No. 16-___

IN THE

Supreme Court of the United States

JAIME CARRASCO; ADRIAN DOMINGUEZ; CHRISTOPHER FOSTER; CRAIG KAISER; JOSE VAZQUEZ; and JASON WEIERS,

Petitioners,

v.

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, *et al*.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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June 5, 2017

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QUESTIONS PRESENTED

1. Congress did not intend Section 1983 liability to attach without direct causation, *i.e.*, unless the defendant either "subjects" another to constitutional injury, or "causes" a second person to subject the other to constitutional injury. 42 U.S.C. § 1983; *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Did the Ninth Circuit Court of Appeals violate this precept, and unlawfully expand the reach of Section 1983, by declaring that the Petitioner detention officers, who are not alleged to have either inflicted any constitutional injury or caused others to do so, can nevertheless face Section 1983 liability as "integral participants" in others' allegedly unconstitutional acts?

2. The lower courts denied Petitioners qualified immunity stating that "the right to be free from an 'unprovoked and unjustified attack by a prison guard'" was clearly established. Respondents have not claimed that the Petitioner detention officers launched an unjustified attack against Atencio, or did anything to set the events in motion. Respondents claim that because others engaged in acts of alleged excessive force, these Petitioners can be liable as integral participants in those acts because they attempted, with soft empty hands, to control and handcuff an actively resisting Atencio. Does the lower courts' formulation of the right at issue – "the right to be free from an 'unprovoked and unjustified attack by a prison guard'" – violate this Court's directive that to be clearly established, the "right at issue" for purposes of a qualified immunity analysis must be particularized to the facts of the case?

PARTIES TO THE PROCEEDING

Petitioners are Maricopa County Sheriff's Office ("MCSO") detention officers Jaime Carrasco, Adrian Dominguez, Christopher Foster, Craig Kaiser, Jose Vazquez, and Jason Weiers (collectively the "MCSO Petitioners"). Respondents are the surviving statutory beneficiaries of decedent: Ernest Joseph Atencio, Rosemary Atencio, Joshua Atencio, Joseph Atencio, Eric Atencio, and M.A.; and personal representative Michael Atencio. Atencio was an arrestee brought to the Fourth Avenue Jail in Maricopa County, Arizona on December 15, 2011.

Other parties to the Ninth Circuit proceedings are MCSO Sergeant Anthony Scheffner (who won summary judgment below and is not a petitioner); co-defendant MCSO Detention Officer Hatton (separately represented); and co-defendants City of Phoenix Police Officers Patrick Hanlon and Nicholas French (separately represented). Other parties to the district court proceedings (non-parties to the appeal) are co-defendants Maricopa County Correctional Health Services employees Ian Cranmer, William McLean and his wife Kelly Clark, and Monica Scarpati and her husband Ariel Scarpati.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, undersigned counsel reports that the MCSO Petitioners are individual public employees.

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PETITION FOR A WRIT OF CERTIORARI

The MCSO Petitioners respectfully petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's memorandum decision is unreported and can found at *Atencio v. Arpaio*, No. 15-15451, __ Fed. Appx. __, 2016 WL 7487732 (9th Cir. Dec. 30, 2016). (Pet. App. 1a.) The district court's decision is reported at *Atencio v. Arpaio*, 161 F. Supp. 3d 789 (D. Ariz. 2015). (Pet. App. 9a.) The district court's order of clarification on denial of reconsideration is unreported and may be found at *Atencio v. Arpaio*, 2015 WL 5337145 (D. Ariz. Sept. 14, 2015). (Pet. App. 55a.)

JURISDICTIONAL STATEMENT

The Ninth Circuit filed its decision on December 30, 2016. (Pet. App. 1a.) That court denied rehearing and rehearing en banc on February 14, 2017. (Pet. App. 69a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons . . . , against unreasonable searches and seizures, shall not be violated. . . .

U.S. Const. amend. IV.

Section 1983 of the Civil Rights Act of 1871 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , 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. . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Atencio was uncooperative from the outset.

These Petitioners are Maricopa County Sheriff's Office (MCSO) detention personnel and were not involved in Atencio's arrest. Phoenix police officers arrested Atencio and brought him to MCSO's jail to be booked. Atencio was uncooperative from the start. He repeatedly ignored orders to sit down in the medical holding cell, had to be handcuffed to a bench and then removed to an isolation cell, where he tried to break a wall outlet. Subsequently, Phoenix Officer Hanlon escorted Atencio to the "line scan room" to complete the booking process. The line scan room is a search area in the jail with security screening equipment used to screen detainees' clothing for contraband. Searching an arrestee and his clothing is a necessary final step before the arrestee can be accepted into the jail.

B. Respondents admit Atencio "actively resisted" being handcuffed in the line scan room.

Once Atencio was in the line scan room – an open area accessible by other arrestees – Phoenix Police Officer Hanlon asked Atencio several times to remove his socks and shoes so they could be scanned through the x-ray machine. Atencio would not comply, however, and said something like "you do it." After refusing several orders to remove his socks and shoes, Atencio (who was not handcuffed) tensed his arms. Concerned that Atencio was becoming aggressive, Phoenix Officer Hanlon grabbed Atencio's wrist to place Atencio's hands behind his back so he could be handcuffed. Atencio began actively resisting (which Plaintiffs admitted in their summary judgment responding facts). Atencio, exhibiting unusual strength, began overpowering Officer Hanlon, so the Phoenix officers decided to try to take him to the ground. Phoenix Officer French grabbed Atencio from behind with his arm across his chest and neck area, a wrestling maneuver that the district court characterized as a "choke hold or carotid hold." Atencio fell on top of Officer French.

MCSO Officers – Petitioners here – then moved in to assist in getting Atencio handcuffed. Once Atencio was on the ground, MCSO Sergeant Weiers knelt on the floor and tried to hold onto Atencio's arm. Atencio clawed at Sergeant Weiers, tried to grab his hand, and scratched him. MCSO Detention Officer Foster and MCSO Lieutenant Kaiser tried to control Atencio's legs but he pushed them both off like "paper weight." MCSO Detention Officer Carrasco knelt down to assist Lt. Kaiser with holding Atencio's legs. Foster was able to get one handcuff on Atencio's left wrist but lost

control of it as Atencio continued to struggle. A flailing cuff can be a dangerous weapon, so MCSO Detention Officer Dominquez moved in to assist. The officers collectively tried to get control of Atencio's hand but he kept breaking free. Plaintiffs have never alleged that any of these assisting MCSO officers applied excessive force as they tried to control Atencio's limbs with soft empty hands.

After about a minute and a half, Atencio was still not under control. At this time, MCSO Officer Jose Vazquez entered the search area. MCSO Sergeant Weiers said "Taser Taser," and deployed the Taser three times, once in probe mode (which had no effect) and twice in drive stun mode. Atencio continued to struggle and kick even after being tased.

Co-defendant MCSO Officer Anthony Hatton delivered three to four strikes to Atencio's facial region in order to subdue him.

Officer Vazquez was finally able to get the second handcuff on Atencio. Once Atencio was handcuffed, Sergeant Weiers and the other officers disengaged. Atencio said, "[w]ait until I catch my breath. I'm going to fuck you guys up." When physician's assistant Ian Cranmer asked Atencio if he was OK, Atencio said: "Anybody that touches me, I'm going to fucking kill you" and unleashed a stream of profanities.

C. Atencio continued to actively resist in the safe cell.

Atencio was carried into a safe cell and placed on the ground – conduct Respondents agree was appropriate. Atencio was still struggling with the officers, who were trying to remove Atencio's clothing, a standard practice for detainees who may be suicidal. The officers told Atencio to stay still, relax, and stop resisting, to

no avail. Officer Carrasco tried to keep Atencio's right leg bent, but Atencio was pushing so hard he almost completely straightened it out. Officer Dominguez used soft hands to control Atencio's right arm while the other officers removed Atencio's clothes and the handcuffs. While the officers were removing Atencio's clothing, with no warning, co-defendant Hatton allegedly delivered a "knee strike" to Atencio's back. The record is devoid of evidence that the other officers knew Hatton would, or should have expected him to, deliver a knee strike, nor would they have had any opportunity whatsoever to prevent it even if they had seen it. Officers finished removing Atencio's clothing and exited the cell. About ten minutes later, medical staff noticed that Atencio did not appear to be breathing. They entered the cell, began life saving measures, and called 911. Atencio was transported to a hospital, where he later died.

D. Respondents sue; Petitioners move for summary judgment.

Respondents sued, claiming (in pertinent part) excessive force in violation of the Fourth Amendment. Three groups of defendants moved for summary judgment on qualified immunity: these MCSO Petitioners, Officer Hatton, and PPOs Hanlon and French. *See Atencio*, 161 F. Supp. 3d at 793.

E. The district court's ruling.

The district court denied qualified immunity, characterizing the "right at issue" as the right to be free from "an 'unprovoked and unjustified attack by a prison guard.'" *Atencio*, 161 F. Supp. 3d at 801. The court also ruled there were genuine fact issues as to: (1) whether co-defendant PPO Hanlon's wrist grab and PPO French's "choke hold/carotid hold" constituted excessive force; (2) whether co-defendant Hatton's fist strikes

in the line scan room and alleged knee strike in the safe cell constituted excessive force, and (3) whether Sergeant Weiers' tasing constituted excessive force. *Id.* at 798–802, 808.[1]

Though no one claimed the MCSO Petitioners (Carrasco, Dominguez, Foster, Kaiser, and Vazquez) used excessive force when trying to control Atencio's flailing arms and legs; and no one claimed the MCSO Petitioners caused anyone else to use allegedly excessive force, the district court nevertheless denied these Petitioners summary judgment on qualified immunity, stating there were factual disputes on: (1) whether they were "integral participants" in the use of excessive force by others; and (2) whether they violated a duty to intervene to prevent the excessive use of force. *Id.* at 801, 803. Petitioners (and their co-defendants) appealed.

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[1] The district court premised its ruling on the incorrect assertion that Atencio demonstrated "at most, passive resistance," *Id.* at 800, ignoring Respondents' own admission that Atencio had actually been "actively resisting." Active resistance justifies taser deployment. *See Hagans v. Franklin Cty. Sheriff's Office*, 695 F.3d 505, 509–11 (6th Cir. 2012) (suspect who refused to be handcuffed and actively resisted arrest did not have a clearly established right not to be tasered); *Barfield v. Rambosk*, 641 F. App'x 845, 848 (11th Cir. 2015) (the force officers used against non-compliant suspect who was resisting arrest and disobeying commands – several uses of the taser and five blows to the upper body – were not excessive); *Forrest v. Prine*, 620 F.3d 739 (7th Cir. 2010) (jail officer's use of taser on arrestee after he had refused strip search commands as part of booking process, and had clenched fists, shouted obscenities, and paced back and forth while facing officer 7-10 feet away, was not unconstitutional); *Hinton v. City of Elwood*, 997 F.2d 774, 781 (10th Cir. 1993) (use of taser multiple times was justified against an arrestee who was "actively and openly resisting").

F. The Ninth Circuit's decision.

The Ninth Circuit affirmed in pertinent respects. Citing *Lolli v. County of Orange*, 351 F.3d 410 (9th Cir. 2003), it upheld the denial of qualified immunity to the MCSO Petitioners, stating there was a genuine issue of material fact as to whether the Petitioners were "integral participants" in the others' acts of alleged excessive force. *Atencio,* 2016 WL 7487732, at *2.[2] With respect to the "right at issue," the Ninth Circuit said only that *Lolli* provided "clearly established precedent" that "should have put a reasonable official on notice that he was prohibited from the type and amount of force used against Atencio . . . when Atencio was at most passively resisting. . . ." *Id.* at *1.[3] *Lolli* was not a case where officers were trying to control an actively resisting detainee (flailing a handcuff) with soft empty hands. It was a case where officers allegedly engaged in a group beating of a detainee. Respondents have not alleged that these Petitioners engaged in any "group beating."

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[2] In *Lolli*, a group of officers took a pre-trial detainee to the ground without warning and allegedly beat him because he asked for food for a diabetic condition. The plaintiff was not able to identify which officer delivered which blow, but the jury could infer that the individual defendant officers actually participated in the alleged beating. *Lolli*, 351 F.3d at 417. That, of course, is not our case. Other than Weiers' taser deployment, Respondents have never claimed that the MCSO Petitioners ever personally engaged in excessive force, or that Respondents were unable to determine which officer did what.

[3] Again, this was incorrect, as Respondents had admitted Atencio was *actively* resisting when the allegedly excessive force was used. Indeed, the record is undisputed that Atencio's active resistance was preventing the officers from controlling him or getting the handcuffs on him.

REASONS TO GRANT THE PETITION

1a. The Ninth Circuit's ruling that the MCSO Petitioners could be subject to Section 1983 liability as "integral participants" conflicts with the language of Section 1983 and this Court's holding in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), both of which require a defendant to directly cause constitutional injury. 42 U.S.C. § 1983 states that for liability to attach, a person must "subject[ ], or cause [another] to be subjected" to a constitutional deprivation. *Monell* held that a municipality cannot be liable under Section 1983 unless it actually "causes" someone to violate another's rights. *Monell*, 436 U.S. at 692 ("[T]he fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent."). Wholly absent from the statute's language, or this Court's interpretations, is any authority for the Ninth Circuit's notion that these Petitioners – who were not even alleged to have either "subjected" Atencio to constitutional injury, or "caused others" to subject Atencio to constitutional injury – could nevertheless be held accountable for others' allegedly unconstitutional acts under the concept of "integral participation."

1b. Section 1983 liability may attach only if officers "subject" someone to constitutional injury in one of two ways: the defendant either *engages in* the allegedly unconstitutional act itself, or is a supervisor who "causes another" to subject plaintiff to unconstitutional injury. *Melear v. Spears*, 862 F.2d 1177 (5th Cir. 1989), is an example of an officer who was deemed

to have actually engaged in the allegedly unconstitutional act (an unlawful search). There, the officer:

> was a full, active participant in the search, not a mere bystander. Avirett proceeded to Stewart's door with Clark, and stood at the door armed with his gun while Clark went into the apartment. Both men thus performed police functions that were integral to the search. Because the jury could properly have found that the search was unconstitutional, it was also justified in finding both officers liable for their integral participation in the violation.

