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15-2870  
Darnell v. City of New York

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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August Term, 2016

Argued: September 22, 2016

Decided: February 21, 2017

Docket No. 15-2870

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KEVIN DARNELL, GERMAIN CANO, MICHAEL GLENN, MICHAEL MCGHEE, KERRY SCOTT, TRAVIS GORDAN, GREGORY MAUGERI, DMITRIY MIOSLAVSKIY, STEVEN MODES, JACQUELINE GUARINO, MICHAEL SPALANGO, WESLEY JONES, RAYMOND TUCKER, YVONNE MING, NANCY VIGLIONE, KEITH JENNINGS, ELLI VIKKI, INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL OTHERS SIMILARLY SITUATED, ERIC CEPHUS, PHILLIP SINGLETON, DEBORAH GONZALEZ,

*Plaintiffs - Appellants,*

Nakaita Moore, Jahmel Lawyer, Peter Eppel,

*Plaintiffs,*

-v.-

RAFAEL PINEIRO, WILLIAM TOBIN, CITY OF NEW YORK, KENNETH KOBETITSCH,

*Defendants - Appellees,*

Deputy Commissioners John Does, 1-5, (representing the Deputy Commissioners who supervised the operation of Brooklyn Central Booking from June 12, 2010 to the present), Police Officers John Does, 1-5, (representing the commanding officers of Brooklyn Central Booking from June 12, 2010 to the present), Police Commissioner Raymond Kelly,

*Defendants.<sup>†</sup>*

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<sup>†</sup> The Clerk of Court is respectfully requested to amend the caption to conform to the above.

Before: LEVAL AND LOHIER, Circuit Judges, and KOELTL, District Judge.\*

1       Twenty state pretrial detainees brought individual § 1983  
2 claims in the same complaint alleging that the City of New York  
3 and the supervisory officers of a pre-arraignement holding  
4 facility (collectively, "the defendants") were deliberately  
5 indifferent to allegedly unconstitutional conditions of  
6 confinement at the holding facility. The United States District  
7 Court for the Eastern District of New York (Kuntz, J.) granted  
8 summary judgment in favor of the defendants, denied the  
9 detainees' motion to reconsider that judgment, and denied a  
10 subsequent motion to reconsider the denial of the motion for  
11 reconsideration. The detainees appealed.

12       The detainees concede that certain claims were properly  
13 dismissed. As to those claims, we affirm the District Court's  
14 judgment. However, because there were genuine disputes as to  
15 material facts with respect to the challenged conditions of  
16 confinement, the individual defendants' knowledge of those  
17 conditions, and the failure to remedy those conditions, as well  
18 as to the liability of the City of New York, we vacate the  
19 judgment as to the remaining claims that were dismissed and  
20 remand for further proceedings.

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\* Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

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2 SCOTT A. KORENBAUM (Stephen Bergstein, on the brief), Bergstein  
3 & Ullrich, LLP, Chester, NY, for Plaintiffs-Appellants.

4  
5 ZACHARY W. CARTER, (Richard Dearing, Devin Slack, Kathy Chang  
6 Park, on the brief), Corporation Counsel of the City of New  
7 York, New York, for Defendants-Appellees.

8 \_\_\_\_\_

9 John G. Koeltl, District Judge:

10 This is a case about unconstitutional conditions of  
11 confinement for pretrial detainees. Twenty state pretrial  
12 detainees ("the plaintiffs")<sup>1</sup> arrested on separate dates between  
13 July 10, 2011, and July 23, 2013, brought individual § 1983  
14 claims in the same complaint against the City of New York (the  
15 "City"), New York City Police Department ("NYPD") Captain  
16 Kenneth Kobetitsch, and NYPD Captain William Tobin (the  
17 "individual defendants") (collectively, "the defendants").<sup>2</sup> The

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<sup>1</sup> The plaintiffs are Kevin Darnell, Germain Cano, Michael Glenn, Michael McGhee, Kerry Scott, Travis Gordan, Gregory Maugeri, Dmitriy Miloslavskiy, Steven Modes, Jacqueline Guarino, Michael Spalango, Wesley Jones, Raymond Tucker, Yvonne Ming, Nancy Viglione, Keith Jennings, Elli Vikki, Eric Cephus, Phillip Singleton, and Deborah Gonzalez. Three additional plaintiffs initially brought claims against the defendants, but, prior to this appeal, two voluntarily dismissed their claims without prejudice, and one passed away.

<sup>2</sup> The John Doe defendants named in the original complaint are no longer parties to this action because the plaintiffs did not pursue claims against them in the amended complaints. During the proceedings before the District Court, the plaintiffs voluntarily dismissed with prejudice the claims against former NYPD Commissioner Raymond Kelly. By letter dated September 22, 2016, the plaintiffs abandoned the appeal of the judgment dismissing their claims against Raphael Pineiro, the former

1 plaintiffs alleged that they were each subjected to appalling  
2 conditions of confinement while held pre-arrainment at Brooklyn  
3 Central Booking ("BCB") with deliberate indifference to the  
4 deprivation of their Fourteenth Amendment due process rights.  
5 Because BCB was only a pre-arrainment holding facility, no  
6 plaintiff was held at BCB for more than twenty-four hours.

7 The United States District Court for the Eastern District  
8 of New York (Kuntz, J.) granted summary judgment to the  
9 defendants, reasoning that the plaintiffs failed to meet both  
10 the objective and subjective requirements for a claim of  
11 unconstitutional conditions of confinement based on a theory of  
12 deliberate indifference. The District Court concluded that, with  
13 respect to the "objective prong," no plaintiff could establish  
14 an objectively substantial deprivation of any constitutional  
15 rights because no plaintiff actually suffered a serious injury,  
16 or was "regularly denied his or her basic human needs or was  
17 exposed to conditions that posed an unreasonable risk of serious  
18 damage to his or her future health" for more than twenty-four  
19 hours; nor could any plaintiff establish the "subjective prong"  
20 of a deliberate indifference claim by proving that the  
21 individual defendants were actually aware of any dangerous  
22 conditions, or that the individual defendants acted unreasonably

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First Deputy Commissioner of the NYPD. The judgment dismissing the claims against Mr. Pineiro is accordingly affirmed.

1 in responding to any such conditions; nor, for similar reasons,  
 2 could the plaintiffs establish that the individual defendants  
 3 acted with punitive intent. See Cano v. City of New York, 119 F.  
 4 Supp. 3d 65, 74, 82, 85-86 (E.D.N.Y. 2015). Because no plaintiff  
 5 could prove a constitutional deprivation, the District Court  
 6 also held that the individual defendants were entitled to  
 7 qualified immunity, and that the plaintiffs could not establish  
 8 that the City was liable pursuant to Monell v. Dep't of Soc.  
 9 Servs. of City of New York, 436 U.S. 658, 690-91 (1978). See  
 10 Cano, 119 F. Supp. 3d at 86-87.

11 The District Court issued its opinion shortly after the  
 12 Supreme Court's decision in Kingsley v. Hendrickson, 135 S. Ct.  
 13 2466 (2015), in which the Supreme Court held that, for excessive  
 14 force claims brought under the Due Process Clause of the  
 15 Fourteenth Amendment, "a pretrial detainee must show only that  
 16 the force purposely or knowingly used against him was  
 17 objectively unreasonable." Id. at 2473. The Court rejected the  
 18 requirement that, for such claims, a pretrial detainee establish  
 19 a state of mind component to the effect that the official  
 20 applied the force against the pretrial detainee "maliciously and  
 21 sadistically to cause harm." Id. at 2475 (citation omitted). The  
 22 District Court's opinion was also issued two weeks before this  
 23 Court's decision in Willey v. Kirkpatrick, 801 F.3d 51, 66-68  
 24 (2d Cir. 2015), in which this Court held that while the proper

1 inquiry for a conditions of confinement claim is by reference to  
2 the duration and severity of the conditions, the claim did not  
3 require a "minimum duration" or "minimum severity" to reach the  
4 level of a constitutional violation. This Court further made  
5 clear that a "serious injury is unequivocally not a necessary  
6 element of an Eighth Amendment [conditions of confinement]  
7 claim." Id. at 68.

8 The District Court did not analyze the implications of  
9 Kingsley in its opinion. Moreover, the District Court denied the  
10 plaintiffs' motion for reconsideration based on Willey, as well  
11 as the plaintiffs' later motion for reconsideration of the order  
12 denying the first motion for reconsideration, because the  
13 District Court found that the plaintiffs' appeal of the summary  
14 judgment order divested it of jurisdiction over the case.

15 Among other issues, this case requires us to consider  
16 whether, consistent with Willey, and the precedents on which it  
17 is based, appalling conditions of confinement cannot rise to an  
18 objective violation of the Fourteenth Amendment's Due Process  
19 Clause so long as the detainee is subjected to those conditions  
20 for no more than twenty-four hours, and the detainee does not  
21 suffer an actual, serious injury during that time. This case  
22 also requires us to consider whether Kingsley altered the

1 standard for conditions of confinement claims under the  
2 Fourteenth Amendment's Due Process Clause.<sup>3</sup>

3 For the reasons explained below, we affirm in part, and  
4 vacate in part, the District Court's judgment, and remand the  
5 case to the District Court for further proceedings.

