suicide by Reyes, but that their lack of adequate monitoring of the inmate did not cause his death. This conclusion meant that, as a matter of law, the deputies did not violate the decedent's constitutional rights because causation is an essential element of a § 1983 claim of a constitutional violation. *Mann v. Taser Intern., Inc.*, 588 F.3d 1291, 1307-7 (11th Cir. 2009); *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1326 (11th Cir.2007); *Marbury v. Warden*, 936 F.3d 1227, 1233 (11th Cir.2019).

Where a Plaintiff identifies specific municipal or local government employees as having committed a constitutional violation, then the two-step path to *Monell* liability is a finding that 1) those employees committed a constitutional violation, and 2) that the agency defendant's official policies or customs caused the underlying violation. *Heller*; *Case v. Eslinger*, 555 F.3d 1317, 1328 (11th Cir. 2009).

[9] Instead of following *Heller*, the panel in this case applied the reasoning of *Barnett v. MacArthur*, 956 F.3d 1291, 1301-02 (11th Cir. 2020) to directly tie the Sheriff's unwritten customs to a violation of Reyes' constitutional rights. The three customs specifically identified in the slip opinion as at fault were:

"(1) permitting the covering of two of the three windows of ACR-1;

(2) housing suicidal inmates in ACR-1, although the cell contained a metal partition and its interior could not be fully viewed from the Jail's booking desk; and

(3) allowing deputies to perform visual checks on suicidal inmates by glimpsing[2] the inmate through a cell window while the deputy remained seated at the booking desk." (Slip op., p. 10, footnote omitted).

ARGUMENT AND AUTHORITIES

I. As in *Heller*, the *Monell* claim against the Sheriff in this case turned entirely on the actions of specific employees such that, when those constitutional claims failed, so did the *Monell* claim.

At trial, Plaintiff explicitly based her § 1983 *Monell* claim against the Sheriff on alleged underlying constitutional violations by the two jail deputies. The jury rejected the §1983 claims against the deputies, finding that any deliberate indifference by them did not cause the suicide of Reyes. This finding precludes [10] § 1983 *Monell* liability against the Sheriff as a matter of law under the Supreme Court's decision in *Heller*.

The district court, over objection from the defense, fashioned the verdict form in such a manner that the

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[2] There are points in the video where Reyes simply passes by the front of the cell but there are other points where Reyes stands at the windows in the cell door.

jury was still able to find *Monell* liability against the Sheriff despite the jury's finding of absence of an underlying constitutional violation by the deputies.[3] The panel decision affirms this result under an exception to traditional *Monell* principles found in *Barnett v. MacArthur*, 956 F.3d 1291 (11th Cir. 2020). (Slip Op., pp. 18-20).

But of course this Court's decision in *Barnett* cannot be applied in such a manner as to contradict the Supreme Court's decision in *Heller.* Neither *Barnett* nor the panel opinion in this case mention *Heller*, which is disconcerting given that this Court in both opinions cites the requirement of an underlying constitutional violation by an individual government official as merely a "superficially deductive" "syllogism." (Slip op. at p. 19).

[11] In *Heller*, plaintiff sued police officers and City officials under § 1983. Claims for false arrest and excessive force against one officer were tried, with the

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[3] The panel opinion suggests in note 10 that the Sheriff might have waived any claim as to an inconsistent verdict. That is not the issue. The verdict was not inconsistent given what the jury was asked. The problem is that, over express defense objection, the verdict form allowed judgment to be entered against the Sheriff on the *Monell* claim despite the jury being permitted to first find no constitutional violation by the deputies. The defense warned this could happen during the charge conference, it is exactly what did happen, and the defendant properly both post-trial and on appeal contends that the verdict for the deputies legally compels a judgment for the Sheriff. The waiver issue is a red herring because the *verdict* was not internally inconsistent; rather, the *later judgment* against the Sheriff was inconsistent with the verdict for the deputies.

jury finding in favor of the officer. The district court then dismissed the action against the City, reasoning that lack of a constitutional violation by the officer precluded *Monell* liability against the City. Essentially identical to the reasoning of the panel in this case, the Ninth Circuit concluded that even if the jury found for the officer another jury might still find against the City if it determined that the officer followed City policy in violating plaintiff's rights. The Ninth Circuit reversed the dismissal of claims against the City. *Heller*, 475 U.S. at 797-98.

The Supreme Court then reversed the Ninth Circuit on exactly this point. The verdict for the officer, the Court said, "was conclusive not only as to [the officer], but also as to the city and its Police Commission. They were sued only because they were thought legally responsible for [the officer's] actions; if the latter inflicted no constitutional injury on respondent, it is inconceivable that petitioners could be liable to respondent." *Id.*, p. 799.

