BY JENNIFER A. BANDLOW

Constitutional Standards for the Care of Pretrial Detainees

PURSUING A CONSTITUTIONAL CLAIM on behalf of a pretrial detainee for the denial of medical care in a state or federal nonmilitary prison in California requires practitioners to enter an ever-evolving legal labyrinth. For example, courts have held that most police misconduct cases occurring in a prison are governed by the Eighth Amendment's prohibition against cruel and unusual punishment. However, if the misconduct is against a pretrial detainee, the Eighth Amendment does not apply. Pretrial detainees—such as those held in prison without bail—have been charged and detained but have not been convicted of a crime. For pretrial detainees, courts apply the due process clause of the Fifth or Fourteenth Amendment. Pretrial detainees cannot be "punished" and have the right to be free from deprivation of "life, liberty, or property, without due process of law."

A pretrial detainee, in contrast to a convicted prisoner, is presumed innocent and only accused of wrongdoing. Yet despite this distinction, the pretrial detainee essentially has the exact same rights—or lack thereof—as the prisoner regarding the denial of medical care.

The method for bringing a claim for police misconduct in a prison depends on whether the prison involved is a state or federal entity. If the prison is a state entity, the constitutional action is frequently brought under 42 USCA Section 1983, the Federal Civil Rights Act.[1] Section 1983 enables a plaintiff to bring an action against a state actor who, while acting under color of law, deprives the plaintiff of his or her rights or privileges under the U.S. Constitution or other federal law. The proper action for a convicted prisoner alleging the denial of medical care is a claim under Section 1983 asserting a violation of the Eighth Amendment (made applicable to the states through the Fourteenth Amendment).[2]

A constitutional claim for police misconduct asserted against federal officials is brought as a *Bivens* action. This type of action is derived from *Bivens v. Six Unknown Federal Narcotic Agents*, in which the U.S. Supreme Court held that a plaintiff has a valid cause of action for constitutional violations against federal agents in their individual capacities even if no statutory authority for the claim exists.[3] As the Court stated in a later case, "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."[4] A recent district court further noted that a "*Bivens* action is the nonstatutory federal counterpart of a civil rights action pursuant to 42 U.S.C. §1983."[5] To have a claim under *Bivens*, plaintiffs "must allege that [they were] deprived of a constitutional right by a federal agent acting under color of federal authority."[6] Although *Bivens* addressed a Fourth Amendment violation, subsequent cases have held that *Bivens* applies to most constitutional violations.[7]

Appropriate Constitutional Provision

Whether an action is brought against state actors (under Section 1983) or federal actors (under *Bivens*), it must allege violations of the appropriate constitutional provision. While it may seem intuitive that a convicted prisoner would have less rights than a detainee awaiting trial, this is not necessarily the case. In the context of the denial of medical care, the rights of pretrial detainees seem to mirror those of convicted prisoners even though they are analyzed under two different amendments to the Constitution.

In the case of convicted prisoners, it is well established that while a convicted prisoner may be punished, the punishment may not be cruel and unusual as proscribed by the Eighth Amendment to the Constitution.[8] This is so because the Eighth Amendment "was designed to protect those convicted of crimes."[9] The Supreme Court has repeatedly stated that "[a]fter incarceration, only the unnecessary and wanton infliction of pain…constitutes cruel and unusual punishment forbidden by the Eighth Amendment."[10] Yet, according to the Court, "What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishment Clause depends upon the claim at issue."[11] This typically involves looking at the state of mind of the actor involved.

A claim that an official used excessive force in violation of the Eighth Amendment, for example, requires the plaintiff to prove that the actor used force "maliciously and sadistically."[12] In *Hudson v. McMillian*, an inmate was punched and kicked while handcuffed after arguing with a prison guard. Rather than focusing on the injuries of the inmate, the Supreme Court looked to the state of mind of the prison guard inflicting the injuries and held that the Eighth Amendment is violated "[w]hen prison officials maliciously and sadistically use force to cause harm" regardless of "whether or not significant injury is evident."[13]

Deliberate Indifference

Other Eighth Amendment claims require less culpability. For instance, the standard in claims for the denial of medical treatment to prisoners is that the official's action was taken with "deliberate indifference" to the prisoner's serious medical need. Plaintiffs must first show that they had a serious medical need or condition and then proceed to demonstrate that the need or condition was treated with deliberate indifference.[14]

