No. _____

In The Supreme Court of the United States

_____ Δ _____

REGINALD PITTMAN, by and through his guardian and next friend, ROBIN M. HAMILTON and his co-guardian FIRST NATIONAL BANK OF TERRE HAUTE,

Petitioners,

v.

COUNTY OF MADISON, ILLINOIS, et al.,

Respondents,

_____ Δ _____

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

_____ Δ _____

PETITION FOR WRIT OF CERTIORARI

_____ Δ _____

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QUESTIONS PRESENTED

The case was tried three times. In the first trial, the jury was properly instructed, but a post-occurrence videotaped statement of the only witness to the occurrence was improperly excluded. In the second and third trials, the videotaped statement was admitted, but the jury was improperly instructed on plaintiff's Fourteenth Amendment Due Process Failure to Protect claim.

In the appeal of this third trial, the Seventh Circuit for the first time set out an appropriate issues instruction to be given in a Fourteenth Amendment due process failure to protect a pre-trial detainee case. In the appeal of this third case, the Circuit Court agreed that the trial court had improperly instructed the jury, but, nonetheless, sustained the defense verdict, holding that, as the plaintiff's third-trial arguments primarily concerned credibility, the trial court's instructional error was not material. The result of the three trials and the Circuit Court holding was that the plaintiff has never been given the opportunity to present the case with both the proper evidence (the videotape) and a proper Fourteenth Amendment Instruction concerning the failure to protect the pre-trial detainee plaintiff.

In this case, the United States Court of Appeals erroneously failed to reverse the defense verdict by failing to send the case back for a new trial. The specific question presented is:

I. Did the Circuit Court improperly impair the plaintiff's due process right to a fair trial by sustaining the jury's verdict and failing to order a new trial, even though the plaintiff has never, throughout the extensive history of this case, been given the opportunity to present the material video-taped evidence to a properly instructed jury.

PARTIES TO THE PROCEEEDINGS

Petitioners (Plaintiffs-Appellees) below: Reginald Pittman, by Robin M. Hamilton, both of 3152 Lawn St., Alton, IL 62002.

Respondents (Defendants-Appellees below): County of Madison, State of Illinois; Sergeant Randy Eaton; Jail Deputy, Matthew Werner.

RULE 29.6 STATEMENT

Petitioner, Reginald Pittman is an individual acting through his duly appointed mother, guardian and next friend, Robin M. Hamilton. Respondents are a governmental corporation and individuals.

First Financial Corporation, d/b/a First Financial Corporation of Terra Haute Indiana, with a publicly traded parent, First Financial Bank, NA that owns more than ten percent of its stock appears on certain pleadings in the case, but it has no interest in the case. It appears simply because the probate court of Madison County selected it as an institution into which any sums that might be awarded in this case would be deposited awaiting any further orders of the probate court. As it has no interest in the case or the outcome, a corporate disclosure statement is not necessary under Rule 29.6; however, the identity of the corporation and its publicly traded parent are disclosed above.

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Petitioners, Reginald Pittman respectfully submit this petition for a writ of certiorari to the Seventh Circuit Court of Appeals.

LIST OF PROCEEDINGS AND OPINIONS BELOW

1. Reginald Pittman, by and through his guardian and next friend, Robin M. Hamilton, v. Madison County, Illinois, Randy Eaton and Matthew Werner, United States District Court of the Southern District of Illinois, Cause No. 3:08-cv-890.

2. Reginald Pittman, by and through his guardian and next friend, Robin M. Hamilton, v. Madison County, Illinois, Randy Eaton and Matthew Werner, United States Court of Appeals for the Seventh Circuit, Cause No. 12-3233

3. Reginald Pittman, by and through his guardian and next friend, Robin M. Hamilton, v. Madison County, Illinois, Randy Eaton and Matthew Werner, United States Court of Appeals for the Seventh Circuit, Cause No. 16-3291

4. Reginald Pittman, by and through his guardian and next friend, Robin M. Hamilton, v. Madison County, Illinois, Randy Eaton and Matthew Werner United States Court of Appeals for the Seventh Circuit, Cause No. 19-2956

5. Reginald Pittman, by and through his guardian and next friend, Robin M. Hamilton, v. Madison County, Illinois, Randy Eaton and Matthew Werner United States Court of Appeals for the Seventh Circuit, Cause No. 23-2301

OPINIONS AND CITATIONS

Pittman v. Madison County, 970 F.4th 561 (7th Cir. 2024).

Pittman v. County of Madison, No. 3:08-cv-890-DWD, 2022 U.S. Dist. LEXIS 140009 (S.D. Ill. Aug. 5, 2022)

Pittman v. Madison County, 970 F.3d 823 (7th Cir. 2020).

Pittman v. County of Madison, No. 08-CV-890-SMY-DGW, 2019 U.S. Dist. LEXIS 155992 (S.D. Ill. Sep. 12, 2019), rev. by Pittman v. Madison County, 970 F.3d 823 (7th Cir. 2020).

Pittman v. County of Madison, 863 F.3d 734 (7th Cir. 2017)

Pittman v. County of Madison, No. 08-cv-890-SMY-DGW, 2016 U.S. Dist. LEXIS 98659 (S.D. Ill. July 28, 2016), rev. by Pittman v. County of Madison, 863 F.3d 734 (7th Cir. 2017)

Pittman v. County of Madison, No. 08-cv-890-SMY-DGW, 2015 U.S. Dist. LEXIS 15883 (S.D. Ill. Feb. 10, 2015)

Pittman v. County of Madison, No. 08-cv-890-SMY-DGW, 2014 U.S. Dist. LEXIS 164304 (S.D. Ill. Nov. 24, 2014)

Pittman v. County of Madison, 746 F.3d 766 (7th Cir. 2014)

Pittman v. County of Madison, No. 08-0890-DRH, 2012 U.S. Dist. LEXIS 124755 (S.D. Ill. Aug. 31, 2012), rev. by Pittman v. County of Madison, 746 F.3d 766 (7th Cir. 2014)

Pittman v. County of Madison, No. 08-0890-DRH, 2011 U.S. Dist. LEXIS 111216 (S.D. Ill. Sep. 27, 2011), rev. by 746 F.3d 766 (7th Cir. 2014)

Pittman v. County of Madison, 2009 U.S. Dist. LEXIS 120816 (S.D. Ill., Dec. 29, 2009)

JURISDICTION

The Petitioner seeks review of the United States Court of Appeals Seventh Circuit's Opinion of July 16, 2024. A timely petitions for rehearing was filed and denied on August 21, 2024. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U. S. Const. Amend VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in Court of the United States, than according to the rules of the common law.

2. U. S. Const. Amend XIV.

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.

STATEMENT OF THE CASE

In this case, the third-trial court entered judgment

and filed an opinion on July 16, 2024. A Petition for Rehearing was filed and denied on August 21, 2024. The Seventh Circuit Court held that in this Fourteenth Amendment due process case, the trial court improperly instructed the jury by requiring that the plaintiff to prove that the defendant prison guards were subjectively aware of an immediate risk of harm to the plaintiff pre-trial detainee in order to prevail. Nonetheless, because the court found that the erroneous jury instruction did not prejudice the plaintiff, the court affirmed judgment for the defense.

The Circuit Court found that the case was put to the jury as a binary choice (Doc. 40, p.21), or, as the court put it, a "credibility contest." The court stated:

> ...neither Pittman nor the defendants focused on Deputy Werner's or Sergeant Eaton's subjective mental states about the risk of harm Pittman posed to him-self. To the contrary, the parties pin-pointed their focus on whether, in the weeks before his suicide attempt, Pittman ever asked Deputy Werner or Sergeant Eaton to return to cri-sis counseling. *Pittman v. Madison County*,108 F. 4th at 573.

The evidence in the case and the arguments do not present a "binary choice". The plaintiff contends that Circuit Court in so assessing the evidence missed the crucial point that each defendant promised to refer the plaintiff to crisis. In so promising, the defendants made a determination that a crisis referral was necessary, and then failed to protect the plaintiff by placing him in a secure environment and

immediately referring him to crisis.

THE REASONS FOR GRANTING THE PETITION

A. THE SEVENTH CIRCUIT'S RULING DENIED PLAINTIFF'S DUE PROCESS RIGHT TO A FAIR TRIAL BEFORE A PROPERLY INSTRUCTED JURY

The Seventh Amendment to the United States Constitution retains the right to trial by jury. That right is embodied in Federal Rule of Civil Procedure 38. The right to a correct jury instruction is set out in Federal Rule of Civil Procedure 51.

Standard of Review

The issue of whether the proper issues jury instruction was given is the gravamen of this petition. When deciding whether jury instructions are properly given, the court engages in a two-pronged test. First the court reviews the contested instruction anew, to see whether it accurately states the law. *Sanchez v. City of Chicago*., 880 F.3d 349, at p. 355 (7th Cir. 2018) Then, the court determines whether the instruction likely confused or misled the jury. See, for example, *Doe v. Burnham* 6 F.3d 476 (7th Cir. 1993). The instruction is to be read in conjunction with the arguments of counsel to determine whether a party has been deprived of his right to a fair trial by instructional error. See, for example, *Lynch v. Belden & Co.,* 882 F.2d 262 (7th Cir. 1989).

B. HE SEVENTH CIRCUIT IMPROPERLY ENGAGED IN FACT FINDING THAT WAS CONTRARY TO THE RECORD IN DECIDING THAT THE THIRD TRIAL JURY WAS PRESENTED WITH A "BINARY CHOICE" ON CREDIBLITY

Here, both defendants, Deputy Matthew Werner and Sergeant Randy Eaton, in promising plaintiff that they were referring him to Crisis, determined that a crisis referral was necessary. All of the professional witnesses testified as set forth below that the defendant officers were trained to an objective standard that prevented the defendants from leaving the decedent in an isolated segregation cell with the means to hang himself.

1. Lieutenant Rene Stephenson

Renee Stephenson, the jail lieutenant who responded to the plaintiff's suicide attempt, testified that the jail policy and procedure required that every request for crisis had to be responded to immediately. Trial Transcript Doc. 366, p. 28, ll. 15-25, even if made in a light-hearted way (Trial Transcript Doc. 366, p. 29, ll. 15-19), and even if the word suicide was not mentioned. Trial Transcript, Doc. 366, p. 28, l. 15-25. According to Lieutenant Stephenson, under the training, policies and procedures at the Madison County jail, a jail officer such as each defendant is to take the detainee who requested crisis and put him in a secure, safe environment until the arrival of the crisis counselor. Doc. 366, p. 34, ll. 16-25.

2. Captain Joseph Gulash

Captain Gulash was the Madison County jail superintendent. According to Superintendent Captain Joseph Gulash, the defendant's failure to address a crisis request, as in this case, would be dangerous and might represent a disciplinary issue. Doc 368, p.66, l. 4-16. If, as witness Banovz testified, defendant Deputy Matthew Werner deferred action from Friday until Monday on a promised crisis referral, he violated the policies and procedures of the jail. Trial Transcript, Doc. 368, p. 71, l. 18-p. 72, l. 1. According to Captain Gulash, once a crisis referral was promised, as witness Banovz testified in this case, Deputy Matthew Werner was required to refer plaintiff to crisis immediately and, until plaintiff could be evaluated by crisis, put in the safety modalities available at the jail. Trial Transcript Doc. 368, 68, l. 12-19; p. 72, l. 2-l.10; p. 72, l. 18-24.

The policies and procedures at the jail defuse the risk of suicide. Trail Transcript, Doc. 368, 68, l. 17-24 until Crisis does the evaluation of the plaintiff for suicide risk. Trial Transcript, Doc. 368, p. 67, l. 22-p. 68, l.6. According to Superintendent Captain Joseph Gulash, walking away from a crisis request ("a known problem"), as witness Banovz testified that defendant deputy Mathew Werner and defendant Sergeant Randy Eaton did, would be objectively unreasonably and a violation of jail policies and procedures. Trial Transcript, Doc. 368, p. 73, ll. 9-23.

3. Jeffery Eiser

The plaintiff's expert, Jeffery Eiser, former deputy director of the Cincinnati jails, testified that jail policies, procedures and national standards require

that defendants take immediate action upon receiving a Crisis request. Trial Transcript, Doc. 366, p. 25, ll. 17-24; Doc. 366, p 97, ll. 10-24. p. 27, l. 25-p. 98, l.5. Jeffery Eiser testified that both defendants failed to take reasonable steps, an objective standard, to protect plaintiff from harm when it was clear that immediate action was required in response to plaintiff's crisis request. Trial Transcript, Doc. 366, p. 96, ll. 4-19. Jeffery Eiser testified that defendant Deputy Matthew Werner's in delaying from Friday, December 14 until Monday, December 17 (as Banovz testified) was in direct conflict with the jail policies and procedures and defendant Deputy Matthew Werner's training (an objective standard.) The jail policies, procedures and training required notification of Crisis and securing the inmate in a safe environment until crisis could be available. Trial Transcript, Doc. 366, p. 99, ll. 14-23. Jeffery Eiser testified that, in failing to follow this policy and the national standards, the guards created a "substantial risk" of harm. Trial Transcript, Doc. 366, p. 99, l. 24--p. 100, l.11.

Jeffery Eiser also testified that it is never appropriate not to follow through with a promise to see "Crisis." Trial Transcript Doc. 366, p. 102, ll. 7-16. The jail policies and system require immediate follow through. Trial Transcript, Doc. 366, . 99, l. 2-p. 100,l. 11. Doc. 366, p. 103, ll. 18-23. Jeffery Eiser testified that every jail across the nation has an immediate notification and safety housing requirement. Trial Transcript, Doc. 366, p. 103, l. 24--104, l.8.

According to Jeffery Eiser, both defendant deputy Matthew Werner and Sergeant Randy Eaton violated

these objective standards and training. See, for example, Trial Transcript, Doc. 366, p. 103, l. 24--104, l.8

Jeffery Eiser testified that had either defendant taken reasonable steps required by the jail procedures and their training outlined above, they would have abated the substantial risk they created. Trial Transcript, Doc. 366, 103, l. 24--104, l.8. p. 109, l. 5--p. 112, l. 2.

4. Dr. David Kan

Dr. David Kan is the director of psychological services for the VA in California. He trained at San Quentin. His duties include supervising the psychiatric care of veterans in California jails. He testified in accordance with the above witnesses.

Dr. David Kan testified that the plaintiff's underlying mental conditions would have responded well to a crisis visit. Trial Transcript, Doc. 366, p. 181, l. 16-18, 181-ll.16-19; 170, ll. 10-12 (crisis evaluations and screening are national standards); Doc. 366, p. 173, ll. 16-24 (every jail has crisis and screening available; when a crisis evaluation is needed there can be no delay (Trial Transcript, Doc. 366, p.187, l. 10--p. 188, l. 8); Dr. Kan testified that defendants acted inappropriately in violation of national standards and caused the plaintiff's suicide attempt when they failed to refer to crisis and protect plaintiff. Trial Transcript, Doc. 366, p. 188, ll. 9- p. 189, l. 25; p. 194, l. 24-p. 195, l.5; p. 195, l. 7-l. 21; Dr. Kan also testified that the guards through their training, procedures and standards should have been aware and were trained that the failure to follow the above standards, policies and training carried a

substantial risk of suicide. Trial Transcript, Doc. 366, p. 222-ll. 23-25, p. 223-1.11-21.