The issue is the same here. Like the Ninth Circuit in *Heller* the panel opinion here concludes that while the jury exonerated the deputies individually the jury could also find that the deputies followed the customs of the Sheriff and caused the suicide. This is illogical. If the deputies inflicted no constitutional injury, then by definition the Sheriff could not have done so. *Heller.*

[12] In *Barnett*, the Sheriff had a policy that any person arrested for driving under the influence (DUI) was to be held for eight hours, even if an arrestee was

determined post-arrest at the jail to have a .000 breath alcohol level. Plaintiff Barnett was arrested for DUI and, at the jail, had a .000 breath alcohol level. She was held pursuant to this policy even after posting bond. Many employees other than the arresting deputy were involved in holding Barnett for the eight hours. This Court held that in such a circumstance it is not necessary for the Plaintiff to show that a *particular* employee violated the Plaintiff's constitutional rights in application of the policy in a particular situation because it was the policy, itself, that represented the constitutional violation. (Id., 1301-02.).

This Court warned, however, that skipping over the individual capacity claim depends on the nature of the claims and defenses:

> "Where, as here, a jury has returned a verdict in favor of an individual defendant on a § 1983 claim, the question is whether that verdict "can be harmonized with a concomitant verdict or decision imposing liability on the municipal entity. The outcome of the inquiry depends on the nature of the constitutional violation alleged, the theory of municipal liability asserted by the plaintiff, and the defenses set forth by individual actors."
>
> *Barnett*, 956 F.3d at 1302 (quoting *Speer v. City of Wynne*, 276 F.3d 980, 986 (8th Cir.2002)).

In this case the Plaintiff's claim was that the Sheriff's customs caused two specific deputies to violate Reyes' rights. At the charge conference the district court noted that while it might be possible to have a

Monell claim not premised on an [13] underlying violation by a particular employee, in this case Plaintiff's *Monell* claim hinged on a finding of a constitutional violation by the named deputies.

> I think you're right that a *Monell* claim based upon policies doesn't have to be grounded on an individual, but here, this *Monell* claim was. This *Monell* claim is premised upon there being a violation, and the only people who have – I think the jury's heard evidence potentially violated his constitutional rights are Gaddis and Bauman, right?

(Day 5 Transcript, p. 21)

Plaintiff's counsel agreed that only deputies Gaddis and Bauman were at issue. (Id., pp. 16-17). Despite the district court's explicit acknowledgement that only the actions of the deputies were at issue, the court, over defense objection, fashioned a verdict form and instructed the jury that it could find *Monell* liability even without liability as to the named deputies. (Id., pp. 20-21; ECF 236).

Defendant Sheriff submits that *Heller* compels reversal of the *Monell* judgment against the Sheriff. Parsing who the jury "blamed" for deliberate indifference by the deputies is a fool's errand because, as a matter of law, if the deputies did not violate Reyes's constitutional rights then by definition neither did the Sheriff. The Sheriff respectfully submits that the result here is a clear departure from *Heller* and asks that the panel, or the Court en banc, rehear the issue.

[14] **II. None of the customs identified by Plaintiff or discussed in the panel opinion were facially unconstitutional or adopted with deliberate indifference. There was no evidence that any had previously caused or contributed to a suicide and Reyes had only a suicide prevention smock with him.**

"The deliberate indifference standard is met only if there were a 'strong likelihood, rather than a mere possibility,' that self-infliction of harm would result." *Edwards v. Gilbert*, 867 F.2d 1271, 1276 (11th Cir. 1989) (collecting cases). The three customs identified by the panel opinion could be argued, perhaps in a negligence sense to create the opportunity for suicide, but they come nowhere close, even collectively, to making it substantially certain that a suicide would occur. In fact, it never had happened – the partition was in compliance with PREA and the suicide prevention smock had never been used to commit suicide.

The Sheriff's post-trial motions should have been granted for lack of any evidence of deliberate indifference in adopting those three customs. "Deliberate indifference" arises twice in a case like this. First, to prove an underlying constitutional violation plaintiff must show deliberate indifference to the risk of suicide by Reyes. Second, under the Supreme Court's decision in *Brown*, Plaintiff must ***also*** show that the customs she faults as causing the suicide were adopted with deliberate indifference.