The Supreme Court first applied the Eighth Amendment to denial of medical treatment in prison in *Estelle v. Gamble*, in which the Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment."[15] After a dispute among the circuits regarding what constitutes deliberate indifference, the Court resolved the issue in *Farmer v. Brennan*.[16] The *Farmer* test for deliberate indifference is subjective and involves a two-prong finding that "the official knows of and disregards an excessive risk to inmate health or safety."[17]

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Applying the test requires a determination that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." The *Farmer* test was codified in the Ninth Circuit Model Civil Jury Instructions, which require the plaintiff to prove that he or she has a substantial risk of serious harm or serious medical need that is known of and disregarded by the defendant.[18]

The first prong of the test—the plaintiff's serious medical need—is a fact-specific determination.[19] Many courts seem to gloss over this prong and focus only on the second prong. Indeed, in *Estelle*, the inmate had an injured back, but the Court did not focus on this fact. Rather, the Court turned its attention on whether the treatment administered to the plaintiff met the deliberate indifference standard.

The second prong of the test, deliberate indifference, requires determining whether an "official knows of and disregards an excessive risk to inmate health or safety."[20] In *Estelle*, the Court held that the government has an "obligation to provide medical care for those whom it is punishing by incarceration."[21] The Court also observed that since "[a]n inmate must rely on prison authorities to treat his medical needs, if the authorities fail to do so, those needs will not be met."[22]

However, the *Estelle* Court did not rule for the plaintiff, stating that "an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'"[23] The Court held that the negligence of a physician in diagnosing or treating a medical condition is not a cognizable claim under the Eighth Amendment simply because the malpractice was against a convicted prisoner.[24]

The Supreme Court has not determined whether the deliberate indifference test that applies to convicted prisoners asserting a denial of medical care also applies to pretrial detainees.[25] However, the Court has analyzed the rights of pretrial detainees generally[26] and determined that the appropriate standard is due process.[27] In comparing the due process clause of the Fifth or Fourteenth Amendment to the Eighth Amendment, the Court stated that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions."[28]

Rights of Detainees and Convicted Prisoners

In *Bell v. Wolfish*, the the Supreme Court held that the due process clause applies to pretrial detainees because they cannot be punished:

> In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.[29]

However, this analysis is so broad that a pretrial detainee may be subjected to basically any aspect of detention even though none of it is deemed to be punishment. Indeed, the Supreme Court has held that pretrial detainees may suffer all the constraints that define detention—as long as the restrictions imposed on the pretrial detainee are "reasonably related to a legitimate government interest."[30] Under *Bell*, pretrial detainees may face "the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment…."[31]

Thus, according to the Supreme Court in *Bell*, once the government decides to detain someone, the fact of the detention, as well as all the conditions that follow—including restriction of movement and the loss of privacy, freedom of choice, and the ability to live as comfortably as possible—are not deemed punishment.[32] As Justice Thurgood Marshall characterized the majority's holding in his dissent, "[T]he Government may burden pretrial detainees with almost any restriction, provided detention officials do not proclaim a punitive intent or impose conditions that are 'arbitrary or purposeless.'"[33]

Notwithstanding these conclusions, the Supreme Court has not decided the issue with respect to denial of medical treatment to pretrial detainees.[34] As stated by the Fifth Circuit in *Hare v. City of Corinth*:

> An open question has remained: Given that both pretrial detainees and convicts have constitutional rights to basic human needs while incarcerated and therefore unable to fend for themselves, what standard applies when a pretrial detainee asserts a deprivation of a constitutional right held in common with convicted prisoners, albeit through a different textual source.[35]

At present, the majority of the circuit courts follow the Eighth Amendment deliberate indifference test in cases involving pretrial detainees claiming lack of medical care, using the same analysis as if the detainee were a convicted prisoner. These courts assess whether the official being sued was "deliberate[ly] indifferent to a detainee's serious medical need." Nevertheless, the cases addressing the denial of medical treatment for pretrial detainees are brought pursuant to the due process clause of the Fourteenth Amendment or the Fifth Amendment—and virtually all of the circuits are in agreement that the Eighth Amendment itself does not apply, even though many find that the deliberate indifference test does apply.[36]

Some of the circuits applying the Eighth Amendment deliberate indifference test to pretrial detainees seem apprehensive, however. For example, in *Gibson v. County of Washoe, Nevada*, the Ninth Circuit stated, "It is quite possible, therefore, that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment."[37] Yet, it is unclear in what "instances" a different standard would apply.

