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OPINIONS AND ORDERS

REHEARING ORDER

OPINION, U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (APRIL 29, 2024)

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VICTOR HILL,

Defendant-Appellant.

No. 23-10934

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:21-cr-00143-ELR-CCB-1

Before: ROSENBAUM, NEWSOM, and MARCUS,
Circuit Judges.

ROSENBAUM, Circuit Judge:

The notion that "[n]o man is above the law and no man is below it"[1] is fundamental to our democratic

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1 President Theodore Roosevelt, Third Annual Message to Congress (Dec. 7, 1903), https://www.presidency.ucsb.edu/documents/third-

republic's continuing viability. That principle applies equally to sheriffs (and other officers of the law) and detainees. And 18 U.S.C. § 242 vindicates that principle. It imposes criminal liability on anyone who, under color of law, willfully deprives another person of their constitutional rights. Under § 242, a jury convicted Victor Hill, the former Sheriff of Clayton County, Georgia, of using his position as the Sheriff to deprive detainees in his custody of their constitutional rights. Hill now appeals.

Hill oversaw the Clayton County Jail. At that jail, officers used restraint chairs for "safe containment" of pretrial detainees "exhibiting violent or uncontrollable behavior." But six times, Hill ordered individual detainees who were neither violent nor uncontrollable into a restraint chair for at least four hours, with their hands cuffed behind their backs (or, in one instance, to the sides of the chair) and without bathroom breaks. Each detainee suffered injuries, such as "open and bleeding" wounds, lasting scars, or nerve damage. Based on these events, a jury convicted Hill of six counts of willfully depriving the detainees of their constitutional right to be free from excessive force, in violation of § 242.

Hill challenges that conviction on three grounds. We reject each one. First, Hill had fair warning that his conduct was unconstitutional—that is, that he could not use gratuitous force against a compliant, nonresistant detainee. Second, sufficient evidence supported the jury's conclusion that Hill's conduct had no legitimate nonpunitive purpose, was willful, and caused the detainees' injuries. Third, the district court did

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annual-message-16 [https://perma.cc/W6UT-AAEG].

not coerce the jury verdict but properly exercised its discretion in investigating and responding to alleged juror misconduct.

So after careful consideration, and with the benefit of oral argument, we affirm Hill's conviction.

I. Background

A. Factual Background[2]

Defendant-Appellant Victor Hill served as Sheriff of Clayton County, Georgia, from 2005 to 2008 and from 2013 to 2022. As Sheriff, Hill oversaw the county jail, where pretrial detainees are incarcerated. Hill characterized the jail, under his supervision, as a "paramilitary facility" with "a lot of rules" like "in a military boot camp."

In his role as Sheriff, Hill received annual use-of-force trainings. Consistent with this training, Hill adopted a use-of-force policy defining "excessive force" as "any force used in excess of the amount of force reasonably required to establish control over or to prevent or terminate an unlawful act of violence."

In 2018, Hill bought restraint chairs for the Clayton County Jail and established a policy for their use. At trial, the Government introduced the following photo of a restraint chair:

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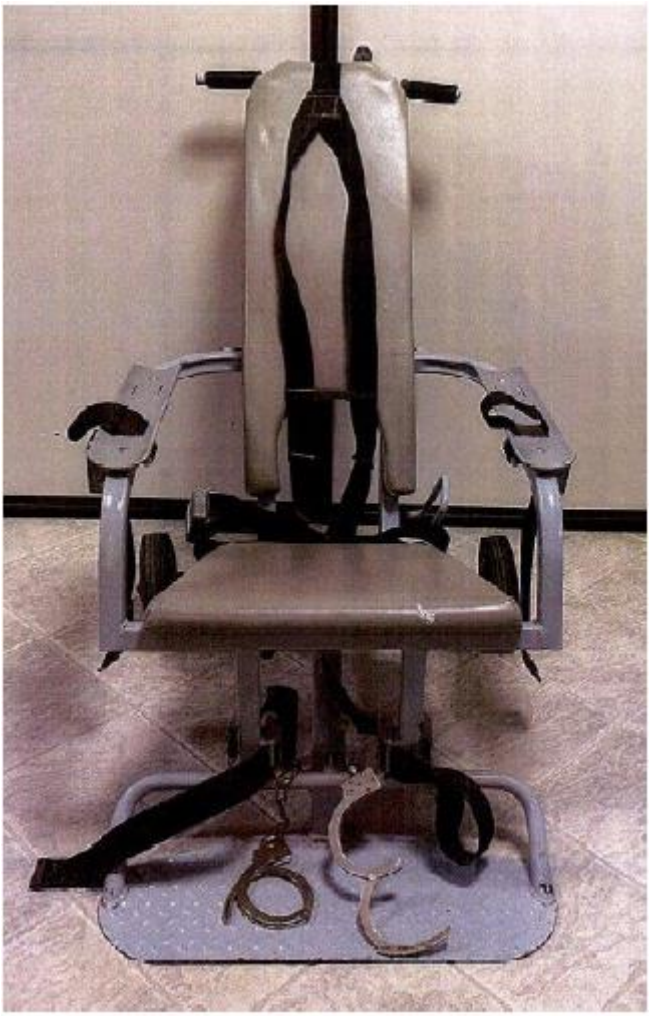
[2] We take these facts from the evidence presented at trial, and we view them in the light most favorable to the verdict. *United States v. Verdeza*, 69 F.4th 780, 785 n.1 (11th Cir. 2023).



Hill adopted a general policy for the use of all types of physical-restraint devices. It provided that a detainee posing a risk of "actual violence for [himself] or others . . . shall be placed into isolation" first. And it emphasized that only if the detainee "continues to exhibit physical violence toward staff, [himself], or others" should he "be placed into restraints."

Besides this policy, Hill adopted a specific restraint-chair policy. Under it, the chairs were "for emergencies," such as "safe containment of an inmate exhibiting violent or uncontrollable behavior" and preventing "self-injury, injury to others or property damage." Chair use, the policy continued, could "never be authorized as a form of punishment." And when a situation called for chair use, officers were to remove handcuffs, and detainees were to be "kept in the restraint chair no longer than four (4) hours unless exigent circumstances exist, *i.e.*, inmates [sic] continued violent behavior." Also under the policy, a detainee had to receive medical clearance before being put in the chair. Finally, the policy mandated regular medical checks and "scheduled exercise periods" for those who were restrained.

Hill and his deputies used the chair about 600 times. According to Hill, he ordered chair use as a "preventative measure" based on "pre-attack indicators" and the "totality of [the] circumstances." And when Hill ordered chair restraint of a detainee, only Hill could order his release from the chair, typically after "at least four hours."

This case concerns Hill's restraint-chair use on six[3] pretrial detainees in 2019 and 2020. We recount the facts of each arrest and detention, organized by detainee, below.

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[3] The indictment charged Hill with seven counts, for seven detainees. But the jury acquitted Hill of one count: the count related to Joseph Harper. That acquittal is not before us on appeal.

1. Raheem Peterkin

In December 2019, Raheem Peterkin was arrested for allegedly pointing a gun at two men outside his apartment and "barricading" himself in the apartment despite officers' repeated requests to come outside. According to the arresting officer, during his arrest and booking, Peterkin was never violent, uncontrollable, or threatening.

After Peterkin arrived at the jail, Hill and specialized security officers—known as the "Scorpion Response Team" ("SRT")— visited Peterkin's holding cell and questioned Peterkin about his alleged offenses. Hill said, "I wish I was there. I would have riddled your ass with bullets." And then he told SRT members to "put that bitch in the chair."

On Hill's order, officers strapped Peterkin into a restraint chair. Peterkin remained there, with his hands cuffed behind his back, for four hours. While in the chair, Peterkin experienced pain in his wrist and side. He testified that the pain was "the worst thing [he] ever felt," and the restraints left scars on both of his wrists. Officers did not allow him to use the restroom, so he was forced to urinate on himself.

2. Desmond Bailey

In February 2020, officers arrested Desmond Bailey for drug and firearm possession. While officers were executing a search warrant, Bailey left his house in a car, requiring officers to follow him before they could stop and arrest him. The arresting officer testified that during his arrest and booking, Bailey was never violent, uncontrollable, or threatening.

In his holding cell at the jail, Bailey told detectives that he did not want to speak to them without a lawyer present. But several hours later, Hill, the detectives, and SRT members arrived, and Hill questioned Bailey about his alleged offenses. Bailey again refused to answer questions without a lawyer present. Hill replied, "You think you're a big badass. Oh, you think you're a gangster. Put his ass in the chair."

On Hill's order, officers strapped Bailey into a restraint chair. There Bailey sat, with his hands cuffed behind his back, for six hours. Bailey described his time in the chair as "horrible" and "terrifying." He testified that he was in extreme pain and eventually felt numb. The restraints cause Bailey to suffer "open and bleeding" cuts on both wrists, which required medical treatment and left scars.

3. Joseph Arnold

In February 2020, officers arrested Joseph Arnold for assaulting two elderly women during a dispute about who was next in line at a grocery store, though they did not arrest him until three weeks after the incident. Following the incident, Hill put Arnold on the Sheriff's Department's "top ten" most wanted list and offered "$2500 of [his] own money to anyone who would lead authorities to identify" Arnold. The arresting officer testified that Arnold was cooperative, non-threatening, and did not resist arrest.

Upon Arnold's arrival at the jail's booking area, Hill confronted Arnold. The jury saw an officer's surreptitious recording of that interaction. When Arnold, who was handcuffed, asked whether he was entitled to a fair and speedy trial, Hill responded,

> You entitled to sit in this chair, and you're entitled to get the hell out of my county and don't come back. That's what you're entitled to. You sound like a damn jackass. Don't you ever put your hand on a woman like that again. You're fortunate that wasn't my mother or grandma or you wouldn't be standing there. Now, sit there and see if you can get some damn sense in your head.

On Hill's order, officers strapped Arnold into a restraint chair. There Arnold remained, with his hands cuffed to the sides of the chair, for at least four hours. Arnold testified that the restraints were "painful and humiliating" and left marks on his wrists that did not heal for weeks.

4. Cryshon Hollins (C.H.)

In April 2020, officers arrested Cryshon Hollins (then 17 years old) for vandalizing his family's home. Deputy Allen, who happened to be Hill's godson, spoke with Hill on the phone, texted Hill a photo of Hollins handcuffed in the back of the police car, and had this text message exchange with Hill:

> Hill: How old is he?
>
> Allen: 17
>
> Hill: Chair

Again, the arresting officers, as well as officers who were in the jail's intake area, testified that Hollins was never violent, uncontrollable, or threatening.

On Hill's order, officers strapped Hollins into a restraint chair immediately upon his arrival at the jail. Hollins cried because he felt like he was "being

tortured," and he was forced to urinate on himself. After four to five hours, officers released Hollins from the chair, and he fell asleep in a holding cell.

An hour later, Hill scolded Hollins for disrespecting Hollins's mother and ordered SRT members to strap Hollins into the restraint chair. There Hollins sat for another five or six hours, with his hands cuffed behind his back. Hollins testified that the restraint felt "like torture" and left visible marks on his wrists and ankles.

During the second restraint, Hill recorded a video of himself, Hollins, and Joseph Harper, who was strapped into another restraint chair in the same room. In that video, among other things, Hill said, "If I hear about you messing up your mama's house again . . . I'm a sit your ass in that chair for sixteen hours straight . . . I need to hear from both of y'all that y'all not gonna show y'all's ass in my county no more." Hill texted that video to his girlfriend.

At trial, Hill claimed that he tried to be "convincing" and do what Hollins's mother wasn't "capable of doing." Hill testified that "the experience [Hollins] had overall," and "the discussion [Hill] had with him, is part of the reason why he's out of trouble now."

5. Glen Howell

In April 2020, Glen Howell and Lieutenant Guthrie had a payment dispute over landscaping work that Howell performed (unrelated to Guthrie's employment). One night, Hill called Howell to ask why he was "harassing" Guthrie, to which Howell responded by telling Hill to "go f himself" and hanging

up. Because Howell didn't believe the caller was Hill but "thought somebody was impersonating the Sheriff," Howell called Hill back via FaceTime. On that call, Howell said, "Now you work for me," to which Hill replied, "I'm coming to get you." Hill then texted Howell and warned Howell not to contact him anymore or Howell would be arrested for harassing communications. Howell responded, "So this is Victor Hill correct," but did not otherwise contact Hill again.

Hill still instructed a deputy to prepare an arrest warrant for misdemeanor harassing communications. After texting Howell multiple times about the warrant, Hill sent a fugitive squad two counties over to arrest Howell. Two days later, after retaining counsel, Howell turned himself in. Surveillance footage and officers' testimony both reflect that Howell was cooperative and compliant during arrest and booking.

After Howell turned himself in, Hill arrived at the jail, accompanied by Lieutenant Guthrie. Howell tried to shake Hill's hand. But Hill replied, "We're way past that. You had an opportunity to fix this before this part." Hill then ordered deputies to "put [Howell] in the chair," and they strapped Howell in with his hands cuffed behind his back. There Howell sat for at least four hours. Hill said that he was "going to teach [Howell] a lesson" and "if [Howell] crossed him or one of his deputies again, it [would] be the sniper team."

Howell testified that, while in the chair, he felt the "worst feeling of [his] life." Although he "asked for a medic" because he felt like he was having a "panic attack," officers "denied [him] a medic." The restraints left visible marks on his wrists and caused his hands to swell. Howell also testified that he still suffers neck,

back, arm, leg, and toe pain and numbness from a pinched nerve, which affects his ability to work.[4]

6. Walter Thomas

In May 2020, an officer arrested Walter Thomas for speeding and driving with a suspended license. The arresting officer testified that Thomas (though crying, cussing, and pleading with the officer not to take him to jail) was never violent, uncontrollable, or threatening.

In the holding cell at the jail, an officer told Thomas to stand up and face the wall while Hill approached. When a female officer told Thomas not to put his head against the wall, Thomas turned to look at her. SRT members then pinned Thomas against the wall. Thomas tried to explain that he was there for only a suspended license, but Hill told him to "shut up" and ordered SRT to strap him into a restraint chair.

Following Hill's orders, officers strapped Thomas into the chair, and there he remained for five or six hours with his hands cuffed behind his back. While Hill was still present, officers covered Thomas with a "spitting hood" (even though he had not been spitting) and punched him in the face, which caused a bruised lip. Thomas cried and urinated on himself several times. And no officers or nurses came to check on him; indeed, he "had to kick the door for somebody to come check on" him. He testified, "I never felt that pain

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[4] Howell also filed a civil lawsuit against Hill seeking damages under 42 U.S.C. § 1983. *Howell v. Hill*, No. 1:20-cv-02662-WMR (N.D. Ga.). In that case, the district court denied Hill's motion for summary judgment on qualified-immunity grounds. Hill's appeal is pending before this Court.

never [sic] before. Like, literally, I wouldn't wish that on my worst enemy."[5]

B. Procedural History

A federal grand jury indicted Hill for "willfully depriv[ing]" the detainees of their constitutional "right to be free from the use of unreasonable force by law enforcement officers amounting to punishment," "under color of law" and with resulting "bodily injury." *See* 18 U.S.C. § 242. That right derives from the Fourteenth Amendment's Due Process Clause. *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989). Hill moved to dismiss the indictment. He asserted that he lacked fair warning that his conduct was criminal. The district court denied that motion.

At trial, after the Government rested, Hill moved for a judgment of acquittal. *See* Fed. R. Crim. P. 29(a). He argued that insufficient evidence supported the conclusions that (1) his use of the restraint chair was objectively unreasonable; (2) he acted willfully; and (3) he caused the detainees' injuries. The district court denied that motion. Hill renewed his motion at the close of the defense's evidence, but the court again denied that motion. Hill also repeatedly moved for a mistrial during jury deliberations, as we discuss below.

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[5] Thomas also filed a civil § 1983 lawsuit against Hill. *Thomas v. Hill*, 1:22-cv-3987 (N.D. Ga.). That lawsuit appears to have stalled or been dropped. The only docket entries include the complaint and summons.

1. Jury Deliberations and Verdict

The court submitted the case to the jury, and just after noon, the jury began its deliberations. Upon request, the court released the jury for the day around 4:30 p.m.