6 **I.**

7 In reviewing the District Court's grant of summary judgment  
8 in favor of the defendants, "we construe the evidence in the  
9 light most favorable to the Plaintiffs, drawing all reasonable  
10 inferences and resolving all ambiguities in their favor." CILP  
11 Assocs., L.P. v. PriceWaterhouse Coopers LLP, 735 F.3d 114, 118  
12 (2d Cir. 2013) (citation and internal quotation marks omitted).  
13 We affirm the grant of summary judgment only where "there is no  
14 genuine dispute as to any material fact and the movant is  
15 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).  
16 Our review is *de novo*. Ruggiero v. County of Orange, 467 F.3d  
17 170, 173 (2d Cir. 2006).

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<sup>3</sup> This case implicates the Due Process Clause of the Fourteenth Amendment because it involves state pretrial detainees who are seeking to vindicate their constitutional rights. See, e.g., Benjamin v. Fraser, 343 F.3d 35, 49 (2d Cir. 2003), overruled on other grounds by Caiozzo v. Koreman, 581 F.3d 63, 70 (2d Cir. 2009). However, the analysis in this decision should be equally applicable to claims brought by federal pretrial detainees pursuant to the Due Process Clause of the Fifth Amendment. See Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.").

A.

2 This is a lawsuit on behalf of twenty individual plaintiffs  
3 rather than a class action. As such, this is a review of a  
4 judgment dismissing the separate claims of twenty plaintiffs  
5 that were filed in a single complaint.

6 In its analysis, the District Court did not perform  
7 individualized assessments of each plaintiff's claims, reasoning  
8 instead that, because no plaintiff's confinement at BCB exceeded  
9 twenty-four hours, and no plaintiff suffered an actual, serious  
10 physical injury, no plaintiff could establish a violation. As  
11 discussed below, the District Court erred in its analysis.  
12 Although the evidence differed with respect to the conditions  
13 that each plaintiff was subjected to, we summarize the facts in  
14 the light most favorable to the plaintiffs as a group to explain  
15 the error in the District Court's grant of summary judgment  
16 dismissing the Second Amended Complaint. On remand, however, it  
17 will be necessary for the District Court to analyze each  
18 plaintiff's claims, both with respect to the conditions of  
19 confinement experienced by each plaintiff, and the personal  
20 involvement of the individual defendants with respect to the  
21 claims of each plaintiff.

# 1 B.

2 (i)

3 During the relevant period, BCB was a temporary holding  
4 facility located at 275 Atlantic Avenue, Brooklyn, New York,  
5 that held recently arrested pretrial detainees awaiting  
6 arraignment. BCB has since been relocated to a different  
7 facility in Brooklyn. The facility at issue in this dispute is  
8 no longer used to hold pretrial detainees.<sup>4</sup>

9 Individual defendant Captain Kenneth Kabetitsch was the  
10 commanding officer at BCB through July 2011, and his tenure only  
11 overlapped with the detention of plaintiff Glenn.<sup>5</sup> Thereafter,  
12 beginning on August 29, 2011, individual defendant Captain  
13 William Tobin became BCB's commanding officer, a position he  
14 still holds, and his tenure overlapped with the detention of the  
15 other plaintiffs. During their respective tenures, Captain  
16 Kabetitsch and Captain Tobin supervised the officers and the  
17 staff at BCB. Captain Kabetitsch and Captain Tobin toured and

<sup>4</sup> The plaintiffs initially brought claims against the defendants seeking compensatory damages and injunctive relief, but, in proceedings before the District Court, the plaintiffs abandoned the request for injunctive relief.

<sup>5</sup> By letter dated September 22, 2016, the plaintiffs abandoned their claims against Captain Kobotitsch, except as to plaintiff Glenn, because Captain Kobotitsch was the commanding officer of BCB only at the time plaintiff Glenn was detained there. The judgment dismissing the claims against Captain Kobotitsch---with the exception of plaintiff Glenn's claims against Captain Kobotitsch---is accordingly affirmed.

1 inspected BCB daily, including its holding cells. Captain Tobin  
2 testified that he monitored BCB for "cleanliness."

3 BCB had eight holding cells, six designated for use by men  
4 and two by women. Subordinate officers guarded detainees and  
5 also purportedly received "training and instructions with  
6 respect to, among other things, transferring detainees between  
7 cells, ensuring that there [was] an appropriate number of  
8 detainees in individual cells, so as to avoid overcrowding,  
9 handling and providing food and beverages to detainees, proper  
10 sanitation procedures, and the proper method for handling and  
11 disposing of human excrement."

12 (ii)

13 On separate dates between July 10, 2011, and July 23, 2013,  
14 each plaintiff was arrested and detained in holding cells at  
15 BCB.<sup>6</sup> Because BCB is a temporary holding facility, each plaintiff  
16 was held in custody at BCB from between ten to twenty-four  
17 hours. While detained at BCB during the two-year period, each  
18 plaintiff was allegedly subjected to one or more degrading  
19 conditions of confinement that purportedly constitute nine types  
20 of constitutional deprivations: (1) Overcrowding; (2) Unusable  
21 Toilets; (3) Garbage and Inadequate Sanitation; (4) Infestation;

<sup>6</sup> With the exception of plaintiffs Spalango and Tucker, who were each detained at BCB on March 13, 2013, and plaintiffs Jennings and Singleton, who were each detained at BCB on July 23, 2013, the plaintiffs' confinements at BCB did not overlap with each other.

1 (5) Lack of Toiletries and Other Hygienic Items; (6) Inadequate  
2 Nutrition; (7) Extreme Temperatures and Poor Ventilation; (8)  
3 Deprivation of Sleep; and (9) Crime and Intimidation. The  
4 evidence adduced related to each condition, construed in the  
5 light most favorable to the plaintiffs, is discussed in turn.

6 **1. Overcrowding.** The plaintiffs consistently testified  
7 that, for the majority of their respective confinements at BCB,  
8 they and other detainees were packed into overcrowded cells  
9 designed for, at best, one-half to one-third the actual  
10 capacity. For example, one plaintiff testified that his holding  
11 cell was so crowded that he could not determine if it had a  
12 toilet. Another plaintiff described his cell as "having no room  
13 to even stand" because it was "stuffed . . . like a can of  
14 sardines."

15 The plaintiffs testified that, because the cells were so  
16 full, there was often only space to stand for hours at a time,  
17 and that being forced to stand for hours continuously was  
18 painful and degrading. Even when there was space in the cells,  
19 the plaintiffs were reluctant to sit or lie down because the  
20 floors were filthy. As one plaintiff testified, he only sat down  
21 "out of extreme necessity" because he was "exhausted" and  
22 "dehydrated." While cells contained hard benches, there were not  
23 nearly enough benches in any given cell to accommodate its  
24 numerous occupants.

1           **2. Unusable Toilets.** Each cell at BCB contained, at best,  
2 one exposed toilet that lacked a seat, lid, toilet paper, or  
3 sufficient privacy partitions to conceal a toilet user from his  
4 or her fellow holding mates. One plaintiff, who was too tired to  
5 remain standing, testified that he curled up in a fetal position  
6 next to the toilet, the only place he could find room to do so  
7 in the cell. Some plaintiffs testified that they were kept for  
8 stretches in cells that did not have any toilet at all.

9           Captain Tobin testified that, as a general practice,  
10 toilets were cleaned and maintained regularly. Captain Tobin  
11 also swore that "[d]etainees are never placed in a cell with a  
12 non-functioning toilet" and that "[t]here is always at least one  
13 roll of toilet paper provided in each cell."

14           But the plaintiffs consistently testified that, for any  
15 cell that did have a toilet, the toilet rim and bowl, along with  
16 the surrounding floor and walls, were covered with some  
17 combination of feces, maggots, urine, vomit, and rotten milk.  
18 The toilets were frequently clogged and would overflow, spilling  
19 their contents. The smell was horrific, with one plaintiff  
20 describing the odor in the cells as "overbearing." The  
21 plaintiffs testified that roaches, mice, and other insects and  
22 vermin were commonplace in the area around the toilets.

23           Under these circumstances, the plaintiffs testified that,  
24 to varying degrees and for varying reasons, they found the

1 toilets unusable. Some testified that they had the tolerance to  
2 urinate in the toilets, while others could not bring themselves  
3 to use the toilets even for urination. Some plaintiffs testified  
4 that they did not use the toilet for the eminently practical  
5 reason that it was clogged or overflowing, leading those  
6 plaintiffs to fear that any overflow would spill into the cell  
7 and even land on other detainees standing, sitting, or lying  
8 next to the toilet; while others found the toilet and  
9 surrounding area simply too sickening and unsanitary to use. As  
10 one plaintiff testified, "you would have to be really out of  
11 your mind to use" the toilet.

12 One plaintiff testified that he defecated in his pants  
13 because he could no longer control his bowels. Another plaintiff  
14 testified that he used a toilet to defecate without any toilet  
15 paper. That plaintiff was later given an almost depleted roll of  
16 toilet paper, which did not have enough paper for him to clean  
17 himself.

18 Some of the plaintiffs testified that they asked officers  
19 to take them to other cells with less filthy toilets, requests  
20 the officers almost invariably denied.