> As *[Board of County Commissioners of Bryan County, Oklahoma v.] Brown* pointed out,

> "Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights." [520 U.S. at 415] (emphasis in [15] the original). To meet this burden, a plaintiff must demonstrate that the lawful action was "taken with 'deliberate indifference' as to its known or obvious consequences." *Id.* at 407, 117 S.Ct. 1382 (quoting *Canton [v. Harris]*, 489 U.S. [378 (1989)]at 388, 109 S.Ct. 1197). Plainly stated, a "showing of simple or even heightened negligence is not enough." *Brown*, 520 U.S. at 407, 117 S.Ct. 1382.
>
> p*McDowell v. Brown*, 392 F.3d 1283, 1291 (11th Cir.2004).

The evidence at trial was unequivocal: no inmate had ever used a suicide prevention smock to commit suicide, much less by tying it over a partition in the back of a cell which was placed there to conform to PREA. Jail staff had never even contemplated that an inmate could use a suicide prevention smock to hang himself, even with partial covering on two of the three windows or checks made from the ACR desk. In the words of the Rule 30(b)(6) witness for the Sheriff and jail staff at trial, Captain Barbara Stearns, "(i)t wasn't something we thought would ever be a problem." (Day 3 Trial Transcript, pp. 161-162).

None of the customs which had evolved over time at the jail was per se unconstitutional and there was no evidence any had led to a suicide before, especially an inmate using a suicide prevention smock. As this

Court held in *AFL-CIO v. City of Miami*, 637 F.3d 1178, 1188 (11th Cir. 2011), where policies and customs are facially constitutional, plaintiff must show that they were adopted despite their "known or obvious consequences." *Id.*, citing *Brown;* see also *City of Canton*, 489 U.S. at 388-89.

[16] Reyes was provided with only the suicide prevention smock, a mattress, and shower shoes. There had never been a suicide in that cell or using the materials Reyes had with him. (Day 4 Transcript, pp. 158-161). The panel opinion in this case concludes that a jury could nonetheless find that the risk of suicide was "obvious" given these conditions. (Slip Op., pp. 16-17).

But foreseeability in the negligence sense is not the same thing as obviousness in the deliberate indifference sense. Reyes used a garment that the Sheriff's Office had every reason to believe would prevent suicide in the form of the suicide prevention smock. Hindsight provides an excellent vantage point to appreciate how three separate unwritten customs converged to create a perfect storm to allow Reyes to commit suicide. And what may seem obvious in hindsight establishes negligence, but it cannot amount to deliberate indifference to allow these customs when the Defendant had no reason to believe the smock would be used in that fashion, regardless of the customs.

[17] **CONCLUSION**

The panel opinion conflicts with the Supreme Court decisions in *Heller* and *Brown* and should be reconsidered by the panel, or the Court en banc.

DATED this 10th day of April 2023.

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[18] **CERTIFICATE OF COMPLIANCE**

Pursuant to Rules 35(b)(2)(a) and 40(b)(1) of the Federal Rules of Appellate Procedure, and 11th Cir. R. 35-1, I hereby certify this Petition for Rehearing or Rehearing En Banc by Defendant/Appellant Sheriff complies with the type-volume limitation of those rules in that it contains 3,896 words, excluding the portions which do not count toward the type-volume limitation.

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[19] **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10th day of April 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/ Thomas W. Poulton
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[Exhibit A Omitted]

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JESSICA N. ROGERS, as personal representative of the Estate of Jose Francisco Escano-Reyes, and as parent and natural guardian of Y.E.R., Plaintiff, v. **JOHN GADDIS,** in his individual capacity, **MICHELLE BAUMAN,** in her individual capacity, and **SHERIFF BOB JOHNSON,** in his official capacity, Defendant.	Case No: 3:18-CV-571/TKW Pensacola, Florida October 8, 2021 9:30 a.m.

TRIAL TRANSCRIPT – DAY 5
INITIAL CHARGING CONFERENCE
BEFORE THE HONORABLE
T. KENT WETHERELL, II
UNITED STATES DISTRICT JUDGE
(Pages 1 through 114)

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[3] **PROCEEDINGS**

THE COURT: All right. This is Case Number 3:18cv571. We're here today for jury charge conference. Before we get into that business, anything else we need to discuss?

MR. SOHN: No, sir.

MR. WARNER: No, Your Honor.

MS. ANDREWS: No, sir.

THE COURT: Okay. I understand that there was a couple of typos in the verdict form, may be some in the jury instructions as well. We were rushing to make sure we got this to you. So that would explain the typos. But that is my fault not hers.

All right. What do y'all want to talk about first, instructions or verdict form?

MS. ANDREWS: I think Mr. Scharf is prepared to talk about it, so.

MR. SCHARF: Yes, Your Honor.

Like the proverbial milking stool, our presentation rests on three legs. We've got a component that I call my Strunk & White *Elements of Style* component, which is five or six real minor things we've pointed out. Then we've got a component which is – the last two components are special instructions. The one, what I call the *Cagle* instruction, regarding close-watch forms; and the other one, what I call the deliberate indifference instruction concerning medical.

