No. 14-

IN THE

# Supreme Court of the United States

MICHAEL B. KINGSLEY,
*Petitioner,*

v.

STAN HENDRICKSON AND FRITZ DEGNER,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All the parties to the proceeding are listed in the caption. The petitioner is not a corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Kingsley respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 744 F.3d 443 and is reproduced in the appendix to this petition at Pet. App. 1a-48a. The judgment of the Western District of Wisconsin is unpublished and is reproduced at Pet. App. 72a.

## JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on March 3, 2014, Pet. App. 49a, and denied Mr. Kingsley's petition for rehearing en banc on April 18, 2014, Pet. App. 50a-51a. On July 2, 2014, this Court granted an application (No. 14A11) to extend the time to file a petition for a writ of certiorari until August 18, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor

excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

The statutory provision involved is 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

## STATEMENT OF THE CASE

The decision of the Seventh Circuit in this case represents one position of several in a split among the federal courts of appeals on the question of whether an excessive force claim pursuant to 42 U.S.C. § 1983 brought by a pretrial detainee requires a showing of the state actor's subjective intent in addition to the objective unreasonableness of the force. Five circuit courts have held that the plaintiff need not prove the subjective intent of the state actor to cause harm at the time the force was used. The Seventh Circuit, along with five other circuits, however, has held that the plaintiff must shoulder the additional burden of

proving that the state actor used force against the pretrial detainee with the intent to violate his constitutional rights.

As a result of these differing standards, the success of a pretrial detainee's excessive force claim depends, in part, on where the claim is brought.

## I. BACKGROUND OF THE CASE

### A. Factual Background

Petitioner Michael Kingsley was arrested and booked as a pretrial detainee into Monroe County Jail in Sparta, Wisconsin on April 21, 2010. Pet. App. 2a, 54a. On May 20-21, 2010, jail officers ordered Mr. Kingsley to remove a piece of paper that was affixed to the light in his cell. Mr. Kingsley told the officers that he had not put the paper there, and refused to remove it. Pet. App. 54a-55a. Consequently, the officers decided to transfer him to a "receiving" cell so that jail staff could remove the paper. Pet. App. 56a.

Defendants, Sergeant Stan Hendrickson and Deputy Fritz Degner, and others participated in transferring Mr. Kingsley to the receiving cell. *Id.* To do so, the officers first entered Mr. Kingsley's original cell, handcuffed him behind his back while he was lying face down on his bunk, and carried him from the original cell to the receiving cell. Pet. App. 56a-57a. Portions of the transfer were captured on video. Pet. App. 57a. During the transfer, Mr. Kingsley did not walk of his own volition but did not threaten or actively resist the officers—rather, he groaned and complained that he could not walk because the officers had banged his leg against the bunk in picking him up. Pet. App. 4a.

In the receiving cell, Mr. Kingsley was placed face down onto a cement bunk with his hands handcuffed

behind his back. Pet. App. 57a. Five corrections officers, blocking the view of the cell's only camera, surrounded Mr. Kingsley. Pet. App. 57a-58a. The officers tried to remove the handcuffs, but had difficulty doing so. Pet. App. 58a. According to the officers, Mr. Kingsley was tensing his arms and resisting removal of the handcuffs—an allegation Mr. Kingsley denies. *Id.*; Pet. App. 5a. Sergeant Hendrickson directed Deputy Degner to "tase" Mr. Kingsley, ostensibly to permit the officers to remove the handcuffs. Pet. App. 5a n.4. Deputy Degner "tased" Mr. Kingsley on his upper back for five seconds, resulting in extreme pain. Pet. App. 5a. Afterwards the officers left him alone in the cell while still handcuffed. Pet. App. 58a. Other officers were later able to remove Mr. Kingsley's handcuffs without incident. Pet. App. 59a.

### B. Proceedings Below

Mr. Kingsley filed suit pro se pursuant to 42 U.S.C. § 1983 alleging Sergeant Hendrickson and Deputy Degner used excessive force during the incident, violating his right to be free from punishment as a pretrial detainee. Pet. App. 6a. The officers filed a motion for summary judgment, which the district court denied after viewing a video of the events in the receiving cell. *Id.* Specifically, the court ruled there was a genuine issue of material fact whether the officers' use of force was disproportionate to the situation. Pet. App. 63a-64a. Following the denial of the officers' motion for summary judgment, the district court appointed pro bono counsel to represent Mr. Kingsley at trial. Pet. App. 7a.

At the trial, both parties presented experts on the use of force. Mr. Kingsley presented the testimony of an expert witness, Brian Landers, a veteran police officer, academy instructor, and a member of the Wisconsin Department of Justice Tactical Advisory

Committee on Defense and Arrest Tactics. Pet. App. 74a-77a. Mr. Landers opined that the use of the taser under the totality of the circumstances did not comport with professional standards and was unreasonable. Pet. App. 78a-82a.

At the jury instruction conference, Mr. Kingsley objected to the district court's proposed instructions, which required a showing of subjective intent, and argued that the standard for excessive force claims brought by pretrial detainees should track the Fourth Amendment. Pet. App. 84a-87a. In other words, Mr. Kingsley argued, the correct standard requires only a showing that the force used was unreasonable. *Id.* Based on applicable Seventh Circuit precedent and the Seventh Circuit Pattern Jury Instructions, Mr. Kingsley argued that there was no need to instruct the jury on the defendants' subjective intent, because the jury may determine unreasonableness from objective factors. *Id.* Over Mr. Kingsley's objection, the district court deviated from the pattern jury instructions and required Mr. Kingsley to show that Appellees applied force "recklessly," "recklessly disregarded plaintiff's safety," and acted with "reckless disregard of plaintiff's rights." Pet. App. 8a-9a. With these phrases placed in context, the jury instructions are as follows:

> Excessive force means force *applied recklessly* that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;

(2) Defendants' use of force was unreasonable in light of the facts and circumstances of the time;

(3) Defendants knew that using force presented a risk of harm to plaintiff, but they *recklessly disregarded plaintiff's safety* by failing to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with *reckless disregard of plaintiff's rights*, you may consider factors such as:

• The need to use force;

• The relationship between the need to use force and the amount of force used;

• The extent of plaintiff's injury;

• Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and

• Any efforts made by defendants to limit the amount of force used.

See Pet. App. 8a-9a (emphases added).

Following deliberations, the jury found for the defendants. The district court entered judgment, and Mr. Kingsley timely appealed.

On appeal to the Seventh Circuit, Mr. Kingsley again argued that under prevailing case law, the applicable standard for excessive force claims brought by a pretrial detainee is whether the conduct is objectively unreasonable. Appellant's Br. 11-16. Mr. Kingsley further argued that to the extent a showing of intent is required, that requirement is met where the conduct is deliberate, as opposed to merely negligent. Appellant's Br. 13. Thus, Mr. Kingsley argued the jury instructions below improperly required him to show subjective elements derived from the Eighth Amendment to prevail on his excessive force claim. Appellant's Br. 18-21.

On March 3, 2014, a divided three-judge panel of the Seventh Circuit affirmed. The majority applied the Due Process Clause of the Fourteenth Amendment in evaluating Mr. Kingsley's excessive force claim because it found a pretrial detainee neither an arrestee (protected from unreasonable seizure by the Fourth Amendment) nor a sentenced prisoner (protected from cruel and unusual punishment by the Eighth Amendment). Rather, a pretrial detainee is entitled to an intermediate level of protection. Pet. App. 11a. Although the panel highlighted that the controlling case in the circuit held that "the propriety of using force on a person in custody pending trial will track the Fourth Amendment: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them," the panel nonetheless concluded that the test is not wholly objective. Pet. App. 15a. (quoting *Titran* v. *Ackman*, 893 F.2d 145, 147 (7th Cir. 1990)). The panel asserted that the circuit's prior cases "make

clear that, although we employ the objective criteria of the Fourth Amendment as a touchstone by which to measure the gravity of the defendant officer's conduct, we also recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind in performing the activity under scrutiny." Pet. App. 17a-18a.

Judge Hamilton dissented, highlighting the confusion among the pretrial detainee excessive force cases both within the Seventh Circuit and across the country. He criticized the panel majority for introducing a new, additional element into the claim and effectively allowing officers an escape hatch, even when they use objectively unreasonable force. Pet. App. 27a. (asking "[w]hen does the Constitution allow law enforcement and correctional officers to use *objectively unreasonable* force against a person not convicted of a crime?"(emphasis added)).

## REASONS FOR GRANTING THE PETITION

### I. A DEEP SPLIT DIVIDES THE CIRCUITS ON THE APPLICABLE STANDARD GOVERNING PRETRIAL DETAINEES' EXCESSIVE FORCE CLAIMS.

The courts of appeals are fractured on the elements of an excessive force claim brought by a pretrial detainee under 42 U.S.C. § 1983. Specifically, the courts do not agree as to whether the governing test is purely objective or whether it requires the plaintiff to prove some sort of subjective intent on the part of the offending officers.

Five circuits—the Fourth, Eighth, Ninth, Tenth, and D.C. Circuits—require proof only of objectively unreasonable force; they do not require the pretrial detainee to prove the state actor's subjective intent at

the time of the incident. See *Justice* v. *Dennis*, 793 F.2d 573, 576-78 (4th Cir. 1986) ("The fundamental inquiry in all excessive force cases, regardless of the protected interest's fourth, fifth or eighth amendment origins, is whether the degree of force was necessary to protect a legitimate state interest, and therefore permissible under all the circumstances. . . . Proof of bad motive, evil intent, or 'ulterior purpose' is not required."); *Andrews* v. *Neer*, 253 F.3d 1052, 1060 (8th Cir. 2001) ("The evaluation of excessive-force claims brought by pre-trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an objective reasonableness standard." (citing *Johnson-El* v. *Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989))); *Gibson* v. *Cnty. of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (holding that an objectively reasonable test applies because "we have determined that the Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention." (quoting *Pierce* v. *Multnomah Cnty.*, 76 F.3d 1032, 1043 (9th Cir. 1996))); *Estate of Booker* v. *Gomez*, 745 F.3d 405, 426-27 (10th Cir. 2014) (holding that objective factors demonstrated "excessive zeal behind the use of force" on the plaintiff, the court stated it has never "disposed of a due process excessive force claim solely on the 'motive' factor when disproportionate force and serious injury were present."); *Norris* v. *District of Columbia*, 737 F.2d 1148, 1156 (D.C. Cir. 1984) ("If the degree of force is unreasonable in response to the justification [for the force], the application of the excessive force is unconstitutional.").

Six circuits—the Second, Third, Fifth, Sixth, Seventh and Eleventh Circuits—require a pretrial-detainee plaintiff in an excessive force case to show

the defendant's subjective intent to violate the detainee's constitutional rights. And even those that fall on this side of the split cannot agree on what level of subjective intent must be proven; the spectrum ranges from reckless to wanton to malicious to sadistic intent. See *United States* v. *Walsh*, 194 F.3d 37, 49-50 (2d Cir. 1999) ("*Hudson* highlights two conditions, one subjective and the other objective, that must be met in order to establish a constitutional claim in the prison context. . . . [T]he subjective requirement is satisfied if the defendant has a 'sufficiently culpable state of mind,' [*Hudson* v. *McMillian*] 503 U.S. [1,] 8 . . . 'shown by actions characterized by wantonness' . . . ." (quoting *Blyden* v. *Mancusi*, 186 F.3d 252, 262 (2d Cir. 1999))); *Fuentes* v. *Wagner*, 206 F.3d 335, 346 (3d Cir. 2000) ("Fuentes was not entitled to an 'objective reasonableness' instruction."); *Bender* v. *Brumley*, 1 F.3d 271, 278 (5th Cir. 1993) ("In short, when determining what standard applies to excessive force claims brought by pre-trial detainees, the proper due process inquiry . . . . probes the subjective intent of the detaining officers."); *Griffin* v. *Hardrick*, 604 F.3d 949, 954 (6th Cir. 2010) ("[T]he court must determine whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (quoting *Watkins* v. *Evans*, No. 95-4162, 1996 WL 499094, at *2 (6th Cir. Sept. 3, 1996))); *Bozeman* v. *Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) ("Under [the excessive force] standard, 'whether or not a prison guard's application of force is actionable turns on whether that force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm.'" (quoting *Brown* v. *Smith*, 813 F.2d 1187, 1188 (11th Cir. 1987))).

Had the incident involving Mr. Kingsley occurred in the Fourth, Eighth, Ninth, Tenth, or D.C. Circuits, the jury would have been instructed on the objective standard contained within Mr. Kingsley's proposed instructions. Those circuits do not condition the success of the plaintiff's claim on whether he can prove the subjective intent of the state actor at the time of the incident. The Seventh Circuit, along with five other circuits, however, significantly increases the burden on the plaintiff by requiring proof of an additional subjective element. The excessive force claims of similarly situated defendants should not hinge on the jurisdiction in which claims are brought. Review is warranted to resolve this split and define the contours of a pretrial detainee's Constitutional protection from excessive force by state actors.

## II. THE COURTS OF APPEALS ARE SPLIT ON WHETHER THE STANDARD FOR EXCESSIVE FORCE CLAIMS BROUGHT BY PRETRIAL DETAINEES SHOULD TRACK THE EIGHTH AMENDMENT OR THE FOURTH AMENDMENT.

The split identified above stems from the fact that the circuits likewise cannot agree as to which constitutional right underlies a pretrial detainee's excessive force claim, a question this Court in *Graham* v. *Connor*, 490 U.S. 386 (1989), left open. Specifically, although this Court has held that due process of law requires that a pretrial detainee be free from punishment, *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979), it has "not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins," *Graham*, 490 U.S. at 395 n.10. As this Court recognized, the very starting

point of the "analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Id.* at 394. However, circuit courts have begun the analysis from different places, and have produced an amalgam of varying standards based on the protections guaranteed by the Fourth and/or Eighth Amendments.

For example, the Ninth and Eighth Circuits apply a Fourth Amendment-style standard based on due process. *Gibson*, 290 F.3d at 1197 ("[T]he Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention." (quoting *Pierce*, 76 F.3d at 1043)); *Andrews*, 253 F.3d at 1060 ("The evaluation of excessive-force claims brought by pre-trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an objective reasonableness standard." (citing *Johnseon-El*, 878 F.2d at 1048-49)).