21 **3. Garbage and Inadequate Sanitation.** Given that many of  
22 the toilets were clogged and overflowing, the plaintiffs  
23 unsurprisingly testified that the holding cells themselves were  
24 filthy. The cells had feces and dried urine caked to the floors.

1 The stench from the toilets drifted through the holding cells,  
2 and caused one plaintiff to "dry heav[e] . . . yellow bile." The  
3 plaintiffs consistently testified that the floors were sticky  
4 and covered with garbage and other unsanitary items, such as  
5 vomit, dead roaches, decaying apple cores, old milk cartons, and  
6 rotting sandwiches. One plaintiff testified that he could not  
7 "recall a time [the cells were] sanitary for a human being."

8 Pursuant to prison policy, the cells did not contain trash  
9 cans and detainees were expected to throw their trash on the  
10 floor. Captain Tobin swore that BCB's cells were cleaned by BCB  
11 custodial staff three times a day. However, the plaintiffs did  
12 not testify to witnessing any BCB staff cleaning or maintaining  
13 the cells.

14 **4. Infestation.** The plaintiffs consistently testified  
15 that the holding cells were infested with rats, mice,  
16 cockroaches, flies, and other insects and vermin. One plaintiff  
17 testified that he saw mice and roaches coming out of a radiator;  
18 another testified that he saw water bugs emerging from the  
19 toilet and nearby exposed pipes; while another described seeing  
20 roaches in the area where the food was stored, and under a sink.  
21 Yet another plaintiff testified that he observed roaches  
22 climbing on his sneaker. Finally, some plaintiffs testified that  
23 they watched as rats and insects crawled into, out-of, and  
24 around the boxes where food was stored.

1           **5. Lack of Toiletries and Other Hygienic Items.** The  
2 plaintiffs generally testified that they were not provided with  
3 basic toiletries, such as soap, tissues, toothbrushes,  
4 toothpaste, and toilet paper, and that the officers generally  
5 refused to provide these items even when explicitly requested.  
6 One plaintiff, who was menstruating at the time of her  
7 detention, began "bleeding all over [her]self." She testified  
8 that the officers were dismissive of her repeated requests for  
9 sanitary napkins, and that she stopped asking for sanitary  
10 napkins only when she heard an officer reprimand another  
11 detainee for making similar requests. Likewise, another  
12 plaintiff testified that he and his fellow detainees took turns  
13 asking the officers for toilet paper. The officers responded by  
14 threatening to delay arraignment if the detainees kept  
15 "harassing [them]."

16           **6. Inadequate Nutrition.** The plaintiffs generally found  
17 the food and water provisions nutritionally inadequate. The  
18 plaintiffs testified that the sandwiches, and much of the other  
19 food, were moldy, rotten, stale, or otherwise inedible. Some  
20 plaintiffs described seeing vermin and insects crawling in and  
21 around the food boxes, which caused those plaintiffs to avoid  
22 the food. One plaintiff testified that he saw another detainee  
23 receive a sandwich that had rat bite marks in it. Another  
24 plaintiff, a practicing Jewish Rabbi, refused to eat any food

1 because it was not Kosher. When the plaintiff complained to an  
2 officer, the officer replied, "[b]eggars can't be choosy." Under  
3 these circumstances, some of the plaintiffs refused to eat any  
4 food at BCB.

5 Many plaintiffs also testified that they did not trust that  
6 the "drinking water" at BCB was potable because it was only  
7 accessible from a grimy cooler on the floor, a filthy fountain,  
8 or a dirty sink adjacent to the toilet. Some plaintiffs  
9 testified that the water from those sources looked rusty and  
10 otherwise foul.

11 Other plaintiffs testified that they did not have access to  
12 any water or food, in any condition, for long periods of time.  
13 One plaintiff testified that he asked for water, but that BCB  
14 ran out of water. Another plaintiff testified that he did not  
15 ask the officers for water or food after he witnessed the  
16 officers ridiculing another detainee who had made the same  
17 request.

18 Under these circumstances, many of the plaintiffs refused  
19 to drink water and became dehydrated. Some plaintiffs were given  
20 milk, but most refused to drink it because it was inexplicably  
21 hot. The plaintiffs testified that the officers ignored the  
22 plaintiffs' concerns with respect to the milk and water.

23 **7. Extreme Temperatures and Poor Ventilation.** The holding  
24 cells were located in areas of BCB that suffered from poor

1 ventilation, which exacerbated odor problems. In addition, the  
2 plaintiffs testified that they were subjected to extreme  
3 temperatures depending on the season and the location at BCB---  
4 as such, a plaintiff might experience extreme heat and extreme  
5 cold on the same day while moving through BCB. Some plaintiffs  
6 testified that they found BCB unbearably hot while others  
7 testified that they found it unbearably cold. One plaintiff  
8 arrested in January 2012 testified that she removed her socks  
9 and shoes due to the "ridiculous[] heat" even though she found  
10 the cells, including the cell floors, disgusting and repulsive.

11       **8. Deprivation of Sleep.** The plaintiffs testified that  
12 they generally could not sleep while at BCB for a variety of  
13 reasons. The filthy state of the holding cells, coupled with the  
14 sheer number of detainees housed in any given cell, made it  
15 difficult to find enough room to lie down---many plaintiffs  
16 refused to sit or lie down on the floors at all. While BCB  
17 apparently had mats that it would provide detainees upon  
18 request, many plaintiffs testified that they were unaware of  
19 their availability and, regardless, did not see any provided in  
20 the cells. To explain why she did not think to request a mat,  
21 one plaintiff mused that, "if [the officers] would not give  
22 somebody toilet paper, I didn't think they" would give us mats.  
23 The plaintiffs who were given mats testified that the mats were

1 filthy and, in any event, that there was no room in the cells to  
2 lie down on them because of the overcrowding.

3       **9. Crime and Intimidation.** The plaintiffs witnessed other  
4 detainees fight each other. Some plaintiffs testified that  
5 officers did not monitor the cells to break up altercations. One  
6 plaintiff testified that she was kicked, pushed, and verbally  
7 abused by other detainees, and that there was no officer nearby  
8 to intervene. Another plaintiff testified that he was verbally  
9 accosted by two other detainees for about ten hours, but that  
10 the officers ignored his requests to be transferred to another  
11 cell.

12 (iii)

13           The plaintiffs paint a picture of BCB that is alarming and  
14           appalling. The plaintiffs testified that they found the  
15           conditions at BCB degrading, humiliating, and emotionally  
16           scarring. One plaintiff testified: "I was not treated in a  
17           humane manner. I believe if I were a dog, and that if the  
18           A.S.P.C.A. was brought in and there was a dog in that cell, that  
19           the police officers, whoever were responsible for the treatment  
20           of that dog in that cell, that they would be brought up on  
21           charges." Another plaintiff had an anxiety attack that required  
22           hospitalization, which he explained:

23 [S]tarted because of the deplorable conditions. I  
24 tried holding my bowel for about four hours. I wasn't  
25 able to use the bathroom or any form of the bathroom

1 and I found it very hard to breathe. My chest was very  
2 heavy and I tried to alert the guard. One guard just  
3 walked by and when they were letting in more people I  
4 told the guard I have to go to the hospital. I'm  
5 having chest pains and it was maybe 30 minutes after  
6 that they took me to the medical cell.

7  
8 Another plaintiff testified that the experience "stay[ed]"  
9 with him, explaining that it was something that was difficult to  
10 forget.

11 However, the plaintiffs did not generally testify that they  
12 suffered serious long term physical injuries or illnesses.

13 c.

14 (i)

15 The plaintiffs filed their initial complaint on June 26,  
16 2013, which they amended on August 7, 2013, and again on  
17 September 12, 2013. The defendants moved to dismiss the  
18 plaintiffs' claims pursuant to Rule 12(b)(6) of the Federal  
19 Rules of Civil Procedure, a motion the District Court denied in  
20 an Opinion and Order dated September 12, 2014. See Cano v. City  
21 of New York, 44 F. Supp. 3d 324 (E.D.N.Y. 2014).

22 Although not the subject of the current appeal, this prior  
23 opinion by the District Court provides helpful background. In  
24 that opinion, the District Court noted that the defendants had  
25 argued for a nearly "per se rule that no matter the conditions,  
26 if a detainee is only exposed to them for less than twenty-four  
27 hours, there can be no objective constitutional violation." Id.

1 at 333. The District Court rejected the defendants' argument,  
2 reasoning that even temporary deprivations could be objectively  
3 unconstitutional so long as those conditions were sufficiently  
4 serious. See id. The District Court accordingly held that the  
5 plaintiffs had "plausibly alleged that the conditions of  
6 confinement at BCB deprived them of the minimal civilized  
7 measures of life's necessities and subjected them to  
8 unreasonable health and safety risks." Id. (citing Walker v.  
9 Schult, 717 F.3d 119, 126 (2d Cir. 2013)).