[4] MR. SOHN: Directives.

MR. SCHARF: Directives, each of which I expect to be less than ten minutes in length. So I think we're going to meet the lunchtime.

THE COURT: Okay. But I guess my initial question was do we want to talk about the verdict form first? Will any of that impact what the verdict form looks like?

MR. SCHARF: The Strunk & White section has both the instructions and the verdict form broken down separately with -it goes through five points on each.

THE COURT: Okay.

MR. SCHARF: And then the special instructions obviously concern just the jury instructions.

THE COURT: Will my resolution of those issues change anything on the verdict form?

MR. SCHARF: I don't think so.

THE COURT: Okay.

MR. SCHARF: In fact –

MR. SOHN: No.

MR. SCHARF: No.

THE COURT: Okay.

MR. WARNER: And, Your Honor, from Gaddis and Bauman's standpoint if the Court would like to –

THE COURT: I'm just trying –

MR. WARNER: No, I was going to say, if the Court [5] wants to commence with the verdict form, that's fine, because I don't think anything that I have to argue or say is going to change significantly anything on the verdict form, Your Honor.

THE COURT: Okay.

MR. LONGFELLOW: Yeah, we'd agree.

THE COURT: Okay. Well, let's pick the low-hanging fruit first, then, and deal with the verdict form and it sounds like the issues there are just editorial in nature.

MR. SCHARF: Yes, Your Honor.

THE COURT: Okay.

MR. SCHARF: In fact, I a Microsoft Word document that we can literally broadcast to the Court that would also help people follow.

THE COURT: All right.

MR. SCHARF: If you can bring that up.

The first part deals with the instructions. The verdict form . . .

On the verdict form on Question 3, we propose changing the language that said, that reads: Did Defendant Gaddis's deliberate indifference cause Mr. Escano-Reyes' death?

DEPUTY CLERK: I'm sorry, is your computer plugged in?

MS. LAX: Yes, it – oh, no.

MR. SCHARF: Currently, the verdict forms reads: Was Defendant Gaddis's deliberate indifference the cause of Mr. Escano-Reyes' death. We would propose to change that to – [6] and you're going to see it in just a second here – Did the Defendant Gaddis's

deliberate indifference cause Mr. Escano-Reyes' death. The difference is the implication of a singular cause versus the potential for multiple concurrent causes. That's all.

THE COURT: Okay. Any issue with that?

MR. WARNER: We like what the Court had initially, Judge. We'd prefer that.

THE COURT: Any objection to –

MR. WARNER: Yes, we object.

THE COURT: On what basis?

MR. WARNER: Because we believe that they're saying that his specific deliberate indifference caused his death, so we think what you have written there is appropriate. That's their claim.

THE COURT: I'm not sure –

MR. SCHARF: And, Your Honor, I would seem –

THE COURT: I'm not sure there's really any difference in what they're asking for and what it currently says. I'm just flipping back to the instructions, give me half a second to.

I think the way they're asking for it is consistent with how they're going to instruct the jury, and I frankly don't see any difference in either one of those wordings, so I will change it.

MR. SCHARF: And then, Your Honor, that makes point –

[7] MR. WARNER: I'm sorry, Judge, so just for clarity, how is that being changed, sir?

THE COURT: So on Question 3 and Question 5, we would be asking the jury –

MR. WARNER: Six, Your Honor.

THE COURT: Yes, I'm sorry.

Did Defendant X is – apostrophe S, that is – did that person's deliberate indifference cause Mr. Escano-Reyes's death.

MR. WARNER: And that's the same change for 3 and 6, Your Honor?

THE COURT: Correct.

MR. WARNER: Okay. Thank you. Just note our objection.

THE COURT: Your second point – or your third point, then, regarding Question 10 was a typo, and that will be fixed.

Fourth point, instructions – that's a typographical error. We'll fix that on your fourth point.

Your fifth point. Okay. That's another typographical error. We'll fix that.

On page 5, the last line above the word "damages," that says Gaddis. It should be Bauman.

MR. SCHARF: Correct.

THE COURT: So now I'm on Question 13. Oh, I see what you're saying. The last – there's an extra hyphen on the line [8] regarding instruction and guidance for mental pain and suffering as a result of Mr. – there shouldn't be a hyphen between Mr. and Reyes, and that should by Mr. Escano-Reyes. No apostrophe S.

And then we'll strike the little tilde, as you call it, simply because it's a challenge for us to find that on the computer.

MR. SCHARF: I agree.

