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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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REGINALD C. HOWARD, <p style="text-align: center;">v.</p> BRIAN CONNETT, et al.,	Plaintiff, Defendants.
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Case No. 2:11-cv-01402-RFB-GWF

ORDER

Plaintiff’s Motion for Attorney Fees (ECF No. 200)

Defendants’ Motion for New Trial (ECF No. 221)

I. INTRODUCTION

Before the Court are Defendants’ Motion for New Trial (ECF No. 221) and Plaintiff’s Motion for Attorney Fees (ECF No. 200). This case arises from various constitutional violations brought under 42 U.S.C. 1983, which occurred to the Plaintiff Reginal C. Howard, while incarcerated at the Southern Desert Correctional Center (“SDCC”). Specifically, Plaintiff’s claims relate to First, Eighth, and Fourteenth Amendment violations at the hands of various Defendants, including numerous correctional officers, lieutenants, and the religious adviser. At trial, the Plaintiff advanced eight counts and prevailed on six.

On November 6, 2015, the jury returned a verdict as follows (ECF No. 193):

1. Count 1
 - a. Count 1: 8th Amendment Excessive Force against Defendant Joseph Lewis: found in favor of Defendant Joseph Lewis.
 - b. Count 1: 8th Amendment Excessive Force against Defendant Jimmy Jones: found in favor of Defendant Jimmy Jones.

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- 2. Count 2
 - a. Count 2: 14th Amendment Due Process against Defendant Ron Jaeger: the Court found in favor of Plaintiff Howard. The jury awarded \$3,000 in compensatory damages and \$4,000 in punitive damages.
- 3. Count 3
 - a. Count 3: 1st Amendment Free Exercise against Defendant Ron Jaeger: The jury found in favor of Plaintiff Howard and awarded \$1000 in compensatory damages and \$1000 in punitive damages.
 - b. Count 3: 1st Amendment Free Exercise against Defendant Vincent Raybourn: The Jury found in favor of Plaintiff Howard and awarded \$1000 in compensatory damages and \$1000 in punitive damages.
- 4. Count 4
 - a. Count 4: 8th Amendment Excessive Force against Defendant Rene Galvan: The jury found in favor of Plaintiff Howard and awarded \$1000 in compensatory damages and \$4000 in punitive damages.
- 5. Count 5
 - a. Count 5: 1st Amendment Free Exercise against Defendant Brian Connett: The jury found in favor of Plaintiff Howard and awarded \$1000 in compensatory damages and \$2,200 in punitive damages.
 - b. Count 5: 1st Amendment Free Exercise against Defendant Julio Calderin: The jury found in favor of Plaintiff Howard and awarded \$1000 in compensatory damages and \$2,200 in punitive damages.
 - c. Count 5: 14th Amendment Equal Protection against Defendant Brian Connett: The jury found in favor of Plaintiff Howard and awarded \$1000 in compensatory damages and \$2,200 in punitive damages.
 - d. Count 5: 14th Amendment Equal Protection against Defendant Julio Calderin: The jury found in favor of Plaintiff Howard and awarded \$1000 in compensatory damages and \$2,200 in punitive damages.

1 Defendants move for a new trial on every claim and every issue. Defendant state the
2 following as grounds for the motion:

- 3 1. Prejudicial misstatements during closing argument by opposing counsel;
- 4 2. Cumulative verdicts awarded for same harm under multiple legal theories;
- 5 3. Punitive damage awards against the clear weight of the evidence;
- 6 4. Error in jury instructions; and
- 7 5. Erroneous admission of prejudicial prior bad act evidence

8 In the alternative, Defendants ask for remittitur.

9 For the reasons stated below, the Court GRANTS in part and DENIES in part Defendants'
10 Motion (ECF No. 221).

11 The Court also addresses Plaintiff's Motion for Attorney Fees. ECF No. 200. For the
12 reasons stated below, the Court GRANTS the Motion for Attorney Fees at the rate capped by the
13 Prison Litigation Reform Act ("PLRA").

14 15 **II. DEFENDANTS' MOTION FOR NEW TRIAL, ECF No. 200**

16 **A. Legal Standard**

17 Pursuant to Fed. R. Civ. P. 59(a), a new trial may be granted in an action in which there
18 has been a trial by jury "for any reason for which a new trial has heretofore been granted in an
19 action at law in federal court." "The grant of a new trial is 'confided almost entirely to the exercise
20 of discretion on the part of the trial court.'" Murphy v. City of Long Beach, 914 F.2d 183, 186 (9th
21 Cir. 1990) (quoting Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980)).

22 Because "Rule 59 does not specify the grounds on which a motion for a new trial may be
23 granted . . . [courts] are thus bound by those grounds that have been historically recognized."
24 Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1035 (9th Cir. 2003). Such historical grounds
25 include claims "that the verdict is against the weight of the evidence, that the damages are
26 excessive, or that, for other reasons, the trial was not fair to the party moving[.]" Montgomery
27 Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940); see also Passantino v. Johnson & Johnson
28 Consumer Prods., 212 F.3d 493, 510 n. 15 (9th Cir. 2000). "[E]rroneous jury instructions, as well

1 as the failure to give adequate instructions, are also bases for a new trial.” Murphy, 914 F.2d at
2 187.

3 The trial court “is not limited to the grounds a party asserts to justify a new trial, but may
4 sua sponte raise its own concerns about the . . . verdict. Ultimately, the district court can grant a
5 new trial under Rule 59 on any ground necessary to prevent a miscarriage of justice.” Experience
6 Hendrix L.L.C. v. Hendrixlicensing.com Ltd., 762 F.3d 829, 842 (9th Cir. 2014) (citations
7 omitted).

