NOT FOR PUBLICATION

FILED

OCT 28 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Mr. MICHAEL DEVIN FLOYD,

Plaintiff - Appellant,

v.

SANTA CLARA DEPARTMENT OF CORRECTION; COUNTY OF SANTA CLARA; SANTA CLARA COUNTY SHERIFF'S OFFICE; ELMWOOD CORRECTIONAL FACILITY; Deputy DUNG TRAN, #10679; Deputy ROBERT SILOS, #11291; Deputy JEREMY HILES, #11188; Deputy SAUL AGUSTIN, #11131; CHARLES STOKES, III #11240; Deputy RYAN REYES, #10612; Deputy GINO COFFERATI, #10991; Deputy COREY EVANS, #10838; Sgt. YVETTE DIAS, #10305; CONSUELO RENEE GARCIA, LMFT; Sgt. BRADLEY REAGAN, #10572; Deputy VICTOR CABRERA, #11081; Deputy KYLE QUADROS, #11216; Deputy FABIAN SERRANO-ALVAREZ, #11284; Deputy GEORGE BARAJAS, #11089; Deputy JESUS PATINO, #11308; Deputy JOSEPH CORTEZ, #11307; Deputy ISAIAH CAMPOS, #11214; Sgt. RYAN HERNANDEZ, #10604; Deputy MIGUEL

No. 24-6866

D.C. No.
3:22-cv-00750-CRB

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

SANCHEZ-PEREZ, #11050; Lt. RUTH COTE, #10457; Deputy Sheriff MATTHEW NEWTON, #2212; Sergeant VORPAHL, #10888; Correctional Deputy DANIEL DICKSON, #11036,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Submitted October 21, 2025**
San Francisco, California

Before: PAEZ, BEA, and FORREST, Circuit Judges.

Late in the evening on August 18, 2021, Plaintiff-Appellant Michael Devin Floyd was arrested and brought to the Santa Clara Main Jail for booking. Four hours later, Floyd was transferred to the nearby Elmwood Correctional Facility. There, correctional officers asked Floyd to change from his civilian clothes into jail-issued attire, a routine procedure that all detainees who arrive at Elmwood must complete before moving from the lobby into the prison's housing unit. Floyd was unwilling to change his clothes and thus could not leave the lobby. For ten hours, Floyd refused to cooperate despite attempts by more than a dozen correctional officers and two mental-health professionals to persuade him. On the afternoon of August 19,

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

2021, Floyd finally relented and allowed officers to escort him to his housing unit, thus ending an encounter that began with Floyd's booking at the Main Jail and lasted more than fourteen hours.

Floyd filed this action under 42 U.S.C. § 1983 against the County of Santa Clara, several of the County's subdivisions, and twenty-four individual correctional officers from both the Main Jail and Elmwood (collectively, "Defendants"). Floyd alleged that various officers used excessive force against him, deprived him of the right to make a phone call, and denied him access to the restroom, in violation of his Fourteenth Amendment right as a pretrial detainee to be free from punishment; Floyd also alleged that the County of Santa Clara had a policy of violating detainees' rights in this manner and was liable under *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978). The district court granted summary judgment to Defendants on all counts. Floyd timely appealed.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court's grant of summary judgment and its qualified immunity determinations de novo. *Hughes v. Rodriguez*, 31 F.4th 1211, 1218 (9th Cir. 2022) (citation omitted). We affirm.

1. The district court did not err in finding that, on account of video evidence proffered by Defendants that "blatantly contradicted" Floyd's version of events, no reasonable jury could find that the officers used excessive force or violated Floyd's

right of access to a restroom. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). Floyd claims that the footage in the videos was altered or fabricated. Floyd offers no evidence to substantiate this claim, yet maintains that because the videos were fabricated, the district court should not have accorded them any weight at summary judgment and should have found that a triable issue of fact existed because of the conflict between Floyd's narrative of events and Defendants' narrative. While the district court's decision to grant summary judgment would be called into question if there were evidence to support a reasonable inference that the videos upon which the district court relied were "doctored or altered in any way," *Scott*, 550 U.S. at 378, Floyd's bare allegations of fabrication do not suffice. "[M]ere allegation and speculation do not create a factual dispute for purposes of summary judgment." *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996). Thus, the district court properly considered the video evidence and accorded it the proper weight under *Scott v. Harris*. *See* 550 U.S. at 378–80.

2. Regarding Floyd's Fourteenth Amendment claim arising from the alleged denial of his right to make a phone call, the district court correctly granted summary judgment to the defendant officers based on qualified immunity. Floyd's asserted right comes from California Penal Code § 851.5, which creates a "liberty interest," protected by the Fourteenth Amendment, in an arrestee's right to make three phone calls. *Carlo v. City of Chino*, 105 F.3d 493, 502 (9th Cir. 1997).

Cal. Penal Code § 851.5 requires officers to allow an arrestee to use a phone "upon request, or as soon as practicable." *Id.* § 851.5(e). At Elmwood, multiple officers assured Floyd that he would be able to use the phone once he "dressed out" and could be taken to his cell. Though Floyd claims that he had to wait over ten hours at Elmwood before he could make a phone call, this delay was caused by Floyd's refusal to "dress out," not the defendant officers. The officers' conduct at Elmwood did not clearly violate their statutory obligation to provide Floyd with a phone call "as soon as practicable." Cal. Penal Code § 851.5(e). Floyd has failed to show that he "suffered a deprivation of a constitutional or statutory right" and therefore cannot overcome the officers' defense of qualified immunity. *Hamby v. Hammond*, 821 F.3d 1085, 1091 (9th Cir. 2016) (quoting *Taylor v. Barkes*, 575 U.S. 822, 824 (2015)). The district court properly granted summary judgment to the defendant officers on this basis.[1]

3. The district court correctly granted summary judgment to Defendants on Floyd's Fourteenth Amendment claim arising out of his alleged deprivation of access to the restroom because Floyd failed to raise a genuine dispute of material fact as to whether Defendants committed a constitutional violation. Because Floyd

[1] Defendants have filed a motion to take judicial notice of the previously enacted text and legislative history of Cal. Penal Code § 851.5. Because the text and legislative history of Section 851.5 are unnecessary to affirm the district court's order granting summary judgment to the defendant officers based on qualified immunity, we **DENY** Defendants' motion to take judicial notice.

was a pretrial detainee, not a convicted prisoner, his asserted right comes from the Fourteenth Amendment's prohibition against "punishment" of pretrial detainees, not the Eighth Amendment's prohibition against "cruel and unusual punishment." *See Norbert v. City & County of San Francisco*, 10 F.4th 918, 928 (9th Cir. 2021). For official action to constitute "punishment" that violates the Fourteenth Amendment, "(1) that action must cause the detainee to suffer some harm or disability, and (2) the purpose of the governmental action must be to punish the detainee." *Demery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir. 2004) (quoting *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). To satisfy the first prong, a detainee must show that he has been subjected to harm that "significantly exceed[s] . . . the inherent discomforts of confinement." *Id.* at 1030. Short-term deprivations of restroom access do not rise to this level. As this Court has recognized, in the prison context, there is "no doubt that toilets can be unavailable for some period of time without violating the [Constitution]." *Johnson v. Lewis*, 217 F.3d 726, 733 (9th Cir. 2000).

Floyd used the restroom four times and did not involuntarily urinate or defecate at any point. There is no evidence that Floyd had to wait longer than two hours to use the restroom after he requested to use it. Construing the facts in the light most favorable to Floyd, he has failed to show he suffered harm that "significantly exceed[s] . . . the inherent discomforts of confinement." *See Demery*,

378 F.3d at 1030. Thus, the district court properly granted summary judgment to Defendants on this claim.

4. Floyd forfeited his excessive force and *Monell* claims by failing to raise them in his opening brief. "[A]rguments . . . omitted from the opening brief" are generally "deemed forfeited," subject to exceptions that are not applicable here. *Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018). This rule applies "even to non-lawyers who proceed pro se." *Sharemaster v. SEC*, 847 F.3d 1059, 1070 (9th Cir. 2017).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL DEVIN FLOYD,

Plaintiff,

v.

SANTA CLARA DEPARTMENT OF CORRECTION, et al.,

Defendants.

Case No. 22-cv-00750-CRB

ORDER GRANTING SUMMARY JUDGMENT

Michael Floyd sued various Santa Clara County law enforcement officers, as well as the County and several of its subdivisions, for alleged constitutional violations stemming from the events following Floyd's August 2021 arrest. Defendants move for summary judgment on all counts. For the reasons that follow, the Court **GRANTS** Defendants' motion in full.

I. BACKGROUND

On this motion for summary judgment, the Court considers the parties' admissible evidence and resolves all factual disputes against the moving party. See Orr v. Bank of Am., NT & SA, 285 F.3d 764, 772–73 (9th Cir. 2002). The Court cannot consider unauthenticated or inadmissible evidence, even for the purpose of drawing inferences from that evidence. Id. at 773.

A. Events at Santa Clara County Main Jail

San Jose Police Department officers arrested Floyd on the evening of August 18, 2021, and brought him to the Santa Clara County Main Jail. Third Am. Compl. at 8. Officers booked Floyd into the Main Jail at 11:45 p.m. Dundic Decl. (dkt. 106-8) ¶ 4.