The next day of deliberations, at around 2:45 p.m., the jury sent the judge a note. It said that the jury had "agreed on [two] counts" but was "deadlocked" on the other five.

The Government requested an *Allen* charge.[6] For his part, Hill asked the court to take the verdict on the two counts and declare a mistrial on the remaining five counts. The district court then gave the Eleventh Circuit pattern modified *Allen* charge.[7] In delivering that charge, though, the district court omitted the sentence, "The trial has been expensive in time, effort, money, and emotional strain to both the defense and the prosecution."

Roughly an hour later, the jury foreperson sent a note asking how the jury should proceed "if a juror is exhibiting the inability to understand the [court's] instructions," "displaying general confusion with basic words, [and] altering meanings of words to conform with personal opinions." The note did not identify the juror, describe the juror as a holdout, or claim that the jury was deadlocked. The court responded in writing, "We've given you the instructions, and it is up

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[6] *See Allen v. United States*, 164 U.S. 492, 501–02 (1896).

[7] Judicial Council of the U.S. Eleventh Judicial Circuit, Criminal Pattern Jury Instruction T5 (Mar. 2022), https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsRevised-MAR2022.pdf [https://perma.cc/WE27-FN36].

to you to deliberate according to those instructions, and work within them to arrive at a verdict." The jury deliberated for another half hour before requesting to be released until the next day because it was "not coming to an agreement."

The next morning, a juror informed the court that she could not continue because she was experiencing excruciating back pain. An alternate juror promptly replaced her. The district court instructed the reconstituted jury to "start [its] deliberations anew" and "disregard entirely any deliberations taking place before [the] alternate juror was substituted." The reconstituted jury then began deliberating.

Later that same morning, the foreperson sent a note "with questions regarding [a juror the foreperson later identified as Juror 6's] ability to: (1) answer yes/no questions, (2) acknowledge the law, [or] (3) be able to understand the instructions." Another juror wrote that the same juror (Juror 6) "appear[ed] to show the beginnings of cognitive impairment," was "unable to understand many basic English words," and "literally closed eyes and covered ears" during deliberations. And Juror 6 allegedly "stated that the Sheriff [and] the President are above the law and not required to follow the Constitution."

In response, the court questioned the foreperson and Juror 6, whom the foreperson identified as the subject of the notes. According to the foreperson, Juror 6 was engaging the other jurors but was not open to others' viewpoints and was not applying the law or the court's instructions. With Juror 6, the foreperson testified, "we just have not been able to get anywhere." The court remembered Juror 6, who the court had to "help . . . through voir dire" and "lead[] . . . in his ques-

tions." Juror 6 told the court that he had been engaging in deliberations and following the court's instructions, though he had "annoyed people" with his definitions of "intent and willful." He also recounted that he had been called "inarticulate or crazy." The court declined to dismiss Juror 6, and the jury resumed deliberations.

Shortly after 4 p.m., the jury sent the court three more notes, again questioning one juror's behavior and cognitive abilities. The first stated that the juror did "not recall a large chunk of testimony," would "not respond" to questions, was "having difficulty construing sentences," and "was arguing with his notes." The second added that the juror "state[d] he [was] biased against the detainees if they were violent" and "demonstrate[d] difficulty in separating different events and the order they occurred." The third and final note said simply, "We are unable to reach a unanimous decision today. Can we start tomorrow?"

Defense counsel again moved for a mistrial. For its part, the Government requested that the jury be allowed to resume deliberations the next day. Instead, the court proposed another Allen charge, to which defense counsel objected. The court released the jury at 4:25 p.m.

The next day, the jury resumed deliberations. Around 1:30 p.m., the court sua sponte gave the jury a modified[8] version of the pattern *Allen* instruction. The transcript reflects that the court (apparently inadvertently) left out the word "not" in the following

[8] The modifications included the removal of (1) the same sentence we've noted above and (2) the portion encouraging jurors in the minority to reexamine their positions.

portion: "You must also remember that if the evidence fails to establish guilt beyond a reasonable doubt, the defendant must have your unanimous verdict of [not] guilty." The court instructed the jury to apply the new charge "in conjunction with all the other instructions [it had] previously given." Defense counsel objected to the court's decision to give the *Allen* charge but not to the substance of that charge (as written or read).

Around 2:30 p.m., the jury sent another note asking how to proceed if a juror stated that "they do not agree with the law in their opinion and [was] using that opinion to base their vote." The court again separately questioned the foreperson, who confirmed the note was about Juror 6. After that, the court received another note asking the court to "clarify" the willfulness instruction.

The court again called in Juror 6. He told the court that he understood the law and was attempting to follow the law and the court's instructions, but he thought "there was a passage that can be taken two different ways." The court left Juror 6 on the jury.

But at defense counsel's request, the court asked the foreperson whether the jury was hopelessly deadlocked, to which the foreperson responded, "I would not like to make that determination right at this moment. . . . With further deliberations, it may be we can get somewhere."

Around 4:20 p.m., the jury announced it had reached a verdict of guilty on six of the seven counts and not guilty on the seventh (the count involving Harper).

2. Sentencing

The district court determined Hill's total offense level to be 23 and his Guidelines range to be 46 to 57 months. But it granted a "significant" downward variance, sentencing Hill to 18 months of incarceration. In doing so, the court characterized the case as "novel" and noted that Hill's behavior did not "involve violence, assaultive behavior, such as beating, tasing, shooting, et cetera, or an unlawful arrest." Neither party challenges Hill's sentence on appeal.

II. Discussion

Hill challenges his § 242 conviction on three grounds. First, Hill claims that he lacked fair warning that his conduct was unconstitutional. Second, he argues that the district court abused its discretion in questioning a juror about alleged misconduct, giving two *Allen* charges to the jury, and omitting one word in the second *Allen* charge. Third, Hill asserts that the Government presented insufficient evidence that his conduct (1) had no legitimate nonpunitive purpose, (2) was willful, and (3) caused the detainees' injuries. We find none of Hill's challenges availing.

A. Hill had fair warning that his conduct violated the detainees' constitutional right to be free from excessive force.

We begin with Hill's claim that he lacked fair warning that his actions violated the detainees' constitutional right to be free from excessive force. We review de novo whether a defendant had fair warning that his conduct violated a constitutional right. *See United States v. House*, 684 F.3d 1173, 1207 (11th Cir.

2012) (reasoning that fair warning is a question of law).

Criminal liability attaches under § 242 only if case law provides the defendant "fair warning" that his actions violated constitutional rights. *United States v. Lanier*, 520 U.S. 259, 267 (1997). "[T]he standard for determining the adequacy of that warning [is] the same as the standard for determining whether a constitutional right was 'clearly established' in civil litigation under § 1983." *Hope v. Pelzer*, 536 U.S. 730, 740 (2002) (citing *Lanier*, 520 U.S. at 270–71). We conclude that case law gave Hill "fair warning" that the use of restraint chairs on compliant, nonresistant detainees inflicted excessive and thus unconstitutional force.

1. Restraint chairs qualify as "force."

First, Hill argues that restraint-chair use is not "force" in the first place, so it could not have been excessive force. In support of this argument, Hill analogizes restraint chairs to "passive restraints" like handcuffs or leg shackles. We are not persuaded.

Even if restraint chairs were "passive restraints," as Hill contends, we have repeatedly applied the constitutional use-of-force framework to such restraints. For instance, in *Williams v. Burton*, 943 F.2d 1572, 1575 (11th Cir. 1991) (per curiam), we characterized the use of four-point restraints as "force." And in *Gold v. City of Miami*, 121 F.3d 1442, 1446–47 (11th Cir. 1997), we referred to tight handcuffing for a twenty-minute period as a use of "force." *See also Rodriguez v. Farrell*, 280 F.3d 1341, 1352 (11th Cir. 2002) (same, for "[p]ainful handcuffing"). In other words, even if a

restraint is "passive," that does not preclude the conclusion that it constitutes "force."

Similarly, in *Hope*, the Supreme Court noted that prior decisions had clearly established that "handcuffing inmates to cells or fences for long periods of time" was "punishment." *See* 536 U.S. at 742 (quoting *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974)). To be sure, "punishment" is not synonymous with "force," but *Hope* demonstrates that even handcuffing may be subject to constitutional analysis in certain circumstances.

Instead of this binding authority, Hill relies on several unpublished cases involving restraint chairs that he claims "focus on the other violence and not the chair itself as the unlawful use of force" and therefore "support[] the inference that this Court does not classify the chair as force."[9] We disagree.

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[9] *See Shuford v. Conway*, 666 F. App'x 811, 814, 818–19 (11th Cir. 2016) (reversing grant of qualified immunity where officers used a "Pepperball gun," Taser, and other physical force on "uncooperative" and "aggressive[]" detainees before putting them in restraint chairs); *Jacoby v. Mack*, 755 F. App'x 888, 891–92, 897 (11th Cir. 2018) (same, where officers pepper sprayed "disruptive" detainee then put him in a restraint chair without adequate decontamination for eight hours); *Coffman v. Battle*, 786 F. App'x 926, 930, 935 (11th Cir. 2019) (affirming denial of qualified immunity where officer ordered resisting detainee into a restraint chair, then tased him twice); *McNeeley v. Wilson*, 649 F. App'x 717, 720, 723 (11th Cir. 2016) (same, where officers sprayed "disobed[ient]" detainee with chemical agents and then put him in four-point restraints without a decontamination shower); *Maldonado v. Unnamed Defendant*, 648 F. App'x 939, 945, 955–56 (11th Cir. 2016) (same, where officer put prisoner, who had violated jail rules, in restraint chair and then broke his finger, kicked him, and burned him with a lighter).

For starters, of course, those unpublished cases are not binding on us. *See* 11th Cir. R. 36-2. But even if they were, they do not support Hill's inferential leap.

In none of those cases did we say that restraint-chair use was not "force." To the contrary, in one case, we characterized the restraint and pre-restraint force "as a single excessive force claim." *Jacoby*, 755 F. App'x at 896. Put differently, that we focused on other, more egregious displays of force does not compel the conclusion that we viewed restraint chairs as not "force." In short, we reject Hill's argument that his restraint-chair use was not "force."

2. Under clearly established law, Hill's use of force was excessive.

Next, we consider whether Hill's use of force was constitutionally excessive. We conclude that, under clearly established law at the time, it was.

For § 242 (and § 1983) purposes, "a right can be clearly established in one of three ways." *Crocker v. Beatty*, 995 F.3d 1232, 1240 (11th Cir. 2021). Those methods include "(1) 'case law with indistinguishable facts,' (2) 'a broad statement of principle within the Constitution, statute, or case law,' or (3) 'conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law.'" *Id.* (quoting *Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291–92 (11th Cir. 2009)). In conducting this analysis, "we look to binding decisions of the Supreme Court of the United States, this Court, and the highest court of the relevant state"—in this case, Georgia. *Glasscox v. City of Argo*, 903 F.3d 1207, 1217 (11th Cir. 2018).

Here, a "broad statement of principle," *see Crocker*, 995 F.3d at 1240, within our case law clearly established that the use of force on compliant, nonresistant detainees is excessive.[10]

As the Supreme Court has clarified, a pretrial detainee's constitutional rights are violated when "the force purposely or knowingly used against him was objectively unreasonable." *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015). Force is excessive if it is "not 'rationally related to a legitimate nonpunitive governmental purpose'" or if it "appear[s] excessive in relation to that purpose." *Id.* at 398 (quoting *Bell v. Wolfish*, 441 U.S. 520, 561 (1979)).

In determining whether Hill's use of force was objectively unreasonable, we consider factors including the relationship between the need for force and the amount of force used, the extent of the detainees' injuries, any effort to temper the amount of force, the severity of the security problem, the threat reasonably perceived by the officer, and whether the detainees were actively resisting. *Id.* at 397. We also account for jail officials' "legitimate" need "to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 546–547.

With these principles in mind, we turn to their application in our precedent. To be sure, our case law has not addressed the precise factual circumstances

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[10] The Government also argues that the third alternative applies—that Hill's conduct was "so egregious" that no reasonable law-enforcement officer could have believed it was constitutionally permissible. *See, e.g.*, *Smith v. Mattox*, 127 F.3d 1416, 1419–20 (11th Cir. 1997). But because we decide this case based on a broad statement of principle, we need not reach that argument.

at issue: the use of restraint chairs on compliant, nonresistant detainees. But fair warning here did not require an "extreme level of factual specificity." *See Lanier*, 520 U.S. at 268. Rather, even in the absence of "a case directly on point," our precedent leaves the unconstitutionality of Hill's conduct "beyond debate." *See White v. Pauly*, 580 U.S. 73, 79 (2017) (citation and internal quotation marks omitted).

We begin with *Hope*, the closest Supreme Court case on point. There, the Court found that prison guards who handcuffed a prisoner to a hitching post for seven hours as punishment for "disruptive conduct" committed an "obvious" and "clear violation" of the Eighth Amendment. *Hope*, 536 U.S. at 733, 741. The Court reasoned that, although "[a]ny safety concerns had long since abated," the guards "knowingly subjected" the prisoner to "unnecessary pain" and "deprivation of bathroom breaks that created a risk of particular discomfort and humiliation." *Id.* at 738. While *Hope* arose under the Eighth Amendment,[11] it stands for the proposition that restraint, especially prolonged and painful restraint, without any legitimate penological purpose is constitutionally impermissible punishment. *See id*. at 741.

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[11] Excessive-force cases under the Eighth Amendment consider similar factors as Fourteenth Amendment cases, so they are instructive. *See, e.g.*, *Bozeman v. Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) ("it makes no difference whether [the victim is] a pretrial detainee or a convicted prisoner because the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving . . . pretrial detainees" (citation and internal quotation marks omitted)), *abrogated on other grounds by Kingsley*, 576 U.S. 389.

Our precedent draws an even clearer line—one that Hill's restraint-chair use crossed. As we've explained, "force in the pretrial detainee context may be defensive or preventative—but never punitive—[so] the continuing use of force is impermissible when a detainee is complying, has been forced to comply, or is clearly unable to comply." *Piazza v. Jefferson County*, 923 F.3d 947, 953 (11th Cir. 2019).

Several cases illustrate that line in practice. First, we found the use of four-point restraints permissible when a prisoner "posed a significant security concern" and the restraints inflicted "no actual injury." *Williams*, 943 F.2d at 1575. In *Williams*, the prisoner was clearly noncompliant—he committed disciplinary violations and cursed at, "threatened to kill," and spat on officers. *Id.* at 1574. Officers put the prisoner in four-point restraints for over 28 hours (except for "brief intervals for eating, physical exercise, and toilet use"), with "constant monitoring and examinations by medical personnel." *Id.* at 1574–75. We found that the officers had not violated the detainee's constitutional rights. *Id.* at 1576–77. But we cautioned that "a Fourteenth Amendment violation could occur if . . . officers continue to use force after the necessity for the coercive action has ceased." *Id.* at 1576.

A decade later, we reiterated that, in any "custodial setting," "officials may not use gratuitous force against a prisoner who has been already subdued or, as in this case, incapacitated." *Skrtich v. Thornton*, 280 F.3d 1295, 1303–04 (11th Cir. 2002), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). In *Skrtich*, the officers "used an electronic shield to shock" the prisoner, who fell to the ground, and then struck him repeatedly, ultimately slamming his

head into the wall. *Id.* at 1299–1300. Even though the prisoner had a "history of disciplinary problems," we found that "no reasonable, similarly situated official" could believe such force was justified when the prisoner "had been restrained . . . and no longer posed a threat." *Id.* at 1299, 1304.

Next, in a case involving a pretrial detainee specifically, we held that "[w]hen jailers continue to use substantial force against a prisoner who has clearly stopped resisting—whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated—that use of force is excessive." *Danley v. Allen*, 540 F.3d 1298, 1309 (11th Cir. 2008), *overruled on other grounds by Ashcroft v. Iqbal*, 556 U.S. 662 (2009). There, the detainee "had a disagreement" with jail officers and refused to obey orders, so an officer pepper sprayed him and then left him in a "small, poorly ventilated cell." *Id.* at 1303–04. That use of force, we found, was unconstitutional. *Id.* at 1310.