8 **B. Remittitur**

9 “If the amount of damages awarded [by a jury] is excessive, it is the duty of the trial judge
10 to require a remittitur or a new trial.” Linn v. United Plant Guard Workers, 383 U.S. 53, 65–66
11 (1966). “A remittitur must reflect the maximum amount sustainable by the proof.” Oracle Corp.
12 v. SAP AG, 765 F.3d 1081, 1094 (9th Cir. 2014) (quotation omitted).

13 “When the court, after viewing the evidence concerning damages in a light most favorable
14 to the prevailing party, determines that the damages award is excessive, it has two alternatives. It
15 may grant defendant’s motion for a new trial or deny the motion conditional upon the prevailing
16 party accepting a remittitur. The prevailing party is given the option of either submitting to a new
17 trial or of accepting a reduced amount of damage which the court considers justified. If the
18 prevailing party does not consent to the reduced amount, a new trial must be granted. If the
19 prevailing party accepts the remittitur, judgment must be entered in the lesser amount.” Fenner v.
20 Dependable Trucking Co., 716 F.2d 598, 603 (9th Cir. 1983).

21 **C. Discussion**

22 **a. Prejudicial Statements By Opposing Counsel**

23 First, Defendants argue that a new trial is warranted because the verdict was unfairly
24 influenced by counsel’s multiple improper statements made during closing argument. “The trial
25 court has broad discretion in the control of closing arguments, and this court will not reverse a
26 judgment because of statements made in the arguments of counsel unless they were so prejudicial
27 that a failure to declare a mistrial was an abuse of discretion.” People of the Territory of Guam v.
28 Ignacio, 852 F.2d 459, 462 (9th Cir. 1988) (citation omitted). For misconduct in closing arguments

1 to warrant reversal, it must “so permeate[] the trial as to the lead to the conclusion that the jury
2 was necessarily influenced by passion and prejudice in reaching its verdict.” Cooper v. Firestone
3 Tire and Rubber Co., 945 F.2d 1103, 1107 (9th Cir. 1991) (citation omitted). Whether or not the
4 comments were objected to, and whether or not opposing counsel moved for a mistrial, are relevant
5 to the determination of prejudice. See Id. (“The trial court, which is in a far better position to gauge
6 the prejudicial effect of improper comments . . . found it was not [so prejudicial as to merit a new
7 trial] Most of counsel’s comments were not objected to at trial and appellants did not move
8 for a mistrial at the end of the argument.”).

9
10 1. “Golden Rule” Violation

11 Defendants argue that Plaintiff’s counsel violated the “Golden Rule” by asking the jurors
12 to put themselves in Plaintiff’s position when he stated “I doubt that any of you have been
13 challenged the way that Mr. Howard has been challenged to protect himself.” (Tr. at 20, Nov. 4,
14 2015.)

15 The “Golden Rule” to which Defendants refer is used primarily in the context of criminal
16 trials, where prosecutors request a juror to think of themselves in the place of the victim. See Fields
17 v. Woodford, 309 F.3d 1095, 1109 (9th Cir. 2002) as amended, 315 F.3d 1062 (9th Cir. 2002)
18 (quoting Drayden v. White, 232 F.3d 704, 712–13 (9th Cir.2000)) (“In his closing argument, the
19 prosecutor asked the jury to ‘think of yourself as Rosemary Janet Cobb’ and described the crimes
20 committed against her from her perspective. In doing so ‘[he] inappropriately obscured the fact
21 that his role is to vindicate the public’s interest in punishing crime, not to exact revenge on behalf
22 of an individual victim.”).

23 Defendants objected to counsel’s statement and the Court sustained the objection.
24 However, the Defendants did not at that time nor at any time after seeking an instruction or move
25 for a mistrial.

26 Plaintiff responds by arguing that the statement was meant to contextualize the actions
27 Plaintiff complained of. Plaintiff argues that Mr. Barrick was merely expressing his doubt that the
28 jurors had ever been in Mr. Howard’s position; he was not asking them to place themselves in it

1 and sympathize with Plaintiff. He appears to have only been emphasizing to jurors that their own
2 life experiences may not be the appropriate frame of reference for evaluating Mr. Howard's actions
3 or credibility. Moreover, the lack of prejudicial impact is reflected by the fact that the jury did not
4 enter judgment against Defendants Lewis and Jones despite Mr. Barrick's statements.

5 The Court finds that counsel's statement did not clearly violate the Golden Rule. The Court
6 does not find that the portion of the closing argument referenced sought to have the jurors consider
7 a perspective or information that was improper. In fact, the argument here appears to be exactly
8 the opposite to the Golden Rule. The argument appears to merely have pointed out to the jury that
9 the prison setting is different than a real world setting in the context of the disputes at issue. This
10 is not an empathy or sympathy argument, rather it is a factual argument about the nature of the
11 circumstances in which the disputed acts occurred. In the context of the entire closing argument
12 by Plaintiff, the Court understood this reference to be asking the jury to remember the prison
13 setting and not rely just upon their common sense applied to a non-prison setting. Indeed, the
14 Defendants themselves often referred, during questioning and closing arguments, to the nature of
15 the prison setting to argue to the jury why the Defendants may have taken the actions they did.

16 In addition, the Court finds that the jury's split verdict—granting one Eighth amendment
17 claim and denying the other—further undermines Defendants' argument that the statement had a
18 prejudicial effect. See United States v. Drummondo-Farias, 622 F. App'x 616, 618 n.4 (9th Cir.
19 2015) (citations omitted) (“That the jury in fact rendered a split verdict shows that the jury followed
20 the trial court's instructions.”) cert. denied, No. 15-7305, 2016 WL 207387 (U.S. Jan. 19, 2016);
21 see also United States v. Unruh, 855 F.2d 1363, 1374 (9th Cir. 1987) (“The best evidence of the
22 jury's ability to compartmentalize the evidence is its failure to convict all defendants on all
23 counts.”) (citation omitted), cert. denied, 488 U.S. 974 (1988).