862 F.2d at 1186. Here, no one claimed that Lieutenant Kaiser or Officers Carrasco, Dominguez, Foster, or Vazquez "subjected" Atencio to unconstitutional injury, or performed acts integral to the allegedly unconstitutional wrist grab by PPO Hanlon, purported "choke hold" by PPO French, strikes by Officer Hatton, or taser deployment by Sgt. Weiers. This is not a case where Respondents have alleged that multiple officers engaged in a group "beating," or participated in some way in an unlawful search.

Nor has anyone claimed these Petitioners "caused others" to engage in allegedly excessive force. *Compare Santiago v. Warminster Township*, 629 F.3d 121, 129 (3d Cir. 2010) (plaintiff claimed defendants could be liable under Section 1983 because they "creat[ed] and authorize[d]" a raid plan that directed other officers to use excessive force); *Brown v. City and County of San Francisco*, 2014 WL 1364931 (N.D.Cal. 2014) (supervising officer who directed deputies in safe cell was an integral participant, for he allegedly caused others to subject Brown to constitutional injury).

The Ninth Circuit, by ruling that these officers could be liable as "integral participants" in the others' allegedly unconstitutional acts without evidence that they actually *subjected* Atencio to unconstitutional injury, or *caused others to subject him* to it, violated the language of Section 1983 and the holding of *Monell*. The Ninth Circuit decision defines participation way too broadly and in so doing has unlawfully expanded the reach of Section 1983. This Court's guidance is needed to instruct the Ninth Circuit that Section 1983 liability requires direct causation for constitutional injury, not some broad notion of "participation" that is really nothing more than a euphemism for vicarious liability.

1c. The Ninth Circuit cleared the path to improperly imposing vicarious liability in Section 1983 cases when it failed to distinguish this case from those in which (a) several officers actually participated in the unconstitutional act, but plaintiff could not identify which officer inflicted which injury; or (b) the defendant officers participated in a plan to use what turns out to be excessive force. *See*, *e.g.*, *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1448 (9th Cir. 1986) (officers could be integral participants because Rutherford could not specifically state whether the three defendants punched or kicked him, but he saw each of them among the five or six officers surrounding him while he was being beaten; they thus arguably participated in the allegedly unconstitutional conduct);[4] *Lolli v. County of Orange*, at 417 (plaintiff was not able to identify which officer delivered which blow, but the

[4] *See also Jones v. Williams*, 297 F.3d 930, 936 (9th Cir. 2002) ("In *Rutherford*, our focus was on permissible inferences. We did not indicate that the jury could find against the defendants without finding that they had some personal involvement in the beating.").

jury could infer that the individual defendant officers actually participated in the alleged beating); *Rosales v. Cty. of Los Angeles*, 650 Fed. App'x 546, 549 (9th Cir. 2016) ("a reasonable jury could infer any one of the four deputies applied blunt force to Rosales' abdomen or back."); *Boyd v. Benton Cnty.*, 374 F.3d 773, 780 (9th Cir. 2004) (where use of a flash bang device to enter a home was excessive force, officers who provided armed backup could be integral participants because they participated in the allegedly unconstitutional search operation knowing the flash bang was to be deployed). In these cases, the defendant officers actually participated in the unconstitutional conduct. That actual participation is missing here, and thus Petitioners are being subjected, improperly, to vicarious liability for others' allegedly unconstitutional acts.

2a. The lower courts have once again improperly defined the qualified immunity "right at issue" without any reference whatsoever to even the alleged facts of this case – despite this Court's repeated and recent warnings against doing so. *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 552 (2017). In Fourth Amendment cases like this one, it is especially important to define the right at issue with specificity because "it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix v. Luna*, __ U.S. __, 136 S. Ct. 305, 308 (2015).

The district court defined the right at issue as the right to be free from "an 'unprovoked and unjustified attack by a prison guard.'" *Atencio*, 161 F. Supp. 3d at 801. That formulation of the right at issue has zero application to these Petitioners' conduct. No one has

ever accused these Petitioners of launching an unprovoked attack on Atencio. Indeed, this formulation of the right at issue does not even account for Respondents' admission that Atencio was actively resisting when Petitioners moved in to assist in getting him under control. As to these Petitioners, the issue should have been whether it was clearly established in December, 2011 that it was unlawful to:

(1) use soft empty hands to help restrain and handcuff an actively resisting pretrial detainee so he could be searched before being admitted to the jail;

(2) use a taser on an actively resisting pretrial detainee to facilitate his handcuffing after efforts at less intrusive force were unsuccessful; and

(3) use soft empty hands to restrain an actively resisting pretrial detainee while removing his clothing and handcuffs during a safe cell placement.

2b. Having improperly defined the "right at issue" without any reference to these Petitioners' actual conduct, the lower courts then erroneously concluded that the law governing the MCSO Petitioners' conduct was "clearly established." To be "clearly established," the contours of the right must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 136 S. Ct. at 308. "Existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*

The district court failed to identify a single case where officers using soft empty hands to try to control an actively resisting detainee were denied qualified immunity (or held to have violated the Fourth Amendment) because others spontaneously engaged in alleged acts of excessive force. The Ninth Circuit cited only

Lolli v. County of Orange, 351 F.3d 410 (9th Cir. 2003), as clearly establishing that these Petitioners should have known their conduct could subject them to Fourth Amendment liability—hardly the "robust consensus of persuasive authority" required by *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Aside from that, the lone case is not even apposite. Even by the court's own description, in *Lolli* "a group of officers took a pre-trial detainee to the ground without warning, then began to strike and pepper spray him even though he posed no threat and was neither aggressive nor violent to the officers." *Atencio*, 2016 WL 7487732, at *1. Again, Respondents *have never alleged that these Petitioners struck Atencio or engaged in excessive force*. Neither *Lolli* nor any other case clearly establishes that detention officers who use soft empty hands to control an actively resisting detainee can be subject to Section 1983 liability when others spontaneously engage in alleged acts of excessive force.

2c. The lower courts' denial of qualified immunity to these Petitioners undermines jail officials' legitimate interests in ensuring the safety and security of jail facilities, and thus has serious repercussions beyond this case. Officers faced with a detainee who is uncooperative and actively resisting, especially in an unsecure jail intake area such as this, must be assured in knowing that they may use soft empty hands and/or a taser to gain control over that individual without fear of potential liability. *See Kingsley v. Hendrickson*, __ U.S. __, 135 S. Ct. 2466, 2473 (2015) (objective reasonableness must account for the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and

to maintain institutional security."); *Plumhoff v. Rickard*, __ U.S. __, 134 S. Ct. 2012, 2020 (2014) ("We thus 'allo[w] for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation."). The Ninth Circuit's decision undermines jail officials' legitimate interests in preserving internal order and discipline and maintaining institutional security.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 5, 2017

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Dec. 30, 2016]

No. 15-15451
D.C. No. 2:12-cv-02376-PGR

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; *et al.*,

Defendants-Appellants,

and

MARICOPA, COUNTY OF, a public entity; *et al.*,

Defendants.

Nos. 15-15456
D.C. No. 2:12-cv-02376-PGR

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; *et al.*,

Defendants,

and

PHOENIX, CITY OF, a public entity; *et al.*,

Defendants-Appellants.

Nos. 15-15459
D.C. No. 2:12-cv-02376-PGR

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; *et al.*,

Defendants,

IAN CRANMER, husband; *et al.*,

Defendants,

and

ANTHONY HATTON, husband

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona

Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted November 17, 2016
San Francisco, California

MEMORANDUM[*]

Before: MELLOY,[**] CLIFTON, and WATFORD, Circuit Judges.

Defendants-Appellants appeal from the district court's denial of summary judgment based on qualified immunity. We have jurisdiction under 28 U.S.C. § 1291.[1] We affirm in part, reverse in part, and remand.

We review de novo an order denying summary judgment based on qualified immunity. *Glenn v. Wash. Cty.*, 673 F.3d 864, 870 (9th Cir. 2011). A public official is entitled to qualified immunity if (1) the disputed facts taken in the light most favorable to the party asserting the injury do not show that the official's conduct violated a constitutional right, or (2) the constitutional right was not clearly established at the time the official acted. *See*, *e.g.*, *CarePartners*, *LLC v. Lashway*, 545 F.3d 867, 876 (9th Cir. 2008).

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

[**] The Honorable Michael J. Melloy, United States Circuit Judge for the Eighth Circuit, sitting by designation.

[1] Plaintiffs-Appellees' ("Atencio") motion to dismiss for lack of jurisdiction is denied because we have jurisdiction to consider "whether the defendant[s] would be entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff[s'] favor." *George v. Morris*, 736 F.3d 829, 836 (9th Cir. 2013) (brackets added) (quoting *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012)).

Viewing the evidence in the light most favorable to Atencio, including the available video evidence, several of Defendants' acts could be found by a jury to constitute excessive force. Officer French appeared to apply what might be perceived as a carotid hold on Atencio when he was already physically subdued by several officers and arguably posed no immediate threat. When Atencio was being held down by several officers in a "dog pile," there was evidence that Sergeant Weiers tasered Atencio three times and Officer Hatton struck Atencio repeatedly with a closed fist before Atencio was handcuffed and taken to a safe cell. There, Officer Hatton delivered a knee strike to Atencio's upper body, and possibly his head, even though Atencio was handcuffed and being held in a prone position on the ground by several officers. Under these circumstances, a reasonable jury could conclude that some or all of those actions were objectively unreasonable. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Assuming these facts for the purpose of the second part of the qualified immunity test, there was clearly established precedent that would have made it sufficiently clear to reasonable officials that the acts here constituted excessive force. The circumstances here are not meaningfully different from those in *Lolli v. County of Orange*, 351 F.3d 410 (9th Cir. 2003), in which this court held that the defendants were not entitled to summary judgment on an excessive force claim alleging that a group of officers took a pre-trial detainee to the ground without warning, then began to strike and pepper spray him even though he posed no threat and was neither aggressive nor violent to the officers. *Id.* at 417. *Lolli* should have put a reasonable official on notice that he was prohibited from the type and amount of force used against Atencio, including

multiple strikes to the face, repeated tasering, and a knee strike, when Atencio was at most passively resisting, he posed no threat to the officers, and he was already being physically restrained by several officers.

We recognize that a jury could credit the testimony of the officers and find that their use of force was permissible. However, because Atencio has shown that there exists a genuine dispute of material fact as to the reasonableness of their conduct, and because under one version of the facts, their conduct violated clearly established law, Officer French, Sergeant Weiers, and Officer Hatton are not entitled to summary judgment based on qualified immunity on the excessive force claim.

The district court denied qualified immunity to several other Defendants because there were genuine issues of material fact as to whether they were "integral participants" in these acts of excessive force. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007). In analyzing the various Defendants' integral participation, the district court properly examined each officer's conduct rather than employing a "team effort" approach that simply "lump[s] all the defendants together." *Jones v. Williams*, 297 F.3d 930, 936 (9th Cir. 2002). Contrary to what Defendants claim, the district court properly found that Officer Kaiser had no involvement in the safe cell, but that there were genuine issues of material fact as to whether he was an integral participant in the linescan room events. The district court also properly determined that Officer Vazquez may have been an integral participant in the linescan room. Neither the video evidence nor Officer Vazquez's own affidavit resolved whether he entered the linescan room

with enough time to participate in the tasering or the strikes.

We cannot say that the district court erred in applying the integral participation doctrine to Officer Hanlon for his wrist lock of Atencio, because his wrist lock was instrumental in controlling Atencio, which allowed the other officers to commit the excessive force against him. *See Blankenhorn*, 485 F.3d at 481 n.12 (holding that officer was liable as an integral participant for his help in handcuffing plaintiff because it "was instrumental in the officers' gaining control of [him], which culminated in" excessive force).

However, the district court erred in denying qualified immunity to Sergeant Scheffner for his role in Officer Hatton's knee strike of Atencio in the safe cell. The district court concluded that genuine issues of material fact regarding his integral participation, supervisory liability, and the duty to intervene precluded summary judgment in his favor based on qualified immunity. We disagree. Sergeant Scheffner could not be liable as a matter of law under any of these theories because, even though he may have seen Hatton deliver the knee strike, there is no evidence that Sergeant Scheffner directed or otherwise knew that the solitary knee strike would occur, physically participated in the knee strike, or had a realistic opportunity to stop the knee strike from happening. *See*, *e.g.*, *Cunningham v. Gates*, 229 F.3d 1271, 1289-92 (9th Cir. 2000) (discussing standards for supervisory liability and duty to intervene).

The district court also erred in denying qualified immunity to Officer Hanlon on Atencio's substantive due process claim for loss of familial association. "Official conduct that 'shocks the conscience' in depriving [family members] of that interest is cognizable as

a violation of [substantive] due process." *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010). "In determining whether excessive force shocks the conscience, the court must first ask 'whether the circumstances are such that actual deliberation [by the officer] is practical.' Where actual deliberation is practical, then an officer's 'deliberate indifference' may suffice to shock the conscience." *Id.* The "deliberate indifference" standard is applicable because the circumstances appeared to permit actual deliberation by Officer Hanlon before he applied the wrist lock. However, it cannot be said that his use of the wrist lock showed his deliberate indifference to Atencio's death. Hanlon could not have reasonably foreseen that his use of a wrist lock would cause or would trigger events ultimately leading to Atencio's death.[2]

We decline to exercise pendent jurisdiction over the district court's denial of summary judgment in favor of the Defendants regarding Atencio's state law claims because these issues are not "inextricably intertwined" with the qualified immunity issues properly raised on interlocutory appeal. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 960 (9th Cir. 2004). Whereas "qualified immunity is an immunity from suit rather than a mere defense to liability," *Jones v. County of Los Angeles*, 802 F.3d 990, 999 (9th Cir. 2015), the Arizona justification statutes raised by Defendants in their motion for summary judgment on the state

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[2] None of the other Defendants, apart from Officers Hanlon and French, appealed the denial of qualified immunity as to the substantive due process claim. Although the Defendants attempted to incorporate each other's arguments by reference, Officers Hanlon's and French's arguments regarding the substantive due process claim were limited to their own conduct, so they do not apply to the other Defendants.

law claims merely provide a potential defense when the merits are adjudicated, A.R.S. §§ 13-413 and 13-403(2).