10 In addition, relying on this Court's decision in Caiozzo v.  
11 Koreman, 581 F.3d 63, 70 (2d Cir. 2009), the District Court  
12 concluded that, to state a claim for unconstitutional conditions  
13 of confinement, the plaintiffs were required to allege that the  
14 individual defendants had acted with deliberate indifference in  
15 a subjective sense, namely that the defendants knew and  
16 disregarded excessive risks to the plaintiffs' health and  
17 safety. Cano, 44 F. Supp. 3d at 332-34. The District Court held  
18 that the plaintiffs had met this threshold, ruling that it was  
19 plausible that the individual defendants were aware of the  
20 challenged conditions based on, among other things, "their own  
21 observations . . . external reports and complaints; complaints  
22 filed by detainees; reports by the media; and prior lawsuits."  
23 Id. at 334.

1 The District Court also held that the plaintiffs had  
2 adequately alleged punitive intent and personal involvement by  
3 the individual defendants. See id. at 334-36.

(i)

5 At the close of extensive discovery---which included, among  
6 other things, the often uncontroverted deposition testimony of  
7 each plaintiff---the defendants moved for summary judgment,  
8 which the District Court granted in an Opinion and Order dated  
9 August 13, 2015. Cano v. City of New York, 119 F. Supp. 3d 65  
10 (E.D.N.Y. 2015).

11 The District Court began by stating that it would describe  
12 the facts of the case "in the light most favorable to the  
13 Plaintiffs, the non-moving party." Id. at 70 (citation omitted).  
14 However, the District Court never described the evidence of the  
15 conditions that each individual plaintiff faced. Instead, the  
16 District Court summarized the case by quoting allegations from  
17 the Second Amended Complaint before proceeding to its discussion  
18 of the case. See id. at 70-71. The District Court ultimately  
19 held that the defendants were entitled to summary judgment for  
20 several reasons. Id. at 72-73.

21 First, the District Court found that no jury could conclude  
22 that any of the evidence of the challenged conditions of  
23 confinement, "either taken in the aggregate or taken as a  
24 whole," objectively deprived any of the plaintiffs of their due

1 process rights. Id. at 81. In contrast to the state of law  
2 described in its opinion denying the defendants' motion to  
3 dismiss, the District Court concluded that, "[t]he Second  
4 Circuit and her constituent District Courts have routinely held  
5 that occasional and temporary deprivations of sanitary and  
6 temperate conditions, *without more*, do not constitute a  
7 sufficiently serious deprivation under the Eighth Amendment to  
8 constitute punishment." Id. at 74. Accordingly, the District  
9 Court held that, "while certain conditions may have been  
10 uncomfortable for Plaintiffs, the evidence fails to establish  
11 any Plaintiff was *regularly* denied his or her basic human needs  
12 or was exposed to conditions that posed an unreasonable risk of  
13 serious damage to his or her future health." Id. (emphasis  
14 added). In particular, the District Court reasoned that no  
15 plaintiff could establish an objective constitutional  
16 deprivation because no plaintiff could link any condition of  
17 confinement to any actual serious injury, and because the period  
18 of confinement did not exceed twenty-four hours for any  
19 plaintiff. See, e.g., id. ("Plaintiffs fail to show any of them  
20 were subjected to overcrowding for an extended period of time  
21 and further fail to establish any of them were injured in any  
22 way from the overcrowding."); id. at 82 ("Most Plaintiffs did  
23 not seek any sort of medical treatment and none of the  
24 Plaintiffs provide evidence of having suffered any long term

1 physical or emotional harm due to time spent in the BCB."); see  
2 also id. at 74-82.

3 Second, the District Court concluded that no reasonable  
4 jury could find that the plaintiffs had satisfied the subjective  
5 prong of a deliberate indifference claim, namely that the  
6 officers knew about conditions that posed excessive risks to the  
7 plaintiffs' safety and health. The Court found that the evidence  
8 for the individual defendants---especially BCB's log book  
9 entries, which documented sporadic cleaning and maintenance  
10 efforts, and Captain Tobin's deposition testimony---established  
11 that the individual defendants had reasonable practices in place  
12 to ensure that the officers under their supervision acted  
13 reasonably in response to any risks. Id. at 84-85. The District  
14 Court found that the individual defendants had acted with, at  
15 most, mere negligence. Id. at 84. Moreover, the District Court  
16 found that none of the individual defendants could have known  
17 about the allegedly unconstitutional conditions because there  
18 was no evidence that the subordinate officers who actually  
19 guarded the detainees informed the individual defendants of any  
20 of the challenged conditions, which were not unconstitutional in  
21 any event. See id. at 85.

22 Third, for substantially the same reasons, the District  
23 Court concluded that there was no triable issue of fact as to

1 whether any individual defendant had acted with punitive intent.  
2 See id. at 85-86.

3 Finally, because the plaintiffs had failed to establish a  
4 triable issue of fact that any of them had suffered an objective  
5 deprivation (and therefore failed to establish an underlying  
6 constitutional violation), the District Court concluded that the  
7 individual defendants were entitled to qualified immunity, and  
8 that the plaintiffs could not prove that the City had any Monell  
9 liability. See id. at 86-87.

10 (iii)

11 On August 14, 2015, the District Court entered judgment  
12 dismissing the plaintiffs' Second Amended Complaint. On August  
13 28, 2015, this Court issued its decision in Willey. On the same  
14 day, the plaintiffs informed the District Court of their  
15 intention to move for reconsideration based on Willey, and the  
16 District Court later set a briefing schedule whereby the motion  
17 for reconsideration would be fully briefed by October 23, 2015.

18 On September 11, 2015, the plaintiffs timely filed a Notice  
19 of Appeal challenging the District Court's grant of summary  
20 judgment. Later that day, the plaintiffs filed with the District  
21 Court their motion for reconsideration pursuant to Rules 59(e)  
22 and 60(b) of the Federal Rules of Civil Procedure, and Local  
23 Rule 6.3(e) of the United States District Court for the Eastern  
24 District of New York. On the same day, in a minute order (the

1 "First Minute Order"), the District Court denied the motion for  
2 reconsideration, stating that the appeal divested it of  
3 jurisdiction over the case.

4 The plaintiffs promptly moved for reconsideration of the  
5 First Minute Order, arguing that, pursuant to Rule 4(a)(4)(B)(i)  
6 of the Federal Rules of Appellate Procedure, the appeal did not  
7 divest the District Court of jurisdiction to reconsider the  
8 judgment. On September 12, 2015, in another minute order (the  
9 "Second Minute Order"), the District Court denied without  
10 elaboration the plaintiffs' motion for reconsideration of the  
11 First Minute Order. On October 5, 2015, the plaintiffs filed an  
12 Amended Notice of Appeal challenging, in addition to the grant  
13 of summary judgment, the First and Second Minute Orders.<sup>7</sup>

14 **II.**

15 A pretrial detainee's claims of unconstitutional conditions  
16 of confinement are governed by the Due Process Clause of the

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<sup>7</sup> It is unnecessary to reach the plaintiffs' appeal challenging the First and Second Minutes Orders, which were entered post-judgment. Those Orders do not raise any substantial issues that affect the disposition of this appeal. To the extent that the plaintiffs' Notice of Appeal divested the District Court of its jurisdiction to hear the post-judgment motions, Rule 62.1 of the Federal Rules of Civil Procedure permits district courts to issue "indicative rulings" to appellate courts when "a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. Civ. P. 62.1; see also Fed. R. App. P. 12.1. In the indicative ruling, the district court may indicate if it believes that the relief sought is meritorious, meritless, or merits further consideration, and request that the appellate court remand the case for further proceedings.

1 Fourteenth Amendment, rather than the Cruel and Unusual  
2 Punishments Clause of the Eight Amendment. Benjamin v. Fraser,  
3 343 F.3d 35, 49 (2d Cir. 2003), overruled on other grounds by  
4 Caiozzo v. Koreman, 581 F.3d 63, 70 (2d Cir. 2009); see also  
5 City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983). A  
6 pretrial detainee's claims are evaluated under the Due Process  
7 Clause because, "[p]retrial detainees have not been convicted of  
8 a crime and thus 'may not be punished in any manner—neither  
9 cruelly and unusually nor otherwise.'" Iqbal v. Hasty, 490 F.3d  
10 143, 168 (2d Cir. 2007) (quoting Benjamin, 343 F.3d at 49–50),  
11 rev'd on other grounds sub nom., Ashcroft v. Iqbal, 556 U.S.  
12 662, 678 (2009). A detainee's rights are "at least as great as  
13 the Eighth Amendment protections available to a convicted  
14 prisoner." City of Revere, 463 U.S. at 244.

15 A pretrial detainee may establish a § 1983 claim for  
16 allegedly unconstitutional conditions of confinement by showing  
17 that the officers acted with deliberate indifference to the  
18 challenged conditions. See Benjamin, 343 F.3d at 50. This means  
19 that a pretrial detainee must satisfy two prongs to prove a  
20 claim, an "objective prong" showing that the challenged  
21 conditions were sufficiently serious to constitute objective  
22 deprivations of the right to due process, and a "subjective  
23 prong"---perhaps better classified as a "*mens rea* prong" or  
24 "mental element prong"---showing that the officer acted with at

1 least deliberate indifference to the challenged conditions. The  
2 reason that the term "subjective prong" might be a misleading  
3 description is that, as discussed below, the Supreme Court has  
4 instructed that "deliberate indifference" roughly means  
5 "recklessness," but "recklessness" can be defined subjectively  
6 (what a person actually knew, and disregarded), or objectively  
7 (what a reasonable person knew, or should have known). See  
8 Farmer v. Brennan, 511 U.S. 825, 836-37 (1994).

