No. 13-16989

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TIMOTHY DEMOND BARRY,

Plaintiff-Appellant,

v.

J. BISHOP *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
2:08-CV-01722-PMP-GWF

APPELLANT'S OPENING BRIEF

Jennifer L. Swize*
Sarah A. Hunger*
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

*Appointed through the
Ninth Circuit Pro Bono Program

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Mr. Barry respectfully requests oral argument, which will aid the Court's decisional process. This is the third time that Mr. Barry appears in front of this Court on appeal in this case. On the first appeal, this Court summarily reversed the district court's dismissal order, and on the second, this Court vacated the district court's summary judgment order and remanded for further proceedings. This appeal, from the district court's subsequent grant of summary judgment, presents detailed factual and procedural considerations as well as significant legal questions involving the Eighth Amendment. Mr. Barry submits that oral argument will assist the Court in addressing the issues presented and in reviewing the lengthy proceedings in this case.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this proceeding under 42 U.S.C. § 1983. The district court granted Defendants' motion for summary judgment, and was thus a final order. This Court has jurisdiction over the district court's grant of summary judgment under 28 U.S.C. § 1291.

The district court entered judgment on September 3, 2013, and Mr. Barry filed his notice of appeal on September 19, 2013. The appeal is therefore timely pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Whether the district court erred in determining that Mr. Barry presented no evidence in support of his Eighth Amendment excessive force claim, where Mr. Barry submitted contemporaneous medical records and eyewitness declarations that created genuine issues of material fact.

2. Whether the district court erred in concluding, in the alternative, that both Defendants were entitled to qualified immunity because it would not have been evident that "ordering and keeping [an inmate] on his knees" violated a clearly established right, where only Defendant Albonico moved for summary judgment on this ground and, in any event, where the Ninth Circuit has held on numerous occasions that the right at issue is prohibiting the use of excessive force under the Eighth Amendment and that this right has been clearly established since 1986.

3. Whether the district court erred in determining that Mr. Barry did not allege an Eighth Amendment deliberate indifference claim, where Mr. Barry's complaint alleges with specificity a serious medical need and further alleges Defendants' deliberate indifference to this need.

STATUTORY AND REGULATORY ADDENDUM

Pertinent statutes and rules are set forth in an addendum to this brief.

STATEMENT OF THE CASE

Timothy Demond Barry appears in front of this Court for a third time, to appeal a final judgment entered by the district court denying on summary judgment Mr. Barry's excessive force and deliberate indifference to serious medical needs claims. On July 25, 2008, Mr. Barry filed a complaint against Defendant prison officials Albonico, Bishop, and Felker, alleging that they violated his right to be free from excessive force and his right to officials who are not deliberately indifferent to serious medical needs. These claims arise out of a July 2007 incident in which Defendants forced Mr. Barry to kneel on hot asphalt for nearly an hour, causing Mr. Barry to suffer deep, second-degree burns that necessitated more than six months of intensive medical treatment.

On Mr. Barry's first appeal in 2010, this Court entered a summary reversal of the district court's decision to enter judgment against Mr. Barry as to all Defendants. ER169 (9th Cir. No. 09-17584 Order). As this Court explained, the district court erred because only one Defendant, Mr. Felker, had actually moved for dismissal.[1] *Id.* On Mr. Barry's second appeal in 2012, this Court vacated the district court order granting summary judgment in favor of Defendants Albonico

[1] On September 24, 2009, Defendant Felker moved to dismiss the claims against him. ER172 (Mot. to Dismiss). The district court granted dismissal as to all Defendants. ER170-71 (Order of Dismissal). On appeal, this Court reversed the district court's entry of judgment. ER169 (9th Cir. No. 09-17584 Order). Mr. Felker is not involved in the instant appeal.

and Bishop and remanded for further proceedings. ER120 (9th Cir. No. 11-17817 Order). The district court had granted summary judgment on the basis that Mr. Barry did not oppose the motion, but this Court determined that summary judgment was improper because Mr. Barry had not received notice of the requirements to defeat summary judgment pursuant to *Rand v. Rowland*, 154 F.3d 952, 960 (9th Cir. 1998) (en banc), and thus did not have the appropriate opportunity to oppose Defendants' motion. ER120 (9th Cir. No. 11-17817 Order).

On remand from the second appeal, Defendants Albonico and Bishop again moved for summary judgment, relying in part on excerpts of their deposition of Mr. Barry taken December 29, 2010. ER64 (Mot. for Summ. J.). Once again, however, Mr. Barry was not provided the proper procedural safeguards afforded to litigants in this Circuit. Notably, Defendants failed to send Mr. Barry a copy of his deposition transcript, as required under U.S. District Court for the Eastern District of California Local Rule 133(j). As a result, Mr. Barry was left unable to review the entirety of his deposition transcript or file additional excerpts of the deposition in support of his opposition to summary judgment.

Additionally, Defendants represented to the district court that Mr. Barry had not pled a claim of deliberate indifference to serious medical needs or presented any evidence in support of such a claim to the extent that it existed. ER19 (Reply Br.). To the contrary, Mr. Barry specifically pled a deliberate indifference to

medical needs claim and attached to his complaint medical reports confirming the serious nature of his injury as well as Defendants' deliberate indifference to his injury. ER189-90 (Compl.). Nevertheless, in its September 2013 order, the court seemingly adopted, without analysis or explanation, Defendants' position that Mr. Barry had not pled such a claim in his complaint. ER8-9 (Final Order). Finally, despite these procedural shortcomings, the district court granted Defendants' motion for summary judgment on Mr. Barry's excessive force claim, without giving any consideration to Mr. Barry's version of the facts. *Id.* at ER9-10.

STATEMENT OF FACTS

On a ninety-five-degree day in July 2007, Defendants Albonico and Bishop forced Mr. Barry to kneel on hot asphalt for almost an hour during the hottest part of the afternoon. During this time, Mr. Barry alerted the officers that his knees were burning and blistering, and he even fell over from the pain of his blisters popping. Instead of removing Mr. Barry from the hot asphalt or seeking appropriate medical attention, the officers ignored Mr. Barry's cries for help, placed him back on his knees, and instructed him to remain kneeling unless he consented to a public strip search. As a result of these actions, Mr. Barry suffered deep, second-degree burns on both of his knees that necessitated more than six months of intensive medical treatment. Mr. Barry filed this § 1983 lawsuit to

recover for that excessive force and deliberate indifference to his serious medical needs.

At all times relevant to the events at issue in this case, Mr. Barry was an inmate incarcerated at High Desert State Prison in Susanville, California. ER39 (Barry Decl.). Defendant Nickolus Albonico was employed as a correctional sergeant at High Desert State Prison, and Defendant Jason Bishop as a correctional lieutenant. ER183 (Answer).

A. Defendants Forced Mr. Barry To Kneel On Hot Asphalt, Causing Him To Suffer Second-Degree Burns

On the afternoon of July 23, 2007, Mr. Barry was in the Facility C exercise yard of High Desert State Prison when two inmates chased another inmate across the yard and attacked him. ER3 (Final Order); ER189 (Compl.). "The victim ran to the other side of the yard, fell to the ground, and died." ER3 (Final Order). Immediately following the attack, officers ordered all inmates present on the exercise yard to the ground so that the officers could locate the weapons and remove the assailants from the yard. ER3 (Final Order); ER92-93 (Albonico Decl.).

Once the weapons had been located and the assailants removed, Defendant Albonico ordered all inmates on the yard to submit to a strip search. ER93 (Albonico Decl.); ER111 (Barry Dep.). As Earl Fullilove, an inmate present on the yard during the attack and the subsequent search, averred in his declaration, the

purpose of the strip searches was to "be checked for abrasions, cuts, [and] blood." ER37 (Fullilove Decl.). Defendant Albonico told the inmates that they could either submit to a public strip search in the yard or wait until the yard was clear and be searched in private. ER214 (Staff Complaint Appeal).

Three inmates, including Mr. Barry, requested a private search given the extreme heat and the presence of female officers on the yard. ER37 (Fullilove Decl.); ER39 (Barry Decl.); ER114 (Barry Dep.). Consistent with past practice and Defendant Albonico's earlier directive, the officers allowed Melvin Foster, an inmate who requested a private search, to leave the yard and be searched in the program clinic. ER112 (Barry Dep.). The officers did not, however, afford the same treatment to Mr. Barry when he voiced the same request. Rather, Defendant Albonico ordered the officers to remove Mr. Barry from the Facility C exercise yard and place him on his knees on asphalt outside of Building C-5. ER3 (Final Order); ER93 (Albonico Decl.). Mr. Barry complied with this order and submitted to handcuffs while placed on his knees. ER38 (Fullilove Decl.); ER189 (Compl.).