We reverse the district court's denial of denial of [sic] summary judgment as to Defendant Scheffner for Atencio's excessive force claim based on qualified immunity. We also reverse the district court's denial of qualified immunity to Defendant Hanlon on Atencio's familial association claim under the Fourteenth Amendment. We affirm in all other respects.

Each party to bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed: Feb. 10, 2015]

No. CV-12-02376-PHX-PGR

ERNEST JOSEPH ATENCIO, *et al*.,

Plaintiffs,

v.

JOSEPH M. ARPAIO, *et al*.,

Defendants.

ORDER

The Court has before it City Defendants' Motion for Summary Judgment (Doc. 299); Defendants Arpaio, Carrasco, Dominguez, Foster, Kaiser, Scheffner, Vazquez, and Weiers' Motion for Summary Judgment (Doc. 347); Hatton Defendants' Motion for Summary Judgment (Doc. 350); Defendants William McLean, Monica Scarpati, and Ian Cranmer's Motion for Partial Summary Judgment (Doc. 355); Plaintiffs' Motion for Partial Summary Judgment against Maricopa County (Doc. 358); Defendant Maricopa County's Motion to Strike Plaintiffs' Statement of Facts Applicable to All Defendants (Doc. 384); and City Defendants' Motion for Leave to File Under Seal Reply in Support of

Motion to Strike Portions of Plaintiffs' Response (Doc. 388).[1]

A. Background[2]

On December 15, 2011, Marty Atencio first came into contact with law enforcement at a 7-Eleven store. Phoenix police officers had been dispatched there based on a report of a suspicious person in the parking lot. That person turned out to be Atencio. Upon interacting with Atencio, the officers noted that Atencio was acting erratically, would easily become distracted, and would speak of random and odd things, but concluded that the cause of his behavior was mental illness, not drugs or alcohol. The officers concluded that Atencio did not show signs of being a danger to himself or others, but was simply acting "goofy" and appeared to be off his medication. The officers told Atencio to go home, which he did.

A short time later, a woman called dispatch, reporting that Atencio was kicking at her apartment door and had also approached her and yelled at her, which scared her. The same officers that responded to the 7-Eleven store responded to the apartment complex. Upon coming into contact with Atencio, the officers noted that Atencio's demeanor had remained

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[1] The Court finds that oral argument would not assist in resolving these matters and accordingly finds the pending motions suitable for decision without oral argument. *See* LRCiv 7.2(f); Fed.R.Civ.P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

[2] For purposes of addressing the pending motions, the Court "draw[s] all reasonable inferences in favor of the non-moving party and, where disputed issues of material fact exist, assume[s] the version of the material facts asserted by the non-moving party to be correct." *Aloe Vera of Am., Inc. v. United States*, 699 F.3d 1153, 1165 (9th Cir. 2012).

the same as it was previously, and was consistent with someone experiencing mental health issues. He was arrested on misdemeanor assault charges and taken to Phoenix's Cactus Precinct.

Atencio was then transported to Maricopa County's Fourth Avenue Jail to be booked into custody. Atencio had difficulty getting into the transport vehicle due to what the officers concluded was mental illness. After approximately ten minutes of talking with Marty, the officers successfully got him into the vehicle and transported him to the Maricopa County Fourth Avenue Jail for booking. By this point, Atencio had been searched by officers at least three times without incident, and he was searched again without incident upon arriving at the Fourth Avenue Jail, including removing his shoes.

Upon arrival at the Fourth Avenue Jail, Atencio was turned over to Defendant Hanlon, a Phoenix City police officer who was in charge of processing Phoenix City detainees through the booking process for admission into the jail. During the initial screening process, Hanlon observed Atencio acting strangely and babbling incoherently, making "bizarre statements," "talking to peanut butter" as if it was a person present in the room, and offering to give his jacket to "peanut butter." (Doc. 343-1 at 98-99, 100, 101; Doc. 343-2 at 6.) Defendant French, a Phoenix City police officer, and Defendant Weiers, a Maricopa County deputy, also observed some of Atencio's behavior. French overheard Atencio's conversation regarding "peanut butter." (Doc. 343-2 at 14.) Weiers noted that Atencio "said a bunch of ridiculous stuff." (Doc. 343-2 at 26.)

Hanlon believed that Atencio "was in an altered state of some kind emotionally or mentally." (*Id.* at 101, 103.) Hanlon noticed that Atencio appeared

unable to focus on questions that were asked of him, and that when Atencio responded to questions, he did not appear to be giving much thought to his answers. Hanlon also noticed that Atencio appeared to be confused and "inconsistent." (*Id.* at 103, 104, 105.) Another officer that observed Atencio during the screening process noted that Atencio did not appear to intentionally disobey officers' orders, but instead appeared merely to be confused and to not understand what was going on. (Doc. 343-2 at 9-10.)

Atencio was eventually seen by Defendant McLean, a nurse, who conducted a cursory evaluation of Atencio. (Doc. 343-2 at 36.) McLean determined that Atencio was alert, but did not clarify his orientation, meaning that he did not ask Atencio questions to determine whether Atencio knew what day it was or what time it was. (*Id.* at 36-37.) Atencio denied being suicidal, but McLean noted on the intake sheet that Atencio may be suicidal based on his understanding that Atencio had indicated he was suicidal earlier in the screening process. McLean asked Defendant Scarpati, a Mental Health Professional, to evaluate Antencio.

Scarpati observed Atencio for a period of forty-two seconds while standing behind him. (Doc. 343-2 at 78, Ex. N.) Scarpati asked Atencio what was going on, and whether he was suicidal, and he did not respond appropriately, instead talking in "word salad," and yelling words "spark plug" and "fire truck." (Doc. 343-2 at 55-56.) Scarpati did not ask Atencio any questions about his social, legal, or criminal history, or whether he was having hallucinations, or had a plan to commit suicide. However, she recognized that Atencio was psychotic and "in crisis at the time," and may not have had the ability to be cooperative with her or with

the officers. (Doc. 343-2 at 56, 58, 82.) Despite these observations, Scarpati did not inform any law enforcement officers of Atencio's mental state or that Atencio might not have the ability to cooperate with them because of his psychosis. (*Id.* at 63-64.)

After Scarpati's evaluation of Atencio, she and McLean consulted, and McLean gave the okay to admit Atencio into the jail and set in motion the process to have him placed in a safe cell.

After Atencio had his mug shot taken, Hanlon escorted him from a holding cell into the linescan room, accompanied by numerous officers. Once Atencio reached the linescan room, he was fingerprinted and his handcuffs were removed by Hanlon. Atencio was described as humorous and jovial, and had not displayed any violent or aggressive behavior towards anyone. (Doc. 343-1 at 91, 109-110; Doc. 343-2 at 20; Doc. 353-5 at 4; City Defendant's Ex. 16.) Hanlon did not believe Atencio was a threat to himself or to the other officers or he would not have removed Atencio's handcuffs. (Doc. 343-1 at 108.) Hanlon also did not feel time pressured to complete the booking process. (Doc. 343-1 at 108, 111-12.)

After Hanlon removed Atencio's handcuffs, he had an approximately thirty second back and forth conversation with Atencio regarding Atencio taking off his shoes so that they could be put through an x-ray machine. (Doc. 343-1 at 109.) Atencio removed one shoe, but did not immediately remove his other shoe, instead pointing at Hanlon and stating, "You can take my shoe off for me?" Atencio, who had a wall at his back and was facing a semi-circle of officers, then merely crossed his arms over his chest. (Doc. 343-1 at 90, 109; City Defendants' Ex. 16.) In response, Hanlon immediately grabbed Atencio by the wrist, and twisted

Atencio's arm behind his back as the other officers, including French, immediately engaged. A struggle ensued, with Atencio standing but bent over by the officers and passively resisting. After approximately thirty-five seconds, French used what appears to be a choke hold or carotid hold on Atencio, and took Atencio to the ground with the assistance of the other officers. Numerous officers then held Atencio down on the ground in what has been characterized as a "dog pile." (City Defendant's Ex. 16.) While Atencio was being held down, one of the officers – Defendant Weiers – tased Atencio and another officer – Defendant Hatton – administered numerous strikes to Atencio's facial region. At no point was Atencio actively aggressive towards the officers, nor did Atencio display any violent or aggressive behavior towards anyone. (*See* Doc. 343-1 at 91, 109-110; Doc. 343-2 at 20; Doc. 353-5 at 4; City Defendant's Ex. 16.)

After Atencio was tased, the officers were able to get handcuffs back on him. Defendant Cranmer, a Physician Assistant, had been called to the scene. Cranmer merely asked Atencio, "Are you okay?" and looked at Atencio's eyes, but did not take Atencio's pulse or check any other vital signs. (Doc. 343-4 at 43.)

Atencio was then carried by officers into a safe cell. Once in the safe cell, Atencio was placed on the floor and numerous officers held him down in a "dog pile" while his clothes were removed. While the officers were removing Atencio's clothing, Hatton delivered a knee strike by dropping his full weight with his knee onto Atencio's back. (*Id.*) By the time the officers finished removing his clothes, Atencio appeared to be unconscious. However, no medical assessment of Atencio was completed and all personnel exited the safe cell, closing the door and leaving Atencio on the

floor of the safe cell, naked and apparently unconscious. (Doc. 343-4 at 50, 51; .) Both Cranmer and McLean observed Atencio through the window of the safe cell door, but neither of them entered the safe cell at that time. (Doc. 343-4 at 51.)

Several minutes later, Cranmer and a nurse were in a room with video monitoring of the safe cell. The nurse, who was watching Atencio on a monitor, said to Cranmer, "Ian, I don't think he's breathing." Cranmer responded, "Yeah he is. He's just intoxicated. He's okay. They tased him. He's alright." The nurse responded, "Um no, I don't think so. He's not breathing." (Doc. 343-4 at 47-48.) Cranmer then walked back to the safe cell. (*Id.* at 48-49.) When Cranmer reentered the safe cell, Atencio was not breathing and did not have a pulse, and life-saving efforts began. A total of nine minutes had elapsed between the time Atencio was left in the safe cell and life-saving efforts were started. (*See* Doc. 343-3 at 50-51 (noting that at 0243 hours all personnel left the safe cell; that between 0243 hours and 0252 hours, Atencio "remained in the same position and made no movements except for an unspecified abdominal movement"; and at 0252 hours, law enforcement personnel reentered the safe cell and noticed Atencio "to be unresponsive, apneic and without pulse" at which point chest compressions were started).) These efforts were unsuccessful and Atencio ultimately died.

B. City Defendants' Motion for Summary Judgment (Doc. 299)

City Defendants argue that Plaintiffs have failed to present any evidence that Officers Hanlon or French violated Atencio's constitutional rights and that they are therefore entitled to summary judgment. (Doc. 299

at 4-5.) The Court disagrees and will deny the City Defendants' motion for summary judgment.

1. Standard to Apply

City Defendants first argue that there is a split in the circuits as to whether the Fourth or Fourteenth Amendment governs the use of force by the officers. However, the Ninth Circuit has already decided the issue, holding "that the Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention." *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (quoting *Pierce v. Mulnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996)). Under this standard, determining whether an officer's use of force was "reasonable" "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989). In making this determination, the factfinder must pay "careful attention to the facts and circumstances" of the particular case, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Finally, although officers are not required to use the least intrusive amount of force possible, "the existence of less forceful options to achieve the governmental purpose is relevant" in determining whether the force used was reasonable. *Marquez v. City of Phoenix*, 693 F.3d 1167, 1174 (9th Cir. 2012).

The reasonableness of the force used against a pretrial detainee is based on the totality of the circumstances. *See Plumhoff v. Richard*, 134 S. Ct. 2012,

2020 (2014). Where multiple officers are involved in an alleged use of excessive force, a "team effort" approach that simply lumps all defendants together, rather than examining each individual officer's own conduct, is prohibited. *See Jones v. Williams*, 297 F.3d 930, 936 (9th Cir. 2002). On the other hand, an individual officer's conduct cannot be viewed in isolation from the conduct of other officers involved in the incident. *See Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004). Rather, the relevant inquiry is (1) whether *any* excessive force was used against the detainee and, if so, (2) whether the individual officer was either personally involved in, or was an "integral participant in," the use of that excessive force. *See Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996); *see also Jones*, 297 F.3d at 936. Further, "integral participation" does not "require that each officer's actions themselves rise to the level of a constitutional violation." *Boyd*, 374 F.3d at 780.

In the present case, if *any* excessive force was used against Atencio, liability could be imposed on any of the other officers that were either personally involved in, or were integral participants in, the use of that excessive force, even if that officer's conduct does not itself rise to the level of a constitutional violation. *See id.*; *Chuman*, 76 F.3d at 294.

2. Officer Hanlon's Escort of Atencio from holding cell to linescan room

Hanlon escorted Atencio from a holding cell to the linescan room of the jail. Hanlon contends that he used minimal and reasonable force in doing so, and that he merely had his hands on Atencio's shoulder and back during the escort.

City Defendants have submitted videos, which the Court has viewed, of Hanlon's escort of Atencio to the linescan room. City Defendants also have submitted Hanlon's deposition testimony, during which Hanlon testified that he escorted Atencio only by placing his hand on Atencio's upper back by his shoulders, and denies that he led Atencio by his arms. (*See* City Defendants' Ex. 10; Doc. 300-2 at 46.) City Defendants contend that the video clips they have submitted "clearly show[] that Officer Hanlon's two hands were on Marty's back and shoulders to guide him without once manipulating Marty's hands" and that Atencio "voluntarily bent and freely moved his cuffed hands between his front waist and a position on his left shoulder," and that any pain or discomfort caused by the manner in which Hanlon escorted Atencio is not actionable.

The evidence shows that during the escort to the linescan room, Atencio never became aggressive, nor did he resist. (Doc. 343-1 at 40.) Matthew Layman, who was present during the escort, states in his affidavit that the "guards" were escorting Atencio "by leading him with his hands and arms bent in what looked to be a very painful position"; that Atencio stated "Your making Tony angry, your making Tony angry," which Layman interpreted to be Atencio telling the guards that they were hurting him; and that at that point, Atencio looked right at Layman, like he was asking for help. (Doc. 343-3 at 10.)