9 Relying on this Court's decision in Caiozzo v. Koreman, 581  
10 F.3d 63, 72 (2d Cir. 2009), the District Court concluded that  
11 the elements for establishing deliberate indifference under the  
12 Fourteenth Amendment were the same as under the Eighth  
13 Amendment. Cano, 119 F. Supp. 3d at 72 (citing Caiozzo, 581 F.3d  
14 at 72). Therefore, the District Court required the plaintiffs to  
15 prove that, "(1) objectively, the deprivation the [detainee]  
16 suffered was 'sufficiently serious that he was denied the  
17 minimal civilized measure of life's necessities,' and (2)  
18 subjectively, the defendant official acted with 'a sufficiently  
19 culpable state of mind . . . , such as deliberate indifference  
20 to [detainee] health or safety.'" Id. at 73 (quoting Walker, 717  
21 F.3d at 125).

22 In applying this test, the District Court erred in two  
23 respects. First, the District Court misapplied this Court's  
24 precedents in assessing whether the plaintiffs had established

1 an objectively serious deprivation. Second, we conclude that the  
2 Supreme Court's decision in Kingsley altered the standard for  
3 deliberate indifference claims under the Due Process Clause.

4 **A.**

5 Under both the Eighth and Fourteenth Amendments, to  
6 establish an objective deprivation, "the inmate must show that  
7 the conditions, either alone or in combination, pose an  
8 unreasonable risk of serious damage to his health," Walker, 717  
9 F.3d at 125, which includes the risk of serious damage to  
10 "physical and mental soundness," LaReau v. MacDougall, 473 F.2d  
11 974, 978 (2d Cir. 1972). There is no "static test" to determine  
12 whether a deprivation is sufficiently serious; instead, "the  
13 conditions themselves must be evaluated in light of contemporary  
14 standards of decency." Blissett v. Coughlin, 66 F.3d 531, 537  
15 (2d Cir. 1995) (citing Rhodes v. Chapman, 452 U.S. 337, 346  
16 (1981)). For example, "[w]e have held that prisoners may not be  
17 deprived of their basic human needs—e.g., food, clothing,  
18 shelter, medical care, and reasonable safety—and they may not be  
19 exposed to conditions that pose an unreasonable risk of serious  
20 damage to [their] future health." Jabbar v. Fischer, 683 F.3d  
21 54, 57 (2d Cir. 2012) (citation and internal quotation marks  
22 omitted).

23 "[C]onditions of confinement may be aggregated to rise to  
24 the level of a constitutional violation, but 'only when they

1 have a mutually enforcing effect that produces the deprivation  
2 of a single, identifiable human need such as food, warmth, or  
3 exercise.'" Walker, 717 F.3d at 125 (quoting Wilson v. Seiter,  
4 501 U.S. 294, 304 (1991)). Unsanitary conditions, especially  
5 when coupled with other mutually enforcing conditions, such as  
6 poor ventilation and lack of hygienic items (in particular,  
7 toilet paper), can rise to the level of an objective  
8 deprivation. See id. at 127-28 (collecting cases).

9 In Willey v. Kirkpatrick, 801 F.3d 51, 68 (2d Cir. 2015),  
10 this Court recently reiterated that the proper lens through  
11 which to analyze allegedly unconstitutional unsanitary  
12 conditions of confinement is with reference to their severity  
13 and duration, not the detainee's resulting injury. In Willey, a  
14 convicted prisoner brought, among other claims, a claim under  
15 the Eighth Amendment against officers at a prison who allegedly  
16 exposed him to unsanitary conditions by confining him alone in a  
17 cell with little airflow, and then incapacitating his toilet for  
18 a period of, at a minimum, seven days "so that he was reduced to  
19 breathing a miasma of his own waste." Id. at 55. In addition, on  
20 two separate occasions (during one of which the prisoner was  
21 kept naked), the officers confined the prisoner to an  
22 observation cell smeared with feces and urine. See id. at 55,  
23 58.

1        In reinstating the prisoner's claim, Willey reviewed Second  
2    Circuit case law involving exposure to unsanitary conditions,  
3    and, consistent with this Court's precedents, made clear that  
4    unsanitary conditions of confinement must be assessed according  
5    to two components, severity and duration, on a case-by-case  
6    basis.<sup>8</sup> Id. at 66-68 (citing Gaston v. Coughlin, 249 F.3d 156 (2d  
7    Cir. 2001); LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972)).  
8    While Willey acknowledged that "there are many exposures of  
9    inmates to unsanitary conditions that do not amount to a  
10   constitutional violation," the Court rejected a "bright-line  
11   durational requirement for a viable unsanitary-conditions claim"  
12   or a "minimal level of grotesquerie required" before such a  
13   claim could be brought. Id. at 68. As this Court explained,  
14   "[t]he severity of an exposure may be less quantifiable than its  
15   duration, but its qualitative offense to a prisoner's dignity  
16   should be given due consideration." Id. Finally, the Court noted  
17   that "serious injury is unequivocally not a necessary element of  
18   an Eighth Amendment claim," although "the seriousness of the  
19   harms suffered is relevant to calculating damages and may shed  
20   light on the severity of an exposure." Id.

21        Willey also reinstated the prisoner's claim based on the  
22   provision of nutritionally inadequate food, concluding that the

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<sup>8</sup> The Court also noted that other Courts of Appeals are broadly in accord with this analytical framework. See Willey, 801 F.3d at 67 (collecting cases).

1 prisoner's allegations that he was usually served stale bread  
2 and rotten cabbage for one week were sufficient to allege an  
3 objective deprivation. Id. at 69. This Court again rejected the  
4 imposition of bright-line limits on inadequate nutrition claims,  
5 noting that the prisoner's "claim is not that all restricted  
6 diets are unconstitutional, but that . . . . *his* restricted diet  
7 was unusually unhealthy." Id.

8 Some of the challenged conditions in this case, such as  
9 inadequate nutrition, and unsanitary conditions---including  
10 inoperable toilets and filthy cells---are clearly covered by  
11 Willey. Other conditions at issue, such as overcrowding, do not  
12 necessarily fall under Willey's express ambit. However, Willey  
13 was not breaking new ground, but rather reaffirming the law in  
14 this Circuit, and its reasoning applies to the other challenged  
15 conditions in this case.

16 While the claims before the Court in Willey related to  
17 unsanitary conditions and inadequate nutrition, this Court has  
18 been reluctant to impose bright-line durational or severity  
19 limits in conditions of confinement cases, and has never imposed  
20 a requirement that pretrial detainees show that they actually  
21 suffered from serious injuries. See Walker, 717 F.3d at 129  
22 (distinguishing Rhodes v. Chapman, 452 U.S. 337 (1981), by  
23 reasoning that the Supreme Court did not hold, as a matter of  
24 law, that the provision of a cell sufficient to afford a

1 pretrial detainee thirty-one square feet of space could not be  
2 an unconstitutional deprivation of living space). Even in the  
3 rare case where the Court has imposed bright-line limits, those  
4 limits have been flexible and dependent upon the circumstances.  
5 See Jabbar, 683 F.3d at 57 ("We hold that the failure of prison  
6 officials to provide inmates with seatbelts on prison transport  
7 buses does not, *standing alone*, violate the Eighth or Fourteenth  
8 Amendments." (emphasis added)).

9 Bright-line limits are generally incompatible with  
10 Fourteenth Amendment teaching that there is no "static"  
11 definition of a deprivation, see Blissett, 66 F.3d at 537  
12 (citing Rhodes, 452 U.S. at 346), and the Supreme Court's  
13 instruction that any condition of confinement can mutually  
14 enforce another, so long as those conditions lead to the same  
15 deprivation, see Wilson, 501 U.S. at 304; see also Walker, 717  
16 F.3d at 127-28. The latter point is implicit in Willey, 805 F.3d  
17 at 68, which found that conditions that would normally have  
18 nothing to do with sanitation (for example, poor air circulation  
19 or being kept naked) can exacerbate the harmful effects of  
20 unsanitary conditions. Accordingly, this Court has repeatedly  
21 reiterated that conditions of confinement cases involve fact-  
22 intensive inquiries. See, e.g., Willey, 805 F.3d at 68-69.

23 The standards for evaluating objective deprivations, as  
24 articulated in Willey, thus extend to each of the nine

1 challenged conditions of confinement at issue in this case---(1)  
2 Overcrowding; (2) Unusable Toilets; (3) Garbage and Inadequate  
3 Sanitation; (4) Infestation; (5) Lack of Toiletries and Other  
4 Hygienic Items; (6) Inadequate Nutrition; (7) Extreme  
5 Temperatures and Poor Ventilation; (8) Deprivation of Sleep; and  
6 (9) Crime and Intimidation---regardless of whether those  
7 conditions relate to a deprivation involving sanitation or  
8 inadequate nutrition. Each of these conditions must be measured  
9 by its severity and duration, not the resulting injury, and none  
10 of these conditions is subject to a bright-line durational or  
11 severity threshold. Moreover, the conditions must be analyzed in  
12 combination, not in isolation, at least where one alleged  
13 deprivation has a bearing on another. See Wilson, 501 U.S. at  
14 304 (noting the synergy between cold temperatures and the  
15 failure to provide blankets in establishing an Eighth Amendment  
16 violation). An overcrowded cell, for example, may exacerbate the  
17 effect of unsanitary conditions. Similarly, poor ventilation may  
18 be particularly harmful when combined with an overflowing  
19 toilet. Inadequate nutrition may be compounded by infestation.