However, according to the standard expressed in the Ninth Circuit's Model Civil Jury Instruction 9.25, "the defendant was deliberately indifferent to [the serious medical need] [if] the defendant knew of it and disregarded it by failing to take reasonable measures to address it."[38] This instruction is prefaced with an explanatory statement that "a prisoner has the right to be free from cruel and unusual punishment." Moreover, the comment to this instruction expressly informs the trier of fact to "[u]se this instruction… when the plaintiff is either a pretrial detainee or a convicted prisoner and claims defendants' deliberate indifference to a substantial risk of serious harm or serious medical needs."[39]

In the 1990s, the Fifth Circuit also seemed less quick to buy the argument that pretrial detainees have no more rights than convicted prisoners.[40] In *Nerren v. Livingston Police Department*, the plaintiff arrestee was injured in an automobile accident and, despite complaining of pain and requesting medical attention, he was taken into custody.[41] Citing *Bell*, the court held that the rights of pretrial detainees and arrestees are "evaluated under the same standards" for the purpose of determining whether substantive due process rights were denied. The court held that pretrial detainees "are entitled to reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective."[42]

Still, the *Nerren* court applied the subjective indifference standard, holding that a pretrial detainee's right to medical care is violated if "the official acts with subjective deliberate indifference to the detainee's rights."[43] Thus, at the time of the *Nerren* decision, it seemed unclear whether the Fifth Circuit would apply the arguably higher stan-

dard of "reasonable medical care" to pretrial detainees.

Substantial Harm

Subsequently, the Fifth Circuit tightened the standard for pretrial detainees in its ruling in *Easter v. Powell* by adding the factor of "substantial harm" to the Eighth Amendment deliberate indifference standard.[44] In a later case, *Flores v. Jaramillo*,[45] the Fifth Circuit applied its substantial harm requirement.[46] The *Flores* case involved officers executing a search pursuant to a warrant. They refused Flores's requests for her antianxiety medication for 20 minutes although she was exhibiting symptoms and complaining of health problems. After 20 minutes, the officers finally called emergency medical services (EMS) to treat her. EMS arrived, treated Flores, and left the scene. When the officers called EMS a second time, EMS transported Flores to the hospital, where she experienced cardiac arrest and fell into a coma.[47]

The Fifth Circuit's analysis involved treating Flores under the same standard as a pretrial detainee. In doing so, the court held that "[w]hile a delay in treatment may support a finding of deliberate indifference, Flores has offered no evidence from which we can infer that the delay in treatment attributable to the officers caused substantial harm."[48]

The Second Circuit has used language that seems to express a desire to provide more rights to pretrial detainees:

> The rights of one who has not been convicted are protected by the Due Process Clause; and while the Supreme Court has not precisely limned the duties of a custodial official under the Due Process Clause to provide needed medical treatment to a pretrial detainee, it is plain that an unconvicted detainee's rights are at least as great as those of a convicted prisoner.[49]

However, the Second Circuit did not expound further beyond this statement and, instead, applied the Eighth Amendment deliberate indifference test. The court held that an official may be liable for violating a pretrial detainee's due process rights if "the official denied treatment needed to remedy a serious medical condition and did so because of his deliberate indifference to that need."[50]

This confusion among the circuits is understandable. Although the Eighth Amendment presupposes punishment, the Fifth Amendment prohibits it. Thus, the application of an identical analysis for convicted prisoners and pretrial detainees is counterintuitive. While the due process clause is intended to safeguard any person's right to life, liberty, and property, the Eighth Amendment only provides safeguards for those individuals who are already being punished under the criminal justice system.