24 This finding is consistent with Ninth Circuit declining to find violations from ambiguous
25 characterizations of the jury. The Ninth Circuit has declined to find a violation where counsel
26 stated, “but here you are, this is your lot in life; you are on this particular jury, and you must make
27 some very difficult determinations . . . I have enjoyed representing these people; but my burden .
28 . . is done, almost. And the burden will now shift to you.” See Minato v. Scenic Airlines, Inc., 908

1 jury instructions includes the following language with respect to punitive damages: “The purposes
2 of punitive damages are to punish a defendant and to deter similar acts in the future.” Instruction
3 5.5, Ninth Circuit Manual of Model Jury Instructions (2007). “A closing argument that tracks the
4 jury instructions cannot possibly be misconduct.” Settlegoode, 371 F.3d at 519; *see also* Cooper
5 v. Firestone Tire and Rubber Co., 945 F.2d 1103, 1107 (9th Cir. 1991) (holding that counsel's
6 actions did not rise to the level of misconduct where his closing argument called for “punishment”
7 and to “make sure . . . [defendants] never forget about [the accident]”).

8 The Court does not find that the language used in this argument unfairly prejudiced the
9 Defendants. While the Court did not find and does not find the language to be clearly contrary to
10 the instructions regarding punitive damages, the language could have been confusing to the jury
11 about the appropriate standard. Because of this possible confusion, the Court sustained
12 defendant’s objection, and immediately clarified that to the extent the comments could be
13 considered, they could be considered for consideration of punitive damages: “That’s correct. There
14 are certain considerations for the damages, and I’ll refer you to what you can consider for damages.
15 And, certainly, punitive damages can be awarded in the context of deterring certain types of
16 conduct. And so I will just instruct you to follow those instructions.” (Tr. at 9, Nov. 4, 2015). As
17 the phrase was only used once and then the Court explicitly rejected and corrected it as to the
18 standard, the Court does not find that prejudice resulted and certainly not to the extent to warrant
19 a new trial.

20 The Court also notes that this issue arose in the context of argument regarding punitive
21 damages. The Defendants were presented with an opportunity to bifurcate the trial for purposes
22 of punitive damages. They opposed such a bifurcation.

23 Finally, the Court notes again that, after the Court’s instruction, the Defendants did not
24 seek a mistrial based upon the one-time use of this phrase. Given all of these circumstances, the
25 Court does not find that the Defendants were prejudiced by this phrase and that, even if there was
26 slight confusion, it was addressed by the Court’s clarification.

27 3. Facts Not in Evidence

28 Defendants argue that counsel improperly invited the jury to consider facts not in evidence.

1 In their Reply, Defendants withdraw this argument, finding that the record does indicate that the
2 facts relied upon were in evidence. (Reply at 4).

3 4. Reference to Hygiene Items

4 Defendants claim that Plaintiff’s counsel improperly referred to the alleged denial of
5 hygiene items after the Court granted a directed verdict as to the conditions of confinement claim.
6 Counsel then withdrew this line of argument.

7 Plaintiff argues that the Defendant failed to object to this at the trial and did not request
8 that the Court strike any portion of Mr. Howard’s testimony regarding the deprivation of both his
9 hygiene and religious supplies during his stay in the segregation unit—statements given with
10 regards to the 8th amendment claim. Further, Plaintiff argues that the references to denial of
11 hygiene items was in the context of the excessive force claim.

12 Defendants fail to cite to any binding authority in the Ninth Circuit or Supreme Court that
13 supports its argument. The Eleventh Circuit case Defendants cite is distinguishable. In that case
14 the court granted a new trial after granting qualified immunity to the defendants: “Especially in
15 the light of the district court’s preexisting immunity order granting Defendants partial summary
16 judgment, we believe Plaintiff’s counsel’s closing argument about liability for conduct other than
17 an intentional blow to the head warrants, by itself, a new trial.” Christopher v. Florida, 449 F.3d
18 1360, 1367 (11th Cir. 2006). The Court finds that statements at issue here are insufficient to rise
19 to the Eleventh Circuit’s holding that “Plaintiff’s counsel’s improper closing argument prejudiced
20 the substantial rights of Defendants by taking away from Defendants the benefits of the partial
21 summary judgment they had won before trial and by incorrectly expanding the grounds for liability
22 at trial to include grounds ruled out by the court.” Christopher v. Florida, 449 F.3d 1360, 1367
23 (11th Cir. 2006)

24 Here, counsel’s statements did not expand liability. Rather, they provided context—
25 perhaps unnecessarily, but not detrimentally—as to why the force used against Plaintiff in the
26 remaining 8th Amendment claim, was particularly unnecessary: “But put it in the context of why
27 he was there. He was there to be punished by Lewis, right, for complaining. So he’s in the hole 12
28 days. He testifies, I didn’t have soap, toilet paper, towel, change of clothes, any of these things. He

1 says he's in the same clothes 12 days, right? He says he got toothpaste from another inmate, but
2 not a toothbrush. I digress. Withdraw that line of argument, your Honor.” (Tr. at 11, Nov. 4, 2015).

3 Even if the comments were entirely irrelevant, here again they are not sufficiently
4 prejudicial as to warrant undoing the jury's judgment. It weighs against a finding of prejudice that
5 defendant's counsel did not object, that Plaintiff unilaterally stated that he withdrew the line of
6 argument, and that Defendants' counsel did not move for a mistrial. See Cooper, 945 F.2d at 1107.

7 5. Cumulative Effect

8 Because the Court does not find that any of the aforementioned arguments regarding
9 counsel's closing arguments rise to the level of necessitating a new trial, the Court does not find
10 any cumulative effect.