C. THE ARGUMENTS AND EVIDENCE AT TRIAL DID NOT, AS SUGGESTED IN THE COURT'S OPINION, PRESENT THE CASE AS DEPENDING ENTIRELY UPON THE JURY'S DETERMINATION OF THE CREDIBILITY OF THE PLAINTIFF'S WITNESSES AND EVIDENCE AS COMPARED WITH THE DEFENDANT'S WITNESSES.

Of course, Banovz's testimony and the plaintiff's suicide note have to be tested for credibility in the presentation of the case, as they provide the facts that the plaintiff relies upon. In its opinion in this case, See *Pittman v. Madison County*, 108 F.4th 561 (7th Cir. 2024), the court stated:

> In its ruling in this case, the court held that the issues jury instruction given was improper in requiring the plaintiff to prove that the defendants "were aware... or strongly suspected facts showing a strong likelihood that [*Pittman*] would be seriously harmed." *Id.*at p. 572.

At trial, plaintiff's attorney argued that jails had developed safety rules and specific structures, including crisis and crisis referral, to meet the safety needs of the jail. Trial Transcript, Doc. 369, p. 98, ll. 19-25. The plaintiff's attorney argued that, in this case, those rules had not been followed. The plaintiff's attorney also argued that the defendant's jail officers cannot, in violation of their training and the jail policies and procedures, promise to send the plaintiff to crisis and, then, renege on that promise.

Transcript, Doc. 369, p. 99, ll. 12-22. Plaintiff's attorney also argued that the defendants were required to take reasonable steps to abate the substantial risk they created by referring to crisis and by placing the plaintiff in a protective environment. Doc. 369, p. 99, l. 23-p. 100, l. 9.

These factors are all objective factors that, under the ruling of the Circuit Court, can now, give rise to liability. However, under the jury instruction given at the third trial, the plaintiff was required to prove that the defendants were aware or strongly suspected the "substantial likelihood" that the plaintiff would harm himself. Under the evidence and instruction in this case, a jury could believe that the defendants were aware, through their training, that they had created a "substantial risk" of harm by leaving the plaintiff in an unprotected environment and by not referring the plaintiff promptly to crisis, but could conclude that the defendants were not subjectively aware or did not suspect that the plaintiff would harm himself. Under that circumstance, the instruction given directed that the jury find for the defendant.

In argument, the plaintiff's attorney also recounted the testimony of witnesses Lieutenant Renee Stephenson, Captain Joseph Gulash, that the failure to protect plaintiff and to refer promptly to crisis created a "substantial risk of harm." Once again, these were objective determinations. Trial Transcript, Doc. 369, p. 108, ll. 1-20. Plaintiff's attorney argued that defendants breached these objective requirements.

The plaintiff's attorney presented the testimony of Terry Fillman, the defendants' expert witness, that

the failure to timely refer to crisis was defendants' training problem. Id., p. 108.

Unfortunately, because the jury instruction given required that plaintiff also prove that the defendants were aware or strongly suspected the substantial likelihood that the plaintiff would harm himself, the plaintiff's attorney was required to argue what the defendants actually knew. As the argument presented by plaintiff's attorney at Trial Transcript Doc.369, p. 109, l. 6-p. 111, l.3 and p. 112, l.5-p. 113, l.13, was not supported by direct evidence that defendants knew or strongly suspected that there would be a suicide attempt (there were no such admissions from the defendants), it was a weak argument. This argument would not have been made had the improper instruction been given, as it addressed topics that, under this court's opinion appealed from need not have been addressed to find liability. As all of the professional witnesses testified that, objectively, the defendants were trained and subject to policies and procedures which advised them that leaving plaintiff in an unprotected, isolated, environment after a crisis request subjects the plaintiff to a high degree of risk, arguments about what the defendants actually knew become irrelevant. Although the argument by plaintiff about what the defendants actually knew was necessary under the instruction that was given, that argument undercut the plaintiff's case. The defendants then engaged in arguments about the defendants' lack of subjective knowledge of an immediate substantial risk which were improper under the instruction finally approved by the court in this case.

Furthermore, the defendants' attorney's argument, which was criticized in *Pittman III*, *Pittman v Madison County*, 970 F.3d 823 (7th Cir. 2020) at p. 829, caused the erroneous instruction to carry great impact in this case. The defendants' attorney, beginning at Trial Transcript, Doc. 369, p. 129, l. 15, made the lack of subjective knowledge the centerpiece of his argument. The defense attorney argued that, regardless of whether the plaintiff was likely to hurt himself, neither "Randy or Matt were [un]aware of this strong likelihood that Plaintiff would seriously harm himself or strongly suspected facts showing a strong likelihood that Plaintiff would be seriously harmed." Now Mr. Anderson tells you, well, yeah, they knew that because they knew he was on suicide watch. That doesn't cut it, because he was taken off suicide watch, and they both said, as a result of that, they concluded he wasn't suicidal....

Defendants' attorney further argued:

> [w]hat is it they knew? What is it that Matt and Randy knew on December 17th, 2019 [sic], when Reggie made the decision to hang himself? Here's what they knew. They knew he was a pretrial detainee awaiting a trial for a charge. They knew he was on suicide watch from October 20th to October 22nd. And they knew he was cleared from suicide watch on October 22nd by crisis intervention. And as I mentioned, they concluded he's not suicidal anymore because they didn't know the reason why he asked for crisis that time or said he was suicidal in October.

> They also knew that he was moved to the segregation cell for security reasons. That's what they knew. Trial Transcript, Doc. 369, p. 128, l. 25, p. 129, l. 11

The defendants' attorney went on to argue:

> Because remember, here's what they didn't know. They didn't know of any of his diagnoses. They didn't know he was diagnosed with impulsivity disorder. They didn't know he was depressed. They didn't know what his medications were. They didn't know the contents of his medical records because jail officers aren't allowed to see those, except in rare circumstances, and they both told you that they did not see his medical records. They knew that Mr. Pittman wrote a letter to his -- or they didn't know about Reggie's letter to his grandma that has been gone over and that you have seen. And they sure didn't know that Mr. Pittman had decided to attempt suicide before he did. I submit to you, ladies and gentlemen, that Eaton and Werner were not aware of the strong likelyhood that Plaintiff would seriously harm himself or even strongly suspect it, facts showing a strong likelihood that Reggie would commit suicide on December 19th, 2007 at 9:30 in the evening. ...
>
> ..The evidence I think is overwhelming in my judgment that they weren't aware of the strong likelihood that Reggie was going to attempt suicide. And they didn't have

> facts that would tell them that... Id. p. 129, l.12-p. 130, l.2.

If an appropriate instruction had been given, the counter argument to these statements would have been that the defendants' specific subjective knowledge of an imminent threat of serious physical harm was irrelevant. The defendant jail guards were trained, and their policies and procedures advised them that leaving plaintiff in an unprotected segregation cell and failing to call Crisis after they had promised to do so, created, a high degree of risk. Under the appropriate instruction, that the defendant jails guards' training required that they act upon by summoning crisis and by putting the plaintiff in a protective environment.

That the instruction given required that the defendant guards be subjectively aware of the immediate danger before liability could be assessed, made all the difference. Here, defendant deputy Matthew Werner testified that he was not aware of the jail policies (he had not read them) his ignorance of the objective standards and procedures would operate as a defense as he was not aware that his conduct was improper. the defendant's attorney's improper argument that the defendants were not aware of the danger, because there was no direct evidence of their subjective knowledge by focusing on the subjective knowledge of an imminent threat of serious physical harm and prejudiced the plaintiff carries great weight.

D. THE CIRCUIT COURT HAS DID NOT CONSIDER, ON A CONCEPTUAL LEVEL,

HOW THE IMPROPERLY GIVEN JURY INSTRUCTION PREJUDICED THE PLAINTIFF

1. Under the evidence, a reasonable jury would conclude that the plaintiff did not decide to commit suicide until December 19, 2007; the jury would conclude that there was, therefore, not a strong likelihood that defendants were aware of serious physical harm when defendants' interacted with plaintiff.

The evidence in this case can be reasonably interpreted by a jury to conclude that the plaintiff did not reach a decision to try to kill himself until he wrote his suicide note on December 19, 2007. A jury so deciding would also determine that the plaintiff could not prove that on December 14, 2007 (Defendant Deputy Matthew Werner), or on December 18, 2007 (Defendant Sergeant Randy Eaton), strongly suspected that there was a strong likelihood that Plaintiff would seriously harm himself (paragraph 1 of the improper instruction Doc. 352-1, p. 21), or that defendants were aware of or strongly suspected such strong likelihood. At the very least a jury concluding that the plaintiff did not decide to commit suicide until December 19, would be strongly confused as to how to apply the instruction to the facts of this case. On the other hand, the defendants, in failing to protect the plaintiff, in failing to honor their promises to refer him to Crisis violated their training, and professional standards reflecting that they were creating a substantial risk and a risk that they could have easily alleviated.

2. That the credibility of witness Banovz was called into question in no way impacts that the defendants' also improperly emphasized the subjective requirement of the improperly given instruction, when arguing the case, thereby causing the improperly given instruction to prejudice the plaintiff.

As pointed out above, the defendants made lack of subjective knowledge the centerpiece of their defense. See the criticism referred to above in Pittman III. That subjective element is not required for the plaintiff to prevail under the court's ruling in this case. A jury is very likely to have based its ruling, at least in part, on the defense argument set forth above. All of the items pointed out in the defense argument were an improper basis upon which to decide the case, in light of this court's ruling in this case. They improperly influenced the jury and prejudiced the plaintiff.

E. UNDER THE HISTORY OF THE CASE, THE PLAINTIFF STILL HAS NOT HAD AN OPPORTUNITY TO HAVE A PROPERLY INSTRUCTED JURY HEAR/VIEW THE APPROPRIATE POWERFUL EVIDENCE.

In *Pittman v. Madison County*, 863 F.3d 734 (7th Cir. 2017) (Pittman II), the trial court ruled that the jury could not see the contemporaneous videotape statement of witness Bradley Banovz, even after it advised the court that it required to view it to reach a verdict. The jury (properly instructed) took a day and a half to consider the case, and only reached a defense verdict when advised by the court that she

would not let them view the aforesaid statement. In *Pittman v. Madison County,* 863 F.3d 734 (7th Cir. 2017 2017) (*Pittman II*), the jury saw the videotape but was improperly instructed. In *Pittman v. Madison County*, 970 F.3d 820, (7th Cir. 2020) (Pittman III), the jury was again improperly instructed. It is the position of the plaintiff that for the plaintiff to receive a fair trial (and, if we take the trial process seriously), a jury considering the material evidence should be allowed to render a verdict in this case while being properly instructed as to the law.

CONCLUSION

For the foregoing reasons, the court should grant the Petition for Certiorari and, after briefing and arguments enter a ruling so that the Judgment of the trial court is reversed and the case is be remanded to the District Court for a new trial

.

Dated: November 18, 2024.

Respectfully submitted,

s/ Ross T. Anderson

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APPENDIX

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APPENDIX A

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 21, 2024

Before

ILANA DIAMOND ROVNER, Circuit Judge

DAVID F. HAMILTON, Circuit Judge

MICHAEL Y. SCUDDER, Circuit Judge

No. 23-2301

REGINALD PITTMAN, by and through his guardian and next friend, ROBIN M. HAMILTON,
Plaintiff-Appellant,

v.

MADISON COUNTY, ILLINOIS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois
No. 3:08-cv-00890-DWD
David W. Dugan,

O R D E R

On consideration of the petition for rehearing filed by the Plaintiff-Appellant on July 30, 2024, all members of the original panel have voted to deny the petition for rehearing.

Accordingly, the petition for rehearing is hereby DENIED.

APPENIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 23-2301

REGINALD PITTMAN, by and through his guardian and next friend, ROBIN M. HAMILTON,
Plaintiff-Appellant,
v.
MADISON COUNTY, ILLINOIS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.
No. 3:08-cv-00890-DWD — David W. Dugan, Judge.

ARGUED APRIL 2, 2024 — DECIDED JULY 16, 2024

Before ROVNER, HAMILTON, and SCUDDER, Circuit Judges.

SCUDDER, Circuit Judge. Reginald Pittman, a pretrial detainee at the Madison County jail, attempted suicide while awaiting trial. He survived but suffered a severe brain injury. Complaining that two guards ignored his requests to see cri-sis counseling before the suicide attempt, Pittman sued Madison County and various jail officials under 42 U.S.C. § 1983, alleging that they violated the

Fourteenth Amendment by failing to provide him with adequate medical care. What followed is a lengthy procedural history including three appeals and three trials. On appeal from the third trial and verdict for the defendants, Pittman challenges a key jury instruction for his Fourteenth Amendment claim. He contends that the instruction erroneously required proof that the officers were subjectively aware or strongly suspected a high likelihood of self-harm.

Pittman pressed this argument in a prior appeal, and we rejected it. But much has evolved in our case law since that decision, as numerous cases have required us to grapple with the nuances of the state-of-mind requirements in claims brought by pretrial detainees. Aided by those decisions, we agree with Pittman that the jury instruction contained an error. Pittman did not need to prove subjective awareness of the risk of harm to establish liability. Instead, the jury should have been instructed to answer whether the defendants made an intentional decision with respect to Pittman's conditions of confinement, and from there, whether defendants acted objectively unreasonably by failing to mitigate the risk Pittman posed to himself.

In the end, though, we cannot conclude that the jury instruction error prejudiced Pittman. We reach that conclusion based on a thorough examination of the evidence presented at trial and the arguments of the parties. So we affirm.

I

A

The trial record following our most recent remand

supplies the operative facts.

In August 2007, Reginald Pittman entered the Madison County jail as a pretrial detainee. Within a few months, he re-ported mental distress. In late October, he told a jail officer, Deputy Matthew Werner, that he was suicidal. Deputy Werner referred Pittman to a social worker from Chestnut Health Systems, also known as "crisis" counseling, and placed him on suicide watch for several days. A few weeks later, Pittman requested to see crisis counseling once again. At a counselor's suggestion, Sergeant Randy Eaton temporarily relocated Pittman to the Special Housing Unit for additional observation.

On December 19, Pittman attempted suicide. He hung himself from the bars of his cell with a bed sheet, resulting in a severe brain injury. Pittman left a suicide note stating that "the [g]uards" were "f***ing with [him]" and would not let him talk to "crisis [counseling]."

According to Bradley Banovz, an inmate housed near Pittman's cell, Pittman had asked Deputy Werner and Sergeant Eaton to refer him to crisis counseling in the days leading up to his suicide attempt, but neither did. Banovz testified that Pittman asked Deputy Werner to put him on the list for crisis counseling on Friday, December 14. As Banovz remembered, Deputy Werner did not take the request seriously, joking that Pittman did not need counseling. Deputy Werner reportedly told Pittman that he would be back on Monday and schedule him for crisis counseling then. That never happened.

Banovz also recalled that Pittman asked Sergeant

Eaton to refer him to crisis counseling a few days later, on Tuesday, December 18. As Sergeant Eaton made his rounds that night, Banovz overheard Pittman—who was crying—ask to see cri-sis counseling with Eaton responding that he would schedule an appointment. But Sergeant Eaton did not refer Pittman to crisis counseling either.