Floyd names the following officers from the Main Jail as Defendants: Dung Tran, Robert Silos, Jeremy Hiles, Saul Agustin, Charles Stokes, III, Ryan Reyes, and Sergeant Vorpahl. Third Am. Compl. at 4, 7.

For most of the time that Floyd spent at the Main Jail, he was secured to a chair in the intake lobby. Id. ¶ 5; see generally Floyd Exhibits (dkt. 108-3), Ex. V1 (intake lobby camera footage), Ex. V2 (intake lobby camera footage).[1] Officers escorted Floyd to a toilet twice during the four hours he spent in the intake lobby: once at 12:35 a.m. and once at 2:37 a.m. on August 19. Dundic Decl. ¶¶ 6–7; Floyd Ex. V1 at 15:40–25:50; Fernandes Decl. (dkt. 106-2) Ex. A (holding cell camera footage).

Floyd was transferred to the Elmwood Correctional Facility at 3:38 a.m. on August 19. Dundic Decl. ¶ 8. Floyd requested to use the telephone in the intake lobby once he had learned that he would be transferred—about thirty minutes before his transfer. Floyd Dep. Tr. (dkt. 106-1) at 95:23–96:16, 97:4–7, 103:21–24. The officers told Floyd that he needed to wait until after he arrived at Elmwood before he could make a phone call. Id. at 98:12–21. Floyd also requested to use the restroom as officers were escorting him to the van that would transport him to Elmwood, but the officers told him he could use the restroom there. Floyd Ex. V4 (body camera footage) at 0:00–3:00.

B. Events at Elmwood Correctional Facility

Floyd arrived at Elmwood around 4:00 a.m. on August 19. Cote Decl. (dkt. 106-7) ¶ 4. Floyd was instructed to "dress out"—that is, change from his civilian clothes into prison clothes—before he could leave the processing lobby and go to his cell. Id. ¶ 7; Floyd Dep. Tr. at 128:18–21. He refused, stating that he needed to make a phone call first. Floyd Dep. Tr. at 128:22–24, 130:2–3; Cote Decl. ¶¶ 7–8, 10. Floyd persisted in his refusal to dress out for ten hours, even as multiple officers asked him to comply and

[1] Both parties rely heavily on video camera footage, yet Floyd repeatedly asserts in his briefing that the video footage has been altered. See Opp. (dkt. 108) at 2, 4, 11. Floyd does not back up these assertions with evidence, so they are not entitled to any weight. The video footage speaks for itself. See Scott v. Harris, 550 U.S. 372, 380–81 (2007). The Court also grants the motions to seal the video camera footage (dkts. 105, 108).

assured him that he would be able to make a phone call once he did. Floyd Dep. Tr. at 130:12–132:8; Cote Decl. ¶ 8. These officers included Defendants Gino Cofferati, Corey Evans, Yvette Dias, Bradley Reagan, Victor Cabrera, Kyle Quadros, Fabian Serrano-Alvarez, George Barajas, Jesus Patino, Joseph Cortez, Isaiah Campos, Ryan Hernandez, and Miguel Sanchez-Perez. Third Am. Compl. at 4–7. Over the course of those ten hours Floyd used the restroom twice, at 4:55 a.m. and at 8:23 a.m. Cote Decl. ¶ 18; Floyd Dep. Tr. at 145:23–146:1. The record does not indicate whether Floyd asked to use the restroom aside from those two occasions.

While Floyd was in the processing lobby, Defendants twice referred him for a mental health assessment. Evans Decl. (dkt. 106-9) ¶¶ 4–5. During the second assessment, Defendant Conseulo Garcia, a therapist, offered to call Floyd's brother. Id. ¶ 5; Garcia Decl. (dkt. 106-10) ¶ 5; Floyd Dep. Tr. at 137:8–16. Garcia initially reached Floyd's brother, but the call was disconnected, and Garcia was unable to reconnect. Evans Decl. ¶ 5; Garcia Decl. ¶ 5. Floyd did not ask Garcia to call anyone else for him. Evans Decl. ¶ 6; Garcia Decl. ¶ 6.

At approximately 11:00 a.m. on August 19, the Emergency Response Team—a group of at least ten officers—went to the processing lobby to try to take Floyd to his cell. Cote Decl. ¶ 8; Cabrera Decl. (dkt. 106-4) ¶ 4. Floyd resisted by pulling away, tensing his extremities, refusing to walk, and otherwise making it difficult or impossible for officers to physically move him from his seat. Fernandes Decl. Ex. B (handheld video camera footage), Ex. C (body camera footage); Ex. D (body camera footage); see also Barajas Decl. (dkt. 106-3) ¶ 5; Quadros Decl. (dkt. 106-11) ¶ 5; Patino Decl. (dkt. 106-12) ¶ 5; Evans Decl. ¶ 8; Serrano-Alvarez Decl. (dkt. 106-13) ¶ 5; Cabrera Decl. ¶ 5; Floyd Dep. Tr. at 143:3–6, 12–14, 144:8–12, 145:10–13. Rather than force Floyd to move, ERT members resecured him to his seat and left. Fernandes Decl. Ex. B, Ex. C; Ex. D; Barajas Decl. ¶ 5; Quadros Decl. ¶ 5; Patino Decl. ¶ 5; Evans Decl. ¶ 8; Serrano-Alvarez Decl. ¶ 5; Cabrera Decl. ¶ 5; Floyd Dep. Tr. at 142:20–22, 145:23–146:1. Floyd suffered bruising from the handcuffs he was wearing at the time. Floyd Dep. Tr. at 146:15–16, 152:20–25.

Ruth Cote, the watch commander at Elmwood, then went into the processing lobby to meet with Floyd. Cote Decl. ¶ 12. She told Floyd that he could not stay in the lobby, but he refused to dress out so he could be moved to his cell. Id. ¶¶ 13–14. Cote then decided that Floyd would have to be moved to his cell and dress out there, so she called the ERT back. Id. ¶ 15. Floyd did not resist this time around, and the ERT members were able to remove him from the lobby in a wheelchair. Fernandes Decl. Ex. E (processing lobby camera footage); Ex. F (body camera footage); Ex. G (body camera footage); Floyd Ex. V5 (processing lobby camera footage) at 55:20–57:30. The ERT members did not use force or injure Floyd on this occasion. Floyd Dep. Tr. at 151:6–11.

ERT members took Floyd to his cell, where he arrived around 2:00 p.m. Cote Decl. ¶ 17. Once in his cell, Floyd spoke with Defendants Matthew Newton and Daniel Dickson. Floyd Ex. V3 (body camera footage). They informed Floyd that there was a phone in the dorm but that he would have to wait his turn to use it. Id. at 5:40–6:15.[2]

C. Procedural History

Floyd sued the 24 individual defendants under § 1983, alleging various theories of liability:

- He alleges that Defendants Barajas, Cabrera, Campos, Cortez, Dias, Evans, Hernandez, Patino, Quadros, Reagan and Serrano-Alvarez used excessive force against him. Third Am. Compl. at 5–6.
- He alleges that Defendants Agustin, Cofferati, Cote, Dias, Dickson, Evans, Garcia, Hiles, Newton, Reagan, Reyes, Sanchez-Perez, Silos, Stokes, Tran, and Vorpahl violated his right under California law to make a phone call. Id. at 4–7.
- He alleges that Defendants Agustin, Hiles, Reyes, Silos, Stokes, Tran, and Vorpahl violated his right to use the restroom. Id. at 4, 7.[3]

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[2] Floyd asserts in his opposition brief that Dickson told him "[a]t some point while on duty" that "he would have to wait 24 hours for a phone call due to COVID." Opp. at 6. Floyd does not identify any supporting evidence for this assertion, and the Court has been unable to locate any.

[3] Floyd initially brought several of these claims under the Eighth Amendment. These claims should have been brought under the Fourteenth Amendment, because Floyd was a

Floyd also sued the County of Santa Clara (and several of its subdivisions, such as the Department of Correction) for municipal liability under Monell v. Department of Social Services, 436 U.S. 658 (1987).

II. LEGAL STANDARD

Summary judgment is proper when there is "no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

The moving party bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). Where, as here, the moving party will not bear a burden of proof at trial, it need only point out "that there is an absence of evidence to support" the nonmoving party's case. Id. Once it has done so, the nonmoving party must go beyond the pleadings to demonstrate the existence of a genuine dispute of material fact by "citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c). If the nonmoving party fails to do so, "the moving party is entitled to a judgment as a matter of law." Celotex, 477 U.S. at 323.

III. DISCUSSION

Floyd asserts three categories of due process claims, each of which stems from a distinct factual predicate: (1) an excessive force claim arising out of Defendants' first, unsuccessful efforts to move Floyd from the Elmwood processing lobby, (2) a claim arising out of Defendants' refusal to allow Floyd to use a phone at either the Main Jail or Elmwood; and (3) a claim arising out of Defendants' refusal to allow Floyd to use the

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pretrial detainee. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979). Floyd's mistake is not itself grounds to enter summary judgment, however. See West v. Dallas Police Dep't, 1997 WL 452727, at *5 (N.D. Tex. July 31, 1995).

restroom at either the Main Jail or Elmwood. Floyd's Monell claim incorporates these three factual bases as well.

