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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-56005
D.C. No. 8:14-cv-01050-CJC-DFM

[Filed April 30, 2018]

MARY GORDON, successor-in-interest for decedent, Matthew Shawn Gordon, individually, *Plaintiff-Appellant*,	)
v.	)
COUNTY OF ORANGE; ORANGE COUNTY SHERIFF'S DEPARTMENT; SANDRA HUTCHENS, Orange County Sheriff - Coroner; ORANGE COUNTY CENTRAL MEN'S JAIL; ORANGE COUNTY HEALTH CARE AGENCY; DOES, 5 through 10, Inclusive; ROBERT DENNEY; BRIAN TUNQUE; BRIANNE GARCIA; DEBRA FINLEY, *Defendants-Appellees.*	)

OPINION

App. 2

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted December 8, 2017
Pasadena, California

Filed April 30, 2018

Before: Kim McLane Wardlaw and Ronald M. Gould, Circuit Judges, and Yvonne Gonzalez Rogers,[*] District Judge.

Opinion by Judge Gonzalez Rogers

SUMMARY[**]

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42 U.S.C. § 1983

The panel vacated the district court's summary judgment in a 42 U.S.C. § 1983 action alleging claims of inadequate medical care under the Due Process Clause of the Fourteenth Amendment, arising from the death of Matthew Gordon when he was a pretrial detainee in the Orange County Men's Central Jail; and remanded for further proceedings.

The panel held that given developments in Section 1983 jurisprudence, including the Supreme Court's

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[*] The Honorable Yvonne Gonzalez Rogers, United States District Judge for the Northern District of California, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and this court's *en banc* opinion in *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016), the proper standard of review of such claims was one of objective indifference, not subjective indifference. The panel held that because the district court applied a subjective standard to the plaintiff's claims of inadequate medical care against individual defendants, the grant of summary judgment was in error.

The panel declined to address the individual defendants' claim of qualified immunity in the first instance.

The panel held that the district court improperly granted summary judgment for the County of Orange and associated entities on the ground that the plaintiff could not establish a custom or practice sufficient under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The panel left this question for the district court to address in the first instance using the proper standard.

COUNSEL

David A. Schlesinger (argued), Jacobs & Schlesinger LLP, San Diego, California; Cameron Sehat, The Sehat Law Firm PLC, Irvine, California; for Plaintiff-Appellant.

Pancy Lin (argued) and S. Frank Harrell, Lynberg & Watkins, Orange, California, for Defendants-Appellees.

OPINION

GONZALEZ ROGERS, District Judge:

This case arises from the death of Matthew Gordon ("Gordon") within 30 hours of being detained in the Orange County Men's Central Jail (the "County Jail"). Plaintiff Mary Gordon, successor-in-interest for decedent, sued defendants Robert Denny, Brian Tunque, Brianne Garcia, and Debra Finley ("the Individual Defendants"); and the County of Orange and associated entities ("the Entity Defendants") under 42 U.S.C. § 1983 for violating Gordon's right to adequate medical care under the due process clause of the Fourteenth Amendment. Given developments in Section 1983 jurisprudence, including the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and our *en banc* decision in *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016), we conclude that the proper standard of review for such claims is one of objective indifference, not subjective indifference. Accordingly, summary judgment is vacated and the case is remanded to the district court for further proceedings consistent with this decision.

PROCEDURAL HISTORY

The Individual Defendants sought summary judgment on the ground that the plaintiff lacked evidence of their alleged deliberate indifference to the decedent's health or safety. The Entity Defendants also sought summary judgment based upon the plaintiff's failure to show a custom or practice sufficient under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). In this regard, the plaintiff had proceeded on two theories which she alleged led to Gordon's death.

First, the plaintiff alleged the systematic use of the wrong intake form which resulted in the misclassification and misplacement of detainees. In particular, she claimed the Entity Defendants used a form designed to address alcohol withdrawal rather than one designed for opiate withdrawal. Second, she alleged the systematic failure to conduct welfare checks or "safety checks" from a vantage point which allowed for visual observation of the safety and welfare of all inmates.

The district court granted summary judgment in favor of the Individual Defendants reasoning that a due process challenge based on inadequate medical care required a showing of subjective deliberate indifference and that there was insufficient evidence to support that showing. The district court also granted summary judgment in favor of the Entity Defendants on the plaintiff's *Monell* claim on the ground that the plaintiff failed to present sufficient evidence of a custom or practice. The plaintiff timely appealed.