20 **B.**

21 The second element of a conditions of confinement claim  
22 brought under the Due Process Clause of the Fourteenth Amendment  
23 is the defendant's "deliberate indifference" to any objectively  
24 serious condition of confinement. Courts have traditionally

1 referred to this second element as the "subjective prong." But  
2 "deliberate indifference," which is roughly synonymous with  
3 "recklessness," can be defined either "subjectively" in a  
4 criminal sense, or "objectively" in a civil sense. As such, the  
5 "subjective prong" might better be described as the "*mens rea*  
6 prong" or "mental element prong."

7 Just over two decades ago, in Farmer v. Brennan, 511 U.S.  
8 825 (1994), the Supreme Court addressed the meaning of  
9 "deliberate indifference" in the context of a convicted  
10 prisoner's deliberate indifference to conditions of confinement  
11 claim brought under the Cruel and Unusual Punishments Clause of  
12 the Eighth Amendment. The Supreme Court concluded that  
13 deliberate indifference is properly equated with the *mens rea* of  
14 "recklessness." Id. at 836. However, the Court observed that  
15 recklessness is not completely self-defining. See id. The Court  
16 noted that recklessness could be defined according to an  
17 objective standard akin to that used in the civil context, which  
18 would not require proof of an official's actual awareness of the  
19 harms associated with the challenged conditions, or according to  
20 a more exacting subjective standard akin to that used in the  
21 criminal context, which would require proof of such subjective  
22 awareness. See id. at 836-37.

23 The Supreme Court in Farmer rejected the application of an  
24 objective standard for deliberate indifference as inappropriate

1 under the Cruel and Unusual Punishments Clause, holding that an  
2 official "cannot be found liable under the Eighth Amendment for  
3 denying an inmate humane conditions of confinement unless the  
4 official knows of and disregards an excessive risk to inmate  
5 health or safety; the official must both be aware of facts from  
6 which the inference could be drawn that a substantial risk of  
7 serious harm exists, and he must also draw the inference." Id.  
8 at 837. The Supreme Court based its holding on a close reading  
9 of the text of the Cruel and Unusual Punishments Clause, which  
10 "outlaws cruel and unusual 'punishments,'" not "cruel and  
11 unusual 'conditions.'" Id. According to the Supreme Court,  
12 "punishment" connotes a subjective intent on the part of the  
13 official, which also requires awareness of the punishing act or  
14 omission. See id. at 836-37. As the Court stated, "an official's  
15 failure to alleviate a significant risk that he should have  
16 perceived but did not, while no cause for commendation, cannot  
17 under our cases be condemned as the infliction of punishment."  
18 Id. at 838.

19       Farmer did not address deliberate indifference for pretrial  
20 detainees under the Due Process Clause of the Fourteenth  
21 Amendment. Following Farmer, this Court seven years ago in  
22 Caiozzo, 581 F.3d at 66, discerned two lines of Fourteenth  
23 Amendment deliberate indifference authority in this Circuit: one  
24 that applied an objective standard and another that applied a

1 subjective standard. Caiozzo resolved the intra-circuit  
 2 divergence, holding that the same subjective standard for  
 3 deliberate indifference claims under the Eighth Amendment's  
 4 Cruel and Unusual Punishments Clause should apply to deliberate  
 5 indifference claims under the Fourteenth Amendment's Due Process  
 6 Clause, which the Court reasoned was "a logical extension of the  
 7 principles recognized in Farmer."<sup>9</sup> Id. at 71. This Court  
 8 explained that this Court's jurisprudence for claims brought  
 9 under the Eighth Amendment had generally mirrored this Court's  
 10 jurisprudence for claims under the Fourteenth Amendment. See id.  
 11 (citing Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000)).  
 12 Relying on the analysis of the Court of Appeals for the Fifth  
 13 Circuit in Hare v. City of Corinth, Mississippi, 74 F.3d 633  
 14 (5th Cir. 1996) (en banc), this Court highlighted that the  
 15 Supreme Court had given no indication that pretrial detainees  
 16 should be treated differently from their post-conviction  
 17 counterparts. See Caiozzo, 581 F.3d at 71-72 (quoting Hare, 74  
 18 F.3d at 649). This Court also noted that the majority of the

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<sup>9</sup> Caiozzo, 581 F.3d at 68, involved a claim for deliberate indifference to medical needs under the Fourteenth Amendment. Nevertheless, the Court's interpretation of "deliberate indifference" applied to any pretrial detainee claim for deliberate indifference to "serious threat to . . . health or safety"---such as from unconstitutional conditions of confinement, or the failure-to-protect---because deliberate indifference means the same thing for each type of claim under the Fourteenth Amendment. See id. at 72.

1 other Courts of Appeals had reached a similar conclusion. See  
2 id. at 71 n.4 (collecting cases).

3 The Supreme Court's decision in Kingsley v. Hendrickson,  
4 135 S. Ct. 2466 (2015)---in which the Supreme Court concluded  
5 that excessive force claims brought under the Fourteenth  
6 Amendment do not require the same subjective intent standard as  
7 excessive force claims brought under the Eighth Amendment---has  
8 undercut the reasoning in Caiozzo.<sup>10</sup> The issue before the Supreme  
9 Court in Kingsley was whether "to prove an excessive force claim  
10 [under the Fourteenth Amendment], a pretrial detainee must show  
11 that the officers were *subjectively* aware that their use of  
12 force was unreasonable, or only that the officers' use of that  
13 force was *objectively* unreasonable." Kingsley, 135 S. Ct. at  
14 2470 (emphasis added). Kingsley involved a pretrial detainee's  
15 allegations that prison officers, who had undisputedly  
16 deliberately used force against the detainee (by using a Taser  
17 to incapacitate him), had, in doing so, acted with excessive  
18 force. See id.

19 Regarding the requisite *mens rea* for the officer's use of  
20 force against the detainee, the Court held "that a pretrial

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<sup>10</sup> See also Ross v. Correction Officers John & Jane Does 1-5, 610 F. App'x 75, 77 n.1 (2d Cir. 2015) (summary order). The panel in Ross did not reach the implications of Kingsley because it concluded that the defendant-official there was entitled to qualified immunity, which resulted in the dismissal of the plaintiff's claims. See id.

1 detainee must show only that the force purposely or knowingly  
 2 used against him was objectively unreasonable."<sup>11</sup> Id. at 2472-73.  
 3 The Court observed that, "[t]hus, the defendant's state of mind  
 4 is not a matter that a plaintiff is required to prove." Id. at  
 5 2472.

6 The Court reasoned that its interpretation of excessive  
 7 force claims under the Due Process Clause was consistent with  
 8 its prior precedents, including Bell v. Wolfish, 441 U.S. 520  
 9 (1979), where the Court had held that a pretrial detainee can  
 10 prevail on a claim brought under the Fourteenth Amendment  
 11 challenging "a variety of prison conditions, including a  
 12 prison's practice of double-bunking" solely by proffering  
 13 objective evidence to show that the conditions were not  
 14 reasonably related to a legitimate, nonpunitive governmental  
 15 purpose. Kingsley, 135 S. Ct. at 2473 (citing Bell, 441 U.S. at  
 16 541-43). The Court found that the focus of Bell and its progeny

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<sup>11</sup> The Supreme Court in Kingsley framed its analysis by observing that excessive force cases involve "two separate state-of-mind questions. The first concerns the defendant's state of mind with respect to his physical acts—i.e., his state of mind with respect to the bringing about of certain physical consequences in the world. The second question concerns the defendant's state of mind with respect to whether his use of force was 'excessive.'" Kingsley, 135 S. Ct. at 2472. The Court did not address the first question because it was undisputed that the officers had deliberately used force against the detainee by purposefully and knowingly using the Taser on the detainee, although the Court left open the possibility that the mental state of recklessness might suffice for the first state-of-mind question as well. Id.

1 on punishment "does not mean that proof of intent (or motive) to  
2 punish is required for a pretrial detainee to prevail on a claim  
3 that his due process rights were violated" or that the  
4 "application of Bell's objective standard should involve  
5 subjective considerations."<sup>12</sup> Id. at 2473-74 (collecting cases).

6 The Court also concluded that Eighth Amendment excessive  
7 force jurisprudence did not control the standard for excessive  
8 force claims under the Fourteenth Amendment. See id. at 2475  
9 (finding that Eighth Amendment cases "are relevant here only  
10 insofar as they address the practical importance of taking into  
11 account the legitimate safety-related concerns of those who run  
12 jails"). The Court stressed the different functions of the  
13 Eighth Amendment's Cruel and Unusual Punishments Clause and the  
14 Fourteenth Amendment's Due Process Clause:

15 The language of the two Clauses differs, and the  
16 nature of the claims often differs. And, most  
17 importantly, pretrial detainees (unlike convicted  
18 prisoners) cannot be punished at all, much less  
19 "maliciously and sadistically." Thus, there is no need  
20 here, as there might be in an Eighth Amendment case,  
21 to determine when punishment is unconstitutional. Id.  
22 (citations omitted).