A. Excessive Force

Floyd's first batch of claims are against the ERT members who were involved in the first, unsuccessful effort to move Floyd from the Elmwood processing lobby to his cell. The Fourteenth Amendment grants pretrial detainees the substantive right to be free from excessive force. Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015). Excessive force is that which amounts to punishment. Graham v. Connor, 490 U.S. 386, 395 n.10 (1989). Force that is reasonable given the "facts and circumstances of [the] particular case," by contrast, is not excessive. Kingsley, 576 U.S. at 397 (citation omitted).

Whether force is reasonable is judged "from the perspective of a reasonable officer on the scene" and must account for "legitimate interests that stem from the government's need to manage the facility in which the individual is detained," including "'policies and practices that in the judgment' of jail officials 'are needed to preserve internal order and discipline and to maintain institutional security.'" Id. (cleaned up) (quoting Bell v. Wolfish, 441 U.S. 520, 540, 547 (1979)). Some factors that bear on the reasonableness of force used include "[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. Moreover, "de minimis uses of physical force" do not give rise to viable Eighth Amendment claims except where "the use of force is [] of a sort repugnant to the conscience of mankind." Wilkins v. Gaddy, 559 U.S. 34, 37–38 (2010) (per curiam) (quoting Hudson v. McMillian, 503 U.S. 1, 9–10 (1992)).

Here, the evidence leaves no room for a genuine dispute of fact as to the reasonableness of the ERT members' use of force when they tried to move Floyd out of the Elmwood processing lobby. At least four aspects of their interaction with Floyd confirm that their use of force was reasonable as a matter of law:

First, the ERT members clearly sought to minimize their use of force. When Floyd resisted, they did not escalate their use of force; rather, they stopped trying to move him and left him where he was. Fernandes Decl. Ex. B, Ex. C, Ex. D. This "effort made … to temper or to limit the amount of force" indicates that the use of force itself was reasonable. See Kingsley, 576 U.S. at 397.

Second, the ERT members' use of force was tailored to specific safety concerns. For example, Barajas and Cabrera held the back of Floyd's head to prevent him from headbutting other ERT members in the face. Barajas Decl. ¶ 5; Cabrera Decl. ¶ 5; see also Fernandes Decl. Ex. B. Patino held Floyd down by his right shoulder and upper back after Floyd started "thrashing … from side to side." Patino Decl. ¶ 5. Quadros and Serrano-Alvarez held Floyd's arm and wrist so that he could be controlled while being unsecured from his chair. Quadros Decl. ¶ 5; Serrano-Alvarez ¶ 5.[4] And when the ERT members returned a second time, Floyd did not resist, so they did not use force to move him. Floyd Dep. Tr. at 151:16–23. Throughout the ERT members' interactions with Floyd, there was a close "relationship between the need for the use of force and the amount of force used," which indicates that the force used was reasonable. See Kingsley, 576 U.S. at 397.

Third, Floyd's injuries were relatively minor, apparently consisting only of bruises from handcuffs. See Opp. at 5. Even if Floyd's injuries were not de minimis, the lack of severe or lasting injuries supports a conclusion that the amount of force used was not excessive. See Kingsley, 576 U.S. at 397; Wilkins, 559 U.S. at 37–38.

Fourth, Floyd's injuries are directly traceable to his own attempts to resist the ERT members' attempt to move him to his cell. Floyd repeatedly swore at them and physically resisted, making it harder for them to control or move him. Fernandes Decl. Ex. C at 0:27–0:32 ("I'm not gonna fucking relax."), Ex. D at 1:19–1:23 (same); see also Barajas

[4] There is no evidence that any of the remaining Defendants against whom Floyd asserts excessive-force claims personally exerted force against him. Floyd identifies no record evidence that would explain why the remaining Defendant should be held liable for actions they did not personally take. See Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002) ("In order for a person acting under color of state law to be liable under section 1983 there must be a showing of personal participation in the alleged rights deprivation.").

Decl. ¶ 5; Quadros Decl. ¶ 5; Patino Decl. ¶ 5; Evans Decl. ¶ 8; Serrano-Alvarez Decl. ¶ 5; Cabrera Decl. ¶ 5 Floyd himself even acknowledged as much. Floyd Dep. Tr. at 152:18–25 ("I had my handcuffs on as I'm struggling. And yeah, I mean, you get the bruises from the handcuffs."). When the ERT members returned and tried again, Floyd did not resist, the ERT members did not use force, and Floyd did not suffer any injuries. Id. at 151:2–11. Floyd's aggravated response makes Defendants' use of force more likely to be reasonable. See Kingsley, 576 U.S. at 397.

Floyd, for his part, brings forward no evidence to back up his assertion that Defendants' use of force was excessive. Instead, he explains that he resisted because of his difficulty accessing the restroom and desire to use the phone. Floyd Dep. Tr. at 144:8–12; Opp. at 4. That may be so. But whether Floyd had a good reason for resisting does not answer whether Defendants' use of force was excessive or reasonable. The undisputed video evidence shows that it was reasonable, so the Court grants summary judgment with respect to Floyd's excessive force claims.

B. Denial of Phone Call

Floyd's next claim stems from the fact that he was not given the ability to make a phone call at either the Main Jail or at Elmwood. He raises a due process claim based on a violation of California Penal Code section 851.5, which requires that pretrial detainees be permitted to make three free phone calls "[i]mmediately upon being booked and, except where physically impossible, no later than three hours after arrest." Cal. Penal Code § 851.5(a)(1). The phone calls "shall be given immediately upon request, or as soon as practicable." Id. § 851.5(e). Penal Code section 851.5 creates a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Carlo v. City of Chino, 105 F.3d 493, 497–98, 500 (9th Cir. 1997).[5]

Defendants argue that Floyd's failure to request a phone call during the three-hour

[5] Floyd also appears to suggest that he has a freestanding Fourteenth Amendment right to use a phone. See Opp. at 6–7 (collecting cases regarding phone communication). The Ninth Circuit rejected this argument in Valdez v. Rosenbaum, 302 F.3d 1039, 1045–48 (9th Cir. 2002), so the Court does not consider it further.

window after his arrest defeats his claim because his statutory right to a phone call lapsed three hours after he was arrested. Mot. (dkt. 106) at 14. Floyd was booked at the Main Jail at 11:45 p.m. on August 18, yet he first requested a phone call no earlier than 3:08 a.m. on August 19—more than three hours later. Dundic Decl. ¶ 4; Floyd Dep. Tr. at 95:23–96:16, 97:4–7, 103:21–24.

On first glance, Defendants' reading seems like a reasonable interpretation of Penal Code section 851.5(a)(1), which states in full: "Immediately upon being booked and, except where physically impossible, no later than three hours after arrest, an arrested person has the right to make at least three completed telephone calls … ." Several district courts have interpreted this statute to apply only "within three hours of being arrested." E.g., Adams v. Albertson, 2012 WL 440465, at *9 (N.D. Cal. Feb. 10, 2012); accord Lhevan v. Spitzer, 2022 WL 2892390, at *8 (May 27, 2022); Medrano v. Acosta, 2020 WL 5413384, at *6 (C.D. Cal. Mar. 25, 2020); Hook v. City of Santa Monica, 2006 WL 5309516, at *3 (C.D. Cal. June 7, 2006); McMahon v. County of Santa Barbara, 2016 WL 11758778, at *7 (C.D. Cal. Jan. 8, 2016). But in an unpublished order that predates most of these district court decisions, the Ninth Circuit rejected this argument. Maley v. County of Orange, 224 F. App'x 591, 593 (9th Cir. 2007); see also Golden v. County of Tulare, 2011 WL 1087097, at *3 (E.D. Cal. Mar. 23, 2011) ("The entire tenor of [] section 851.5 is one of liberality to the accused.").

The Court need not decide whether the Ninth Circuit's order (which relies on a California Supreme Court decision interpreting a previous version of Penal Code section 851.5—a version that does not have the three-hour language) or the district courts' orders (which do not squarely address the issue) are more persuasive. The legal uncertainty around the scope of Penal Code § 851.5 in this context means that Defendants are entitled to qualified immunity. See Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (qualified immunity protects government officials who make "mistaken judgments about open legal questions"); Rico v. Ducart, 980 F.3d 1292, 1300–01 (9th Cir. 2020) ("it will be a rare instance in which, absent any published opinions on point or overwhelming obviousness of

illegality, we can conclude that the law was clearly established on the basis of unpublished decisions only" (citation omitted)). The individual Defendants are thus entitled to summary judgment.