Deputy Werner and Sergeant Eaton both testified and offered an altogether different account. To be sure, they were quick to admit knowing that Pittman had been on suicide watch in October 2007. But they rejected Banovz's account and denied ever hearing or seeing any indication of subsequent mental distress from Pittman or, more specifically, ever hearing him ask to return to crisis counseling. And, going further, Deputy Werner and Sergeant Eaton insisted that had Pittman asked for crisis counseling, they would have referred him for mental health treatment.

B

Through his guardian, Pittman sued Madison County, Deputy Werner, Sergeant Eaton, and others, bringing claims under 42 U.S.C. § 1983 and state law. Pittman's § 1983 claim alleges that defendants violated the Due Process Clause of the Fourteenth Amendment by failing to respond to his requests for mental health treatment. Pittman's case has a lengthy history, including three prior appeals. See *Pittman ex rel. Hamilton v. County of Madison* (Pittman I), 746 F.3d 766 (7th Cir. 2014) (reversing in part a grant of summary judgment for defendants because a triable issue of fact existed on Pittman's claims against Deputy Werner and Sergeant Eaton);

Pittman ex rel. Hamilton v. County of Madison (Pittman II), 863 F.3d 734 (7th Cir. 2017) (reversing and remanding for a new trial because the district court erroneously excluded Banovz's recorded interview at the first trial); Pittman ex rel. *Hamilton v. County of Madison* (Pittman III), 970 F.3d 823 (7th Cir. 2020). Most relevant to this appeal is Pittman III, which involved a pivotal jury instruction articulating the elements of Pittman's Fourteenth Amendment claim. In *Pittman III,* we held that a portion of that jury instruction misstated the law and remanded for a new trial.

The case then went to trial for the third time. Over Pittman's objection, the district court instructed the jury in line with our ruling in *Pittman III*, using materially identical language to that which we approved in *Pittman III*. The jury returned a verdict for defendants, and this appeal followed.

II

The sole issue before us is whether the district court accurately instructed the jury on the elements of Pittman's Fourteenth Amendment claim. Pittman believes that the instruction improperly injected a subjective component into an otherwise objective inquiry, contravening *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), and our precedent. "We evaluate [] jury instructions anew when deciding if they accurately state the law." *Miranda v. County of Lake*, 900 F.3d 335, 350 (7th Cir. 2018). If the instruction contains a legal error, we will reverse only if the error prejudiced Pittman. *See Cotts v. Osafo*, 692 F.3d 564, 567 (7th Cir. 2012).

A

Incarcerated persons have a constitutional "right to receive adequate medical treatment," including mental health treatment and protection from self-harm. Miranda, 900 F.3d at 350 (citing *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976)). But the source and scope of that right turns "on the relationship between the state and the person in the state's custody." *Collins v. Al-Shami*, 851 F.3d 727, 731 (7th Cir. 2017) (quoting Currie v. Chhabra, 728 F.3d 626, 630 (7th Cir. 2013)).

For convicted prisoners, the Eighth Amendment's proscription on "cruel and unusual punishments" protects against deliberate indifference to serious medical needs. See *Estelle*, 429 U.S. at 102–04. These claims measure state-of-mind, specifically, deliberate indifference, using a subjective standard: to be liable a prison official must be "aware of a substantial risk of serious harm, and effectively condone[] the harm by allowing it to happen." *Jones v. Mathew*s, 2 F.4th 607, 613 (7th Cir. 2021) (citation and internal quotation marks omitted). "This subjective standard," we have explained, "is closely linked to the language of the Eighth Amendment." Miranda, 900 F.3d at 350.

Pretrial detainees, however "stand in a different position: they have not been convicted of anything, and they are still entitled to the constitutional presumption of innocence." Id. "[P]retrial detainees (unlike convicted prisoners) cannot be punished at all," *Kingsley*, 576 U.S. at 400, so "the [Eighth Amendment's] punishment model is inappropriate for them," *Miranda,* 900 F.3d at 350. Instead, they "are protected from certain abusive conditions" by

the Fourteenth Amendment's Due Process Clause. Id.; see also *Bell v. Wolfish*, 441 U.S. 520, 535–36 (1979) (explaining that "the restrictions and conditions of the detention facility" cannot "amount to punishment" because "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law").

These "different constitutional provisions" lead to "different standards." *Collins,* 851 F.3d at 731 (quoting Currie, 728 F.3d at 630). Yet for many years we "assessed pretrial detainees' medical care (and other) claims under the Eighth Amendment's [subjective] standards." Miranda, 900 F.3d at 350. That changed in Kingsley.

In *Kingsley*, the Supreme Court held that an objective reasonableness standard applies to a pretrial detainee's claim of excessive force. 576 U.S. at 392. Such a claim, the Court explained, involves "two separate state-of-mind" questions: (1) "the defendant's state of mind with respect to his physical acts—i.e., his state of mind with respect to the bringing about of certain physical consequences in the world," and (2) "the defendant's state of mind with respect to whether his use of force was 'excessive.'" Id. at 395. The former, which requires "a purposeful, a knowing, or possibly a reckless state of mind," was not disputed in *Kingsley* itself. Id. at 396. Still, the Court took care to observe that this part of the mental-state requirement safeguards against liability for "negligently inflicted harm," which is "categorically beneath the threshold of constitutional due process." *Id.* (citation and internal quotation marks omitted).

The Supreme Court focused its attention on the

latter state-of-mind question, considering at some length whether "the defendant's state of mind with respect to the proper interpretation of the force" is judged by an objective or subjective standard. Id. That question, the Court determined, requires proof "only that the force purposely or knowingly used against [the pretrial detainee] was objectively unreasonable." *Id*. at 396–97. Applying this standard, the Court in *Kingsley* rejected jury instructions that suggested "weigh[ing] [a defend-ant's] subjective reasons for using force and subjective views about the excessiveness of the force." *Id*. at 403–04.

Concluding that the Supreme Court did not limit its reasoning in *Kingsley* to excessive force claims, we extended the objective reasonableness standard to pretrial detainees' medical care claims in our decision in *Miranda v. County of Lake*. See 900 F.3d at 352. In doing so, we emphasized *Kingsley's* reminder to pay careful attention to the different status of pre-trial detainees. See *id.* at 352 (reiterating that "[t]he language of the two Clauses differs, and the nature of the claims often differs[, a]nd most importantly, pretrial detainees … cannot be punished at all, much less maliciously and sadistically" (citation and internal quotation marks omitted)). Conceptualizing the Kingsley standard, we concluded that a jury must decide two questions: (1) "whether the medical defendants acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their handling of [plaintiff's] case" and (2) whether the defendants' actions were "objectively reasonable." *Id.* at 353–54.

B

Pittman III came not long after Miranda and confronted how to instruct a jury on *Kingsley's* objective standard. 970 F.3d at 827–28. During his second trial, which was reviewed on appeal in *Pittman III*, the district court instructed the jury that Pittman had to prove four elements to prevail on his Fourteenth Amendment claim against Deputy Werner and Sergeant Eaton for failing to respond to his requests for mental health care:

(1) there was a strong likelihood that Pittman would seriously harm himself,
(2) the defendants were aware of … or strongly suspected facts showing this strong likelihood,
(3) they consciously failed to take reasonable measures to prevent Pittman from harming himself, and
(4) Pittman would have suffered less harm if the defendants had not disregarded the risk.

Id. at 827 (cleaned up).

On appeal Pittman contended that the second and third elements of this instruction were inconsistent with Kingsley and Miranda because the "language directed the jury to apply the now-defunct subjective test rather than the [governing] objective test." Id.

We agreed that the instruction's use of the word "consciously" in the third element introduced a subjective component into the requirements for proving mental state. See *id.* at 828–29. But we rejected Pittman's argument that the instruction's second element, requiring proof that defendants "were aware of … or strongly suspected facts showing" a "strong likelihood" of harm, ran afoul of the guidance supplied by our post-Kingsley decision in *Miranda. Id.* at 827–28. That element, we concluded,

was "consistent with *Miranda*" because it went "to *Miranda's* first inquiry: whether the defendants acted purposefully, knowingly, or perhaps even recklessly." *Id.* at 827 (internal quotation marks omitted).

We reasoned that "if the defendants 'were aware' that their actions would be harmful, then they acted 'purpose-fully' or 'knowingly'; if they were not necessarily 'aware' but nevertheless 'strongly suspected' that their actions would lead to harmful results, then they acted 'recklessly.'" *Id.* at 828. In other words, to act purposefully, knowingly, or recklessly, a defendant must have personal knowledge of—and thereby subjectively appreciate—the consequences of their actions.

C

Since *Pittman III*, we have had additional occasions to con-sider *Kingsley's* two-stepped mental state requirement applicable to claims brought by pretrial detainees. As we extended Kingsley to the failure-to-protect context, we determined that a pretrial detainee does not have to show a defendant's subjective awareness of the risk of harm. See Kemp v. *Fulton County*, 27 F.4th 491, 497 (7th Cir. 2022); *Thomas v. Dart*, 39 F.4th 835, 841 (7th Cir. 2022); *Echols v. Johnson*, No. 22-3230, 2024 WL 3197540, at *1 (7th Cir. June 27, 2024).

First, in *Kemp v. Fulton County*, we held that Kingsley abrogated our pre-Kingsley case law "to the extent that [it] re-quire[d] pretrial detainees to show, in a failure-to-protect case, that a defendant was subjectively aware of a substantial risk of serious injury." 27 F.4th at 497 (internal quotation marks

omitted). Such a requirement "cannot be reconciled with Kingsley's language, reasoning, and reminder to 'pay careful attention to the different status of pretrial detainees.'" Id. (quoting *Miranda,* 900 F.3d at 352). Instead, a pretrial detainee must show that the defendant "intend[ed] to carry out a certain course of actions," and "[a]t that point, the remaining question is whether that course is objectively reasonable." *Id.*

We adhered to the same approach in *Thomas v. Dart*, articulating the elements of a Fourteenth Amendment failure-to-protect claim without reference to a defendant's subjective awareness of the risk of harm:

> (1) the defendant made an intentional decision regarding the conditions of the plaintiff's confinement; (2) those conditions put the plaintiff at substantial risk of suffering serious harm; (3) the defendant did not take reasonable avail-able measures to abate the risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved, making the consequences of the defendant's inaction obvious; and (4) the defendant, by not taking such measures, caused the plaintiff's injuries. 39 F.4th at 841.

As in Kemp, we still considered awareness of the risk of harm, but from the perspective of a reasonable officer as part of *Kingsley's* objective reasonableness inquiry. See also *Echols*, 2024 WL 3197540, at *3–4 (applying the *Kingsley* standard in a recent failure-to-protect case and concluding that the jury instructtions improperly required the plaintiff to prove

subjective awareness of the risk of harm).

D

We have canvassed these post-Kingsley decisions in order to reveal the tension, if not inconsistency, in our case law. *Miranda* and *Pittman III* can be read as requiring pretrial detainees alleging inadequate medical care claims to prove defend-ants' subjective awareness of the risk of harm. See *Miranda*, 900 F.3d at 353–54; *Pittman III*, 970 F.3d at 827–28. Yet in Kemp and Thomas we retreated from any such requirement in evaluating the requirements for failure-to-protect claims. See *Kemp,* 27 F.4th at 497; *Thomas,* 39 F.4th at 841.

The confusion and discrepancy arise from our interpretation of Kingsley's first state-of-mind inquiry: "the defendant's state of mind with respect to his physical acts." Kingsley, 576 U.S. at 395. Pittman III, and to a lesser extent Miranda, conceptualize this inquiry as requiring proof of both intentional physical action and awareness of the consequences of that action. *Pittman III*, 970 F.3d at 827–28; *Miranda*, 900 F.3d at 353 (asking "whether the medical defendants acted purposefully, know-ingly, or perhaps even recklessly when they con-sidered the consequences" of their actions (emphasis added)). Under this interpretation, a defendant must subjectively know the consequences of their action or inaction to act purposefully, knowingly, or recklessly. On the other hand, our failure-to-protect cases perceive the first inquiry as a lower bar, requiring proof only that a defendant "intended to carry out a certain course of actions." See, e.g., *Kemp*, 27 F.4th at 497. In these cases, once a defendant deliberately

acts, their awareness of the risk of harm, or lack thereof, goes only to objective reasonableness. See *id.* at 496–97.

We owe it to our case law and litigants alike to resolve this confusion. Given the volume and importance of § 1983 pre-trial detainee litigation, now is the time to resolve any inconsistency within our case law. The circumstance before us is one of our own making, as we (like many other courts) have struggled to implement *Kingsley's* standards outside the con-text of a pretrial detainee's claim of excessive force. In light of today's clarification of our case law, we circulated this opinion to the full court under Circuit Rule 40(e). No judge in active service requested to hear this case *en banc*.

III

A

As difficult as it is to acknowledge, we have a hard time squaring *Pittman III* with our post-*Pittman III* precedent interpreting and applying *Kingsley*. With the benefit of multiple cases in multiple contexts requiring application of this Circuit's and our sister circuits' analyses of *Kingsley*, we are left with the firm conviction that a pretrial detainee in a medical care case need not prove a defendant's subjective awareness of the risk of harm to prevail on a Fourteenth Amendment Due Process claim. To the extent *Pittman III* concluded otherwise, it is overruled on this particular point.

The Supreme Court in *Kingsley* described the first inquiry as focusing on a defendant's "state of mind with respect to the bringing about of certain physical consequences into the world." *Kingsley*, 576 U.S. at

395 (emphasis added). In articulating the content of this first inquiry in the excessive-force context, the Court distinguished between intentional acts—"the swing of a fist that hits a face, a push that leads to a fall, or the shot of a Taser that leads to the stunning of its recipient"—that can lead to liability, and negligent acts—"if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee"—that cannot. *Id.* at 395–96. This framing asks strictly whether the defendant intended to commit the physical act that caused the alleged injury.

Only at the next step—as part of the second state-of-mind inquiry—do we begin to "interpret" the "reasonableness" of the defendant's action. Id. at 396. In the excessive-force con-text, "objective" factors informing this determination include "the relationship between the need for the use of force and the amount of force used" and "the threat reasonably perceived by the officer." *Id.* at 397. "Subjective reasons for using force," by contrast, and "subjective views about the excessiveness of the force," are off-limits. *Id*. at 403–04 (emphasis added). The objective reasonableness of a decision to deny medical care likewise does not consider the defendant's subjective views about risk of harm and necessity of treatment. Instead, the proper inquiry turns on whether a reasonable officer in the defendant's shoes would have recognized that the plaintiff was seriously ill or injured and thus needed medical care.