After approximately five to ten minutes of kneeling, Mr. Barry told the officers that his knees were beginning to burn from the hot asphalt. ER189-90 (Compl.); ER214 (Staff Complaint Appeal). The officers ignored his complaints and instructed him to remain kneeling. ER40 (Barry Decl.); ER214 (Staff Complaint Appeal). A few minutes later, Mr. Barry felt "blisters pop on [his]

knee[s]," ER112 (Barry Dep.), and "could feel the fluid running under" his pants. ER190 (Compl.); *see also* ER214 (Staff Complaint Appeal) ("Blisters were popping on my knees and fluid was running down.").

The pain of the popping blisters caused Mr. Barry to fall over on his side and cry out to the officers that his knees were burning and that he needed help. ER40 (Barry Decl.). Instead of being assisted with his burns or being moved off of the hot asphalt, Mr. Barry was picked up, placed back on his knees, and told "that if [he] get[s] naked, [he] can go back to [his] cell and deal with [his] problems." ER112 (Barry Dep.). During this sequence, Defendant Bishop began his shift on the yard, where he supervised Mr. Barry. ER35 (Sign In Sheet) (indicating that Defendant Bishop's shift began at 2:00 p.m.); ER97 (Albonico Report) (asserting that the kneeling incident occurred at 2:05 p.m.); *see also* ER52 (Opp'n Br.).

B. Mr. Barry Did Not Receive Treatment For His Burns After Being Removed From The Yard

By the time Defendants finally escorted Mr. Barry to the medical clinic, more than forty-five minutes had passed since Defendant Albonico forced him to kneel in the first instance, and more than thirty minutes since Mr. Barry fell over from the burns and blisters on his knees. Licensed Vocational Nurse ("LVN") Burroughs, the nurse on duty, performed an exam and sent him back to his cell with antibiotic cream for his knees. ER103 (Burroughs Report).

Throughout the afternoon, however, Mr. Barry's burns continued to worsen. As he alleged in his complaint, the blisters on his knees kept draining and the pain of the burns and blisters brought him to tears. ER190 (Compl.). Indeed, the burns worsened to such a degree that Mr. Barry was taken back to the medical clinic at 5:45 p.m., where Nurse Flaherty performed an exam and began more extensive treatment. *Id.*; ER60 (Flaherty Report).

As described by Nurse Flaherty, Mr. Barry presented with deep, second-degree burns on both knees that were open, red, and blistered at the time of the exam. ER60 (Flaherty Report). Mr. Barry reported a pain level of eight out of ten. *Id.* Based on her initial exam, Nurse Flaherty called a physician, who cleansed the burns, applied a topical cream, and dressed the wounds, and prescribed pain medication for seven days. *Id.* Mr. Barry was also instructed to return to the clinic for daily dressings. *Id.* at ER61.

C. Mr. Barry Required Frequent And Extensive Medical Treatment For Six Months

In the days and weeks that followed, Mr. Barry's condition did not improve. Almost a month after the incident, on August 15, 2007, Mr. Barry underwent a procedure known as "debridement" in an attempt to remove the fibrotic scar tissue that developed as a result of the burns and that could, if left untreated, limit Mr. Barry's mobility. ER197 (8/15/07 Medical Report). Debridement is a procedure that requires local anesthesia and involves using a "15 scalpel blade . . .

to sharply dissect down to healthy tissue" both in the wound and on "the periphery." *Id.* This procedure exposed Mr. Barry to significant risks, including "scar[ring], pain, recurrence, bleeding and infection." *Id.* The physician recommended that Mr. Barry be provided a wheelchair and return to the clinic for daily, post-debridement dressing changes. ER198 (8/16/07 Medical Report). He also prescribed Codeine to Mr. Barry. *Id.*

On August 24, 2007, more than a month after the initial injury, Mr. Barry's burns had developed dead tissue, requiring the physicians to perform a second debridement procedure. ER200 (8/24/07 Medical Report). The physician again prescribed Codeine and instructed Mr. Barry to use crutches. *Id.* A mere three days later, a physician examined Mr. Barry and approved his "URGENT" request to be seen at the "Wound Specialty Clinic" for "non-healing 2[nd degree] burns." ER201 (8/27/07 Physician Request for Services). This physician also prescribed wet-to-dry dressing changes and Codeine. *Id.*

On August 31, 2007, Mr. Barry was seen by Dr. Zittel at the Center for Wound Care at Shasta Regional Medical Center for "[n]onhealing burn wounds to the right and left knees." ER203 (8/31/07 Specialist Consultation). Dr. Zittel described Mr. Barry and his injuries as follows: "The patient is a pleasant 33-year-old male who presents to the Center for Wound Care complaining of thermal burns to his right and left anterior knees, which he sustained on July 23, 2007 while he

was in a kneeling position on hot pavement for about 45 minutes." *Id.* Dr. Zittel also noted that Mr. Barry was "taking two courses of antibiotics" and "has been applying wet to dry dressings daily." *Id.*

Dr. Zittel further remarked that "[e]xamination of the left and right knee reveals evidence of open wounds, which are full thickness depth with scant yellowish slough." *Id.* at ER204. Mr. Barry underwent for a third time "[e]xcisional sharp debridement of the right and left knee wounds" in order "to decrease bacterial bioburden." *Id.* at ER204-05. After debridement, the "wounds were irrigated, dried, and [] dressed." *Id.* at ER205. Mr. Barry was "instructed to stay off his knees, and protect the wounds." *Id.* at ER204. Dr. Zittel "recommended to the patient that in the future we may consider placing him in some form of a knee immobilizer." *Id.* After the third debridement, Mr. Barry continued to be seen by Dr. Zittel and the program clinic until January 15, 2008, when he was finally discharged with the instruction to "[a]pply lotion as needed." ER206 (1/15/08 Medical Report).

D. Mr. Barry Exhausted His Administrative Remedies And Filed A § 1983 Action In Federal Court

In September 2007, Mr. Barry filed an internal complaint for his maltreatment on July 23, 2007. On April 7, 2008, Mr. Barry received notification from the Inmate Appeals Branch that his complaint and appeals had been denied,

and that "[t]his decision exhausts the administrative remedy available to the appellant within CDCR." ER208-09 (Director's Level Appeal Decision).

After exhausting his administrative remedies, Mr. Barry filed an action in the U.S. District Court for the Eastern District of California alleging that Defendants violated his Eighth Amendment rights. ER187-91 (Compl.). Specifically, Mr. Barry alleged that Defendants applied excessive force against him by forcing him to kneel on hot asphalt for almost an hour and then were deliberately indifferent to his serious medical needs by refusing him proper medical treatment for hours after the initial infliction of the burns. *Id.* at ER189-90.

During the five years that followed, the district court twice entered judgment in favor of Defendants—once on a motion to dismiss and again on summary judgment. This Court reversed the district court in both instances. In March 2013, on remand from this Court for the second time, Defendants Albonico and Bishop filed a motion for summary judgment on Mr. Barry's Eighth Amendment excessive force claim. ER64 (Mot. for Summ. J.). Defendants Albonico and Bishop argued that they were entitled to summary judgment because there was no evidence in the record to support Mr. Barry's claim. *Id.* at ER71. In the alternative, Defendant Albonico, but not Defendant Bishop, argued that he was entitled to qualified immunity. *Id.* In support of their motion, Defendants attached their declarations; violation reports related to the July 23, 2007 incident;

LVN Burroughs's medical report from the afternoon of the incident; and excerpts from the deposition of Mr. Barry taken December 29, 2010. *Id.* at ER92-118. Notably, Defendants did not attach, or otherwise provide to Mr. Barry, the entirety of his deposition transcript. *Id.*

On May 15, 2013, Mr. Barry filed his opposition brief to Defendants' motion for summary judgment, arguing that he provided facts sufficient to support his claims that Defendants applied excessive force and were deliberately indifferent to his serious medical needs. ER41-49 (Opp'n to Summ. J.). In support of his brief, Mr. Barry attached excerpts from Defendants' declarations; medical reports from his continuing treatment through January 2008; the declaration of inmate and eyewitness Mr. Fullilove; and Mr. Barry's own declaration. *Id.* at ER37-40, 50-63.