Most recently, we found that repeated taser use on a "motionless" and "unresponsive" pretrial detainee violated the detainee's constitutional right to be free from excessive force. *Piazza*, 923 F.3d at 950, 954. While "non-compliant, [the detainee] had neither threatened nor attempted to harm the officers," so, we reasoned, "the severity of the problem and the corresponding risk to the officers in this case were—from the very outset—exceedingly minimal." *Id.* at 954–55. Under these circumstances, taser use was objectively unreasonable. *See id.*

Hill contends that *Piazza* and its precursors do "not apply with 'obvious clarity' to cases involving passive restraint," or restraint chairs specifically.

But "we have never suggested that the longstanding prohibition on a jail officer's use of force on an incapacitated detainee turns on as fine a point as the particular weapon deployed." *Id.* at 956. Indeed, in rejecting the officers' qualified-immunity arguments in *Piazza*, we said, "it is no answer to say that *Danley* involved pepper spray, *Skrtich* kicks and punches, *Williams* four-point restraints, etc.—and that none of those cases concerned the use of a taser specifically." *Id.* In other words, case law need not confront the *type* of force at issue if it clearly establishes that *no* force would be objectively reasonable under the circumstances. *See id.*

And here, precedent clearly established that Hill could not use force against a compliant, nonresistant detainee.[12] Indeed, the relevant factors weigh against Hill here: no need for force existed, the detainees were not "actively resisting," and Hill could not have "reasonably perceived" any "threat" from the detainees' compliant behavior. *See Kingsley*, 576 U.S. at 397. Yet Hill still ordered each detainee into a restraint chair for at least four hours with his hands cuffed behind his back, without medical observation, and without bathroom (or other) breaks. Even accepting Hill's "legitimate . . . purpose" of maintaining jail security,

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[12] Though it does not bear on our fair-warning inquiry, we note that several of our sister circuits have also concluded that, while restraint-chair use may be proper if a detainee is violent or noncompliant, it is impermissible once the detainee is compliant or subdued. *Compare Blackmon v. Sutton*, 734 F.3d 1237, 1242 (10th Cir. 2013) (Gorsuch, J.), *and Young v. Martin*, 801 F.3d 172, 181 (3d Cir. 2015), *with Howell v. NaphCare, Inc.*, 67 F.4th 302, 321 (6th Cir. 2023), *and Reynolds v. Wood County*, No. 22-40381, 2023 WL 3175467, at *1, 4 (5th Cir. May 1, 2023) (per curiam) (unpublished).

protracted restraint-chair use was "excessive in relation to that purpose." *See id.* at 398. And contrary to Hill's contentions, four hours in a restraint chair is not "a *de minimis* level of imposition with which the Constitution is not concerned." *See Crocker*, 995 F.3d at 1251 (quoting *Bell*, 441 U.S. at 539 n.21).

To be clear, we do not suggest that officers may never use "passive restraint" if the restrained individual is not actively resisting. We reiterate only the longstanding principle that force, including "passive restraint," is excessive if it is "not 'rationally related to a legitimate nonpunitive governmental purpose'" *Kingsley*, 576 U.S. at 398 (quoting *Bell*, 441 U.S. at 561). Officers sometimes have a "legitimate nonpunitive . . . purpose," *id.*, for restraining a compliant individual, such as ensuring officer safety when transporting a pretrial detainee to his arraignment. But here, Hill had no legitimate purpose for ordering compliant, nonresistant detainees who were in the secure jail environment into restraint chairs for at least four hours. Hill's use of force was therefore excessive, and our precedent gave him fair warning of that fact. *See id.*; *see also Piazza*, 923 F.3d at 953.

As a final matter, we briefly address Hill's invocation of our recent decision in *Myrick v. Fulton County*, 69 F.4th 1277 (11th Cir. 2023). Of course, that decision issued after the events here, so it does not bear on the fair-warning inquiry. But even if it did, *Myrick* is not on point.

In *Myrick*, we found that jail officers' use of restraints, including a restraint chair "to transport" a detainee, did not violate clearly established law. *Id.* at 1303–04. That detainee, who had been diagnosed with substance-induced psychotic disorder, expressed

suicidal thoughts, refused to comply with officers' commands, and "charged at the officers while screaming, kicking, and punching." *Id.* at 1288–89. Officers tased and pepper-sprayed the detainee, who continued to resist, before strapping him into a restraint chair (along with leg restraints, handcuffs, and a spit mask). *Id.* at 1289–90.

Myrick does not help Hill for two reasons. First, the detainee in *Myrick* was violently resisting and noncompliant, so the restraint used did not implicate the general legal principle that force used against a compliant, nonresistant detainee is excessive. Second, the officers left the detainee in the restraint chair only briefly before he became unresponsive. *Id.* at 1291. Here, by contrast, the detainees were compliant and nonresistant, yet they were left in the restraint chair for at least four hours. "[O]bjective reasonableness turns on the 'facts and circumstances of each particular case.'" *Kingsley*, 576 U.S. at 397 (quoting *Graham*, 490 U.S. at 396). Because *Myrick* is so distinguishable, it does not support the conclusion that Hill's conduct was reasonable.

In sum, we conclude that Hill had fair warning that his conduct violated the detainees' Fourteenth Amendment rights to be free from excessive force.[13] Hill's first challenge to his conviction fails.

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[13] Hill also invokes the rule of lenity. But neither the excessive-force principle we recount above nor its application to the facts here involves any ambiguity. So there is nothing "for the rule of lenity to resolve." *See Shular v. United States*, 589 U.S. 154, 165 (2020).

B. The evidence sufficiently supported each element of Hill's § 242 conviction.

Next, we consider Hill's challenges to the sufficiency of the evidence against him. We review de novo the sufficiency of the evidence, viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences and credibility choices in favor of the jury verdict. *United States v. Wilson*, 788 F.3d 1298, 1308 (11th Cir. 2015). We uphold a verdict "if any reasonable construction of the evidence would have allowed the jury to find the defendant guilty beyond a reasonable doubt." *Id.* (citation and internal quotation marks omitted).

Hill asserts that the evidence did not sufficiently show that his conduct (1) had no legitimate nonpunitive purpose, (2) was willful, and (3) caused the detainees' injuries. We reject all three claims.

1. Sufficient evidence supported a finding that Hill's conduct had no legitimate nonpunitive purpose.

First, Hill argues that the evidence failed to sufficiently show that his restraint-chair use had no "legitimate nonpunitive . . . purpose," *see Kingsley*, 576 U.S. at 398, and was thus constitutionally excessive. Among other purported flaws, Hill points to the Government's failure to call a law-enforcement expert to opine on whether an officer in Hill's position would believe that restraint-chair use was reasonable.

But the Government need not have presented expert testimony to establish unreasonableness. The lay evidence at trial was more than enough to allow a jury to reasonably conclude that Hill's conduct lacked

any legitimate nonpunitive purpose and thus was constitutionally excessive.

We begin with Hill's own policy. As a reminder, that policy allowed the use of restraint chairs for "safe containment of an inmate exhibiting violent or uncontrollable behavior," but it warned that such use "never be authorized as a form of punishment." True, violation of law-enforcement "policies on the use of force [does] not by itself establish that [Hill's] actions amounted to excessive force." *United States v. Brown*, 934 F.3d 1278, 1296 (11th Cir. 2019). But the policy provided examples of legitimate nonpunitive purposes for which restraint chairs could be used and expressly prohibited their use as a punishment. So that policy is relevant, especially if the jury found that the detainees were not "exhibiting violent or uncontrollable behavior" or otherwise requiring "safe containment."

More importantly, multiple officers testified that each detainee was compliant, controllable, and nonviolent before officers placed him into the chair. Yet the undisputed evidence shows that Hill ordered each detainee into the chair, anyway.

And based on the detainees' own testimony, a jury reasonably could have concluded that Hill authorized chair use *purely* as a form of punishment. For example, the jury knew about Hill's personal dispute with Howell and Hill's statements that he was "going to teach [Howell] a lesson." Similarly, the jury knew about Hill's advance decision to order Hollins into the chair without any information about Hollins's compliance during his arrest. It also knew about Hill's choice to film a video of himself with Hollins to send to his girlfriend. And the jury heard testimony that Hill had ordered Arnold into the chair because he

"got irritated personally." Plus, the jury saw a video of Hill ordering Arnold to "sit there and see if you can get some damn sense in your head." Finally, the jury heard testimony that Hill told Peterkin, "I would have riddled your ass with bullets . . . put that bitch in the chair," and told Bailey, "Oh you think you're a gangster. Put his ass in the chair." Based on this evidence, a reasonable jury could have concluded that Hill had no legitimate purpose in using the restraint chairs on the six individuals but only a punitive purpose.

What's more, Hill's argument that no expert testimony established the unreasonableness of Hill's conduct ignores that the defense itself called Deputy Chief Boehrer, the second-in-command of the Clayton County Sheriff's Department, who has worked with that department for 25 years. To be sure, neither party tendered Boehrer as an expert, but Boehrer has decades of law-enforcement experience, and both parties asked Boehrer general questions on use of force. For instance, on cross, the Government asked Boehrer about several "hypothetical" scenarios that track the facts here. And Boehrer affirmed that no policy or guideline consistent with the Constitution would permit use of a restraint chair in those circumstances without other "preattack indicators." Taken together with the other evidence we've mentioned, Boehrer's testimony also supports the jury's finding of objective unreasonableness.

In sum, the jury reasonably could have concluded that Hill had no legitimate nonpunitive purpose for ordering each detainee into a restraint chair. And the jury was entitled to reject Hill's testimony that if a detainee "ever did anything that was violent or ag-

gressive, when they get to the jail, even if they are behaving, [he could] then order them strapped into a restraint chair." Indeed, "[b]ecause we recognize that the jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial, our sufficiency review requires only that a guilty verdict be reasonable, not inevitable, based on the evidence presented at trial." *United States v. Browne*, 505 F.3d 1229, 1253 (11th Cir. 2007) (citation and internal quotation marks omitted). Here, it was.

Especially viewing the evidence in the light most favorable to the Government and drawing reasonable inferences in favor of the jury verdict, as we must, Hill's first sufficiency challenge fails. *See Wilson*, 788 F.3d at 1308.

2. Sufficient evidence supported a finding that Hill acted willfully.

Hill next argues that insufficient evidence showed that he "willfully," *see* 18 U.S.C. § 242, deprived the detainees of their constitutional rights. This challenge fares no better.

To prove willfulness, the Government must show that Hill acted "in open defiance or in reckless disregard of a constitutional requirement which ha[d] been made specific and definite." *Screws v. United States*, 325 U.S. 91, 105 (1945) (plurality opinion). Hill "need not have been 'thinking in constitutional terms,' so long as his 'aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution.'" *Brown*, 934 F.3d at 1296 (quoting *Screws*, 325 U.S. at 106). That purpose "need not be

expressed; it may be reasonably inferred from all the circumstances." *Screws*, 325 U.S. at 106.

We have reasoned that a law-enforcement officer's "training in the use of force supports the jury's finding of willfulness." *Brown*, 934 F.3d at 1296. And "where [the] officer's actions so obviously violate his training on the use of force, a jury may infer that the violation was willful." *Id.* at 1297. Such an inference may be stronger when a defendant repeatedly uses force exceeding that authorized by his training. *Cf. House*, 684 F.3d at 1202.

Here, sufficient circumstantial evidence established that Hill acted in "reckless disregard" or "open defiance" of constitutional requirements and his own policies. *See Screws*, 325 U.S. at 105. Hill testified that he had received use-of-force training and adopted use-of-force policies. Those policies defined "excessive force" as "any force used in excess of the amount of force reasonably required to establish control over or to prevent or terminate an unlawful act of violence."

As we've discussed, the jury reasonably could have concluded that restraint-chair use was not "reasonably required to establish control over" compliant, non-resistant detainees. Indeed, the jury reasonably could have found that Hill ordered the detainees into restraint chairs solely to punish them. And if it did, that conduct "so obviously violate[d]" Hill's training and clearly established law—namely, that force can never be used to punish pretrial detainees—that the jury reasonably could have "infer[red] that the violation was willful." *See Brown*, 934 F.3d at 1297. Based on this record, we reject Hill's argument that the jury needed expert testimony to draw that an inference.

So viewing the evidence in the light most favorable to the Government and drawing reasonable inferences in favor of the jury verdict, Hill's second sufficiency challenge fails. *See Wilson*, 788 F.3d at 1308.

3. Sufficient evidence supported a finding that Hill's use of force caused the detainees' injuries.

Finally, Hill argues that, in three ways, the evidence failed to sufficiently show that his conduct caused the detainees' injuries. First, he says that he neither ordered nor foresaw that jail staff would ignore policy that forbade leaving detainees handcuffed and without medical attention. Second, Hill theorizes that the detainees' injuries could have resulted from being handcuffed before arriving at the jail. Third, he asserts that "discomfort from sitting in a chair for four hours . . . hardly rises to the level of physical pain that would support a felony conviction." Again, we conclude that Hill's arguments lack merit.

For a § 242 conviction, "bodily injury" includes "(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary." *United States v. Myers*, 972 F.2d 1566, 1572–73 (11th Cir. 1992) (citations and internal quotation marks omitted).

Setting aside Hill's specific arguments, the detainees' testimony and photographs admitted into evidence satisfy this definition. All detainees testified that they experienced serious physical pain while in the restraint chair. Under our definition, that is enough. But the Government also introduced photo-

graphic evidence of the detainees' injuries: the lasting scars on Peterkin's wrists and Howell's wrists, as well as the "open and bleeding" wounds on Bailey's wrists. These marks qualify as "cut[s]" or "other injur[ies] to the body." *See id.* Howell also testified that he continues to suffer neck, back, arm, leg, and toe pain and numbness from a pinched nerve. So the record evidence easily allowed a reasonable jury to find that the detainees suffered "bodily injury" and that hours in the restraint chair on Hill's orders caused that injury.

Next, we turn to Hill's three sub-arguments. First, sufficient circumstantial evidence allowed the jury to reasonably conclude that Hill foresaw that jail officials would not adhere to the restraint-chair policy. Hill visited detainees, including Hollins, while they were in the chair and saw them handcuffed with their hands behind their back. Hill was also present when officers placed a handcuffed Howell in the chair. On cross, Hill acknowledged that he did not order the handcuffs removed. Because Hill had seen multiple detainees handcuffed while in the restraint chair, a jury could reasonably infer that Hill foresaw and knew that jail officials would not follow policy directives to remove handcuffs. On top of that, though the policy allowed for chair restraint *up to* four hours, multiple officers testified that Hill ordered detainees into restraint chairs for *at least* four hours. So a jury could reasonably infer that Hill foresaw that a detainee would remain handcuffed in the chair for four or more hours at a time, which could lead to physical pain and injury.

Second, while it is theoretically possible that the detainees could have sustained wrist injuries from

too-tight handcuffs before arriving at the jail, testimony from multiple detainees rebukes that theory. Bailey expressly testified that his wrist cuts were from his time in the chair, not handcuffs during his arrest. Other detainees testified similarly. So a jury reasonably could have found that the detainees' time in the chair—not their prior handcuffing—caused their injuries.

Third, the evidence rebuffs Hill's claim that the restrained detainees experienced mere "discomfort." For example, Hollins testified that the pain was "like torture," and Peterkin called it "the worst thing [he] ever felt." The detainees also testified to the pain of having to hold their urine and ultimately urinate on themselves. *Cf. Hope*, 536 U.S. at 738 (noting the "risk of particular discomfort and humiliation" from denial of bathroom breaks). The jury reasonably could have accepted these detainees' testimony about the pain they experienced and rejected Hill's dismissal of it as mere "discomfort."

Viewing the evidence in the light most favorable to the Government and drawing reasonable inferences in favor of the jury verdict, Hill's third sufficiency challenge fails. *See Wilson*, 788 F.3d at 1308.