Viewing the evidence in the light most favorable to Atencio, there is a genuine factual dispute regarding whether the escort of Atencio from the holding cell to the linescan room involved an unreasonable use of force against Atencio.

3. Use of force by Hanlon and French in the linescan room

Genuine factual disputes also remain as to whether Hanlon or French used excessive force against Atencio. First, it is far from clear that Atencio's conduct would be construed by a reasonable officer at the scene as an act of defiance or resistance justifying the immediate use of force, particularly in light of evidence that the officers knew Atencio was having trouble following directions, was in a state of psychosis – whether it was mental psychosis or drug-related psychosis – and did not appear to be intentionally disobeying commands but rather was just very confused.

Second, Plaintiffs' expert, Ron Bruno, opined that the use of force by Hanlon in the linescan room was unreasonable. (*See* Doc. 300-3 at 78.) Third, the video shows French using what appears to be a choke hold/carotid hold on Atencio, and both Hanlon and French actively engaged in taking Atencio down to the ground and holding him down. (*Id.*) While Atencio was being held down, Hatton delivered strikes to Atencio's facial region, and Weiers used the Taser on Atencio, both of which Bruno opined to be unreasonable uses of force. (Doc. 300-3 at 78.) Finally, even if Hanlon and French were no longer physically engaged when the facial strikes were delivered or the Taser was used, there is a genuine factual dispute as to whether one or both of them were integral participants in the use of excessive force. *See Boyd*, 374 F.3d at 780; *Chuman*, 76 F.3d at 294.

City Defendants' reliance on *Gibson*, 290 F.3d 1175, is misplaced. In that case, the officers came across psych meds when searching Gibson's car and suspected that Gibson had not been taking his medication. *Gibson*, 290 F.3d at 1182. Gibson, who suffered

from manic-depressive disorder, was verbally aggressive both before and after being placed under arrest, and became physically combative immediately after being placed into the patrol car, "kicking the partition between the car's front and back seats." *Id.* Once they arrived at the jail, Gibson refused to get out of the patrol car and four officers pulled Gibson from the car and carried him into the jail's sally port. *Id.* Gibson was restrained with a waist chain, wrist chains, and leg irons, and, after being processed, placed into a cell. Twice during the night, Gibson slipped out of his waist chain. The first time, officers were able to enter his cell and replace the chain without difficulty. The second time, Gibson was repeatedly using the chain to hit the window in his cell's door, and the officer in charge decided Gibson should be further restrained and, as several deputies got ready to enter the cell, Gibson assumed a "fighting stance with his fists up and shouted obscenities at them." *Id.* Gibson was pepper sprayed in the face, then three officers entered the cell and held Gibson down while more officers came in to help. The officers dragged Gibson to the special watch cell and placed him onto the bench. *Id.* at 1182-83. As Gibson was laying face down on the bench, he continued to struggle, he was "kicking and screaming and fighting and everything and yelling at us," and two officers climbed onto his back and legs, while the other officers helped restrain his arms and legs. *Id.* at 1183. Suddenly, Gibson did not have a pulse, and efforts to revive him failed. *Id.*

The Ninth Circuit affirmed the grant of summary judgment in favor of the officers in that case, holding that the officers' conduct was reasonable. *Id.* at 1198. The Court noted that, "[f]rom the moment Gibson arrived at the jail, he was struggling against the deputies, hurling invective, and generally behaving

very strangely and violently." *Id.* There was no proof the officers on duty at the jail were aware that Gibson's behavior was connected to his mental illness, and thus the officers could not be held "accountable for having treated Gibson as a dangerous prisoner rather than a sick one." *Id.* Further, the "decision to enter Gibson's cell and restrain him" was reasonable because the officer in charge was concerned Gibson might shatter the window in his cell door, thereby placing himself and any officers entering the cell at risk of harm. *Id.* Finally, once the officers "began to restrain Gibson and move him to the special watch cell, he fought back vigorously." *Id.* "[T]he deputies' decisions under these difficult circumstances resulted in restraining Gibson no more forcefully than was reasonably necessary." *Id.*

In contrast to the situation in *Gibson*, here, viewed in the light most favorable to Plaintiffs, Atencio was not being combative, violent, or threatening; he did not display any violent or aggressive behavior towards anyone; and he did not punch, strike, bite, spit, or kick at anyone. Although he was acting oddly, for instance talking to "peanut butter" as if it was a person, and talking in "word salad," his overall demeanor was described as "humorous," "jovial," and non-aggressive. (Doc. 343-1 at 86-87; Doc. 343-2 at 8.) When he did not obey an officer's orders to do something, this disobedience did not appear to be intentional, but instead appeared to be because he was confused, and the officers were aware that Atencio was in some form of psychotic state. (Doc. 343-2 at 69.) Even when Atencio failed to take his second shoe off in the linescan room, he merely said to Hanlon, "You can take my shoe off for me?" and pointed at Hanlon, then merely crossed his arms over his chest.

City Defendant's reliance on *Forrest*, 620 F.3d 739, is similarly misplaced. Forrest was uncooperative from the beginning of his encounter with law enforcement. He struck an officer in the face, and the officers deployed a taser several times. *Id.* at 741. After reaching the jail, he was escorted to a holding cell for a strip search. Forrest removed most of his clothing, but refused to remove his underwear. *Id.* An officer warned Forrest that if he did not comply with the strip search commands, the officer would use the taser on him. *Id.* Forrest called the officers "faggots" and used other expletives. He eventually removed his underwear but would not comply with the rest of the officer's strip search commands. *Id.* Forrest shouted obscenities and with fists clenched, began pacing back and forth while facing the officer, but remained seven to ten feet away from the officer. The officer repeatedly told Forrest that if he did not comply with the strip search commands, the taser would be used on him. The officer did eventually deploy the taser, which, although aimed at either Forrest's upper back or torso area, ended up striking Forrest in the face and arm due to Forrest's sudden movement. *Id.* at 742.

The Seventh Circuit held that the use of force by the officer was reasonable as a matter of law. The officer knew that Forrest had attacked another officer earlier in the evening, and that the prior attack had necessitated the use of a taser. *Id.* at 745. In addition, Forrest was a relatively large man in an enclosed area that was relatively small, and was pacing the cell, clenching his fists, and yelling obscenities. *Id.* "Forrest was not merely 'slow to comply with an order'; his conduct created a situation where the officers were 'faced with aggression, disruption, [and] physical treat.'" *Id.* "Clearly Mr. Forrest posed an immediate threat to

safety and order within the jail" and thus, the use of the taser "constituted a permissible use of force." *Id.*

In the present case, in contrast to the situation in *Forrest*, Atencio was not acting aggressively. Instead, Atencio's response to Hanlon could be reasonably seen as merely slow compliance, the result of confusion or, at most, passive resistance. A reasonable jury could conclude that the use of force under these circumstances was unreasonable.

Finally, *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), does not assist City Defendants because, in contrast to *Billington,* here there was no violent response to which the officers were responding. *See id.* at 1190 (holding that where officer's negligent act provokes a violent response, "that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation").

Because genuine factual disputes remain on whether Hanlon and French used excessive force in the linescan room, summary judgment on this issue will be denied.

4. Punitive Damages

City Defendants contend that there is no basis for Plaintiffs' claim for punitive damages because there is no evidence either officer acted with an evil motive or intent, or with reckless or callous indifference to Atencio's constitutional rights. In support of this argument, City Defendants focus on the individual conduct of each of the officers. As discussed above, there is a genuine factual dispute as to whether one or both of the City officers individually engaged in, or were integral participants in, the use of excessive force. *See Boyd*, 374 F.3d at 780; *Chuman*, 76 F.3d at 294. A "jury could certainly infer that there was

'reckless or callous indifference'" based upon evidence that excessive force was used against Atencio. *Davis v. Mason County*, 927 F.2d 1473, 1485 (9th Cir. 1991), *overruled on other grounds, Davis v. City and County of San Francisco*, 976 F.2d 1536, 1556 (9th Cir. 1992). Moreover, it is the Court's policy, when a trial must be held, to resolve the issue of the propriety of punitive damages through the resolution of objections to jury instructions and/or through the resolution of a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. Therefore, the Court will deny summary judgment on the issue of punitive damages.

5. Qualified Immunity

City Defendants contend that Hanlon and French are entitled to qualified immunity because "virtually every case supported their limited use of force in attempting to coerce the defiant and resisting Atencio to complete the booking process by removing his shoes." However, as discussed above, there are genuine disputes of fact regarding whether Hanlon and French used excessive force against Atencio, either individually or as integral participants. The determination of whether Hanlon and French "may be said to have made a 'reasonable mistake' of fact or law [will] depend on the jury's resolution of these disputed facts and the inferences it draws therefrom." *Santos v. Gates*, 287 F.3d 846, 855 n.12 (9th Cir. 2002). If Plaintiffs' version of the facts prevails at trial, there is a reasonable likelihood that neither Hanlon nor French would be entitled to qualified immunity. *See Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir. 2003); *Felix v. McCarthy*, 939 F.2d 699, 701-02 (9th Cir. 1991) (the law of this circuit as of 1985 put reasonable officers on notice that an "unprovoked and unjustified attack by a prison guard" violated clearly

established constitutional rights). Hanlon and French are not, therefore, entitled to summary judgment on the question of qualified immunity.

C. Defendants Arpaio, Carrasco, Dominguez, Foster, Kaiser, Scheffner, Vazquez, and Weiers' Motion for Summary Judgment (Doc. 347)

1. Carrasco, Dominguez, Foster, Kaiser, Vazquez, and Weiers

Defendants Carrasco, Dominguez, Foster, Kaiser, Vazquez, and Weiers (as to Weiers participation in the "dog pile" and use of "soft empty hands" techniques) contend that they did not use unreasonable force on Atencio, and that they are therefore entitled to summary judgment. In support of their argument, they point only to their individual conduct, contending that the conduct in which they individually engaged was not unreasonable.

Even assuming that their conduct, when looked at individually, was not unreasonable, these officers are not entitled to summary judgment. While these officers were holding Atencio down in the linescan room, Hatton delivered strikes to Atencio's facial region, and Weiers used the Taser on Atencio, both of which Plaintiffs' expert opined to be unreasonable uses of force. Further, while these officers (except Kaiser and Weiers) held Atencio down in the safe cell, Hatton delivered a knee strike to Atencio, which Plaintiffs' expert opined to be an unreasonable use of force. There is a genuine factual dispute as to whether these officers were integral participants in the use of excessive force in the linescan room and/or the safe cell, as well as whether these officers violated a duty to intervene to prevent the use of excessive force. *See Estate of Booker*, 745 F.3d at 422; *Boyd*, 374 F.3d at 780;

Chuman, 76 F.3d at 294. Summary judgment will therefore be denied as to Defendants Carrasco, Dominguez, Foster, Kaiser, Vazquez, and Weiers.

2. Weiers

Weiers contends that his use of the taser was reasonable given the safety and security concerns that Atencio's continued resistance presented, and that he is therefore entitled to summary judgment.

Viewing the evidence in the light most favorable to Plaintiffs, Atencio was on the ground with numerous officers on top of him. The struggle on the ground had continued for less than a minute. Although Atencio was not yet handcuffed and was passively resisting, he was not being aggressive toward the officers. Weiers then deployed the taser a total of three times. The first was in probe mode, and Weiers deployed the probes into Atencio's chest area, near his heart. The second two deployments were in drive stun mode. Data downloaded from the taser used by Weiers indicates that the taser was used on Atencio for a period of 22 seconds. Plaintiffs' expert has opined that the use of the taser was unreasonable, and a reasonable juror could conclude that Weiers' use of the taser under these circumstances was excessive. Accordingly, genuine factual disputes remain and summary judgment as to Weiers will be denied.

3. Defendant Scheffner

Scheffner argues that he is entitled to summary judgment because he did not participate in, or fail to intercede in, any use of excessive force. (Doc. 347 at 3-4.) Plaintiffs respond that Scheffner – a sergeant with the Maricopa County Sheriff's Department – "supervised the officers in both the LineScan room and Safe

Cell 4" and is liable for both his own acts and for the acts of his subordinates. (Doc. 415 at 30-31.)

A supervisor can be liable "for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation . . .; or for conduct that showed a reckless or callous indifference to the rights of others." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991). Thus, a supervisor can be liable if he or she "knowingly refused to terminate a series of acts by others, which he [or she] knew or reasonably should have known, would cause others to inflict the constitutional injury." *Id.* (citations and alterations omitted).

As to the linescan room, Scheffner contends, and the Court agrees, that he cannot be held liable conduct that occurred outside his presence and without his knowledge. A review of the video of the linescan room shows Scheffner arriving shortly after Weiser deployed the taser and Hatton delivered the strikes to Atencio. (Plaintiffs' Ex. D.) Scheffner testified that shortly after he entered the linescan room, the officers had Atencio under control and handcuffed. Although Plaintiffs contend that, even after this point, several officers continued to keep their weight on Atencio and that Scheffner should therefore be liable for failing to intervene, a review of the video does not indicate any excessive force was used in Scheffner's presence in the linescan room, and Plaintiffs have pointed to no evidence indicating that, to the extent officers did continue to place some weight on Atencio, that amount of force was unreasonable or that Scheffner had sufficient information on which to determine that it was unreasonable. Summary judgment will therefore

be granted in favor of Scheffner as to the linescan room.

As to what occurred in the safe cell, although Scheffner contends that he did not see what occurred, the video of the hall outside the safe cell shows that Scheffner was standing just outside of and looking into the safe cell twenty seconds before Hatton delivered a knee strike to Atencio. (Atencio Defendants' Ex. 11.) The video of the hall provided to the Court cuts off prior to the time of the knee strike which, according to the video of the safe cell, occurred at 2:41:52. (*See id.*) Scheffner states in his affidavit that he could not see into the safe cell, and still photos from the video of the hall outside the safe cell does show Scheffner had moved slightly from his position immediately in front of the cell door at 2:41:47. (Doc. 348-11 at 3, 7-8.) However, this still photo does not demonstrate that Scheffner was not still observing the activities of the safe cell, nor does it demonstrate that before and at the time the knee strike was delivered, Scheffner could not see what was happening. Moreover, Scheffner stated in his affidavit that he could hear the officers telling Atencio to stop resisting. (Doc. 348-11 at 3.) It is reasonable to infer that he also heard Officer Blas Gabriel when he yelled out Hatton's name to get Hatton to stop using the knee strike on Atencio (*see* Doc. 343-4 at 11), and thus that Scheffner knew that the use of unreasonable force may have been in progress.