Moreover, even if Penal Code section 851.5 granted Floyd a right to a phone call beyond three hours after his arrest, Defendants were simply obligated to provide him a phone call "as soon as practicable" after he requested one. Cal. Penal Code § 851.5(e). Though Floyd was denied a phone call for over 10 hours after he first requested one, that delay was largely of his own making given his refusal to dress out in the Elmwood processing lobby. In fact, Defendants consistently told Floyd that his cooperation would enable him to make a phone call sooner. See, e.g., Fernandes Decl. Ex. B at 1:23–1:26 ("All I want to do is get you to your housing unit and get you that phone call."), 2:05–2:10 ("You let us help you, we'll get you to your housing unit, you can use your phone, and we can go from there."). Defendants' conduct—which is mostly marked by their consistent efforts to move Floyd to his cell, where he would be able to make a phone call—does not so clearly violate Penal Code section 851.5 as to defeat qualified immunity.

C. Restriction of Restroom Access

Floyd's final claim against the individual Defendants is a due process claim arising out of their alleged refusals to allow him to use the restroom. The Fourteenth Amendment entitles pretrial detainees to "adequate food, clothing, shelter, sanitation, medical care, and personal safety." Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996) (citation omitted), overruled on other grounds by John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008). With respect to restroom access, "temporary deprivations … that last only a short amount of time and do not pose a serious threat of harm to the prisoner do not give rise to deprivations that are sufficiently serious to support [a Fourteenth Amendment] claim." Gunn v. Tilton, 2011 WL 1121949, at *3 (E.D. Cal. Mar. 23, 2011); see also Hason v. County of Los Angeles, 2012 WL 13123537, at *5 (C.D. Cal. Mar. 13, 2012) (five-hour deprivation of access to toilet facilities "does not violate an inmate's constitutional rights"); Kanick v. Nevada, 2010 WL 2162324, at *1, 5 (D. Nev.

Apr. 27, 2010) (denying constitutional claim where the plaintiff had to wait two hours between requesting to use the restroom and being able to do so).

The record indicates that Floyd used the restroom twice while at the Main Jail, see Floyd Dep. Tr. at 100:3–18, and twice at Elmwood, Cote Decl. ¶ 18.[6] Moreover, the evidence does not show that Defendants meaningfully delayed Floyd's access to restrooms. Floyd conceded that he did not have to wait more than five minutes either time he asked to use the restroom at the Main Jail, Floyd Dep. Tr. at 100:3–18, and the first time he used the restroom at Elmwood was within an hour after he arrived there, Cote Decl. ¶¶ 4, 18. And Floyd never involuntarily urinated or defecated outside the restroom. Floyd Dep. Tr. at 124:3–6.

Even if Floyd was denied access to a restroom for some brief window of time while at the Main Jail or Elmwood, any such temporary deprivation fails to rise to the level of a substantive due process violation. See Kanick, 2010 WL 2162324, at *5 ("temporary deprivation of access to toilets, in the absence of physical harm or a serious risk of contamination, … does not amount to anything more than an inconvenience"). Summary judgment is therefore appropriate on Floyd's Fourteenth Amendment claim based on the denial of access to a restroom.

D. Monell Claim

In addition to his claims against the individual defendants, Floyd asserts a Monell claim against the County of Santa Clara. A Monell claim has four elements: (1) a constitutional deprivation and (2) a government policy, practice, or custom (3) that demonstrates deliberate indifference to the constitutional right at issue and (4) is a

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[6] Floyd contends that he was denied access to restrooms at Elmwood, relying on two videos as support. But neither creates a genuine dispute of fact. One video shows Floyd several hours after the fact recounting what happened in the processing lobby. Floyd Ex. V3. This is hearsay and inadmissible at summary judgment. Orr, 285 F.3d at 778. The other video, which shows the processing lobby, is unintelligible. Floyd Ex. V5. Floyd's characterization in his briefs of what that video shows is not evidence. See Hill v. PetSmart, Inc., 2022 WL 980269, at *4 (S.D. Tex. Mar. 30, 2022) ("While the Court examines the Parties' characterizations of the evidence in the briefs, the Court also reviews the underlying evidence itself for the purpose of summary judgment."). Cote's declaration that Floyd used the restroom twice at Elmwood is therefore unopposed.

"moving force behind the constitutional violation." Dougherty v. City of Covina, 654 F.3d 892, 900 (9th Cir. 2011). A Monell claim is not a claim for vicarious liability—the policy, practice, or custom must be tied to the constitutional violation at issue. Id.; see also City of Canton v. Harris, 489 U.S. 378, 385 (1989).

As explained above, Floyd does not show a constitutional deprivation on either his excessive force theory or his restroom access theory. And it is questionable whether he has shown a constitutional deprivation on his phone access theory. It does not matter whether he has, though, as his Monell claim fails on another prong—lack of a policy, practice, or custom.

Floyd fails to bring forth any evidence that would establish that the County of Santa Clara has a policy, practice, or custom of refusing phone calls to prison inmates. He does not identify any official County policy. And though he asserts in his briefing that the County had a "culture" of refusing requests for phone calls, Opp. at 13, his conclusory statement is backed up only by a single lawsuit from over fifteen years ago. That is an insufficient basis for a Monell claim. See Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989) (requiring a "longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity"); Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996) (requiring "practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy"). Nor does it matter for purposes of municipal liability that multiple officers were allegedly involved in preventing him from making a phone call. See Jett, 491 U.S. at 737; Trevino, 99 F.3d at 918. Summary judgment on Floyd's Monell claim is therefore appropriate.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** summary judgment in favor of Defendants.

IT IS SO ORDERED.

Dated: October 10, 2024

CHARLES R. BREYER
United States District Judge

United States District Court
Northern District of California

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Mr. MICHAEL DEVIN FLOYD,

Plaintiff - Appellant,

v.

SANTA CLARA DEPARTMENT OF CORRECTION; et al.,

Defendants - Appellees.

No. 24-6866

D.C. No.
3:22-cv-00750-CRB
Northern District of California,
San Francisco

ORDER

Before: PAEZ, BEA, and FORREST, Circuit Judges.

The panel has unanimously voted to deny Appellant's petition for panel rehearing. The petition for panel rehearing (Dkt. 35) is therefore **DENIED**.

No. 24-6866

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL DEVIN FLOYD,

Plaintiff-Appellant,

v.

Santa Clara Department of Correction, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:22-cv-00750-CRB
Hon. Charles R. Breyer

APPELLANT'S OPENING BRIEF

Michael Devin Floyd
Pro Se
1214 Mount Hermon Rd
Scotts Valley, CA 95066
(713)562-7229
mdf3039@gmail.com

Attorney for Appellant

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
INTRODUCTION	5
JURISDICTIONAL STATEMENT	6
ISSUES PRESENTED	8
STATEMENT OF THE CASE	9
I. The Detainment	9
SUMMARY OF THE ARGUMENT	16
STANDARD OF REVIEW	17
ARGUMENT	18
I. Sufficient Evidence Of Video Tampering; Jury Should Decide Truth	18
II. Phone Call Was Not Provided Within 3 Hour Window Nor As Soon As Practicable	20
III. Reason For NonCompliance With Dressing Out Request	23
CONCLUSION	25
STATEMENT OF RELATED CASES	26
CERTIFICATE OF COMPLIANCE	27
CERTIFICATE OF SERVICE	28

TABLE OF AUTHORITIES

Cases **Page(s)**

Anderson v. Liberty Lobby. Inc.,
477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 17,19

Animal Legal Def. Fund v. U.S. Food & Drug Admin.,
836 F.3d 987, 988–89 (9th Cir. 2016) 17

Ariz. Dream Act Coal. v. Brewer,
818 F.3d 901, 908 (9th Cir. 2016) 17

Bell v. Wolfish,
441 U.S. 520, 535-37 and n.16, 99 S.Ct. 1861,
60 L.Ed.2d 447 (1979) 21

Besinga v. United States,
14 F.3d 1356, 1359 (9th Cir. 1994) 17

Chappell v. Mandeville,
706 F.3d 1052, 1059 (9th Cir. 2013) 21

Floyd v San Jose Police Department et al et al,
USDC CAND 3:22-cv-00751 21

Forsyth v. Barr,
19 F.3d 1527, 1537 (5th Cir.), cert denied,
513 U.S. 871, 115 S.Ct. 195, 130 L.Ed.2d 127 (1994) 19

Olsen v. Idaho State Bd. of Med.,
363 F.3d 916, 922 (9th Cir. 2004) 17

Pierce v. Cnty. of Orange,
526 F.3d 1190, 1205 (9th Cir. 2008) 21

Suzuki Motor Corp. v. Consumers Union, Inc.,
330 F.3d 1110, 1131 (9th Cir. 2003) 17

Statutes

California Penal Code
851.5 8,22,25

United States Code
28 U.S.C. § 1291 7
28 U.S.C. § 1331 6
42 U.S.C. § 1983 6

Constitutional Provisions

United States Constitution
5th Amendment 6
8th Amendment 6,21
14th Amendment 6,21,22

Rules

Federal Rules of Appellate Procedure
4(a)(1) 7
32(a)(5) 27
32(a)(6) 27
32(f) 27

Federal Rules of Civil Procedure
56(c) 17

US Court of Appeals Ninth Circuit
Rule 25-5(f)(1) 28
Rule 28-2.6 26
Rule 32-1 27

INTRODUCTION

Summary judgment should only be granted when observing undisputed evidenced facts. This appeal challenges the evidence used to grant the summary judgment for the Defense; that evidence shows two contrasting sets of facts. Should the evidence produced by the Defense be judged in favor of the Defense? Somehow the evidence shows two different stories; I'm implying tampering by the Defense for its defense. A jury should decide which party the evidence favors in this situation.