The Third, Sixth, and Eleventh Circuits apply a standard akin to the Eighth Amendment. *Fuentes*, 206 F.3d at 347 ("[W]e hold that the Eighth Amendment cruel and unusual punishments standards. . . apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance." (emphasis omitted)); *Griffin*, 604 F.3d at 953 (applying the Eighth Amendment standard, the court held that "[t]he law is unsettled as to whether the analysis for a Fourteenth Amendment excessive-force claim and an Eighth Amendment excessive-force claim is the same."); *Bozeman*, 422 F.3d at 1271 (holding that technically the constitutional standard is the Fourteenth Amendment rather than the Eighth Amendment, "[b]ut it makes no difference whether [plaintiff] was a pretrial detainee or a convicted prisoner because 'the applicable standard is the same.'" (quoting

*Cottrell* v. *Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996))).

Perhaps the most confusing standards are those adopted by the Second, Fifth, and Seventh Circuits, where a combination of the Eighth and Fourth Amendments are applied. *Walsh*, 194 F.3d at 49 (holding the Fourteenth Amendment applies, but the standard requires two conditions, "one subjective and the other objective."); *Bender*, 1 F.3d at 278 (holding the Fourteenth Amendment applies, but the standard "probes the subjective intent of the detaining officers."); *Wilson* v. *Williams*, 83 F.3d 870, 875 (7th Cir. 1996) ("In this circuit, we have recognized the insufficiency of the Eighth Amendment's protections for pretrial detainees and have held that to prevail on a Fourteenth Amendment claim, a plaintiff must prove that the defendant(s) 'acted deliberately or with callous indifference, evidenced by an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights.'" (quoting *Anderson* v. *Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988))).

This Court should resolve this threshold inquiry in order to ensure uniformity among the circuits on the question of the elements of excessive force claims by pretrial detainees.

## III. THE SEVENTH CIRCUIT'S APPROACH FALLS ON THE WRONG SIDE OF THE SPLIT AND THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE QUESTION.

The Seventh Circuit wrongly tethers its Fourteenth Amendment excessive force standard to the Eighth Amendment—and asks too much of pretrial detainee plaintiffs by forcing them to establish a subjective intent in addition to objectively unreasonable force. First, unreasonable force is de facto evidence of pun-

ishment for purposes of the Due Process protections of the Fourteenth Amendment. Therefore, the Seventh Circuit's approach runs afoul of this Court's precedent by requiring a plaintiff to prove more. *Bell*, 441 U.S. at 535; see also Pet. App. 27a (Hamilton, J., dissenting) (explaining that, "[i]f a pretrial detainee can prove that a correctional officer used objectively unreasonable force against him, it should be self-evident that the detainee was 'punished' without due process of law."). And the Seventh Circuit's incorporation of Eighth Amendment subjective language into the standard does not adequately vindicate a pretrial detainee's rights. Indeed, the Court generally disfavors requiring a showing of subjective intent to harm. Cf. *United States* v. *Feola*, 420 U.S. 671, 684 (1975) (holding the government need not prove the specific intent of the accused to harm a federal agent because "[a] contrary conclusion would give insufficient protection to the agent."). In contrast, application of the Fourth Amendment objective standard to pretrial detainees would vindicate these rights, equalize the treatment between those who are able to make bail and those who cannot (and thus are often housed with convicted prisoners), see, *e.g.*, *Shreve* v. *Jessamine Cnty. Fiscal Ct.*, 453 F.3d 681 (6th Cir. 2006), and clearly demarcate the different rights accorded to convicted prisoners and those that have not yet been found guilty beyond a reasonable doubt.

Mr. Kingsley's case is an ideal vehicle for this Court to consider these questions. The officers applied a taser to Mr. Kingsley when he presented no objectively reasonable threat. Had the officers' subjective intent not been placed in issue by the trial court's jury instruction, the jury likely would have found that the officers violated Mr. Kingsley's constitutional rights through their actions. The issue was cleanly pre-

served before trial, after trial and on appeal. The case is not encumbered by procedural anomalies or alternate grounds of decision. And the Seventh Circuit explicitly recognized the split of authority; Judge Hamilton's dissent ably laid bare the difficulties with the panel majority's approach. And because nearly every circuit has weighed in on the question, it is ripe for this Court's review.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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# Petition Appendix

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 12-3639

MICHAEL B. KINGSLEY,

*Plaintiff-Appellant*,

*v.*

STAN HENDRICKSON, ET AL.,

*Defendants-Appellees.*

Appeal from the United States District Court for the
Western District of Wisconsin.
No. 3:10-cv-00832-bbc — **Barbara B. Crabb**, *Judge.*

ARGUED APRIL 23, 2013 — DECIDED MARCH 3, 2014

Before RIPPLE and HAMILTON, *Circuit Judges,* and STADTMUELLER, *District Judge*.[*]

RIPPLE, *Circuit Judge.* Michael Kingsley brought this action under 42 U.S.C. § 1983 against six staff members of a Wisconsin county jail, where he had been held as a pretrial detainee in 2010. Mr. Kingsley alleged that during his forcible

[*] The Honorable J.P. Stadtmueller, United States District Court for the Eastern District of Wisconsin, sitting by designation.

transfer to a new cell, which included the application of a taser, the defendants had violated various of his constitutional and statutory rights. The district court granted partial summary judgment for the defendants; a single claim of excessive force against Sgt. Stan Hendrickson and Deputy Fritz Degner proceeded to trial. The jury returned a verdict for the defendants.

Mr. Kingsley now appeals the judgment entered on the verdict, contending that the jury received erroneous and confusing instructions. Specifically, Mr. Kingsley contends that the district court conflated the standards for excessive force under the Eighth and Fourteenth Amendments and, as a result, wrongly instructed the jury to consider the subjective intent of the defendants. Mr. Kingsley also contends that the instructions misstated the harm that he must prove to obtain relief. We hold that the instructions were not an erroneous or confusing statement of the law of this circuit and that Mr. Kingsley affirmatively acquiesced to the instruction dealing with harm. Accordingly, we affirm the judgment of the district court.

## I

## BACKGROUND

### A.

In April 2010, Mr. Kingsley was booked into the Monroe County Jail in Sparta, Wisconsin, as a pretrial detainee. On May 1, he was transferred to the facility's south cell block.

On May 20, 2010, a deputy performing a cell check noticed a sheet of yellow legal paper covering the light above Mr. Kingsley's bed and ordered him to take it down. Mr. Kingsley refused the order and answered that he had not put the paper there.[1] The deputy moved on. When he returned for a further cell check later in the evening, he noticed that the paper had not been removed and again ordered Mr. Kingsley to take it down. After another refusal and a warning of possible disciplinary action, the deputy issued him a minor violation and reported it to Sgt. Hendrickson. Sgt. Hendrickson informed Deputy Karl Blanton that Mr. Kingsley would have to remove the paper in the morning.

When Deputy Blanton made his morning rounds, he ordered Mr. Kingsley to take down the paper. Mr. Kingsley did not respond and did not remove the paper. A few minutes later, Sgt. Hendrickson came to deliver Mr. Kingsley's medication, and he again ordered Mr. Kingsley to take down the paper. After several requests, Mr. Kingsley again refused, stating once again that he had not put the paper there. Sgt. Hendrickson next called the jail administrator, Lieutenant Robert Conroy.

Lt. Conroy then went to Mr. Kingsley's cell. After Mr. Kingsley refused his order, Lt. Conroy said jail staff would take the paper down and would have to transfer Mr. Kingsley to another cell in the interim. He also threatened discipline.

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[1] Apparently, covering the lights with paper is a common practice by inmates in an effort to dim some of the brightness of the jail's lights.

A few minutes later, Sgt. Hendrickson, Deputy Blanton, Lt. Conroy, Deputy Fritz Degner and Deputy Sheriff Shisler arrived at the cell. They ordered Mr. Kingsley to stand up and to back up to the door with his hands behind his back. Mr. Kingsley asked why and protested that he had done nothing wrong. Deputy Degner told Mr. Kingsley to follow the order or he would be tasered. He was again ordered to get up, but he continued to lie facedown on his bunk. He did, however, put his hands behind his back.

At this point, Sgt. Hendrickson and Deputy Blanton entered the cell, and, with some difficulty (which they attribute to Mr. Kingsley "tensing" his arms and holding them apart),[2] they were able to handcuff him. Mr. Kingsley would not follow an order to stand, so they pulled him to his feet. Mr. Kingsley then fell to his knees; he claimed that, in pulling him off of the bed, the officers had smacked his feet on the bedframe, causing him pain. He claimed that the pain was so severe that he could not stand or walk. The officer therefore carried him out of the cell by holding him under his arms and placed him facedown in the hallway. When he would not answer questions about his foot injury, he was taken in the same manner to a receiving cell and placed facedown on the bunk.

Once he was on the receiving-cell bunk, the officers attempted to remove the handcuffs. The evidence at trial was conflicting on the later course of events.[3] The defendants say

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[2] R.27 at 7.

[3] The record contains several videos, including one of the transfer and one (continued...)

that Mr. Kingsley resisted their effort, pulling the handcuffs apart and trying to get up. Mr. Kingsley denied this resistance at trial. At some point, Sgt. Hendrickson put his knee in Mr. Kingsley's back, and Mr. Kingsley told him, in colorful language, to get off him. Mr. Kingsley claims that the defendants then smashed his head into the concrete bunk, an allegation the defendants deny.

After some further verbal exchange,[4] Deputy Degner applied a taser for five seconds on Mr. Kingsley's back. Lt. Conroy then ordered all of the staff to clear the cell. Fifteen minutes later, the staff returned and were able to remove the handcuffs. Mr. Kingsley was placed on a medical watch, but refused the attention of a nurse.[5]

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[3] (...continued)
of the incident in the receiving cell. However, the district court found them of limited value on the disputed points because the camera angle is such that Mr. Kingsley is nearly entirely blocked by the defendants.

[4] Mr. Kingsley claims Sgt. Hendrickson ordered Deputy Degner to "[t]ase his ass." R.157 at 52. The defendants deny that these words were used but agree that Sgt. Hendrickson told Deputy Degner to apply the taser in contact stun mode to Mr. Kingsley.

[5] Following the incident, Mr. Kingsley was given a major violation report showing four rule violations. The events surrounding the issuance of that report and the consequences were a part of Mr. Kingsley's procedural due process claim, which is not at issue in this appeal.

**B.**

In December 2010, Mr. Kingsley, proceeding pro se, brought this action in the district court. His principal theory was that the defendants had violated his due process rights under the Fourteenth Amendment.[6] His initial complaint presented several claims against seven Monroe County defendants, including an excessive force claim relating only to Sgt. Hendrickson and Deputy Degner.

The parties cross-moved for summary judgment. The district court granted partial judgment for the defendants on a procedural due process claim relating to Mr. Kingsley's discipline by jail staff. It concluded, however, that material issues of fact remained that precluded judgment on the excessive force claim based on the officers' conduct in the receiving cell. Specifically, the court identified "a dispute about whether defendants slammed plaintiff's head into the concrete bed and used a taser against him solely for the purpose of causing him harm."[7] Although the officers clearly had difficulty removing the handcuffs, Mr. Kingsley claims that it was because they had been applied too tightly and Sgt. Hendrickson's kneeling on his back had caused his body to tense; the officers claim that Mr. Kingsley was resisting. The court observed that, from the video, "it is not clear … whether

[6] He brought the federal claims under 42 U.S.C. § 1983. A state law claim for assault and battery initially was presented as well. That claim is not at issue in this appeal.

[7] R.69 at 12.

plaintiff was resisting or struggling. [He] does not appear to be moving his body around aggressively or very much at all."[8]

The court noted the case law that held that it was reasonable to use force against an inmate who refused to comply with orders but concluded that the issue in the case was "whether [the] defendants' response to plaintiff's obstinance was *reasonable under the circumstances* or whether it was excessive and was intended to cause [the] plaintiff harm."[9] The court also concluded that, because a jury could find that the defendants had acted with malice, qualified immunity was not available. Although the court, in its ruling, concluded that the relevant constitutional right was contained within the Fourteenth Amendment because of Mr. Kingsley's status as a pretrial detainee, the court applied Eighth Amendment excessive force standards in assessing the claim.

Following the grant of summary judgment, the parties stipulated to the dismissal with prejudice of all outstanding claims except the excessive force claim against Sgt. Hendrickson and Deputy Degner. Counsel was appointed for Mr. Kingsley and the case proceeded to trial. In pretrial proceedings, the district court proposed an instruction on excessive force to which both parties objected, and the court made various modifications. At the close of the evidence, the parties revisited the instruction and again objected to its content. Again, the district court made some modification and

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[8] *Id.* at 7.

[9] *Id.* at 14 (emphasis added).

added a clarifying instruction. The court finally settled on the following instruction:

> Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;
>
> (2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;
>
> (3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and
>
> (4) Defendants' conduct caused some harm to plaintiff.
>
> In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.
>
> Also, in deciding whether one or more defendants used unreasonable force and acted with reckless

> disregard of plaintiff's rights, you may consider such factors as:
>
> - The need to use force;
> - The relationship between the need to use force and the amount of force used;
> - The extent of plaintiff's injury;
> - Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
> - Any efforts made by defendants to limit the amount of force used.[10]

Mr. Kingsley's counsel objected to the inclusion of "harm" as an element of an excessive force claim. He contended that the jury might confuse the element of harm for some sort of lasting or significant injury. Counsel first requested a clarifying instruction that "pain is considered harm."[11] When the court began to offer a preferred alternative, "[A] person can be harmed even if he does not suffer a lasting injury or …," plaintiff's counsel interjected, "Or severe injury."[12] Following this exchange, the jury was instructed that "[a] person can be harmed even if he did not suffer a severe injury."[13]

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[10] R.146 at 3–4.

[11] R.156 at 79.

[12] *Id.* (internal quotation marks omitted).

[13] R.146 at 4.

The jury returned a verdict for the defendants, and the district court entered judgment dismissing the case. Mr. Kingsley timely appeals the judgment. He submits that the instruction misstated the law and confused the jury on the subjects of both the intent and harm necessary to establish an excessive force claim in the pretrial detainee context.