Viewing the evidence in the light most favorable to Atencio, the Court finds genuine factual disputes remain as to whether Scheffner knowingly refused to terminate or intervene to stop actions, or was an integral participant in actions, that he knew or reasonably should have known would cause others to

inflict constitutional injury on Atencio after Atencio was placed into the safe cell. *See Estate of Booker*, 745 F.3d at 422; *Boyd*, 374 F.3d at 780; *Chuman*, 76 F.3d at 294; *Larez*, 946 F.2d at 630. Summary judgment will accordingly be denied as to the safe cell.

4. Qualified Immunity

Arpaio Defendants contend that they are entitled to qualified immunity because a reasonable officer could believe that their conduct was appropriate as a matter of law. The Court disagrees.

As discussed above, there are genuine factual disputes regarding whether Weiers used excessive force on Atencio. There also are genuine factual disputes as to whether Carrasco, Dominguez, Foster, Kaiser, Vazquez, and Weiers were integral participants in the use of excessive force in the linescan room and/or the safe cell, as well as whether these officers violated a duty to intervene to prevent the use of excessive force. Further, there are genuine factual disputes as to whether Scheffner knowingly refused to terminate or intervene to stop actions, or was an integral participant in actions, occurring in the safe cell that he knew or reasonably should have known would cause others to inflict constitutional injury on Atencio. The determination of whether these Defendants "may be said to have made a 'reasonable mistake' of fact or law [will] depend on the jury's resolution of these disputed facts and the inferences it draws therefrom." *Santos*, 287 F.3d at 855. If Plaintiffs' version of the facts prevails at trial, there is a reasonable likelihood that none of these Defendants would be entitled to qualified immunity. *See Lolli*, 351 F.3d at 421; *Felix*, 939 F.2d at 701-02. Arpaio Defendants are not, therefore,

entitled to summary judgment on the question of qualified immunity.[3]

5. State Law Claims

Plaintiffs' state law claim against Arpaio Defendants is brought under Arizona Revised Statute § 12-611, which provides for liability for the death of a person caused "by wrongful act, neglect or default." A.R.S. § 12-611. Arpaio Defendants contend they are entitled to summary judgment on Plaintiffs' state law claims because their use of force was justified and reasonable under Arizona law, citing A.R.S. § 13-413 and A.R.S. § 13-403(2). The Court disagrees.

Section § 13-413 merely provides that no persons shall be "subject to civil liability for engaging in conduct otherwise justified pursuant to the provisions" of Chapter 14 of the Arizona Revised Statutes. Section 13-403(2) provides that a "superintendent or other entrusted official of a jail, prison or correctional institution may use physical force for the preservation of peace, to maintain order or discipline, or to prevent

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[3] Arpaio Defendants contend that Atencio had not yet been searched. However, the evidence viewed in the light most favorable to Plaintiffs shows that Atencio by this point had been searched at least four times, including removing his shoes. First, he was searched when he was arrested. (Doc. 343-1 at 28.) He was searched again, including having his shoes removed and any shoelaces removed, upon reaching the Cactus Park Precinct. (Doc. 343-1 at 29.) Prior to be transported to the Phoenix's Central Booking station, Atencio was searched yet again, including a search of his shoes and socks. (Doc. 343-1 at 31, 33.) When he arrived at Phoenix Central Booking, he was searched again, including having his shoes removed. (Doc. 343-1 at 84-85.) All of these searches were without incident. Moreover, if there was any concern regarding Atencio having weapons, it is highly unlikely that his handcuffs would have been removed.

the commission of any felony or misdemeanor." A.R.S. § 13-403(2).

Although, contrary to Plaintiffs' contentions,[4] it appears that both § 13-403(2) and § 13-413 apply here, this conclusion does not translate into a grant of summary judgment for the Arpaio Defendants. To the contrary, these provisions only entitle Defendants to use the amount of force necessary to maintain order, and merely shield Defendants from civil liability under state law for using such force. *See* A.R.S. §§ 13-403(2), 13-413; 13 403(2); *Bojorquez*, 675 P.2d at 1317 (noting if the amount of force used exceeds that needed to maintain order in prison, an inmate is justified in using physical force to defend himself). As discussed previously, there is a genuine factual dispute as to whether the force used by the Arpaio Defendants, individually or collectively as integral participants, was excessive and therefore unreasonable. Summary

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[4] Plaintiffs contend that § 13-413 applies only to criminal cases and thus does not apply to the present case. However, neither the language of the statute, nor the case law support their argument. *See* A.R.S. § 13-413; *Pefil v. Smith*, 900 P.2d 12, 14 (Ariz. Ct. App. 1995) (noting that § 13-413 does no more than establish justification as an affirmative defense in civil lawsuits). Further, § 13-414, relied on by Plaintiffs, is not applicable here because that section applies by its plain terms only to a "prisoner sentenced to the custody of the state department of corrections." A.R.S. § 13-414.

Plaintiffs also contend that § 13-403(2) does not apply to the present case because the Arpaio Defendants are neither the "superintendent of" the jail, nor "entrusted official" of the jail. Again, neither the plain language of the statute, nor the case law support their argument. *See* A.R.S. § 13-403(2); *State v. Bojorquez*, 675 P.2d 1314, 1317 (Ariz. 1984) ("prison officials have the statutory right to use that amount of physical force necessary to maintain order within the prison").

judgment will accordingly be denied as to the state law claim against Arpaio Defendants.

6. Causation

In both a § 1983 action, and a wrongful death action under Arizona state law, a plaintiff must "demonstrate that the defendant's conduct was the actionable cause of the claimed injury." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008); *see Grafitti-Valenzuela v. City of Phoenix*, 167 P.3d 711, 717 (Ariz. Ct. App. 2007).

Arpaio Defendants contend that Plaintiffs have not presented credible evidence that they caused Atencio's death and that they are therefore entitled to summary judgment on both the § 1983 claims and the state law wrongful death claims. In support of their contention, Defendants challenge the opinion of Plaintiffs' expert, Dr. Wilcox. The admissibility of Wilcox's expert testimony and opinions already have been extensively discussed by this Court in its Order denying the motions to exclude and/or limit Wilcox's testimony, and will not be readdressed here. (*See* Doc. 439.)

Wilcox's opinion regarding the cause of Atencio's death, set forth in his report and as explained and clarified during his deposition, is that a combination of pain and fear activated Atencio's "sympathetic system, which dumped epinephrine and norepinephrine into his system and caused sudden cardiac death." (Doc. 418-6 at 23.) He explained that it was "sort of a sum total of the uses of force that caused his sympathetic nervous system to go into overdrive, and that was ultimately the cause of his sudden cardiac death." (*Id.*) The forces Wilcox referred to include the choke hold or carotid hold, the "dogpile" on top of Atencio, the "beating" (the facial strikes by Hatton), the use of

the taser, the knee strike, and the resulting pain, decreased ability to breathe, and fear that the uses of force caused Atencio.

In addition to Wilcox, the medical examiner, Dr. Stano, opined in his report that Atencio "died of complications of a sudden cardiac arrest that occurred in the setting of acute psychosis, law enforcement subdual, and multiple medical problems." (Doc. 418-6 at 48.) Stano explained during his deposition that he did not believe it was merely Atencio's pre-existing condition of heart disease that caused his death, nor did he believe that Atencio's psychosis caused his heart to stop. (Doc. 418-6 at 26-29.) He further explained that the law enforcement subdual that he was referring to in his opinion included "the chokehold, the prone placement, the restraint, the use of the TASER and the use of handcuffs." (Doc. 418-6 at 37.)

This evidence raises genuine factual disputes regarding whether the acts of force used by the officers, including Arpaio Defendants, caused Atencio's death. Accordingly, summary judgment on the issue of causation will be denied.

7. Arpaio

a. Individual Capacity

Arpaio contends that he is entitled to summary judgment in his individual capacity because Plaintiffs cannot present evidence to satisfy the supervisory liability standard.

Arpaio can be held liable in his individual capacity if he "set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional

injury." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (alterations omitted). Supervisory liability can be imposed on Arpaio in his individual capacity for his "own culpable action or inaction in the training, supervision, or control of his subordinates"; for his "'acquiescence in the constitutional deprivations of which the complaint is made'"; or for his conduct that showed a "'reckless or callous indifference to the rights of others.'" *Id.* (citations and alterations omitted).

Plaintiffs have submitted evidence that includes articles, a report, video clips of Arpaio making public statements, and the testimony of Plaintiffs' expert witness, Ken Katsaris. (*See* Doc. 418-1 at 12-38; Doc. 418-2 at1-45; Doc. 418-3 at 1-2 (Ex. J); Doc. 418-4 at 1-3; Doc. 418-5 at 1-13; 418-6 at 1-49.)

Katsaris examined the history of the policies, practices, and procedures of the MCSO, and the operation of MCSO under Arpaio's administration. He opined that Arpaio's rhetoric and leadership over a period of time, including his statements regarding his desire that jails be places of punishment, have had an influence on MCSO personnel and the operation of the jail and have created a culture of punishment. Specifically, Katsaris opined that Arpaio's rhetoric was inconsistent with recognized and accepted jails practices and procedures, and that this rhetoric fostered a culture consistent therewith, causing employees to follow the rhetoric and disregard their training and official policies that are inconsistent with the rhetoric. Katsaris explained that the historical circumstances of the jail, including depositions of MCSO employees in other cases, the lack of change and continued bad outcomes at the jail despite having what appeared to be appropriate training and policies

in place, demonstrated both that employees knew of Arpaio's public rhetoric and that employees were influenced by that rhetoric.

A review of the other evidence submitted by Plaintiffs – the articles, report, and video clips – demonstrate that Arpaio has made public statements which, when viewed in the light most favorable to Plaintiffs, are consistent with Katsaris's opinion. Some of the statements made by or attributed to Arpaio include that he makes jails places of punishment; that he "educate[s] through punishment"; that he tries to make conditions for inmates as unpleasant as possible; that the guard dogs should be and are treated better than the inmates; that the tent city for the inmates is like concentration camps used by the Germans in the 1930s and 1940s; that he believes he has the "best-run jail in the country . . . [n]o one's died"; dismissing complaints that his approach is inhumane with the statement, "See anyone dying?"; that he knows "just how far I can go"; and that he doesn't care what the law says. (*See, e.g.*, Doc. 418-1 at 17, 23, 25, 29, 31, 37; Doc. 418-3 (Ex. J); Doc. 418-4 at 2; Doc. 418-4 at 1-13; 418-5 at 5.)

Arpaio also argues that he cannot be held liable in his individual capacity for the medical care provided or not provided to Atencio because the individuals that provided or did not provide that care are not Arpaio's subordinate but are instead medical professionals that work for an independent entity, Correctional Health Services ("CHS"). Arpaio has made this argument previously without success. The Court agrees with the holdings in those previous cases and, consistent with those holdings, declines to dismiss Plaintiffs' claims against Arpaio "merely because they are predicated on inadequate medical care." *See Payne v. Arpaio*, 2009

WL 3756679, *5-*6 (D. Ariz. 2009) (holding that Arpaio, as sheriff, can be held liable for inadequate medical care in the county jails); *Grevan v. Arpaio*, 2013 WL 6670296, *2 (D. Ariz. 2013) (following the holding in *Payne*).

The evidence, viewed in the light most favorable to Plaintiffs, raises a genuine factual dispute as to whether Arpaio promoted a culture of punishment and cruelty in the jail and thereby set in motion a series of acts by others that he knew or reasonably should have known would cause others to violate the constitutional rights of inmates.[5] Summary judgment on individual capacity will therefore be denied.

b. Official Capacity

As Arpaio correctly points out, an action against a municipal officer in his or her official capacity generally is simply another way of pleading an action against the municipality. *See Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 n.55 (1978). There is thus "no longer a need to bring official-capacity actions against local government officials" because, under *Monell*, "local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (citation omitted). Where, as here, "both a municipal officer and a local government entity are named, and the officer is named only in an official capacity, the court may dismiss the officer as a redundant defendant." *Center for Bio-Ethical Reform*, *Inc. v.*

[5] Additional challenges raised by Arpaio on this issue either have been previously considered by the Court in its Order addressing the admissibility of Katsaris s opinion (*see* Doc. 439), and will not be readdressed here, or have been considered and rejected by the Court as without merit.

Los Angeles County Sheriff Dept., 533 F.3d 780, 799 (9th Cir. 2008).

Plaintiffs have not objected to the dismissal of Arpaio in his official capacity. Accordingly, summary judgment will be granted to Arpaio as a redundant defendant, but only to the extent claims are brought against him in his official capacity.

8. Fourteenth Amendment Claim

Plaintiffs' Fourteenth Amendment claim alleges that Arpaio Defendants violated their due process right to familial association. "[O]nly official conduct that 'shocks the conscience' is cognizable as a due process violation." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008).

> In determining whether excessive force shocks the conscience, the court must first ask "whether the circumstances are such that actual deliberation [by the officer] is practical." Where actual deliberation is practical, then an officer's "deliberate indifference" may suffice to shock the conscience. On the other hand, where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives.

Wlkinson v. Torres, 610 F.3d 546, 554 (9th Cir. 546) (citations omitted).

Although the situation in the present case was rapidly evolving, viewing the evidence in the light most favorable to Plaintiffs, a reasonable juror could conclude that some or all of the Defendants had the

opportunity to deliberate before they acted or failed to intervene, and that they acted or failed to intervene with deliberate indifference. Alternatively, a reasonable juror could conclude that although there was no time to deliberate, one or more of the Defendants acted or failed to intervene with a purpose to harm unrelated to legitimate law enforcement objectives. Summary judgment on this issue will therefore be denied.

9. Punitive Damages

Plaintiffs are seeking punitive damages against Arpaio Defendants only on their § 1983 claims; they are not seeking punitive damages based on their state law claims.