In their reply, Defendants Albonico and Bishop argued principally that Mr. Barry had failed to raise triable issues of fact on his excessive force claim. ER16 (Reply Br.). Defendants also clarified that they did not seek summary judgment on any other claims, contending that Mr. Barry did not plead a deliberate indifference claim. *Id.* at ER19. In support of these arguments, Defendants attached two declarations. *Id.* at ER29-35. Finally, Defendant Albonico reiterated his position that he is entitled to qualified immunity. *Id.* at ER19.

On September 3, 2013, the district court granted Defendants' motion for summary judgment on the basis that Mr. Barry had not presented any evidence in support of his excessive force claim. ER10 (Final Order). In a cursory, two-page analysis, the district court adopted Defendants' version of the facts without taking into consideration any of the evidence that Mr. Barry set forth. *Id.* On that basis, the district court determined that Mr. Barry had failed to present "evidence that either Defendant acted with any purpose other than to restore order in light of the exigent circumstances the correctional officers were confronting." *Id.* With respect to the deliberate indifference claim, the district court seemingly accepted Defendants' argument that Mr. Barry had not alleged this claim in his complaint, as it focused only on the excessive force claim in its analysis. *Id.*

The district court also held in the alternative that even if Mr. Barry had presented evidence in support of his excessive force claim, both "Defendants would be entitled to qualified immunity [because it] would not be clear to an officer in Defendants' position that ordering and keeping [Mr.] Barry on his knees under the circumstances would violate [Mr.] Barry's Eighth Amendment rights." *Id.* The district court did not offer any additional reasoning for its holding, relying instead on a single, conclusory paragraph to resolve the entirety of the qualified immunity analysis. *Id.*

After ruling in favor of Defendants Albonico and Bishop on their summary judgment motion, the district court entered final judgment in their favor. On September 19, 2013, Mr. Barry timely appealed the district court's grant of summary judgment. ER12.

SUMMARY OF THE ARGUMENT

The district court made three significant errors in its order granting summary judgment to Defendants Albonico and Bishop. *First*, the district court improperly determined that Mr. Barry failed to present any evidence in support of his Eighth Amendment excessive force claim. In reaching this conclusion, the district court overlooked specific, documentary evidence that Mr. Barry presented demonstrating the serious nature of his injury and the absence of any need to apply force. Instead, the district court improperly adopted the version of facts as described by Defendants Albonico and Bishop in their declarations. The district court's error was compounded by the fact that Defendants Albonico and Bishop failed to send Mr. Barry or, apparently, the district court, a complete copy of his deposition transcript as required under the district court's Local Rule 133(j). In other words, Mr. Barry did not have the opportunity to review, let alone submit excerpts of, the testimony that he gave in his deposition.

Second, the district court erroneously concluded that even if Mr. Barry had presented evidence in support of his excessive force claim, Defendants Albonico

and Bishop would be entitled to summary judgment on the basis of qualified immunity. Not only had Defendant Bishop not moved on this ground, but the district court based its decision on the patently incorrect assertion that the law was not clearly established at the time of the incident. To the contrary, this Court has held on numerous occasions that the right to be free from excessive force under the Eighth Amendment was clearly established nearly thirty years ago.

Third, the district court incorrectly accepted Defendants' contention that Mr. Barry's complaint does not allege an Eighth Amendment claim of deliberate indifference to serious medical needs. Indeed, Mr. Barry's complaint specifically alleges the existence of a serious medical need and Defendants' deliberate indifference to that need. Mr. Barry also attached medical reports and other documentation to his complaint which demonstrate the serious and lasting nature of his second-degree burns and the unduly delayed treatment.

These errors warrant reversal of the district court order and a remand for trial on Mr. Barry's Eighth Amendment claims of excessive force and deliberate indifference to serious medical needs.

STANDARD OF REVIEW

The Ninth Circuit "review[s] de novo a grant of summary judgment." *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). It "must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* "If, as to any given material fact, evidence produced by the moving party (the officers, in this case) conflicts with evidence produced by the nonmoving party ([Mr. Barry], in this case), [the Court] must assume the truth of the evidence set forth by the nonmoving party with respect to that material fact." *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013).

Likewise, this Court reviews "a grant of qualified immunity de novo." *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't*, 533 F.3d 780, 793 (9th Cir. 2008). The underlying question of "whether federal rights asserted by a plaintiff were clearly established at the time of the alleged violation" is also reviewed de novo. *Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003).

ARGUMENT

I. MR. BARRY PROFFERED EVIDENCE SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT ON HIS EIGHTH AMENDMENT EXCESSIVE FORCE CLAIM

In a cursory, two-page analysis, the district court granted summary judgment in favor of Defendants Albonico and Bishop on the basis that Mr. Barry failed to present evidence in support of his Eighth Amendment excessive force claim. In reaching this conclusion, the district court failed to consider *any* evidence proffered by Mr. Barry. Instead, the court made numerous credibility determinations in the course of adopting wholesale the facts as set forth by Defendants Albonico and Bishop in their declarations.

When viewed in the light most favorable to Mr. Barry, as is required at summary judgment, the evidence shows that Defendants chose to apply force to a subdued inmate under non-exigent circumstances, and that this imposition of force caused Mr. Barry to suffer deep, second-degree burns that required months of intensive treatment. Defendants' decision to order Mr. Barry to kneel on hot asphalt for nearly an hour was a gratuitous infliction of pain that violated Mr. Barry's right to be free from excessive force under the Eighth Amendment. Summary judgment should be reversed and the case should proceed to trial.

A. Eighth Amendment Excessive Force Claims Are Governed By A Five-Factor Test

"When prison officials use excessive force against prisoners, they violate the inmates' Eighth Amendment right to be free from cruel and unusual punishment." *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002). A prisoner's claim of excessive force under the Eighth Amendment must be based on "the unnecessary and wanton infliction of pain." *Jeffers v. Gomez*, 267 F.3d 895, 910 (9th Cir. 2001). "The question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Furnace*, 705 F.3d at 1028 (internal quotation marks omitted).

In determining whether force was applied for the very purpose of causing harm, this Court relies on the five factors initially outlined by the Supreme Court in *Hudson v. McMillan*, 503 U.S. 1 (1992): "(1) the extent of injury suffered by an inmate; (2) the need for application of force; (3) the relationship between that need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response." *Furnace*, 705 F.3d at 1028 (internal quotation marks omitted). "From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with

respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Whitley v. Albers*, 475 U.S. 312, 321 (1986). However, "[b]ecause such balancing nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, [this Court] ha[s] held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly." *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002); *see also Barnard v. Theobald*, 721 F.3d 1069, 1076 (9th Cir. 2013) (same).

B. The District Court Improperly Viewed The Facts In The Light Most Favorable To Defendants

Although the district court acknowledged that these five factors controlled its analysis, it failed to consider them in the light most favorable to Mr. Barry as required under this Circuit's controlling precedent. In fact, in the entirety of its discussion of these factors, the district court never once addressed any of the evidence presented by Mr. Barry. Rather, the district court simply adopted the evidence as told by Defendants in their declarations, regardless of whether Mr. Barry had proffered any evidence disputing their statements. Such an approach not only directly contradicts the fundamental principle that a court deciding a summary judgment motion must "view the evidence in the light most favorable to the plaintiff," but also disregards this Court's determination that where an inmate has proffered evidence in support of his version of the facts, it is

improper to "resolve[] all material disputes in favor of the officers, based on their declarations alone." *Martinez*, 323 F.3d at 1184. The Supreme Court recently underscored the significance of these principles when it summarily vacated and remanded the Fifth Circuit's grant of summary judgment to state officials in a § 1983 action because the decision reflected "a clear misapprehension of summary judgment standards." *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (per curiam). The Fifth Circuit's opinion, the Supreme Court explained, was in error because it "failed to adhere to the axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* (internal quotation marks omitted). To adopt one version of the facts over another is to make a credibility determination, an exercise reserved for the factfinder at trial.

The importance of these elemental concepts carries even more weight where, as here, the plaintiff is a pro se prisoner. In such instances, this Court applies a liberal-construction standard to pro se prisoner filings in addition to the ordinary safeguards invoked for any party opposing summary judgment. *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010) ("We have, therefore, held consistently that courts should construe liberally motion papers and pleadings filed by *pro se* inmates and should avoid applying summary judgment rules strictly."). This Court has enacted such a standard because it recognizes that "an inmate's choice of self-

representation is less than voluntary; and, when that unwilling self-representation is coupled with the further obstacles placed in a prisoner's path by his incarceration—for example his limited access to legal materials and to sources of proof—it seems appropriate to apply the requirements of the summary judgment rule with less than strict literalness." *Id.* As is detailed below, the district court violated these principles when it gave credence to Defendants' version of the facts at summary judgment.