Ten is the only thing that even approaches substance. And reading it through the way a juror might, we looked at it, and it talks of either state or federal liability or neither state or federal liability. And, of course, the third or the other possibility is both federal and state liability. That's all.

THE COURT: I'm wondering if – I understand your point and it's a good one. I am wondering if that should be a sentence between Questions 14 and 15.

MR. WARNER: Your Honor, I think that would make more sense.

MR. SOHN: Between 14 and 15, Your Honor?

THE COURT: Yeah, because what I was intending to do in that introductory paragraph under

paragraph – or, excuse me, under punitive damages is to tell them: If you found for him on – found for the plaintiff on the federal claim, go to Question 14; if not, go to 15, if you found for them on the [9] state claim. Maybe it's – and then, If neither, skip these two questions. And so I guess it could go either place.

And maybe right in the beginning: If your verdict was for the plaintiff on both the federal and state claims, answer both Questions 14 and 15.

MR. SCHARF: That's how we figured to address it.

THE COURT: Okay.

MR. WARNER: So basically just reformatting that sentence, Judge?

THE COURT: It would be a new sentence.

MR. WARNER: Okay.

THE COURT: Or maybe – so it will be a new sentence after that last introductory paragraph or in that last introductory paragraph.

So first sentence is: If you found for the plaintiff on the federal claim, answer 14; if you didn't, go to 15. If you found for them on the state – found for the plaintiff on the state claim – and so the third thing they would decide for themselves: If your verdict was for Gaddis on both, you skip both of them. So we'll add a sentence that says, If your verdict was for plaintiff on both the federal and state claims, answer both Questions 14 and 15.

MR. WARNER: No objection, Judge.

THE COURT: And then we'll do that same thing on page 7 in the paragraph relating to Deputy Bauman but with the [10] reference to Question 16 and 17, rather than 14 and 15. Okay Is that all the plaintiff's issues with the verdict form?

MR. SOHN: That is all the Strunk & White nitpicking, yes, and –

MR. BRONSTON: That's all we have on the verdict form.

MR. SCHARF: That's all we have on the verdict form, yes.

THE COURT: Okay. Do the defendants have anything on the verdict form?

MR. WARNER: Your Honor, if I may. And this is more of a clarification issue than the formatting of this.

If I understood – and I may have misunderstood, so I'm just clear with your guys, okay? But if I understood correctly on the state law claims, Judge – and I'm focused on number 9 and number 11 on pages 4 and 5 of the verdict form.

It's been my understanding that on the state law claims against my clients, Gaddis and Bauman, the focus is that they acted in a wanton and willful disregard for life, not in bad faith or malicious purpose. Now, if I misunderstood that, you guys tell me that; but if

they're not arguing bath faith or with malicious purpose, I would just ask that that it be stricken from that.

MR. SCHARF: Your Honor, I think we could agree to strike that because –

[11] MR. SOHN: Yes.

MR. SCHARF: – it simplifies it. I think Mr. Warner's correct. We're not invoking bad faith or malicious purpose but, rather, wanton and willful disregard.

THE COURT: So it would say: Did Defendant Gaddis act in a manner exhibiting wanton or willful disregard for the life or safety of Mr. Escano-Reyes?

MR. WARNER: Yes, Your Honor.

MR. SCHARF: Yes.

THE COURT: All right. We'll make that same change to Question 11 related to Deputy Bauman.

Okay. So is that it for the verdict form?

MR. WARNER: Your Honor, that's all I had, sir.

THE COURT: Sheriff okay?

MR. LONGFELLOW: No, Your Honor, we have a couple of recommendations if you don't mind.

THE COURT: Okay. On the verdict form?

MR. LONGFELLOW: Yes, Your Honor.

THE COURT: Okay.

MR. LONGFELLOW: We would request that we remove Question 7. And as a result of removing Question 7, obviously that changes all the numbering, but in the paragraph above it before you get to the federal claim against Defendant Johnson, at the end, take out "but first proceed to Question 7" and then change it to state: If your answer to Questions 1, 2, or 3 and [12] 4, 5, or 6 is No, comma, your verdict is for the Santa Rosa County Sheriff's Office and you should proceed to Question Number – it will be the new Number 8.

And then the sentence following that would be: If your answer to Questions 1, 2, or 3 or 4, 5, or 6 is yes, then proceed to Question 7.

THE COURT: What's your rationale for that?

MR. LONGFELLOW: I'm sorry?

THE COURT: And what's your rationale for that?

MR. LONGFELLOW: Rationale for that is having that question there presents the opportunity or the possibility for an inconsistent verdict; meaning, what they could do is they could come down here, answer these questions, and then move on to – proceed to Question 7 and mark yes, after maybe possibly not finding against either the deputies.