Reasonable Medical Care

In *Hare*, the Fifth Circuit determined that pretrial detainees and convicted prisoners are both entitled to the same basic human rights, such as medical care. The court also reasoned whether "*Bell*'s reasonable-relationship test is functionally equivalent to a deliberate indifference inquiry."[51] According to *Hare*, ultimately it does not matter which test applies, because both tests are means to the same end. Nevertheless, this analysis does not take into account that the pretrial detainee has not been convicted of any wrongdoing and thus should be afforded greater rights than the convicted prisoner.

For example, with respect to matters such as continuing a specific medication rather than being arbitrarily switched to a generic version, should the pretrial detainee have a choice? What about the right to medical care that is substantially similar to that covered by the detainee's private insurance? The trend in most circuits is to hold the pretrial detainee to the deliberate indifference standard. The circuits seem to find that unless the pretrial detainee has a serious medical condition that is treated with deliberate indifference, he or she has no constitutional right to even "reasonable" medical care. And in the Fifth Circuit, substantial harm is now required in addition to deliberate indifference.[52]

Pretrial detainees should at least be afforded the right to argue that they are entitled to "reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective."[53] "Reasonable medical care" should include medical treatment covered by a detainee's private insurance policy. However, perhaps the notion that a different test for pretrial detainees would ultimately guarantee better treatment for them is naive.

Regardless of the applicable test for adequate medical care in the California prison system, the reality is that prisons are so grossly overcrowded that, according to the Ninth Circuit in *Coleman v. Schwarzenegger*, "the California prison medical care system is broken beyond repair."[54] The three-judge panel hearing the *Coleman* case ordered the reduction of the "population of the CDCR's [California Department of Corrections and Rehabilitation] adult institutions to 137.5% of their combined design capacity."[55] The court held that its extreme remedy was essential and inevitable:

> The harm already done…to California's prison inmate population could not be more grave, and the threat of future injury and death is virtually guaranteed in the absence of drastic action.…

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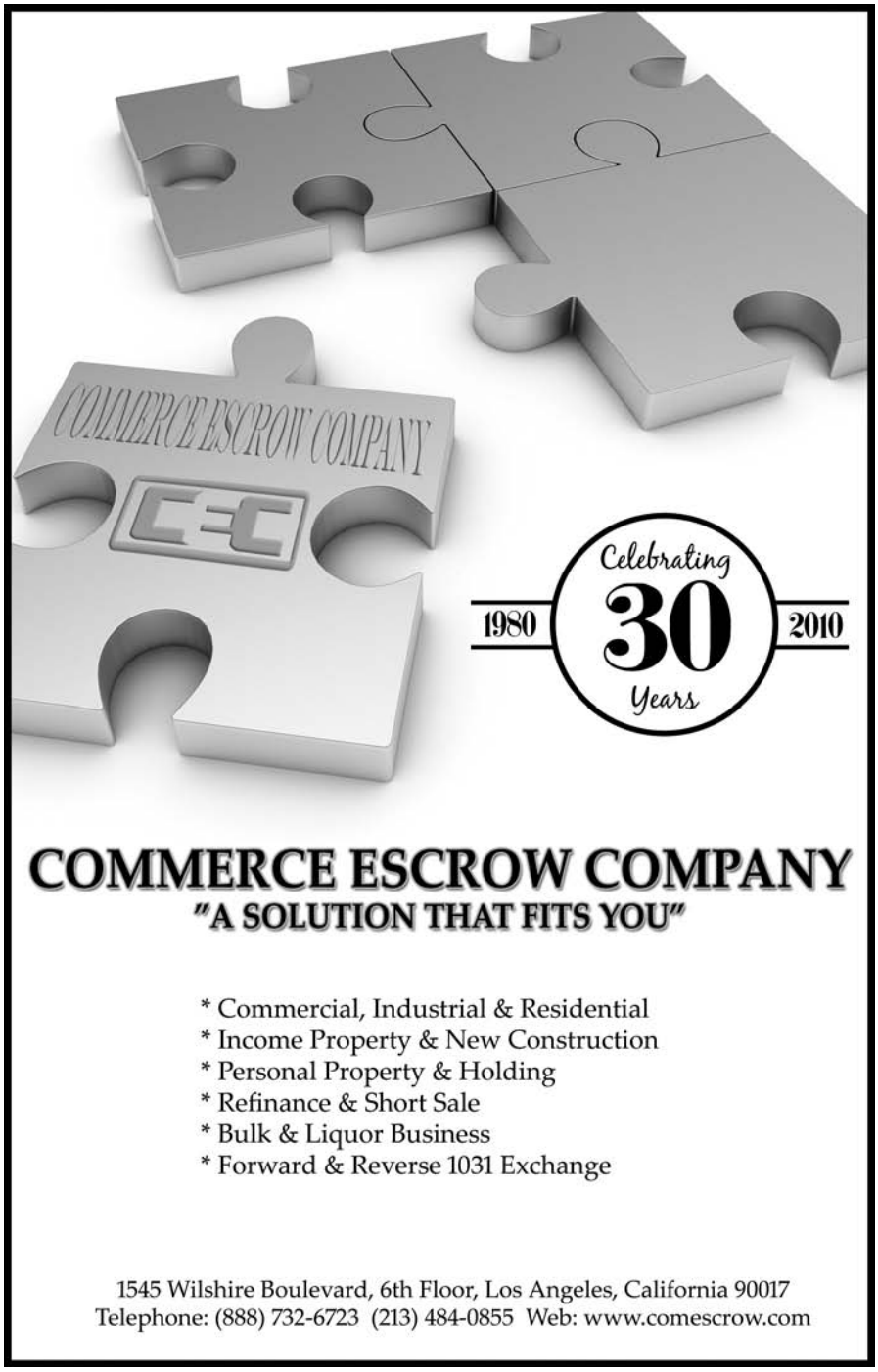