Also, was a phone call provided to the Plaintiff-Appellant at a practicable opportunity? The Plaintiff was forced to wait nearly a day for a phone call. Was that impractical wait a pretrial punishment? A jury should decide whether the Plaintiff waiting more than 18 hours is practicable or not.

JURISDICTIONAL STATEMENT

Title 42 of the United States Code Section 1983 allows claims alleging the "deprivation of any rights, privileges, or immunities secured by the Constitution and [federal laws]." The Plaintiff is suing for violations of federal constitutional or statutory right(s) by state or local officials. Those rights include, but are not limited to, the Fifth Amendment to the United States Constitution, Eighth Amendment to the United States Constitution, and Fourteenth Amendment to the United States Constitution, along with all the decided cases in regards to these Amendments. The California Northern District court had jurisdiction pursuant to 28 U.S.C. § 1331.

Floyd commenced this action on February 4, 2022, with the filing of the original complaint. (ER-130). The Court dismissed Floyd's complaint with leave to amend to clarify several issues. Floyd filed the operative Third Amended Complaint on March 19, 2023. (ER-112). The Defendants filed their Motion to Dismiss Floyd's Third Amended Complaint on April 3rd, 2023, which was fully briefed then later denied. (DistrictECF Nos. 80,82,84,94; ER-17–20). The Defendants answered the Third Amended Complaint. (DistrictECF Nos. 96,100; ER-20–21, ER-103–111). There are 28 Defendants. All Defendants were granted Summary Judgment after motioning and briefing. (DistrictECF No. 105–110,112,122,123; ER-22–26). The orders were delivered on October 10th, 2024. (DistrictECF No. 122,123; ER-26, ER-28–39).

The order is a final decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. As mentioned earlier, the judgment was delivered on October 10th, 2024. Floyd filed a timely notice of appeal on November 5th, 2024; this is within 30 days of the order, which is required under Fed. R. App. P. 4(a)(1) to be considered timely. (DistrictECF No. 126, ER-26).

ISSUES PRESENTED

I. Whether the district court erred in granting Summary Judgment to all the Defendants.

II. Whether the evidence produced by the Defense for its defense should be viewed in favor of the Defense, when two contrasting stories can be observed in the evidence.

III. Whether providing a phone call more than 18 hours after practicable is a violation of California Penal Code 851.5.

STATEMENT OF THE CASE

I. The Detainment

I (Plaintiff-Appellant) was detained around 9:30 PM on August 18th, 2021 by the San Jose Police Department (SJPD). Prior to my untimely detainment, I took a concoction that would empty my bowels. My stomach felt bloated for the past week. I was initially brought to the Santa Clara County Main Jail by SJPD. I was handcuffed to a chair in the lobby area and told that I would see a judge in the morning. I requested and was granted access to use the bathroom twice. On each occasion, I was unhandcuffed and escorted into a cell to relieve myself. The defecations were extremely loud. A psychiatrist came and spoke to me after the first completed bile movement. Each time I finished relieving myself, as soon as I finished, I was escorted back into the lobby area and re-handcuffed to a chair.
I was provided a piece of paper stating that the bail was 26,000 dollars. I was also instructed I would be seeing a judge in the morning. I was arrested twice in Clemson, South Carolina and the judge released me without bail the next morning. I figured it would be a similar scenario. But then the conversation started shifting. The officers/staff present at the Main Jail began stating they were taking the prisoners to Elmwood. They initially made it seem as if Elmwood was a mental facility. I asked one of the officers what Elmwood was. The guard informed me that Elmwood was a correctional facility.

Upon knowing that I was being taken to another facility, I thought I should call someone to let them know what happened. I also requested to use the toilet somewhere around this time. The guard told me to wait until I arrived at Elmwood. This was minutes before they attempted to un-handcuff me. I kept informing the officers that the bathroom request cannot wait until I arrived at Elmwood.

[The officer discussed above is Defendant Sergeant Vorpahl #10888.]

Then a couple officers walked towards me to remove me to Elmwood. An argument ensued: I did not want to leave the facility without using the restroom. After the officers continuously denied my request and insisted I wait until Elmwood, I decided to abide by their instructions, lest I resist and accidentally relieve myself during the struggle.

[The officers discussed above are Defendants Deputy Dung Tran, #10679; Deputy Robert Silos, #11291; Deputy Jeremy Hiles, #11188; Deputy Saul Agustin, #11131; Deputy Charles Stokes, III, #11240; Deputy Ryan Reyes, #10612.]

I arrived at Elmwood at approximately 3:55 AM on August 19, 2021. Upon reaching Elmwood, I was brought into the lobby area for incoming and outgoing prisoners. I requested to use the toilet and phone. A nearby officer told me to wait. The officer left. I fell asleep waiting for his return. When I awoke, there was a different officer present. I asked that officer to use the toilet and phone. He told me to wait. He left. I fell asleep waiting for his return. The officers left my vision of

sight for at least 30 minutes before I fell asleep both times. When I awoke again, I asked another guard to use the restroom. He informed me that there would be a shift change soon. Once the shift change occurs, the new guards will take you to the toilet. 30 minutes later, the new guards arrived. I asked one of the new guards to use the restroom. He tells me to wait. He left. He comes back 5 minutes later and takes me to the restroom. I then ask for a phone call. The officer tells me to wait and leaves.

When he comes back, he tells me it was now time to change into prison clothes and go inside a jail cell. I told the officer I will not change into prison clothes until I receive a phone call. The officers refused to provide me with a phone call, stating there would be an opportunity once I changed into prison clothes. Seeing as how responsive the officers were throughout the detainment, I was sure I was never going to get a phone call if I allowed them to put me in prison clothes and inside a cell. I refused the officers' pleas for me to dress into prison clothes. Several different officers and psychiatrists came and requested for me to follow commands. They treated me as if I was mentally ill. They asked me whether I finished high school. They asked me if I was in any special education classes in high school. They asked me if I was on any medications. No one made any attempt to provide me with a phone call.

[The officers discussed above are Defendants Sgt. Yvette Dias, # 10305; Deputy Gino Cofferati, #10991; Deputy Corey Evans, #10838.]

At two points during conversations I had with prison faculty, two of the staff members "attempted" to call different numbers I provided. One of the numbers was my brother's number. His number has been the same number for approximately 20 years and has never been disconnected. The prison worker (a female psychiatrist) left to attempt to call my brother's number. When she returned, she informed me the number was disconnected. This stalemate went on for hours: I refused to dress into prison clothes until they provided me with a phone call and they refused to provide the phone call.

[The officer discussed above is Defendant Consuelo (Renee) Garcia, LMFT.]

There were phones on the wall near the restroom where I relieved myself. I requested to use those phones. Someone informed me those phones were not working. At some point, after the fake phone call attempts, several officers restrained me and put shackles on my feet. They then left.

[The officers discussed above are Defendants Sgt. Bradley Reagan, # 10572; Deputy Cory Evans, #10838; Deputy Victor Cabrera, #11081; Deputy Kyle Quadros, #11216; Deputy Fabian Serrano-Alvarez, #11284; Deputy George Barajas, #11089; Deputy Jesus Patino, #11308; Deputy Joseph Cortez, #11307;

Deputy Isaiah Campos, #11214; Sgt. Yvette Dias, #10305; Sgt. Ryan Hernandez, #10604.]

More people came and talked to me. Officers came back again and attempted to move me; they put me in a helpless position, putting a boot on my lower back as I was sitting. I felt raped; I broke into tears after this. The officers took pictures and left. More people came and talked to me.

[The officers responsible for these acts were not captured in the video surveillance footage received through discovery. The Plaintiff-Appellant will state the videos have been altered.]

More people came and talked to me. I told them I would dress into prison clothes once I received a phone call. Whenever someone would talk to me concerning the issues I kept stating the amount of time since I was detained, the lack of a phone call, and the reason why I would not dress into prison clothes. I was visiting the area and it was more than 20 hours since I was detained; no one knew my whereabouts.

[The officer discussed above is Defendant Deputy Miguel Sanchez-Perez, #11050.]

Eventually, several officers came in SWAT team uniforms and forced me to stand up. By forced, the officer applied enough pressure on my arm and elbow to indicate he would break my arm if I was not cooperative. I decided to cooperate.

They put me in a wheelchair and rolled me out of the lobby and into a jail cell. They stripped me naked and exited the cell. This was late Thursday afternoon.

[The supervising officer discussed above is Defendant Lt. Ruth Cote, #10457. The officers discussed above are Deputy Cory Evans, #10838; Deputy Victor Cabrera, #11081; Deputy Kyle Quadros, #11216; Deputy Fabian Serrano-Alvarez, #11284; Deputy George Barajas, #11089; Deputy Jesus Patino, #11308; Deputy Joseph Cortez, #11307; Deputy Isaiah Campos, #11214.]

Once in the cell, when I asked to use the phone, the guard on duty told me I would have to wait 24 hours because of COVID.