THE COURT: And –

MR. LONGFELLOW: Deliberate indifference. And not to mention, if they find one of the deputies deliberately indifferent, then they've essentially established that first part of that prong to get to liability against us. And the only question at that point would be Number 8, which is about the -whether we had a custom or practice that violated his constitutional rights was the moving force behind his death.

THE COURT: And I initially had that thought, but the reason I thought we needed to ask them this question, isn't it [13] possible that they could – the jury could, looking at Deputy Bauman, and the same would apply to Deputy Gaddis, couldn't they find yes to Question 4, yes to Question 5, but no to Question 6? Find that they were aware, were deliberately indifferent, but that wasn't the cause. And so if they then made those findings and then answered yes to Question Number 7, yes to Question Number 8, in that circumstance – I'm not sure that would be inconsistent. They're finding a violation, they're just finding no cause – they, on the individual defendants, they're finding the cause to be your policies.

MR. LONGFELLOW: My understanding it's not just finding that the actions were deliberate indifference but they actually established a claim of deliberate indifference.

MR. SOHN: No.

MR. LONGFELLOW: And that's first prong you get to. There's no – a valid claim for deliberate indifference outside of the officer being entitled to

qualified immunity, then you can't proceed against the actual Sheriff's Office.

THE COURT: Okay. Does the plaintiff have a different view?

MR. SOHN: I would say Your Honor's inclination is supported by – I mean, in my understanding, there are even situations where, let's suppose that Defendants Bauman and Gaddis were qualifiedly immune. As long as the jury were to find a constitutional violation, regardless of, you know, [14] clearly establishing them, you're absolutely right, they could still find a Monell violation. So I think – I think Your Honor's inclination is correct.

MR. LONGFELLOW: But if you go and look at what was now Question 8, it resolves any issue that either the plaintiff's expressing or the Court – the reservations the Court had before, because that constitutional violation still has to be the moving force behind his death. And if they're not find the deliberate indifference is the moving force behind his death, then how is anything else going to be the moving force behind his death? They're not finding against individual officers.

THE COURT: Okay. I think the only risk that we have – well, how would the risk for an inconsistent verdict that you express be eliminated by doing what you're suggesting if – I mean, if the jury comes back and answers 4, 5 – oh, I guess you're saying if we tell them if you answer no to everything, don't even –

MR. LONGFELLOW: Then go to the –

THE COURT: Skip 8 all together.

MR. LONGFELLOW: Skip the new 7 and go to the new 8.

THE COURT: Well, if they do that, it seems to me under your argument, if they answer no to everything as to the individual defendants, we would – you would really be arguing that they would just skip entirely the questions about Sheriff's [15] liability.

MR. LONGFELLOW: That is correct. That's why I said the new Number 8.

THE COURT: Oh, I see.

MR. LONGFELLOW: The new Number 8 would what is now marked as 9.

THE COURT: Okay. I understand your argument. I don't think I agree with it. I do see – and particularly that's how I see this case. I see them struggling with this case. I think they're going to find somebody responsible here, in my mind; and the question is whether they're going to blame it on the officers for not doing what the policy required or whether they were going to blame it on the Sheriff for having the policy that allowed the officers to do what they did.

MR. LONGFELLOW: Yes –

THE COURT: Again, that's my crystal ball what's going to happen. Again, I may be completely misreading this case and misreading the jury. And I

think that's a permissible finding for them to make. I think they could find that the officers didn't violate the constitutional rights. It was the policies they were – or the practices they were given by the Sheriff's Office that was the cause of this action.

So, I mean, I understand your argument, but I don't think it's correct. And I think that question is appropriate in the event the jury answers these questions in a way that creates [16] an inconsistent verdict, we will deal with that then. I just don't think a yes answer to Questions 4 and 5, a no answer to Question 6, and a yes answer to Question 7 is an inconsistent verdict. I know you disagree, but I just don't thing –

MR. LONGFELLOW: May I just state one other point in support of it?

THE COURT: Sure.

MR. LONGFELLOW: In response to that decision, I have a different change that I'd like to request. But I would also suggest that by doing what we have here and under the logic that's been presented by the Court, it also presents the opportunity for this jury to decide this case on vicarious liability, which a deliberate indifference claim against the Sheriff's Office cannot be based on vicarious liability. And so it suggests that that could be a possibility here, and that would create an inconsistent verdict, as well as be a violation of what the law states.

Moving on to what the Court has decided to do, as to keeping Number 7, we would ask that you change

the language of "Did one or more employees or agents of the Santa Rosa County Sheriff's Office violate Mr. Escano-Reyes's rights" to read "Did Gaddis or Bauman violate Mr. Escano-Reyes's constitutional rights." Otherwise, that is a vicarious liability suggestion, and the only two people that could have violated his rights for liability for this case is Gaddis or Bauman.