## II

## DISCUSSION

On appeal, Mr. Kingsley raises two challenges to the jury instructions. First, he claims that the instruction wrongfully conflated the standard for excessive force claims under the Eighth and Fourteenth Amendments and that, as a result, the instructions incorrectly required him to demonstrate that the defendants acted with reckless disregard for his safety. Second, Mr. Kingsley claims that the instruction regarding harm, which stated that harm was an element of the claim and that it could be demonstrated without a showing of "severe injury," was both incorrect and confusing.

We shall assess each of his objections to the instructions in turn. Our review of jury instructions is de novo. *Huff v. Sheahan*, 493 F.3d 893, 899 (7th Cir. 2007). We must "determine whether, taken as a whole, [the instructions] correctly and completely informed the jury of the applicable law." *Id.* "We defer to the district court's phrasing of an instruction that accurately states the law; however, we shall reverse when the instructions misstate the law or fail to convey the relevant legal principles in full and when those shortcomings confuse or

mislead the jury and prejudice the objecting litigant." *Id.* (citation omitted) (internal quotation marks omitted).

**A.**

**1.**

A claim of excessive force, like the one at issue here, is, at bottom, one that seeks to impose liability for "physically abusive governmental conduct." *Graham v. Connor*, 490 U.S. 386, 394 (1989). The right to be free from such abuse derives from various provisions of the Bill of Rights. The Fourth Amendment affords protection to the person in the context of a seizure, *id.*; the Eighth Amendment applies when, following the constitutional guarantees of our criminal process, there has been an adjudication of guilt and an imposition of sentence, *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). Between the status of arrestee and sentenced prisoner is the intermediate status of the detainee, who similarly is entitled to protection from physically abusive government conduct. The constitutional source of that protection lies in the right to be free from deprivations of liberty without due process of law. *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979).

In sum, we evaluate a claim of excessive force not under "some generalized 'excessive force' standard," but "by reference to the specific constitutional standard which governs that right." *Graham*, 490 U.S. at 394. Mr. Kingsley was a pretrial detainee at the time of the tasing incident; therefore, the Fourteenth Amendment's Due Process Clause is the source of his substantive right and determines the applicable standards

to evaluate his claim. *See Ingraham*, 430 U.S. at 672 n.40; *Forrest v. Prine*, 620 F.3d 739, 743–44 (7th Cir. 2010).

**2.**

In examining the contours of the right to be free from excessive force *as an element of due process*, *Bell v. Wolfish*, 441 U.S. 520 (1979), is our primary touchstone. There, the Supreme Court evaluated a claim regarding the conditions of confinement for pretrial detainees. "[U]nder the Due Process Clause, a detainee *may not be punished* prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535 (emphasis added). As a consequence, "the proper inquiry" is whether the treatment of the detainee "amount[s] to punishment." *Id.* The Supreme Court markedly contrasted due process protections for detainees against the rights of sentenced inmates: "A sentenced inmate[] … *may be punished*, although that punishment may not be 'cruel and unusual' under the Eighth Amendment." *Id.* at 535 n.16 (emphasis added).

Our cases also have noted that the protection afforded by the Due Process Clause is broader than that afforded under the Eighth Amendment. *See Lewis v. Downey*, 581 F.3d 467, 474 (7th Cir. 2009) ("[T]he Due Process Clause, which prohibits all 'punishment,' affords broader protection than the Eighth Amendment's protection against only punishment that is 'cruel and unusual.'"); *id.* at 475 (noting that, in the excessive force context, "anything that would violate the Eighth Amendment would also violate the Fourteenth Amendment"); *cf. Forrest*, 620 F.3d at 743–44 (acknowledging that "[t]he Fourteenth

Amendment right to due process provides at least as much, and probably more, protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment"). Of course, "[n]ot every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense." *Bell*, 441 U.S. at 537.[14] We must ask whether a particular action was taken "for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538.[15]

Notably, the Due Process Clause provides its own limiting principle; the Clause protects against only abusive conduct that is more than negligence, *Daniels v. Williams*, 474 U.S. 327, 334 (1986), or even gross negligence, *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc). Indeed, we have said that the official conduct must be at least reckless. *See Archie*, 847 F.2d at 1219–20. Recklessness, which necessarily incorporates some measure of subjective intent, stands in contrast to the rule under the Fourth Amendment that focuses only on whether the government conduct was "*objectively*

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[14] As we already have noted, *Bell v. Wolfish*, 441 U.S. 520 (1979), was a conditions of confinement case, not a case concerning excessive force, and the Supreme Court has not applied its rule directly in the excessive force context. However, in *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989), the Court noted that *Bell* made clear the right of a detainee to be free from excessive force under the Due Process Clause.

[15] The Supreme Court has noted, at least in the context of the Eighth Amendment, that "punishment" itself requires "'a deliberate act intended to chastise or deter.'" *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

reasonable" in light of all of the facts and circumstances. *Graham*, 490 U.S. at 397 (emphasis added) (internal quotation marks omitted); *see also Common v. City of Chicago*, 661 F.3d 940, 943 (7th Cir. 2011).

While these cases make clear the basic theoretical and doctrinal distinction among the constitutional standards governing the various categories of confinement, they do not provide a practical framework for distinguishing the obligations of those constrained by each of the constitutional provisions. Indeed, on more than one occasion, while noting the distinction between pretrial and posttrial incarceration, we have decided the case before us by employing the more familiar Eighth Amendment standard. *See, e.g.*, *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 664 (7th Cir. 2012) ("[C]ourts still look to Eighth Amendment case law in addressing the claims of pretrial detainees, given that the protections of the Fourteenth Amendment's due process clause are at least as broad as those that the Eighth Amendment affords to convicted prisoners, and the Supreme Court has not yet determined just how much additional protection the Fourteenth Amendment gives to pretrial detainees." (citations omitted)); *Forrest*, 620 F.3d at 744 (affirming summary judgment for the defendant officers where the plaintiff detainee had "not explained[] … how any protections guaranteed by the Fourteenth Amendment provide him with more protection than he would receive under traditional Eighth Amendment standards"); *Lewis*, 581 F.3d at 474 (reversing summary judgment for officer in Fourteenth Amendment case upon concluding that the plaintiff had raised

a genuine issue of fact even when considered under the more stringent standard set by the Eighth Amendment).

Here, we also have no need to delineate, in any comprehensive fashion, the differences between the rights of pretrial detainees and adjudicated criminals. Our task is less ambitious. We must determine the adequacy of an instruction given to a jury tasked with determining whether excessive force was employed against a pretrial detainee. We simply must determine whether the instruction at issue was sufficiently precise in its description of the due process right of a pretrial detainee to ensure that Mr. Kingsley's case was fairly presented to the jury.

Several of our cases have explored the problem of describing, in the due process context, the right of a detainee to be free from excessive force. In *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), we expressed concern about defining a detainee's due process right to be free from excessive force by use of highly subjective terms such as "grossly disproportionate" or "shocks the conscience." *Id.* at 147 (internal quotation marks omitted). We pointed out that, in the usual course of events, "the propriety of using force on a person in custody pending trial will track the Fourth Amendment: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them." *Id.* This emphasis on the objective standard of a reasonable prison officer was written, of course, against the background of the amorphous "shocks the conscience" standard. *See id.* at 147–48. Notably, however, while giving us the objective criteria borrowed from the Fourth Amendment as a more concrete touchstone against which to measure the

conduct of government officials, the court in *Titran* also pointedly remarked that, because "the Due Process Clause does not proscribe negligence or even gross negligence, the search for 'punishment' *cannot be wholly objective*." *Id.* at 147 (emphasis added).

*Wilson v. Williams*, 83 F.3d 870 (7th Cir. 1996), a case that came to us posttrial and that involved the correctness of the jury instructions, afforded us an occasion to focus more directly on the requisite intent for a due process violation based on excessive force. The jury was instructed that the plaintiff must establish that there was a "use of force that was clearly excessive to the need[,] … the excessiveness of which was … objectively unreasonable in light of the facts and circumstances at the time." *Id.* at 873. The jury was further instructed that the plaintiff must establish that the defendant "acted deliberately or with callous indifference, evidenced by an actual intent to violate plaintiff's constitutional rights or reckless disregard for his rights." *Id.*

In *Wilson*, the plaintiff had objected that the instruction wrongfully excluded the officer's subjective intent from the jury's consideration. We perceived no error in this regard. We stated that, where the issue of intent is contested, "a jury may properly rely on objective factors to arrive at their determination of that intent." *Id.* at 876. Notably, we also reaffirmed the pointed holdings of *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988), and *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1094 (7th Cir. 1986), that a plaintiff must prove that the defendants "acted deliberately or with callous indifference, evidenced by an actual intent to violate

[the plaintiff's] rights or reckless disregard for his rights." *Wilson*, 83 F.3d at 875 (internal quotation marks omitted).

Again in *Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650 (7th Cir. 2012), when we confronted a situation analogous in many relevant respects to the situation before us today (jail guards extricating a detainee from his cell), we wrote:

> Where, as here, force is employed in the course of resolving a disturbance, the pertinent inquiry is whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. Factors relevant to that inquiry include whether jail officials perceived a threat to their safety and the safety of other inmates, whether there was a genuine need for the application of force, whether the force used was commensurate with the need for force, the extent of any injury inflicted, and whatever efforts the officers made to temper the severity of the force they used. *See also Forrest v. Prine*, 620 F.3d 739, 744–45 (7th Cir. 2010); *Lewis v. Downey*, 581 F.3d 467, 475–77 (7th Cir. 2009).

*Id.* at 668 (additional citations omitted) (internal quotation marks omitted).

Our dissenting colleague believes that our cases have been ambiguous on the question of intent, but we see no serious ambiguity here. Our cases make clear that, although we employ the objective criteria of the Fourth Amendment as a touchstone by which to measure the gravity of the defendant

officer's conduct, we also recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind in performing the activity under scrutiny. In determining whether the defendant officer had the requisite state of mind—at least recklessness—the same criteria used to measure the defendant's lack of care are a useful benchmark. This is because, as *Titran* intimated, the gravity of the offense and the requisite intent are closely linked. *Titran* is clear that the strength of this link under a particular set of facts may mean that the inference of intent is so strong that no further inquiry need be made. *See Titran*, 893 F.2d at 148 ("If the officers intentionally restrained, jolted, and roughed up Titran without physical provocation from her, their behavior was unreasonable."). But when the inference is less strong, the cases do make clear that some examination of intent is appropriate, and that the distinction makes a mechanical application of Fourth Amendment objective standards impossible. *See id.* at 147 ("Subtle differences between Fourth and [Fourteenth] Amendment standards *are inevitable on account of this mental element*." (emphasis added)).[16]

We think at this point it is useful to pause and be certain that we have not lost sight of the basic point of *Bell*. *Bell* teaches

[16] The dissent also suggests that under *Daniels v. Williams*, 474 U.S. 327 (1986), the only "intent" requirement applicable in Fourteenth Amendment cases is the general requirement of intentional rather than negligent acts, necessary to impose liability for *any* alleged constitutional violation. The difficulty with this view is that *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), and other of our cases already have held that there is something unique about the Fourteenth Amendment that imposes a burden not imposed under the Fourth Amendment.

that the central inquiry relevant in a Fourteenth Amendment case brought by a pretrial detainee is whether the state *punished* him—as opposed to whether it had merely held him, restricted him, or applied a measure of force in a manner consistent with and expected of constitutional restraints on liberty prior to trial. *Bell* was, of course, a conditions of confinement case, *see supra* n.14, but it notes the necessity of determining from the facts whether there is an *intent* to punish.

Finally, we note that although *some* consideration of intent is embraced by our cases, it is limited in significant measure by the fact that it is discernable from objective considerations[17]. *See Wilson*, 83 F.3d at 876.

**3.**

With these principles in mind, we now turn to the jury instruction at issue in the case before us.

On the subject of excessive force, the jury was instructed as follows:

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[17] We acknowledge and are grateful for the fine work of the Committee that developed this circuit's impressive Pattern Civil Jury Instructions. Nevertheless, while those instructions represent learned studies of the law of this circuit, they are persuasive only to the extent that they accurately restate the law of this circuit. *See United States v. Burke*, 781 F.2d 1234, 1239 n.2 (1985) ("Although the pattern instructions are suggestive rather than absolutely binding, a decision of this court is authoritative."). Moreover, it is not clear from the commentary to the Pattern Instruction that the issue we now confront was considered squarely. Notably, there is no mention of the above cases and the contrary language included within them.

Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:

(1) Defendants used force on plaintiff;

(2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;

(3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused some harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
- Any efforts made by defendants to limit the amount of force used.[18]

Mr. Kingsley argues that the instructions were erroneous and confusing because he was required to establish that the officers had acted with "reckless disregard" for his safety, when the instruction should have allowed the jury to find the existence of punishment on the basis of wholly objective factors.

A faithful adherence to the case law that we have discussed precludes our accepting this contention. As we have noted earlier, our cases are clear that the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases. The court's instruction reflected this requirement in our case law. The jury was told specifically that, in determining whether the intent element is satisfied, that is, whether the defendants "acted with reckless disregard of plaintiff's rights," it "may consider" a non-exhaustive list of five factors, drawn almost verbatim from *Wilson*. In short, the instruction required a level of intent at least equivalent to

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[18] R.146 at 3–4.

recklessness, measured largely by the objective factors that we already have identified.[19]

The jury was instructed adequately on the elements of Mr. Kingsley's Fourteenth Amendment cause of action.[20]

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[19] The dissent contends that "[t]he clearest thing about *Wilson* is that it reversed the use of the confusing amalgam of an instruction." Dissent at 31. In *Wilson*, this court approved an instruction that tracked very closely the language used in this case, and turned on "whether the prohibited punitive intent was present." *Wilson v. Williams*, 83 F.3d 870, 877 (7th Cir. 1996). It reversed only on another element, completely absent from our present instruction, of a "good faith" defense. *Id.*

[20] The dissent also contends that the instruction was confusing not only because it introduced the extraneous concept of intent, but also because it did so in three separate and quite different ways. *See* dissent at 35-36. We think this overstates the point and overly parses the instruction, which is not our settled approach on review of such matters. True enough, the instruction uses the term "reckless" three times, in three separate phrases. Its first use, that the "force [must have been] applied recklessly" merely tracks the usage that the dissent essentially admits is legally proper; that is, it says that the force must be applied in a manner displaying more culpability than negligence (i.e., the taser did not go "off by accident," *id.* at 39). The evidence admittedly did not suggest that it had, but no reasonable juror would have been confused as to the meaning under the circumstances. The second usage is less clear, but the surrounding context cures any confusion. Although the jury is asked to determine if the defendants "recklessly disregarded plaintiff's safety"—a less than ideal phraseology it is then told precisely *how* to determine it, by whether they had "failed to take reasonable measures to minimize harm to the plaintiff." The final usage is part of the phrase which introduces the uncontroversial objective considerations.