C. The district court acted within its discretion in questioning jurors and giving two Allen charges.

Finally, Hill challenges the district court's juror questioning and *Allen* charges during jury deliberations. We review a district court's investigation of alleged juror misconduct during deliberations for abuse of discretion. *United States v. Polar*, 369 F.3d 1248, 1253 (11th Cir. 2004). We also review a district court's *Allen* charge for abuse of discretion. *See United States v.*

Woodard, 531 F.3d 1352, 1364 (11th Cir. 2008). But when a defendant does not object to the contents of that charge, we review for plain error. *See United States v. Anderson*, 1 F.4th 1244, 1268 (11th Cir. 2021).

Here, we find no merit to the challenge. The district court found itself in a difficult position, and we conclude that it acted within the limits of its discretion.

1. The district court did not abuse its discretion in investigating alleged juror misconduct.

First, the district court acted within its discretion in questioning the jury foreperson and Juror 6 twice each. The court received multiple reports that Juror 6 refused to follow the law, including an allegation that Juror 6 "stated that the Sheriff [and] the President are above the law and not required to follow the Constitution." And several jury notes claimed that Juror 6 could not or would not engage in deliberation. The foreperson corroborated these allegations when called before the court. So the district court had cause for concern.

When faced with allegations of juror misconduct, a district court has "broad" investigatory discretion. *United States v. Yonn*, 702 F.2d 1341, 1344–45 (11th Cir. 1983), *cert. denied*, 464 U.S. 917 (1983). Among other courses of proceeding, juror questioning may be "necessary so as to avoid premature or unjustified dismissal" of a juror. *Polar*, 369 F.3d at 1253. Indeed, a "district court is uniquely situated to make the credibility determinations" related to "a juror's motivations and intentions" before taking such action as dismissing the juror or declaring a mistrial. *United*

States v. Abbell, 271 F.3d 1286, 1302 (11th Cir. 2001), *cert. denied*, 537 U.S. 813 (2002).

We have repeatedly found no abuse of discretion on facts similar to those here. In *Polar*, for example, we held that the district court did not abuse its discretion in questioning the foreperson and another juror after it received notes that the juror "wishe[d] to abstain" from a verdict, "refused to vote," and "indicated a mistrust of and bias against the government and the criminal justice system." 369 F.3d at 1251, 1254. We rejected the defendant's argument that such questioning was "inherently coercive." *Id.* at 1254; *see also United States v. Augustin*, 661 F.3d 1105, 1133 (11th Cir. 2011) (finding no abuse of discretion where, after several complaints from jurors, the court asked a juror "only general questions that provided [her] with a sufficient opportunity to repeat or elaborate on the allegation[s]"); *Yonn*, 702 F.2d at 1344–46 (same, where district court interviewed each juror individually after one juror had improperly expressed her opinion on the evidence before deliberations).

In fact, we have upheld juror *dismissals* on facts similar to those here. For instance, in *Abbell*, we found no abuse of discretion when the district court interviewed each juror and then dismissed a juror who allegedly said she was not going to follow the law and that the court's instructions were only advisory. *See Abbell*, 271 F.3d at 1303–04; *see also United States v. Godwin*, 765 F.3d 1306, 1315, 1319 (11th Cir. 2014) (same, after other jurors complained that the juror "simply disagree[d] with what the law is" and was following his own opinion "over the rules"). Of course, the district court did not dismiss Juror 6, so we express no opinion on whether it had sufficient cause

to do so. But this precedent further favors the conclusion that the district court did not abuse its discretion.

The district court acted consistently with our precedent's directives. The court assured Juror 6 that he was "not in trouble." *See Yonn*, 702 F.2d at 1345. And rather than confronting Juror 6 with the specific allegations, the court asked him "only general questions" like whether he was engaging in deliberations and following the court's instructions. *See Augustin*, 661 F.3d at 1133. Our case law does not require a district court to declare a mistrial at the first sign of jury conflict. *Cf. United States v. Davis*, 779 F.3d 1305, 1314 (11th Cir. 2015) ("declaring a mistrial can impose a cost not just in time and resources but in the quality of justice . . . [s]o it is best not to declare a mistrial too soon"). Nor does it require a district court to sit back and do nothing in the face of "specific, consistent, and credible" evidence that a juror is not engaging in deliberations or following the law. *See Godwin*, 765 F.3d at 1318.

To be sure, it was unusual for the district court to ask Juror 6 essentially the same questions twice, including once after the court gave the reconstituted jury an *Allen* charge.[14] But none of the district court's questions were coercive—even Hill does not argue that they were. And the court expressly told Juror 6 not to "go too far in[to] what [the jury] discussed." Nor was the questioning in and of itself coercive. Though unusual for good reason, we cannot conclude on this

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[14] As we discuss below, this was the reconstituted jury's first *Allen* charge, not, as Hill contends, simply a second *Allen* charge.

record that the district court's conduct constituted an abuse of discretion.

So we conclude that, especially in the interest of avoiding either a mistrial or a juror dismissal, the district court did not abuse its discretion in investigating the claims against Juror 6. *See Yonn*, 702 F.2d at 1344.

2. The district court did not abuse its discretion in giving two Allen charges.

Second, the district court acted within its discretion when giving both *Allen* charges. Like Hill, we focus on the second *Allen* charge. And for the sake of argument, we adopt Hill's characterization of the *Allen* charges as "successive," though technically the reconstituted jury received only one *Allen* charge. Again, the district court told the jury to "start its deliberations anew," and we have no reason to believe the jury did not follow that instruction. To the contrary, "[w]e have obediently followed and repeated the Supreme Court's direction that we presume juries follow their instructions." *United States v. Roy*, 855 F.3d 1133, 1186–87 (11th Cir. 2017) (en banc).

A district court has "broad discretion" with respect to *Allen* charges "but must not coerce any juror to give up an honest belief." *Davis*, 779 F.3d at 1312. We will conclude that "a district court has abused its discretion in giving a modified *Allen* charge only if the charge was inherently coercive." *Woodard*, 531 F.3d at 1364. To determine coerciveness, "we consider the language of the charge and the totality of the circumstances under which it was delivered." *Id.* And we have "never adopted a *per se* rule against successive *Allen* charges;" rather, "what counts is not the number

of instructions but the overall circumstances and risk of coercion." *Davis*, 779 F.3d at 1313.

At the outset, any challenge to the language of the *Allen* charge fails, as we have "approved" the Eleventh Circuit pattern *Allen* instruction, including with "minor wording changes," "on numerous occasions." *Anderson*, 1 F.4th at 1269, 1271 (quoting *United States v. Bush*, 727 F.3d 1308, 1320 (11th Cir. 2013)).

Hill must rely, then, on the totality of the circumstances. The relevant circumstances include (1) the length of the deliberations; (2) the number of times the jury reported being deadlocked; (3) whether the court was aware of the numerical split when it instructed the jury to continue deliberating; and (4) the time between the court's final instruction and the jury's verdict. *Brewster v. Hetzel*, 913 F.3d 1042, 1053 (11th Cir. 2019).[15] We discuss each below.

As to the length of the deliberations, we begin by clarifying how long that period lasted. Hill contends that the jury deliberated for four days. But that collapses the original and reconstituted juries. The original jury deliberated for roughly a day and a half, while the reconstituted jury deliberated for two days.

Hill is right that the "[t]he risk of coercion increases as deliberations run longer." *Davis*, 779 F.3d

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[15] We note *Brewster*'s distinct procedural posture, as we applied de novo review to the district court's denial of the defendant's 28 U.S.C. § 2254 habeas petition. 913 F.3d at 1053. Here, by contrast, we review for abuse of discretion. *See Woodard*, 531 F.3d at 1364. That said, because Hill relies heavily on *Brewster* and because we find its articulation of the relevant factors useful, we work within that portion of its framework here.

at 1314. And a two-day period is considerably longer than other cases in which we have found *Allen* charges to not be coercive. *See, e.g.*, *Anderson*, 1 F.4th at 1252 (three-and-a-half hours); *Bush*, 727 F.3d at 1317–1319 (roughly five hours); *Davis*, 779 F.3d at 1312 ("just over six hours"); *Woodard*, 531 F.3d at 1359–60 (seven hours). But this factor, standing alone, does not render the district court's second *Allen* charge coercive. *See Brewster*, 913 F.3d at 1053 ("eleven hours over two days . . . is not an inordinate amount of time").

Next, we turn to the number of deadlock reports. The reconstituted jury never reported that it was deadlocked, hopelessly or otherwise. To be sure, before one juror was replaced, the original jury reported that it had "agreed on [two] counts" but was "deadlocked" on the other five. And later, the reconstituted jury sent a note stating that it was "unable to reach a unanimous decision *today*" (emphasis added). But at no time did the reconstituted jury say it could not reach a verdict *at all*. To the contrary, when the court asked whether the jury was hopelessly deadlocked, the foreperson responded, "I would not like to make that determination right at this moment. . . . With further deliberations, it may be we can get somewhere."

We have found no coercion even when the jury *did* report deadlock. *See Anderson*, 1 F.4th at 1252 (jury sent a note stating that it could not reach a verdict); *Davis*, 779 F.3d at 1312 (jury reported deadlock before and after *Allen* charge); *Woodard*, 531 F.3d at 1359 (jury declared that it was "hung" and "[would] not come to a unanimous decision"); *but see Brewster*, 913 F.3d at 1047–48 (finding coercion where jurors sent six notes "stating that they could not reach

a verdict," including one expressing "no possibility of resolve"). This factor, then, does not support finding that the *Allen* charge was coercive.

Turning to the jurors' numerical split, we find that the record doesn't show that the court knew this information before it gave the *Allen* charge. In fact, during the court's second questioning of the foreperson, the court directed her not to share "the numerical breakdown" of the jurors' votes. To be sure, the district court knew that Juror 6 was the subject of the jury's notes and foreperson's concerns, but it did not know (nor do we) that Juror 6 was the sole "holdout" juror on all (or any particular) counts. Indeed, the jury returned a not-guilty verdict on the count involving Harper. And we have no information about whether any of the other jurors, at any point in the deliberations, leaned towards a not-guilty verdict on any of the other counts. In any case, the record here doesn't provide a sufficient basis to conclude that this factor favors a finding of coercion. *See Lowenfield v. Phelps*, 484 U.S. 231, 234–35, 241 (1988) (finding no coercion when trial court polled the jurors as to whether "further deliberations [would] enable [them] to arrive at a verdict," effectively revealing an 11-to-1 split, and then gave a supplemental instruction); *but see Brewster*, 913 F.3d at 1047 (finding coercion where the jury revealed an 11-to-1 split twice).

Finally, we consider the time between the court's final instruction and the jury's verdict. The jury deliberated for nearly three hours after the second *Allen* charge before it reached its verdict. We have repeatedly found no coercion even with shorter periods between charge and verdict. *See Davis*, 779 F.3d at 1313 (just over two hours); *Anderson*, 1 F.4th at 1271

(an hour and a half); *United States v. Rey*, 811 F.2d 1453, 1458–60 (11th Cir. 1987) (same); *United States v. Bailey*, 468 F.2d 652, 664 (5th Cir. 1972) (same), *aff'd en banc*, 480 F.2d 518 (5th Cir. 1973);[16] *Bush*, 727 F.3d at 1319 (47 minutes); *United States v. Scruggs*, 583 F.2d 238, 239–41 (5th Cir. 1978) (48 minutes, at nearly 11:30 p.m.); *but see Brewster*, 913 F.3d at 1056 (finding coercion when "only 34 minutes" elapsed between the final charge and verdict). This substantial three-hour period contradicts any suggestion that a holdout juror was "forced to roll over without engaging in further conscientious deliberation." *See Anderson*, 1 F.4th at 1271.

The other circumstances here likewise fail to indicate coercion. So we conclude that the district court did not abuse its discretion in giving two *Allen* charges.

3. The district court's inadvertent omission of "not" in the Allen charge was harmless.

Finally, we address Hill's claim that the misread *Allen* charge was itself coercive. As we've explained, the transcript indicates that the district court misstated the law when it instructed the jury that "if the evidence fails to establish guilt beyond a reasonable doubt, the defendant must have your unanimous verdict of guilty." It should have said "not guilty." But on this record, that error does not entitle Hill to relief.

Because Hill failed to object to the contents of the *Allen* charge (either as written or read), we review for

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[16] All Fifth Circuit decisions issued before October 1, 1981, are binding precedent in this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

plain error. *See Anderson*, 1 F.4th at 1268. On plain-error review, Hill must prove that (1) error occurred, (2) that error was plain, and (3) it affected Hill's substantial rights. *United States v. Malone*, 51 F.4th 1311, 1319 (11th Cir. 2022). Only if Hill can satisfy all three prongs do we then have discretion to correct the error if it "(4) seriously affected the fairness of the judicial proceedings." *Id.*

Hill can satisfy the first and second prongs here, but not the third. As to the third, an error affects a defendant's substantial rights if it "affect[s] the outcome of the district court proceedings." *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). Here, we know that the omission of "not" did not lead the jury to convict Hill when it would have otherwise acquitted because the jury, in fact, acquitted Hill of the count relating to Harper.

But on top of that, the weight of the evidence here, as we've already discussed, was substantial, and the court's other correct instructions made it clear to the jury that it must find Hill not guilty if it concluded that the evidence failed to establish guilt beyond a reasonable doubt. In this respect, the district court had already given an *Allen* charge and correctly read the phrase "not guilty." And the court's legal instructions at the beginning and end of the trial, which the jury took into the deliberation room, recited the correct legal standard.

At bottom, then, the court's plain error in leaving out the word "not" did not "affect[] the outcome" of Hill's trial. *See id.*; *cf. also United States v. Gold*, 743 F.2d 800, 822 (11th Cir. 1984) (holding that an "inadvertent[]" addition of "not," especially "in the context of the charge as a whole," was "clearly harmless

beyond a reasonable doubt"); *United States v. Mills*, 704 F.2d 1553, 1558 (11th Cir. 1983) (finding no prejudice from a "single slip of the tongue by the trial judge" where the record was otherwise "replete" with correct instructions on the burden of proof).

Since Hill cannot satisfy the third requirement, we do not get to the fourth prong of plain-error review. *See Malone*, 51 F.4th at 1319. And Hill's challenge to the district court's second *Allen* charge fails.

III. Conclusion

For the reasons we've discussed, Hill had fair warning that his conduct was unconstitutional, the evidence was sufficient to convict, and the district court did not coerce the verdict. We affirm Hill's conviction on all counts.

AFFIRMED.

CONCURRING OPINION, JUDGE MARCUS

MARCUS, Circuit Judge, Concurring:

I concur fully in the Court's opinion. I have no doubt Sheriff Hill had fair warning that he violated the constitutional rights of six detainees when he ordered them strapped into a painful restraint chair for four or more hours for no legitimate reason associated with maintaining safety and good order in a county jail. I also agree that the evidence was more than sufficient to sustain the jury's verdicts. And I am satisfied that the district court judge acted within her considerable discretion when she questioned Juror 6 two times during the course of the jury's deliberations. I write separately, however, to highlight the substantial dangers inherent in singling out a juror for judicial inquiry, particularly doing so twice within a relatively short time frame.

Dealing with allegations of juror misconduct is an extraordinarily difficult and dangerous undertaking for any trial judge. A defendant's right to a trial by an impartial jury is a "fundamental reservation of power in our constitutional structure." *United States v. Brown*, 996 F.3d 1171, 1183 (11th Cir. 2021) (en banc) (quoting *Blakely v. Washington*, 542 U.S. 296, 306 (2004)); *see* U.S. CONST. amend. VI. So, when there are allegations that a juror cannot be impartial, or that he refuses to follow the court's instructions, or that he refuses to deliberate with the other members of the jury, or, perhaps, that he has considered extrinsic evidence beyond the trial record, a district judge must take these claims seriously. *See United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985) ("The more serious the potential jury contamination, . . . the heavier the

burden to investigate."); *United States v. Harris*, 908 F.2d 728, 734 (11th Cir. 1990) (same); *United States v. Bradley*, 644 F.3d 1213, 1278-79 (11th Cir. 2011) (noting that "we would expect the district court to take . . . measures in investigating the potential prejudice to the defendants" where there were "troubling" allegations that two jurors had prejudged the defendants' guilt). We have sustained the power of the trial judge to investigate allegations of misconduct by questioning jurors precisely in order to "avoid premature or unjustified dismissal." *United States v. Polar*, 369 F.3d 1248, 1253 (11th Cir. 2004). But in investigating misconduct, the judge must tread very carefully in order to respect the secrecy of the jury's deliberative process and to avoid coercing a juror who may be at odds with the others into giving up his honestly held beliefs or for the sake of conforming to the majority. *See Brown*, 996 F.3d at 1186.