BACKGROUND

The events at issue began on September 8, 2013 at 6:47 p.m. and ended on September 9, 2013 at 11:00 p.m. Within less than 30 hours, Matthew Gordon died while detained in Module C, Tank 11 of the Orange County Jail.

On September 8, 2013, the Placentia Police Department arrested Gordon on heroin-related charges and transported him to the County Jail. Defendant nurse Debra Finley ("Nurse Finley") conducted an intake assessment of Gordon at 6:47 p.m. during which she inquired whether he "use[d] any street drugs." In

response Gordon indicated that he used "[h]eroine, by IV, at 3 grams a day." To evaluate Gordon, Nurse Finley used an assessment form designed for alcohol withdrawal, entitled Clinical Institute Withdrawal Assessment for Alcohol ("CIWA"). She did not use the county's "Clinical Opiate Withdrawal Scale" ("COWS") assessment form.

Thereafter, defendant Nurse Finley consulted with non-party Dr. Thomas Le (a consulting physician) ("Dr. Le") who issued an "Opiate WD [Withdrawal] Order." Therein, Dr. Le both ordered that Gordon be placed in regular housing rather than medical unit housing and prescribed Tylenol for pain, Zofran for nausea, and Atarax for anxiety. Dr. Le apparently crossed out a section under the heading "Nursing Detox Assessments" which stated "COWS and Vital Signs on admission and daily x5" and instead handwrote "CIWA x 4 Days," that is, Gordon was to receive the ordered protocol for four days. Nurse Finley completed the intake assessment and had no further contact with Gordon.

The plaintiff's nursing expert opined that the county's COWS form would have measured symptoms specific to opiate withdrawal and triggered a need to house Gordon in the Medical Observation Unit where Gordon would have been monitored more closely. The plaintiff's expert further opined that had the COWS form been used, it is more probable than not that Gordon would have been found to be in medical distress hours prior to his death. The plaintiff proffered evidence that the Entity Defendants did not use the COWS form systematically, and changed their practice after Gordon's death.

Following his intake assessment, Gordon waited for nearly ten hours to be assigned a space in the County Jail's general population. During this time a fellow detainee observed Gordon vomit continuously for 30–45 minutes and "curl up in a ball." At approximately 8:30 a.m. on September 9, 2013, Gordon was transferred to Module C, Tank 11 in the County Jail along with a "module card" to advise the deputies that Gordon required medical attention. While Gordon was in Module C, defendant nurse Brianne Garcia, on three occasions, administered the medications which Dr. Le prescribed but had no further interaction with the decedent.

Defendant Deputy Denny ("Deputy Denny") conducted a welfare check of Module C at approximately 6:47 p.m. on September 9, 2013. He then conducted a second and third check after lights out at 8:31 p.m. and 9:29 p.m., respectively. The stated purpose of the checks was to "maintain the safety and health of the inmates and the security of the facilities" with "direct visual observation of each inmate . . . ." Deputy Denny testified that he conducted these three welfare checks from a corridor which was twelve to fifteen feet away from Gordon's bunk and was elevated approximately six feet from the Tank 11 floor. The plaintiff's evidence suggests that the checks were further obscured by a glass corridor. In any event, Deputy Denny acknowledged that from his vantage point he was unable to determine whether an inmate was "breathing," "alive," or had "potential indicators of a physical problem."

At approximately 10:46 p.m., inmates in Module C yelled "man down" to the deputies, the man being

Gordon. Deputy Denny arrived within a couple of minutes. He testified that upon his arrival Gordon's "face was blue, he was unresponsive and his skin was cold to the touch." Medical staffers arrived a few minutes later and attempted to administer care. At 11:00 p.m. paramedics transported Gordon to Western Medical Center in Santa Ana where he was pronounced dead. The record reflects that defendant Brian Tunque was the supervising Sergeant on the night of the incident but was apparently not otherwise involved in events described herein.

STANDARD OF REVIEW

We review the district court's decision to grant summary judgment de novo. *Qwest Commc'ns Inc. v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006). Thus, viewing the evidence in the light most favorable to the nonmoving party, we must determine whether the district court correctly applied the relevant substantive law, and if so, whether genuine issues of material fact exist. *Fichman v. Media Ctr.*, 512 F.3d 1157, 1159 (9th Cir. 2008) (internal citation omitted).