**B.**

Mr. Kingsley next submits that the district court erred in instructing the jury on the issue of harm. He contends that he should not have been required to demonstrate harm at all and, if harm is an element, that the use of a taser establishes the requisite injury as a matter of law. For this latter proposition, Mr. Kingsley relies on *Lewis v. Downey*, 581 F.3d 467, 475 (7th Cir. 2009), in which we held that use of a taser qualified as more than a de minimis application of force. In the alternative, he argues that, even if the harm instruction itself were proper, the jury should not have been further instructed that "[a] person can be harmed even if he did not suffer a severe injury."[21] In his view, this clarifying instruction only confused the matter by "allow[ing] the jury to consider whether the use of the taser on Mr. Kingsley met some threshold standard of injury to qualify as harm."[22] The defendants counter that the plaintiff waived any objection and that, in any event, the instruction as given was not erroneous.

**1.**

We begin with the question of waiver. At trial, Mr. Kingsley did object to the inclusion of harm as an element of the excessive force claim. Our reading of the transcript makes clear, however, that his objection was that, because the defendants repeatedly had contended that there had been no

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[21] R.146 at 4.

[22] Appellant's Br. 20.

*lasting* injury, the inclusion of the element of harm might be misread as requiring *more* than de minimis harm. Counsel for Mr. Kingsley therefore requested a clarifying instruction that "pain is considered harm."[23] The court simply stated, "I think I'll add 'a person can be harmed even if he does not suffer a lasting injury or … .'"[24] At this point, plaintiff's counsel interjected, "Or severe injury."[25]

Although Mr. Kingsley objected to the inclusion of "harm" as an element, counsel described the objection as concern that the inclusion of "harm" might be construed erroneously by the jury to require some lasting injury. Notably, counsel stated: "[W]e submit that in the Seventh Circuit, *injury* isn't a required element of an excessive force claim. I think the use of harm *is an element*."[26] Counsel specifically further told the court that "[i]t's just the extent that [the defendants are] going to argue and there will be any suggestion to the jury that some form of lasting injury is required under the law, *that's what we would have the objection to*."[27]

We do not discern on the record any argument presented to the district court that harm itself is not an element of the cause of action or that tasing constitutes harm per se.

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[23] R.156 at 79.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 78 (emphasis added).

[27] *Id.* at 79 (emphasis added).

Consequently, we must agree that Mr. Kingsley's current position on the question of harm itself, or harm per se, has been forfeited.

**2.**

We now turn to the question whether the district court's clarifying instruction introduced confusion by suggesting to the jury that some unspecified level of injury was required to establish harm. The transcript makes clear that, after voicing the objection to the inclusion of harm and stating that it was out of concern that the defendants would argue need for a lasting injury, counsel for Mr. Kingsley participated in the modification of the instruction and specifically suggested the inclusion of the "[o]r severe injury" language that ultimately was given by the district court to ameliorate the concerns raised in the prior objection. In short, the clarifying instruction was offered at Mr. Kingsley's request, and for the very purpose of minimizing any risk that the jury would construe harm as a significant injury. Mr. Kingsley's counsel actively participated with the district court in achieving an instruction that would be satisfactory in that regard and did not continue an objection to the language as presenting further difficulty or insist on a more specific instruction that any amount of pain qualified as harm. Accordingly, the current objection is waived.

In any event, even if the merits of these objections were properly before us, we previously have approved an instruction in this context that included a requirement of "some harm." *See Wilson*, 83 F.3d at 876. Although it would not have been error for the district court to define injury in a taser

case in terms of pain, *see Lewis*, 581 F.3d at 475; *see also Hudson v. McMillian*, 503 U.S. 1, 9–10 (1992), the instruction given by the district court adequately permitted counsel to argue that the pain inflicted fulfilled the injury requirement of the cause of action. Indeed, counsel so argued.

There was no reversible error with respect to the requirement of a showing of "harm" in this case.

**Conclusion**

Because the jury instructions were neither erroneous nor confusing statements of the law of this circuit, the judgment in favor of the defendants is affirmed.

AFFIRMED

HAMILTON, *Circuit Judge*, dissenting. I respectfully dissent. This case presents an important issue about the extent of a pretrial detainee's constitutional right to be free from punishment and excessive force. If a pretrial detainee can prove that a correctional officer used objectively unreasonable force against him, it should be self-evident that the detainee was "punished" without due process of law. In this case, however, the district court's jury instruction on excessive force added an unnecessary and confusing element of "reckless" conduct or purpose to the required elements of plaintiff's claim.

The Committee on Pattern Civil Jury Instructions of the Seventh Circuit considered this question in 2009. The committee wisely omitted such language of recklessness or purpose from its Pattern Instructions 7.08 and 7.09 for excessive force claims by pretrial detainees. We should remand for a new trial with instructions tracking those pattern instructions. That way we could avoid the puzzle posed by the majority opinion: When does the Constitution allow law enforcement and correctional officers to use objectively unreasonable force against a person not convicted of a crime?

I. *The Problem: Excessive Force Claims by Pretrial Detainees*

As the majority explains, when law enforcement officers apply physical force to suspects, detainees, or prisoners, the constitutional standard depends on the status of the person on the receiving end. A person who is not in custody and who is a target of police force, such as in an arrest or investigative stop, is protected by the Fourth Amendment's prohibition on unreasonable seizures of the person. The Fourth Amendment standard is objective: was the application of force unreasonable

in light of all the relevant circumstances confronting the officer at the time? *Graham v. Connor*, 490 U.S. 386, 395–97 (1989); Federal Civil Jury Instructions of the Seventh Circuit No. 7.08 & 7.09. On the question of liability for a Fourth Amendment violation, the officer's subjective purposes do not matter as long as the force was used intentionally rather than by accident. *Graham*, 490 U.S. at 397–99.

A person convicted of a crime and serving a custodial sentence is protected by the Eighth Amendment's prohibition on cruel and unusual punishment. The Eighth Amendment standard differs from the Fourth because the officer's state of mind is critical. The plaintiff must prove that the correctional officer intentionally used extreme or excessive cruelty toward the plaintiff for the purpose of harming him, and not in a good faith effort to maintain or restore security or discipline. *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986); Federal Civil Jury Instructions of the Seventh Circuit No. 7.15. In *Graham*, the Supreme Court explained that the less protective Eighth Amendment standard applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." 490 U.S. at 398–99, quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977).

Both the objective standard under the Fourth Amendment for free citizens and the subjective standard under the Eighth Amendment for sentenced prisoners are well established in the law. The person in between is the pretrial detainee. That person is protected from excessive force by the Due Process Clauses of the Fifth or Fourteenth Amendments because he may not be "punished" until he has been adjudged guilty

through due process of law. *Bell v. Wolfish*, 441 U.S. 520, 535 & n. 16 (1979); *Ingraham*, 430 U.S. at 671 n. 40. We have recognized that pretrial detainees receive more protection than convicted prisoners. *E.g.*, *Lewis v. Downey*, 581 F.3d 467, 474 (7th Cir. 2009).

Just what the excessive force standard for a pretrial detainee looks like in detail is not as clear. The detainee may often be held in a jail with convicted offenders under conditions that seem indistinguishable from prison, yet he has not been convicted and is still entitled to a presumption of innocence. The Supreme Court has not settled the question of the standard for pretrial detainees. *Graham* explicitly left it open. 490 U.S. at 395 n.10. Our circuit's case law points in the direction of a standard identical or close to the objective Fourth Amendment standard, but there are conflicting signals in our opinions that we should clarify here.[1]

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[1] There is a long-standing circuit split on the substantive standard for these excessive force claims by pretrial detainees. Compare, e.g., *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (applying objective Fourth Amendment standard); and *Pierce v. Multnomah County*, 76 F.3d 1032, 1042–43 (9th Cir. 1996) (reversing defense verdict and ordering new trial with jury instructions using objective Fourth Amendment standard); with *Bozeman v. Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) (applying Eighth Amendment standard); and *Fuentes v. Wagner*, 206 F.3d 335, 346–48 (3d Cir. 2000) (applying Eighth Amendment standard to use of force to quell jail disturbance); see generally Karen M. Blum & John J. Ryan, *Recent Developments in the Use of Excessive Force by Law Enforcement*, 24 Touro L. Rev. 569, 573 (2008) (standards "vary widely"); Baker, *Wilson v. Spain: Will Pretrial Detainees Escape the Constitutional "Twilight Zone"?*, 75 St. John's L. Rev. 449 (2001). Because of the effect of qualified immunity in litigation of these

(continued...)

My colleagues rely heavily on *Wilson v. Williams*, 83 F.3d 870 (7th Cir. 1996), where a pretrial detainee claimed that he had been punished by the use of excessive force, but its guidance does not support the majority here. In *Wilson* we approved the portion of a jury instruction that tracked the objective Fourth Amendment standard. *Id*. at 876 ("While this sentence, lifted verbatim from *Graham*…was intended to apply to excessive force claims raised explicitly under the Fourth Amendment, we do not consider it, nor the test which it espouses, inappropriate in the context here."). In other respects, though, the instruction given in *Wilson* was a confusing amalgam of Fourth Amendment, Eighth Amendment, and punitive damages law, along with a defense of subjective good faith that we said was erroneous. See *id*. at 877. We also noted that convicted prisoners and pretrial detainees are often held together in the same facility, so it might be impractical to have different standards, at least in the context of a jail disturbance. *Id*. at 876.

On this last point, though, recall the caution in *Bell* and *Graham* that the Eighth Amendment standard applies only after the state has complied with the constitutional protections needed to convict a person of crime. 441 U.S. at 535; 490 U.S. at 398–99. In light of *Bell* and *Graham* and their constitutional foundations, there is no apparent reason why a state's unilateral decision to house pretrial detainees with convicted

---

[1] (...continued)
claims, I respectfully submit that our court and/or the Supreme Court needs to bring greater clarity to this question for the sake of both detainees and law enforcement and correctional personnel.

prisoners—for financial or other institutional reasons— should have the effect of reducing the constitutional protections of pretrial detainees who are still presumed innocent. The clearest thing about *Wilson* is that it reversed the use of the confusing amalgam of an instruction. It does not support the recklessness instruction given here.

More enlightening is *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), where a pretrial detainee brought a claim for excessive force. We applied the objective reasonableness standard identical to the Fourth Amendment: "It does not follow [from the transition from arrest to detention] that officers acquired greater ability to assault and batter Titran." *Id.* at 147. We explicitly rejected one defendant's effort to apply a subjective standard, and we noted: "Multiple standards of official conduct send confusing signals that undermine the force of the law…." *Id.* Our holding was clear: "If the officers intentionally restrained, jolted, and roughed up Titran without physical provocation from her, their behavior was unreasonable." *Id.* at 148. That looks like an objective standard.

My colleagues make much of a sentence in *Titran* between the two I have quoted: "Given *Daniels v. Williams* and *Archie v. City of Racine*, holding that the Due Process Clause does not proscribe negligence or even gross negligence, the search for 'punishment' cannot be wholly objective." *Id*. at 147 (citations omitted). As explained below, however, the point of *Williams* and *Archie* is only that the officer's conduct must be intentional. Negligent accidents do not violate the Constitution. Neither decision added a subjective element of wrongful purpose into the excessive force standard for a pretrial detainee, nor did

*Titran* do so. Nevertheless, I will cheerfully acknowledge that our few opinions on excessive force against pretrial detainees leave some room for debate. This case provides an opportunity to clarify the standard, but we are missing that opportunity.

II. *The Pattern Jury Instructions*

The Committee on Pattern Civil Jury Instructions of the Seventh Circuit took up this problem in 2009 and published with approval of the Circuit Council the pattern jury instructions that advise using the same objective reasonableness standards for excessive force claims by pretrial detainees as well as arrestees. The Circuit Council's publication does not imply substantive approval for every line of the instructions, but the committee chaired by Judge Robert H. Miller, Jr., included talented judges and practitioners representing a range of perspectives, and the committee invited and received public comment on its draft instructions. The committee's work deserves our respect and close attention.

Pattern Instructions 7.08 and 7.09 were drafted for use in excessive force cases for both arrestees under the Fourth Amendment and pretrial detainees under the Fifth and Fourteenth Amendments. The full texts of the instructions and committee comments are attached as an appendix to this opinion.

The elements instruction, 7.08, includes three elements:

> 1. Defendant used unreasonable force against Plaintiff;
>
> [2. Because of Defendant's unreasonable force, Plaintiff was harmed;]

> [3. Defendant acted under color of law.]
>
> The second and third elements are in brackets because there will often be no dispute about them and because it is not clear whether "harm" is a distinct element, as the committee's comment explains.

Instruction 7.09 then explains what is meant by excessive or unreasonable force, and it does so in purely objective terms:

> You must decide whether Defendant's use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that Defendant faced. You must make this decision based on what the officer knew at the time of the arrest, not based on what you know now. In deciding whether Defendant's use of force was unreasonable, you must not consider whether Defendant's intentions were good or bad.
>
> In performing his job, an officer can use force that is reasonably necessary under the circumstances.

The committee chose not to identify specific factors, but offered a proposed list for judges who believe such a list might aid a jury:

> — the need for the use of force;
>
> — the relationship between the need for the use of force and the amount of force used;

- the extent of the plaintiff's injury;
- any efforts made by the defendant to temper or limit the amount of force;
- the severity of the crime at issue;
- the threat reasonably perceived by the officer(s);
- whether the plaintiff was actively resisting arrest or was attempting to evade arrest by fleeing.

These pattern instructions are more consistent with the applicable constitutional standard, see *Graham*, *Titran*, and *Wilson*, and much less confusing than the instruction used in this case. The problem is the concept of "recklessness" in the district court's instruction.