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<sup>12</sup> A pretrial detainee can establish a due process claim for inhumane conditions of confinement either by proving an official's deliberate indifference to those conditions, or by proving that those conditions are punitive. See Benjamin, 343 F.3d at 50. Kingsley and its precedents are clear that the two theories of liability are distinct. Nothing about our interpretation of the proper standard for deliberate indifference for due process purposes should be construed as affecting the standards for establishing liability based on a claim that challenged conditions are punitive.

1       Following the Supreme Court's analysis in Kingsley, there  
2       is no basis for the reasoning in Caiozzo that the subjective  
3       intent requirement for deliberate indifference claims under the  
4       Eighth Amendment, as articulated in Farmer, must apply to  
5       deliberate indifference claims under the Fourteenth Amendment.  
6  
7       Caiozzo is thus overruled to the extent that it determined that  
8       the standard for deliberate indifference is the same under the  
9       Fourteenth Amendment as it is under the Eighth Amendment.<sup>13</sup>

10       Farmer is clear that "deliberate indifference" can be  
11       viewed either subjectively or objectively. In the context of a  
12       convicted prisoner asserting a violation of an Eighth Amendment  
13       right to be free from cruel and unusual punishments, the Supreme  
14       Court in Farmer defined deliberate indifference subjectively,  
15       meaning that a prison official must appreciate the risk to which  
16       a prisoner was subjected. The conditions of confinement were a  
17       form of punishment, and, based on the Supreme Court's  
18       interpretation of the Cruel and Unusual Punishments Clause, the  
19       prison official had to have subjective awareness of the  
20       harmfulness associated with those conditions to be liable for  
21       meting out that punishment.

22       After Kingsley, it is plain that punishment has no place in  
23       defining the *mens rea* element of a pretrial detainee's claim

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<sup>13</sup> This opinion has been circulated to all of the judges of the Court prior to filing.

1 under the Due Process Clause. Unlike a violation of the Cruel  
2 and Unusual Punishments Clause, an official can violate the Due  
3 Process Clause of the Fourteenth Amendment without meting out  
4 any punishment, which means that the Due Process Clause can be  
5 violated when an official does not have subjective awareness  
6 that the official's acts (or omissions) have subjected the  
7 pretrial detainee to a substantial risk of harm.

8       Kingsley held that an officer's appreciation of the  
9 officer's application of excessive force against a pretrial  
10 detainee in violation of the detainee's due process rights  
11 should be viewed objectively. The same objective analysis should  
12 apply to an officer's appreciation of the risks associated with  
13 an unlawful condition of confinement in a claim for deliberate  
14 indifference under the Fourteenth Amendment. A pretrial detainee  
15 may not be punished at all under the Fourteenth Amendment,  
16 whether through the use of excessive force, by deliberate  
17 indifference to conditions of confinement, or otherwise.

18       Therefore, to establish a claim for deliberate indifference  
19 to conditions of confinement under the Due Process Clause of the  
20 Fourteenth Amendment, the pretrial detainee must prove that the  
21 defendant-official acted intentionally to impose the alleged  
22 condition, or recklessly failed to act with reasonable care to  
23 mitigate the risk that the condition posed to the pretrial  
24 detainee even though the defendant-official knew, or should have

1 known, that the condition posed an excessive risk to health or  
2 safety. In other words, the "subjective prong" (or "*mens rea*  
3 prong") of a deliberate indifference claim is defined  
4 objectively.

5 In concluding that deliberate indifference should be  
6 defined objectively for a claim of a due process violation, we  
7 join the Court of Appeals for the Ninth Circuit, which, sitting  
8 *en banc* in Castro v. County of Los Angeles, 833 F.3d 1060, 1070  
9 (9th Cir. 2016) (*en banc*), cert. denied, No. 16-655, 2017 WL  
10 276190 (U.S. Jan. 23, 2017), likewise interpreted Kingsley as  
11 standing for the proposition that deliberate indifference for  
12 due process purposes should be measured by an objective  
13 standard.<sup>14</sup> The Court of Appeals for the Ninth Circuit concluded  
14 that Kingsley's broad reasoning extends beyond the excessive  
15 force context in which it arose.<sup>15</sup> See id. at 1069 ("The

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<sup>14</sup> Castro dealt with deliberate indifference in a failure-to-protect case, but---like this Court's interpretation of deliberate indifference, see note 9, supra---the interpretation of deliberate indifference by the Court of Appeals for the Ninth Circuit is equally applicable to a conditions of confinement claim. See Castro, 833 F.3d at 1069-70 (overruling Clouthier v. County of Contra Costa, 591 F.3d 1232 (9th Cir. 2010), which had held that a subjective test applied to due process claims for deliberate indifference to addressing serious medical needs); Williams v. Fresno Cty. Dist. Attorney's Office, No. 16-cv-00734 (DAD)(MJS), 2016 WL 5158943, at \*4 (E.D. Cal. Sept. 20, 2016) (applying Castro test to a due process claim for deliberate indifference to conditions of confinement).

<sup>15</sup> The defendants cite several decisions by other Courts of Appeals that have continued to apply a subjective standard to deliberate indifference claims for pretrial detainees after

1 underlying federal right, as well as the nature of the harm  
2 suffered, is the same for pretrial detainees' excessive force  
3 and failure-to-protect claims.").

4 The defendants argue that using an objective standard to  
5 measure deliberate indifference---a similar standard to the one  
6 used before Caiozzo, see, e.g., Benjamin, 343 F.3d at 51; Liscio  
7 v. Warren, 901 F.2d 274, 276 (2d Cir. 1990), overruled by  
8 Caiozzo, 581 F.3d at 71---risks that officials that act with  
9 mere negligence will be held liable for constitutional  
10 violations. But any § 1983 claim for a violation of due process  
11 requires proof of a *mens rea* greater than mere negligence.<sup>16</sup> See  
12 Kingsley, 135 S. Ct. at 2472 ("[L]iability for negligently  
13 inflicted harm is categorically beneath the threshold of  
14 constitutional due process." (citation omitted)). A detainee  
15 must prove that an official acted intentionally or recklessly,

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Kingsley. But none of those cases considered whether Kingsley had altered the standard for deliberate indifference for pretrial detainees. See, e.g., Brown v. Chapman, No. 15-3506, 2016 WL 683260 (6th Cir. Feb. 19, 2016); Moore v. Diggins, 633 F. App'x 672 (10th Cir. 2015) (summary opinion); Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268 (5th Cir. 2015); Smith v. Dart, 803 F.3d 304, 310 n.2 (7th Cir. 2015) (noting, in light of Kingsley, that the parties argued the state of mind element but that "it is not at issue in this appeal").

<sup>16</sup> The reckless or intentional action (or inaction) required to sustain a § 1983 deliberate indifference claim must be the product of a voluntary act (or omission) by the official. See Farmer, 511 U.S. at 835 (observing that the word "deliberate" in "deliberate indifference" might "require[] nothing more than an act (or omission) of indifference to a serious risk that is voluntary, not accidental" (citation omitted)).

1 and not merely negligently. Indeed, pre-Caiozzo case law that  
2 applied an objective standard was clear that officials could not  
3 be found liable for negligent conduct. See, e.g., Liscio, 901  
4 F.2d at 275.

5 The defendants also argue that the return to an objective  
6 definition of deliberate indifference will open the flood-gates  
7 to litigation. The argument is unpersuasive. Prior to Caiozzo,  
8 some courts in this Circuit applied an objective standard for  
9 deliberate indifference. Caiozzo chose to apply a subjective  
10 standard to deliberate indifference because this Court thought  
11 that it was more consistent with Farmer, not because of any  
12 concerns that an objective standard would prompt the filing of  
13 non-meritorious claims. Consistency with the Supreme Court's  
14 decision in Kingsley now dictates that deliberate indifference  
15 be measured objectively in due process cases.

16 **III.**

17 **A.**

18 The District Court erroneously granted summary judgment for  
19 the defendants on the basis that no jury could find that the  
20 nine challenged conditions of confinement in this case,  
21 considered together or separately, amounted to an objective  
22 constitutional deprivation because no plaintiff could establish  
23 a regular deprivation lasting more than twenty-four hours, or an  
24 actual serious injury or sickness. However, the plaintiffs have

1 adduced substantial evidence, much of it uncontested, that  
2 they were subjected to appalling conditions of confinement to  
3 varying degrees and for various time periods. While we recognize  
4 that the District Court did not have the benefit of this Court's  
5 guidance in Willey, the plaintiffs' claims should not have been  
6 dismissed on the grounds that the conditions in this case did  
7 not exceed ten to twenty-four hours, or result in serious  
8 injury.