Arpaio Defendants contend that they are entitled to summary judgment on the issue of punitive damages for the § 1983 claims because the record lacks evidence of any evil motive or intent, or a reckless or callous indifference to Atencio's constitutional rights. As discussed above, there is a genuine factual dispute as to whether Arpaio Defendants individually engaged in and/or were integral participants in the use of excessive force, as well as whether these officers violated a duty to intervene to prevent the use of excessive force. The evidence, viewed in the light most favorable to Plaintiffs, shows multiple instances of unreasonable and excessive force, including the use of a choke hold or carotid hold, "dog piles" during which multiple officers held Atencio down by placing their full or partial weight on him while he was in a prone position, facial strikes, taser, and knee strike. A "jury could certainly infer that there was 'reckless or callous indifference'" based upon the evidence. *Davis*, 927 F.2d at 1485. Moreover, it is the Court's policy, when a trial must be held, to resolve the issue of the propriety of punitive damages through the resolution

of objections to jury instructions and/or through the resolution of a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. Therefore, the Court will deny summary judgment on the issue of punitive damages.

D. Hatton Defendants' Motion for Summary Judgment (Doc. 350)

1. Hatton's Uses of Force

Hatton contends that he is entitled to summary judgment because his uses of force were "reasonable and justified." As to the linescan room, he contends he delivered the strikes on Atencio because Atencio had grabbed Hatton's hand and was twisting it. However, the evidence, viewed in the light most favorable to Plaintiffs, shows that Hatton delivered the three to four strikes to Atencio at about seventy percent of his full strength, with two to three of those strikes to Atencio's facial region, after Atencio had been tased and at a time when Atencio was "defenseless," with his hands out in front of him in a "superman position." (Doc. 343-4 at 19-14; Doc. 416 at 11 (Ex. A); Doc 416 at 16.) According to Officer Salinas, who was on the scene and witnessed Hatton's actions, these strikes were unreasonable, unjustifiable, and excessive. (*Ibid.*) When asked specifically about Hatton's assertion that he delivered the strikes because Atencio had grabbed and was twisting Hatton's hand, Salinas said that Hatton's assertion was not true and was a lie. (Doc. 416 at 11 (Ex. A); Doc 416 at 16.) Salinas also said that it would be a lie if Hatton said he delivered the strikes in self-defense. (*Id.*). Officer Blas also testified that he believed Hatton's use of the face strikes on Atencio was "inappropriate" and "unreasonable." (Doc. 343-4.) Plaintiffs' expert witness Bruno similarly opined the

strikes by Hatton in the linescan room to be unreasonable uses of force.[6] (Doc. 300-3 at 78.)

As to the safe cell, there is evidence that Hatton delivered a knee strike, dropping his full weight on Atencio, while Atencio was on the ground and restrained by multiple officers. Officer Gabriel, who was present and witnessed the strike, reacted by yelling out Hatton's name to get him to stop. (Doc. 343-4 at 11.) Gabriel testified that he believed the knee strike to be unnecessary and unreasonable. (*Id.*) Maricopa County's expert, Tim Gravette, also testified that in his opinion, the knee strike by Hatton was unnecessary and unreasonable. (Doc. 343-4 at 56-57.)

There is, in sum, genuine factual disputes regarding whether Hatton's actions constituted excessive force. Summary judgment will therefore be denied.

2. Causation

Hatton contends that Plaintiffs cannot prove that his actions caused Atencio's death. As discussed above in relation to the Arpaio Defendants, there are genuine factual disputes regarding whether the acts of force used by the officers, including Hatton's use of the strikes, the knee drop, and participation in the subdual and restraint of Atencio, caused Atencio's death. Accordingly, summary judgment on the issue of causation will be denied.

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[6] The admissibility of Bruno's expert testimony and opinions already have been extensively discussed by this Court in its Order denying the motions to exclude Bruno's testimony, and will not be readdressed here. (*See* Doc. 439.)

3. Qualified Immunity

Hatton contends that he is entitled to qualified immunity because "it cannot be said that no reasonable officer would have acted as Hatton did in these circumstances." The Court disagrees.

As discussed above, there are genuine factual disputes regarding whether Hatton used excessive force on Atencio. The determination of whether Hatton "may be said to have made a 'reasonable mistake' of fact or law [will] depend on the jury's resolution of these disputed facts and the inferences it draws therefrom." *Santos*, 287 F.3d at 855 n.12. If Plaintiffs' version of the facts prevails at trial, there is a reasonable likelihood that Hatton would not be entitled to qualified immunity. *See Lolli*, 351 F.3d at 421; *Felix*, 939 F.2d at 701-02. Hatton is not, therefore, entitled to summary judgment on the question of qualified immunity.

4. State Law Claim

Hatton contends that his use of force was justified under Arizona law. As discussed in relation to the Arpaio Defendants, although it appears that both A.R.S. § 13-403(2) and A.R.S. § 13-413 apply here, this conclusion does not translate into a grant of summary judgment for Hatton. To the contrary, these provisions only entitle Hatton to use the amount of force necessary to maintain order, and shield Hatton from civil liability under state law for using such force. *See* A.R.S. §§ 13-403(2), 13-413; 13-403(2); *Bojorquez*, 675 P.2d at 1317. There are genuine factual disputes as to whether the force used by Hatton was excessive and therefore unreasonable. Summary judgment will accordingly be denied on the state law claim.

5. Fourteenth Amendment Claim

Hatton contends that there is no evidence that his uses of force were applied with an intent to harm Atencio, outside of the goal of forcing compliance. He argues that he is therefore entitled to summary judgment on Plaintiffs' Fourteenth Amendment familial association claim.

As discussed in relation to the Arpaio Defendants, although the situation in the present case was rapidly evolving, viewing the evidence in the light most favorable to Plaintiffs, a reasonable juror could conclude that Hatton had the opportunity to deliberate before he acted, and that he acted with deliberate indifference. *See Wlkinson*, 610 F.3d at 554. Alternatively, a reasonable juror could conclude that although there was no time to deliberate, that Hatton acted with a purpose to harm Atencio unrelated to legitimate law enforcement objectives.[7] *See id.* Summary judgment on the Fourteenth Amendment claim will therefore be denied.

6. Punitive Damages

Hatton contends that Plaintiffs cannot recover punitive damages against him in his official capacity because government officials are immune from punitive damages under § 1983. However, Plaintiffs are not seeking punitive damages against the individual defendants in their official capacity.

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[7] Hatton's self-serving statement that he had no ill will does not entitle him to summary judgment on this issue because a reasonable jury could choose to not believe him and conclude that his actions were instead motivated by something other than legitimate law enforcement objectives.

Hatton also contends that Plaintiffs cannot meet their burden to support an award of punitive damages against him in his individual capacity under § 1983. He contends that Plaintiffs have not produced any evidence demonstrating he was motivated by an evil motive or intent, or acted with reckless or callous indifference to Atencio's constitutional rights. However, viewing the evidence in the light most favorable to Plaintiffs, Hatton used unreasonable and excessive force when he delivered the facial strikes and the knee strike on Atencio. A "jury could certainly infer that there was 'reckless or callous indifference'" based upon the evidence. *Davis*, 927 F.2d at 1485. Moreover, it is the Court's policy, when a trial must be held, to resolve the issue of the propriety of punitive damages through the resolution of objections to jury instructions and/or through the resolution of a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. Therefore, the Court will deny summary judgment on the issue of punitive damages.

E. Defendants William McLean, Monica Scarpatir, and Ian Cranmer's Motion for Partial Summary Judgment (Doc. 355)

Defendants McLean, Scarpati, and Cranmer (collectively, "CHS Defendants") move for summary judgment, contending that Plaintiffs' evidence at most supports nothing more than a medical malpractice claim and is insufficient to give rise to § 1983 liabliity or to support an award of punitive damages.[8] CHS

[8] The courtesy copy provided to Chambers of the exhibits to Defendants William McLean, Monica Scarpatir, and Ian Cranmer's Statement of Facts in Support of Their Motion for Partial Summary Judgment (Doc. 356) were untabbed and unbound. Not only does this make it extremely difficult for the Court to find the necessary exhibits, it also violates the Court's

Defendants make clear that they are not seeking, through this motion, summary judgment on Plaintiffs' malpractice claims.

1. Applicable Standard

Plaintiffs contend that because Atencio was merely an arrestee, his claims against medical personnel are governed by the Fourth Amendment. The Court disagrees.

"Although the Fourth Amendment provides the proper framework for [Atencio's] excessive force claim[s], it does not govern his medical needs claim." *Lolli*, 351 F.3d at 418. Instead, claims for "failure to provide care for serious medical needs, when brought by a detainee such as [Atencio] who has been neither charged nor convicted of a crime, are analyzed under the substantive due process clause of the Fourteenth Amendment." *Id.* (citation omitted). Thus, to defeat summary judgment on his medical needs claims, Atencio must show that the CHS Defendants knew of and disregarded an excessive risk to his health and safety. *Id*. "[I]t is not enough that the person merely 'be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, [he or she] must also draw that inference.'" *Id.* (citation omitted). However, "'if a person is aware of a substantial risk of serious harm, a person may be liable for neglecting a

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Electronic Case Filing Administrative Policies and Procedures Manual. *See* Elec. Case Filing Admin. Policies & Proc. Manual § II(D)(3)(requiring party to provide Chambers with a courtesy copy of any electronically filed document "exceeding 10 pages in length, including exhibits and attachments" and that such courtesy copy comply with LRCiv 7.1); LRCiv 7.1(b)(1) (requiring all paper documents must be either stapled or, if too large for stapling, bound with a metal clasp).

prisoner's serious medical needs on the basis of either his action or his inaction.'" *Id.* (citation omitted).

2. Initial Assessment

McLean and Scarpati contend that Atencio has failed to present evidence that they acted with deliberate indifference to his serious medical needs in relation to his initial intake and assessment and that they are therefore entitled to summary judgment on this issue.

In assessing Atencio, McLean did not follow the standard process that is to be used to determine whether Atencio was alert (meaning he was awake and talking) and oriented. Specifically, although McLean determined that Atencio was oriented as to "person," i.e., Atencio knew who he himself was, McLean did not ask the questions to determine whether Atencio was oriented to where he was, when it was, or his current situation. (Doc. 343-2 at 36.) Atencio denied to McLean any intention to hurt himself, but because Atencio had previously indicated that he did have such an intention, McLean formed the opinion that Atencio was a danger to himself. (Doc. 343-2 at 38.) McLean also formed the opinion that Atencio was under the influence of drugs based on Atencio's behavior and because Atencio had previously admitted that he had used methamphetamine at 5:00 p.m. the previous evening. McLean requested a drug recognition expert (DRE) to examine Atencio, and also requested that Scarpati, a mental health professional, evaluate Atencio. It does not appear that the DRE ever examined Atencio.

Scarpati's assessment of Atencio lasted only forty-five seconds, was conducted in McLean's presence, and apparently was conducted while she stood behind

Atencio. (Doc. 343-2 at 78, Ex. N; Doc. 343-2 at 42, 64.) Scarpati testified that she approached where Atencio was seated, at a desk in front of the nursing station, and asked him what was going on. (Doc. 343-2 at 55.) Atencio did not answer "appropriately" and was instead "yelling word salad, spark plug, firetruck." (*Id.*) She then asked Atencio if he was suicidal, but he didn't respond. (*Id.*) Atencio also made the statement, "Tony goes to heaven," and "he's a spark plug." (*Id.* at 56; Doc. 414-2 at 3.) During this exchange, McLean also was present.

Scarpati testified that Atencio appeared to be psychotic, and she formed the opinion that Atencio was in crisis. She noted that Atencio was uncooperative with her assessment, but also acknowledged Atencio may not have had the ability to be cooperative due to the mental state of psychosis he was in. (Doc. 343-2 at 58-59.) Scarpati further acknowledged that it is not unusual for mental health professionals to communicate with MCSO officers about a patient, but that she did not inform any of the officers that Atencio was in a state of psychosis, that he was in crisis, or that he might not have the ability to be cooperative or follow directions due to his mental state. (Doc. 343-2 at 64.) Instead, Scarpati merely determined that Atencio should be placed into a safe cell, and conferred with McLean regarding the same. McLean, then started the process necessary for Atencio's placement into a safe cell.

Scarpati thus knew that Atencio was in a state of psychosis and in a crisis. She also knew that he was uncooperative, and may not have had the ability to cooperate due to his state of psychosis. Atencio's state of psychosis was so obvious that officers – who did not have medical training – were able to recognize it.

Despite her knowledge, she neither recommended that Atencio be transferred to a facility for treatment of his psychosis, nor informed the officers who would take control of Atencio for placement into the safe cell of Atencio's state of psychosis.

Similarly McLean, who witnessed Atencio's behavior both during his own assessment and during Scarpati's assessment, did not recommend Atencio be transferred for treatment of his psychosis, nor did he inform the officers who would take control of Atencio for placement into the safe cell of Atencio's mental state

Based on this and other evidence in the record, a jury could find that Scarpati and McLean were deliberately indifferent to Atencio's serious medical needs. *See Gibson*, 290 F.3d at 1194. Specifically, viewed in the light most favorable to Plaintiffs, the evidence shows that Scarpati and McLean knew that Atencio was in the throes of a psychotic crisis; that, as a result, he did not have the ability to cooperate with them or the officers; that hospitalization could have relieved Atencio's condition; and that if Atencio remained in the jail, he presented a danger to both himself and others. *See id.* Summary judgment will therefore be denied.

3. Post-Use-of-Force Treatment

Both McLean and Cranmer responded to the line-scan room after a call was made for medical personnel. They both knew that Atencio had been subjected to the use of force that included being held down in a prone position by the weight of multiple officers and being tased. After Atencio was handcuffed and subdued, Cranmer knelt next to him, observed where the taser points had come into contact with him, and asked him

if he was okay. Atencio, who was still being held down by officers, said, "Anybody that touches me, I'm going to fucking kill." Cranmer, concerned for his safety, backed away from Atencio, but continued to observe him. He determined Atencio to be well enough to be placed into a safe cell because Atencio verbally responded to his question of, "Are you okay?" with the threat. No vital signs were taken by Cranmer, nor was any other assessment of Atencio completed before Atencio was carried to and placed into the safe cell by the officers.