III. *The Instruction Given in This Trial*

The jury instruction given in plaintiff Kingsley's trial, quoted by the majority at pages 8–9, goes astray by introducing the concept of reckless conduct as an additional element the plaintiff must prove. The first line of the instruction given in this trial told the jury that excessive force is "force applied *recklessly* that is unreasonable in light of the facts and circumstances of the time." In the Fourth Amendment context, excessive force is force that is unreasonable in light of the facts and circumstances the officer faced. *Graham*, 490 U.S. at 396–97; *Fitzgerald v. Santoro*, 707 F.3d 725, 733 (7th Cir. 2013); *Phillips v. Community Ins. Corp.*, 678 F.3d 513, 519 (7th Cir. 2012).

Assuming the pretrial detainee plaintiff can prove force "that is unreasonable in light of the facts and circumstances of the time," which is the correct standard, the concept "recklessly" adds a vague and confusing extra hurdle for the plaintiff. Put another way, how and why would it be constitutional for an officer to use force against a pretrial detainee that was "unreasonable in light of the facts and circumstances of the time," since this instruction invites that very possibility? How and why would objectively unreasonable force be deemed anything other than "punishment" that would be imposed on the detainee without due process of law? See *Bell*, 441 U.S. at 535 ("under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

The instruction here also introduced a second version of recklessness in the third element, saying the plaintiff must show: "Defendants knew that using force presented a risk of harm to plaintiff, but they *recklessly disregarded plaintiff's safety* by failing to take reasonable measures to minimize the risk of harm to plaintiff." I am not at all sure what that means, and I don't know how a juror should have interpreted it. Must the plaintiff come forward with evidence of reasonable measures that would have minimized the risk of harm? Would simply refraining from the alleged use of force—in this case, using a taser on an allegedly compliant prisoner, or refraining from smashing his head into a concrete bed—have been sufficient? Or was something else required? (I realize that whether the plaintiff was actually compliant by that time and how force was used were hotly debated at trial, but jury instructions must

guide the jury on the law applicable to both sides' versions of the facts.)

Adding to the confusion, the same jury instruction then used a third version of recklessness, telling the jury: "in deciding whether one or more defendants used unreasonable force and acted with *reckless disregard of plaintiff's rights*, you may consider such factors as…." A juror trying to follow the instructions carefully might ask at this point where the idea of reckless disregard of plaintiff's rights came from and what it means. Something different from use of excessive force? Something different from the first two uses of recklessness? Does this instruction mean the defendant must have realized he was violating the detainee's rights, or at least not cared whether he was doing so? Reckless disregard for the plaintiff's rights will support a punitive damage award, so that admittedly subjective concept is used in punitive damage instructions. See *Smith v. Wade*, 461 U.S. 30, 56 (1983); Pattern Inst. No. 7.24. But reckless disregard of the plaintiff's rights is simply not an element of the plaintiff's core case for liability. It was an error to add it to the elements instruction.

So the district court's instruction was erroneous for two reasons. First, it introduced an extra element—recklessness—that is simply not required in a pretrial detainee's claim for excessive force. Second, its treatment of that extra element in three different ways made this instruction a confusing amalgam that a jury could not reasonably be expected to follow.

As we consider the district court's instruction, we should also step back a moment from the details of the case law and

ask whether and why a pretrial detainee's claim for excessive force should differ at all from that of a person being arrested or stopped. The pretrial detainee is still cloaked in the presumption of innocence and may not be punished. *Bell*, 441 U.S. at 535; see also *Graham*, 490 U.S. at 398–99. Ordinarily, of course, a judge will have found probable cause to detain the person. If the detention is prolonged, a judge in the federal system ordinarily will have found either a risk of flight or a danger to the community. See 18 U.S.C. §3142(e).

Even those federal detainees are still presumed innocent, though, and should not be subject to punishment before a conviction. And in many state justice systems, a pretrial detainee may remain in jail for weeks or even months simply because he cannot afford the premium for the presumptive bond set in his case. For those many thousands of people in the criminal justice system, we should recognize that the intentional use of objectively unreasonable force against them amounts to punishment without due process of law and violates the Constitution. They are not and should not be required to prove more in terms of reckless disregard for or intentional violation of their rights. The transition from arrest to pretrial detention does not give officers "greater ability to assault and batter" the detainees. *Titran*, 893 F.2d at 147.

IV. *The Role of Intentional or Reckless Conduct*

To support the subjective recklessness element in the district court's instruction, my colleagues cite the case law holding that a plaintiff suing under 42 U.S.C. § 1983 for a constitutional violation must show intentional conduct. They then treat reckless conduct as a form of intentional conduct.

See above at 13, citing *Daniels v. Williams*, 474 U.S. 327, 334 (1986), and *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc). That reasoning mistakenly combines two separate issues. The same confusion appeared in *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1094 (7th Cir. 1986), and was repeated in *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988), both also cited by the majority. The Pattern Instruction Committee carefully and correctly kept the two issues separate.

In *Daniels* the Supreme Court resolved a circuit split on whether negligent conduct can violate the individual rights guaranteed by the Constitution. The Court's answer was no. In *Daniels* a jail inmate claimed he had been deprived of liberty when he was injured by slipping on a pillow that an employee had negligently left on a staircase. The Court left such claims from accidental conduct to state tort law. 474 U.S. at 332. At the same time, the Court carefully drew the distinction that my colleagues overlook. In response to an argument that prison officials' negligent failure to comply with procedural requirements in depriving a prisoner of good-time credit should be actionable, the Court explained: "We think the relevant action of the prison officials in that situation is their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural protections of the Due Process Clause." *Id.* at 333–34. Applying the same distinction here, the focus should be on a deliberate decision to use force, not a negligent or reckless or intentional failure to comply with the constitutional standard for using force.

In the context of an excessive force claim, *Daniels* means that if, during the removal of Kingsley from his cell, the application of force was not intentional—the taser went off by accident, for example, or a guard slipped, fell, and knocked the handcuffed inmate down so that his head hit the floor—then there would have been no constitutional violation. Reckless conduct is generally recognized as equivalent to intentional conduct for these purposes, when it is equivalent to criminal recklessness, meaning that the actor is subjectively aware of the high risk of harm and then disregards it. See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Slade v. Board of School Directors of City of Milwaukee*, 702 F.3d 1027, 1029 (7th Cir. 2012); see also *Archie*, 847 F.2d at 1219.

In an appropriate case, therefore, it could be appropriate to instruct a jury that if the defendant's use of force was reckless (perhaps, for example, running through a crowd with a finger on the trigger of an unaimed gun), that would be sufficient to show intentional use of force. That would be an appropriate role for the concept of recklessness in an excessive force case. But there is no need for such an instruction unless the defense contends the use of force was unintended. The defense did not argue that here, so there was no need for a subjective element in the instruction.[2]

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[2] Section 1983 and *Bivens* excessive force cases in which defendants contend the application of force was accidental appear to be relatively unusual, but they do arise. The Pattern Instruction Committee allowed for them. Its comment on Instruction 7.08 advises judges in such cases to break the first element of unreasonable force into two parts: intentional use of force and unreasonable use of force.

My colleagues' reliance on the need for intentional conduct to justify the subjective recklessness elements of the instruction given here also proves too much. As explained above, intentional conduct is needed to show *any* constitutional violation, including the Fourth Amendment, where the standard for excessive force is objective. See *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process"), citing *Daniels*, 474 U.S. at 328; *Brower v. County of Inyo*, 489 U.S. 593, 596–97 (1989) ("seizure" requires "intentional acquisition of physical control" through "means intentionally applied"). That is why an accidental police shooting is not actionable under the Fourth Amendment, see *Watson v. Bryant*, 532 Fed. Appx. 453, 457 (5th Cir. 2013); *Pleasant v. Zamieski*, 895 F.2d 272, 276–77 (6th Cir. 1990); *Dodd v. City of Norwich*, 827 F.2d 1, 7–8 (2d Cir. 1987) (on reargument), but an *intentional* shot that accidentally hits the wrong person is a seizure of that person that may be actionable under the Fourth Amendment, *Fisher v. City of Memphis*, 234 F.3d 312, 317–18 (6th Cir. 2000).

The court in *Fisher* explained precisely the difference that my colleagues' reasoning overlooks. After recognizing that a Fourth Amendment violation requires intent, not negligence, the Sixth Circuit explained: "However, the intent in question is the intent to commit the act, not the intent that a certain result be achieved. Therefore, Officer Taylor's act of firing the gun was intentional, even if the result was not one he sought to achieve. Instructing the jury that more than negligence was required would likely confuse the jury as to the intent question." *Id*. at 317. Again, because the defendants at this trial

did not claim the use of force was accidental, there was no reason to introduce the concept of recklessness into the excessive force instruction.

Before closing, I should add that I have considerable sympathy for both this district judge and any other judge trying to distill our case law into a coherent elements instruction for a pretrial detainee's excessive force claim. Some of the cases cited by the majority—especially *Wilson*—reflect similar confusion. But that is why the work of the Pattern Instruction Committee was so valuable. We should endorse their work, not reject it.

Finally, I agree with the majority that plaintiff Kingsley waived in the district court his challenge to the "harm" element of the court's instruction on excessive force. As for the merits of that challenge, which the majority also addresses, I see no prejudicial error by including harm as an element. The Pattern Instruction Committee also confronted this issue as part of its Instruction 7.08 and could not come to a definitive conclusion. The committee's comment gives good advice and leaves the choice to the sound judgment of the district court. In most excessive force cases, harm is likely to be so obvious that it does not require treatment as a separate element. (It will ordinarily be relevant in deciding whether the force applied was excessive or in deciding on an amount of damages.) If the defense argues that the force used was too minimal to violate the plaintiff's rights, the plaintiff should not be prejudiced if the district judge includes harm as an element but also instructs the jury, as the court did here, that pain can be harm for purposes of proving that element.

For these reasons, I would reverse the judgment of the district court and remand for a new trial with jury instructions that track Seventh Circuit Pattern Jury Instructions 7.08 and 7.09.

## APPENDIX

### 7.08 FOURTH AMENDMENT/FOURTEENTH AMENDMENT: EXCESSIVE FORCE AGAINST ARRESTEE OR PRETRIAL DETAINEE — ELEMENTS

In this case, Plaintiff claims that Defendant used excessive force against him. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant used unreasonable force against Plaintiff;

[2. Because of Defendant's unreasonable force, Plaintiff was harmed;]

[3. Defendant acted under color of law.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff did not prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

### Committee Comments

a. **Unreasonable Force:** For authority regarding the "unreasonable force" element of the claim, see *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999). Although *Graham* and *Garner* are Fourth Amendment cases involving arrestees, *Wilson v. Williams*, 83 F.3d 870, 876 (7th Cir. 1996), states that the same standard applies to pretrial detainees. A

separate instruction applies to cases involving convicted prisoners.

If the defendant contends that the application of force was accidental, the court may wish to break the first element into two:

1. Defendant intentionally used force against Plaintiff;

2. The force Defendant used was unreasonable;

b. **Harm to Plaintiff:** Although some other circuits include an element of "damage" in their pattern instruction, *see, e.g.*, EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 4.30 (1999), the Committee believes that there is significant doubt as to whether damage, or "harm" as that term is commonly understood, is actually required for a finding of liability under §1983. Though "harm" in the commonly-understood sense is likely to exist in most excessive force cases, some cases will arise in which it does not, *e.g.*, a situation in which an officer strikes the plaintiff with his hand but leaves no mark and causes no lingering injury or pain. In such cases, the court will need to determine whether the jury should be instructed on this point.

In *Gumz v. Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985), the court held that an officer's use of force was unconstitutional if it (1) caused severe injuries; (2) was grossly disproportionate to the need for action under the circumstances; and (3) was inspired by malice or shocked the conscience. *Gumz*, however, was overruled by *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987), which used the same "totality of the circumstances test" that was later adopted by

the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). In *Lanigan v. Village of East Hazel Crest, Illinois*, 110 F.3d 467 (7th Cir. 1997), the court upheld a claim based on force consisting of "one violent push and poke," noting that the plaintiff "need not have been injured to have an excessive force claim." *Id.* at 470 n.3. In *McNair v. Coffey*, 279 F.3d 463 (7th Cir. 2002), the court addressed a claim arising from an incident in which no physical force was used, but officers pointed their weapons at the plaintiffs. Though it determined that the officers were entitled to qualified immunity, and indicated that the Fourth Amendment appeared to require *some* use of force, *id.* at 467, the majority ended its opinion with the statement "we do not foreclose the possibility that the circumstances of an arrest could become 'unreasonable' without the application of physical force." *Id.* at 468. *See also Herzog v. Village of Winnetka, Ill.*, 309 F.3d 1041, 1043 (7th Cir. 2002) (refusal to loosen chafing handcuffs or shoving an arrestee would constitute actionable excessive force).

Even if, as *McNair* indicates, an application of force is required in order to implicate the Fourth Amendment, it is not at all clear that the plaintiff must suffer "harm" in order to obtain a finding of liability; the availability of nominal damages in excessive force cases suggests that "harm" is not a requirement. *See, e.g., Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996) (indicating that nominal damages may be awarded in a Fourth Amendment excessive force case where no injury resulted from the use of excessive force, where the evidence of actual injury is not credible, or where the injury has no monetary value). Because the issue of whether a plaintiff must prove "harm" is not definitively resolved, the Committee

placed the second element in brackets, indicating that a court should give this part of the instruction to the jury at its discretion.

c. **Third element:** The third element should be eliminated if the "color of law" issue is not in dispute.

d. **Single Element Instruction:** If the second and third elements are eliminated, only one element will remain, and the instruction's second sentence should read as follows: "To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that Defendant used unreasonable force against him."

### 7.09 FOURTH AMENDMENT/FOURTEENTH AMENDMENT: EXCESSIVE FORCE — DEFINITION OF "UNREASONABLE"

You must decide whether Defendant's use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that Defendant faced. You must make this decision based on what the officer knew at the time of the arrest, not based on what you know now. In deciding whether Defendant's use of force was unreasonable, you must not consider whether Defendant's intentions were good or bad.

In performing his job, an officer can use force that is reasonably necessary under the circumstances.