11 **b. Cumulative Verdicts**

12 Next, Defendants argue that a new trial is warranted due to cumulative verdicts, because
13 the Plaintiff was able to recover under alternative legal theories. Specifically, Defendants argue
14 that as to Count V, the jury returned verdicts against Defendants Calderin and Connett, and
15 assessed identical compensatory and punitive damages on each of two theories of liability: free
16 exercise and equal protection. In support of this argument, Defendants cite to Greenwood Ranches,
17 Inc. v. Skie Const. Co., Inc., 629 F.2d 518, 521 (8th Cir. 1980), standing for the proposition that a
18 plaintiff is not entitled to separate damage awards for each legal theory. Instead, he is entitled only
19 to one damage award if liability is found on any or all of the theories involved. Id.

20 The Court rejects this argument. Greenwood holds that a plaintiff may not recover for the
21 same harm arising from the same facts under multiple alternative theories. See 629 F.2d at 521
22 (“Greenwood sought to recover damages flowing essentially from the same transaction . . . for loss
23 and for money expended on the system”). In this instance, Plaintiff alleged two separate causes of
24 action: a First Amendment Free Exercise claim and a Fourteenth Amendment Equal Protection
25 claim. These causes of action have different legal standards requiring different legal elements;
26 have different injuries; and are related to different facts. Plaintiff's First Amendment claim relates
27 to his ability to practice his religion, by restricting Plaintiff's access to Nation of Islam services.
28 Plaintiff's Fourteenth Amendment claim relates to his treatment as a Muslim, as compared to other

1 prisoners belonging to other religious groups.

2 The jury instructions further illustrate the different legal elements required for each cause
3 of action. Regarding the First Amendment claim, the parties agreed upon, and the Court provided,
4 the following: “To implicate the Free Exercise Clause of the First Amendment, the plaintiff must
5 show that 1) the prison’s regulation substantially burdened a belief that is sincerely held and
6 religious in nature; and 2) that the regulation is not reasonably related to legitimate penological
7 interests.” See Shakur v. Schriro, 514 F.3d 878, 884-85 (9th Cir. 2008). Regarding the Fourteenth
8 Amendment claim, the parties agreed upon, and the Court provided, the following: “To state a
9 claim under section 1983 for a violation of the Equal Protection Clause of the Fourteenth
10 Amendment a plaintiff must show that: 1) The defendants acted with an intent or purpose to
11 discriminate against the plaintiff 2) based upon membership in a protected class, in this case, a
12 religious group.” See Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir. 2003).

13 Finding that Plaintiff’s First and Fourteenth Amendment claims are distinct constitutional
14 claims based upon different theories and different factual determinations, the Court rejects
15 Defendants’ argument that the claims were essentially alternative theories of recovery and
16 therefore cumulative.

17 **c. Punitive Damages Not Supported By Clear Weight of the Evidence**

18 A plaintiff seeking punitive damages under Section 1983 must present evidence of an “evil
19 motive or . . . reckless indifference to the rights of others.” Smith v. Wade, 461 U.S. 30, 46-47
20 (1983) (citation omitted). The parties did not, nor do they object to the model jury instruction given
21 stating that “[y]ou may award punitive damages only if you find that the defendant’s conduct that
22 harmed the plaintiff was malicious, oppressive or in reckless disregard of the plaintiff’s rights.”
23 Instruction 5.5, Ninth Circuit Manual of Model Jury Instructions (2007).

24 Defendants argue that a new trial is warranted because the jury’s awards of punitive
25 damages were contrary to the clear weight of the evidence with respect to several defendants.
26 Those arguments are addressed in turn.

27 1. Defendant Rabourn and the Free Exercise Claim in Count III

28 Defendant Rabourn, a correctional officer, acknowledged that he was present at the

1 classification hearing that transferred Plaintiff from one cell to another, but emphasized that he
2 had no control over Plaintiff's personal property or the return of his religious items, and that the
3 control of inmate property was generally outside his job duties. In addition, the Court notes that
4 on cross examination, Defendant Rabourn maintained he did not recall dealing with Plaintiff and
5 his property concerns despite records indicating that he responded to Plaintiff's grievances filed
6 on February 7, 2011. (Tr. at 123-124, Oct. 29, 2015).

7 Mr. Howard testified that Defendant Rabourn was in a position to help him recover his
8 religious items but did nothing to aid him in their recovery. Specifically, Plaintiff testified that he
9 told Defendant Rabourn about his religious items at the classification hearing, that it had been 72
10 hours, that he hadn't received his property, and that Defendant Rabourn sent no one to retrieve his
11 items. (Tr. at 224-225, Oct. 27, 2015).

12 Defendants reply that if the jury believed that Defendant Rabourn had control over his
13 possessions, his declining to aid Plaintiff was, at best, negligent.

14 At oral argument regarding the Motion for New Trial, Plaintiff's counsel conceded that
15 this particular award of punitive damages was supported by the least evidence and that it was a
16 "close call."

17 "If the amount of damages awarded [by a jury] is excessive, it is the duty of the trial judge
18 to require a remittitur or a new trial." Linn v. United Plant Guard Workers, 383 U.S. 53, 65-66
19 (1966). The Court finds that the clear weight of the evidence does not support the award of punitive
20 damages in the amount of \$1,000. While Defendant Rabourn may have been in a position to aid
21 Plaintiff in the recovery of his religious items, he was not required to do so. Defendant Rabourn's
22 single interaction with Plaintiff in which he declined to help in the retrieval of religious items, at
23 best, barely established "reckless or callous disregard" as required by law. See Smith v. Wade, 461
24 U.S. 30, 51 (1983). The Court finds that the fact that the jury awarded punitive damages for
25 Rabourn on only one count further demonstrates their perception of his actions, in comparison to
26 the other defendants.