[The officer discussed above is Defendant Correctional Deputy Daniel Dickson, #11036.]

Another prison officer came into my cell shortly after along with the guard on duty (Dickson). It was at this time the prison officer informed me of the Miranda rights. It was my first time hearing Miranda rights. The prison officer then questioned me about what happened and requested if I would like to make a complaint. I told him what happened and he then told me I could make a complaint. I told him I wanted to do this. The prison officer told me he would look into it.

[The officer discussed above is Defendant Deputy Sheriff Detective Matthew Newton, #2212.]

I was detained Wednesday night (around 9 PM). I arrived at the Elmwood facility Thursday morning (possibly around 3:30 AM). I was informed of the Miranda rights approximately 4 PM Thursday. I was allowed to make a phone call Friday morning at 8:30 AM, approximately 35 hours after my Wednesday night detainment.

SUMMARY OF THE ARGUMENT

Summary judgment was granted using evidence that alludes to two different series of events. As mentioned in the arguments of this document, I was informed I would be allowed to use the restroom after a 6:30 AM shift change. In at least three recorded conversations between myself and officers, I can be heard explaining to them why I refused to dress into prison clothes until a phone call was received. I can be heard venting my frustrations about lack of restroom access for hours upon arrival at the Elmwood facility. Somehow of course, the evidence produced by the Defense for its defense did not fully incriminate the Defendants.

The Plaintiff requested a phone call within a reasonable time after he was detained. That initial request was postponed until reaching the Elmwood facility. At Elmwood, the Plaintiff requested a phone call to handfuls of guards. Guards told the Plaintiff he would receive a call once he was housed. But the Plaintiff was housed approximately at 2PM on Thursday, 08/19/2021. He did not make a phone call until after 8 AM on Friday. This is not a practicable waiting duration for a phone call, violating California and constitutional law.

STANDARD OF REVIEW

An appellate court reviews de novo the granting of a summary judgment motion.

> Under our usual practice, "[w]e review the district court's grant or denial of motions for summary judgment de novo." *Ariz. Dream Act Coal. v. Brewer, 818 F.3d 901, 908 (9th Cir. 2016)* (citing *Besinga v. United States, 14 F.3d 1356, 1359 (9th Cir. 1994)*). Thus, on appellate review, we employ the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). See *Suzuki Motor Corp. v. Consumers Union, Inc., 330 F.3d 1110, 1131 (9th Cir. 2003)*. As required by that standard, we view the evidence in the light most favorable to the nonmoving party, determine whether there are any genuine issues of material fact, and decide whether the district court correctly applied the relevant substantive law. See *Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004)*.
>
> Animal Legal Def. Fund v. U.S. Food & Drug Admin., 836 F.3d 987, 988–89 (9th Cir. 2016)

ARGUMENT

I. SUFFICIENT EVIDENCE OF VIDEO TAMPERING; JURY SHOULD DECIDE TRUTH

Although declarations from the Appellees declare I used the bathroom twice within the Elmwood lobby, there are parts within the videos that profess the opposite. The videos of surveillance were produced by the Defendant-Appellees, who have every reason to desire to discredit the statements within my Complaint.

> If the evidence presented is such that a reasonable jury could return a verdict for the nonmoving party, a dispute about a material fact is considered to be "genuine." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

As mentioned in the original Complaint and operative Third Amended Complaint, I was not allowed to use the bathroom in the Elmwood lobby until after a shift change at 6:30 AM. Knowledge of the time of the shift change came through admission from a lackluster prison guard on duty, who decided to not uphold his responsibilities and force me to wait for another prison guard to begin his shift. I would otherwise have no way or reason to know if and when shift changes occur.

The second suggestion of video fabrication comes from the recorded conversation between myself and Defendant Deputy Sheriff Detective Matthew Newton, #2212. In that conversation, I vent my frustration at requesting multiple employees for restroom access and then waiting for a shift change in order to use the restroom. (Exhibits V3,P3 of Summary Judgment Opposition @02:51; ER-63–70)

The third suggestions of video fabrication come from recorded conversations between myself and the Defendants within the Elmwood lobby on August 19, 2021. I can be heard explaining to Defendants many times during the videos why I didn't follow orders and demanded a phone call before dressing out into prison clothes. (Exhibits V5,P5 of Summary Judgment Opposition; ER-89_17).

> Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment; the party defending against a motion for summary judgment cannot defeat the motion unless it provides specific facts that show the case presents a genuine issue of material fact, such that a jury might return a verdict in its favor. Anderson, 477 U.S. at 256–57. This means that the non-movant must "identify specific evidence in the record and articulate the 'precise manner' in which that evidence support[s] [its] claim [[s]." Forsyth v. Barr, 19 F.3d 1527, 1537 (5th Cir.), cert denied, 513 U.S. 871, 115 S.Ct. 195, 130 L.Ed.2d 127 (1994).

Using the declarations and video from Defendants, summary judgment was entered by finding it factual that I was allowed to use the restroom at Elmwood twice. But those declarations and videos vary drastically from my declaration and videos, testifying to the alternative event where I was only allowed to use the restroom after a 6:30 AM shift change. This is a factual dispute that a jury should decide: should all evidence provided by the Defense for its defense be viewed in favor of the defense? The Defense has every reason to not incriminate itself. If the evidence produced by the Defense shows contrasting events, those events should be viewed in favor of the Plaintiff.

And, if the evidence is considered in favor of the Plaintiff, would a 3 hour lapse in restroom access at the Elmwood facility amount to a constitutional violation? Under the circumstances, knowing the Plaintiff took a laxative substance, a jury could conclude the Plaintiff's civil rights were violated.

II. PHONE CALL WAS NOT PROVIDED WITHIN 3 HOUR WINDOW NOR AS SOON AS PRACTICABLE

The inaudible video within the Santa Clara Main Jail reflects the Plaintiff making requests to officers at the Main Jail. (ER-44_19). Plaintiff was booked at approximately 11:48 PM. Two requests were made at approximately 2:36 AM and 3:10 AM. At least one of the requests was within the 3 hour window. Although the video is inaudible, the conversation with Defendant Detective Newton shortly after

declares the Plaintiff requested to use the phone during those aforementioned requests at the Main Jail. (Exhibits V3,P3 of Summary Judgment Opposition @02:04; ER-63–70).

And even if the denial of a phone call at the Main Jail cannot be sufficiently evidenced due to the inaudible video, prison guards did not adhere to the Plaintiff's phone call requests at Elmwood as soon as practicable. The Defense admits staff informed the Plaintiff he could make a phone call once he was housed. (ER-104_11). Prison guards stated many times the Plaintiff could make a phone call once he was housed. But, the Plaintiff was not provided a phone call once housed, serving as punishment for not willfully complying with dress out requests.

> As pretrial detainees, they are entitled to the protections of the Due Process Clause in the Fourteenth Amendment as well as the specific substantive guarantees of the federal Constitution. *Bell v. Wolfish, 441 U.S. 520, 535-37 and n.16, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)*; *Pierce v. Cnty. of Orange, 526 F.3d 1190, 1205 (9th Cir. 2008)*. Fourteenth Amendment protects a broader class of interests than the Eighth Amendment, and proscribes any conduct that amounts to punishment, cruel or otherwise, of a person detained before trial. *Bell, 441 U.S. at 535-37, 99 S.Ct. 1861*; *Chappell v. Mandeville, 706 F.3d 1052, 1059 (9th Cir. 2013)*; *Pierce, 526 F.3d at 1205*.

Plaintiff was informed by Deputy Gino Cofferati at approximately 1:22 PM on August 19, 2021 that Plaintiff would not be allowed access to a telephone if he did not comply and willfully dress into prison clothes. (ER-83_9). Plaintiff was then denied immediate access to a phone call. This is pretrial detainee punishment of a constitutionally protected right, a violation of the 14th Amendment. Telephone access is a constitutional right protected by the 14th Amendment and state liberty protected by California Penal Code 851.5.

Although the video shows the Plaintiff was housed at approximately 2 PM on August 19 2021, the Plaintiff was not allowed to make a phone call when practicable. (ER-31_10). Shortly after, the Plaintiff also requested Defendants Dickson and Newton for phone calls, but was denied. Those Defendants entered the Plaintiff's cell around 3:30 PM, had a 10 minute conversation with the Plaintiff, and guaranteed the Plaintiff would be provided a phone call after hearing the Plaintiff's complaints. (Exhibits V3,P3 of Summary Judgment Opposition @05:42, 09:53, 11:08; ER-63–70). Plaintiff finally placed a call at 8:08 AM on August 20; this is more than **sixteen** hours after the conversation with Defendants Dickson and Newton, more than **eighteen** hours after the Plaintiff was housed. (ER-104_2).

There were several conversations I had with Defendants concerning phone call access. For violation of phone access, the order states I am suing Defendants Agustin, Cofferati, Cote, Dias, Dickson, Evans, Garcia, Hiles, Newton, Reagan,

Reyes, Sanchez-Perez, Silos, Stokes, Tran, and Vorpahl. (ER-31_20). I was provided those names by the Defense, who identified their officers from screenshots showing those officers talking to me. (ER-115_6).