[An officer may use deadly force when a reasonable officer, under the same circumstances, would believe that the suspect's actions placed him or others in the immediate vicinity in imminent danger of death or serious bodily harm. [It is not

necessary that this danger actually existed.] [An officer is not required to use all practical alternatives to avoid a situation where deadly force is justified.]]

**Committee Comments**

a. **Authority:** *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985); *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999).

b. **Factors:** Case law establishes a number of factors that may be relevant to the jury's determination of whether a particular use of force was unreasonable. The Committee did not list these factors in the instruction because the jury is to consider *all* circumstances, and the listing of some might suggest that others are irrelevant. However, a court may wish to consider giving a list of factors for the jury's consideration, and if it elects to do so the following is proposed:

— the need for the use of force;

— the relationship between the need for the use of force and the amount of force used;

— the extent of the plaintiff's injury;

— any efforts made by the defendant to temper or limit the amount of force;

— the severity of the crime at issue;

— the threat reasonably perceived by the officer(s);

— whether the plaintiff was actively resisting arrest or was attempting to evade arrest by fleeing.

*See Graham v. Connor*, 490 U.S. at 396 (fifth, sixth, and seventh factors). In *Wilson v. Williams,* 83 F.3d 870 (7th Cir. 1996), a Fourteenth Amendment excessive force case involving a pretrial detainee, the Seventh Circuit listed factors one, two, three, four, and six from the above list, and stated that they are "generally relied on in the Fourth Amendment excessive force context." *Id.* at 876. For this proposition, however, the court cited *Hudson v. McMillian*, 503 U.S. 1, 7 (1992), which was an Eighth Amendment case, not a Fourth Amendment case. *See generally* Eighth Circuit Manual of Model Jury Instructions (Civil) 4.10 (1999) (using factors one, two, and three).

c. **Deadly Force:** The final (bracketed) paragraph applies only in cases involving an officer's use of deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988). With regard to the final (bracketed) sentence of this paragraph, *see Deering v. Reich*, 183 F.3d 645, 652-653 (7th Cir. 1999); *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994). The fact that a particularized instruction is proposed for deadly force cases does not preclude the consideration or giving of a particularized instruction in other types of cases, for example, those involving a fleeing felon or an officer's claim of self-defense.

# UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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

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## FINAL JUDGMENT

March 3, 2014

Before: KENNETH F. RIPPLE, Circuit Judge
DAVID F. HAMILTON, Circuit Judge
J. P. STADTMUELLER, District Court Judge*

| | |
|---|---|
| No.: 12-3639 | MICHAEL B. KINGSLEY,<br>Plaintiff - Appellant<br><br>v.<br><br>STAN HENDRICKSON, et al.,<br>Defendants - Appellees |
| **Originating Case Information:** | |
| District Court No: 3:10-cv-00832-bbc<br>Western District of Wisconsin<br>District Judge Barbara B. Crabb | |

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

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* The Honorable J.P. Stadtmueller, United States District Court for the Eastern District of Wisconsin, sitting by designation.

form name: **c7_FinalJudgment**(form ID: **132**)

# United States Court of Appeals

**For the Seventh Circuit**
**Chicago, Illinois 60604**

April 18, 2014

**Before**

KENNETH F. RIPPLE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

J. P. STADTMUELLER, *District Judge*[*]

No. 12-3639

MICHAEL B. KINGSLEY,
*Petitioner-Appellant*,

*v.*

STAN HENDRICKSON, ET AL.,
*Respondent-Appellee.*

Appeal from the United States District Court for the Western District of Wisconsin.

No. 3:10-cv-00832-bbc

Barbara B. Crabb,
*Judge*.

## ORDER

Upon consideration of Plaintiff-Appellant's petition for rehearing with suggestion of rehearing en banc, filed on March 17, 2014, no judge in active service has requested a vote thereon.[**] A majority of the judges on the original panel have voted to

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[*] The Honorable J.P. Stadtmueller, United States District Court for the Eastern District of Wisconsin, sitting by designation.

[**] Circuit Judge Flaum took no part in the consideration or the decision of this case.

deny the petition. Judge Hamilton voted to grant panel rehearing.

**IT IS ORDERED** that the petition for rehearing with suggestion of rehearing en banc is hereby **DENIED**.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

MICHAEL B. KINGSLEY,

OPINION and ORDER

Plaintiff,

10-cv-832-bbc

v.

LISA JOSVAI, PATRICIA FISH,
ROBERT CONROY, STAN HENDRICKSON,
FRITZ DEGNER and KARL BLANTON,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

In this civil action, plaintiff Michael B. Kingsley is proceeding pro se on claims that defendants Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton used excessive force on him while he was a pretrial detainee in violation of his rights under the Fourteenth Amendment and state law. Additionally, he is proceeding on claims that defendants Patricia Fish and Lisa Josvai denied him his right to procedural due process.

Now before the court are the parties' cross motions for summary judgment. Plaintiff moves for summary judgment on only his due process claim. Dkt. #21. Defendants move for summary judgment on plaintiff's excessive force and due process claims. Dkt. #26. (Defendants did not move for summary judgment on plaintiff's state law assault and battery

claim. Their first and only mention of this claim is a footnote in their reply brief, in which they contend that "[f]or the same reasons that [plaintiff's] excessive force claim should be denied, [plaintiff's] state law assault and battery claim should likewise be denied." Dfts.' Reply Br., dkt. #50, at 12, n.4. Even if defendants had made this conclusory argument in their opening brief, I would not have been persuaded by it. The legal standard for plaintiff's constitutional excessive force claim is not the same as for his assault and battery claim.)

After reviewing the parties' arguments and the evidence in the record, I conclude that defendants' motion must be granted in part and denied in part. Defendants' motion must be denied with respect to plaintiff's claims that defendants Conroy, Hendrickson, Degner and Blanton used excessive force against him after they carried him to a receiving cell. There are too many material facts in dispute related to the reasonableness and necessity of the force used by defendants while they were in the receiving cell. However, I will grant defendants' motion as it relates to plaintiff's claim that defendants Conroy, Hendrickson, Degner and Blanton used excessive force against him when they removed him from his cell and carried him to the receiving cell. Plaintiff has adduced no specific evidence that defendants used excessive force against him during the transport.

Also, I will grant defendants' motion as it relates to plaintiff's claim that defendants Fish and Josvai violated his Fourteenth Amendment rights by failing to provide him procedural due process. The fact that plaintiff was held in a receiving cell for two days

without a hearing was not a sufficient deprivation of his liberty to require that defendants provide him a due process hearing at which he would have an opportunity to present witnesses to an impartial decision maker.

In finding which of the proposed material facts are in genuine dispute, I have taken into account the facts proposed by the parties, their responses and supporting affidavits and the videos of the incident filed by defendants.

## UNDISPUTED FACTS

At all times relevant to this action, plaintiff Michael Kingsley was a pretrial detainee at the Monroe County jail. Defendants Lisa Josvai, Patricia Fish, Robert Conroy, Stan Hendrickson, Karl Blanton and Fritz Degner are corrections officers at the jail.

Plaintiff was booked into the Monroe County jail on April 21, 2010 and was transferred to the south block of the jail on May 1, 2010. On May 20, 2010, Deputy Nicholas Manka was performing a mandatory cell check and saw that the light fixture above plaintiff's bunk had been covered with a sheet of yellow legal paper. Manka told plaintiff to remove the paper covering the light. Plaintiff refused to remove the paper, stating that he did not put it there. (According to plaintiff, inmates often put paper over their lights because the lights are extremely bright. Plaintiff says the paper had been on the light in his cell since he was placed there.) Manka continued with his cell check, believing that plaintiff

would remove the paper covering the light later.

After the jail was locked down for the evening, Manka did another cell check at approximately 10:45 p.m. During this cell check, Manka saw that plaintiff had not removed the paper from the light fixture above his bunk. Manka asked plaintiff to remove the paper. (Defendants say that plaintiff responded by saying "better call in the CERT (Correctional Emergency Response Team) team." Plaintiff denies saying this.) Manka warned plaintiff that failure to comply with jail rules would result in disciplinary action. Later that night, Manka issued plaintiff an inmate minor violation report.

Deputy Manka told defendant Sergeant Hendrickson that he had issued a violation to plaintiff for his refusal to follow orders and explained what had happened. Hendrickson signed the inmate minor violation report and told defendant Blanton that plaintiff would be required to remove the paper from the light when the cells were open the next morning.

The next morning, May 21, 2010, defendant Blanton went to plaintiff's cell at approximately 5:25 a.m. Blanton told plaintiff to remove the paper covering the light. Plaintiff did not comply and did not respond to Blanton. At approximately 5:48 a.m., defendant Hendrickson performed "medication pass" (presumably this refers to the distribution of medication to inmates for whom it has been prescribed) and took plaintiff his medication. Hendrickson asked plaintiff to remove the paper attached to the light. Initially, plaintiff did not respond. After a few requests, plaintiff told Hendrickson that he

would not remove the paper because he did not put it there. Hendrickson told plaintiff several times that he still needed to take it down. Plaintiff did not respond.

At approximately 6:13 a.m., defendant Henrickson called jail administrator defendant Robert Conroy to tell him about the situation with plaintiff. Conroy arrived at the jail at approximately 6:30 a.m. Henderson told Conroy that plaintiff would not respond to orders and Conroy said that he would talk to plaintiff. At approximately 6:33 a.m., Conroy went to plaintiff's cell and asked him to remove the paper from the light fixture. (Defendants say that Conroy told plaintiff the paper was a fire hazard. Plaintiff denies this.) Conroy asked plaintiff several times, but plaintiff refused to take the paper down. Conroy told plaintiff he would remove the paper from the light fixture, but plaintiff would have to be moved to receiving so that a management team could enter plaintiff's cell. Conroy also told plaintiff that he would face disciplinary action because he was failing to follow staff orders.

At approximately 6:38 a.m., defendants Hendrickson, Blanton, Degner, Conroy and Sergeant Shisler went to plaintiff's cell to take him to receiving so that the paper could be removed from the light fixture. Hendrickson ordered plaintiff to stand up and back up to the cell door. Plaintiff asked, "What for? I didn't do anything wrong." Defendant Degner told plaintiff that if he did not comply he would be tasered. Hendrickson ordered plaintiff again to stand up. Plaintiff continued to lie face down on his bunk, but put his hands

behind his back. Hendrickson and Blanton entered the cell and attempted to handcuff plaintiff. (Defendants say that plaintiff began tensing and tightening his arms and holding them apart, making it difficult to handcuff him. Plaintiff denies that he was resisting in any way. Defendants did not submit a video that captured the events in plaintiff's cell.) The officers eventually handcuffed plaintiff by applying their body weight to plaintiff to secure him while they handcuffed him. Defendants Blanton and Hendrickson asked plaintiff to stand, but plaintiff refused. Defendants pulled plaintiff to his feet, and plaintiff fell to his knees, stating that his foot hurt and he could not walk. (Plaintiff says that when defendants pulled him from the bunk, his feet hit the bed frame, caused him serious pain and making him incapable of standing or walking.) Plaintiff would not stand up or walk. Defendants asked plaintiff what was wrong with his foot but he did not respond. The video of this incident shows two officers (defendants Blanton and Hendrickson) carrying plaintiff out of his cell and out of the south cell block by holding him under his arms.

After plaintiff was taken out of the south cell block, he was placed face down on the floor in the hallway. Defendants asked plaintiff what was wrong with his foot, but he did not answer. Deputy Shisler and defendants Conroy, Blanton and Hendrickson carried plaintiff from the hallway into a receiving cell. Plaintiff was placed face down on the receiving cell bunk. Hendrickson and Blanton then attempted to remove his handcuffs.

The parties dispute what happened next and, although defendants submitted a

security video from the receiving cell, the view of plaintiff is obstructed by the officers in the cell. Defendants say that plaintiff became physically resistive, pulling the handcuffs apart and trying to get up. The video shows defendant Hendrickson and the officers telling plaintiff repeatedly to relax and stop resisting so that the handcuffs could be removed, but it is not clear from the video whether plaintiff was resisting or struggling. Plaintiff does not appear to be moving his body around aggressively or very much at all, and plaintiff denies being physically resistive or struggling against the handcuffs. However, it is impossible to tell from the video whether plaintiff was "tensing" his arms as defendants aver.

The video shows defendant Hendrickson putting his knee on plaintiff's back and plaintiff telling Hendrickson to "get the fuck off." (Plaintiff says that at this point, defendants slammed his head down into the concrete cell bed, causing plaintiff serious pain. Defendants deny this. It is not clear from the video whether this happened.)

The verbal exchanges between the parties are not clear on the video. Defendants say that defendant Degner, who was standing to the side with the taser, warned plaintiff that if he did not comply, he would be tasered. Defendant Hendrickson told Degner to apply a "contact stun" to plaintiff. Plaintiff says that Hendrickson told Degner to "tase his ass." Degner applied a contact stun for five seconds on plaintiff's back. (Plaintiff says that the taser caused him "excruciating pain.") Defendant Conroy, who had been waiting in the hall, ordered everyone to clear the cell.

Approximately 15 minutes later, defendant Conroy decided to try again to remove plaintiff's handcuffs. Deputy Tom Wildes, Deputy Bedenbaugh and defendants Blanton and Conroy entered the receiving cell and were able to remove the handcuffs. Following the incident, plaintiff was placed on medical watch. At 7:05 a.m., defendant Blanton asked a jail nurse to examine plaintiff. The nurse came to the receiving cell to check plaintiff for injuries. Plaintiff refused to see her and did not seek any medical attention for any injuries allegedly sustained during his removal from his cell.

After the incidents on May 21, 2010, defendant Patricia Fish reviewed the incident reports prepared by Deputy Manka and defendants Conroy, Hendrickson, Degner and Blanton. Fish determined that plaintiff had violated four separate Monroe County jail rules: (1) failing to follow lawful orders; (2) resisting jail officers; (3) disorderly conduct; and (4) causing jail disruption. She prepared an inmate major violation report and concluded that plaintiff should receive 10 days in a receiving cell as punishment for his violations of the jail rules.