27 Therefore the Court remits the amount of punitive damages against Defendant Rabourn
28 from \$1,000 to \$10.

1 for the last four weeks and has not been denied access to the chapel.” (Ex. 46). Defendant Calderin
2 then admitted at the trial that he had “no records upon which to base [his] answer.” (Tr. at 90-91,
3 Nov. 4, 2015). In other words, Defendant Calderin recklessly yet unequivocally **lied** in an official
4 grievance report that Plaintiff had not been denied access to religious services despite lacking any
5 information to suggest that this was true. Defendant Calderin admitted on the stand to fabricating
6 statements during the grievance process. “Q: So when you signed this document (Ex. 46, Def.’s
7 declining of Pl.’s grievance), you had no records upon which to base your answer, right? . . . A:
8 No.” (Tr. at 90-91, Nov. 4, 2015). The Court therefore finds that the jury could draw the inference
9 that he fabricated this statement, and did so out of malice or with obvious reckless disregard to
10 known violations of Mr. Howard’s rights.

11 The Court finds that the clear weight of the evidence indicated a basis for punitive damages
12 against Defendant Calderin. Given his position as a spiritual adviser in the prison, his refusal to
13 acknowledge his role in Plaintiff’s access to religious services, and knowing misrepresentations
14 made in the grievance process which resulted in the denial of Plaintiff’s access to religious service,
15 the Court finds that there was a clear basis for finding that Defendant Calderin acted in a malicious,
16 oppressive, or reckless disregard of Plaintiff’s religious rights. All of this evidence from the trial
17 supports the jury’s verdict that Calderin personally and oppressively participated in the deprivation
18 of Howard’s rights.

19 Further, the Court finds that Defendant Calderin’s demeanor when he took the stand to
20 further support an award of punitive damages. His nonchalance about lying in an official report,
21 his apparent indifference to his actions, and his anger for having to respond to Plaintiff’s claims
22 could have provided an additional basis for finding that his behavior in repeatedly denying
23 Plaintiff’s requests was malicious, oppressive, or in reckless disregard of Plaintiff’s religious
24 rights.

25 The Court therefore declines to vacate or remit the punitive damages against Defendant
26 Calderin.

27 3. Defendant Connett, and the Free Exercise and Equal
28 Protection Claims Presented in Count V

1 Defendants argue that the evidence does not establish that Defendant Connett, a deputy
2 director at the prison, was responsible for Plaintiff's inability to attend Nation of Islam services,
3 or that he denied Plaintiff access to the services out of ill will or complete indifference to Plaintiff's
4 rights. (Tr. at 30-31, Oct. 28, 2015). Further, Defendants argue that Plaintiff's exhibits confirm
5 that it was Deputy Director Foster, not Defendant Connett, who provided a second-level response
6 to Plaintiff's grievance related to the Nation of Islam services. (Tr. at 25, Oct. 28, 2015).

7 Plaintiff argues that Mr. Howard testified that he submitted grievances that were responded
8 to by Defendant Connett regarding deprivation of religious services. (Tr. at 30-31, Oct. 28, 2015).
9 Accordingly, Defendant Connett was on notice of his religious deprivation and was in a position
10 to rectify it. (Tr. at 39, Oct. 28, 2015). In addition, Defendant Connett testified that he received
11 and reviewed multiple grievances from Plaintiff during the period of time that he reviewed
12 grievances. (Tr. at 37, 39-50, Nov. 4, 2015). These grievances included complaints associated with
13 Plaintiff's inability to access services. (Tr. at 37, 39-50, Nov. 4, 2015). However, although
14 Defendant Connett had the ability and the authority to investigate these grievances, he did not do
15 so. (Tr. at 48-50, Nov. 4, 2015). Connett also did not even inquire as to whether or not the issues
16 or grievances were in fact ever investigated or resolved.

17 The Court has reviewed the transcript and Ex. 45, "Inmate Grievance History," and finds
18 that Plaintiff's grievance filed on July 18, 2011 was specifically assigned to Brian Connett. The
19 comments related to this grievance note: "I was not allow to attend Friday prayer for the week of
20 July 1st and July 'th [sic], 2011.' This has become a continue [sic] practice from May 27, 2011
21 and June 3, 2011. But other Muslims are been allowed." (Ex. 45). Based on the testimony noted
22 above and a review of this Exhibit, the Court finds that there was testimony to support Connett's
23 review of Howard's grievances regarding his inability to worship and access to religious services.
24 Thus, there was evidence to support Connett's ratification of the deprivation of rights of Howard.
25 This evidence supports the jury's punitive damages award as to the Free Exercise claim. The Court
26 also notes again Connett's apparent demeanor of indifference even at trial as to Howard's rights
27 further supports this award. Connett's demeanor could easily have led the jury to understand that
28 he was disdainful of having to respond to an inmate and offended at having to appear at trial to

1 discussed the potential ramifications of Jaeger’s testimony, including a limiting instruction: “THE
2 COURT: ... what he said is actually not true legally. He cannot—he doesn’t have the authority
3 under any regulation to deny someone their constitutional rights.” (Tr. at 119, Oct. 28, 2015).

4 Therefore the Court finds that the clear weight of the evidence provided the basis for a
5 reasonable jury to find that, at a minimum, Jaeger acted with reckless disregard for plaintiff’s due
6 process rights, and therefore lawfully awarded punitive damages as to Count II against Defendant
7 Jaeger.

8 **b. Count III**

9 As to Count III, Defendants argue that Plaintiff acknowledged receiving his religious items
10 within days and provided no evidence indicating that his health or safety was at risk due to the
11 short delay associated with the return of his personal property.

12 Defendants appear to have confused the legal standard associated with a First Amendment
13 free exercise claim. Proving such a claim does not require that a plaintiff show that his health or
14 safety was at risk. See, e.g., Shakur v. Schriro, 514 F.3d 878, 884-85 (9th Cir. 2008) (To implicate
15 the Free Exercise Clause of the First Amendment, the plaintiff must show that 1) the prison’s
16 regulation substantially burdened a belief that is sincerely held and religious in nature; and 2) that
17 the regulation is not reasonably related to legitimate penological interests.).