It should go without saying that district court judges are best placed to handle allegations of juror misconduct because they "deal with jurors on a regular basis, and . . . are in the trenches when problems arise." *United States v. Dominguez*, 226 F.3d 1235, 1246 (11th Cir. 2000). They are therefore particularly well "situated to make the credibility determinations that must be made" when faced with an allegation of juror misconduct. *United States v. Abbell*, 271 F.3d 1286, 1303 (11th Cir. 2001); *cf. Owens v. Wainwright*, 698 F.2d 1111, 1113 (11th Cir. 1983) ("Appellate courts reviewing a cold record give particular deference to credibility determinations of a fact-finder who had the opportunity to see live testimony."). For this reason, the trial judge has broad discretion in how to handle such allegations. *See Dominguez*, 226 F.3d at 1247.

The applicable abuse-of-discretion standard means that "there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call." *Id.* (quoting *In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994)). "The whole point of discretion is that there is [a] range of options open, which means more than one choice is permissible." *Id.* We will defer to the district court's superior ability to handle these issues unless we find their choice reflects a clear error of judgment. *See McMahan v. Toto*, 256 F.3d 1120, 1128 (11th Cir. 2001).

The district judge in this case was faced with a particularly difficult judgment call. During the deliberative process, she had received a note from the foreperson of the jury complaining that Juror 6 was incompetent, that he would not engage in deliberations with the others, and that he would not follow the court's instructions on the law. The trial judge questioned him to discern whether these allegations were true in whole or in part, and did so faithfully following our precedent. *See Abbell*, 271 F.3d at 1304 n.20 (recognizing that a judge may question jurors "to detect and rectify" misconduct). The problem, however, was compounded the next day when the judge received two more notes signed by the foreperson, again complaining that Juror 6 was incompetent and that he would not follow the judge's instructions.

The universe of options the district judge faced were limited. She had four choices; none was ideal. First, she could have declared a mistrial–the most extreme option–but understandably decided that that would be premature, since the reconstituted jury had only deliberated for a day and a half. (The trial had lasted eight days.) Second, she could have dismissed

Juror 6 and replaced him with an alternate-but a judge can dismiss a juror only if she is sure there is "no substantial possibility" that he will deliberate according to instructions, and the juror's notes, standing alone, almost surely did not meet this high standard. *See id.* at 1304. Third, she could have done nothing. This, too, was an unenviable choice because the district judge was faced with renewed allegations of serious misconduct that, if substantiated, would likely have warranted dismissal. *See id.* (affirming dismissal of a juror who indicated she would not follow the court's instructions). Finally, the district court judge could have brought Juror 6 in again, as she did, for additional questioning in order to inform her decision about the appropriate course of conduct.

Faced with these unenviable choices, the judge's decision to question Juror 6 again was not an abuse of discretion. A district court judge could well have thought that it was too early to declare a mistrial and that the dismissal of Juror 6 based solely on the allegations of his fellow jurors was reversible error. *See Brown*, 996 F.3d at 1175. So, the judge had two real options: do nothing or carefully question the juror again. "[O]ur jury system works only when both the judge and the jury respect the limits of their authority," and a juror who refuses to follow the court's instructions "abdicates his constitutional responsibility and violates his solemn oath." *Id.* at 1184 (quotation marks and citations omitted). The allegations of misconduct were repeated and they were serious. The greatest concern was the claim that Juror 6 had told the other jurors he did not agree with the law and "w[ould] not consider it." Indeed, before Juror 6 was questioned the first time, the most serious allegation

of misconduct was that he told the other jurors that "the sheriff [and] the president are above the law and not required to follow the constitution." Thus, the trial judge was understandably reluctant to allow Juror 6 to continue deliberating without checking whether the juror actually refused to follow her instructions on the law. Although Juror 6 had said he was trying to follow the court's instructions when the judge first questioned him, the judge acted within her broad discretion to follow up on the repeated assertions from the foreperson.

And when the judge did question Juror 6 on each occasion, she did so with care and tact, doing her best not to penetrate the jury's deliberative process, and asking Juror 6 only general questions that did not suggest he had done anything wrong. *See United States v. Yonn*, 702 F.2d 1341, 1345 (11th Cir. 1983) ("[T]he record reveals the commendable caution exercised by the trial judge in questioning each juror."). Under these circumstances, and done with such care, the judge did not abuse her discretion.

The hard fact of life, however, is that questioning a juror always comes with risk. *See United States v. Thomas*, 116 F.3d 606, 620 (2d Cir. 1997) ("[T]he very act of judicial investigation can at times be expected to foment discord among jurors."). The more often you do it, the greater the danger. Among other things, the judge risks revealing information about the nature and extent of the jury's deliberations, which must remain secret to promote the jury's ability to debate freely, robustly, and fully. *See United States v. Symington*, 195 F.3d 1080, 1086 (9th Cir. 1999); *see also Clark v. United States*, 289 U.S. 1, 13 (1933) ("Freedom of debate might be stifled and independence

of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."). The trial judge also runs the risk of influencing the jury simply by singling out one of its members for separate inquiry. *See Symington*, 195 F.3d at 1086. No matter how careful a judge is, a questioned juror often will veer into a discussion about the jury's deliberations-as the judge discovered in this case when Juror 6 revealed that the jury's dispute centered on the meaning of specific intent and willfulness.[1]

Perhaps even more serious is the risk that, in questioning a juror, the court will inadvertently pressure a dissenting juror into giving up his honestly held beliefs. When one juror disagrees with the majority, there is always the danger that the majority will mistakenly brand the dissenter incompetent or biased, when he is in fact simply harboring a reasonable doubt. *See Abbell*, 271 F.3d at 1302; *Thomas*, 116 F.3d at 622. To dissent in the face of universal opposition often requires courage. *See United States v. Rey*, 811

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[1] In the judge's first inquiry of Juror 6, the following colloquy occurred:

> [Juror 6]:–If I may also add?
>
> The Court: Yes, sir.
>
> [Juror 6]: I–I have annoyed people by going to specific paragraphs of the document that you gave us, and the specifics of this case, and under three different passages that related to intent and willful where you're defining the terms and then-
>
> The Court: Okay.
>
> [Juror 6]: And I–
>
> The Court: I don't want to go too far in what you discussed.

F.2d 1453, 1460 (11th Cir. 1987) ("In some cases, the duty of a juror is rigorous. Deliberations can be long, hard and heated. It is each juror's duty to stand by his honestly held views; this can require courage and stamina."). A dissenting juror is already under considerable pressure to fold, and the judge must take care not to add to that mix. "The last thing such a minority holdout juror needs is for the trial judge–cloaked with the full authority of [her] office–to even hint that" the juror should "just reconsider." *Id.* A central feature of our criminal justice system and an important safeguard of liberty is the right to be free unless convicted by a unanimous jury. *See Brown*, 996 F.3d at 1182-83; *see also Rey*, 811 F.2d at 1460 ("One of the safeguards against the conviction of innocent persons built into our criminal justice system is that a jury may not be able to reach a unanimous verdict.").

Questioning a juror once is risky enough; questioning the same juror twice is downright dangerous. The risks inherent in this kind of judicial inquiry are amplified each time the juror is questioned. And, where the allegations of misconduct have not changed, there may be diminishing returns in bringing the juror out again–after all, the judge has already had the opportunity to probe the allegations and decide if they are substantiated. Because the standard for dismissing a juror is so high, limited questioning and contextual clues will usually suffice to tell a judge that the standard for dismissal has not been met. *See Brown*, 996 F.3d at 1186 ("'A presiding judge faced with anything but unambiguous evidence that a juror [is engaging in misconduct] need go no further in [her] investigation' of the alleged misconduct." (quoting *Thomas*, 116 F.3d at 622)).

Because "the twin imperatives of preserving jury secrecy and safeguarding the defendant's right to a unanimous verdict from an impartial jury" are so important, *id.* (quoting *Symington*, 195 F.3d at 1087), sometimes it may be wiser for a judge not to question the juror. *See Symington*, 195 F.3d at 1086 (accepting that, "[i]n refraining from exposing the content of jury deliberations, . . . a trial judge may not be able to determine conclusively" whether allegations of juror misconduct are legitimate); *see also Brown*, 996 F.3d at 1195 (Brasher, J., concurring) ("When disputes arise between jurors, the default response should be deliberation, not investigation."). Sometimes, it may be wiser to "err on the side of too little inquiry as opposed to too much." *See Abbell*, 271 F.3d at 1304 n.20.

Put simply, questioning a juror repeatedly is not a path that should be taken lightly or without meticulous care. The terrain is dangerous and the traveler must proceed with great caution.

JUDGMENT IN A CRIMINAL CASE, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION (MARCH 15, 2023)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

v.

VICTOR HILL

Case Number: 1:21-CR-00143-ELR-1

USM Number: 41909-509

Before: Eleanor L. ROSS, U.S. District Judge.

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

The defendant was found guilty on COUNTS ONE, TWO, THREE, FOUR, SIX AND SEVEN after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	18 U.S.C. § 242
Nature of Offense	Deprivation of Rights Under the Color of Law
Offense Ended	December 8, 2019
Count	1

Title & Section	18 U.S.C. § 242
Nature of Offense	Deprivation of Rights Under the Color of Law
Offense Ended	February 6, 2020
Count	2

Title & Section	18 U.S.C. § 242
Nature of Offense	Deprivation of Rights Under the Color of Law
Offense Ended	February 25, 2020
Count	3

Title & Section	18 U.S.C. § 242
Nature of Offense	Deprivation of Rights Under the Color of Law
Offense Ended	April 27, 2020
Count	4

Title & Section	18 U.S.C. § 242
Nature of Offense	Deprivation of Rights Under the Color of Law
Offense Ended	April 27, 2020
Count	6

Title & Section	18 U.S.C. § 242
Nature of Offense	Deprivation of Rights Under the Color of Law
Offense Ended	May 11, 2020
Count	7

The defendant is sentenced as provided in pages 3 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If

ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

March 14 2023
Date of Imposition of Judgment

/s/ Eleanor L. Ross
Signature of Judge

ELEANOR L. ROSS, U S DISTRICT JUDGE
Name and Title of Judge

March 15 2023
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: EIGHTEEN (18) MONTHS on Counts One, Two, Three, Four, Six and Seven, all to be served concurrently, for a total of EIGHTEEN (18) months.

The court makes the following recommendations to the Bureau of Prisons: That Defendant be designated to FPC Montgomery, or to a minimum-security camp in order to minimize any danger that may come to him based on his status as a former law enforcement officer.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[. . .]

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: THREE (3) YEARS on Counts One, Two, Three, Four, Six and Seven, all to be served concurrently to one another for a total of THREE (3) YEARS.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

4. You must cooperate in the collection of DNA as directed by the probation officer.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to

take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific

purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov

I understand that a violation of any of these conditions of supervised release may result in modification, extension, or revocation of my term of supervision.

Defendant's Signature _____ Date _____

USPO's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following special conditions of supervision.

You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you violated a condition of your supervision and that areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

You must permit confiscation and/or disposal of any material considered to be contraband or any other item which may be deemed to have evidentiary value of violations of supervision.

You must complete 100 hours of community service. All community service work hours must be approved prior to completion by the supervising officer. The probation office will supervise your participation in the program. You must provide written verification of completed hours to the probation officer.

You must refrain from engaging in the occupation, business or profession of law enforcement, including as a consultant pursuant to 18 U.S.C. § 3563(b)(5).

CRIMINAL MONETARY PENALTIES

The Court finds that the defendant does not have the ability to pay a fine and cost of incarceration. The Court will waive the fine and cost of incarceration in this case.

The defendant shall pay to the United States a special assessment of $600.00, which shall be due immediately.

	Special Assessment
TOTAL	$600.00
	Fine
TOTAL	**WAIVED**

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

ORDER, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION (MAY 5, 2022)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

UNITED STATES OF AMERICA,

v.

VICTOR HILL,

Defendant.

Criminal Action No. 1:21-CR-143-ELR-CCB

Before: Eleanor L. ROSS, U.S. District Judge Northern District of Georgia.

This matter is before the Court for consideration of Magistrate Judge Christopher C. Bly's Final Report and Recommendation ("R&R") [Doc. 45]. By the instant R&R, Judge Bly recommends that the Court should deny as moot Defendant Hill's motion to dismiss the original indictment [Doc. 20]. *See* R&R at 34. Importantly, Judge Bly also recommends that the undersigned deny Defendant's amended motion to dismiss the first superseding indictment and to strike surplusage [Doc.

33].[1] *See* R&R at 34. Additionally, Judge Bly declares the case is Ready for Trial. *See id.* By and through his counsel, Defendant timely filed his objections to the R&R. [Doc. 47]. For the following reasons, the Court ADOPTS the R&R and OVERRULES Defendant's objections.

I. Standard of Review

The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *See* 28 U.S.C. § 636(b)(1)(C). The Court reviews portions of the R&R to which no objections have been made for clear error. *See Thomas v. Arn,* 474 U.S. 140, 154 (1985); *see also Macort v. Prem, Inc.,* 208 F. App'x 781, 784 (11th Cir. 2006). A

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[1] Since the Judge Bly issued his R&R regarding Defendant's motion to dismiss the first superseding indictment, the grand jury issued a second superseding indictment. [Doc. 49]. Generally, "[f]iling a superseding indictment has the same effect as dismissing an original indictment and filing a new indictment[,]" *U.S. v. McKay,* 30 F.3d 1418, 1420 (11th Cir. 1994), and as such, the "superseding indictment renders the original motion to dismiss moot." *See U.S. v. Taylor,* No. 1:18-CR-425-SCJ, 2019 WL 3891854, at *1 (N.D. Ga. Aug. 19, 2019). However, in the matter at bar, the only difference between the first and second superseding indictments is that the second superseding indictment adds two (2) additional counts for violations of 18 U.S.C. § 242 (in relation to two (2) additional pretrial detainees who were held at Clayton County Jail). *[See* Doc. 49 at 2–4]. Further, on April 8, 2022, "[r]ather than re-litigating the issues" entirely, Defendant filed a motion to adopt and incorporate his previous motions and arguments "as to all counts in the second superseding indictment." [*See* Doc. 57 at 1]. The United States did not oppose Defendant's motion. Accordingly, the Court grants Defendant's motion and deems his previous motions and arguments to be adopted and incorporated in opposition to all counts set forth by the second superseding indictment. [*See id.*]

party objecting to an R&R "must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." *See U.S. v. Schultz,* 565 F.3d 1353, 1361 (11th Cir. 2009) (quoting *Marsden v. Moore,* 847 F.2d 1536, 1548 (11th Cir. 1988)) (internal quotation marks omitted). If there are no specific objections made to the proposed factual findings of the Magistrate Judge, there is no requirement that the district court review those findings *de novo*. *See Garvey v. Vaughn,* 993 F.2d 776, 779 n.9 (11th Cir. 1993).

However, the Court "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *See* 28 U.S.C. § 636(b)(1); *see also* FED. R. CRIM. P. 59(b)(3). In accordance with 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Criminal Procedure 59, the Court has conducted a *de novo* review of those portions of the R&R to which the Defendant objects and has reviewed the remainder of the R&R for clear error. *See U.S. v. Slay,* 714 F.2d 1093, 1095 (11th Cir. 1983).

II. Discussion

Defendant is charged with multiple counts of violating 18 U.S.C. § 242 in connection with causing several detainees at the Clayton County Jail, on separate occasions, to be strapped into a restraint chair without any legitimate nonpunitive governmental purpose. [*See* Docs. 24 at 2–14; 49 at 2–17]. As Judge Bly notes in his R&R, 18 U.S.C. § 242 makes it "criminal to act (1) willfully and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States." *See* R&R at 8 (quoting *U.S. v.*

Lanier, 520 U.S. 259, 264 (1997) (internal quotation marks and footnote omitted)); *see also U.S. v. Brown,* 934 F.3d 1278, 1294 (11th Cir. 2019) (same).