On May 22, defendant Fish went to plaintiff's cell in receiving, gave him the inmate major violation report and told him that she had imposed 10 days in receiving as sanctions for his violations of jail rules. Fish told plaintiff that he had a right to a hearing regarding his violation of jail rules and that she would conduct the hearing on the disciplinary sanctions she had decided to impose on plaintiff. She asked plaintiff whether he wanted a

hearing or whether he would waive his right to a hearing. Plaintiff said that he did not understand his hearing rights and asked "What's the point of having a hearing when it seems to me, though, you have your mind made up without the hearing?" Plaintiff handed the inmate major violation report back to Fish and stated "I didn't understand my hearing rights . . . it seems you had your mind made up, if I had a hearing or if I didn't have a hearing, I would get the 10 days regardless." Plaintiff refused to sign the inmate major violation report and Fish left.

A few minutes later, plaintiff saw defendant Fish in the hallway and asked if he could speak to her. He told her that he wanted a disciplinary hearing. Fish told plaintiff that he had waived his right to a disciplinary hearing when he refused to sign the inmate major violation report. Plaintiff told Fish that he wished to appeal her decision.

On May 23, defendant chief deputy Josvai considered plaintiff's appeal. She reviewed the incident reports and questioned plaintiff. She told plaintiff that she would increase the sanctions imposed on him if she could. Ultimately, she determined that the 10-day sanction was appropriate.

On May 24, defendant Conroy reviewed defendants Fish's and Josvai's decisions and decided that plaintiff had not waived his right to a disciplinary hearing. Conroy overturned the 10-day sanctions and ordered that plaintiff be returned to a regular cell. Plaintiff was returned to a regular cell that morning and did not receive any further penalties or discipline

related to the May 21 incident.

## OPINION

### A. Excessive Force

Plaintiff contends that defendants Conroy, Hendrickson, Degner and Blanton used excessive force to pull him off his bunk and drag him through the hall and that he suffered an injury to his foot and wrists as a result. Additionally, plaintiff contends that defendants used excessive force against him by slamming his head onto the concrete cell bed and tasing him when he was handcuffed in the receiving cell. Defendants contend that their actions did not constitute excessive force and even if they did, they are entitled to qualified immunity on plaintiff's excessive force claim.

Because plaintiff was a pretrial detainee at the time of the incident, his claim of excessive force falls under the due process clause of the Fourteenth Amendment. Forrest v. Prine, 620 F.3d 739, 743-44 (7th Cir. 2010); Lewis v. Downey, 581 F.3d 467, 473 (7th Cir. 2009). The court of appeals has explained that "[t]he Fourteenth Amendment right to due process provides at least as much, and probably more, protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment." Forrest, 620 F.3d at 744. However, "the exact contours of any additional safeguards [guaranteed by the Fourteenth Amendment] remain undefined." Lewis, 581 F.3d at 474. Neither plaintiff nor defendants

have identified any protections guaranteed by the Fourteenth Amendment that would have provided plaintiff more protection than he would received under traditional Eighth Amendment standards. Thus, I will use the Eighth Amendment standards for excessive force cases to analyze plaintiff's Fourteenth Amendment claim. Id. at 475 (applying Eighth Amendment excessive force standard to pretrial detainee's excessive force claim); Forrest, 620 F.3d at 744 (same).

To determine whether a prison official's use of force on a prisoner was "excessive" in violation of the Eight Amendment, a court must determine "whether [the] force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). The factors relevant to making this determination include:

- the need for the application of force;
- the relationship between the need and the amount of force that was used;
- the extent of injury inflicted;
- the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; and
- any efforts made to temper the severity of a forceful response.

Whitley, 475 U.S. at 321.

Plaintiff has adduced no evidence that defendants used excessive force against him when they entered his regular cell, handcuffed him, pulled him off the bunk and carried him to the receiving cell. Plaintiff says that defendants pulled him off the bed in "an excessive way," Plt.'s Dep., dkt. #31-1, at 33, but that is too conclusory a statement to create a genuine issue of material fact. He provides no details about how defendants' actions were "excessive." Moreover, it is undisputed that plaintiff did not get off the bunk or stand up when ordered to do so, thus requiring defendants to pull him up from the bunk. Although plaintiff says that his feet hit the bedframe when defendants pulled him up, he has adduced no evidence suggesting that defendants intentionally caused his feet to hit the bedframe or intended to harm him in anyway. Additionally, defendants asked plaintiff repeatedly what was wrong with his foot and whether he could walk, but plaintiff responded only by saying that his foot hurt and refusing to stand up. Thus, defendants carried him to the receiving cell. No reasonable jury could infer from these allegations that defendants used force against plaintiff "maliciously and sadistically for the very purpose of causing harm," rather than "in a good faith effort to maintain or restore discipline."

However, there is a genuine dispute of material fact regarding whether defendants used excessive force against him once he was in the receiving cell. In particular, there is a dispute about whether defendants slammed plaintiff's head into the concrete bed and used a taser against him solely for the purpose of causing him harm. Plaintiff says that defendants

slammed his head into the concrete cell bed and used a taser against him even though he was not resisting or posing any risk of harm to jail staff or anyone else. He says that to the extent defendants were having difficulty removing his handcuffs, it was solely because they had put the handcuffs on too tightly and because they were kneeling on his back and causing his body to tense. Although defendants deny slamming plaintiff's head and say that plaintiff was resisting their attempts to remove his handcuffs, this is a factual dispute that must be resolved by a jury. The video of the incident is the only objective evidence in the record and it does not establish whether plaintiff was resisting, whether defendants slammed plaintiff's head into the concrete slab or whether defendants' use of the taser was reasonable. The video shows only that plaintiff was handcuffed, lying on his stomach and surrounded by correctional officers when the alleged excessive force occurred. If a jury were to believe plaintiff's version of events, the jury could conclude that because plaintiff was not resisting and posed no safety threat at the time defendants slammed his head and used the taser against him, defendants' use of force was disproportionate to the situation. In addition, a jury could conclude that defendants made no efforts to temper the severity of the force and that defendants intended to harm plaintiff.

Defendants cite several cases that they contend support their use of force, but the cases do not change my conclusion that a genuine dispute of fact exists that must be resolved by a jury. First, defendants contend that under circuit precedent, prison guards may use

force against inmates who are refusing to comply with orders. They cite Soto v. Dickey, 744 F.2d 1260, 1267 (7th Cir. 1984), in which the court of appeals stated that

> Orders given must be obeyed. Inmates cannot be permitted to decide which orders they will obey, and when they will obey them . . . . Inmates are and must be required to obey orders. When an inmate refuse[s] to obey a proper order, he is attempting to assert his authority over a portion of the institution and its officials. Such refusal and denial of authority places the staff and other inmates in danger.

However, the issue in this case is not whether plaintiff was required to obey staff's orders to remove the paper from his light, to walk down the hallway or to cooperate with defendants' attempts to remove his handcuffs. The issue is whether defendants' response to plaintiff's obstinance was reasonable under the circumstances or whether it was excessive and was intended to cause plaintiff harm.

Also, defendants cite several cases in which the court of appeals discusses the use of tasers in jail and prison. E.g., Lewis, 581 F.3d at 476 (recognizing "the important role that non-lethal, hands-off means—including taser guns—play in maintaining discipline and order within detention facilities"); Forrest, 620 F.3d at 745 ("in a jail or prison setting, it is not hard to imagine any number of scenarios that would justify the [use of] . . . taser guns") (citation omitted). These cases are not particularly helpful to defendants, because the court of appeals has explained explicitly that whether an application of force is excessive depends on the circumstances. As the court of appeals explained in Lewis,

> In many circumstances—often when faced with aggression, disruption, or physical threat—compelling compliance with an order is a valid penological justification for use of a taser. But such justification does not necessarily exist every time an inmate is slow to comply with an order. What must be decided in each case . . . is whether the facts surrounding the taser's deployment . . . demonstrated actual malice or sadistic purpose on the part of the user.

Lewis, 581 F.3d at 477 (internal citations omitted).

In Lewis, the court of appeals also explained that the use of taser guns may be appropriate when "the victims have been violent, aggressive, confrontational, unruly, or presented an immediate risk of danger to themselves or others. . . . [because] [s]uch behavior certainly increases the need for force and often poses a threat to the security officers." Id. (collecting cases). If a jury accepted plaintiff's version of events in this case, it could conclude that the defendants' use of the taser was wanton and malicious because plaintiff was not violent, aggressive, unruly or even resistant and posed no threat to defendants.

Finally, I agree with plaintiff that defendants are not entitled to qualified immunity on plaintiff's excessive force claim. Qualified immunity applies whenever a government official's actions, even if unconstitutional, did not violate the "clearly established law" at the time. Pearson v. Callahan, 555 U.S. 223, 822 (2009); Vinning-El v. Evans, 657 F.3d 591, 594 (7th Cir. 2011). Once the defendant has raised a qualified immunity defense, the plaintiff has the burden to show that it should not apply. Mannoia v. Farrow, 476 F.3d 453, 457 (7th Cir. 2007). As explained above, a reasonable jury could conclude that defendants

acted with malice and intended to harm plaintiff when they used force against him. "The notion that unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment is not a new or unusual constitutional principle." Hill v. Shelander, 992 F.2d 714, 718 (7th Cir. 1993) (internal quotations and citations omitted). Nor is the notion that the Fourteenth Amendment provides at least as much protection from excessive force as the Eighth Amendment. Wilson v. Williams, 83 F.3d 870, 875 (7th Cir. 1996). Thus, defendants are not entitled to qualified immunity and are not entitled to summary judgment on plaintiffs' claim that defendants used excessive force against him in the receiving cell. Lewis, 581 F.3d at 478-79 (summary judgment inappropriate because there was genuine issue of fact regarding whether officer's use of taser was malicious and qualified immunity did not apply).

B. Due Process

Plaintiff and defendants have moved for summary judgment on plaintiff's claim that defendants Josvai and Fish violated his procedural due process rights under the Fourteenth Amendment by providing him no process before placing him in a receiving cell. To establish a procedural due process violation, plaintiff must show that he was deprived of a "liberty interest" and that this deprivation took place without the procedural safeguards necessary to satisfy due process. Sandin v. Conner, 515 U.S. 472, 483-84 (1995); U.S. Const. amend.

XIV. Plaintiff contends that he was entitled to receive at least as much process as convicted prisoners are entitled to receive, namely, advance written notice of the charges against him; a hearing before an impartial decision maker at which he could have presented testimony and evidence; and, for any disciplinary action taken, a written explanation, supported by at least "some evidence" in the record. Wolff v. McDonnell, 418 U .S. 539, 563-71(1974); Lagerstrom v. Kingston, 463 F.3d 621, 624 (7th Cir. 2006). Plaintiff contends that he was denied due process because (1) he was not given copies of the incident reports before he was found guilty of violating jail rules; (2) he was not given a hearing at which he could present evidence and witnesses; (3) defendant Fish, the decision maker, was not impartial because she had decided that plaintiff was guilty of the charges and should be placed in segregation for 10 days before she offered plaintiff a hearing; (4) defendant Fish did not explain the reason for the disciplinary sentence she imposed; and (5) defendant Josvai failed to correct Fish's due process violations on appeal.

I agree with plaintiff that defendant Fish would not have been an impartial decision maker who could have conducted a hearing in compliance with the due process requirements set forth in Wolff, 418 U .S. at 563-71. Fish had made up her mind about plaintiff's guilt and the punishment he should receive before listening to plaintiff's version of events or any testimony from plaintiff's witnesses. Additionally, I agree with plaintiff that he did not waive his right to a hearing by telling Fish that he did not understand his hearing rights.

Nonetheless, I conclude that plaintiff cannot establish a violation of his due process rights.

In Rapier v. Harris, 172 F.3d 999 (7th Cir. 1999), the court of appeals held that a pretrial detainee cannot be punished for disciplinary infractions that occur during detention without being afforded due process. Id. at 1005-06. However, the court of appeals has also explained that the due process clause does "not confer a right to a *predeprivation* hearing in every case in which a public officer deprives an individual of liberty or property." Holly v. Woolfolk, 415 F.3d 678, 680 (7th Cir. 2005) (emphasis added). In Holly, the court of appeals held that a pretrial detainee's placement in segregation for two days without a prior hearing did not violate his due process rights. Id. at 680-81. Corrections officers had reason to believe that the detainee was disrupting a jail headcount, which had the potential to interfere with jail security and discipline. In finding no due process violation, the appellate court analogized the two-day detention to the 48 hours in which a person can be arrested and held before being charged with a crime or given a hearing. Id. at 680-81. See also Protect Marriage Illinois v. Orr, 463 F.3d 604, 608 (7th Cir. 2006) ("what is required in the name of due process depends" on circumstances). More recently, the court of appeals explained that "[d]isciplinary measures that do not substantially worsen the conditions of confinement of a lawfully confined person are not actionable under the due process clause, regardless of whether the confinement is criminal or civil." Miller v. Dobier, 634 F.3d 412, 415 (7th Cir. 2011) (citing Sandin, 515 U.S. at 485-86).

Like the pretrial detainee in Holly, plaintiff was held in a receiving cell for only two days because defendant Conroy released him after determining that plaintiff should have been given a hearing. As in Holly, the defendants had valid managerial reasons for placing plaintiff in the receiving cell initially. In particular, it is undisputed that plaintiff refused several orders from jail staff to remove the paper from his light and that he had to be removed from his cell so that staff could remove the paper. As the court explained in Holly, it may be appropriate for jail staff to separate a detainee without providing him a hearing when staff has "probable cause to believe [he] has violated a disciplinary rule." Id. at 681. In other words, a limited detention of a pretrial detainee while he is awaiting a hearing is constitutionally permissible. Id.; see also Dunkin v. Dart, 2010 WL 3547969, *5 (N.D. Ill. Sept. 2, 2010) ("plaintiff had no right to remain in the general population prior to the disciplinary hearing"); Williams v. County of Cook, 2010 WL 3324718, *7-8 (N.D. Ill. Aug. 19, 2010) (being held for 10 days in segregation before hearing did not violate pretrial detainee's due process rights). In this case, plaintiff was never provided a hearing or opportunity to be heard. However, he never received any punishment beyond the two days in spent in the receiving cell. Under the circumstances, the mere fact that plaintiff was segregated from the general population for a short time is not sufficient by itself to rise to a violation of his due process rights. Therefore, I will deny plaintiff's motion for summary judgment on this claim and grant summary judgment to defendants.