[17] THE COURT: There hasn't been any evidence of anybody else, has there?

MR. SOHN: Well, no, Your Honor. Mr. Bronston, I think, was going to address that.

MR. SCHARF: And, Your Honor, this is accounted for in your jury instruction 5.10, page 10. I'm going to read this so it's clear. You're already instructing the jury:

The Sheriff's Office is not liable for violating Mr. Escano-Reyes' constitutional rights simply because it employed someone who violated them. Rather, the Sheriff's Office is liable only if the plaintiff proves that an official policy or custom of the jail directly caused Mr. Escano-Reyes' death. Put another way, the Sheriff's Office is liable if its official policy or custom was a moving force behind Mr. Escano-Reyes' death.

So that – you're instructing them, point blank, on the vicarious liability issue that it doesn't work that way.

MR. LONGFELLOW: There's no supervisory liability claim here, Your Honor.

THE COURT: Right. And, again, I don't think anything I've said – and if it was interpreted that way, just to clear up the interpretation, I'm not suggesting any sort of vicarious liability. What I'm envisioning is the possibility that the jury finds that the deputies complied to the letter with practices and policies that the Sheriff's Office had in place [18] but the jury finds that those practices and policies by their nature were the constitutional violation.

MR. LONGFELLOW: No, I understand that –

THE COURT: Okay.

MR. LONGFELLOW: – but I'm suggesting that if that is the point, then the language one or "more employees or agents of Santa Rosa County Sheriff's Office" suggests that it could be someone else outside of Gaddis and Bauman and so we would ask that that language be removed and replaced with "Gaddis or Bauman."

THE COURT: Is there any issue with that? I wondered when I wrote that who else conceivably is here. I don't think this jury has heard this evidence that there were other people who allegedly violated his rights.

MR. SCHARF: I think it goes back to the model or the standard Eleventh Circuit Pattern Jury Instructions. What counsel for the jail is essentially doing is trying to make the two claims cantilevered, one on top of the other, and I believe it's fully permissible

to bring a Monell claim as a standalone item and not being suing individual officers for deliberate indifference underneath that. In that case, these instructions are correct and the jury's entitled to look at the entire panoply of evidence and conclude whether somebody violated the rights.

If you want me to start trying to pick through who was [19] discussed in the trial, like, individually, I don't know that I can do that right now. And I understand that the focus understandably would be on Gaddis and Bauman, but it isn't necessarily that way, and I think it would misstate the law from the Eleventh Circuit pattern.

THE COURT: I think you're right that a Monell claim based upon policies doesn't have to be grounded on an individual, but here, this Monell claim was. This Monell claim is premised upon there being a violation, and the only people who have – I think this jury's heard evidence potentially violated his constitutional rights are Gaddis and Bauman, right?

MR. SOHN: The thought that I'm having – can I just?

THE COURT: Sure.

(Off-the-record discussion between counsel for the Plaintiff.)

MR. BRONSTON: Your Honor, I guess one that question I would have is the phrasing "Did they violate its constitutional rights." That may include within it a notion of causation and bootstrap the

problem that Your Honor was trying to avoid; that is to say, if the jury believes that "violate his constitutional rights" necessarily presupposes the finding that their own actions caused it, it would present the same problem that Your Honor's phrasing was trying to avoid.

MR. SOHN: I think what I was trying to whisper to Mr. Scharf, because I'm coming at it in real time, is perhaps [20] maybe the solution would be to adopt what the defendants are suggesting but include some kind of instruction that essentially states: Ladies and gentlemen of the jury, if – you need not find – essentially Defendants Bauman and Gaddis could be following policy but if you find that policy to have been unconstitutional –

THE COURT: Well, let me offer this, if we're in the horse-trading mode at this point. If understanding Mr. Longfellow's view that the jury would have to answer yes to 4, 5, and 6 to even get to his client's liability, based upon my understanding that they could answer yes to 4 and 5 and no to 6, and still get to his liability, could we do something along the lines of what Mr. Longfellow was suggesting but simply tie it to Questions 4 and 5 and 1 and 2. If you enter yes to questions 1 and 2 or yes to Questions 1 and 4, then proceed to what's now Number 8; if not, proceed to now what's Number 9.

MR. SOHN: It certainly would work, Your Honor, I'm just –

MR. BRONSTON: It may be more confusing.

MR. SOHN: It's going to be confusing.