C. Mr. Barry Presented Ample Evidence In Support Of His Excessive Force Claim

Notwithstanding the district court's conclusion otherwise, Mr. Barry proffered substantial evidence in support of his excessive force claim. Indeed, under Mr. Barry's version of the facts, Defendants Albonico and Bishop inflicted a serious and lasting injury on Mr. Barry at a point when any need to apply force had long passed. Mr. Barry's evidence further demonstrates that despite the pain he endured while kneeling on the hot asphalt for nearly an hour and the repeated denial of any medical attention for his burned knees, he remained compliant with the officers on the yard throughout the entire sequence of events. All told, Mr. Barry has presented evidence that, at a minimum, creates genuine issues of material fact under the five-factor *Hudson* balancing test.

1. Mr. Barry Suffered A Serious And Lasting Injury As A Result Of Defendants' Application Of Force

The first factor that a court must consider—the extent of the injury suffered by the inmate—weighs heavily in favor of Mr. Barry. *Furnace*, 705 F.3d at 1028. As the Supreme Court has explained, while an excessive force claim must rest upon something more than "*de minimis* uses of physical force," there is no requirement that the injury be lasting or serious. *Hudson*, 503 U.S. at 9-10. Were such a threshold required, "the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury." *Id.* at 9. To the extent an inmate suffered a serious or lasting injury, however, this evidence is relevant to the *Hudson* analysis, as "the extent of injury suffered by an inmate is one factor that may suggest whether the use of force could plausibly have been thought necessary in a particular situation, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Id.* at 7 (internal quotation marks omitted).

Although the district court recognized that Mr. Barry suffered an injury and classified Mr. Barry's injuries as "not trivial," it did not consider, or even mention, any of the evidence set forth by Mr. Barry describing the severity of the burns or the extent of his medical treatment. ER9 (Final Order). By failing to take this evidence into account, the district court effectively ignored the substantial amount

of material evidence filed by Mr. Barry in support of his claims that is directly relevant to the *Hudson* analysis. As a result of Defendants' actions, Mr. Barry endured at least six weeks of open, non-healing wounds and five months of additional treatment. To categorize this injury as "not trivial" simply does not accurately reflect the injury inflicted by Defendants.

Indeed, the kind of evidence that Mr. Barry presented—contemporaneous medical records, declarations, and eyewitness testimony—is critical to an analysis under *Hudson*. Not only does it demonstrate the serious and lasting nature of his injury, but it also is instructive as to the need to apply excess force and an official's true motivation. For example, Mr. Barry proffered evidence that Defendants inflicted force over a significant period of time—beginning as soon as Defendant Albonico directed Mr. Barry to kneel on the hot asphalt, and continuing well into the afternoon. During this time—while he was kneeling on the hot asphalt, and as his knees continued to burn while he waited in his cell that afternoon—the burns on his knees blistered and popped, causing fluid to drain down his legs. As described in his medical records, when Mr. Barry was seen by Nurse Flaherty that evening, he presented with deep, second-degree burns on both knees that were open, red, and blistered. ER60 (Flaherty Report).

Mr. Barry also set forth evidence demonstrating the serious and lasting nature of his injury. Unlike cases in which the injury subsides within hours or

even days of the use of force, *see, e.g.*, *Furnace*, 705 F.3d at 1029, Mr. Barry underwent six months of treatment to heal the open wounds on his knees. For the initial three weeks following the injury, Mr. Barry was seen at the prison's medical clinic, where the staff changed his dressings daily, applied cream to his burns, and prescribed pain medication. And when Mr. Barry's burns were still classified as "non-healing" on August 15, 2007, the physicians at the clinic performed a debridement procedure on both of his knees. ER197 (8/15/07 Medical Report). This procedure requires local anesthetic so that the physician can use a "15 scalpel blade . . . to sharply dissect down to healthy tissue" both in the wound and on "the periphery." *Id.* Far from a routine procedure, debridement exposes patients to significant risks, including "scar[ring], pain, recurrence, bleeding and infection." *Id.*

Unfortunately, the August 15 debridement procedure proved unsuccessful, and physicians decided to perform a redebridement procedure on August 24, 2007. ER200 (8/24/07 Medical Report). And, when this second procedure still did not heal Mr. Barry's substantial burns, the physician at the clinic approved Mr. Barry's "URGENT" request to be seen at the Center for Wound Care for "non-healing 2[nd degree] burns." ER201 (8/27/07 Physician Request for Services). There, Mr. Barry was seen by a specialist, who remarked upon the severity and persistent nature of the burns, explaining in his notes that "[e]xamination of the left and right

knee reveals evidence of open wounds, which are full thickness depth with scant yellowish slough." ER204 (Specialist Consultation). The specialist performed a third debridement procedure, after which Mr. Barry's "wounds were irrigated, dried, and [] dressed." *Id.* at ER205. Mr. Barry was "instructed to stay off his knees, and protect the wounds," and Dr. Zittel recommended considering placing him in a knee immobilizer. *Id.* at ER204.

After the third debridement, Mr. Barry underwent five additional months of treatment. When he was finally discharged on January 15, 2008, nearly six months after the initial injury, Mr. Barry's knees were scarred, and he still needed to apply lotion and dressings to manage the pain. ER206 (1/15/08 Medical Report). In short, Defendants not only caused Mr. Barry to endure forty-five minutes of extreme pain, but also inflicted an injury that required six months of intensive procedures and treatment.

2. The Need To Apply Force Was Minimal And Short-Lived

Under the second *Hudson* factor, the district court was required to assess whether, under Mr. Barry's version of the facts, there was a need to apply force. *Furnace*, 705 F.3d at 1029. Although this Court has not established a bright-line rule delineating when the application of force is necessary, it has typically distinguished between situations where officers use force while confronting an ongoing, active struggle and those in which the officers apply force to inmates who

have already been contained or subdued. Because the officers had removed the weapons and subdued the inmates on the yard prior to ordering Mr. Barry to kneel on the hot asphalt, this factor weighs in Mr. Barry's favor.

The district court engaged in a skewed analysis of this factor. As an initial matter, the court improperly adopted wholesale Defendants' version of the facts on this issue, without even so much as acknowledging the evidence set forth by Mr. Barry. ER9-10 (Final Order). Critically, the court ignored evidence proffered by Mr. Barry in support of his contention that all weapons associated with the attack had been recovered by the time that Defendants employed force against him. For example, Mr. Barry testified that the officers on the yard "found both—they had both suspects or whatever it is, the victim and both the weapons" prior to instructing the inmates that they must submit to a public or private strip search. ER111 (Barry Dep.). Mr. Fullilove, an eyewitness to the events on the yard, similarly averred that the officers were searching the inmates not involved in the attack for "abrasions, cuts, [and] blood," not weapons. ER37 (Fullilove Decl.). Because Defendants' position on summary judgment rests almost exclusively on the enduring state of emergency in the yard, *see* ER77 (Mot. for Summ. J.), the evidence showing that the officers had located all weapons and removed the assailants at a minimum creates a genuine dispute of material fact regarding whether their force against Mr. Barry was excessive.

Despite Mr. Barry's clear evidence, the district court gave credence to, and ultimately adopted, Defendant Albonico's statement that the officers were still looking for a weapon. ER9 (Final Order); ER93 (Albonico Decl.). But such an approach directly contradicts the fundamental requirement that at summary judgment, a court must view the evidence in the light most favorable to the *nonmoving* party and refrain from making credibility determinations where evidence is in dispute. *Tolan*, 134 S. Ct. at 186 ("By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party."); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 n.5 (9th Cir. 2004) ("[I]t is axiomatic that disputes about material facts and credibility determinations must be resolved at trial, not on summary judgment."). Here, the district court violated that requirement when it chose to believe the facts as described by Defendant Albonico instead of by Mr. Barry.