18 Plaintiff testified that he was not permitted to have his Qur’an and other religious books
19 for twelve days. (Tr. 215-16, Oct. 27, 2015). He testified that he told Jaeger personally that he was
20 missing the Qu’ran and other religious texts; that he filed an emergency grievance with regard to
21 his items; and that Jaeger responded in writing that the grievance was not an emergency, without
22 providing any further explanation. (Tr. At 218, Oct. 27, 2015); (Pl’s Ex. 17). His explanation stated
23 that Plaintiff should “utilize the proper grievance procedures.” (Id.) Plaintiff testified that the
24 alternative procedure, a “regular grievance” could take 30 to 45 days to receive a response. (Tr. At
25 220, Oct. 27, 2015). Plaintiff thus provided evidence that his sincerely held religious belief was
26 substantially burdened by confiscation of his faith’s holy book and other religious texts, and
27 presented evidence that Jaeger would have knowingly allowed that burden to persist for thirty days
28 or more. Defendants did not present evidence that the twelve-day confiscation was reasonably

1 related to a legitimate penological interest. The Court finds that the clear weight of the evidence
2 provided a basis for the jury to decide that Jaeger acted with deliberate or reckless disregard for
3 Plaintiff's free exercise rights. Therefore the Court rejects Defendants' argument that there was no
4 reasonable basis for punitive damages against Defendant Jaeger as to Count III.

5 The Court therefore declines to vacate or remit the punitive damages against Defendant
6 Jaeger.

7 **d. Instructional Error**

8 Defendants argue that the removal of the deference language from the excessive force
9 instruction was error and prejudiced Defendants.

10 The instruction reads as follows: "you should give deference to prison officials in the
11 adoption and execution of policies and practices that in their judgment are needed to preserve
12 discipline and to maintain internal security in a prison."

13 Defendants argue that given that the parties presented fundamentally different versions of
14 the April 2011 confrontation and that Defendant Galvan presented evidence of Plaintiff's
15 threatening behavior, the evidence strongly indicates that Defendants were prejudiced by the
16 removal of the deference language from the excessive force instruction. Defendants cite Wood v.
17 Beauclair, 692 F.3d 1041, 1049-50 (9th Cir. 2012) to allege a "requirement to accord deference to
18 prison officials when using force." Def.'s Mot. for a New Trial at 15.

19 Plaintiff argues that because the Jury found in favor of Defendants Lewis and Jones on the
20 first Excessive Force claim, the Defendants' arguments lack merit. Further, regarding the Wood
21 decision, the rationale for such deference arises only where there is a "need to maintain or restore
22 discipline inside the prison." Wood v. Beauclair, 692 F.3d 1049 (9th Cir. 2012) (citation omitted).
23 Here, Defendant Galvan testified that he felt no physical threat. He further testified that he felt no
24 particular threat at all. (Tr. at 85:18 - 87:15, Oct. 29, 2015). Thus, there was no "need to maintain
25 or restore order." Defendant Galvan did not testify that he was not implementing any NDOC policy
26 and the jury was entitled to consider whether he acted "maliciously and with the intent to inflict
27 harm" without granting him any deference at all.

28 As an initial matter, the Court finds that the instruction Defendants requested was in fact

1 read aloud to the jury before the Court considered Plaintiff’s motion to remove the deferential
2 language in the jury instruction. This is to say that the oral instruction to the jury included the
3 deference language but the written instructions sent back to them did not include this language.

4 Further, having reviewed the instruction, the Court finds that the instruction does not apply
5 in this case. The deferential instruction by its terms applies where the Defendants are arguing that
6 their behavior was justified by the adoption or execution of a policy or practice. Galvan did not
7 testify that he was implementing a particular policy or following a specific protocol. He was acting
8 on his discretion and judgment. As stated in Wood, “[w]here there is no legitimate penological
9 purpose for a prison official’s conduct, courts have presume[ed] malicious and sadistic intent.”
10 692 F.3d at 1050 (alteration in original) (citation omitted). Throughout the entirety of this action,
11 Defendants have never argued with respect to the Eighth Amendment causes of action that they
12 acted pursuant to a particular prison policy or protocol. To the extent Defendants are arguing this,
13 the Court finds that the Defendants would have been required to present this specific defense well
14 before the issuance of jury instructions, so that the Plaintiff could have notice of such a defense
15 and the opportunity to rebut this defense by arguing, for example, that the policy itself was
16 unconstitutional. Rather, Defendants appear to suggest that their individual judgment, including
17 the use of force, should be given de facto deference without reference to a penological interest.
18 However, by this logic, all uses of force would need to be deferred to, regardless of penological
19 interest. The Ninth Circuit has rejected such blanket deference. See Wood, 692 F.3d at 1050. In
20 order for deference to apply, the prison officials must connect their actions to a policy or
21 penological interest which could then be challenged by the Plaintiff.

22 The Court further finds that the jury’s split verdict, in granting for the Plaintiff on one
23 excessive force claim and for the Defendants on another, undermines Defendants’ argument that
24 the instruction was prejudicial to them. See United States v. Drummondo-Farias, 622 F. App’x
25 616, 618 n.4 (9th Cir. 2015) (citations omitted) (“We note also that the district court instructed the
26 jury to consider the charges separately, diminishing the risk of prejudice. . . . That the jury in fact
27 rendered a split verdict shows that the jury followed the trial court's instructions.”) cert. denied,
28 No. 15-7305, 2016 WL 207387 (U.S. Jan. 19, 2016); see also United States v. Unruh, 855 F.2d

1 1363, 1374 (9th Cir. 1987) (“The best evidence of the jury’s ability to compartmentalize the
2 evidence is its failure to convict all defendants on all counts.”), cert. denied, 488 U.S. 974 (1988).

3 Therefore the Court denies the motion on this ground.

4 **e. Prejudicial Bad Act Evidence**

5 The Court allowed Plaintiff to recall Defendant Jaeger over Defendants’ objection and
6 examine him with respect to other instances in which Defendant Jaeger had denied inmate requests
7 for witnesses at disciplinary hearings in his role as a hearing officer. (Tr. at 146, Nov. 4, 2015).
8 Then, the Court denied Defendants’ request that the limiting instruction be provided to the jury in
9 written form. (Tr. at 42-43, 74, Nov. 5, 2015).