This application of Kingsley comports with the Supreme Court's reminder that pretrial detainees stand in a different position than convicted prisoners. Convicted prisoners serving a sentence must

produce subjective evidence that a defendant was "aware … that a substantial risk of serious harm exists" and "disregard[ed]" that risk to prevail. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); see also *Collins v. Seeman*, 462 F.3d 757, 761 (7th Cir. 2006) (requiring a "dual showing" that the defendant "(1) subjectively knew the prisoner was at a substantial risk of committing suicide and (2) intentionally disregarded that risk"). But "a pretrial detainee can prevail by providing only objective evidence that the challenged govern-mental action is not rationally related to a legitimate govern-mental objective or that it is excessive in relation to that purpose." *Kingsley*, 576 U.S. at 398 (emphasis added); see also *Bell*, 441 U.S. at 561. Accordingly, neither portion of the Eighth Amendment's subjective dual showing is required to establish Fourteenth Amendment liability.

In *Pittman III*, we expanded Kingsley's first inquiry and risked collapsing this distinction. Instead of asking solely about a defendant's state-of-mind as to "the bringing about" of certain physical conditions, *Kingsley*, 576 U.S. at 398, we asked about their state-of-mind as to the risks that action or inaction posed. Pittman III, 970 F.3d at 828. This error likely originated with our observation in Miranda that Kingsley asks whether a defendant "acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their handling of [a plaintiff's] case." *Miranda*, 900 F.3d at 353–54 (stating that a properly instructed jury could find the defendant failed to act "with purposeful, knowing, or reckless disregard of the consequences"); *Pittman III*, 970 F.3d at 827–28

(interpreting *Miranda*). But in charting this course, the mistake we made was in reintroducing what Kingsley prohibited: consideration of a defendant's "intent (or motive) to punish." *Kingsley*, 576 U.S. at 398.

While recognizing our error, we acknowledge the difficulty we faced in *Pittman III*. This is a very complicated area of law, and in no way are we alone in struggling to discern the appropriate mental state standard for judging pretrial detainees' claims. See, e.g., *Helphenstine v. Lewis County*, 60 F.4th 305, 315–17 (6th Cir. 2023) (collecting cases). The Supreme Court in Kingsley focused on a narrow question: whether, in the excessive force context, an objective or subjective standard applied to a defendant's state of mind regarding the interpretation of the force. See *Kingsley*, 576 U.S. at 395. As a result, the Court understandably left unresolved the several issues that the Pittman III panel faced, including the contours of the first Kingsley inquiry, how the two state-of-mind requirements interact, and how the *Kingsley* standard works in different con-texts such as cases of inaction.

At the time of *Pittman III*, few courts had weighed in on these issues. But that has changed. Several of our fellow circuits now agree that a pretrial detainee does not have to prove a defendant's subjective awareness of a serious risk of harm. See *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc) (holding in the failure-to-protect context that "[u]nder *Kingsley*, a pretrial detainee need not prove those subjective elements about the officer's actual awareness of the level of risk"); *Gordon v. County of Orange*, 888 F.3d 1118, 1124–25

(9th Cir. 2018) (extending Castro's reasoning to medical-care claims by pretrial detainees); *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (concluding that "the Due Process Clause can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm" in a conditions of confinement case); *Short v. Hartman*, 87 F.4th 593, 611 (4th Cir. 2023) (determining, in the medical care context, that "[t]he plaintiff no longer has to show that the defendant had actual knowledge of the detainee's serious medical condition and consciously disregarded the risk that their action or fail-ure to act would result in harm"); *Lawler ex rel. Lawler v. Hardeman*, 93 F.4th 919, 927 (6th Cir. 2024) (explaining that "officers can face liability even if they did not actually know of a risk of harm to a pretrial detainee" if there is proof "that the officers recklessly disregarded a risk so obvious that they either knew or should have known of it" in a medical care case). We know of no circuit court that has reached a contrary conclusion.

And our post-*Pittman III* failure-to-protect cases have explained the *Kingsley* standard in cases of inaction. Leaning on *Kingsley*, we have concluded that *Kingsley's* first inquiry re-quires proof only that a defendant made an intentional decision about the plaintiff's conditions. See *Kemp*, 27 F.4th at 496–97. For example, in Kemp, it was enough to show that the defendant "intentionally chose not to wear his hearing aid on the day of the fight," even if he did not appreciate the risk of harm from that choice. *Id.* at 497.

With the benefit of these developments, we

recognize our error in *Pittman III*. By requiring proof that "the defendants were aware of … or strongly suspected facts showing" a strong likelihood of harm, *Pittman III*, 970 F.3d at 827, we introduced a subjective component into *Kingsley's* otherwise objective inquiry. The district court, following our guidance in *Pittman III*, thus erred (through no fault of its own) by instructing the jury in this most recent trial that Pittman must prove that the defendants "were aware … or strongly suspected facts showing a strong likelihood that [Pittman] would be seriously harmed."

Instead, on the mental-state element in question, the district court should have instructed the jury that, to prevail, Pittman must prove that the defendants did not take reasonable available measures to abate the risk of serious harm to Pittman, even though *reasonable officers under the circumstances would have understood the high degree of risk involved*, making the consequences of the defendants' conduct obvious. That is the essential objective inquiry.

B

We have no doubt our course of action will catch the defendants by surprise. As they see it, we already approved the challenged language as consistent with *Kingsley* in *Pittman III*, creating law of the case that precludes further consideration. Tempting though it is, we cannot accept their invitation.

"The doctrine of law of the case establishes a presumption that a ruling made at one stage of a lawsuit will be adhered to throughout the suit." *Cannon v. Armstrong Containers, Inc.,* 92 F.4th 688,

701 (7th Cir. 2024) (quoting *Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995)); *Pepper v. United States*, 562 U.S. 476, 506 (2011) (defining the doctrine to "posit[] that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case" (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983))). It prevents a party from getting a "second bite at the [] apple." *Grede v. FCStone, LLC*, 867 F.3d 767, 775 (7th Cir. 2017). But "[t]he doctrine is discretionary, 'not an inflexible dictate.'" *Cannon*, 92 F.4th at 701 (quoting *Chi. Joe's Tea Room, LLC v. Village of Broadvie*w, 894 F.3d 807, 818 (7th Cir. 2018)); *Evans v. City of Chicago*, 873 F.2d 1007, 1014 (7th Cir. 1989) (describing the doctrine as "a self-imposed prudential limitation rather than a recognition of a limitation on the courts' power" (citation omitted)); *Avitia,* 49 F.3d at 1227 ("But it is no more than a presumption, one whose strength varies with the circumstances; it is not a straitjacket.").

Typically, courts will only depart from an earlier decision because of "good reason" or "unusual circumstances." *Cannon*, 92 F.4th at 701 (internal quotation marks omitted). That might include "(1) substantial new evidence introduced after the first review, (2) an intervening change in the law, and (3) a clearly erroneous decision." Id. But the "duty of adherence is less rigid" "if the ruling in question was by the same court." *Avitia,* 49 F.3d at 1227. In those circumstances, "[t]he doctrine does not apply if the court is 'convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.'" *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (quoting

Ari-zona, 460 U.S. at 618 n.8).

Because we conclude *Pittman III* would be decided differently given our current understanding of Kingsley, adherence to that decision risks a manifest injustice and the law of the case doctrine does not apply.

IV

Pittman's task on appeal is not yet over. We must still assess whether the jury instruction error prejudiced him. *Cotts*, 692 F.3d at 567. "When evaluating prejudice, we view the evidence as a whole to determine whether the jury could have reached a different outcome had the instructions been correct." *Kuberski v. Rev Recreation Grp.*, 5 F.4th 775, 780 (7th Cir. 2021). On this trial record—and especially mindful of the evidence and arguments by both parties—we conclude that the erroneous instruction did not impact the jury's verdict.

At bottom, the parties presented this case as a credibility contest: which version of events—Bradley Banovz's or the officers'—was more believable? Pittman's counsel told the jury that Banovz was the "lynchpin" of the case, and defense counsel agreed. In framing the case (and the accompanying presentation of evidence) this way, neither Pittman nor the defendants focused on Deputy Werner's or Sergeant Eaton's subjective mental states about the risk of harm Pittman posed to himself. To the contrary, the parties pinpointed their focus on whether, in the weeks before his suicide attempt, Pittman ever asked Deputy Werner or Sergeant Eaton to return to crisis counseling.

Pittman urged the jury to believe Banovz's

testimony that he asked Officers Werner and Eaton for crisis counseling and that the officers promised to make the referral. Banovz further testified that Sergeant Eaton heard Pittman crying in his cell—possibly for hours—the night he asked Eaton to see crisis counseling. It is undisputed that no referral was made—de-spite both officers' knowledge that Pittman had spent time on suicide watch about two months earlier. So, relying on multiple lay and expert witnesses, Pittman urged the jury to find that a properly-trained correctional officer at the Madison County jail would have understood the need to follow through on an inmate's request for crisis counseling—especially after promising to make the referral.

Deputy Werner and Sergeant Eaton pressed an entirely different account. They testified that they had a positive relationship with Pittman—testimony that aligned with Banovz's statements that Pittman viewed both officers as his favorites within the Madison County jail. Werner and Eaton denied ever hearing Pittman ask to return to crisis counseling and testified that, had they ever heard such a request, they would have made the referral. Both went a step further and agreed that failing to respond to an inmate's request for crisis counseling would have been unreasonable.

The parties put the case to the jury in this exact way—as a binary choice on credibility: believe Bradley Banovz or believe the two officers. Given this presentation, we cannot see how the erroneous jury instruction had any impact on the jury's verdict for the defendants. Neither Pittman nor the defendants focused their arguments on Deputy Wer-

ner's and Sergeant Eaton's subjective awareness of what would likely happen to Pittman if they ignored his request for crisis counseling. The case went to the jury with both sides hinging everything on whether Pittman asked for crisis counseling at all.

Presented in that way, the correct instruction would not have changed the outcome. If the jury believed the defendants' testimony, a reasonable officer in their shoes would know only that Pittman had previously been on suicide watch a few weeks before his attempt. But many detainees spend time on suicide watch without later attempting suicide, so that alone would not put a reasonable officer on notice of a substantial risk of harm or render defendants' failure to sua sponte refer Pittman to crisis counseling objectively unreason-able.

Conversely, if the jury believed Banovz's testimony, Deputy Werner and Sergeant Eaton admitted that ignoring an in-mate's crisis counseling request would be unreasonable. As such, neither party presented a theory whereby a jury could believe that even though a reasonable officer would have appreciated the risk of harm, Deputy Werner and Sergeant Eaton subjectively did not. Because of the way the parties presented this case, we conclude that the erroneous jury instruction did not steer the jury toward a verdict that turned on defendants' subjective awareness of the risk of harm to Pittman.

V

The broader circumstances and duration of this litigation are not lost on us. Pittman filed suit before *Kingsley* and in the years since, the legal landscape for assessing pretrial detainee claims has meaning-

fully changed. Kingsley set in motion that change and ever since, we have confronted nuanced legal issues presented by pretrial detainees' Fourteenth Amendment claims. While we hold that the district court erred when instructing the jury that a pretrial detainee must show a defendant was subjectively aware of the risk of harm, we do not fault the district court or parties for this error.

As the record reveals, the district court and parties handled this case and the jury instructions with care. The district court faithfully applied our guidance in *Pittman III* and ultimately, the legal mistake we recognize today did not prejudice Pittman.

In the final analysis, then, we AFFIRM.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Office of the Clerk
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604
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FINAL JUDGMENT

July 16, 2024

Before
ILANA DIAMOND ROVNER,
Circuit Judge
DAVID F. HAMILTON, *Circuit Judge*
MICHAEL Y. SCUDDER, *Circuit Judge*

No. 23-2301

REGINALD PITTMAN, by and through his guardian and next friend, ROBIN M. HAMILTON,
Plaintiff - Appellant
v.

MADISON COUNTY, ILLINOIS, et al.,
Defendants-Appellees

Originating Case Information:

District Court No: 3:08cv-00890-DWD
Southern District of Illinois District Judge David W. Dugan

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

REGINALD PITTMAN, by and through his Guardian and Next Friend, Robin M. Hamilton,

Plaintiff,

vs.

COUNTY OF MADISON, ROBERT HERTZ, RANDY EATON, and MATT WERNER,

Defendants.

Case No. 08-cv-890-DWD

MEMORANDUM AND ORDER

DUGAN, District Judge:

Now before the Court is Plaintiff's Motion for New Trial (Doc. 361) and Motion to Amend/Correct the Record (Doc. 363). Defendants filed a response to both Motions (Docs. 370, 371), and Plaintiff filed a reply (Doc. 372). For the reasons detailed below, the Motions will be denied.

Background

In December 2007, Plaintiff Reginald Pittman was a pretrial detainee at the Madison County Jail. Plaintiff attempted suicide. Although the attempt failed, Plaintiff sustained severe brain damage. Through his guardian, Robin Hamilton, Plaintiff

filed this 42 U.S.C. § 1983 suit against Madison County, Illinois and then-employees, Sheriff Robert Hertz, Sergeant Randy Eaton, and Deputy Matthew Werner, alleging that Eaton and Werner violated the Fourteenth Amendment by failing to provide Plaintiff with adequate medical care.

This matter has a lengthy procedural history, involving multiple appeals and three jury trials. The details of these prior events are more fully contained in the Court record and the three opinions from the Seventh Circuit Court of Appeals (See Docs. 115, 248, 310). As is relevant to these Motions, in August 2022, a third trial was held to determine whether the conduct of Defendants Eaton and/or Werner was deliberately indifferent under federal law or willful or wanton under Illinois law. Following a 5-day trial, the jury found for Defendants and against Plaintiff.

Plaintiff now seeks a new trial pursuant to Fed. R. Civ. P. 59(a). Plaintiff alleges prejudicial error caused by the Court's giving of Defendant's Proposed Jury Instruction 19 with the Court's modifications (Doc. 351-1, p. 21). This instruction concerned the objectively reasonable standard under the Fourteenth Amendment.

Legal Standard

The decision to grant a new trial is committed to the Court's discretion. *Johnson v. Gen. Bd. of Pension & Health Benefits of United Methodist Church*, 733 F.3d 722, 730 (7th Cir. 2013). In deciding whether to grant a new trial, the Court considers "if the jury's verdict is against the manifest weight of the evidence or if the trial was in some way unfair to the moving party." *Venson v. Altamirano*,

749 F.3d 641, 656 (7th Cir. 2014). When a motion for a new trial is based on a challenge to jury instructions, the trial court's jury instructions are analyzed in their entirety, "to determine if, as a whole, they were sufficient to inform the jury correctly of the applicable law." *Knox v. State of Ind.*, 93 F.3d 1327, 1332 (7th Cir.1996). If the jury instructions contain incorrect or confusing legal statements, the Court must determine whether a party was prejudiced by the instructions. *United Airlines, Inc. v. United States*, 111 F.3d 551, 555 (7th Cir. 1997). "The submission of inadequate jury instructions requires reversal only if 'it appears that the jury's comprehension of the issues was so misguided that one of the parties was prejudiced.'" *Soller v. Moore*, 84 F.3d 964, 969 (7th Cir. 1996).