In addition to making improper credibility determinations on summary judgment, the district court's reliance on Defendant Albonico's assertion is further in error because that assertion was not based on personal knowledge. Under Federal Rule of Civil Procedure 56(c)(4), a "declaration used to support or oppose a motion must be made on personal knowledge." Fed. R. Civ. P. 56(c)(4); *see also*

Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1063 (9th Cir. 2012) ("Declarations must be made with personal knowledge."). As this Court has held, "declarations not based on personal knowledge are inadmissible and cannot raise a genuine issue of material fact." *Hexcel Corp.*, 681 F.3d at 1063. So exacting is this standard that even declarations based on "information and belief" do not suffice on summary judgment. *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991) ("Because Irwin's declaration is not based on personal knowledge, but on information and belief, his statement does not raise a triable issue of fact."). Here, Defendant Albonico stated—without any indication as to how he learned of this information, let alone that he has personal knowledge—that "[o]ne weapon was recovered from the assailant who fell to the ground near the group of black inmates, but a second weapon was not immediately recovered." ER93 (Albonico Decl.).[2] Without personal knowledge, the statement is simply inadmissible.

Moreover, the circumstances at the time Defendants inflicted force upon Mr. Barry differ greatly from those cases in which courts have determined that a

[2] This is but one example of a declaration riddled with unfounded assertions, written in passive voice, with no statement that Defendant Albonico personally observed these matters. *See, e.g.*, ER92 ("Officers on the yard observed two assailant inmates chasing another inmate."); *id.* at ER93 ("However, when BARRY refused to be searched, the facility's program holding cells were occupied."); *id.* at ER94 ("The inmates were searched, and a medical evaluation was conducted in the Medical Clinic.").

need to apply force was present. Under Mr. Barry's version of the facts, the yard was subdued and the emergency had ended *prior* to Defendants' application of force. This distinction is critical under Supreme Court and Ninth Circuit precedent, which focuses on the volatility of the situation at the time the force was applied. For example, in *Whitley*, the Supreme Court concluded that force was appropriate because the "situation remained dangerous and volatile." *Id.* at 323. Indeed, at the time officers applied force in *Whitley*, "a guard was still held hostage, [an inmate] was armed and threatening, several other inmates were armed with homemade clubs, numerous inmates remained outside their cells, and the cellblock remained in control of the inmates." *Id.* at 323-24. Likewise, in *Torres v. Runyon*, 80 F. App'x 594 (9th Cir. 2003), this Court concluded that a need to apply force existed where "two prison gangs continued fighting in groups of three to five inmates" even after officers fired warning shots and deployed pepper spray. *Id.* at 596. In other words, where the threat remains ongoing, as evidenced by a dangerous and active struggle, controlling precedent would condone the use of force.

By contrast, where the disturbance has been contained by the time an officer decides to employ force, this Court has consistently held that the necessity had subsided and the application of force is no longer justified. In *Johnson v. Lewis*, 217 F.3d 726 (9th Cir. 2000), for example, this Court addressed whether officials had subjected inmates to excessive force in the wake of a riot. Because the

inmates "were handcuffed, prone and under armed guard" at the time the officials applied the force, this Court determined that "the inmates presented no further danger to prison staff, the public, or each other, and prison officials were no longer required to make split-second, life-and-death decisions." *Id.* at 734.

Similarly, this Court reversed a lower court decision granting summary judgment to defendants where, under the inmate's version of the facts, the officials used "excessive force after they fully restrained [the inmate] and he was no longer struggling." *Pratt v. Deeds*, 538 F. App'x 771, 771 (9th Cir. 2013). Notably, although it was undisputed "that the defendants used reasonable force in subduing him" after he attacked an officer during a cell extraction, the inmate's evidence that the officials "repeatedly punched him in the face *after restraining him* . . . establish[ed] a 'malicious and sadistic' use of force in violation of the Eighth Amendment." *Id.* at 771-72 (emphasis added). In other words, even when an inmate has actually attacked an officer, this Court has determined that the officer cannot apply force once the inmate is subdued.

The district court's decision is incorrect and contrary to this case law. Even assuming that the officers could have required Mr. Barry to kneel on the hot asphalt during or immediately following the attack on the yard, this need dissipated once the officers had secured the yard, located the weapons, and removed the assailants. And it is at that point, when Defendants actually applied the force, that

the inquiry under this second factor is appropriate. Under controlling precedent, forcing an inmate to kneel on hot asphalt for nearly an hour after the yard was secured and the threat subdued cannot be construed as necessary. *See Hope v. Pelzer*, 536 U.S. 730, 747 (2002) (affirming the lower court's reasoning that "cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat is a violation of the Eighth Amendment") (internal quotation marks omitted).

Finally, to the extent that the district court concluded that force was justified because Mr. Barry did not comply with an order to submit to a public strip search, ER9 (Final Order), this determination does not comport with the record or this Court's binding precedent. Under Mr. Barry's version of the facts, Defendant Albonico instructed the inmates that they could *either* submit to a public strip search in the yard *or* wait until the yard was clear and be searched in private; Defendant Albonico did not give an order requiring only immediate, public strip searches. ER214 (Staff Complaint Appeal). In fact, Defendant Albonico did not even specify in his own declaration that he ordered a public strip search, asserting instead merely that "each inmate was required to submit to an unclothed body search," with no reference to whether the search would be public or private. ER93 (Albonico Decl.). As this Court has held, "[o]fficers cannot justify force as necessary for gaining inmate compliance when inmates have been given no order

with which to comply." *Furnace*, 705 F.3d at 1029. Because Mr. Barry was not ordered to submit to a public strip search, the district court erred in relying on such an order to justify its decision that Defendants' force was warranted.

3. The Amount Of Force Applied Exceeded Any Need

In light of the foregoing, the third factor, which considers the relationship between the need to apply force and the amount of force applied, weighs in favor of Mr. Barry. As described above, under Mr. Barry's version of the facts, the need to apply force diminished as time went on, to the point that no force was needed. By the same token, the type of force applied resulted in an injury that compounded over time, as Mr. Barry remained on his knees and the burns continued to worsen. In brief, any need to apply force lapsed by the time that Defendants forced Mr. Barry to kneel on the hot asphalt, and certainly well short of the forty-five minute period to which he was subjected.

The district court failed to take into consideration the evolving nature of these circumstances, stating instead that "[t]he force used under the circumstances from the perspective of a reasonable officer on the scene was minimal." ER9 (Final Order). It reached this conclusion on the basis that Mr. Barry was "escorted, without physical abuse" to a location where he was handcuffed and forced to kneel. *Id.* This reasoning, however, is based on the wrong set of facts. Mr. Barry does not contend that Defendants employed excessive force while escorting him to the

asphalt and handcuffing him, or during the initial act of making him kneel. Rather, Mr. Barry's excessive force claim is based on the injury that followed due to his forced kneeling on the hot asphalt for forty-five minutes. As Mr. Barry stated clearly, the basis of his excessive force claim is Defendants' decision to "forc[e] him to kneel down on the asphalt, asphalt that was dangerous to the Plaintiff's health and safety," and that "Defendants left the Plaintiffs on the hot concrete long enough to cause second degree burns." ER42, 44 (Opp'n to Summ. J.). The district court's analysis did not recognize that Mr. Barry was forced to kneel on hot asphalt or that he remained kneeling for an extended period of time. ER9-10 (Final Order). In other words, the district court did not address the crux of Mr. Barry's claim.

Under the correct inquiry, the evidence set forth by Mr. Barry at a minimum created a genuine issue of material fact as to whether the force used exceeded the temporally-limited, minimal need. As an initial matter, as explained above, *supra* Section I.C.3, under Mr. Barry's version of the facts and supported by Mr. Fullilove's declaration, both weapons had been recovered prior to Defendants' decision to force him to kneel. Moreover, Mr. Barry presented evidence that placing an inmate on his knees for declining to be searched in public runs counter to ordinary practice; typically, the officers "take [the inmate] somewhere else where there's no female or something else, you know, in a secure location and they

strip you out." ER114 (Barry Dep.). In fact, as Mr. Barry testified, when Defendants placed him on his knees, the "[o]ther inmates on the yard [voiced] their opinions about why am I being placed on my knees on the ground" and expressed "complaints like 'Why are you going to place him on the knees on the concrete, you know, for refusing to strip?'" *Id.* "Considered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." *Tolan*, 134 S. Ct. at 1867-68.