Although all aforementioned Defendants were obliged to provide the Appellant with a phone call, the notable or in-depth conversations with Defendants Cofferati, Cote, Dickson, and Newton concerning the phone call access place these Defendants under weighted liability. Those conversations happened at Elmwood. Defendant Cofferati guaranteed the Plaintiff would be punished and prevented from phone access if the Plaintiff didn't dress out. Lieutenant Cote took a supervisory lead in the lobby area; although the Plaintiff informed Defendant Cote he needed a phone call, he was not provided with one. And Defendants Dickson and Newton visited the Plaintiff in his cell, were made aware of the desire to place a phone call, and did not adequately respond to this request.

III. Reason For NonCompliance With Dressing Out Request

The order granting summary judgment refers to several 'encouragements' from Defendants. Inside the Elmwood lobby, they explained to the Plaintiff that he would be provided a phone call after dressing into prison clothes. (ER-37_4). Those encouragements, however, come after several notably terrible performances from previous officers. After informing officers I ingested a laxative-like substance, officers demanded I leave the Main Jail before using the bathroom for a

third time. Spanning dozens of minutes, I pleaded with officers to allow me to use the restroom prior to departure. And unfortunately, much like the video provided of Elmwood, the video and audio of the Main Jail struggles are different from my recollection.

Once at Elmwood, officers were unresponsive to my bathroom requests, forcing me to wait more than 3 hours for restroom access while in the lobby. Multiple officers, hearing my request, yet ignoring me and proceeding to leave the lobby area. I fell asleep waiting for their return more than once. I was told by another prison guard to wait until a shift change, finally afforded restroom access roughly 30 minutes later. When I stepped out of the restroom, I was informed I needed to dress out. I was confident at that moment that if I allowed them to place me in a cell and in prison clothes, it would be extremely difficult to obtain a phone call. So, I decided to demand a phone call before dressing out.

In the conversation with Defendants Newton and Dickson, I mentioned the fear of being moved to different places with different personnel who abide by different rules. (Exhibits V3,P3 of Summary Judgment Opposition @06:31; ER-63–70). That fear became reality. Once housed in the cell, I was informed by Defendant Dickson I would not be allowed a phone call for 24 hours due to COVID policy.

CONCLUSION

Using evidence from the Defense, the District court found facts within the summary judgment motion in favor of the Defense. But that evidence, as I illustrated in this brief, describes two different events. My declaration of the events that occurred in Elmwood correlates with the alternative description of events. It also varies drastically with the Defense's declaration of events. The evidence should not be judged in favor of the Defense on summary judgment; a jury should decide whether there is sufficient proof the evidence favors whichever party.

The lack of phone call access was also not proper under the circumstances. While in the Elmwood lobby, Defendants Cote and Cofferati guaranteed the Plaintiff a phone call once he was housed. Defendants Dickson and Newton were made aware of the Plaintiff's desire for a phone call well after he was housed. The Plaintiff was housed around 2 PM; he did not receive a phone call until 8:30 AM. This is a direct violation of Penal Code 851.5.

Date: January 20, 2025

Michael Devin Floyd
Pro Se for Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Statement of Related Cases Pursuant to Circuit Rule 28-2.6

The undersigned attorney or self-represented party states the following:

[X] I am unaware of any related cases currently pending in this court (Ninth Circuit).

[X] I am aware of the following related case currently pending in US California Northern District Court: 3:22-cv-00751 Floyd v San Jose Police Department et al et al. The orders relating the cases are Docket numbers 59,65. (ER-15–16).

Signature Michael Floyd **Date** January 20, 2025

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 24-6866

I am the attorney or self-represented party.

This brief contains _____ words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief:

[X] complies with the word limit of Cir. R. 32-1 (less than 14,000).

Signature Michael Floyd **Date** January 20, 2025

CERTIFICATE OF SERVICE

In accordance with Ninth Circuit Rule 25-5(f)(1), the electronic filing of the brief and excerpt of records will be electronically served upon the appellee; no certificate of service is required.

TONY LoPRESTI, County Counsel (S.B. #289269)
WINIFRED BOTHA, Deputy County Counsel (S.B. #139357)
OFFICE OF THE COUNTY COUNSEL
70 West Hedding Street, East Wing, Ninth Floor
San Jose, California 95110-1770
Telephone: (408) 299-5900
Facsimile: (408) 292-7240
Email: winifred.botha@cco.sccgov.org

Attorneys for Defendant
COUNTY OF SANTA CLARA (including SANTA CLARA DEPARTMENT OF CORRECTION, COUNTY OF SANTA CLARA OFFICE OF THE SHERIFF, and ELMWOOD CORRECTIONAL FACILITY)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

(SAN FRANCISCO)

MICHAEL DEVIN FLOYD,

Plaintiff,

v.

SANTA CLARA DEPARTMENT OF CORRECTION, et al.,

Defendants.

No. 22-CV-00750 CRB

DEFENDANT COUNTY OF SANTA CLARA'S ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS (NON-PRISONER) UNDER U.S.C. § 1983

REQUEST FOR JURY TRIAL

Defendant County of Santa Clara (including Santa Clara Department of Correction, County of Santa Clara Office of the Sheriff, and Elmwood Correctional Facility) answers Plaintiff's Third Amended Complaint for Violation of Civil Rights and alleges as follows:

I.

JURISDICTION

1. As to the allegations on page 2, lines 1 to 10, these allegations amount to legal conclusions and/or arguments, are not facts that Defendant is obligated to admit or deny, and do not contain any charging allegations, but to the extent they are deemed factual, they are denied. Defendant admits that the Court has jurisdiction over this matter.

2. As to the allegations on page 2, lines 11 to 16, Defendant denies that Plaintiff's due

process rights were violated; admits that he requested a telephone call on multiple occasions when he was detained; admits that Plaintiff placed a call at 8:08 a.m. on August 20; objects to legal conclusions and/or arguments that are not facts that Defendant is obligated to admit or deny and do not contain any charging allegations, but to the extent they are deemed factual, they are denied; and lacks sufficient knowledge or information to admit or deny the remaining allegations currently, and on that basis denies the allegations.

3. As to the allegations on page 2, lines 17 to 21 to page 3, lines 1 to 8, these allegations amount to legal conclusions and/or arguments, are not facts Defendant is obligated to admit or deny, and do not contain any charging allegations, but to the extent they are deemed factual, they are denied.

4. As to the allegations on page 3, lines 9 to 16, Defendant admits that the officers explained to Plaintiff that once he was housed, he could make a phone call, and that he was restrained when he resisted or refused to follow officer directions. Defendant denies the remainder of the allegations.

II.

DIVISIONAL ASSIGNMENT

As to the allegations on page 3, lines 17 to 21 and page 4, lines 1 to 6, Defendant admits that the incident involved Plaintiff and staff members of the Main Jail and the Elmwood Correctional Facility that are County employees, that he was detained at two County facilities, and that he was released on August 20, 2021, from Elmwood in Milpitas. As to the remaining allegations, Defendant lacks sufficient knowledge to admit or deny the allegations, and on that basis denies the allegations and/or these allegations amount to legal conclusions and/or arguments that are not facts with charging allegations that Defendant is obligated to admit or deny, but to the extent they are deemed factual, they are denied.

III.

DEFENDANTS IDENTIFIED THROUGH DISCOVERY

1. Defendant admits that it identified the persons in the screenshot as Deputies Dung Tran, Robert Silos, Jeremy Hiles, Saul Augustin, Charles Stokes, and Ryan Reyes. Defendant denies

the remainder of the allegations.

2. Defendant admits that it identified the persons in the screenshot as Deputies Gino Cofferati and Corey Evans. Defendant denies the remainder of the allegations.

3. Defendant admits that it identified the persons in the screenshot as Sgt. Yvette Diaz and Deputy Gino Cofferati. Defendant denies the remainder of the allegations.

4. Defendant admits that it identified the staff member in the screenshot as Consuelo (Renne) Garcia. Defendant denies the remainder of the allegations.

5. Defendant admits that it identified the person in the screenshot as Sgt. Bradley Reagan. Defendant denies the remainder of the allegations.

6. Defendant admits that it identified the persons in the screenshot as Deputies Cory Evans, Victor Cabrera, Kyle Quadros, Fabian Serrano-Alvarez, George Barajas, Jesus Patino, Joseph Cortez, and Isaiah Campos, and Sergeants Yvette Dias, Ryan Hernandez, and Bradley Reagan. Defendant denies the remainder of the allegations.

7. Defendant admits that it identified the person in the screenshot as Deputy Miguel Sanchez-Perez. Defendant denies the remainder of the allegations.

8. Defendant admits that it identified the person in the screenshot as Lt. Ruth Cote. Defendant denies the remainder of the allegations.

9. Defendant admits that it identified the persons in the screenshot as Deputies Cory Evans, Victor Cabrera, Kyle Quadros, Fabian Serrano-Alvarez, George Barajas, Jesus Patino, Joseph Cortez, and Isaiah Campos. Defendant denies the remainder of the allegations.

10. Defendant admits that it could not identify the officer in the screenshot. Defendant denies the remaining allegations.