Discussion

Plaintiff alleges prejudicial error caused by the Court's giving of the following jury instruction:

> The United States Constitution requires jail officials to protect detainees from harming themselves under certain circumstances. To succeed on this claim, Plaintiff must prove each of the following four (4) things by a preponderance of the evidence:
>
> 1. There was a strong likelihood that Plaintiff would seriously harm himself;
>
> 2. Defendant Randy Eaton and/or Defendant Matt Werner were aware of this strong likelihood that Plaintiff would seriously harm himself or strongly suspected facts showing a strong likelihood that Plaintiff would be seriously harmed;

> 3. Defendant Randy Eaton and/or Defendant Matt Werner failed to take objectively reasonable measures to prevent Plaintiff from harming himself; and
>
> 4. As a result of the conduct of Defendant Randy Eaton and/or Defendant Matt Werner, Plaintiff was harmed.
>
> If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must decide for Plaintiff, and go on to consider the question of damages.
>
> If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you must decide for Defendant, and you will not consider the question of damages.

Plaintiff argues that this instruction was erroneous in light of *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) and *Miranda v. Cnty. of Lake,* 900 F.3d 335, 352 (7th Cir. 2018), requiring pretrial detainee claims brought under the Fourteenth Amendment to be evaluated under an objectively reasonable test rather than the subjective deliberate indifference standard employed for Eighth Amendment claims. Plaintiff thus renews his argument that his proposed instruction No. 9 should have been given in its place. Plaintiff's proposed instruction is attached as Exhibit A to Plaintiff's Motion for New Trial(Doc. 361-1) and the Court's Jury Instructions at Doc. 352-4, p. 3. This refused instruction provides:

> The plaintiff has the burden of proving that the acts or failure to act of one or more of the defendants deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff

alleges the defendant deprived him of his rights under the Fourteenth Amendment to the Constitution by failing to refer him to a Crisis counselor, or by failing to properly record his Crisis request under jail procedures or by failing to house him in a safe environment pending a Crisis evaluation. Under the Fourteenth Amendment. a pretrial detainee has the right to be protected while in custody. To succeed on this claim, Plaintiff must prove each of the following four things by a preponderance of the evidence:

1. Defendant made an intentional decision with respect to the conditions under which Plaintiff was confined.
2. Those conditions put the Plaintiff at a substantial risk of suffering serious physical harm.
3. Defendant failed to take reasonable measures to prevent Plaintiff seriously harming himself, even though a reasonable officer would have appreciated the high degree of risk involved-making the consequences of the defendant's decision obvious, and
4. By not taking such measures, the defendant caused the plaintiff's injuries. With respect to the third element, the defendant's conduct must be objecttively unreasonable.
(Doc. 361-1, Doc. 352-4, p. 3).

Before addressing the merits of Plaintiff's arguments, the Court will first dispose of Plaintiff's Motion to Supplement the Court Record (Doc. 362). Plaintiff seeks to supplement the Court Record to include a copy of Plaintiff's refused Proposed Jury Instruction No. 9 (Doc. 361-1) believing that a verbatim copy of this instruction was not included in

the court record. However, upon review of the Court's Jury Instructions (Doc. 352), a verbatim copy of Plaintiff's Proposed Jury Instruction No. 9 exists at Doc. 352-4, p. 3. Accordingly, as this instruction is already contained in the Court record, Plaintiff's Motion to Clarify the Record (Doc. 363) is **DENIED**.

Turning to the substance of Plaintiff's arguments, Plaintiff avers that the Court's instruction failed to "limit[] the first prong higher standard of liability, i.e., intentionally or recklessness, to the physical act performed by the defendants", specifically Defendants alleged promise to refer Plaintiff to crisis and failure to follow through with that promise (Doc. 362, p. 7). Plaintiff maintains that the appropriate causation requirement for this case only required Plaintiff to "prove that the acts performed by the defendant carry a substantial risk of serious physical harm." (Id.). Thus, Plaintiff argues that including the language, "[t]here was a strong likelihood that Plaintiff would seriously harm himself" erroneously required Plaintiff to prove that Plaintiff was going to attempt suicide (Id.). Plaintiff thus concludes that the instruction erroneously required the jury to find that Defendants "made an intentional or reckless act concerning the conditions under which the Plaintiff was confided, [and] also that the defendants acted with the knowledge or strong suspicion that plaintiff would make a suicide attempt (self-harm)." (*Id.*). Plaintiff avers that by setting out these requirements, the instruction "combines a heightened causation requirement … with an expression of subjective intent that requires that plaintiff prove that defendants knew or strongly suspected they were, through their actions, causing a strong

likelihood of a suicide attempt" or that defendants "directly and knowingly caused[ed] the plaintiff's suicide attempt" (Id. at pp. 7-8).

The Court disagrees. The alleged erroneous language, that "[t]here was a strong likelihood that plaintiff would seriously harm himself" and Defendants "were aware of this strong likelihood that Plaintiff would seriously harm himself or strongly suspected facts showing a strong likelihood that Plaintiff would be seriously harmed" correctly outlined the first prong of Miranda's objectively reasonable test, namely that the jury "must decide whether the 'defendants acted purposefully, knowingly, or perhaps even recklessly.'" Pittman by & through *Hamilton v. Cnty. of Madison, Illinois*, 970 F.3d 823, 827 (7th Cir. 2020). Indeed, in Plaintiff's most recent appeal, this language was specifically discussed by the Seventh Circuit Court of Appeals. As set forth in the Seventh Circuit's opinion, the language in the prior instruction, and as also adopted by this Court, instructed the jury to decided "whether the defendants 'were aware of … or strongly suspected facts showing' a strong likelihood that Pittman would harm himself" goes to Miranda's first inquiry, and correctly encompassed all states of mind except for negligence and gross negligence consistent with *Miranda. Pittman by and through Hamilton*, 970 F.3d at 828. Thus, the Seventh Circuit found that this language accurately conveyed Miranda's first standard to the jury. Just as at trial, the Court finds no reason to depart from the Seventh Circuit's analysis concerning this language, and finds that the Court's instruction correctly instructed the jury on the Seventh Circuit's "objectively

reasonable" test.

For these reasons, Plaintiff's Motion for New Trial and to Vacate Amended Judgment (Doc. 361) is DENIED.

SO ORDERED.
Dated: June 1, 2023

_____
DAVID W. DUGAN
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

REGINALD PITTMAN,

Plaintiff,

vs.

COUNTY OF MADISON, STATE OF ILLINOIS, ET AL,

Defendants.

Case No.: 3:08-cv-890-DWD

AMENDED JUDGMENT IN A CIVIL ACTION

DUGAN, District Judge:

IT IS ORDERED AND ADJUDGED that pursuant to the jury verdict rendered on August 12, 2022, the Court enters Judgment in favor of Defendants Count of Madison, State of Illinois, Robert Hertz, Randy Eaton and Matt Werner and against Plaintiff, Reginald Pittman, by and through his guardian and next friend, Robin M. Hamilton.

Pursuant to the Order entered on September 27, 2011 (Doc. 98), Judgment is entered in favor of Defendants Gulash, Unfried, Blankenship, Hartsoe, John Does 1-5, John Does 1-10 and Stephenson.

IT IS SO ORDERED.

DATED: August 12, 2022

MONICA A. STUMP, Clerk of Court

s/ Dana M. Winkeler
Deputy Clerk

Approved: s/ David W. Dugan
David W. Dugan, U.S. District Judge

APPENDIX F

In the
United States Court of Appeals
For the Seventh Circuit

No. 19-2956

REGINALD PITTMAN, by and through his guardian and next friend, ROBIN M. HAMILTON,
Plaintiff-Appellant,
v.

COUNTY OF MADISON, ILLINOIS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois
No. 3:08-cv-00890-SMY-DGW — Staci M. Yandle, Judge.

ARGUED MAY 18, 2020 DECIDED AUGUST 14, 2020

Before WOOD, BARRETT, and SCUDDER, Circuit Judges.

BARRETT, Circuit Judge.

Reginald Pittman attempted suicide at the Madison County jail in 2007. Although the attempt failed, it left him in a vegetative state. Through his guardian, Pittman filed this § 1983 suit against Madison County and then-Madison County jail employees, Sergeant Randy Eaton and Deputy Matthew Werner, alleging that they violated the Fourteenth

Amendment by failing to provide him with adequate medical care. In 2018, the suit went to trial for the second time, and the jury returned a verdict in favor of the defendants. We reverse the district court's denial of Pittman's motion for a new trial and remand because we conclude that one of the jury instructions erroneously directed the jury to evaluate Pittman's Fourteenth Amendment claim according to a subjective rather than objective standard.

I.

In 2007, Reginald Pittman was a pretrial detainee at the Madison County jail. At the time, Sergeant Randy Eaton and Deputy Matthew Werner were employees of the county jail. After four months of detention, Pittman attempted suicide by hanging himself with a blanket. The suicide attempt left Pittman in a vegetative state. In his suicide note, he stated that the guards were "f***ing" with him and would not give him access to "crisis [counseling]."

After Pittman's suicide attempt, Bradley Banovz, an inmate housed near Pittman's cell, substantiated the claim that Pittman had made in his suicide note. In an interview with a county detective, which was captured on video, Banovz stated that in the days leading up to Pittman's suicide attempt, Pittman had asked both Werner and Eaton to refer him to crisis counseling. According to Banovz, while both defendants promised Pittman that they would schedule him for counseling, neither of them followed through with their promises.

Pittman filed a § 1983 suit against Madison County, Werner, and Eaton. As is relevant on this appeal, Pittman claimed that the defendants

violated the Due Process Clause of the Fourteenth Amendment by failing to provide him with adequate medical care. The defendants moved for summary judgment, which was granted in 2011. We reversed and remanded the suit. *Pittman ex rel. Hamilton v. Cnty. of Madison* (Pittman I), 746 F.3d 766 (7th Cir. 2014). On remand, the parties went to trial for the first time, which resulted in a jury verdict in favor of the defendants in 2015. Pittman appealed again. Among other things, he challenged the district court's exclusion of Banovz's video interview. We concluded that the district court's exclusion of the video interview was a reversible error and remanded for a new trial. *Pittman ex rel. Hamilton v. Cnty. of Madison* (Pittman II), 863 F.3d 734 (7th Cir. 2017). In 2018, the case went to trial for the second time. Once again, the jury returned a verdict for the defendants. Pittman filed a motion for a new trial, which was denied. On what is now his third appeal, Pittman challenges one of the jury instructions and two evidentiary rulings by the district court.

II.

Pittman's principal challenge on appeal concerns a pivotal jury instruction.[1] According to Pittman, the

[1] The defendants argue that Pittman did not preserve this challenge because his objection to the jury instruction was neither timely nor sufficiently specific under Federal Rule of Civil Procedure 51. See *Schobert v. Ill. Dep't of Transp.*, 304 F.3d 725, 729 (7th Cir. 2002) (noting that to preserve an objection to a jury instruction under Rule 51, the objection must be timely and must "distinctly state the matter objected to and

instruction misstated the law: instead of requiring the jury to determine whether the defendants acted in an objectively reasonable manner, the instruction required the jury to ascertain the defendants' subjective intent. We decide de novo whether a jury instruction misstated the law, but even if it did, we will reverse only if the misstatement "misguide[d] the jury to the extent that the complaining party suffered prejudice." *Viramontes v. City of Chicago*, 840 F.3d 423, 428 (7th Cir. 2016) (citation omitted).

The challenged jury instruction required the jury to make four findings: (1) "[t]here was a strong likelihood that [Pittman] would seriously harm himself," (2) the defendants "were aware of … or strong-

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the ground of the objection"). We're wholly unconvinced by this argument. As for the timing, the record indicates that Pittman raised his objection early enough in the proceedings to give the district court the opportunity to review his objection before instructing the jury. *See id.* at 729-30 ("There are no formal requirements [for the timing of the objection], but pragmatically speaking the district court must be made aware of the error prior to instructing the jury, so that the judge can fix the problem before the case goes to the jury."). Moreover, the record shows that Pittman identified the alleged error in the jury instruction with sufficient specificity by arguing that the instruction did not comply with the newly articulated objective standard in *Miranda v. County of Lake*, 900 F.3d 335 (7th Cir. 2018). Thus, the objection was "sufficiently detailed to draw the court's attention to the defect." *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1295 (7th Cir. 1987). Pittman preserved his challenge for appeal.

ly suspected facts showing [this] strong likely-hood," (3) they "consciously failed to take reasonable measures to prevent [Pittman] from harming himself," and (4) Pittman "would have suffered less harm if [the defendants] had not disregarded the risk." Pittman argues that the instruction is inconsistent with the objectively reasonable standard that we recently articulated in *Miranda v. County of Lake*, 900 F.3d 335 (7th Cir. 2018).

Before *Miranda*, this circuit evaluated a Fourteenth Amendment due process claim brought by a pretrial detainee under the deliberate indifference standard, which requires a showing that the defendant had a "sufficiently culpable state of mind' and asks whether the official actually believed there was a significant risk of harm." *Id.* at 350 (citation omitted). This standard tracked the subjective inquiry employed for Eighth Amendment claims—and that made it a misfit. "Pretrial detainees stand in a different position" than convicted prisoners, so "the punishment model is inappropriate for them." *Id.* Moreover, our approach was undercut by the Supreme Court's decision in *Kingsley v. Hendrickson*, which held that an excessive-force claim brought by a pretrial detainee under the Fourteenth Amendment must be evaluated under an objective test rather than the subjective deliberate indifference standard. 135 S. Ct. 2466, 2473 (2015). So in *Miranda*, we changed course. Taking our cue from *Kings-*

ley, we held that an objective standard applies to medical-needs claims brought by pretrial detainees such as the one brought by *Pittman*. 900 F.3d at 352. Under this standard, the jury must answer two questions. First, it must decide whether the "defendants acted purposefully, knowingly, or perhaps even recklessly." *Id.* at 353. to Pittman, this language directed the jury to apply the now defunct subjective test rather than the objective test that governs under *Miranda*. Second, it must determine whether the defendants' actions requirements [for the timing of the objection], were "objectively reasonable." Id. at 354.

Pittman argues that the jury instruction conflicts with this test because the jury was told to consider whether the defendants "*were aware of … or strongly suspected"* facts showing a likelihood that Pittman would harm himself and whether the defendants "consciously

Pittman's argument fails as to the instruction that the jury decide whether the defendants "were aware of … or strongly suspected facts showing" a strong likelihood that Pittman would harm himself. This language goes to Miranda's first inquiry: whether the defendants acted "purposefully, knowingly, or perhaps even recklessly." At bottom, Miranda's first inquiry encompasses all states of mind except for negligence and gross negligence. *Miranda*, 900 F.3d at 353. The challenged language accurately conveyed this standard to the jury: if the defendants "were aware" that their actions would be harmful, then they acted "purposefully" or "knowingly"; if they

were not necessarily "aware" but nevertheless "strongly suspected" that their actions would lead to harmful results, then they acted "recklessly." This much is consistent with *Miranda*.

But the district court erred by telling the jury to determine whether the defendants "consciously failed to take reasonable measures to prevent [Pittman] from harming himself." (emphasis added). This language conflicts with Miranda's second inquiry: whether the defendants acted in an "objectively reasonable" manner. By using the word "consciously," the instruction erroneously introduced a subjective element into the inquiry. Under *Miranda's* standard, whether the defendants' failure to take reasonable measures was the result of a conscious decision is irrelevant; they are liable if their actions (or lack thereof) were objectively unreasonable. See *Kingsley*, 135 S. Ct. at 2470 (holding that the plaintiff's Fourteenth Amendment excessive-force claim turned on whether the defendants' conduct was "objectively unreasonable" rather than on whether the defendants were "subjectively aware" that that their conduct was unreasonable). Because the word "consciously" rendered the jury instruction impermissibly subjective, the jury instruction misstated the law.