Finally, even assuming a need existed at the time of the incident, the district court could not have found on summary judgment that the amount and duration of the force that Defendants applied was justified under "the evolving standards of decency" that govern an Eighth Amendment analysis. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). Rather, the evidence demonstrates that Defendants "inflict[ed] gratuitous pain" on Mr. Barry with an intent to punish him for his decision to submit to a private strip search rather than a public one. *Hope*, 536 U.S. at 747. This type of punitive action has been squarely denounced by the Supreme Court, for it constitutes an "unnecessary and wanton infliction[] of pain . . . without penological justification." *Id.* at 737 (internal quotation marks omitted). As Mr. Barry astutely argued in his opposition brief, "[p]lacing an inmate on his knees

on hot, hot[] concrete is not a part of the Plaintiff's punishment for the crimes he has committed against society." ER55 (Opp'n to Summ. J.).

The district court's conclusion to the contrary—that Mr. "Barry presents no evidence that Albonico's or Bishop's purpose was to punish," ER10 (Final Order)—was made without consideration of Mr. Barry's evidence that there existed no need to apply force, and without the benefit of all relevant testimony, as discussed below, *infra* Section I.D.[3] Tellingly, Defendant Albonico, the officer who instructed Mr. Barry to kneel on the hot concrete, could not even aver that placing Mr. Barry in that location for that amount of time was *necessary* under the circumstances. Rather, Defendant Albonico simply stated that the location "made sense" and that a kneeling inmate posed less of a threat than a standing inmate. ER93 (Albonico Decl.). But neither of those statements even comes close to

[3] In determining that Defendants Albonico and Bishop lacked a purpose to punish, the district court improperly relied on the fact that the truncated excerpt of Mr. Barry's deposition transcript describing an interaction with an officer did not identify who the specific officer was. ER10 (Final Order). For numerous reasons, however, the record does not support the district court's conclusion that Defendants Albonico and Bishop acted with a lawful purpose. There are many indications in the record that Defendants acted with the intention to gratuitously inflict pain, as detailed above, such as the duration and nature of the force imposed. Ample record evidence specifically connects Defendant Albonico to the knowing imposition of this force, including his own declaration. ER93-94. And to the extent the district court's recitation of the facts focuses on Defendant Albonico rather than Defendant Bishop, this is only because of Defendants' failure to provide Mr. Barry with the entirety of the deposition transcript, in which Mr. Barry provides context and a full description of the incident, including the extent of both Defendants' participation. *Infra* Section I.D.

justifying the imposition of deep, second-degree burns over a period of forty-five minutes by forcing someone to kneel on hot asphalt "that was hot enough to fry an egg." ER44 (Opp'n to Summ. J.). That a location "makes sense" during a non-exigent circumstance does not, and cannot, outweigh Mr. Barry's right to be free from excessive force under the Eighth Amendment.

4. Mr. Barry Did Not Pose A Threat To Defendants

The fourth factor—whether the inmate presented a threat to the safety of the officials—also favors Mr. Barry. Although the district court concluded that "an obvious and immediate safety threat" existed in the time directly following the murder, it failed to address Mr. Barry's evidence demonstrating that the threat subsided once the assailants were removed, the weapons recovered, and the inmates secured. ER9 (Final Order). This evidence is critical to an inquiry under this factor because, as described in detail above, even in the aftermath of a prison riot, a threat no longer exists under Ninth Circuit precedent when inmates are "handcuffed, prone and under armed guard." *Johnson*, 217 F.3d at 734; *see also Hope*, 536 U.S. at 738 ("Any safety concerns had long since abated by the time petitioner was handcuffed to the hitching post because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to the prison.").

Besides, with respect to Mr. Barry specifically, there is no evidence that he presented a threat to the officers. To the contrary, Mr. Barry proffered substantial

evidence to support his contention that he was compliant with Defendants' demands at all times and did not pose any threat to their safety. To begin, Mr. Barry did not refuse a search; he consented to submit to a strip search in the program office, as allowed under Defendant Albonico's directive. ER214 (Staff Complaint Appeal). Nor did Mr. Barry contest or in any way confront the officers when Defendant Albonico ordered them to relocate Mr. Barry to the hot concrete and directed him to kneel while restrained in handcuffs. Rather, as a witness to these events attested, Mr. Barry "complied and submitted to mechanical restraints." ER38 (Fullilove Decl.).

Even after that, the evidence shows that Mr. Barry remained compliant. As the undisputed evidence in the record demonstrates, until he was searched nearly an hour later (and ultimately cleared without incident), Mr. Barry remained handcuffed and in the kneeling position, except for the brief time period during which he fell over from the pain. ER112 (Barry Dep.). There is likewise no evidence in the record that Mr. Barry ever attempted to stand, confront any officer in the yard, or renege on his initial consent to submit to a strip search. Rather, the evidence demonstrates that Mr. Barry remained compliant—and, frankly, incapacitated from the pain—during the entire incident.

5. Defendants Made No Effort To Temper The Severity Of Their Response

The final factor under *Hudson*, which the district court did not consider at all, examines whether the officials made any efforts to temper the severity of a forceful response. *Furnace*, 705 F.3d at 1030. This Court has held, for example, that giving warnings prior to applying force constitutes an effort to temper the severity of the force. *Covington v. Fairman*, 123 F. App'x 738, 744 (9th Cir. 2004) (addressing a situation in which an inmate barricaded himself in his cell and refused to come out). Because there is no evidence in the record demonstrating *any* attempt to temper the severity of the force applied, this factor unquestionably weighs in favor of Mr. Barry.

Instead, the undisputed evidence shows that when given the opportunity to recalibrate the amount of force they applied against Mr. Barry, Defendants decided to prolong, and therefore *increase*, the severity of the force. Once Defendant Albonico forced Mr. Barry to kneel, neither he nor Defendant Bishop made any efforts to temper the severity of the force. As Mr. Barry asserted in his declaration, he "cried for help when he was suffering the horrific side effects of being placed on hot concrete getting second degree burns." ER40 (Barry Decl.) After ten minutes of kneeling on the concrete, he fell over on his side and told the officers present that he just felt "blisters pop on his [knee]." ER112 (Barry Dep.). The officers ignored his complaints, and as Mr. Barry testified, they "literally picked

me back up, put me back on my knees and told me if I get naked, I can go back to my cell and deal with my problems." *Id.* Had the district court considered this evidence, it could only have concluded that Defendants made absolutely no effort to temper the severity of the force that they applied.

6. The *Hudson* Factors Weigh In Favor Of Mr. Barry

In essence, the *Hudson* test requires this Court to balance the amount of force applied with the need to apply it. *Whitley*, 475 U.S. at 321. Where there is a heightened need, the test condones employment of an appropriate amount of force. Where a need does not exist, the use of force is not justified. Here, the facts viewed in the light most favorable to Mr. Barry depict an inverse relationship between the force applied and the threat perceived. As time passed, the threat diminished, but the imposition of force increased. Nevertheless, Defendants never changed course, choosing instead to inflict injury when there was no longer any need. In light of the foregoing, Mr. Barry has, at the very least, created genuine issues of material fact regarding whether Defendants Albonico and Bishop acted maliciously and sadistically to cause harm in violation of the Eighth Amendment.

D. Mr. Barry Did Not Receive All Available Evidence As Required Under The Local Rules

Although Mr. Barry has presented evidence sufficient to survive summary judgment, any deficiencies in the record arise out of Defendants' failure to provide Mr. Barry, and the district court, with a complete copy of Mr. Barry's deposition

transcript as required under the U.S. District Court for the Eastern District of California Local Rules. Under Local Rule 133(j), a party that relies upon excerpts of a deposition in its motion for summary judgment must submit the entirety of the deposition in hard copy to the Clerk or as an electronic copy to the presiding judge. *See* Local Rule 133(j). When a party sends a hard copy to the Clerk, the Clerk makes an entry on the docket indicating that the submission occurs, and a copy remains in the Clerk's office, which the nonmovant can access. If the moving party chooses to send an electronic copy to chambers in lieu of submitting a hard copy to the Clerk, it must also "concurrently email or otherwise transmit the deposition to all other parties." *Id.*

Here, it appears that Defendants Albonico and Bishop either submitted Mr. Barry's deposition transcript to chambers directly, without also transmitting a copy to Mr. Barry, or did not provide a copy to the district court at all. Indeed, there is no indication on the docket that Defendants submitted a hard copy of the transcript pursuant with the Clerk, and when Mr. Barry's undersigned counsel requested a review of the files associated with Mr. Barry's case in an attempt to locate the entirety of the transcript, the Clerk's office confirmed that Defendants Albonico and Bishop had not submitted a hard copy of the transcript.