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> Indeed, it is an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the CDCR's medical delivery system. This statistic, awful as it is, barely provides a window into the waste of human life occurring behind California's prison walls due to the gross failures of the medical delivery system.[56]

The Supreme Court has granted certiorari and heard oral arguments in *Coleman*.[57]

Although access to medical care in prisons may improve overall after the Supreme Court decides *Coleman*, the question will remain as to whether a pretrial detainee should be afforded more rights than a convicted prisoner. For now, regarding inadequate medical treatment in prison, a person's status—whether prisoner or pretrial detainee—equates to a distinction without a difference. ■

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[1] *See* MICHAEL AVERY, DAVID RUDOVSKY & KAREN BLUM, POLICE MISCONDUCT LAW AND LITIGATION (3d ed. 2007) ("Sections 1981, 1985(3), 1986, and 1988 should be invoked where necessary under the factual circumstances of the case to supplement the relief available under §1983.").

[2] Estelle v. Gamble, 429 U.S. 97, 101-02 (1976) (citing Robinson v. California, 370 U.S. 600 (1962)).

[3] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971); *see also* FDIC v. Meyer, 510 U.S. 471 (1994).

[4] Carlson v. Green, 446 U.S. 14, 17 (1980).

[5] Ali v. Cassanta, 2007 U.S. Dist. LEXIS 37298 (D. Conn. May 21, 2007).

[6] *Id*.

[7] *See*, *e.g.*, Carlson, 446 U.S. 14.

[8] *See*, *e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977).

[9] *Id*. at 664.

[10] *Id*. at 670 (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (internal quotation marks omitted)).

[11] Hudson v. McMillian, 503 U.S. 1, 8 (1992).

[12] *Id*. at 9.

[13] *Id*.

[14] *See*, *e.g.*, Estelle, 429 U.S. 97.

[15] *Id*. at 104.

[16] Farmer v. Brennan, 511 U.S. 825 (1994).

[17] *Id*. at 837.

[18] NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS 9.25.

[19] *See*, *e.g.*, Gayton v. McCoy, 593 F. 3d 610, 621 (7th Cir. Ill. 2010) (An inmate's pre-existing heart condition, for which she took medication, was considered a serious medical need.).

[20] Farmer, 511 U.S. at 837; Gibson v. County of Washoe, Nev., 290 F. 3d 1175, 1187 (9th Cir. 2002).

[21] Estelle v. Gamble, 429 U.S. 97, 103 (1976).

[22] *Id*.

[23] *Id*. at 105-06.

[24] *Id*. at 106; however, claims for medical negligence may be brought under the Federal Tort Claims Act. *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980).

[25] Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244-45 (1983).