THE COURT: I guess what – I think Mr. Longfellow makes a good point based upon how the evidence – how this case was pled, how it was presented, it was premised upon Bauman and Gaddis violating his rights pursuant to these unconstitutional policies. And so to bring in one or more unnamed employees or [21] agents, I think adds a level of confusion that the Sheriff is rightfully objecting to.

So if the argument we're having is whether you have to have essentially an entire deliberate indifference claim proven to establish Monell liability, I don't think that's the case. You just have to have a constitutional right violation proven, and that's Questions 1 and 2 and 4 and 5.

MR. SOHN: That all is sound, as far as I'm concerned, Your Honor. Mr. Bronston had suggested perhaps as another solution in Question 7 simply changing it to "Did Defendants Bauman or Gaddis violate Mr. Escano-Reyes – "

MR. BRONSTON: We know the jail proposed that. The question is at the end of the day that might be less confusing. *(Interruption by the reporter.)*

THE COURT: I'm open to either. I think – I thought that the concern – I mean, y'all are kind of at cross-purposes there, and maybe put your heads together and decide what you'd rather, because the concern was that that was incorporating in Question 6 and Question 3 as well. I'm happy to do either. I think

either one would solve the legitimate concern the Sheriff's Office raised about these unnamed other employees and agents.

MR. SOHN: Probably the 1 and 4 approach, Your Honor.

MR. WARNER: I'm sorry?

THE COURT: So the plaintiff would prefer asking the [22] jury if you answer yes to Questions 1 and 2 or yes to Questions 3 – or, excuse me, Questions 4 and 5, proceed to what's currently Question 8. If you answer no to all those or no to, I guess it would be to any of those – I guess we'll figure it out.

I mean, the bottom line is if they say yes – okay. We'll figure that out, but we'll proceed that way. And I know that's over the Sheriff's initial objection that they shouldn't even be asked anything about – or they should be asked everything about the underlying deliberate indifference claims, but I've overruled that. But we'll reword that, and we'll get that to you obviously before the jury sees it so you can make sure we've done it the way that we've talked about.

Okay. Anything else?

MR. LONGFELLOW: Yes, Your Honor.

THE COURT: Okay.

MR. LONGFELLOW: The old 8, new 7, is I think what we're going with.

THE COURT: Yep.

MR. LONGFELLOW: Okay. We would ask that the Court identify the specific custom, as there was only one custom identified as we discussed yesterday in the third amended – the Corrected Third Amended Complaint, and that be identified as the custom on practice of violated – or allegedly violated Mr. Escano-Reyes' constitutional rights and was the moving force

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[91] MR. LONGFELLOW: We would request on line 20 and -220 and 221 that we remove the language "an employee or agent of the Sheriff's Office" and change it to "Gaddis or Bauman."

THE COURT: And that's the discussion we had with the –

MR. LONGFELLOW: The verdict.

THE COURT: – verdict form?

MR. LONGFELLOW: Yes, Your Honor.

THE COURT: Okay. I think consistent with what we did with the verdict form, that would be proper.

Any objection want to be noted?

MR. SCHARF: Well, this is a standard jury instruction, 5.10, and that language is right out of the Eleventh Circuit. If they had meant it to be insert the exact names of individuals or make out a sort of bill of particulars, they would have put brackets and said

"insert relevant individuals." They didn't. They left it general like this, I presume, for a reason. So that's why we did it this way, took right out of the standard pattern.

THE COURT: Understood. But I do think the reason we have these discussions and the reason they're only pattern is as the evidence in a particular case develops, we have to massage them a little bit. And I think this is one of those areas that, as you pointed out earlier, you can have a Monell claim without any – standalone Monell claim; and in those circumstances, it [92] would make sense to be more generic, perhaps. But here, since we're focused on Bauman and Gaddis, I'm going to make that change.

MR. BRONSTON: Your Honor, before doing that, the question is, Are we certain that's consistent with the verdict form; that is to say, the concern that Your Honor had raised about causation, does the locution . . .

THE COURT: I think it becomes even more – I don't see the risk at this point that they're going to – I mean, when we're specifically going to be telling them if you answered -again over the Sheriff's objection, if you only answer yes to knowledge and deliberate indifference, you proceed to determine the Sheriff's liability. So I think that's crystal clear on the verdict form. So I don't see any inconsistency, and I don't think this is a problem in my mind.

MR. BRONSTON: Okay. Thank you, Your Honor.

THE COURT: So everybody's concern is noted. All right. That change will be made.

MR. LONGFELLOW: Okay. And if we continue on with that sentence, "violated Mr. Escano-Reyes' constitutional rights," we would propose that we drop the S off it -constitutional right – and then add "to be protected from self-inflicting harm" – whatever the language is that was previously cited – "self-inflicted injuries, including suicide," to identify the specific constitutional right that's

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