Had Defendants instead sent an electronic copy of the transcript to chambers directly, Rule 133(j) would have required them to mail to Mr. Barry a copy of the

transcript as well. But there is no evidence in the certifications associated with Defendants' motion that they ever sent the transcript to Mr. Barry. Moreover, Mr. Barry has verified that he never received a deposition transcript. Mr. Barry has further represented that Defendants told him (incorrectly) that he would have to pay for a copy of the transcript in order to review it.

Under either scenario, the prejudice to Mr. Barry is clear. While Defendants were able to review Mr. Barry's transcript and submit testimony excerpts supporting their motion, Mr. Barry was not given the same opportunity. As evidenced by the district court's grant of Defendants' motion for summary judgment based on the conclusion that Mr. Barry had provided insufficient evidence in support of his claim, ER24 (Final Order), Defendants' failure to provide Mr. Barry with the transcript caused him prejudice. At minimum, the case should be remanded to permit Mr. Barry to supplement his opposition brief on summary judgment with additional excerpts of his now-obtained deposition transcript.[4]

[4] Mr. Barry's undersigned counsel acquired the complete deposition transcript from the court reporter on April 11, 2014.

II. THE DISTRICT COURT IMPROPERLY CONCLUDED THAT DEFENDANTS WOULD RECEIVE QUALIFIED IMMUNITY ON MR. BARRY'S EIGHTH AMENDMENT EXCESSIVE FORCE CLAIM

In addition to proffering evidence sufficient to create a genuine issue of material fact on his Eighth Amendment excessive force claim, Mr. Barry has demonstrated that Defendants are not entitled to qualified immunity at this stage in the proceedings. The district court's contrary holding not only disregards Mr. Barry's evidence but is also in direct conflict with controlling Ninth Circuit precedent.

Moreover, the district court's sua sponte determination that Defendant Bishop was entitled to qualified immunity did not adequately allow Mr. Barry to respond to the merits of this affirmative defense. Indeed, while Defendant Albonico moved for summary judgment on the basis of qualified immunity, Defendants' motion made clear that Defendant Bishop did not: "Bishop and Albonico are entitled to summary judgment because (1) there is no evidence to support Barry's claims and, (2) in the alternative, *Albonico* is entitled to qualified immunity." ER71 (Mot. for Summ. J.) (emphasis added); *see also id.* at ER79 ("Albonico, therefore, is entitled to qualified immunity."); *id.* ("[I]n the alternative, Albonico is entitled to qualified immunity.").

In determining whether officials are entitled to qualified immunity for Eighth Amendment violations, this Court employs a two-part test. First, it

"assess[es] whether the contours of [the] Eighth Amendment right were clearly established with respect to the alleged misconduct." *Furnace*, 705 F.3d at 1026. "If the right was clearly established, [it] then ask[s]: Taken in the light most favorable to the party asserting the injury, do the facts . . . show the officer's conduct violated a constitutional right?" *Id.* "A public official is not entitled to qualified immunity when the contours of the allegedly violated right were sufficiently clear that a reasonable official would understand that what he was doing violated that right." *P.B. ex rel. N.B. v. Koch*, 96 F.3d 1298, 1301 (9th Cir. 1996) (internal quotation marks and alterations omitted). As with the Eighth Amendment analysis detailed above, "[i]n determining whether a government official should be granted qualified immunity, [courts] view the facts in the light most favorable to the injured party." *Chappelle v. Mandeville*, 706 F.3d 1052, 1056 (9th Cir. 2013); *see also Tolan*, 134 S. Ct. at 1866 ("Our qualified immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard.").

Because this Court has held on numerous occasions that the right to be free from excessive force has been clearly established for nearly three decades, the district court's conclusion on the first inquiry was reached in error. Likewise, with respect to the second inquiry, to the extent the district court relied on a

determination that Mr. Barry had not presented evidence sufficient to show that Defendants Albonico and Bishop violated his Eighth Amendment rights, it erred for the same reasons discussed above, *supra* Section I.C.

A. The Right To Be Free From Excessive Force Under The Eighth Amendment Was Clearly Established In July 2007

The district court based its qualified immunity holding on the patently incorrect assertion that the law was not clearly established at the time of the incident. ER10 (Final Order). The court did not explain how it reached this conclusion or rely on any controlling authority in its curt analysis. Rather, the court simply stated: "It would not be clear to an officer in Defendants' position that ordering and keeping Barry on his knees under the circumstances would violate Barry's Eighth Amendment rights." *Id.* Such a holding mischaracterizes the right at issue and runs counter to longstanding Ninth Circuit precedent.

In order to discern whether a right was clearly established at the time of the incident, the threshold inquiry is to identify "the specific right allegedly violated." *Kelley v. Borg*, 60 F.3d 664, 666 (9th Cir. 1995). In the Eighth Amendment context, identifying the specific right at issue requires more than asserting that "the Eighth Amendment generally is clearly established." *Id.* at 667. But, as this Court has cautioned, a court "need not find that the very action in question has previously been held unlawful." *Chappelle*, 706 F.3d at 1056 (internal quotation marks omitted); *see also Furnace*, 705 F.3d at 1028 ("[I]t is clear that to determine that

the law was clearly established, we need not look to a case with identical or even materially similar facts.") (internal quotation marks and alterations omitted). Were such specificity required, defendants would routinely be able to escape liability by "defin[ing] away all potential claims." *Kelley*, 60 F.3d at 667.

In light of these competing concerns, this Court has defined Eighth Amendment rights as, for example, the right to be free from "a prison guard's use of excessive force," *Martinez*, 323 F.3d at 1183, or "a right to officials who are not deliberately indifferent to serious medical needs," *Kelley*, 60 F.3d at 667. Here, however, the district court narrowly defined the right at issue as "ordering and keeping Barry on his knees under the circumstances." ER10 (Final Order). In other words, the court incorporated the specific facts of Mr. Barry's case into its definition of the right, a practice that this Court has squarely denounced. *See, e.g.*, *Kelley*, 60 F.3d at 667 (rejecting the following characterization of an Eighth Amendment right: "after complaining about foul smells . . . for defendant correctional officers to immediately remove him from his cell in the Security Housing Unit during a lock down"). Rather, the appropriate definition of the right at issue in this case, as described by the Ninth Circuit in analogous cases, is the right to be free from excessive force. *See, e.g.*, *Clement*, 298 F.3d at 903 (identifying the "specific constitutional right" as "excessive force against prisoners"); *Martinez*, 323 F.3d at 1183 (defining the right as "a prison guard's use

of excessive force"); *Furnace*, 705 F.3d at 1027 (characterizing the right as an "Eighth Amendment right to be free from cruel and unusual punishment by using excessive force against him").

Once the right has been identified, a court must determined "whether that right was so clearly established as to alert a reasonable officer to its constitutional parameters." *Kelley*, 60 F.3d at 666. As this Court has noted, the right to be free from excessive force was clearly established as early as 1986: "The law concerning Eighth Amendment protections against excessive force was established in *Whitley v. Albers*, 475 U.S. 312, 320-321 (1986)." *Torres*, 80 F. App'x at 596. Indeed, any argument that the right to be free from excessive force was not clearly established on July 23, 2007, is foreclosed by this Court's decision in *Martinez v. Stanford*, 323 F.3d 1178 (9th Cir. 2003). There, this Court held that "the law regarding a prison guard's use of excessive force was clearly established by 1994, the year in which the officers' allegedly unconstitutional conduct occurred." *Id.* at 1183-84; *see also Hudson*, 503 U.S. at 1; *Furnace*, 705 F.3d at 1027; *Clement*, 298 F.3d at 903; *Koch*, 96 F.3d at 1305; *Covington*, 123 F. App'x at 741.

In defining the right by the specific facts of Mr. Barry's case—that officers ordered Mr. Barry to kneel on hot asphalt—the district court misapplied Ninth Circuit precedent. This Court should reverse the district court's legally incorrect

holding that the right that Mr. Barry seeks to vindicate was not clearly established on July 23, 2007.

B. Mr. Barry Has Presented Evidence In Support Of His Claim That Defendants Violated His Eighth Amendment Rights

If the right is clearly established, a court must then ask whether a reasonable officer would have known that his conduct violated the constitutional right identified. Or, as explained by this Court in *Furnace*, does the plaintiff's version of the facts "show the officer's conduct violated a constitutional right?" 705 F.3d at 1026. Although much has been written on the concept of the "reasonable officer," at bottom, a "reasonable officer avoids committing acts that have been clearly established as unconstitutional—for example, handcuffing a prisoner to a fence for a long period of time—as well as other, similar acts, like handcuffing a prisoner not to a fence, but instead to a hitching post." *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168 (9th Cir. 2013).