9 The District Court repeatedly stressed that the plaintiffs  
10 were not *regularly* denied humane conditions of confinement:  
11 "Plaintiffs only complain of such issues for a short period of  
12 time—an average of ten to twenty-four hours—with nothing more."  
13 Cano, 119 F. Supp. 3d at 73; see also, e.g., id. at 75 ("[T]he  
14 uncontested evidence establishes that no Plaintiff was  
15 *regularly* deprived access to a toilet."); id. at 77 ("Here, not  
16 a single Plaintiff was exposed to urine, feces, and/or vomit for  
17 anything more than a limited period of time because no Plaintiff  
18 was held at BCB for more than one twenty-four hour period.");  
19 id. at 79 ("[T]here is no evidence that a single Plaintiff was  
20 *regularly* denied any such toiletry during his or her stay at BCB  
21 . . . ."). The District Court essentially ruled that no set of  
22 conditions, no matter how egregious, could state a due process  
23 violation if the conditions existed for no more than ten to  
24 twenty-four hours. This was error. Willey, 801 F.3d at 68.

1       The District Court also repeatedly stressed the lack of any  
2   actual serious injury or illness in the case. See, e.g., Cano,  
3   119 F. Supp. 3d at 82 ("Most Plaintiffs did not seek any sort of  
4   medical treatment and none of the Plaintiffs provide evidence of  
5   having suffered any long term physical or emotional harm due to  
6   time spent in the BCB."). In Willey, 801 F.3d at 68, this Court  
7   rejected the argument that a plaintiff must prove a serious  
8   injury in order to establish a constitutional violation due to  
9   inhumane conditions of confinement.

10       The defendants argue that the District Court's judgment  
11   should be affirmed based on an assessment of the severity and  
12   duration of the conditions at issue. They argue that Willey  
13   supports their position given its admittedly more extreme facts.  
14   They contend that those are the types of facts that constitute  
15   an objective deprivation. They further contend that no plaintiff  
16   in this case actually suffered a long term, grievous physical or  
17   emotional injury, a not-so-subtle attempt to bring the standard  
18   full circle back to evaluating objective deprivation by injury.

19       Ultimately, the defendants' theory appears to be that state  
20   officials are free to set a system in place whereby they can  
21   subject pretrial detainees awaiting arraignment to absolutely  
22   atrocious conditions for twenty-four hour periods (and perhaps  
23   more) without violating the Constitution so long as nothing  
24   actually catastrophic happens during those periods. That is not

1 the law. As the District Court aptly stated in denying the  
2 defendants' motion to dismiss, "[o]ur Constitution and societal  
3 standards require more, even for incarcerated individuals, and  
4 especially for pretrial detainees who cannot be punished by the  
5 state." Cano, 44 F. Supp. 3d at 333. This Court's cases are  
6 clear that conditions of confinement cases must be evaluated on  
7 a case-by-case basis according to severity and duration, and  
8 instructs that a pretrial detainee's rights are at least as  
9 great as those of a convicted prisoner. Based on the record, the  
10 gradation between the conditions of confinement at issue in this  
11 case, and those at issue in Willey, may speak to damages, not  
12 the absence of an objective constitutional deprivation.

13 **B.**

14 In addition, the District Court granted summary judgment to  
15 the individual defendants because it concluded that the  
16 plaintiffs could not establish that the individual defendants  
17 had acted with subjective deliberate indifference, as opposed to  
18 objective deliberate indifference. The District Court neither  
19 analyzed Kingsley, nor had the benefit of our interpretation of  
20 Kingsley as set forth in this opinion, which inures to the  
21 benefit of the plaintiffs. The defendants argue that the  
22 judgment should nevertheless be affirmed based on the standard  
23 for deliberate indifference articulated here. The defendants'  
24 argument should be addressed in the first instance by the

1 District Court. The purported deliberate indifference of the  
2 individual defendants must be assessed on an individualized  
3 basis with respect to each plaintiff.<sup>17</sup>

4 **C.**

5 The District Court also erred in its application of the  
6 well-settled standards for deciding a motion for summary  
7 judgment. The District Court did not construe the evidence in  
8 the light most favorable to the plaintiffs, nor did it draw all  
9 reasonable inferences in their favor.

10 For example, the District Court justified the rejection of  
11 the plaintiffs' inadequate nutrition claims in part by noting  
12 that plaintiff Vikki had "claimed that BCB served 'wonderful  
13 cheese and bologna sandwiches.'" Cano, 119 F. Supp. 3d at 80.  
14 Although not reflected in the District Court's opinion,

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<sup>17</sup> The defendants also argue on appeal that the plaintiffs have failed to establish that the individual defendants had any personal involvement in any of the challenged conditions of confinement. As counsel for the defendants conceded at oral argument, although the defendants raised the personal involvement argument on their motion to dismiss, they did not renew the argument in their motion for summary judgment. In their summary judgment papers, the defendants only raised the personal involvement argument with respect to the former First Deputy Commissioner of the NYPD, Raphael Pineiro, who is no longer a party to this action. See note 2, supra. The defendants' argument is accordingly not preserved for review and deemed waived. See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 124 n.29 (2d Cir. 2005). In any event, the plaintiffs' claims against the individual defendants rely on the evidence that the individual defendants personally toured BCB on a daily basis, and were thus aware of the conditions at the holding facility.

1 plaintiff Vikki later clarified in her deposition that she did  
2 not eat the sandwiches "[b]ecause the cheese was dry, the bread  
3 was dry, and [she] wouldn't feed it to [her] dog." Construed in  
4 the light most favorable to the plaintiffs, plaintiff Vikki's  
5 comment about "wonderful" sandwiches was sarcastic.

6 In another example, the District Court noted that plaintiff  
7 Guarino had asked for a sanitary napkin to clean herself because  
8 she was menstruating and "bleeding all over [her]self," but the  
9 District Court indicated that there was no proof that "any  
10 officer at BCB acted with a sufficiently culpable state of  
11 mind." Id. at 84. This ignored plaintiff Guarino's testimony  
12 that, after repeatedly asking for a sanitary napkin, she only  
13 desisted because she observed an officer threaten another  
14 detainee with delayed arraignment if that detainee made any  
15 additional requests.

16 Moreover, the District Court discounted as a mere matter of  
17 preference the plaintiffs' testimony that toilets were unusable,  
18 reasoning that the plaintiffs were not "denied access" to  
19 toilets. Id. at 75-76. That frames the plaintiffs' testimony far  
20 too narrowly. The plaintiffs' testimony was that the toilets (if  
21 there were any toilet in the particular cell) could not be used  
22 for bowel movements because the toilets lacked privacy, and  
23 because the toilets were not kept in such a way that they could  
24 reasonably be used. The plaintiffs' theory is that the toilets

1 were maintained by deliberately indifferent officers in such a  
2 manner that they were unusable. It is not a reasonable inference  
3 that the plaintiffs merely decided not to use the toilets,  
4 especially when one plaintiff defecated in his pants, another  
5 defecated without toilet paper, and a third had an anxiety  
6 attack that required hospitalization because he was "holding  
7 [his] bowel for about four hours."

8 Contrary to the District Court's ruling that the individual  
9 defendants "establish[ed] [that] they responded reasonably to  
10 any risk that existed," see id. at 83-85, the evidence about  
11 regularly scheduled cleanings and pest control visits, at best,  
12 established that there are genuine disputes as to material facts  
13 concerning the handling of sanitation issues at BCB. The fact of  
14 thrice daily visits by cleaning crews, even if undisputed, would  
15 not eliminate the force of the plaintiffs' testimony that the  
16 cleaning crews did not do what was needed to clean the cells, or  
17 remedy the non-functioning toilets.

18 **D.**

19 The District Court also granted summary judgment for the  
20 defendants on the grounds that the plaintiffs could not  
21 establish a claim based on punitive intent; that the individual  
22 defendants were entitled to qualified immunity; and that the  
23 plaintiffs could not establish that the City had Monell  
24 liability. In light of the foregoing rulings, we vacate these

1 rulings as well, although we do not decide how those issues  
2 should be decided using the proper standards, including the  
3 standards for a due process claim for deliberate indifference to  
4 the conditions of confinement described above.

5 With respect to the plaintiffs' punitive intent theory, the  
6 District Court should reconsider the dismissal of that theory in  
7 light of the evidence of the objectively serious conditions of  
8 confinement.

9 With respect to qualified immunity and Monell liability,  
10 the District Court based its rulings solely on its finding that  
11 no plaintiff could establish an objective due process  
12 deprivation. Because we disagree with that conclusion, we vacate  
13 the qualified immunity and Monell liability rulings, and remand  
14 those issues for further consideration in light of this  
15 opinion.<sup>18</sup> See, e.g., Jova v. Smith, 582 F.3d 410, 418 n.4 (2d  
16 Cir. 2009) (per curiam) (remanding the issue of qualified  
17 immunity where the district court did not consider the question  
18 in the first instance).

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<sup>18</sup> The parties dispute whether letters from the Correctional Association of New York---which the defendants contend support the conclusion that the individual defendants are entitled to qualified immunity---are inadmissible hearsay. The District Court never ruled on this issue and, because we do not reach the qualified immunity issue, we do not reach the admissibility issue.

1

CONCLUSION

2       For the reasons explained above, the judgment is **AFFIRMED**  
3    in part, and **VACATED** in part, and the case is **REMANDED** for  
4    further proceedings consistent with this opinion.