10 The Defendants argue that a new trial is warranted due to the admission of prejudicial
11 testimony of Defendant Jaeger regarding prior instances with other inmates in which he denied
12 requests for witnesses in his capacity as a hearing officer. The Defendants further argue that the
13 jury did not have the benefit of a trial transcript, and that the Court’s statement that “it is a violation
14 of due process for Mr. Howard to have been denied witnesses at the proceeding at all,” and “there
15 is nothing that this witness can say that would in any way and can in any way change that finding”
16 confused the jury and led it to place undue weight on the bad act evidence.

17 The Court rejects this argument. Relevant evidence may be excluded if its probative value
18 is substantially outweighed by a danger of unfair prejudice. Fed. R. of Evid. 403. “Unfairly
19 prejudicial evidence is that having “an undue tendency to suggest decision on an improper basis,
20 commonly, though not necessarily, an emotional one.” U.S. v. Gonzalez-Florez, 418 F.3d 1093,
21 1098 (9th Cir. 2005) (citation omitted). A district “court’s evidentiary rulings are reviewed for
22 abuse of discretion and will not be reversed absent prejudice to the party whose evidence was
23 excluded.” Glover v. BIC Corp., 6 F.3d 1318, 1328 (9th Cir. 1993).

24 As a preliminary matter, the Court does not find that the Court’s statements had or
25 compounded any prejudicial effect. The first allegedly prejudicial statement made by the Court is
26 the summary of the legal standard for due process claims relevant to Defendant Jaeger. The second
27 statement was appropriate where summary judgment has already been found for Defendant Jaeger.
28 The Court finds that rather than confusing the jury, these instructions were necessary to clarify

1 Defendant Jaeger’s actions and the impact the Court’s prior ruling had on the proceedings going
2 forward. In fact, this possibility was expressly discussed at sidebar during Jaeger’s testimony
3 because Jaeger had in fact misstated the law and his culpability. As previously discussed, the Court
4 and parties discussed the potential ramifications of Jaeger’s testimony, including a limiting
5 instruction: “THE COURT: ... what he said is actually not true legally. He cannot—he doesn’t
6 have the authority under any regulation to deny someone their constitutional rights.” (Tr. at 119,
7 Oct. 28, 2015). Therefore, the instruction was necessary to mitigate any effect Jaeger’s erroneous
8 testimony justifying his actions may have had on the jury’s consideration of punitive damages for
9 the due process violation.

10 Defendants also argue that the evidence regarding Defendant Jaeger’s prior actions was
11 not disclosed during discovery and placed Plaintiff at an unfair advantage at trial, since the Court
12 ordered Defendants produce it only after the trial began. Defendants argue that this required
13 Defendants to respond to a discovery request during trial, resulting in a significant burden and
14 distraction during the critical phase of trial.

15 The Defendants cite to no legal authority that damaging evidence revealed during the trial
16 should be categorically precluded. Further, Defendants cite to no authority suggesting that the
17 inconvenience of complying with a Court order—in this case, a discovery-related order—unduly
18 prejudices the opposing side such that the evidence produced should be excluded. The Court
19 requested the documents in question to be filed under seal on the first day of the trial. (Tr. at 10-
20 11, Oct. 26, 2015). At no point did Defendants request a continuance in order to produce these
21 documents. In fact, Defendants in their Motion for New Trial fail to explain what if any action
22 they would have taken or done differently, had they had more time to do so.

23 As to the prejudicial effect of the evidence itself, Plaintiff also points out that in order to
24 recover punitive damages, the §1983 plaintiff must show defendant’s “evil motive or . . . reckless
25 indifference to the rights of others.” Smith v. Wade, 461 U.S. 30, 46-47 (1983). Accordingly, one
26 way for Mr. Howard to recover punitive damages against Defendant Jaeger was to introduce the
27 pattern of conduct evidence that the Court allowed.

28 The Court finds that the information regarding Defendant Jaeger’s prior bad acts associated

1 with his refusal to allow prisoners to bring witnesses in their proceedings was not unduly
2 prejudicial but rather crucial in the Plaintiff's ability to prove punitive damages on his Fourteenth
3 Amendment cause of action. While the information required to do so was disclosed perhaps later
4 than the Defendants, and indeed the Plaintiff, may have preferred, neither its introduction nor the
5 requirement that Defendants produce the information was unduly prejudicial.

6 Furthermore, the parties specifically addressed the possibility of bifurcating the trial at the
7 outset as to punitive damages, given the prior bad acts alleged by Defendants. While Plaintiff's
8 counsel requested bifurcation, Defendants expressly opposed it.

9 "THE COURT: So I guess my first question is this then. Are you moving to bifurcate this
10 trial as it relates to punitive damages?"

11 MR. BARRICK: Yes, Your Honor.

12 THE COURT: Okay. Ms. Menendez? Mr. Frost?

13 MS. MENENDEZ: Obviously, we disagree with it because we want to go forward."

14 (Tr. at 10, Oct. 26, 2015).

15 Therefore, the Defendants had the possibility of bifurcating the trial—an option that
16 opposing counsel requested and supported—for the purpose of isolating the prior bad acts as
17 evidence in support of punitive damages, but they specifically opposed bifurcation from the
18 beginning. A district "court's evidentiary rulings are reviewed for abuse of discretion and will not
19 be reversed absent prejudice to the party whose evidence was excluded." Glover v. BIC Corp., 6
20 F.3d 1318, 1328 (9th Cir. 1993). Just as failure to move for a mistrial weighs against a
21 determination of prejudicial effect of statements in closing argument, see Cooper, 945 F.2d at
22 1107, opposition to the mitigating procedure of bifurcation may weigh against declining to find
23 sufficient prejudice to merit undoing the jury's judgment on grounds of prejudicial evidence. Yet
24 even if Defendants had not opposed bifurcation, the Court finds that the prejudicial effect of the
25 evidence did not substantially outweigh its probative value, and thus it was properly admitted.