11. Defendant admits that it identified the person in the screenshot as Sgt. Vorpahl. Defendant denies the remainder of the allegations.

12. Defendant admits that it identified the person in the screenshot as Deputy Daniel Dickson. Defendant denies the remainder of the allegations.

13. Defendant does not have sufficient information to admit or deny these allegations as Plaintiff did not identify the interrogatory number with the screenshot, and on that ground, denies the

allegations.

IV.

STATEMENT OF CLAIM

A. What federal and constitutional rights were violated under 42 U.S.C. § 1983.

Defendant objects to the allegations to the extent they are legal conclusions and/or arguments and not facts that Defendant is obligated to admit or deny and do not contain any charging allegations, but to the extent they are deemed factual, they are denied. Defendant denies that Plaintiff's Fifth, Eight, Fourteenth or any other constitutional or other federal rights were violated.

B. Where did the events giving rise to your claim(s) occur?

Defendant admits that the events took place at the Main Jail and the Elmwood Correctional Facility.

C. What date and approximate time did the events giving rise to your claim(s) occur?

Defendant does not have sufficient knowledge or information to admit or deny the allegations and on that basis denies the allegations.

D. What are the facts underlying your claim(s)?

1. Page 8 lines 13 to 21 to page 9, lines 1 to 12: Defendant admits that Plaintiff was handcuffed to a chair in the Main Jail lobby; requested and was granted access to use the bathroom twice; was unhandcuffed and escorted to the cell to relieve himself; requested to use the toilet before being taken to Elmwood; and being told that he had to wait until he arrived at Elmwood. Defendant either denies or does not have sufficient knowledge or information to admit or deny the remainder of the allegations and on that basis denies the allegations.

2. Page 9, lines 13 to 17: Defendant admits that Plaintiff did not want to be transferred to Elmwood before he used the restroom and that the officers said he should wait until he arrives at Elmwood. Defendant either denies or does not have sufficient knowledge or information to admit or deny the remainder of the allegations and on that basis denies the allegations.

3. Page 9, lines 18 to 21 to page 10, lines 1 to 10: Defendant admits that Plaintiff was taken to Elmwood; placed in the processing lobby; asked to use the phone and toilet; and being told to undress before he could make a phone call. Defendant denies the remainder of the allegations.

4. Page 10, lines 11 to 21 to page 11, 1 to 3: Defendant admits that officers told Plaintiff that he could make a phone call after he dressed out, that Plaintiff denied dressing out before he could make a call, and that several staff members asked Plaintiff to follow commands. Defendant denies the remainder of the allegations.

5. Page 11, lines 4 to 11: Defendant admits that a staff member attempted to make a call for Plaintiff, but the number was disconnected; and that Plaintiff refused to dress out until he was provided with a phone call. Defendant denies the remainder of the allegations.

6. Page 11, lines 12 to 19: Defendant denies these allegations.

7. Page 11, lines 20 to 21 to page 12, lines 1 to 9: Defendant admits that officers restrained Plaintiff when he resisted being moved and that he said he would dress out once he made a call. Defendant denies the remainder of the allegations.

8. Page 12, lines 10 to 21 to page 12, lines 1 to 2: Defendant admits that the officers restrained Plaintiff when he resisted being moved, placed him in a wheelchair, and told him that he could make a call once he has dressed out. Defendant denies the remainder of the allegations.

9. Page 12, lines 3 to 13: Defendant admits that Plaintiff was interviewed, informed of his Miranda rights, and asked if he wanted to make a complaint. Defendant either denies or does not have sufficient knowledge or information to admit or deny the remainder of the allegations and on that basis denies the allegations.

E. How are the Santa Clara County of Correction, the County of Santa Clara, and the County of Santa Clara Office of the Sheriff liable?

Defendant denies that it is liable under a *Monell* theory; that Plaintiff was deprived of his Fifth, Eighth, and Fourteenth Amendment rights; that he suffered cruel and unusual punishment; that the County has a policy that is deliberately indifferent to Plaintiff's constitutional rights; that the County does not enforce policies that would have avoided the alleged incident; that the County has a policy that leads to indifference to Plaintiff's constitutional rights; that a policy was a moving force behind the alleged constitutional violations; that a policy or lack of a policy amounted to deliberate indifference, and that training is improper. The remaining allegations amount to legal conclusions and/or arguments, are not facts Defendant is obligated to admit or deny, and do not contain any

charging allegations, but to the extent they are deemed factual, they are denied.

F. How are the individual employees liable for their actions?

Defendant denies the allegations and denies that its employees are liable for the alleged actions.

V.

STATEMENT OF CLAIMS (CALIFORNIA LAWS)

Defendant objects to the allegations that are legal conclusions and/or arguments and not facts that Defendant is obligated to admit or deny and do not contain any charging allegations, but to the extent they are deemed factual, they are denied. Defendant denies the remainder of the allegations and denies that its employees are liable for any of their alleged actions.

VI.

INJURIES

Defendant denies these allegations and denies that Plaintiff sustained any damages or injuries.

VII.

RELIEF

Defendant denies that Plaintiff is entitled to any relief.

VIII.

TRIAL BY JURY

Defendant requests a jury trial.

IX.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

Defendant alleges that the Third Amended Complaint does not state facts sufficient to constitute a claim upon which relief can be granted.

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SECOND AFFIRMATIVE DEFENSE

(Statute of Limitations)

Defendant alleges that the Third Amended Complaint is barred by the applicable statutes of limitations.

THIRD AFFIRMATIVE DEFENSE

(Frivolous, Vexatious)

Defendant alleges that the Third Amended Complaint is frivolous and vexatious, and not brought with reasonable cause and in a good-faith belief that there is a justifiable controversy under the facts and law that warranted the filing of this lawsuit.

FOURTH AFFIRMATIVE DEFENSE

(Compliance with State and Federal Law)

Defendant alleges that the actions taken by it or its employees, comported with all state and federal laws.

FIFTH AFFIRMATIVE DEFENSE

(No Established Constitutional Rights)

Defendant alleges that at the time of the events complained of, there was no clearly established constitutional rights of which Defendant and its employees knew, or should have known, which required Defendant or its employees to act differently. Defendant thus alleges that it and its employees are immune from liability.

SIXTH AFFIRMATIVE DEFENSE

(No Violation of Constitutional Rights)

Defendant denies that it or its employees deprived Plaintiff of any rights, privileges, or immunities guaranteed by the laws or Constitution of the United States or the laws or Constitution of the State of California.

SEVENTH AFFIRMATIVE DEFENSE

(Qualified Immunity)

Defendant alleges that its employees are entitled to qualified immunity as to Plaintiff's federal constitutional claims because the law was not clearly established regarding the alleged

conduct at the time thereof.

EIGHTH AFFIRMATIVE DEFENSE

(No Policy, Custom, or Practice)

Defendant alleges that it does not have a policy, custom, or practice that violated Plaintiff's constitutional rights.

NINTH AFFIRMATIVE DEFENSE

(Actual Cause)

Defendant alleges that the conduct complained of did not actually cause the alleged violations of Plaintiff's constitutional rights.

TENTH AFFIRMATIVE DEFENSE

(Authorized/Justified Use of Force)

Defendant alleges that if any force was used to restrain or detain Plaintiff, such force was authorized and privileged, and Plaintiff is barred from any recovery for any alleged claimed injury or damage.

ELEVENTH AFFIRMATIVE DEFENSE

(Privileged/Justified Conduct)

Defendant alleges that its conduct and the conduct of its employees was privileged and/or justified under applicable law.

TWELTH AFFIRMATIVE DEFENSE

(Good Faith)

Defendant alleges that the Third Amended Complaint does not state a claim upon which relief can be granted because Defendant and its employees acted within the scope of their discretion, with due care and in good faith fulfillment of their responsibilities pursuant to applicable statutes, rules, regulations, and practices within the bounds of reason under all the circumstances known to them, and with a good faith belief that their actions comported with all applicable federal and state laws.

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THIRTEENTH AFFIRMATIVE DEFENSE

(Necessity)

Defendant alleges that at the time of the alleged events, the actions undertaken by Defendant and its employees were necessary to prevent harm to other third parties, or the public interest, which resulted from Plaintiff's conduct.

FOURTEENTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

Defendant alleges that Plaintiff has failed to mitigate the damages alleged in the Third Amended Complaint and is thereby precluded from recovering those damages that reasonable could have been avoided by the exercise of due care on Plaintiff's part.

X.

RELIEF

Defendant requests that Plaintiff be denied any relief and that Defendant be awarded its costs of suit and such other and further relief as the Court may deem just and proper.

XI.

DEMAND FOR JURY TRIAL

Defendant demands a trial by a jury.

Dated: July 26, 2023

Respectfully submitted,

TONY LoPRESTI
County Counsel

By: */s/ Winifred Botha*
WINIFRED BOTHA
Deputy County Counsel

Attorneys for Defendant
COUNTY OF SANTA CLARA (including SANTA CLARA DEPARTMENT OF CORRECTION, COUNTY OF SANTA CLARA OFFICE OF THE SHERIFF, and ELMWOOD CORRECTIONAL FACILITY)

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