In the Eighth Amendment excessive force context, this Court applies the *Hudson* five-factor balancing test to determine whether the official's acts violated the right to be free from excessive force. *Furnace*, 705 F.3d at 1027. As described in detail above, *supra* Section I.C, Mr. Barry has provided evidence sufficient to show that Defendants violated his Eighth Amendment rights. Moreover, as in an Eighth Amendment excessive force analysis, the existence of disputed facts on the question of whether the force applied was objectively reasonable precludes a grant

of summary judgment. As this Court held in *Santos*, "[i]n light of the factual disputes regarding the amount of force used, the circumstances under which it was applied, and the extent of the plaintiffs' injuries, the question is properly for the jury whether the force applied by the officers was objectively reasonable under the totality of the circumstances." 287 F.3d at 855; *see also Tolan*, 134 S. Ct. at 1868 ("The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system."). Because Mr. Barry has certainly presented enough evidence to create genuine issues of material fact as to his Eighth Amendment claim, this Court should allow Mr. Barry to present his evidence to a jury.

III. THE DISTRICT COURT IMPROPERLY CONCLUDED THAT MR. BARRY DID NOT PLEAD AN EIGHTH AMENDMENT DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS CLAIM

In his complaint, Mr. Barry specifically alleged that Defendants Albonico and Bishop violated his Eighth Amendment right to officials who are not deliberately indifferent to serious medical needs in addition to his allegations that Defendants violated his right to be free from excessive force. ER189-90 (Compl.). Nonetheless, Defendants Albonico and Bishop moved for summary judgment only on Mr. Barry's excessive force claim, taking the position that Mr. Barry had not pled a deliberate indifference claim. ER19 (Reply to Summ. J.). The district court

seemingly adopted this position and did not undertake any analysis on Mr. Barry's deliberate indifference claim. ER9-10 (Final Order).[5]

In this Circuit, a plaintiff must allege two facts in order to state a claim for deliberate indifference to medical needs under the Eighth Amendment: (1) the existence of a serious medical need, and (2) a prison official's deliberate indifference to that need. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). A plaintiff can satisfy the first requirement "by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." *Id.* (internal quotation marks omitted). As to the second, a plaintiff must show "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." *Id.* Indifference "may appear when prison officials deny, delay or intentionally interfere with medical treatment." *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988); *see also Clement*, 298 F.3d at 905 ("Prison officials violate their obligation by 'intentionally denying or delaying access to medical care.'") (quoting *Estelle*, 429 U.S. at 104-05). "A prisoner need not show his harm was substantial; however, such would provide additional support for the inmate's claim that the defendant was deliberately indifferent to his needs." *Jett*, 439 F.3d at 1096.

[5] To the extent the district court order is construed as a dismissal for failure to state a claim, such determinations are reviewed de novo by this Court. *Lopez-Valenzuela v. Cnty. of Maricopa*, 719 F.3d 1054, 1059 (9th Cir. 2013).

Mr. Barry's complaint contains allegations on both of these points. As to the first, Mr. Barry's complaint is replete with allegations of a serious medical need. For example, Mr. Barry alleged that he "had second degree burns," that those burns blistered and popped, and that the fluid from those blisters ran down his legs. ER190 (Compl.). Mr. Barry further alleged that this pain endured and worsened throughout the entire afternoon. *Id.* While in his cell, Mr. Barry was "literally [] in tears" and his burns continued to drain for three hours. *Id.*

The complaint also details specific ways in which Defendants were deliberately indifferent to his serious medical need. First, Mr. Barry alleged that he alerted Defendants that the asphalt was hot, his knees were burning, and blisters caused by the burns were popping: "I started complaining that the (asphalt) was too hot. After another five to ten minutes, I stated that I felt blisters on both my knees pop and that I could feel the fluid running under my state issued pants." *Id.* at ER189-90. According to Mr. Barry, Defendants did not provide him with any medical assistance for the blisters popping on his knees as a result of the burns. Rather, Mr. Barry alleged that his "complaints [were] ignored by corrections officers." *Id.* After he "could no longer take the pain and fell over on [his] side," the officers continued to bar any medical attention: "I was immediately picked up . . . and placed back on my knees forcefully." *Id.* at ER190. Defendants delayed medical attention further, as Mr. Barry alleged that he "stayed on [his]

knees for almost an hour before [he] was finally taken to the program clinic." *Id.* By failing to treat his burns when Mr. Barry first alerted Defendants to the pain, Defendants ignored a situation that could—and, in this case, did—result in further significant injury or the unnecessary and wanton infliction of pain. *Jett*, 439 F.3d at 1096. This is especially so, where, as here, Mr. Barry alleged that he did not receive any care for his burns until hours after he first suffered that injury.

In addition to these allegations, Mr. Barry attached numerous exhibits to his complaint demonstrating the substantial harm incurred by Defendants' deliberate indifference and delay. ER192-221 (Exhibits). As detailed above, these medical reports confirm that Mr. Barry received treatment twice on July 23, and that he endured significant pain for several hours after the painful and blistering kneeling. Moreover, these reports show the severity of the injury to Mr. Barry and the amount of time that it took before the wounds healed and he was discharged. *Supra* Section I.C.

In the summary judgment briefing, Mr. Barry reiterated his position that he pled a deliberate indifference to serious medical needs claim: "Defendants,[] and each of them exhibited deliberate indifference for the Plaintiff's Health and Safety." ER44 (Opp'n to Summ. J.). Nevertheless, Defendants represented to the district court in their briefing that "[t]his is not a case of failure to summon medical attention as it is not alleged in the Complaint." ER19 (Reply to Summ. J.). In light

of the clear allegations and contemporaneous medical records, Defendants' position is untenable.

For its part, the district court seemingly agreed with Defendants that Mr. Barry had failed to state a claim of deliberate indifference to serious medical needs. Indeed, the court described the allegations at issue solely in excessive force terms, and even rejected any applicability of the deliberate indifference standard: "When an Eighth Amendment claim is based on an allegation that a prison official used excessive force, the culpable state of mind inquiry is whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm, rather than a deliberate indifference standard." ER8 (Final Order) (internal quotation marks omitted); *see also id.* ("To establish an Eighth Amendment violation based on a use of force . . . .").

Given the specific allegations made by Mr. Barry, as well as the evidence in the record on summary judgment confirming Defendants' deliberate indifference, the district court's dismissal of Mr. Barry's Eighth Amendment deliberate indifference to serious medical needs claim was reached in error. This Court should remand this claim for trial.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and remanded for trial.

Dated: June 3, 2014

Respectfully submitted,

/s/ Sarah A. Hunger

Jennifer L. Swize*
Sarah A. Hunger*
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

*Appointed through the
Ninth Circuit Pro Bono Program

Attorneys for Appellant

CERTIFICATION OF COMPLIANCE

1. I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,641 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word in a 14-point Times New Roman proportionally spaced typeface.

Dated: June 3, 2014

/s/ Sarah A. Hunger
Sarah A. Hunger

STATEMENT OF RELATED CASES

Counsel is not aware of any related cases pending before this Court within the meaning of Ninth Circuit Rule 28-2.6.

Dated: June 3, 2014

/s/ Sarah A. Hunger
Sarah A. Hunger

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 3, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 3, 2014

/s/ Sarah A. Hunger
Sarah A. Hunger

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

Page

42 U.S.C. § 1983—Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

U.S. District Court for the Eastern District of California Rule 133—Filing and Contents of Documents

* * *

(j) Depositions. Depositions shall not be filed through CM/ECF. Before or upon the filing of a document making reference to a deposition, counsel relying on the deposition shall ensure that a courtesy hard copy of the entire deposition so relied upon has been submitted to the Clerk for use in chambers. Alternatively, counsel relying on a deposition may submit an electronic copy of the deposition in lieu of the courtesy paper copy to the emailbox of the Judge or Magistrate Judge and concurrently email or otherwise transmit the deposition to all other parties. Neither hard copy nor electronic copy of the entire deposition will become part of the official record of the action absent order of the Court. Pertinent portions of the deposition intended to become part of the official record shall be submitted as exhibits in support of a motion or otherwise. See L.R. 250.1(a).

Federal Rule of Civil Procedure 56—Summary Judgment

* * *

(c) Procedures.

* * *

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.