After the officers removed Atencio's clothes and handcuffs, Atencio was left alone, naked, and lying motionless on the floor of the safe cell and the cell door was closed. Again, no vital signs were taken, nor was any other assessment performed on Atencio. Instead, Cranmer and McLean merely observed Atencio briefly through the cell door window. Cranmer then went into a room that allowed Atencio to be monitored via video camera. Although Cranmer testified at his deposition that while he was watching Atencio through the window, he thought he saw Atencio move and take a breath, a review of the video of the safe cell shows that after the officers left Atencio in the safe cell, Atencio never made any movement and, moreover, there is not any visible breathing by Atencio. (*See* Doc. 343-2 at 78, Ex. N, Clip 7.)

Based on this and other evidence in the record, a jury could find that Cranmer and McLean were deliberately indifferent to Atencio's serious medical needs. *See Estate of Booker*, 645 F.3d at 431-32. Specifically, viewed in the light most favorable to Plaintiffs, the evidence shows that McLean and Cranmer knew that Atencio had been tased multiple times as well as held down in a prone position by the weight of multiple

officers, yet never took any vital signs nor completed any other assessment of Atencio (other than a quick observation of the taser puncture wounds); and that after Atencio was left naked on the floor of the safe cell, McLean and Cranmer knew that he was motionless and not visibly breathing. In light of McLean's and Cranmer's training, a reasonable jury could conclude that McLean and Cranmer inferred that Atencio was or may have been unconscious and in need of immediate medical attention. If a jury made that inference, it could further infer that McLean and Cranmer were deliberately indifferent in failing to respond sooner to determine Atencio's condition.[9] *See id.* Summary judgment will therefore be denied.

4. Punitive Damages

As discussed above, a reasonable jury could find that McLean and Cranmer acted with deliberate indifference to Atencio's serious medical needs. Consequently, a reasonable jury could also find recklessness or callous indifference for the purpose of assessing punitive damages. *See Larez v. City of Los Angeles,* 946 F.2d 630, 648-49 (9th Cir. 1991) (noting that the standard for individual liability for compensatory damages for deliberate indifference under § 1983 "largely overlaps the standard for punitive damages" in that both look to a defendant's "reckless or callous disregard or indifference to" the plaintiff's constitutional rights); *see also Smith v. Wade*, 461 U.S. 30, 53

[9] McLean testified that he expected the clinic nurse to follow-up with Atencio and take his vital signs within the time required by CHS policy. This assertion does not, however, assist McLean because a reasonable jury could find that if Atencio was unconscious and/or not breathing, waiting for someone else to check on him at all, let alone within the fifteen minutes required under CHS policy, exhibited deliberate indifference.

(1983) (approving overlapping standard for compensatory and punitive damages in § 1983 cases involving reckless or callous indifference and noting that common law has never required a higher threshold for punitive damages). Moreover, it is the Court's policy, when a trial must be held, to resolve the issue of the propriety of punitive damages through the resolution of objections to jury instructions and/or through the resolution of a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. Therefore, the Court will deny summary judgment on the issue of punitive damages.

F. Plaintiffs' Motion for Partial Summary Judgment against Maricopa County (Doc. 358)

Plaintiffs contend that they are entitled to summary judgment on their *Monell* claims against Maricopa County on the issues of whether the County has a policy of deliberate indifference towards the medical care provided to incoming detainees in their jails, and whether the County knew its policy of deliberate indifference posed significant risks to those detainees.

In support of their contention, Plaintiffs cite to and rely on orders issued in *Graves v. Arpaio*, No. 77-CV-00479-NVW, as well as evidence submitted in that case. Plaintiffs argue that the County is collaterally estopped by *Graves* from denying that it was violating pretrial detainees' constitutional rights by depriving them of adequate receiving screenings and ready access to care for their serious mental health needs. (Doc. 342 at 7- 11.) The Court disagrees and holds that the doctrine of collateral estoppel does not apply.

First, the *Graves* case was initially settled through a 1981 consent decree, and the 1995 first amended

judgment in that case was entered through stipulation and explicitly provided that it did "not represent a judicial determination of any constitutionally mandated standards applicable to the jails." *Graves v. Arpaio*, 2008 WL 4699770, *1 (D. Ariz. 2008).

Second, the *Graves* court's 2008 order denying in part and granting in part the defendants' motion to terminate judicial oversight was based on evidence of conditions at the jail presented at an August 2008 evidentiary hearing. *See id.* at *2, 27-*28, *52. The conditions at the jail as of August 2008 do not necessarily reflect conditions in December 2011. *See Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000) (to have preclusive effect, issue necessarily decided at previous proceeding must be identical to the one sought to be relitigated).

Third, the *Graves* court's statements in its April 7, 2010, order regarding the lack of progress as of that date regarding mental health treatment at the jail, also do not necessarily reflect the conditions that existed in December 2011, and, further, the statements are not a judgment on the merits. The April 2010 order thus does not provide a basis for estopping the County from contesting conditions in the jail in December 2011. *See id.* (to have preclusive effect, must not only have identical issue, but also the prior proceeding must have ended with a final judgment on the merits).

Fourth, the *Graves* third amended judgment entered in May 2012 simply restated the portions of the 2008 second amended judgment that remained in place and continued in effect. (*See* Case No. 77-CV-00479, Doc. 2093, 2094.) This order was entered in response to the defendants' unopposed motion to terminate certain of the conditions set forth in the 2008

second amended judgment. Thus, the third amended judgment is not a determination on the merits, and does not provide a basis for estopping the County from contesting conditions in the jail in December 2011. *See id.*

Finally, prudential concerns also convince the Court that nonmutual collateral estoppel should not be applied against the County. *See United States v. Mendoza*, 464 U.S. 154, 161 (1984) (holding nonmutual collateral estoppel does not apply to the federal government). As the Court explained in *Mendoza*, the government's "litigation conduct in a case is apt to differ from that of a private litigant." *Id.* "Unlike a private litigant who generally does not forgo an appeal if he believes he can prevail," the government considers various prudential concerns in determining whether to authorize an appeal, such as the limited government resources and the courts' crowded docket. *Id.* Thus, although the County would be bound by principles of res judicata from relitigating the same issue with the same party, the Court declines to hold that the County is "further bound in a case involving a litigant who was not a party to the earlier litigation." *Id.* at 162.

Plaintiffs' remaining grounds for summary judgment rely, directly or indirectly, on orders issued in the *Graves* case. Accordingly, Plaintiffs' motion for partial summary judgment will be denied.

G. Defendant Maricopa County's Motion to Strike Plaintiffs' Statement of Facts Applicable to All Defendants (Doc. 384)

Defendant Maricopa County moves to strike Plaintiffs' Statement of Facts Applicable to all Defendants (PSOFAD), found at Doc. 359, on the ground that

if fails to comply with the local rules. Assuming that the PSOFAD does violate the local rules, the Court declines to strike it. Plaintiffs could have filed the information contained in the PSOFAD with their various responses to Defendants' motions for summary judgment, and Plaintiffs' early filing of this information, and combining of the information, did not prejudice Defendants. Although the preferable approach would have been for Plaintiffs to [sic] permission from the Court prior to filing the PSOFAD, the Court will deny the motion to strike it.

H. City Defendants' Motion for Leave to File Under Seal Reply in Support of Motion to Strike Portions of Plaintiffs' Response (Doc. 388)

In this motion, City Defendants seek leave to file under seal their Reply in Support of Motion to Strike Portions of Plaintiffs' Response. The motion does not reference a docket number, and the only motion to strike portions of plaintiffs' response that the Court has located is found at Docs. 329, 340, and 341. The Court has already ordered sealed the unredacted versions of the Motion to Strike Portions of Plaintiffs' Response (*see* Docs. 339, 340, 341), and Doc. 329 is the redacted copy of 340/341. The Court will therefore deny the current motion as moot.

IT IS ORDERED that City Defendants' Motion for Summary Judgment (Doc. 299) is Denied.

IT IS FURTHER ORDERED that Defendants Arpaio, Carrasco, Dominguez, Foster, Kaiser Scheffner, Vazquez, and Weiers' Motion for Summary Judgment (Doc. 347) is Granted in part and Denied in part as follows:

Defendant Scheffner is granted summary judgment only as to conduct that occurred in the line scan room.

Defendant Arpaio is granted summary judgment only as to claims brought against him in his official capacity.

Summary judgment as to Arpaio, Carrasco, Dominguez, Foster, Kaiser Scheffner, Vazquez, and Weiers' [sic] is otherwise denied.

IT IS FURTHER ORDERED that Hatton Defendants' Motion for Summary Judgment (Doc. 350) is Denied.

IT IS FURTHER ORDERED that Defendants William McLean, Monica Scarpati, and Ian Cranmer's Motion for Partial Summary Judgment (Doc. 355) is Denied.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment against Maricopa County (Doc. 358) is Denied.

IT IS FURTHER ORDERED that Defendant Maricopa County's Motion to Strike Plaintiffs' Statement of Facts Applicable to All Defendants (Doc. 384) is Denied.

IT IS FURTHER ORDERED that City Defendants' Motion for Leave to File Under Seal Reply in Support of Motion to Strike Portions of Plaintiffs' Response (Doc. 388) is Denied as moot.

IT IS FURTHER ORDERED that the caption of all further documents filed in this action shall comply with the party name capitalization requirement of LRCiv 7.1(a)(3). Dated this 10th day of February, 2015.

/s/ Paul G. Rosenblatt
Paul G. Rosenblatt
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed Sept. 15, 2015]

No. CV-12-02376-PHX-PGR

ERNEST JOSEPH ATENCIO, *et al*.,

Plaintiffs,

v.

JOSEPH M. ARPAIO, *et al*.,

Defendants.

ORDER

The Court has before it City Defendants' Motion to Stay Proceedings Pending Appeal and Request for Clarification as to the State Law Claim Only (Doc. 447), Sheriff Arpaio's Separate Motion to Clarify/ Reconsider Ruling that Arpaio can be Responsible in his Individual Capacity for the Medical Defendants' Conduct (Doc. 448), and Plaintiffs' Motion to Certify Appeal as Frivolous (Doc. 454). The Court also has before it the various joinders in the pending motions and the responses and replies to the motions (*see* Doc. 448, 449, 474, 478, 499, 500). The Court will grant in part and deny in part the Motion to Certify Appeal as Frivolous (Doc. 454). The Court will grant City Defendant's Motion to Stay Proceedings Pending Appeal and Request for Clarification (Doc. 447). The Court will deny Sheriff Arpaio's Motion to Clarify/ Reconsider Ruling (Doc. 448).

A. Plaintiffs' Motion to Certify Appeal as Frivolous (Doc. 454).

Defendants have filed notices of appeal from this Court's denial of summary judgment on the issue of qualified immunity. Plaintiffs move to certify those appeals as frivolous. The Court will grant in part and deny in part Plaintiffs' motion.

An order denying a motion for summary judgment on the question of qualified immunity generally is immediately appealable. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2018 (2014). This immediate appealability is "because such orders conclusively determine whether the defendant is entitled to immunity from suit," an issue that "is both important and completely separate from the merits of the action," and also "could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost." *Id.* at 2019.

However, not all orders denying summary judgment on the issue of qualified immunity are immediately appealable. "[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995). On the other hand, "summary judgment determinations *are* appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity – typically, the issue whether the federal right allegedly infringed was 'clearly established.'" *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (emphasis and alteration in original, citation omitted).

As the Ninth Circuit explained, "both the denial of a defendant's motion as well as a ruling by the trial judge that 'if the facts are as asserted by the plaintiff, the defendant is not immune,'" may be immediately appealed. *Mueller v. Auker*, 576 F.3d 979, 987 (9th Cir. 2009). However, a challenge to the "*sufficiency* of the evidence in support of the factual claims made by the parties" is not immediately appealable. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1060 (9th Cir. 2006) (emphasis added); *see Wilkins v. City of Oakland*, 350 F.3d 949, 951 (9th Cir. 2003) ("It is well-established that 'an appellate court lacks jurisdiction over an interlocutory appeal challenging the sufficiency of the evidence supporting the trial court's conclusion that an issue of fact exists.'" (Citation omitted.)).

1. City Defendants

a. Escort to linescan room

As to the escort of Atencio from the holding cell to the linescan room, City Defendants contend that whether Defendant Hanlon is entitled to qualified immunity is a purely legal issue because there is a video of the event, and that this video demonstrates that Hanlon merely had his hands on Atencio's back and shoulders to guide him and did not manipulate Atencio's hands, or in any way cause Atencio to bend over. However, the quality of the video provided to the Court, which recorded most but not all of the escort, was insufficiently clear for the Court to rule out the version of the escort put forward by Plaintiffs, particularly in light of the testimony of Matthew Laymen, who indicated that the officers escorted Atencio by leading him with his hands and arms bent in what looked like a very painful position and that Atencio's statements indicated that the officers were hurting him. Further, the video demonstrates that Atencio

was neither aggressive nor resistant during the escort, and other evidence indicates that Atencio was "humorous," "jovial," and non-aggressive. Moreover, viewing the evidence in the light most favorable to Plaintiffs, this alleged use of force during the escort was merely a step in the series of events that occurred in the linescan room and the safe cell that led to Atencio's death. Indeed, the subsequent events in the linescan room and safe cell may well have never happened but for the alleged use of force during the escort.

As the Court found in denying summary judgment, there is a genuine factual dispute as to what actually occurred during the escort to the linescan room and what Hanlon knew at the time. Under Plaintiffs' versions of the facts, Hanlon would not be entitled to qualified immunity because his use of force under these circumstances would be objectively unreasonable. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) ("a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable" with such objective unreasonableness turning "on the 'facts and circumstances of each particular case,'" and "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight").

This genuine factual dispute does not render an appeal from the Court's denial of summary judgment frivolous in its entirety. To the extent City Defendants seek to challenge on appeal the Court's determination that, viewing the evidence in the light most favorable to Plaintiffs, Hanlon would not be entitled to qualified immunity based on his conduct escorting Atencio to the linescan room, appellate jurisdiction exists and thus, such an appeal would not be frivolous. *See*

Mueller, 576 F.3d at 987 ("a ruling by the trial judge that 'if the facts are as asserted by the plaintiff, the defendant is not immune'" qualifies for an interlocutory appeal); *Kennedy*, 439 F.3d at 1060 (appellate jurisdiction exists over question of whether, viewing issues of fact in favor of plaintiff, officer's actions were objectively unreasonable).