This error likely "confused or misled" the jury. *Boyd v. Ill. State Police*, 384 F.3d 888, 894 (7th Cir. 2004). Although the word "consciously" is the only aspect of the instruction that conflicts with Miranda, we consider "the instructions as a whole, along with all of the evidence and arguments." *Susan Wakeen Doll Co. v. Ashton-Drake Galleries*, 272 F.3d 441, 452 (7th Cir. 2001). Here, the evidence and

arguments presented at trial by both Pittman and the defendants reveal that the word "consciously" was likely prejudicial. Pittman presented the transcript of Banovz's video interview to convince the jury that the defendants ignored Pittman's multiple requests for crisis counseling. For their part, the defendants sought to avoid liability by arguing that, despite knowing that Pittman had been placed on suicide watch a few months before his suicide attempt and had an episode of extensive crying around the same time, they were nevertheless unaware of the actual risk that Pittman posed to himself. They supported this argument by testifying, among other things, that they were not familiar with the jail's suicide-prevention policies, were not able to identify suicide risks, and could not remember whether they had been trained on handling suicidal inmates. In other words, the defendants argued and presented evidence to show that they did not consciously fail to take reasonable measures to prevent Pittman's suicide attempt. In light of the evidence presented at trial and the arguments made by the defendants, the use of the word "consciously" likely steered the jury toward the subjective deliberate indifference standard. And that error "likely made [a] difference in the outcome," *Guzman v. City of Chicago*, 689 F.3d 740, 745 (7th Cir. 2012), because a reasonable jury could conclude that the defendants' failure to provide medical care for Pittman was objectively unreasonable, but not a conscious failure. In sum, because the jury instruction misstated Miranda's objective standard and the error was likely prejudicial, we reverse the judgment and remand the case for a new

trial.

III.

Pittman also challenges two of the district court's evidentiary rulings: one barring any witness testimony as to whether the defendants acted in a "deliberately indifferent" manner and another ex-cluding Banovz's testimony that he notified un-named guards that Pittman was suicidal. "'We review [the] district court's rulings on [the] motions in limine for an abuse of discretion' because 'decisions regarding the admission and exclusion of evidence are peculiarly within the competence of the district court.'" *Von der Ruhr v. Immtech Int'l, Inc.,* 570 F.3d 858, 862 (7th Cir. 2009) (alterations in original) (citation omitted). We conclude that neither ruling amounted to an abuse of discretion.

A.

Pittman's first challenge pertains to the district court's grant of the defendants' motion in limine to bar witnesses from testifying that the defendants were "deliberately indifferent" toward him. Before we dive into the merits of this challenge, we must first address the defendants' contention that Pittman failed to preserve it. Relying on this circuit's ruling in *Jenkins v. Keating*, the defendants argue that Pittman forfeited this challenge by failing to renew his objection to the pretrial evidentiary ruling at some point during the trial. 147 F.3d 577, 581 (7th Cir. 1998) ("[I]n order to preserve for appeal the merits of a pre-trial ruling on a motion in limine, the party who unsuccessfully opposes the motion must accept the court's invitation to renew his or her

challenge to it at trial."). The defendants' reliance on Jenkins is misplaced, however, because that case turned on the district court's stated willingness to reconsider its pretrial ruling. By contrast, if a pretrial ruling is definitive, the objecting party need not renew his objection to it. FED. R. EVID. 103(b) ("Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal."); see also *Wilson v. Williams*, 182 F.3d 562, 563 (7th Cir. 1999) ("[A] definitive ruling in limine preserves an issue for appellate review, without the need for later objection … .").

In this case, the district court gave the parties no reason to believe that its grant of the defendants' motion in limine was anything but definitive. Although the order contains little analysis, it makes clear that granting such a motion is warranted only if "the evidence is clearly inadmissible on all potential grounds." (emphasis added). And the order contains no conditional language other than a passing boilerplate reference to the fact that a ruling on a motion in limine is "subject to change." Notably, unlike the district court in Jenkins, the district court in this case did not invite Pittman to renew his challenge at any point during the trial. 147 F.3d at 586; see also *United States v. Addo*, 989 F.2d 238, 242 (7th Cir. 1993) (holding that a party abandons an objection if he fails to accept the district court's invitation to renew his objection during trial). Because the pretrial ruling was definitive, Pittman did not have to renew his objection at trial to preserve it.

Securing review of his argument, however, is as

far as Pittman gets because the district court's ruling survives scrutiny. Admittedly, the district court's reasoning was flawed. It asserted that allowing any witness to testify that the defendants were "deliberately indifferent" toward Pittman would violate Federal Rules of Evidence 701, 702, and 704, which together prohibit lay and expert witnesses from offering outcome-determinative opinions. See FED. R. EVID. 701 (setting forth the rule regarding lay witness testimony); FED. R. EVID. 702 (expert witness testimony); FED. R. EVID. 704 (testimony regarding an ultimate issue). That's wrong; under Rule 704(a), "[a]n opinion is not objectionable just because it embraces an ultimate issue." FED. R. EVID. 704(a). But this mistake does not undercut the district court's decision to exclude the testimony because its decision is easily justified. "Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time." FED. R. EVID. 704(a) advisory committee's notes to 1972 Proposed Rules; see also FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). In light of Miranda, any testimony about the defendants' alleged "deliberate indifference" was far more likely to confuse the jury than to help it. See *McCann v. Ogle Cnty.*, 909 F.3d 881, 886 (7th Cir. 2018) (explaining that under Miranda, "a standard of objective reasonableness, and not deliberate indifference, governs claims

under the Fourteenth Amendment's Due Process Clause for inadequate medical care provided to pretrial detainees" (emphasis added)). Excluding the testimony, therefore, was an eminently reasonable choice. See *Smith v. Hunt*, 707 F.3d 803, 807–08 (7th Cir. 2013) ("A decision is an abuse of discretion only if 'no reasonable person would agree with the decision made by the trial court.'" (citation omitted)).[2]

B.

Pittman also argues that the district court was wrong to exclude Banovz's testimony that he had notified unnamed guards that Pittman was suicidal. We can dispose of this contention succinctly because we already rejected it in Pittman's last appeal. The district court's decision to exclude Banovz's testimony as to the unnamed guards was among the various rulings before us in Pittman II. Although we remanded for a new trial because we concluded that the district court's exclusion of the Banovz's video interview was an abuse of discretion, we expressly rejected all of Pittman's other challenges. See *Pittman II*, 863 F.3d at 738 ("Pittman's brief raises several other issues relating to how the judge conducted the trial. None of these arguments has merit."). Pittman gives us no reason to depart from our previous ruling on this issue, so we 2 Pittman also argues that the exclusion was improper because the parties had signed a written stipulation prior to the second trial, agreeing that the testimony of any witness who testified at the first trial could be presented to the jury without further foundation or authentication. This argument is likewise unpersua-

sive. As we've explained, the district court's decision to bar witnesses from testifying that the defendants were deliberately indifferent toward Pittman was proper for reasons other than foundation or authentication. affirm the district court's grant of the defendants' motion. *Tice v. Am. Airlines, Inc.*, 373 F.3d 851, 853 (7th Cir. 2004) ("[A] ruling made in an earlier phase of a litigation controls the later phases unless a good reason is shown to depart from it.").

Although we find no error in the district court's evidentiary rulings, the erroneous jury instruction requires us to REVERSE the district court's judgment and REMAND for a new trial.

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[2] Pittman also argues that the exclusion was improper because the parties had signed a written stipulation prior to the second trial, agreeing that the testimony of any witness who testified at the first trial could be presented to the jury without further foundation or authentication. This argument is likewise unpersuasive. As we've explained, the district court's decision to bar witnesses from testifying that the defendants were deliberately indifferent toward Pittman was proper for reasons other than foundation or authentication.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
August 18, 2017

Before

RICHARD A.POSNER, Circuit Judge
DANIEL A. MANION, Circuit Judge
MICHAEL S. KANNE, Circuit Judge

No. 16-3291

REGINALD PITTMAN,by his guardian,ROBIN M. HAMILTON,
Plaintiff-Appellant,

v.

COUNTY OF MADISON, ILLINOIS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.
No. 3:08-cv-00890-SMY DGW

Stacy M. Yandle,
Judge.

ORDER

On July 28, 2017, defendants-appellees filed a petition for rehearing en banc. A majority of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing en banc. The petition is therefore DENIED.

APPENDIX H

In the
United States Court of Appeals
For the Seventh Circuit

No. 16-3291

REGINALD PITTMAN, by his guardian ROBIN M. HAMILTON,
Plaintiff-Appellant,

v.

COUNTY OF MADISON, ILLINOIS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.
No. 3:08-cv-00890-SMY-DGW — Staci M. Yandle, Judge.

ARGUED MAY 24, 2017 — DECIDED JULY 14, 2017

Before POSNER, MANION, and KANNE, Circuit Judges.

POSNER, Circuit Judge. On the night of December 19, 2007,

Reginald Pittman, a pretrial detainee in the Madison County, Illinois, jail, hanged himself from the bars of his cell (of which he was the only occupant) with a

blanket. He did not die, but he sustained brain damage that has left him in a vegetative state, cared for entirely by his mother with no government benefits. This suit, brought on his behalf, charges deliberate indifference by guards and other jail staff to the risk of his attempting suicide, in violation of the Eighth Amendment. See *Estelle v. Gamble*, 429 U.S. 97 (1976). There are ancillary state-law claims, but they received little attention at the trial or in the parties' submissions to us; so since we're reversing and remanding the district court's decision, we'll defer consideration of those claims to a subsequent appeal, if any.

Pittman had left a suicide note in which he said that he was killing himself because the guards were "fucking" with him by not letting him see "crisis," by which he meant crisis counselors (the members of a crisis intervention team at the jail), whose duties include trying to prevent the inmates from killing or injuring themselves. Although the "National Study of Jail Suicide: 20 Years Later," conducted by the Justice Department's National Institute of Corrections in 2006 (the year before Pittman's suicide attempt), found that jail suicides had declined significantly since 1986, the study also found that suicides in jails and other detention facilities were three times as frequent as suicides by free persons. Lindsay M. Hayes, "National Study of Jail Suicide: 20 Years Later," pp. 1, 46 (National Institute of Corrections, April 2010).

Although Madison County was among the defendants named in Pittman's complaint, along with two of the county's sheriffs, the defendants who are the particular focus of the litigation are jail

guards Randy Eaton and Matt Werner. In 2011 the district court granted summary judgment in favor of all the defendants, but our court reversed as to Eaton and Werner (and so remanded) on the ground that there was a genuine issue of fact as to whether they had been deliberately indifferent to the risk that Pittman would attempt suicide. *Pittman ex. rel. Hamilton v. County of Madison,* 746 F.3d 766, 777–78 (7th Cir. 2014). The case was then tried to a jury, which returned a verdict in favor of both defendants, precipitating this appeal by Pittman's guardian.

The key witness for Pittman was a man named Bradley Banovz (pronounced "Banoviz"), who occupied a cell adjacent to Pittman's when Pittman hanged himself. He testified at the trial that in the five days preceding Pittman's suicide attempt Eaton and Werner had ignored Pittman's requests to see members of the jail's crisis staff.

Some three hours after the suicide attempt a county detective obtained, in an interview room in the jail, a 25-minute interview with Banovz about the attempt, which was captured on video. Pittman's lawyer attempted to introduce the video at the trial, for while Banovz testified at the trial, that was seven years after the suicide attempt and video interview; and while he'd been lucid and articulate in the video interview he was a terrible witness at the trial, with poor recollection, an alternately hostile and flippant demeanor, and an inability to counter evidence of his criminal record harped on by defense counsel.

The trial transcript shows that defense counsel had stipulated on the second day of the trial that if the plaintiff's lawyer put Banovz on the stand, the

defense would not object to the admission of the 2007 video in evidence, the parties having agreed to that before trial. In defense counsel's words, "the agreement was that if, if Bradley Banovz would testify, that, that [plaintiff counsel] could offer the video and the statement." Yet as soon as the video began, the defendants' lawyer objected, and though he called the objection "pro forma" and said he knew the video would be played (for remember the stipulation), the district judge sustained the objection. Twice more during the trial the plaintiff's lawyer moved to admit the video, and twice more the defendant's lawyer objected. Each time the district judge sustained the objection and so the video wasn't shown after all—even though Banovz's testimony was the lynchpin of the plaintiff's case and the defendants had stipulated to the showing of the video.

The judge's ground for sustaining the objections to showing the video was that the video was hearsay because it recorded a statement that Banovz had made out of court (i.e., in the interview room at the jail in 2007). But of course the defendants' lawyer had known all this when he had agreed to allow the video to be placed in evidence. And he gave no reason for retracting his agreement; he just said that his clients had changed their minds—but so what? Stipulations are not so easily set aside. See Fed. R. Civ. P. 36(b), 16(e). Even if the video testimony was hearsay of the sort normally excluded from a trial, the defendants had—to repeat— stipulated to its admissibility, and a stipulation is binding unless it creates "manifest injustice" (see Rule 16(e)) or was made inadvertently or on the basis of a legal or a

factual error. *United States v. Wingate*, 128 F.3d 1157, 1161 (7th Cir. 1997); see also *United States v. Bell,* 980 F.2d 1095, 1097 (7th Cir. 1992); *Lloyd v. Loeffler,* 694 F.2d 489, 495 (7th Cir. 1982); *Cummins Diesel Michigan, Inc. v. The Falcon*, 305 F.2d 721 (7th Cir. 1962); *United States v. Kanu,* 695 F.3d 74 (D.C. Cir. 2012). None of these factors is present in this case. The district judge said that she didn't think she had the authority to enforce the agreement, but "agreements to waive hearsay objections are enforceable." *United States v. Mezzanatto,* 513 U.S. 196, 202 (1995).

True, a judge can exclude evidence under Fed. R. Evid. 403 even if the parties have stipulated its admissibility, provided the harm of admitting it would substantially outweigh its probative value. See *Noel Shows, Inc. v. United States*, 721 F.2d 327, 330 (11th Cir. 1983) (per curiam). But the district court did not invoke Rule 403; nor is there any indication that playing the tape would have confused the jury, unfairly prejudiced the defend-ants, prolonged the trial, or otherwise impaired justice. What is more, defense counsel told us at the oral argument that he thought the video actually strengthened the defense case, and though it did not, counsel's statement took all the wind out of his sails. For he would not have objected to the playing of the video at the trial had he thought it would strengthen the defense; he knew it would have weakened the defense.

The district judge brushed aside all the reasons why the video should have been allowed in evidence, and excluded it without giving any reason why it should be excluded.