[26] Although, the Supreme Court, in dicta, stated that "[s]ince it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners, it follows that such deliberately indifferent conduct must also be enough to

satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial." County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) (internal citations omitted).
[27] Bell v. Wolfish, 441 U.S. 520, 535-37 (1979) (Fifth Amendment claim).
[28] *Id.* at 537 n.16 (quoting Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977)).
[29] *Id.* at 535.
[30] *Id.* at 539.
[31] *Id.* at 536-37.
[32] *Id.* at 537.
[33] *Id.* at 563 (Marshall, J. dissenting).
[34] Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244-45 (1983).
[35] Hare v. City of Corinth, 74 F. 3d 633, 640 (5th Cir. Miss. 1996) (en banc).
[36] Cuoco v. Moritsugu, 222 F. 3d 99, 106 (2d. Cir. 2000); Phillips v. Roane County, Tenn., 534 F. 3d 531, 539-40 (6th Cir. 2008); Butler v. Fletcher, 465 F. 3d 340, 344 (8th Cir. 2006), *cert. denied*, 550 U.S. 917 (2007); Whiting v. Marathon County Sheriff's Dep't, 382 F. 3d 700, 703 (7th Cir. 2004) (quoting Washington v. LaPorte County Sheriff's Dep't, 306 F. 3d 515, 517 (7th Cir. 2002)); Olsen v. Layton Hills Mall, 312 F. 3d 1304, 1315 (10th Cir. 2002) (quoting Lopez v. LeMaster, 172 F. 3d 756, 759 n.2 (10th Cir. 1999)); Brown v. Harris, 240 F. 3d 383, 388 (4th Cir. 2001); Lancaster v. Monroe County, Ala., 116 F. 3d 1419, 1425 & n.6 (11th Cir. 1997), *overruled on other grounds by* LeFrere v. Quezada, 588 F. 3d 1317 (11th Cir. Ala. 2009).
[37] Gibson v. County of Washoe, Nev., 290 F. 3d 1175, 1189, n.9 (9th Cir. 2002).
[38] NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS 9.25.
[39] *Id.*
[40] Nerren v. Livingston Police Dep't, 86 F. 3d 469 (5th Cir. 1986).
[41] *Id.* at 470-71.
[42] *Id.* at 472-74.
[43] *Id.* at 473.
[44] Easter v. Powell, 467 F. 3d 459, 463 (5th Cir. 2006) (citing Mendoza v. Lynaugh, 989 F. 2d 191, 195 (5th Cir. 1993)).
[45] Flores v. Jaramillo, 2010 U.S. App. LEXIS 16520 (5th Cir. Aug. 9, 2010).
[46] Easter, 467 F. 3d at 463.
[47] Flores, 2010 U.S. App. LEXIS 16520, at *2.
[48] *Id.* at *4-6.
[49] Weyant v. Okst, 101 F. 3d 845, 856 (2d Cir. N.Y. 1996) (citing City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983)); *see also* Cuoco v. Moritsugu, 222 F. 3d 99, 106 (2d Cir. 2000), *and* Butler v. Fletcher, 465 F. 3d 340, 344 (8th Cir. 2006).
[50] Weyant, 101 F. 3d at 856.
[51] The court stated that there is "no constitutionally significant distinction between the rights of pretrial detainees and convicted inmates to basic human needs, including medical care and protection from violence or suicide," and thus held that the deliberate indifference standard applies to both. Hare v. City of Corinth, 74 F. 3d 633, 643 (5th Cir. Miss. 1996).
[52] Flores, 2010 U.S. App. LEXIS 16520.
[53] Nerren v. Livingston Police Dep't, 86 F. 3d 469, 474 (5th Cir. 1986).
[54] Coleman v. Schwarzenegger, 2009 U.S. Dist. LEXIS 67943, at *60 (E.D. Cal. Aug. 4, 2009) (citing Plata v. Schwarzenegger, 2005 U.S. Dist. LEXIS 43796, at *1 (N.D. Cal. Oct. 3, 2005)).
[55] *Id.* at *394-95.
[56] *Id.* at *60 (citing Plata, 2005 U.S. Dist. LEXIS 43796, at *1).
[57] Schwarzenegger v. Plata, 130 S. Ct. 3413 (2010) (Coleman and Plata are now consolidated.). At press time, the Supreme Court has not yet issued its opinion.

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