Here, the gravamen of Defendant's motion to dismiss the operative indictment is his argument that the third element of the Section 242 test is lacking: specifically, Defendant contends that he lacked fair warning or notice that his conduct was criminal according to clearly established law. [*See* Docs. 20 at 1–2, 4–8; 33 at 1]. Upon consideration, Judge Bly concluded that the indictment is sufficient to survive dismissal. *See* R&R at 9–24. In his objections, Defendant again challenges whether the operative indictment establishes third element of 18 U.S.C. § 242, arguing that because "[t]he law does not [] provide sufficient guidance to law enforcement officers for when their use of restraint crosses the line from permissible to criminal[,] . . . due process forbids [this type] of a prosecution." [*See* Doc. 47 at 2].

In the R&R, Judge Bly reasons that Defendant did have fair notice that his conduct was criminal, particularly based on "a broad statement of principle within the Constitution, statute, or case law" that establishes "the right to be free from the use of unreasonable force by law enforcement officers," as charged in the indictment. *See* R&R at 10, 14 n.2 (citing Doc. 24 at 10–14); [*see also* Doc. 49 at 12–17]. In his objections, Defendant oversimplifies and somewhat misstates Judge Bly's analysis by summarizing it as: "restraint is force, force cannot be applied against a detainee who has stopped resisting, therefore an unresisting detainee cannot be restrained." [*See* Doc. 47 at 1].

However, within this characterization, a key understanding must be included—that the restraint of a pretrial detainee must have some legitimate nonpunitive governmental purpose. *See Kingsley v. Hendrickson,* 576 U.S. 389, 398 (2015) ("'[P]unishment' does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim. . . . [A] pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is [(1)] not rationally related to a legitimate governmental objective or [(2)] that it is excessive in relation to that purpose.") (collecting cases); *see also Piazza v. Jefferson Cnty.,* 923 F.3d 947, 952 (11th Cir. 2019) (explaining that "a pretrial detainee has not yet been adjudicated guilty and [] may not be punished at all[,]" and thus, "if force used against a pretrial detainee is more severe than is necessary to subdue him or otherwise achieve a permissible governmental objective, it constitutes 'punishment' and is therefore unconstitutional.") (internal citations omitted). Thus, using Defendant's words, a more accurate statement of Judge Bly's analysis would be: "restraint is force, force cannot be applied against a detainee who has stopped resisting, and therefore, an unresisting detainee cannot be restrained absent a legitimate nonpunitive governmental purpose."

The above qualifier clearly distinguishes the conduct charged in the operative indictment from situations where restraints are used for order and safety, such as when detainees (despite remaining compliant) are handcuffed while being moved throughout a jail or while being interviewed by counsel in a courthouse visitation room—two (2) examples Defendant proffers in objecting to Judge Bly's analysis and recommenda-

tion. [*See* Doc. 47 at 2, 6]. However, the Eleventh Circuit has recognized that "officers may (of course) use force" for "legitimate interests" such as "preserv[ing] internal order and discipline and maintain[ing] institutional security[,]" and the Court finds the above examples to be patently distinguishable from the facts at bar. *See Piazza,* 923 F.3d at 953–54 (internal quotation marks omitted).

Additionally, Defendant cites *Crocker v. Beatty,* 995 F.3d 1232 (11th Cir. 2021), *cert. denied,* 142 S. Ct. 845 (2022), for the suggestion that no excessive force occurs where a compliant, unresisting arrestee is restrained but not tased, struck, pepper sprayed, kicked, or subjected to other "traditional" means of force. [*See* Doc. 47 at 4, 7–8]. However, *Crocker* reiterates the need for law enforcement to have a legitimate nonpunitive governmental purpose in restraining such an arrestee, such as the security concerns created for an officer transporting the arrestee.[2] *See* 995 F.3d at

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[2] Additionally, the panel in *Crocker* discussed the Eleventh Circuit's previous analysis in *Patel v. Lanier Cnty.*, 969 F.3d 1173 (11th Cir. 2020), to illustrate when a legitimate "need" exists to restrain an arrestee or detainee in a particular manner. *See* 995 F.3d at 1251. While addressing the defendant officer's detention of the plaintiff arrestee in a hot patrol car, the Eleventh Circuit panel explained: "What about the need? In *Patel,* we noted that about half of the detention was 'not just harsh but also unnecessary' because the detainee there could have been held inside an immediately adjacent jail instead of the hot van. [] Here, by contrast, there doesn't appear to have been another feasible place for [the officer] to detain [the plaintiff.]" *See Crocker,* 995 F.3d at 1251 (citing *Patel,* 969 F.3d at 1184). This legitimate "need" aspect of *Crocker* further distinguishes that case from the matter at hand, as Defendant does not herein argue that he lacked any other "feasible place . . . to detain" the

1250 (setting forth the six (6) factors enumerated by the Supreme Court in *Kingsley* for assessing the reasonableness of force used on a plaintiff).

These legitimate nonpunitive governmental purposes—such as security concerns outside of a jail and maintaining order within a jail—appear to be quite different from the conduct with which Defendant is charged, where, as the Government alleges in its indictment, no such legitimate governmental purpose exists. This of course does not mean that Defendant cannot demonstrate at trial that such a legitimate nonpunitive governmental purpose did exist, or that the Government has failed to satisfy its burden to demonstrate the absence of such a purpose. At this juncture, however, the undersigned finds Judge Bly correctly determined that—as charged—the counts in the operative indictment fit within the Eleventh Circuit's well-defined case law precluding the use of force against a detainee who has stopped resisting, absent any legitimate nonpunitive governmental purpose to continue such restraint. *See Coffman v. Battle,* 786 F. App'x 926, 929 (11th Cir. 2019) (citing *Piazza,* 923 F.3d at 953). Defendant's motion to dismiss the operative indictment is therefore due to be denied.[3] [*See* Docs. 33, 57].

Judge Bly also recommends that the undersigned deny without prejudice Defendant's motion to strike

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pretrial detainees other than the restraint chair. [*See generally* Doc. 47]; *see also* 995 F.3d at 1251.

[3] Defendant has requested oral argument on his motion to dismiss the operative indictment. [*See* Doc. 47 at 2]. Based on the Court's ability to decide the issues here without the benefit of argument, this request is denied.

surplusage related to paragraphs 46–49 of the first superseding indictment. *See* R&R at 23–26 (citing Doc. 33 at 2–3). Specifically, Judge Bly recommends that the motion be denied without prejudice "so that [] Defendant has the opportunity to raise the issue again at trial when the relevancy may be more clear" and the undersigned hears evidence. *See id.* at 26. The Court adopts this recommendation and will allow Defendant to raise this issue again in a pretrial motion, to be further discussed during the pretrial conference.

III. Conclusion

Upon *de novo* review of those portions of the R&R to which Defendant objects and having reviewed the remainder of the R&R for plain error, this Court finds that the Magistrate Judge's factual and legal conclusions are correct.

Accordingly, the Court OVERRULES Defendant's Objections [Doc. 47], and ADOPTS the R&R [Doc. 45] as the Opinion and Order of this Court. The Court DENIES AS MOOT Defendant's motion to dismiss the original indictment [Doc. 20] and DENIES Defendant's amended motion to dismiss the superseding indictment(s) and to strike surplusage [Doc. 33]. Additionally, the Court GRANTS Defendant's motion to adopt and incorporate his previously filed motions. [Doc. 57].

Finally, the Court DIRECTS Defendant to announce within thirty (30) days of the date of the issuance of this order whether he intends to enter a plea or proceed to trial. Should Defendant announce his attention to proceed to trial, the Court will, by separate notice, schedule the trial to begin September 26, 2022.

SO ORDERED, this 5th day of May, 2022.

/s/ Eleanor L. Ross
U.S. District Judge
Northern District of Georgia

ORDER AND FINAL REPORT AND RECOMMENDATION, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION (DECEMBER 29, 2021)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

VICTOR HILL,

Defendant.

Criminal Action No. 1:21-CR-143-ELR-CCB

Before: Christopher C. BLY, U.S. Magistrate Judge.

ORDER AND FINAL REPORT AND RECOMMENDATION

Defendant Victor Hill is charged with five counts of willfully depriving detainees at the Clayton County Jail of their constitutional rights in violation of 18 U.S.C. § 242. (Doc. 24). Defendant moved to dismiss the indictment, (Doc. 20), and for a bill of particulars, (Doc. 21). After he filed his motions, the grand jury returned a superseding indictment. (Doc. 24). Defendant then filed an amended motion to dismiss the superseding indictment and to strike surplusage from

that document, (Doc. 33), as well as an amended motion for a bill of particulars, (Doc. 32). Counsel for the parties presented oral argument regarding the motion to dismiss the superseding indictment on November 29, 2021. (Doc. 43). For the reasons stated below, the motion for a bill of particulars as to the original indictment, (Doc. 21), is DENIED AS MOOT, and the motion for a bill of particulars as to the superseding indictment, (Doc. 32), is DENIED. Further, I recommend that the motion to dismiss the original indictment, (Doc. 20), be DENIED AS MOOT and that the motion to dismiss the superseding indictment and to strike surplusage, (Doc. 33), be DENIED.

I. The Superseding Indictment

The superseding indictment alleges that Defendant was the Sheriff of Clayton County, Georgia and that the Clayton County Sheriff's Office (CCSO) was the law enforcement agency responsible for staffing, maintaining, and running the Clayton County Jail (the jail). (Doc. 24 at 1). It generally alleges that Defendant caused five people, all of whom were detainees at the jail, to be strapped into a restraint chair without any legitimate governmental purpose. *Id.* at 2–10.

The superseding indictment alleges that J.A. encountered Defendant during the booking process at the jail. *Id.* at 3. J.A. asked Defendant whether he was entitled to a fair and speedy trial, and Defendant told him, "You entitled to sit in this chair, and you're entitled to get the hell out of my county and don't come back. That's what you're entitled to. . . . Now, sit there and see if you can get some damn sense in your head." *Id.* at 3. During J.A.'s interaction with Defendant, J.A. was surrounded by law enforcement personnel, was

handcuffed most of the time, and never posed a threat to anyone. *Id.* at 4. Following the interaction, J.A. was strapped into a restraint chair "for hours" per Defendant's orders. *Id.* at 5. There was no legitimate, nonpunitive, governmental purpose for use of the restraint chair, which caused J.A. physical pain and bodily injury. *Id.* at 11.

C.H. was apprehended by a CCSO deputy. *Id.* at 4. He was unarmed, not under the influence of drugs, and offered no resistance. *Id.* The deputy spoke with Defendant, texted Defendant a photograph of C.H. handcuffed and seated in a patrol car, and had this text-message exchange with Defendant:

Defendant: How old is he?

Deputy: 17

Defendant: Chair

Id. at 4–5. A few hours later, C.H. was booked into the jail. *Id.* at 5. Although he was compliant with law enforcement and never posed a threat to anyone, C.H. was strapped into a restraint chair and left there for "several hours" per Defendant's orders. *Id.* There was no legitimate, nonpunitive, governmental purpose for use of the restraint chair, which caused C.H. physical pain and bodily injury. *Id.* at 11.

J.H. was arrested following a domestic disturbance, with possible drug use. *Id.* at 5. He pretended to pass out at the police station and was transported to the hospital, where he refused treatment and left. *Id.* at 5. He was later re-arrested, at which time he did not cooperate with officers or comply with their commands, and he had to be carried down some stairs and placed in a patrol vehicle. *Id.* at 5– 6. He was later booked

into the jail, where he was not combative and did not pose a threat to anyone. *Id.* at 6. He was strapped into a restraint chair and left there for "several hours" per Defendant's hours. *Id.* During that time, he was not allowed to go to the restroom, and he urinated on the chair. *Id.* Defendant addressed J.H., who happened to be sitting next to C.H., stating "If I hear about you (C.H.) messing up your mama's house again, if I hear about you (J.H.) fighting cops and faking and going to the [hospital] and then walking out and pulling out the IV, I'm a sit your ass in that chair for sixteen hours straight. Do you understand me? I need to hear from both of y'all that y'all not gonna show y'all's ass in my county no more." *Id.* at 7. There was no legitimate, nonpunitive, governmental purpose for the use of the restraint chair, which caused J.H. physical pain and bodily injury. *Id.* at 12.

G.H. had a dispute with a CCSO deputy over some landscaping work that G.H. did for the deputy. *Id.* at 7. The work and dispute were unrelated to the deputy's employment with the CCSO. *Id.* Defendant and G.H. engaged in several communications regarding the work and why G.H. was harassing the deputy, and Defendant ultimately instructed a CCSO deputy to swear out a misdemeanor arrest warrant against G.H. for harassing communications. *Id.* at 7–8. Defendant texted G.H. on April 24, 2020, asking if G.H. would like to turn himself in, and again on April 25, instructing G.H. that he could not turn himself in whenever he wanted to and that he needed to do so that day. *Id.* at 8. G.H. turned himself in on April 27, at which time he offered no resistance and appeared complaint and cooperative with jail personnel. *Id.* at 8–9. Defendant arrived, at which time G.H. was

surrounded by law enforcement personnel, remained compliant, and never posed a threat to anyone. *Id.* at 9. Defendant ordered that G.H. be strapped into a restraint chair "for several hours" without any legitimate, nonpunitive, governmental purpose, which caused G.H. physical pain and bodily injury. *Id.* at 9, 13.

W.T. was arrested for speeding and having a suspended license. *Id.* at 9. When he arrived at the jail, he was met by Defendant and members of the CCSO Scorpion Response Team (SRT). *Id.* W.T. was not physically aggressive and did not pose a threat to anyone. *Id.* Defendant ordered SRT deputies to strap W.T. into a restraint chair, where he was left for "several hours" per Defendant's orders. *Id.* While W.T. was in the chair, and while Defendant was present, a CCSO employee covered W.T.'s head with a hood. *Id.* at 10. Just after W.T.'s head was covered, his face was struck twice by what he believes was a fist, and the strikes caused W.T. to bleed. *Id.* At some point later, while still in the restraint chair, a CCSO deputy asked W.T. if he was "the one they beat up?" *Id.* The deputy covered the blood on W.T.'s jail uniform with a smock and took a photograph of W.T. *Id.* W.T. was not allowed to use the restroom while he was restrained, and he urinated on the chair. *Id.* There was no legitimate, nonpunitive, governmental purpose for strapping W.T. into a restraint chair. *Id.* at 14.

II. Analysis

A. Motion to Dismiss the Indictment

The Federal Rules of Criminal Procedure provide that an indictment "must be a plain, concise, and

definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). "An indictment is sufficient if it (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." *United States v. Chalker*, 966 F.3d 1177, 1190 (11th Cir. 2020) (internal quotation marks omitted). "And when an indictment specifically refers to the statute on which the charge was based, the reference to the statutory language adequately informs the defendant of the charge." *Id.* (internal quotation marks omitted). "Nevertheless, even when an indictment 'tracks the language of the statute, it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense with which he is charged.'" *United States v. Durrett*, 524 F. App'x 492, 493 (11th Cir. 2013) (alteration omitted) (quoting *United States v. Bobo*, 344 F.3d 1076, 1083 (11th Cir. 2003)).

In judging the sufficiency of an indictment, the Eleventh Circuit has cautioned that courts should give the charging document "a common sense construction, and its validity is to be determined by practical, not technical, considerations." *Chalker*, 966 F.3d at 1190 (internal quotation marks omitted). In considering a motion to dismiss, the court "is limited to reviewing the *face* of the indictment and, more specifically, the *language used* to charge the crimes." *United States v. Sharpe*, 438 F.3d 1257, 1263 (11th Cir. 2006) (emphasis in original). This is so because "a court may not dismiss an indictment on a determination of facts that should

have been developed at trial." *Id.* (internal quotation marks and alteration omitted); *see also United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004) (noting that there "is no summary judgment procedure in criminal cases" and that the Federal Rules of Criminal Procedure do not provide "for a pre-trial determination of sufficiency of the evidence" (internal quotation marks omitted)).