Now it might seem that because Banovz testified at trial, the video would have added nothing. But no; as Banovz acknowledged at the trial, the passage of seven years had dimmed his recollection to a considerable extent—and as we've said, his demeanor at trial was notably different from his demeanor in the video. But with his memory refreshed by a transcript of the video recording, at the trial he remembered that in the days leading up to the suicide attempt Pittman had been depressed and worried and, Banovz believed, could not "handle the solitary confinement," and Pittman had asked defendant (as he is in this lawsuit) Werner to contact crisis so that crisis would examine Pittman for "mental stability." That conversation took place on a Friday, Banovz testified, and Werner had promised to refer Pittman to crisis on Monday—but did not do so, because he didn't work that Monday. Pittman hanged himself two days later without having been referred to crisis. Banovz also testified that defendant Eaton had told Pittman the night before he hanged himself that he could consult a crisis counselor, and that Pittman had been crying for hours that night. But Eaton hadn't followed through by referring Pittman to crisis, and that failure, if Banovz is believed, constituted deliberate indifference to a danger that Eaton had reason to know was real. Some details mentioned in the video interview were not included in Banovz's trial testimony. On the videotape Banovz says that Werner thought Pittman was just joking about needing to see crisis; but at the trial, Werner's deposition cast doubt on whether he was able to make such a judgment. For it turned out that he'd

never been told by his superiors (or at least couldn't recall having been told by them) what to do if he thought an inmate was at risk of committing suicide, what a "suicide crisis" was, or what the jail's suicide prevention policy was—if there was such a policy.

It was senseless to think that testimony by Banovz seven years after Pittman's suicide attempt was as or more reliable than his recorded testimony made three hours after the attempt. And anyway the stipulation between the parties entitled the plaintiff to play the tape at the trial. The case being close, showing the video to the jury could have resulted in a verdict for the plaintiff—and so the judge's error was not harmless. The defendants and other witnesses (including other jail personnel besides Werner and Eaton) testified that7 it was the jail's policy for any reference to suicide by an inmate of the jail to require an immediate referral to crisis even if the reference appeared to be a joking one. Although Werner and Eaton testified that Pittman hadn't mentioned suicide or asked to be referred to crisis on the nights in question, they admitted not remembering any of the conversations they'd had with Pittman on those nights, so their testimony was worthless. And Werner admitted in a pretrial deposition that he didn't believe he'd ever been "given any information about the signs and symptoms of suicide in [his] training" at the jail.

Pittman's brief raises several other issues relating to how the judge conducted the trial. None of these arguments has merit.

Having for the reasons stated no assurance that Pittman's claim was fairly tried, we hereby vacate

the judgment and remand the case for a retrial conducted in conformity with the analysis in this opinion.

MANION, Circuit Judge, dissenting.

In today's decision, this court holds that when a party seeking to admit evidence asserts the existence of an out-of-court agreement to allow that evidence, it is an abuse of discretion for district judge to exclude that evidence, even when the judge believes that evidence is inadmissible hearsay and the moving party has made no showing to the contrary. Because I disagree, I dissent. Given that today's decision for the court lacks some detail, I write separately to examine what this court has done, and to raise concerns about the burden shifting we have imposed.

In order to reverse the judgment below, this court must first find that it was an abuse of discretion for the judge in this case to have excluded Banovz's video testimony from trial. The district court held that Banovz was available as a witness and the plaintiffs had "failed to lay a proper foundation that Banovz lacked the appropriate recollection under F.R.E. 803(5) …Nevertheless, Banovz was able to review the [videotaped] statement on the stand and testify to its contents." *Pittman v. County of Madison,* No. 3:08-cv-890-SMYDGW, slip op. at 12 (S.D. Ill. July 28, 2016). Critically, the court today makes two factual findings. First, it finds that "the passage of seven years had dimmed [Banovz's] recollection to a considerable extent." Second, it finds that there was a stipulation for admitting the video testimony. The court does not specify why and

how it makes these determinations, neither of which is supported by the record. In the process, the court shifts the burden from the party moving to admit evidence (to prove foundation for that evidence) to the party seeking to exclude the evidence (to prove lack of foundation). See Fed. R. Evid. 103(a)(2).

At trial, the district judge excluded the video as lacking a proper foundation. When pressed, plaintiff's counsel had no explanation for why the video ought to have been allowed other than a reference to a prior, out-of-court informal agreement with defense counsel. The court also explicitly asked what harm would come of excluding the video, and counsel stated simply that the harm was that "the proper regulation of the Court requires [admitting the videotape]" based upon the purported prior agreement of the defense counsel. Transcript of Jury Trial Proceedings Day 2 of 8 at 146:12–147:2, *Pittman v. County of Madison,* No. 3:08-cv-890-SMY (S.D. Ill. March 3, 2015), ECF No. 233. Plaintiff's counsel did not attempt to make any showing that Banovz did not adequately recall the events about which he was testifying.

Counsel also failed to make any additional offer of proof other than to rely upon what he termed a "stipulation," but which the trial court explicitly noted was not a stipulation. At best, the parties had an informal agreement relating to admission of evidence, the precise contours of which is disputed, and which was never presented to the district judge until day two of the trial. This court should not elevate that agreement to the status of a stipulation absent fact-finding below. Moreover, the so-called stipulation first arose when plaintiff's counsel was

pressed for an offer of proof for the video testimony. The trial court explicitly noted that the repeated references by plaintiff's counsel to an agreement was "not an offer of proof." Id. at 143:16. In the hearing below relied upon by this court today, the district judge summarized what was before her: "[T]he offer of proof … as I understand it [is] some agreement that you allege existed whereby [defense counsel] agreed to allow a hearsay statement to come into evidence without proper foundation … . I believe what you are asking the Court to do is to somehow enforce an agreement that you say existed [to admit a] statement [which] is clearly hearsay. It is clearly hearsay." Id. at 144:22– 145:13.

Yet even supposing Banovz's videotaped statement were improperly excluded, as a court of appeals we would be obliged to make a further determination: was this improper exclusion so prejudicial as to require disturbing the judgment below? Specifically, we would be obliged to determine whether the erroneous exclusion had "a substantial and injurious effect or influence on the determination of a jury and the result is inconsistent with substantial justice … [E]ven if a judge's decision is found to be erroneous, it may be deemed harmless if the record indicates the trial result would have been the same." Lewis v. City of Chicago Police Dept., 590 F.3d 427, 440 (7th Cir. 2009). As noted above, plaintiff's counsel was unable to provide any reason why exclusion of the videotape would prejudice his client. Furthermore, Banovz was allowed to quietly read the pertinent parts of the transcript of his videotaped statement in the presence of the jury before testifying about the aftermath of Pittman's

suicide attempt. There is no indication that this was insufficient to jog Banovz's memory, because he himself noted: "I'm a very fast reader." Id. at 151:22. After being provided with time to read the whole transcript, the judge verified that Banovz had read the entire thing. Banovz also stated that the transcript was accurate. During his testimony, counsel even directed Banovz back to the statement, to refresh his recollection in real time. Id. at 161:4 .

There is no indication Banovz omitted any information included in the video: the only complaint that the plaintiff has is that Banovz was a cagey and unreliable witness in person. As plaintiff's trial counsel noted at oral argument, the entire reason he took the case was the videotape. But Banovz was still available as a witness. Over eight days of trial, the jury clearly concluded that the prison guards were credible when they claimed that they followed prison procedure to the letter. There is no indication that Banovz's essentially identical video testimony would have changed their minds. In other words, any error in excluding the video was harmless.1

The district judge in this case was not persuaded that the videotape was admissible under any of the hearsay exceptions and made a reasonable decision to exclude it. This was not an abuse of discretion, and I therefore dissent.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Office of the Clerk
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

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FINAL JUDGMENT

July 14, 2017

Before: RICHARD A. POSNER, Circuit Judge
DANIEL A. MANION, Circuit Judge
MICHAEL S. KANNE, Circuit Judge

No. 16-3291

REGINALD PITTMAN, by and through his guardian and next friend, ROBIN M. HAMILTON,
Plaintiff - Appellant

v.

MADISON COUNTY, ILLINOIS, et al.,
Defendants - Appellees

Originating Case Information:
District Court No: 3:08-cv-00890-SMY-DGW

Southern District of Illinois
District Judge Staci M. Yandle

Having for the reasons stated no assurance that Pittman's claim was fairly tried, we hereby vacate the judgment and remand the case for a retrial conducted in conformity with the analysis in this opinion. The above is in accordance with the decision of this court entered on this date.

No award of costs.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

REGINALD PITTMAN, by and through his Guardian and Next Friend, ROBIN M. HAMILTON,

Plaintiff,

v.

COUNTY OF MADISON, et al.,

Defendants.

Cause No. 3:08-cv-890-SMY-DGW

MEMORANDUM AND ORDER

This matter comes before the Court on Plaintiff's Motion for New Trial (Doc. 199). Defendant filed a Response and Plaintiff filed a Reply (Docs. 222 & 225). Plaintiff argues that he is entitled to a new trial because (1) the Court erred in not transferring venue to East St. Louis from Benton, Illinois, (2) the verdict was against the manifest weight of the evidence, and (3) the Court erred in making certain evidentiary rulings and rulings regarding jury selection. For the reasons that follow, Plaintiff's motion is DENIED.

In ruling on a motion for new trial, Federal Rule of Civil Procedure 59 requires "a district court to determine 'whether the verdict is against the manifest weight of the evidence…or for other reasons, the trial was not fair to the party moving." *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir.

2004) (quoting *EEOC v. Century Broadcasting Corp*., 957 F.2d 1146, 1460 (7th Cir. 1992) (internal citation omitted). A verdict should be determined to be against the manifest weight of the evidence "when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." *Latino v. Kaizer*, 58 F.3d 310, 315 (7th Cir. 1995.

The district judge who "heard the same testimony as the jury" and "observed the witnesses' demeanor just as the jury did" can assess the evidence, including the witnesses' credibility. *Thomas v. Statler*, 20 F.3d 298, 304 (7th Cir. 1994). Thus, the district court may consider the credibility of the witnesses, the weight of the evidence, and anything else justice requires. *Mejia v. Cook County, Ill*., 650 F.3d 631, 633 (7th Cir. 2011). With the standards in mind, the Court will address Plaintiff's arguments.

Jury Selection

On August 26, 2014, this matter was re-assigned to the undersigned district judge whose duty station is Benton, Illinois (Doc. 135). As a result, the trial location was changed from the courthouse in East St. Louis, Illinois to the courthouse in Benton, Illinois (Doc. 136). Plaintiff, an African American, alleges that as a result of moving the trial from East St. Louis to Benton, there were no African Americans on the jury panel. As such, Plaintiff argues that relocating the trial "constituted impermissible discrimination against the plaintiff's right to a jury made of a cross-section of the community and containing members of his on race." (Doc. 199, paragraph 10).

Plaintiff further asserts that the decision to transfer the case from East St. Louis to Benton was arbitrary and made for the Court's benefit only (Doc. 200). On January 13, 2015, Plaintiff filed a motion seeking to retain the undersigned as trial judge but to have the case tried in East St. Louis "if possible" (Doc. 149). The motion asserted that Plaintiff's severe brain damage and disability made travel difficult and that traveling from Plaintiff's home in Alton, Illinois, to Benton, Illinois created a hardship for Plaintiff. Id. Themotion further asserted that every subpoenaed witness expressed that they preferred appearing in East St. Louis and that trying the case in East St. Louis would be more convenient for the attorneys *Id*. Additionally, in the motion, Plaintiff's Counsel noted "it is the understanding of the attorney for the plaintiff that the jury pools at the Benton and East St. Louis courthouses are different – although the divisions in the Southern District of Illinois have been eliminated as of 1988, jury selection, apparently does not take place from a district wide pool, but rather takes place from counties within the old division boundaries, so that the East St. Louis jury pool is taken from the old northern division counties and the Benton jury pool is taken from the old southern division counties. The attorney for the plaintiff believes that there are greater chances of African American jurors in the East St. Louis jury pool and believes, therefore, for a fair trial, the matter should be held in the East St. Louis." Id.

In denying Plaintiff's motion, the Court noted the preference convenience of witnesses and Plaintiff's Counsel of trying the case in East St. Louis as well as Plaintiff's Counsel's arguments regarding the

racial composition of jury panels in East St. Louis versus Benton and the potential impact on Plaintiff's ability to receive a fair trial. The Court also noted that while holding trial at the E. St. Louis courthouse may have been more convenient for counsel and witnesses, the Court has inherent power to manage itself, its resources and its caseload as it sees appropriate. However, the Court advised Plaintiff's Counsel that if he provided the Court with statement from a healthcare provider indicating a health and safety issue for Plaintiff associated with having the trial in Benton rather than East St. Louis, the it would reconsider moving the trial (Doc. 160, p. 2). No such statement was provided prior to trial. As such, the Court's decision to hold trial in Benton rather than East St. Louis was not arbitrary; trial was held in Benton in keeping with the policy of the Southern District of Illinois to effectively manage the caseload of its judges.

With respect to Plaintiff's contention that he did not have a fair cross-section of the community serve on the jury because there were no African Americans in the jury pool, the right to a jury trial in civil cases is based on the Seventh Amendment and the Supreme Court has not recognized a Constitutional mandate that jury pools in civil cases reflect a fair cross-section of the community. See *Fleming v. Chicago Transit Authority*, 397 Fed. App'x. 249 (7th Cir. Oct. 22, 2010). There is no doubt that racial discrimination in the selection of jurors in a civil trial may result in an unfair trial to a litigant and calls into question the integrity of the judicial system. *Edmonson v. Leesville Concrete Co., Inc.,* 500 U.S. 614, 630 (1991). However, a litigant does not

have the right to demand "a jury of a particular racial composition." *Sargent v Idle*, 212 F.App'x 569, 573 (7th Cir. 2006). In addition, courts have held that a post-trial challenge to the composition of a jury are untimely and are therefore barred. See *Dawson v. Wal-Mart Stores, Inc*., 978 F.2d 205, 210 (5th Cir. 1992).

Here, Plaintiff has not alleged that any of the jurors were biased against him. Moreover, Plaintiff did not object to composition of the jury during voir dire or any other time during trial, but raises it for the first time in his Motion for New Trial. Thus, Plaintiff's challenge to the jury composition is untimely and barred. Manifest Weight of the Evidence, Credibility of Witnesses

To prevail on an Eighth Amendment deliberate indifference to serious medical needs claim, the plaintiff must show that (1) the medical condition was objectively serious, and (2) the state officials acted with deliberate indifference to his medical needs, which is a subjective standard. The Seventh Circuit considers the following to be objective indications of a serious medical need: (1) where failure to treat the condition could "result in further significant injury or the unnecessary and wanton infliction of pain, (2) [e]xistence of an injury that a reasonable doctor or patient would find important and worth of comment or treatment, (3) presence of a medical condition that significantly affects an individual's daily activities, or (4) the existence of chronic and substantial pain." *Gutierrez v. Peters* 111 F.3d 1364, 1373 (7th Cir. 1997). To show deliberate indifference, a prison official must "be aware of facts from which the inference could be drawn that a

substantial risk of serious harm exists" and must actually "draw the inference." Farmer, 511 U.S. at 837. At trial, Bradley Banovz, an inmate at the time of Plaintiff's suicide attempt, was the only witness to testify that Plaintiff made a crisis intervention request to Defendants Eaton and Werner on December 17, 2017. Initially, Banovz testified that he did not "know if he really said he was suicidal then but he said, you know I just really, really need to talk to somebody…" (emphasis in transcript) (Tr. Tran. Day 2, Doc. 213, p. 125). Banovz's testimony was sharply disputed.