DISCUSSION

A. Section 1983 Claims after *Castro*

With this Court's *en banc* decision in *Castro*, we rejected the notion that a subjective deliberate indifference standard applied globally to all section 1983 claims, whether brought by pretrial detainees or by convicted prisoners. *Castro*, 833 F.3d at 1069–71. This decision addresses the standard for claims brought by pretrial detainees for inadequate medical care.

We briefly recount the jurisprudential history relevant here. In *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), the Supreme Court held that prison officials' "deliberate indifference to serious medical needs of prisoners" violates the Cruel and Unusual Punishment Clause of the Eighth Amendment. In 1986, we concluded in *Carnell* that "even though pretrial detainees[sic] claims 'arise under the due process clause [of the Fourteenth Amendment], the [E]ighth [A]mendment guarantees provide *a minimum standard of care* for determining rights as a pretrial detainee, including rights . . . to medical care.'" *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996) (quoting *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (emphasis in *Carnell*)). Thus, prior to our decision in *Castro*, all conditions of confinement claims, including claims for inadequate medical care, were analyzed under a subjective deliberate indifference standard whether brought by a convicted prisoner under the Eighth Amendment or pretrial detainee under the Fourteenth Amendment. *See Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1242–43 (9th Cir. 2010) (finding a single "deliberate indifference" test for plaintiffs who bring a constitutional claim—whether under the Eighth Amendment or the Fourteenth Amendment).[1]

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[1] *Clouthier* concerned a medical care case in which the parents of a pretrial detainee claimed that jail officials violated the due process rights of their son by failing to address his medical needs, in particular there, suicide prevention. *Clouthier*, 591 F.3d at 1240. The Court interpreted prior precedent "to require proof of punitive intent for failure-to-protect claims, whether those claims arise in a pretrial or a post-conviction context." *Castro*, 833 F. 3d at 1068 (citing *Clouthier*, 591 F.3d at 1236). "We further held that this standard incorporates the *subjective* test . . . ." *Id.* (citing *Clouthier*,

In *Castro* we noted that our decision in *Clouthier* to create a single "deliberate indifference" standard for constitutional claims brought under the Eighth and Fourteenth Amendments was "cast . . . into serious doubt" by the Supreme Court's holding in *Kingsley*. *Castro*, 833 F.3d at 1068. In *Kingsley*, the Supreme Court had considered "whether, to prove an excessive force claim a pretrial detainee must show that the officers were *subjectively* aware that their use of force was unreasonable, or only that the officers' use of force was *objectively* unreasonable." *Kingsley*, 135 S. Ct. at 2470 (emphasis in original). The Supreme Court

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591 F.3d at 1242) (emphasis in original). Under this subjective test, the *Clouthier* Court held that "[a]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation," cannot support liability under the Fourteenth Amendment. *Clouthier*, 591 F.3d at 1242 (quoting *Farmer v. Brennan*, 511 U.S. 825, 838 (1994)).

Clouthier relied upon both *Farmer*, *supra*, and *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (finding that inmates who sue prison officials for injuries suffered while in custody may do so under the Eighth Amendment's Cruel and Unusual Punishment Clause or, if not yet convicted under the Fourteenth Amendment's Due Process Clause). In *Farmer*, the Supreme Court held that a prison official cannot be liable under the Eighth Amendment's Cruel and Unusual Punishment Clause for denying an inmate adequate conditions of confinement "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." 511 U.S. at 837. We interpreted *Farmer* to stand for the proposition that "the official must demonstrate a *subjective awareness* of the risk of harm." *Conn v. City of Reno*, 591 F.3d 1081, 1096 (9th Cir. 2010), *cert. granted and judgment vacated*, 563 U.S. 915 (2011), *opinion reinstated in relevant part*, 658 F.3d 897 (9th Cir. 2011) (emphasis in original).

identified two "separate state-of-mind questions," namely the defendant's state of mind regarding (i) "his physical acts—*i.e.*, his state of mind with respect to the bringing about of certain physical consequences in the world" and (ii) "whether his use of force was excessive." *Id*. at 2472. With regard to the first question, defendants did not dispute that the officers' use of force was intentional. With regard to the second question, the Court held that "the relevant standard is objective not subjective." *Id*. Put differently, the Supreme Court explained that "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable." *Id*. at 2473.