The superseding indictment[1] contains five counts, each charging a violation of 18 U.S.C. § 242. "Section 242 is a Reconstruction Era civil rights statute making it criminal to act (1) willfully and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States." *United States v. Lanier*, 520 U.S. 259, 264 (1997) (internal quotation marks and footnote omitted); *see also United States v. Brown*, 934 F.3d 1278, 1294 (11th Cir. 2019) (same). As to the third element, which is the only one Defendant challenges, criminal liability "may be imposed for deprivation of a constitutional right if, but only if, in light of preexisting law the unlawfulness under the Constitution is apparent." *Lanier*, 520 U.S. at 271–72 (internal quotation marks and alteration omitted). This is so because a defendant is entitled to "fair warning . . . of what the law intends to do if a certain line is passed." *Id.* at 265

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[1] "Filing a superseding indictment has the same effect as dismissing an original indictment and filing a new indictment. . . . " *United States v. McKay*, 30 F.3d 1418, 1420 (11th Cir. 1994). As such, the motion to dismiss the original indictment, (Doc. 20), should be DENIED AS MOOT. *See United States v. Taylor*, No. 1:18-CR-425-SCJ, 2019 WL 3891854, at *1 (N.D. Ga. Aug. 19, 2019) ("The superseding indictment renders the original motion to dismiss MOOT.")

(internal quotation marks omitted). In other words, it must be "reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267.

The standard that the Supreme Court has articulated for determining whether pre-existing law makes clear that the charged conduct violates the law is the same as the "clearly established" standard that applies for determining whether a defendant is entitled to qualified immunity in the context of a civil claim under 42 U.S.C. § 1983. *See id.* at 270–72. The Court explained why in these terms:

> In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants reasonably can anticipate when their conduct may give rise to liability, by attaching liability only if the contours of the right violated are sufficiently clear that a reasonable official would understand that what he is doing violates that right. So conceived, the object of the "clearly established" immunity standard is not different from that of "fair warning" as it relates to law "made specific" for the purpose of validly applying § 242. The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than "clearly established" would, then, call for

something beyond "fair warning."

Id. at 270–71 (internal quotation marks, citations, and alterations omitted); *see also id.* at 269 (holding that prior decisions, including those with "notable factual distinctions" from the conduct at issue, may provide fair warning so long as they "gave reasonable warning that the conduct then at issue violated constitutional rights"). A right can be "clearly established" by "(1) case law with indistinguishable facts, (2) a broad statement of principle within the Constitution, statute, or case law, or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Crocker v. Beatty*, 995 F.3d 1232, 1240 (11th Cir. 2021) (internal quotation marks omitted). So then, the question boils down to whether—based on the facts alleged in the superseding indictment (as opposed to the facts that Defendant anticipates might come out at trial)—pre-existing law gave reasonable warning that Defendant's conduct violated constitutional rights.

The superseding indictment alleges that each of the five detainees were deprived of "the right to be free from the use of unreasonable force by law enforcement officers." (Doc. 24 at 10–14). The right to be free from excessive force can, depending on the status of the victim, come from one of three constitutional provisions: the Fourth, Eighth, and Fourteenth Amendments. *Crocker*, 995 F.3d at 1246. "[T]he Fourth Amendment covers arrestees, the Eighth Amendment covers prisoners, and the Fourteenth Amendment covers those who exist in the in-between—pretrial detainees." *Id.* (internal quotation marks omitted). The line is not always clear, however, "as to when an arrest ends and pretrial detainment begins." *Id.* at 1247 (internal quo-

tation marks omitted). As such, "[f]or someone who could plausibly be characterized as either an arrestee or a pretrial detainee, it's hard to say whether the Fourth or Fourteenth Amendment should govern the analysis." *Id.* Luckily, "inasmuch as it entails an inquiry into the objective reasonableness of the officers' actions, the Fourteenth Amendment standard has come to resemble the test that governs excessive-force claims brought by arrestees under the Fourth Amendment." *Piazza v. Jefferson Cnty.*, 923 F.3d 947, 952–53 (11th Cir. 2019). As such, the Court first analyzes the counts under the Fourteenth Amendment (which applies to pretrial detainees), and concludes with a brief explanation about why the analysis is the same under the Fourth Amendment (which applies to arrestees).

The "appropriate standard for a pretrial detainee's excessive force claim is solely an objective one." *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015). The Supreme Court has made clear "that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Id.* (internal quotation marks omitted). And because a pretrial detainee may not be punished (he has, after all, not been convicted of anything yet), any force used against him that is "more severe than is necessary to subdue him or otherwise achieve a permissible governmental objective" is "punishment" and therefore unconstitutional. *Piazza*, 923 F.3d at 952. Stated differently, "because force in the pretrial detainee context may be defensive or preventative—but never punitive— *the continuing use of force is impermissible when a detainee is complying, has been forced to*

comply, or is clearly unable to comply." *Id.* at 953 (emphasis added).

And this proposition of law—that a law enforcement officer may not use force against a detainee who is complying—is neither novel nor new. In *Piazza*, the Eleventh Circuit noted that "for decades our decisions have embraced and reiterated the principle that an officer may not continue to use force after a detainee has clearly stopped resisting." 923 F.3d at 955–56 (citing *Danley v. Allen*, 540 F.3d 1298, 1309 (11th Cir. 2008) ("Once a prisoner has stopped resisting there is no longer a need for force, so the use of force thereafter is disproportionate to the need."), *abrogated on other grounds by Kingsley*, 576 U.S. at 397; *then Skritch v. Thornton*, 280 F.3d 1295, 1303 (11th Cir. 2002) ("[G]overnment officials may not use gratuitous force against a prisoner who has been already subdued or, as in this case, incapacitated."); *then Williams v. Burton*, 943 F.2d 1572, 1576 (11th Cir. 1991) ("The basic legal principle is that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments."); *and then Ort v. White*, 813 F.2d 318, 327 (11th Cir. 1987) ("A [F]ourteenth [A]mendment violation occurs . . . where prison officers continue to employ force or other coercive measures after the necessity for such coercive action has ceased.")).

Viewed against that standard and the facts alleged in the indictment, Defendant's motion to dismiss should be denied. Again, the superseding indictment makes clear that every one of the detainees was complying with the deputies' commands when Defendant ordered them into a restraint chair. (Doc.

24 at 4 (alleging that J.A. was surrounded by law enforcement personnel, was handcuffed most of the time, and never posed a threat to anyone), at 5 (alleging that C.H. had been compliant with law enforcement and never posed a threat to anyone), at 6 (alleging that J.H. was not combative and never posed a threat), at 9 (alleging that G.H. was surrounded by law enforcement personnel, remained compliant, and never posed a threat), at 10 (alleging that W.T. was not physically aggressive and never posed a threat to anyone)). And it further alleges that Defendant caused each of the five to be restrained "without any legitimate nonpunitive governmental purpose." *Id.* at 11–14. Simply put, the superseding indictment alleges that Defendant used force against pretrial detainees who were complying with law enforcement instructions. Those allegations, for purposes of a motion to dismiss, are enough. *See Piazza*, 923 F.3d at 953 (noting that "our decisions make one thing clear: Once a prisoner has stopped resisting there is no longer a need for force, so the use of force thereafter is disproportionate to the need" (internal quotation marks omitted)).

Defendant argues that this broad statement of law[2] is insufficient. He maintains that there is no

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[2] Again, a right can be clearly established based on "(1) case law with indistinguishable facts, (2) a broad statement of principle within the Constitution, statute, or case law, or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Crocker*, 995 F.3d at 1240 (internal quotation marks omitted). Here, the Court finds an applicable broad statement of the law regarding the use of force with detainees who are not resisting, as noted above. As such, the Court does not consider whether there might also be case law with indistinguishable facts (the Court is not aware of any such

case law making clear that the use of restraint chairs amounts to the use of force at all, let alone excessive force. (Doc. 20 at 8–15). He suggests that the only cases from within the Eleventh Circuit dealing with restraint chairs also involved some other type of force, *id.* at 9–10, and that absent such on-point, within-the-four-corners-of-the-indictment, restraint-chair-only case, he did not have fair notice that his conduct was illegal, *id.* at 10.

The Court is unpersuaded. First, the Court simply cannot agree that placing someone in restraints, to a degree that they cause physical pain and bodily injury (as is alleged as to each of the detainees), does not amount to the use of "force." In *Williams v. Burton*, the Eleventh Circuit addressed a scenario where a prisoner who was causing a disturbance (yelling, spitting, threatening, throwing bodily fluids) was placed in a four-point restraint and his mouth was covered with tape for about twenty-eight hours (with some brief intervals for eating, exercising, and using the toilet). 943 F.2d at 1574. The prisoner alleged (among other things) that the use of the restraints for such a long period of time amounted to punishment, in violation of the Eighth and Fourteenth Amendments. *Id.* at 1575–76. The Eleventh Circuit noted that it was somewhat of a "difficult" question as to whether the restraints— which it found were clearly justified in the first place—were used for too long of a period of time. *Id.* Critically, the court never questioned that the use of the four-point restraints amounted to the use of force—it simply wrestled with

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case law, nor have the parties identified any) or whether this conduct is so egregious that the right could be deemed clearly established even in the total absence of case law.

whether that force was used for too long a period of time. The court framed the inquiry in this way:

> Once restraints are initially justified, it becomes somewhat problematic as to how long they are necessary to meet the particular exigent circumstances which precipitated their use. The basic legal principle is that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at the prisoner after he terminated his resistance to authority is an Eighth Amendment violation.

Id. The court ultimately found that, given the prisoner's history of disobedience and the potential for him to incite others, the use of the restraints for as long as they were used was not a constitutional violation. *Id.* at 1576–77. But again, the key take-away from *Williams* is that the use of a four-point restraint amounted to force. It was a use of force that did not violate the Constitution given the facts of that case, but was a use of force nonetheless. I see no meaningful distinction between the four-point restraint in *Williams* and the restraint chair here—they are both external restraints used to prevent a detainee from moving. As such, Defendant's argument that putting someone in a restraint chair for hours, in a manner sufficient to cause pain and injury, does not amount to force *at all* fails to carry the day.

Nor is it problematic that there are no excessive force cases involving restraint chairs (as opposed to tasers or punches or any other type of force). (*See* Doc. 20 at 10–15). Indeed, the Eleventh Circuit made this

very point in *Piazza*. In that case, an inmate (who officers were attempting to move to a new cell) ran away from the officers and grabbed a shower curtain. 923 F.3d at 950. An officer tased him, and he fell to the floor unresponsive. *Id.* The officer then ordered him to roll over, which he did not do, and the officer tased him again. *Id.* The court held that the officer was not entitled to qualified immunity because he used force (the *second* application of the taser) after the inmate had stopped resisting. *Id.* at 955–56. In doing so, the court relied on its prior excessive force cases (*Danley*, *Skritch*, *Williams*, and *Ort*), none of which happened to involve tasers, for the proposition that those cases "embraced and reiterated the principle that an officer may not continue to use force after a detainee has clearly stopped resisting." *Id.* And the court made clear that the fact that those cases did not happen to involve a taser did not in any way lessen their ability to "clearly establish" the relevant law:

> To be clear, it is no answer to say that *Danley* involved pepper spray, *Skritch* kicks and punches, *Williams* four-point restraints, etc.—and that none of those cases concerned the use of a taser specifically. It's true, of course, that to defeat qualified immunity a rule must be specific enough that an act's unlawfulness follows immediately from the conclusion that the rule was firmly established. But we have never suggested that the longstanding prohibition on a jail officer's use of force on an incapacitated detainee turns on as fine a point as the particular weapon deployed.

Id. at 956 (internal quotation marks, alteration, and citation omitted). Simply put, there need not be a prior case involving restraint chairs for it to be "reasonably clear," *Lanier*, 520 U.S. at 267, that Defendant's use of the restraint chair in this case, against detainees who were not resisting, amounted to criminal conduct. *Piazza* is one of the more recent in a decades-old line of cases that gave Defendant the notice to which he is required: "that an officer may not continue to use force after a detainee has clearly stopped resisting." 923 F.3d at 955.[3]

Defendant argues that, for a "general rule" to show that a law is clearly established, the rule must apply "with obvious clarity to the circumstances." (Doc. 20 at 12 (quoting *Crocker*, 995 F.3d at 1240 (internal quotation marks and emphasis omitted))). Here the general rule—that an officer may not continue to use force against a detainee who has clearly stopped resisting—squares with the allegations in the superseding indictment. Again, the charging document makes clear that, as to each detainee, Defendant ordered the use of force, without any legitimate purpose, against individuals who were not resisting

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[3] Defendant suggests that this case is different because it involves the use of "passive restraint" in a chair. (Doc. 39 at 4). This argument seems to hinge on Defendant's related argument that the use of a restraint chair is not force at all. But as noted above, that argument fails to carry the day. And as the Eleventh Circuit has made clear, force is force, whether in the form of a punch, spray, taser, or restraint. *Piazza*, 923 F.3d at 956. There is no meaningful distinction between what Defendant terms "passive" force (restraining someone for hours) and more "active" force (punching someone in the face, for example).

and did not pose a threat. Those allegations are sufficient to survive a motion to dismiss.

Defendant points to *Crocker*, where the Eleventh Circuit held that a sheriff's deputy was entitled to qualified immunity after leaving an arrestee in a hot patrol car for somewhere between 22 and 30 minutes. 995 F.3d at 1238. There the court considered six non-exclusive, non-exhaustive factors that the Supreme Court identified in *Kingsley* for determining whether force is excessive for purposes of the Fourteenth Amendment: (1) the relationship between the need for the use of force and the amount of force used; (2) the extent of the plaintiff's injury; (3) any effort made by the officer to temper or to limit the amount of force; (4) the severity of the security problem at issue; (5) the threat reasonably perceived by the officer; and (6) whether the plaintiff was actively resisting. *Id.* at 1250–51. The court determined that the amount of force used (putting the arrestee in a hot car on the side of a Florida highway for less than 30 minutes) was slight and there was essentially no harm done to the plaintiff. *Id.* at 1251 (noting that there is a *de minimis* "level of imposition with which the Constitution is not concerned"). The court feared that if those facts amounted to a violation, then every arrestee placed into a hot patrol car in Alabama, Florida, and Georgia would have a similar cause of action—all in the face of no real injury (the plaintiff in *Crocker* "endured some discomfort" but needed no medical attention). *Id.* at 1251–52. The facts in *Crocker* are not terribly helpful to the analysis here because, in that case, there was some need for the use of force—the officer had to restrain the arrestee by placing him in the squad car in order to transport him to jail. Here, as the

indictment alleges, there was no need for the use of force at all—each of the detainees was compliant and not resisting. Therefore, *any* use of force was unconstitutional. *See Piazza*, 923 F.3d at 955. Indeed, the *Kingsley* factors themselves—which are aimed towards determining whether a particular use of force was excessive—are somewhat of an imperfect guide here where, given the allegations in the indictment, *any* use of force was impermissible. The factors are rather fact-intensive and lend themselves more to the summary judgement analysis the court faced in *Crocker* or the post-trial analysis in *Kinsley* itself. Nevertheless, to the extent they are helpful here, they all suggest that Defendant's motion to dismiss should be denied. Based on the allegations in the indictment, there was no need for the use of force at all, the detainees were injured as a result of the use of force, the force was not used in response to any security problem at the jail, the detainees were not a threat to anyone, and they were not resisting.[4]

Defendant also points to two recent decisions from the Supreme Court, *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021), and *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021), for the proposition that "[h]ighly general proscriptions that bar excessive force

[4] Nor, by denying Defendant's motion to dismiss, is the Court second-guessing Defendant's choices in how he runs the jail. (Doc. 20 at 15–17). A trier of fact will ultimately determine whether Defendant's actions violated the charged criminal statutes. At this stage, all the Court is holding is that the allegations in the superseding indictment present the essential elements of the charged offenses, notify Defendant of the charges to be defended against, and enable him to rely upon a judgment as a bar against double jeopardy for any subsequent prosecution. Nothing more and nothing less.

amounting to punishment under circumstances very different than those faced by" Defendant are not sufficient to have put him on notice that his conduct was unlawful. (Doc. 41 at 3). The Court does not find either case particularly instructive here. In *Rivas-Villegas*, an officer placed his knee on the back of a suspect—for no more than eight seconds—while other officers removed a knife from the suspect's pocket. 142 S. Ct. at 8–9. The officers encountered the suspect in response to a domestic violence complaint possibly involving a chainsaw. *Id.* The Court held that a prior circuit case involving an officer digging his knee into the back of an unarmed suspect when responding to a noise complaint, who did not threaten the officers, was not sufficiently similar so as to clearly establish that the defendant's actions were unlawful. *Id.* The fact-specific analysis in that case, which was decided at summary judgment, does not help Defendant here. The proposition of law the Court relies upon in this case—that an officer may not continue to use force after a detainee has stopped resisting—stems from decades of Eleventh Circuit precedent. *See Piazza*, 923 F.3d at 955–56. And the allegations in the superseding indictment place this case squarely within that precedent—the detainees were not threatening or resisting, and Defendant used force against them. *Rivas-Villegas* requires nothing more. *See* 142 S. Ct. at 7–8 (noting that the Supreme Court's "case law does not require a case directly on point for a right to be clearly established" so long as "existing precedent . . . placed the statutory or constitutional question beyond debate") (internal quotation marks omitted)).