26 The Court therefore declines to grant a motion for new trial based on the prior bad act
27 evidence admitted.

28

1 **III. MOTION FOR ATTORNEY FEES, ECF NO. 200**

2
3 42 U.S.C. §1997e(d)(2)-(3) of the PLRA provides: “Whenever a monetary judgment is
4 awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25
5 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant. If
6 the award of attorney’s fees is not greater than 150 percent of the judgment, the excess shall be
7 paid by the defendant. No award of attorney’s fees in an action described in paragraph (1) shall be
8 based on an hourly rate greater than 150 percent of the hourly rate established under section
9 20006A of Title 18, United States Code, for payment of court-appointed counsel.” The Ninth
10 Circuit has found that the PLRA caps on attorney’s fees are constitutional. Madrid v. Gomez, 190
11 F.3d 990, 995-996 (9th Cir. 1999). The current Criminal Justice Act’s (“CJA”) maximum
12 compensation rate is \$127. This means the maximum hourly rate Plaintiff’s counsel can claim is
13 \$190.50 (which is 150% of \$127.00).

14 The Ninth Circuit has defined the contours of the PLRA and the cap on attorney fees as
15 follows: “[T]he cap in § (d)(2) does not apply to fees incurred on appeal by a prisoner who
16 successfully defends the verdict that he obtained in the district court. In other words, the § (d)(2)
17 cap applies only to fees incurred in securing the judgment in the district court and not to fees
18 incurred in defending the judgment on appeal.” Woods v. Carey, 722 F.3d 1177, 1179 (9th Cir.
19 2013) (emphasis added).

20 The parties agree that the PLRA cap applies to fees incurred to this point, where judgment
21 has not been entered and the Defendants have not yet appealed the judgment. The Court therefore
22 finds that the maximum hourly rate for Plaintiff’s counsel is \$190.50.

23 Turning to the specific fees incurred, the Court also finds that Plaintiff’s fees for both
24 counsel and his legal assistant are not duplicative, because the nature of the work done by counsel
25 and legal assistants is distinct. The Court incorporates its reasoning laid out in the hearing on
26 December, 14, 2015, and elaborates below, addressing the individual objections at this time
27 regarding billing for Plaintiff’s counsel.

28 **A. 11/6/2015 – 9.20 Hours**

1 The parties were told to report to Court by 9:00 a.m. on November 6, 2015. (Tr. at 94-95,
2 Nov. 4, 2015). Counsel was excused by the court by 2:10p.m.; thereby making the maximum time
3 at court related to the case approximately 5 hours.

4 Plaintiff argues that the entry for 9.20 hours accounts not only for being in trial but also for
5 debriefing with Plaintiff's legal assistant and a volunteer from Legal Aid.

6 Defendants argue that any conversations could have easily taken place while waiting for
7 the jury to deliberate and that amount should be cut to the time actually spent in court, taking into
8 account traveling back and forth. The Court should award no more than 7 hours for this entry.

9 Having verified the time of adjournment on November 6, 2015, The Court grants reduction
10 of the hours to 6.2 hours.

11 **B. 11/3/2015 – 4.40 Hours**

12 Defendant argues that Plaintiff billed over four hours for a response, which was a four page
13 document regurgitating his previous motion. (See Doc. 175). As such, the court should award no
14 more than 2 hours for the drafting of this document. The Court denies reduction of this entry. The
15 Court finds the billing to appropriate for the work done.

16 **C. 10/19/15 – 3.30 Hours**

17 Defendants argue that Plaintiff's counsel's entry includes "getting white board for trial."
18 However, Defendant ignores that this time also includes travel to attend an interview of Tyrone
19 Hutchins. The Court denies reduction of this entry.

20 **D. Any Entries Related to Conferences with Sabree (Phillip Lyons)**

21 Defendants argue that there are various entries related to conferences with Sabree Lyons,
22 which is indicative of double billing. For the reasons stated above, the Court denies reduction of
23 this entry, finding that Plaintiff's counsel is entitled to recover fees for work done in collaboration
24 with his legal assistant.

25 **E. Billing Entries Made Before Appointment of Counsel 4/22/15 to 4/28/15 – 1.8**
26 **Hours**

27 The Court denies reduction of this entry.

28 **F. Total Fees Granted**

1 Subtracting three hours for the November 6 entry, and applying the PLRA cap, the Court
2 grants Plaintiff's Motion in the amount of \$46,819.

3 This results from the following calculation:

4 --Travis N. Barrick: 178.4 hours x PLRA maximum rate of \$190.5/hour = \$33,985

5 --Mr. Lyons: 127.5 hours x \$100/hour = \$12,750

6 --Gallian, Welker, & Beckstrom, LC: (postage & trial exhibit) \$84

7 **Total: \$46,819**

8
9 **IV. CONCLUSION**

10 Based on the reasons stated above, the Court GRANTS in part and DENIES in part
11 Defendants' motion for new trial. (ECF No. 221). The Court GRANTS remittitur of punitive
12 damages against Defendant Rabourn from \$1,000 to \$50. The Court GRANTS the remittitur of
13 punitive damages against Defendant Connett as to the Equal Protection Claim in Count V from
14 \$2,200 to \$50. The Court DENIES the remainder of the motion.

15 The Court further GRANTS in part and DENIES in part Plaintiff's motion for attorney fees
16 consistent with its findings stated above. (ECF No. 200).

17
18 **DATED** this 17th day of October, 2017.

19
20 

21 **RICHARD F. BOULWARE, II**
22 **UNITED STATES DISTRICT JUDGE**