ORDER

IT IS ORDERED that

1. Plaintiff Michael Kingsley's motion for partial summary judgment, dkt. #21, is DENIED.

2. The motion for summary judgment filed by defendants Lisa Josvai, Patricia Fish, Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton, dkt. #26, is GRANTED IN PART AND DENIED IN PART. Defendants' motion is DENIED with respect to plaintiff's claims that defendants Conroy, Hendrickson, Degner and Blanton used excessive force against plaintiff in violation of the Eighth Amendment after plaintiff had been carried to a receiving cell on May 21, 2010. Defendants' motion for summary judgment is GRANTED in all other respects.

Entered this 16th day of November, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MICHAEL B. KINGSLEY,

Plaintiff,

v.

DENNIS PEDERSEN, LISA JOSVAI, PATRICIA FISH, ROBERT CONROY, STAN HENDRICKSON, FRITZ DEGNER and KARL BLANTON,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 10-cv-832-bbc

This action came before the court and a jury with District Judge Barbara B. Crabb presiding. The issues have been considered, tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants and this case is dismissed.

Approved as to form this 18th day of October, 2012.

Barbara B Crabb
Barbara B. Crabb,
District Judge

Peter Oppeneer
Peter Oppeneer, Clerk of Court

10/23/12
Date

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

MICHAEL KINGLSEY,

Plaintiff,

-vs- Case No. 10-CV-832-BBC

STAN HENDRICKSON and FRITZ DEGNER, Madison, Wisconsin October 15, 2012 1:14 p.m.

Defendants.

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STENOGRAPHIC TRANSCRIPT OF SECOND DAY OF JURY TRIAL
AFTERNOON SESSION
HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB, and a jury

APPEARANCES:

For the Plaintiff: Merchant & Gould
BY: EDWARD PARDON
WENDY WARD
JOEL GRAHAM
10 East Doty Street, Ste. 600
Madison, Wisconsin 53703

For the Defendants: Whyte Hirschboeck Dudek
BY: ANDREW JONES
TIMOTHY POSNANSKI
One East Main Street
Madison, Wisconsin 53703

Lynette Swenson RMR, CRR, CBC
Federal Court Reporter
U.S. District Court 120 N. Henry St., Rm. 520
Madison, WI 53703 (608) 255-3821

Q Was there any discipline to be imposed other than these lockdowns and the segregation in the receiving cell? Or was that it?
A No other discipline, just a lockdown.
MR. JONES: Thank you.
THE COURT: You may step down.
(Witness excused at 2:21 p.m.)
THE COURT: Mr. Pardon, you may call your next witness.
MR. PARDON: All right. Your Honor --
MR. JONES: I'm sorry, I didn't mean to interrupt, but this witness was under subpoena. Is he released from that subpoena?
MR. PARDON: Yes.
THE COURT: You're free to leave the building.
MR. PARDON: Your Honor, we call Mr. Brian Landers.

**BRIAN LANDERS, PLAINTIFF'S WITNESS, SWORN,**

DIRECT EXAMINATION

BY MR. PARDON:
Q Good afternoon.
A Good afternoon.
Q Could you state your name.
A Brian Landers.
Q Mr. Landers, what is your present employment

position?
A I am the criminal justice chair for Madison College.
Q And Madison College, just for the benefit of our jury, has that been referred to as any other names?
A Yes. Madison Area Technical College.
Q MATC?
A MATC, correct.
Q Do you have any other positions that you presently hold?
A I co-own a company called *BlueboardIT*, and I'm also an elected official. I'm the mayor of the City of Wisconsin Dells.
Q Could you briefly describe your educational background.
A I have a social degree studies from MATC. I also have a bachelor of science in criminal justice and prelaw from Mt. Senario College. And I also attended the 500 -- or the 400-hour at that time Basic Law Enforcement Recruit Academy at MATC.
Q All right. And do you have any direct experience in law enforcement?
A Yes. I served 18 years with the Wisconsin Dells Police Department.
Q And when was that?

A From 1992 to the end of 2010.
Q Okay. And what in general were your duties as a police officer?
A General patrol duties. Investigative duties. As I advanced through the Department, I became a canine handler for about eight-and-a-half years. I was on the drug unit. I was assigned to the county drug units as well in Sauk and Columbia County. I was in charge of Department training.

I was promoted to Lieutenant in 2003 through 2008. In 2008 I was promoted to Lieutenant. Part of my duties as a sergeant were supervision of patrol staff, supervision of nonpatrol staff, as well our dispatch. Part of my duties as Lieutenant was to do policy guidance, assessment budgeting.

We also had a municipal lockup, so duties included administration of the municipal lockup as well.
Q Just to clarify I think you said you became a Lieutenant in 2003.
A I'm sorry. Sergeant. I was promoted to Sergeant from 2003 to 2005 or 2003 to 2008 and then 2008 I was promoted to Lieutenant.
Q Okay. And did part of your training as a police officer involve the appropriate use of force?
A Yes, it did.

Q Did you ever have occasion to use force or consider the use of force while you were a police officer?
A Many times.
Q Did you ever have occasion to use a taser on anyone while you were a police officer?
A Yes, I did.
Q And have you ever yourself been tased?
A Yes, I have.
Q What does it feel like?
A It hurts.
Q And as part of your duties in the Wisconsin Dells Police Department, did you have occasion to have access to a jail?
A Yes. The City of Wisconsin Dells actually sits on four different counties: Sauk, Columbia, Juneau and Adams. So we had to be familiar with the jail procedures in all four of those jails. That included taking people to the jail; sometimes we'd have to pick them up to transport them to other places; sometimes we'd have to interview people at the jail. So we had to be familiar with those jails, as well as our municipal lockup as well.
Q Okay. Now, you mentioned that you're on the faculty of Madison College or MATC, formerly known as MATC. How long have you been on the faculty?

unreasonable force. We think that's essentially a legal conclusion and that he should not be permitted to testify to it. I do have citations if that would assist the Court.

MR. PARDON: I think the answer to your motion in limine, to the motion in limine was an accurate description of the law. I think he can testify. He's talking about what the standards are, how officers are expected to act, and he's going to testify whether that's reasonable.

THE COURT: Right. We'll stick with that, with the ruling. Okay.

(End of side bar discussion at 2:35 p.m.)

BY MR. PARDON:

Q Getting back to where we were, let me reask the question. What were you asked to do in connection with this case?

A I was asked to review the case and establish an opinion based upon my review, and my opinion was that -- my first opinion was that the use of the taser was unreasonable.

My second opinion that I've established is that the handcuffing that was done on Mr. Kingsley was not done appropriately and could have led to the handcuffs not being applied appropriately to tension in the arms of

Mr. Kingsley.

The last opinion that I've established was that the control tactics done by Sergeant Hendrickson in the receiving cell of Mr. Kingsley were also unreasonable.

Q Okay. I'm going to ask you more detail about those opinions in a bit. But I would just like to back up a little bit and say what things did you do personally to come to those conclusions?

A I reviewed the incident reports that were supplied to me. I reviewed the videos that were supplied to me. I also reviewed the policies by Monroe County. I've reviewed the deposition of Mr. Kingsley. I've also used the -- used the State training manuals that were present at the time of the incident. And I used my own training and experience to establish my opinion.

Q Okay. Did you review the training records of the officers in this case as well?

A Yes, I did.

Q All right. All right. I'd like to turn now to your opinion on the use of the taser, and if you could summarize why do you believe that the use of the taser on Mr. Kingsley under this circumstance was unreasonable?

A The use of a taser is -- a taser is a weapon. The use of a taser in our state and also throughout many

the deputies complied with the Monroe County policy in this case?

A In particular attention is No. 4, "Intermediate weapon and the use of a stun device or an electronic security belt."

MR. JONES: I'm going to object to the testimony, Your Honor, as being irrelevant.

MR. PARDON: May I?

THE COURT: Mr. Pardon. Oh, I thought you wanted to be heard.

MR. PARDON: I do.

THE COURT: Okay. Go ahead.

MR. PARDON: I mean it's in his report and it's relevant to the expectations of how force was to be used.

THE COURT: I'll overrule the objection. I think this is appropriate testimony.

BY MR. PARDON:

Q Okay. You were referring to Sec. 4 I think of the report. How does that inform your opinions in this case?

A It informs my opinions that the expectation of performance by Monroe County employees was that the intermediate weapon, which would be in today's language -- actually language at the time, but it was not

updated, would be protective alternative. So what they've essentially done is they said that where the state has said that you can use a taser or a stun device at a level of control alternatives which is -- control alternatives would again be when you're facing active resistance or threat, they put it at one level even higher. Now --

THE COURT: I'm sorry, when you say *they*, who are you talking about?

THE WITNESS: Monroe County. I'm sorry, Ma'am. They put that at one level higher. So this is at a level that is in today's time, you would be faced with ongoing resistance or assaultive behavior in which you really have a definitive fear that you're going to be seriously hurt by this person.

So what Monroe County did is they told their deputies even though the state is saying this, you can use the taser at a lower level, we expect you to use it at an even higher level, which would be equal to use of a baton.

BY MR. PARDON:

Q All right. Set that aside then. Just briefly again then, could you, just to sum it up, summarize your opinion about why the use of the taser was not appropriate in this case?

A There was no active resistance. There was no intentional threat of bodily harm against any of the deputies that were there.
Q All right. I'd like to ask you about a second opinion you expressed in this case. You testified earlier that the handcuffs were improperly applied. Do you recall that?
A Yes, I do.
Q All right. And that that, in fact, may have led to -- it was possible that that led to tension and pain on the part of Mr. Kingsley. Do you recall that?
A Yes.
Q All right. And just to be clear, are you saying that there was resistive tension by Mr. Kingsley?
A I'm just saying that that was what was reported in the officers' reports.
Q Now you said that the handcuffs were put on improperly and I'm wondering if you could just describe and perhaps demonstrate to the jury a proper means of putting on a handcuff.
A Okay. Handcuffs are generally placed on a person in either a compliant or noncompliant fashion, whatever the subject is exhibiting at the time. In a compliant fashion, officers are trained how to verbalize with the person, how to stabilize a person, how they move in to

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL KINGLSEY,

Plaintiff,

-vs- Case No. 10-CV-832-BBC

STAN HENDRICKSON and FRITZ DEGNER, Madison, Wisconsin October 17, 2012 9:00 a.m.

Defendants.

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STENOGRAPHIC TRANSCRIPT OF FOURTH DAY OF JURY TRIAL HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB, and a jury

APPEARANCES:

For the Plaintiff: Merchant & Gould
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what you put on the bench?

MS. WARD: Yes, Your Honor.

THE COURT: This is from the Seventh Circuit?

MS. WARD: Yes. Do you want me to address the question now?

THE COURT: Sure.

MS. WARD: Okay. So we would just like to request that the originally proposed post-trial jury instructions be used because we submit that there isn't a separate subjective element for the instruction for excessive force in the Seventh Circuit. There are a number of Seventh Circuit pretrial detainee failure to protect or conditions of confinement cases in which a separate determination of intent is articulated. In those cases, the necessary level of intent is deliberate, callous indifference and reckless disregard. However, in excessive force cases, the conduct will always be intentional. So there's a distinction between a failure to protect where, for example, a prisoner is beaten by other prisoners and then the level of intent comes into question because it's whether the prison officials, it accidentally happened on their watch or they egged it on, and that's when the level of intent becomes an issue.

But in an excessive force case, the conduct will

always be intentional. Indifference or disregard makes no sense. And in that respect, Your Honor, we submit that the way the jury instructions are currently worded is confusing.

In the Fourteenth Amendment context, excessive force is any force that is determined to constitute punishment, and the Seventh Circuit has squarely held in *Wilson v. Williams* that intent to punish can be inferred from the objective factors used to determine whether a use of force is unreasonable. That holding of *Williams* is set forth in the Seventh Circuit Pattern Instruction 708 and 709, which we provided to Your Honor, and those are the instructions on which we based our proposed instructions.

In *Wilson*, the Seventh Circuit held that the trial court's jury instruction was not inappropriate in the Fourteenth Amendment context where that instruction stated the test was objective on reasonableness. That was the holding of *Wilson*.

The Court in *Wilson* also held that even if the test for excessive force is not wholly objective, the jury can rely on those objective factors to infer intent, and the fact that a separate subjective element isn't a part of the excessive force standard in the Seventh Circuit is also shown in pattern instruction 709, which

expressly states that "in deciding whether the defendant's use of force was unreasonable, you must not consider whether the defendant's intentions were good or bad."

And I want to draw the Court's attention to two additional cases that we also provided to Your Honor and those are *Titran v. Ackman* and *Davis v. Peoria County*. In *Titran*, the Seventh Circuit held that most of the time the propriety of using force on a person in-custody pending trial will track the Fourth Amendment. The court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them.

In the *Davis* case that we provided to Your Honor, the Central District of Illinois analyzed the Seventh Circuit law on this issue and found that reasonableness is the key analysis for both pretrial detainees and arrestees. The court there referred to the intent element as just the intent to use force.

THE COURT: So, you have no objection to the proposal for No. 1, defendants used force on plaintiff.

MS. WARD: No. 1 of the special verdict?

THE COURT: I'm talking about --

MS. WARD: Oh, yes. Correct. Yes, Your Honor.

THE COURT: Then defendants' use of force was

unreasonable in light of the facts and circumstances at the time.

MS. WARD: Correct. We have no problem with that either.

THE COURT: Okay. So it's the third one. That defendants knew that using force presented a risk of harm to plaintiff but they recklessly disregarded his safety by failing to take reasonable measures to minimize the risk of harm.

MS. WARD: Right. And it's that that we submit is confusing. The *disregard of plaintiff's safety* is confusing in the context of an excessive force case where they were deliberately applying force.

So we would suggest eliminating 3, and also we had an argument for eliminating 4 as well.

THE COURT: I'm sorry, for eliminating?

MS. WARD: No. 4. The defendants' conduct caused harm.

THE COURT: Well, let's stick with No. 3.

MS. WARD: Sorry to jump ahead.

THE COURT: Mr. Posnanski.

MR. POSNANSKI: Yes, Your Honor. We would reiterate our request for the initial pretrial instruction we submitted on the excessive force issue. But to write intent completely out of the instruction I