Barbara Unfried, a nurse at the jail, testified that she had not received sick slips from Plaintiff between the dates of November 24, 2007 and December 19, 2007 (Tr. Tran. Day 3, Doc. 214, p. 45). Defendant Eaton testified that had Plaintiff indicated he was depressed or suicidal, he would have acted on that information and would have documented it (Tr. Tran. Day 6, Doc. 217, p. 70). Further, Eaton indicated that he did not know that Plaintiff was depressed, and was unaware of any past history of suicide attempts (Tr. Tran. Day 6, Doc. 217, p. 73).

Defendant Werner testified that he did not recall Plaintiff making any remarks or otherwise indicating to him that he was suicidal (Tr. Tran. Day 6, Doc. 217, p. 139). He also testified that Banovz never informed him that Plaintiff was suicidal (Tr. Tran. Day 6, Doc. 217, p. 84).

It was within the purview of the jury to decide these disputed facts in favor of Defendants and to conclude that neither Defendant was aware of a substantial risk of harm to Plaintiff. They did so and the record supports the jury's determination. Gower

v. Vercler, 377 F.3d 661, 666-67

Accordingly, the jury's verdict was not contrary to the manifest weight of the evidence.

Evidentiary Rulings

Plaintiff argues that the Court made several erroneous evidentiary rulings: the Court erred by not admitting into evidence Defendant Eaton's supplementary report and Banovz's recorded statement; by allowing Plaintiff's criminal history to be displayed to the jury; by not allowing Plaintiff's Representative at First Financial Bank testify; by not submitting the issue of liability of an unnamed guard to the jury; and by not dismissing certain jurors for cause. An erroneous evidentiary ruling merits a new trial only if it had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Young v. James Green Management, Inc.,* 327 F.3d 616, 623 (7th Cir. 2003) (quoting *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 951 (7th Cir. 1998).

Randy Eaton's Supplementary Report

Plaintiff sought to introduce a report prepared by Defendant Eaton for impeachment purposes. The report detailed a suicide attempt by a different inmate 11 months prior to Plaintiff's suicide attempt (Doc. 164. Ex. A). At trial, Eaton testified about the policies and procedures for addressing a potentially suicidal inmate (Tr. Tran. Day 6, Doc. 217, p. 33-34). He specifically testified that his custom and practice was to talk to an inmate who mentioned suicide and find out if the inmate's comments had merit. (Tr. Tran. Day 6, Doc. 217, p. 36). If he deemed the

comments had merit, he would refer the inmate to Crisis and would make a note of it in the records. (Tr. Tran. Day 6, Doc. 217, p. 36). Plaintiff argued that the report was a prior inconsistent statement because it showed that Eaton did not always follow the procedure for handling a suicidal inmate as he testified.

The Court ruled that the report was irrelevant and did not contradict Eaton's testimony (Tr. Tran. Day 6, Doc. 217, p. 36). The Court noted that, although on cross examination, Plaintiff's Counsel had attempted to elicit testimony that Eaton always sent a slip to Crisis, he testified on more than one occasion, that it depended on the situation—that he would talk to the inmate to determine if it had any merit, and if he thought it had merit, he would refer the inmate to Crisis.

Prior inconsistent statements may be used to impeach the credibility of a witness, but the Court must first be satisfied that the prior statement was in fact inconsistent with the witness's testimony. *Grunewald v. U.S.,* 353 U.S. 391 (1957). Here, the Court determined that statement was not inconsistent because Defendant Eaton testified that whether he refers an inmate to crisis counseling depends on the circumstances (Tr. Tran. Day 6, Doc. 217, p. 31). Thus, the ruling that the statement was inadmissible was not in error.

Statement of Bradley Banovz

Plaintiff also sought to present a video statement of Bradley Banovz and to admit the transcript of the statement into evidence. Banovz's cell was adjacent to Plaintiff's cell at the time of Plaintiff's suicide

attempt. Banovz provided the video statement to Detective Presson three hours after Plaintiff was found in his cell. In the video statement, Banovz stated that Plaintiff had been upset recently, that he spoke with Eaton and Werner and requested to see a crisis counselor, that Werner and Eaton told Plaintiff they would put in a request for him, but that no request was ever actually made (Doc. 199-4, p. 4). Banovz also stated in the video that Plaintiff had mentioned committing suicide the week prior, but that Banovz understood Plaintiff to be joking. (Doc. 199-4, p. 9).

Plaintiff argues that the video as well as the transcript should have been admitted in its entirety as a past recollection recorded (Fed. R. Evid. 803(5)), a present sense impression (Fed.R. Evid. 803(1)), a prior consistent statement (Fed. R. Evid. 801(d)(1)(B)), or as a general exception to hearsay (Fed. R. Evid. 802). Pursuant to Rule 803(5), a document may be read to the jury if (1) the witness once had knowledge about matters in the document, (2) the witness now has insufficient recollection to testify fully and accurately and (3) the record was made or adopted at a time when the matter was fresh in the witness's memory and reflected to his knowledge correctly. United States v. Cash, 394 F.3d 560, 564 (7th Cir. 2005).

At trial, the Court determined that Plaintiff had failed to lay a proper foundation that Banovz lacked the appropriate recollection under F.R.E. 803(5) (Tr. Tran. Day 2, Doc. 213, p.141-43). Nevertheless, Banovz was able to review the statement on the stand and testify to its contents (Tr. Tran. Day 2, Doc. 213, p. 153). Plaintiff also argues that the video

statement and transcript should have been admitted as a prior consistent statement. Plaintiff's contention that the Court ruled that the statement was inadmissible as a prior consistent statement is inaccurate—the Court ruled that the statement could be presented at trial with limitation—portions of the statement would be allowed to rebut a charge of recent fabrication or improper influence or motive, but were not allowed to bolster the veracity of the witness's testimony (Tr. Tran. Day 6, Doc. 217, p. 126-128). Plaintiff argued that the entire statement was necessary to rebut "admissions" made by Defense counsel during opening statement (Tr. Tran. Day 2, Doc. 213, p. 150).

An opening statement is neither evidence nor argument; it is simply an outline of what the lawyer expects will be proven during the course of the trial. *Testa v. Village of Mundelein, Ill.*, 89 F.3d 443, 446 (7th Cir. 1996). As such, the Court properly ruled that the statements were inadmissible for the purpose of rebutting statements made during opening statements.

Plaintiff also contends that a stipulation existed between Defendants and Plaintiff regarding the admissibility of Banovz's statement (Doc. 213, p. 147). Plaintiff cites to *United States v. Kanu*, 695 F.3d 74 (D.C. Cir. 2012) to support his position that the stipulation was enforceable and the Court erred in not enforcing it. While Kanu states that "[s]tipulations, like admissions in the pleadings, are generally binding on the parties and the court…" it also states that "'the trial court may, in the exercise of sound judicial discretion and in furtherance of justice, relieve parties from stipulations into which

they have entered.'" Kanu, 695 F.3d at 78 (quoting Nat'l Audubon Soc'y., Inc. v. Watt, 678 F.2d 299, 311 n. 28 (D.C. Cir. 1982)). Here, the parties never filed a stipulation about the statement, but reached the agreement between themselves. The Court ruled that it would not be bound by the agreement because the statement was hearsay. Additionally, Plaintiff was not prejudiced by the ruling because, while the statement itself was not admitted into evidence, Banovz was permitted to testify as to its contents during direct examination by Plaintiff (Doc. 213, p. 152).

Plaintiff further argues that the statement should have been admitted as a present sense impression under Rule 803(1). A present sense impression is a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it. Fed. R. Evid. 803(1). "There is no per se rule indicating what time interval is too long under Rule 803(1)." *Alexander v. Cit Technology Financing Services, Inc.*, 217 F.Supp.2d 867, 882 (N.D. Ill. 2002). Here, Plaintiff did not seek to admit the statement as a present sense impression. Additionally, the statement was not taken immediately after the incident in question, but rather three hours later (Doc. 213, p. 152). The statement also included information relating to events occurring days and weeks prior to Plaintiff's suicide attempt (Doc. 199-4). Therefore, even if Plaintiff had moved to admit the statement as a present sense impression, it would not have been admissible.

Plaintiff also claims that Banovz's statement constituted an "excited utterance," and thus should

have been admitted, pursuant to Rule 803(2). Rule 803(2) provides that a statement relating to a startling event or condition made while the declarant was under the stress of excitement that it caused is an exception to hearsay. To qualify as an excited utterance, the declarant must have personally perceived the event in question. *United States v. Joy*, 192 F.3d 761, 766 (7th Cir. 1999). Due to the 3-hour lapse in time between the incident and Banovz's statement and the fact that Banovz did not actually witness Plaintiff's suicide attempt, the video does not qualify as an excited utterance.

Finally, Plaintiff contends that Banovz's statement was admissible under the "catch all" exception to the hearsay rule. Under this exception, a hearsay statement is not excluded if "(1) the statement has equivalent circumstantial guarantees of trustworthiness, (2) it is offered as evidence of a material fact, (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts and (4) admitting it will best serve the purposes of these rules and the interests of justice." (Fed. R. Evid. 802).

Again, Plaintiff did not seek to admit the statement under this exception at trial and therefore, did not lay a foundation that the statement was offered as a material fact, that the statement was trustworthy, that it is more probative than any other evidence or that the interests of justice would have been served by admitting the statement. Plaintiff cannot now claim that the Court was in error by not admitting the statement under this hearsay exception.

Display of Criminal Information to the Jury

Plaintiff also argues that he was prejudiced when an Information regarding his criminal case was included in an exhibit consisting of photographs of Plaintiff's cell (See Docs. 199-5, 199-6). The photo series includes photos of Plaintiff's cell which also show documents regarding his criminal case within the cell. (Docs. 199-5, 199-6). Plaintiff introduced the series of photographs during the testimony of Detective Presson (Tr. Tran. Day 2, Doc. 213, p. 84-5). In United States v. Danford, 435 F.3d 682, 686-87 (7th Cir. 2005) the Court determinedthat prejudicial yet irrelevant information inadvertently published to the jury did not warrant a mistrial because the information was before the jury for only about one minute. Additionally, "[i]t is well-settled law that a party cannot complain of errors which it has committed, invited, induced the court to make, or to which it consented. Abel v. Miller, 824 F.2d 1522, 1535 (7th Cir. 1987). In this case, Plaintiff was the party who moved to admit the photographs into evidence (Tr. Tran. Day 2, Doc. 213, p. 112). The witness was asked to hold up the photos for the jury to see (Tr. Tran. Day 2, Doc. 213, p. 109). Plaintiff subsequently moved to have the photographs showing the criminal history removed from the exhibit, which the Court allowed (Tr. Tran. Day 2, Doc. 213, p. 112). Like in Danford, the amount of time the photograph was published was minimal—the jury was exposed to the photo for 15 seconds—and the defect was quickly corrected. More importantly, there is no indication in the record that Plaintiff was prejudiced as a result of the photograph being shown.

Plaintiff's Representative, James Mulvaney

Plaintiff sought to present the testimony of Mulvaney, a bank representative who was appointed as Co-Guardian of Plaintiff's Estate (Doc. 176). Defendants argued that the testimony should be barred on the bases of relevancy and materiality (Doc. 176). The Court agreed with Defendants (Tr. Tran. Day 2, Doc. 213, p. 6-7). Specifically, the Court found that evidence regarding the purpose of the guardianship and how it would affect a potential recovery had nothing to do with liability or damages, or any other issue at trial. (Doc. 213, p. 6). Additionally, the Court invited Plaintiff to submit an offer of proof as to why Mulvaney's testimony would be relevant, but Plaintiff declined to do so (Tr. Tran. Day 2, Doc. 213, p. 7). Finally, Plaintiff has failed to establish that he was prejudiced as a result of Mulvaney not testifying.

Liability of Unnamed Guard

Bradley Banovz testified that an unnamed guard was advised of the suicide potential of Plaintiff (Tr. Tran. Day 2, Doc. 213, p. 121). Plaintiff argues that the liability of the unnamed guard should have been submitted to the jury. However, Plaintiff did not include an instruction about the unnamed guard in his proposed jury instructions (Tr. Tran. Day 7, Doc. 218, p. 6-62). When a party does not ask for an instruction, reversal is required only if no reasonable juror could have found the evidence sufficient under the instructions heard. *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 675 (7th Cir. 1985). Also, as previously noted, a party cannot complain of errors that it committed, invited or induced the court

to make. See *Abel*, 824 F.2d at 1535. Thus, Plaintiff waived this argument.

Dismissing Jurors For Cause

Plaintiff contends that the Court erred in not dismissing jurors who indicated that they would require higher burden of proof (60 through 90 percent) to rule in Plaintiff's favor. Specifically, Plaintiff moved to strike three jurors (numbers 9, 13, and 17) for cause on this basis (Voir Dire. Tran. 2, Doc. 212, p. 157). Upon questioning, all three jurors indicated that they could be fair and impartial and would follow the instructions given by the Court (Voir Dire. Tran. 2, Doc. 212, p. 158). As the record reveals, Plaintiff's Counsel introduced the concept of percentages relative to the burden of proof and repeatedly asked the prospective jurors about percentages. Several prospective jurors responded that they were unsure how to answer Counsel's question about what percentage of proof they would require because the question was confusing and required them to be speculate (Voir Dire. Tran. 2, Doc. 212, p. 68). The Court did not strike the jurors for cause because it determined that they could be unbiased and impartial despite Counsel's confusing questioning. Further, Plaintiff was not prejudiced by the Court's refusal to strike these jurors for cause because Jurors 9, 13, and 17 were not selected for the jury.

Conclusion

For the foregoing reasons, the record does not reveal reversible error or a miscarriage of justice and the manifest weight of the evidence supports the

jury's verdict. Accordingly, Plaintiff's Motion for New Trial is DENIED.

IT IS SO ORDERED.

Date: July 28, 2016

/s/ Staci M. Yandle
STACI M. YANDLE
DISTRICT JUDGE

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

REGINALD PITTMAN, By and through his Guardian and Next Friend, Robin M. Hamilton,

Plaintiff,

vs.

COUNTY OF MADISON, STATE OF ILLINOIS, et al.,

Defendants.

Case No. 08-cv-890-SMY-DGW

JUDGMENT

This matter having come before the Court, the issues having been heard, and jury having rendered a verdict,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendants, County of Madison, State of Illinois, Robert Hertz, Randy Eaton, and Matt Werner, and against plaintiff, Reginald Pittman.

DATED: March 12, 2015 JUSTINE FLANAGAN, Acting Clerk of Court

By: s/ Kailyn Kramer, Deputy Clerk

Approved: s/ Staci M. Yandle
STACI M. YANDLE
DISTRICT JUDGE

APPENDIX L

Rule 38. Right to a Jury Trial; Demand

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may—within 14 days after being served with the demand or within a shorter time ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) Admiralty and Maritime Claims. These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).

APPENDIX M

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) Before or at the Close of the Evidence. At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) After the Close of the Evidence. After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) How to Make. A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) When to Make. An objection is timely if:

(A) a party objects at the opportunity provided under **Rule 51(b)(2);** or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) Assigning Error. A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.

(2) Plain Error. A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.