However, to the extent City Defendants seek to challenge on appeal the *sufficiency* of the evidence to support Plaintiffs' version of the facts, and the Court's determination that a genuine issue of fact exists, such an appeal would be frivolous. *See Kennedy*, 439 F.3d at 1060 (no appellate jurisdiction over interlocutory appeal challenging sufficiency of the evidence supporting factual claims made by the parties); *Wilkins*, 350 F.3d at 951 (no appellate jurisdiction over interlocutory appeal challenging sufficiency of evidence supporting district court's determination an issue of fact exists).

b. Linescan room

As to the use of force in the linescan room, City Defendants again rely on the presence of a video recording of the event and contend that the question of qualified immunity is thus a purely legal issue. However, viewed in the light most favorable to Plaintiffs, this video recording, when combined with other evidence in the record, demonstrates that Atencio was not being combative, violent, aggressive, or threatening towards anyone; that Atencio's demeanor was "humorous," "jovial," and non-aggressive; that the officers, including Hanlon and French, knew that Atencio was in a state of psychosis and confusion, and was having trouble following directions; that Atencio's response to the command to remove his shoes by removing one shoe then asking the officer to remove

his other shoe (or telling the officer to remove his own shoe), pointing at Hanlon, and crossing his arms over his chest were a result of Atencio's psychosis, confusion, and difficulty following directions; that if Atencio had been given time and opportunity to understand and follow the direction to remove his other shoe, the use of force may not have been needed; and that Atencio was not posing a threat or a risk of harm to anyone. Under this view of the facts, it was objectively unreasonable for an officer to immediately grab and engage in a physical struggle with Atencio and take Atencio to the ground through the use of a choke hold/carotid hold. *See Kingsley*, 135 S. Ct. at 2473.

The officers clearly dispute Plaintiffs' version of the facts and argue that the dispute is purely legal, citing *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), and *Scott v. Harris*, 550 U.S. 372 (2007). However, the videos in both *Plumhoff* and *Scott* not only contradicted the plaintiffs' versions of the events, but also made it clear that the suspect was putting other civilians and officers at risk, and that the officers' conduct in using force to end that risk was reasonable. *See Plumhoff*, 134 S. Ct. at 2021-22; *Scott*, 550 U.S. at 379-380, 386. In contrast, here the video neither contradicts the version of the facts put forward by Plaintiffs nor makes it clear that Atencio was creating a threat or a risk to the officers or others in the jail. The existence of the video in the present case does not, therefore, transform the factual disputes into a purely legal question, and these factual disputes preclude a grant of summary judgment on the issue of qualified immunity.

The genuine factual disputes do not, however, render an appeal from the Court's denial of summary judgment frivolous in its entirety. To the extent City Defendants seek to challenge on appeal the Court's

determination that, viewing the evidence in the light most favorable to Plaintiffs, neither Hanlon nor French would be entitled to qualified immunity based on their conduct in the linescan room, appellate jurisdiction exists and thus, such an appeal would not be frivolous. *See Mueller*, 576 F.3d at 987; *Kennedy*, 439 F.3d at 1060. On the other hand, to the extent City Defendants seek to challenge on appeal the *sufficiency* of the evidence to support Plaintiffs' version of the facts, and the Court's determination that a genuine issue of fact exists, such an appeal would be frivolous. *See Kennedy*, 439 F.3d at 1060; *Wilkins*, 350 F.3d at 951.

As to the uses of force that occurred after Hanlon and French were no longer physically involved, e.g., the facial strikes by Hatton and the Taser deployment by Officer Weiers, the Court denied summary judgment on the issue of qualified immunity because there was a genuine factual dispute as to whether Hanlon and French were integral participants in that use of force. To the extent City Defendants seek to challenge on appeal whether the integral participant theory can be applied under the circumstances of this case and, if so, whether, viewing the evidence in the light most favorable to Plaintiffs, City Defendants are entitled to qualified immunity, such an appeal would not be frivolous. *See Behrens*, 516 U.S. at 313 (summary judgment decisions appealable when they resolve dispute about abstract issue of law); *Mueller*, 576 F.3d at 987; *Kennedy*, 439 F.3d at 1060. On the other hand, to the extent City Defendants seek to challenge on appeal the *sufficiency* of the evidence to support Plaintiffs' version of the facts and the Court's determination that a genuine issue of fact exists regarding whether Hanlon and French were integral participants, such

an appeal would be frivolous. *See Kennedy*, 439 F.3d at 1060; *Wilkins*, 350 F.3d at 951.

2. Arpaio Defendants

Arpaio defendants were participants in the struggle with Atencio, and assisted with taking Atencio to the floor and holding him down on the floor in a "dog pile" in the linescan room while Hatton delivered strikes to Atencio's facial region and Weiers used the Taser on Atencio. Arpaio Defendants also were participants in holding Atencio down in the safe cell while Hatton delivered a knee strike to Atencio. In addition to that noted above, the evidence, viewed in the light most favorable to Plaintiffs, demonstrates that once the officers physically engaged with Atencio, Atencio passively resisted; that after Atencio was taken to the floor, Arpaio Defendants participated in a "dog pile" to hold Atencio down while Defendant Weiers tased Atencio and Defendant Hatton administered numerous strikes to Atencio's face; that once Atencio was transferred to the safe cell, Arpaio Defendants held him down while Defendant Hatton delivered a knee strike to Atencio's back; and that at no point was Atencio actively aggressive or violent towards the officers or anyone else. Under this view of the facts, it was objectively unreasonable for Arpaio Defendants to hold Atencio down while officers engaged in the facial strikes and knee strike, and tased Atencio. *See Kingsley*, 135 S. Ct. at 2473.

Arpaio Defendants dispute this view of the facts, and set forth their own version of the facts. Their version does not, however, view the facts in the light most favorable to Plaintiffs and, further, ignores many of the disputed facts relied upon by the Court in denying summary judgment.

There are genuine factual disputes as to what exactly happened in the linescan room and the safe cell, including the conduct of Atencio and the conduct of Arpaio Defendants and what they knew at the time of the use of force. These genuine factual disputes preclude summary judgment on the issue of qualified immunity but do not render an appeal from the Court's denial of summary judgment on qualified immunity frivolous in its entirety. To the contrary, to the extent Arpaio Defendants seek to challenge on appeal the Court's determination that, viewing the evidence in the light most favorable to Plaintiffs, Arpaio Defendants would not be entitled to qualified immunity, appellate jurisdiction exists and thus, such an appeal would not be frivolous. *See Mueller*, 576 F.3d at 987; *Kennedy*, 439 F.3d at 1060. Similarly, to the extent Arpaio Defendants seek to challenge on appeal whether the integral participant theory and/or duty to intervene can be applied under the circumstances of this case, such an appeal would not be frivolous. *See Behrens*, 516 U.S. at 313 (summary judgment decisions appealable when they resolve dispute about abstract issue of law); *Mueller*, 576 F.3d at 987; *Kennedy*, 439 F.3d at 1060.

However, to the extent Arpaio Defendants seek to challenge on appeal the *sufficiency* of the evidence to support Plaintiffs' version of the facts, and the Court's determination that a genuine issue of fact exists, such an appeal would be frivolous. *See Kennedy*, 439 F.3d at 1060; *Wilkins*, 350 F.3d at 951.

3. Hatton Defendants[1]

There is a genuine factual dispute regarding what actually occurred prior to Hatton's delivery of the face and knee strikes. Although Hatton claimed he delivered the strikes in self-defense (at least as to the facial strikes), other evidence indicates that Atencio was helpless and defenseless at the time Hatton made these strikes and that the strikes were unreasonable, unjustifiable, and excessive. This genuine factual dispute precludes summary judgment on the issue of qualified immunity. The factual dispute does not, however, render an appeal regarding the denial of summary judgment on qualified immunity frivolous in its entirety. To the contrary, to the extent Hatton seeks to challenge on appeal the Court's determination that, viewing the evidence in the light most favorable to Plaintiffs, Hatton would not be entitled to qualified immunity, appellate jurisdiction exists and thus, such an appeal would not be frivolous. *See Mueller*, 576 F.3d at 987; *Kennedy*, 439 F.3d at 1060. However, to the extent Hatton seeks to challenge on appeal the *sufficiency* of the evidence to support Plaintiffs' version of the facts and the Court's determination that a genuine issue of fact exists, such an appeal would be frivolous. *See Kennedy*, 439 F.3d at 1060; *Wilkins*, 350 F.3d at 951.

[1] Hatton notes that Plaintiffs' motion does not explicitly include Hatton Defendants' appeal, likely because Plaintiffs filed their motion on the same day that Hatton Defendants filed their notice of appeal (*see* Doc. 453, 454).

B. City Defendants' Motion to Stay Proceedings Pending Appeal and Request for Clarification as to State Law Claim (Doc. 447).

1. Motion to Stay

In the Ninth Circuit, an interlocutory appeal of the denial of qualified immunity divests the district court of jurisdiction to proceed with trial unless the trial court has certified the appeal as frivolous or waived. *See Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992). As discussed above, the Court will deny in large part Plaintiffs' request to certify Defendants' appeals as frivolous. Thus, the interlocutory appeal filed by Defendants divests the Court of jurisdiction over Plaintiffs' federal constitutional claims.

City Defendants move to stay the proceedings as to the remaining state law wrongful death claim pending the outcome of the appeal. Plaintiffs object to the requested stay.

Failure to stay the proceedings pending the outcome of the appeal could result in two separate trials, inconsistent results, the waste of judicial resources, and increased expense to the parties. Moreover, the facts relating to Plaintiffs' state law wrongful death claim are inextricably intertwined with the facts relating to their federal constitutional claims as demonstrated by the First Amended Complaint, which alleges the same wrongful conduct of Defendants violated both state law and § 1983.

On the other hand, the Court recognizes that a stay of these proceedings, and the resulting delay in resolution of Plaintiffs' claims, will injure Plaintiffs, and that there is a risk that witness memories will fade. However, discovery has been completed in this action, with only final pretrial proceedings and trial remaining.

This posture significantly decreases the risk of fading memories impacting the outcome of this litigation.

The Court finds that, under the circumstances of this case, a stay of the proceedings is appropriate. The Court will thus exercise its discretion and stay these proceedings pending the outcome of the appeal.

2. Motion for Clarification

City Defendants seek clarification of the Court's Order regarding the denial of summary judgment on the state law claim against them. City Defendants argued in their motion for summary judgment (Doc. 299) that their use of force was reasonable and that they were therefore immune from liability on the state law claim. The Court did not, in its Order (Doc. 442) denying summary judgment, separately discuss whether City Defendants were entitled to summary judgment on the state law claim. However, as discussed above and in the Court's Order (Doc. 442), the evidence viewed in the light most favorable to Plaintiffs demonstrates that Hanlon's and French's uses of force on Atencio were objectively *unreasonable*. Hence, Hanlon and French are not entitled to summary judgment based on the protection from liability provided by A.R.S. § 13-409 (providing defense of justification if certain conditions are met, including that a "*reasonable* person would believe that such force is immediately necessary" (emphasis added)).[2]

[2] To the extent City Defendants seek reconsideration of the Court's denial of summary judgment on the state law claim, their request is untimely. *See* LRCiv 7.2(g)(2).

C. Arpaio's Motion to Clarify/Reconsider Ruling Arpaio Can be Responsible in Individual Capacity for Medical Defendants' Conduct (Doc. 448).

Sheriff Arpaio's Motion to Clarify/Reconsider does not seek clarification as to the Court's Order but instead merely seeks to have the Court reconsider its previous rulings and repeats arguments made previously by Arpaio. The request for reconsideration will be denied as untimely. *See* LRCiv 7.2(g)(2) ("[A]ny motion for reconsideration shall be filed not later than fourteen (14) days after the date of the filing of the Order that is the subject of the motion").

IT IS ORDERED that Plaintiffs' Motion to Certify Appeal as Frivolous (Doc. 454) is granted in part and denied in part. The motion is granted to the extent that Defendants seek to challenge on appeal the sufficiency of the evidence to support Plaintiffs' version of the facts and the Court's determination that a genuine issue of fact exists. The motion is otherwise denied.

IT IS FURTHER ORDERED that City Defendants' Motion to Stay Proceedings Pending Appeal (Doc. 447-1) is granted. The proceedings are stayed pending the outcome of the appeal to the U.S. Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that City Defendants' Request for Clarification as to the State Law Claim Only (Doc. 447-2) is granted to the extent it seeks clarification. Defendants Hanlon and French are not entitled to summary judgment on the state law claims based on A.R.S. § 13-409. To the extent City Defendants seek reconsideration, the request is denied.

IT IS FURTHER ORDERED that Sheriff Arpaio's Separate Motion to Clarify/Reconsider Ruling that Arpaio can be Responsible in his Individual Capacity for the Medical Defendants' Conduct (Doc. 448) is denied.

Dated this 14th day of September, 2015.

/s/ Paul G. Rosenblatt
Paul G. Rosenblatt
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: Feb. 14, 2017]

No. 15-15451
D.C. No. 2:12-cv-02376-PGR

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; *et al.*,

Defendants-Appellants,

and

MARICOPA, COUNTY OF, a public entity; *et al.*,

Defendants.

Nos. 15-15456
D.C. No. 2:12-cv-02376-PGR

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; *et al.*,

Defendants,

and

PHOENIX, CITY OF, a public entity; *et al.*,

Defendants-Appellants.

Nos. 15-15459
D.C. No. 2:12-cv-02376-PGR

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; *et al.*,

Defendants,

IAN CRANMER, husband; *et al.*,

Defendants,

and

ANTHONY HATTON, husband

Defendant-Appellant.

ORDER

Before: MELLOY,[*] CLIFTON, and WATFORD, Circuit Judges.

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

[*] The Honorable Michael J. Melloy, United States Circuit Judge for the Eighth Circuit, sitting by designation.

The panel voted to deny the petitions for rehearing. Judge Watford voted to deny the petitions for rehearing en banc, and Judge Melloy and Judge Clifton so recommended.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matters en banc. Fed. R. App. P. 35.

The petitions for rehearing and the petitions for rehearing en banc are DENIED.