City of Tahlequah is similar. There too the Court engaged in a fact-specific inquiry, following a district

court's resolution of the case at summary judgment, to determine that no case clearly established that the defendant's actions were unlawful. In that case, police officers shot a man who was not complying with their commands to stop, and who raised a hammer behind his back and took a stance as if he was about to throw the tool or charge at the officers. 142 S. Ct. at 10–11. The Court distinguished the cases the Tenth Circuit had relied upon—two of which involved a suicidal suspect and aggressive officers, and the other was dismissed for lack of jurisdiction—and reiterated that "[i]t is not enough that a rule be suggested by then-existing precedent; the rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 11–12 (internal quotation marks omitted). Here, as explained above, the allegations in the indictment fit within the Eleventh Circuit's well-defined case law precluding the use of force against a detainee who has stopped resisting. Again, the Court considers this case in the posture of a motion to dismiss the superseding indictment, where the allegations in that document are accepted as true and are the entirety of the facts available for consideration. The Court offers and decides nothing about what a trier of fact might later conclude upon consideration of the evidence at trial.[5] For present purposes, the

[5] The analysis would be the same under the Fourth Amendment, which applies to arrestees. The Eleventh Circuit has noted that "the Fourteenth Amendment standard has come to resemble the test that governs excessive-force claims brought by arrestees under the Fourth Amendment," *Piazza*, 923 F.3d at 953, and neither party offers any argument for why the result here would be different under the Fourth Amendment than it would be under the Fourteenth.

superseding indictment is sufficient, and the motion to dismiss, (Doc. 33), should be DEINED.

B. Motion to Strike Surplusage

Within the motion to dismiss, Defendant also seeks to strike certain paragraphs from the superseding indictment. (Doc. 33 at 2–3). Federal Rule of Criminal Procedure 7(d) authorizes a court to "strike surplusage from the indictment." "A motion to strike surplusage from an indictment should not be granted unless it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial. This is a most exacting standard." *United States v. Awan*, 966 F.2d 1415, 1426 (11th Cir. 1992) (internal quotation marks and alterations omitted). As such, "to prevail on a motion to strike surplusage, a defendant must show, first, that the contested portions of the indictment are irrelevant to the charged crimes, and, second, that the challenged language is unfairly prejudicial or inflammatory." *United States v. Anyanwu*, No. 1:12-CR-190-TWT-ECS-1, 2013 WL 1558712, at *4 (N.D. Ga. Mar. 12, 2013), *adopted by* 2013 WL 1561011 (N.D. Ga. Apr. 12, 2013). And, "to determine whether the allegations are relevant to the charges and the evidence introduced at trial, the Court may reserve ruling on a motion to strike surplusage until hearing the evidence and determining its relevance at trial." *United States v. Webman*, No. 1:13-CR-25-SCJ, 2014 WL 835988, at *4 (N.D. Ga. Mar. 4, 2014) (internal quotation marks and alteration omitted).

Defendant seeks to strike paragraphs 46–49 of the superseding indictment, which relate to detainee W.T. Those paragraphs allege that after W.T. was strapped into the restraint chair, and while Defendant

was still present, a CCSO employee covered W.T.'s head with a hood. (Doc. 24 at 10, ¶ 46). The superseding indictment alleges that after W.T.'s head was covered, his face was struck by what he believed was a closed fist, which caused him to bleed. *Id.* at ¶ 47. An officer later covered the blood on W.T.'s jail uniform with a white paper smock and took a photograph of W.T. *Id.* at ¶ 48. While he was in the restraint chair, W.T. was not allowed to go to the restroom, and he urinated on the chair. *Id.* at ¶ 49.

Defendant argues that there is no allegation that he is the one who struck W.T., or that he directed, encouraged, or in any way facilitated any other person striking the detainee. (Doc. 33 at 2). He notes that he is charged as a principal (as opposed to a conspirator or an aider and abettor), and that the conduct is therefore irrelevant to his guilt and inflammatory. *Id.* The Government responds by arguing that how the detainees were treated while in the chairs is relevant to determining whether the chairs were used to respond to an exigent circumstance or, rather, were used as unjustified punishment. (Doc. 35 at 22). It further argues that the challenged allegations are relevant to determining Defendant's intent and whether he acted willfully. *Id.* at 22–23. The Government maintains that the allegations are not inflammatory or unfairly prejudicial because the jurors are entitled to know how the detainees were treated at Hill's orders and/or in his presence. *Id.* at 23.

At this stage, Defendant has not demonstrated that the challenged paragraphs are irrelevant or that they are unfairly prejudicial or inflammatory. Critically, the superseding indictment alleges that Defendant was present when W.T.'s head was covered with a

hood. (Doc. 24 at 10, ¶ 46). As such, the jury may be able to infer something from this evidence about why he ordered W.T. to be strapped into the chair. Moreover, the Court cannot conclude that the information is unfairly prejudicial or inflammatory because, again, at least some of it occurred while Defendant was present, and it could therefore be relevant to his intent. As such, the motion should be DENIED.

I make this recommendation based on the limited allegations alleged in the superseding indictment, however. The relevancy could be greater or lesser depending on other things like, for example, whether Defendant was also present when the detainee was struck (as opposed to just being present when the mask was placed on his face). As such, and because the Court has the discretion to reserve ruling on a motion to strike surplusage until after it hears the evidence at trial and can better determine the relevancy, I further recommend that the Court deny the motion without prejudice so that that Defendant has the opportunity to raise the issue again at trial when the relevancy may be more clear.

C. Motion for a Bill of Particulars

Defendant filed a motion for a bill of particulars as to the original indictment. (Doc. 21). Because the grand jury returned a superseding indictment, the motion for a bill of particulars as to the original indictment, (Doc. 21), is DENIED AS MOOT. *See McKay*, 30 F.3d at 1420 ("Filing a superseding indictment has the same effect as dismissing an original indictment and filing a new indictment. . . . ").

Defendant also filed a motion for a bill of particulars as to the superseding indictment, where he

requests that the Government be ordered to identify the specific "physical pain" and "bodily injury" suffered by the detainees identified in Counts 1–4. (Doc. 32). For the reasons set forth below, that motion is DENIED.

"The purpose of a bill of particulars is to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense." *United States v. Davis*, 854 F.3d 1276, 1293 (11th Cir. 2017) (internal quotation marks omitted). "A bill of particulars may not be used to obtain a detailed disclosure of the government's evidence prior to trial," nor is a defendant entitled to one "where the information sought has already been provided by other sources, such as the indictment and discovery." *Id.* (internal quotation marks omitted). A bill of particulars "is not a general tool of discovery, nor is it a device to give the defense a road map to the government's case." *United States v. Leiva-Portillo*, No. 1:06-CR-350-WSD, 2007 WL 1706351, at *14 (N.D. Ga. June 12, 2007). Instead, a bill of particulars "supplements an indictment by providing the defendant with information *necessary* for trial preparation." *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986) (emphasis in original). It is appropriate where the indictment "fails to set forth specific facts in support of requisite elements of the charged offense, and the information is essential to the defense." *United States v. Cole*, 755 F.2d 748, 760 (11th Cir. 1985). "Courts have routinely denied requests for bills of particulars concerning the 'wheres, whens and with whoms' of the crime." *United States v. Bonventre*, No. 10 Cr.

228(LTS), 2013 WL 2303726, at *6 (S.D.N.Y. May 28, 2013), *aff'd*, 646 F. App'x 73, 78–79 (2d Cir. 2016).

The statutory maximum punishment for violating 18 U.S.C. § 242 is one year in prison unless "bodily injury" results from the acts or the acts include the use or attempted use of a dangerous weapon, explosives, or fire—in which case the statutory maximum is ten years in prison (there is also a provision that raises the statutory maximum to life or death, which is not relevant here). 18 U.S.C. § 242. The statute does not define "bodily injury," so the Eleventh Circuit has looked to how that term is defined in other federal statutes and has held, for purposes of Section 242, that it means: (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary. *United States v. Myers*, 972 F.2d 1566, 1572–73 (11th Cir. 1992); *see also* Eleventh Circuit Pattern Jury Instructions (Criminal Cases) § O8 annotations and comments (noting that the Eleventh Circuit approved of this definition of "bodily injury" in *Myers*).

Defendant argues that the superseding indictment does not specify the *type* of pain or bodily injury suffered by J.A. (Count One), C.H. (Count Two), J.H. (Count Three), or G.H. (Count Four). Without that information, he maintains, he cannot explore whether there might be alternate causes for any alleged injuries nor can he determine whether he needs an expert witness (he posits the possibility of a medical expert) to assist with his defense. (Doc. 32 at 4–5). The Government counters that the indictment sufficiently alleges that each detainee suffered physical pain that

resulted in bodily injury, and that those allegations are sufficient to allow Defendant to prepare his defense. (Doc. 35 at 24). Moreover, the Government alleges that the discovery it has provided gives Defendant further details, including that:

- J.A. felt pain in both of his hands and legs and, after being removed from the restraint chair, he had visible red marks on both of his wrists and ankles;
- C.H. felt pain in his arms, back, and ankles during and after confinement in the chair; that he had difficultly walking when he was removed from the chair; and that he had visible marks on both of his wrists and ankles from the straps that secured him to the restraint chair;
- J.H. suffered a sprained wrist from the handcuffs being too tight; and
- G.H.'s hands were black and blue after being removed from the chair, he could barely walk after being removed from the chair, his hands were numb, he had cramping in both of his shoulders, he could feel a pull between his neck and shoulder, his right arm was numb to the wrist, his left arm was numb from the elbow to the wrist, and he experienced a shocking sensation through his nerves on the left arm.

(Doc. 35 at 25 n.6). Defendant maintains that the information in discovery is not sufficient, noting, for example, that a sprain requires a medical diagnosis, and there is not other evidence that J.H. suffered such a sprain. (Doc. 39 at 8). He argues that the Govern-

ment should be forced to commit to a theory regarding how it will demonstrate bodily injury now and that, if it intends to rely on anything other than physical pain, it should have to explain what physical injuries the detainees suffered. *Id.* at 8–9.

Defendant has failed to demonstrate that the information he seeks is *necessary* for his trial preparation. The indictment alleges that each of the detainees suffered "physical pain" as a result of being strapped into the restraint chair. And physical pain is one of the methods available to the Government to demonstrate bodily injury. *See Myers*, 972 F.2d at 1572–73.

Additionally, the Government has provided Defendant with individualized discovery as to each of the detainees relevant to Counts 1–4 (the only ones as to which Defendant seeks a bill of particulars) that describes in some detail the pain that they each felt, as well as the physical manifestations of such pain (red marks, numbness, difficulty walking, bruises, etc.). The fact that Defendant might wish for the Government to lay out its hand and provide in detail exactly how it will demonstrate bodily injury as to each of the detainees is simply not a reason to grant a request for a bill of particulars, particularly where the superseding indictment alleges that they each experienced pain and the discovery provides further details about that pain and the injuries the detainees suffered. It is not surprising, therefore, that courts around the country have routinely denied motions for "bodily injury" bills of particular related to charges under the statute charged in this case and others. *See United States v. Bell*, No. 17-cr-20183, 2020 WL 7382527, at *3–4 (E.D. Mich. Dec. 16, 2020) (denying

a request for a bill of particulars detailing the "serious bodily injury" victims experienced in a drug case where the indictment alleged that each victim suffered serious bodily injury and the discovery offered further details regarding the injuries); *United States v. Brown*, No. 14 CR 674, 2016 WL 806552, at *5 (N.D. Ill. Mar. 2, 2016) (denying a motion for a bill of particulars seeking the "precise description" of the "bodily injury" a victim suffered in a § 242 prosecution); *United States v. Isch*, No. CR-09-040-D, 2009 WL 2409578, at *4 (W.D. Okl. Aug. 3, 2009) (denying a motion for a bill of particulars seeking information about the bodily injury in a § 242 case and noting that the allegation of bodily injury, which relates only to punishment, is not an essential element of a § 242 charge); *United States v. Passaro*, No. 5:04-CR-211-1-BO, 2006 WL 8439896, at *4 (E.D.N.C. Mar. 23, 2006) (denying a motion for a bill of particulars directing the government to specify the serious bodily injury it intended to prove at trial in an assault case where the indictment tracked the language of the statute and the statute defined "serious bodily injury"); *United States v. Livoti*, 8 F. Supp. 2d 246, 249–50 (S.D.N.Y. 1998) (denying a motion for a bill of particulars for the bodily injury a victim suffered in a § 242 case where the government produced a death certificate, autopsy report, and medical records).[6]

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[6] I have identified one case where a court ordered a bill of particulars regarding bodily injury. *See United States v. Darden*, 346 F. Supp. 3d 1096, 1123–24 (M.D. Tenn. 2018) (ordering a bill of particulars regarding the serious bodily injury a victim suffered as to a RICO assault count). The court ordered the bill of particulars to "clarify any potential confusion" because the Government alleged that the victim at issue was shot by a co-defendant, leaving questions as to what serious bodily injury the defendant

The Court appreciates that it might be helpful for Defendant to know precisely how the Government will demonstrate bodily injury at trial as to each of the detainees and, specifically, whether the Government will rely on something other than physical pain. But physical pain alone is sufficient, the Government has alleged pain as to each detainee, and it has provided details regarding that pain (as well as certain other bodily injuries) in discovery.[7] Given that, "the only purpose a bill of particulars would serve is to lock the Government into a trial strategy far in advance of the trial date," and that is not an appropriate purpose. *Bell*, 2020 WL 7382527, at *4. The motion for a bill of particulars, (Doc. 32), is DENIED.

III. Conclusion

For the reasons stated above, the motion for a bill of particulars as to the original indictment, (Doc. 21), is DENIED AS MOOT, and the motion for a bill of particulars as to the superseding indictment, (Doc. 32), is DENIED. Further, I recommend that the motion to

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allegedly caused. *Id.* Here, there is no similar confusion regarding who caused the bodily injury alleged in the superseding indictment.

[7] The Government cites FBI reports of interviews with the detainees where they describe their pain and injuries. Several of the cases denying bills of particular noted above rely in part on the fact that the Government had produced medical records in discovery. The Government has not indicated one way or the other whether it possesses any medical records related to the pain or injuries the detainees allegedly suffered or, if it does, whether those records have been produced. If the Government has any such medical records, it should produce them to Defendant or, if it believes they should be withheld, present them to the Court for *in camera* review.

dismiss the original indictment, (Doc. 20), be DENIED AS MOOT and that the motion to dismiss the superseding indictment and to strike surplusage, (Doc. 33), be DENIED. There are no other pretrial motions pending before the undersigned, and this case is CERTIFIED READY FOR TRIAL.

IT IS SO ORDERED and RECOMMENDED, this 29th day of December, 2021.

/s/ Christopher C. Bly
U.S. Magistrate Judge

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (AUGUST 22, 2024)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VICTOR HILL,

Defendant-Appellant.

No. 23-10934

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:21-cr-00143-ELR-CCB-1

Before: ROSENBAUM, NEWSOM, and MARCUS, Circuit Judges.

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

PERCURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.