Interpreting *Kingsley*, our decision in *Castro* extended the objective standard to failure-to-protect claims, reasoning, in part, that "Section 1983 itself 'contains no state-of-mind requirement independent of that necessary to state a violation' of the underlying federal right." *Castro*, 833 F.3d at 1069 (quoting *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 405 (1997)); *see also Daniels v. Williams*, 474 U.S. 327, 330 (1986). We concluded that as with excessive force claims, failure-to-protect "claims arise under" the same constitutional framework. *Castro*, 833 F.3d at 1069–70. Thus "it does not matter whether the defendant understood that the force used was excessive, or intended it to be excessive, because the standard is purely objective." *Id*. at 1068 (citing *Kingsley*, 136 S. Ct. at 2472–73). In short, in *Castro*, we declared that *Kingsley* "expressly rejected the interpretation of *Bell* on which we had relied in *Clouthier* . . . . [and] the notion that there exists a single 'deliberate indifference' standard applicable to *all* § 1983 claims, whether brought by pretrial

detainees or by convicted prisoners." *Id*. (Emphasis in original.)

B. Claims for Inadequate Medical Care by Pretrial Detainees

While *Kingsley* did "not necessarily answer the broader question of whether the objective standard applies to all Section § 1983 claims brought under the Fourteenth Amendment against individual defendants[,]" (*id.*) logic dictates extending the objective deliberative indifference standard articulated in *Castro* to medical care claims.[2] First, the landscape remains the same. As noted, we remain in a realm where "Section 1983 itself 'contains no state-of-mind requirement independent of that necessary to state a violation' of the underlying federal right" (*id*.) and here, the medical care claims brought by pretrial detainees also "arise under the Fourteenth Amendment's Due Process Clause, rather than under the Eighth Amendment's Cruel and Unusual Punishment Clause" (*id.* at 1069–70). Notably, the "broad wording of *Kingsley* . . . . did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally." *Id*. at 1070 (quoting *Kingsley*, 135 S. Ct. at 2473–74).

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[2] The Second Circuit also recently extended the objective deliberate indifference standard to all conditions of confinement claims brought under the due process clause of the Fourteenth Amendment. *See Darnell v. City of New York,* 849 F.3d 17, 36 (2d Cir. 2017) (opining on a wide range of conditions of confinement claims brought by twenty pretrial detainees, the court held "[c]onsistency with the Supreme Court's decision in *Kingsley* now dictates that deliberate indifference be measured objectively in due process cases").

Second, the Supreme Court has treated medical care claims substantially the same as other conditions of confinement violations including failure-to-protect claims. For instance in 1991, in *Wilson v. Seiter*, the Supreme Court saw "no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement.' Indeed, the medical care a prisoner receives is just as much a 'condition' of his confinement as . . . the protection he is afforded against other inmates." *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). Third, we have long analyzed claims that government officials failed to address pretrial detainees' medical needs using the same standard as cases alleging that officials failed to protect pretrial detainees in some other way.[3] *Simmons v. Navajo Cty., Ariz.*, 609 F.3d 1011, 1017–18 (9th Cir. 2010); *Clouthier*, 591 F.3d at 1241–42; *Lolli v. County of Orange*, 351 F.3d 410,418–19 (9th Cir. 2004).

Accordingly, we hold that claims for violations of the right to adequate medical care "brought by pretrial detainees against individual defendants under the Fourteenth Amendment" must be evaluated under an objective deliberate indifference standard. *Castro*, 833 F.3d at 1070. Based thereon, the elements of a pretrial detainee's medical care claim against an individual

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[3] Correspondingly, other circuit courts treat failure-to-protect claims as claims alleging failure to provide adequate medical care. *See Young v. City of Mount Rainier*, 238 F.3d 568, 575 (4th Cir. 2001) (concluding that a failure-to-protect claim was "no different in any meaningful respect from the indifferent-to-medical-needs claim"); *Hare v. City of Corinth*, 74 F.3d 633, 644 (5th Cir. 1996) (*en banc*) (noting "the absence of a constitutionally significant distinction between failure-to-protect and medical care claims").

defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries. "With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily 'turn[ ] on the facts and circumstances of each particular case.'" *Id.* at 1071 (quoting *Kingsley*, 135 S. Ct. at 2473; *Graham v. Connor*, 490 U.S. 386, 396 (1989)). The "'mere lack of due care by a state official' does not deprive an individual of life, liberty, or property under the Fourteenth Amendment." *Id*. (quoting *Daniels*, 474 U.S. at 330–31). Thus, the plaintiff must "prove more than negligence but less than subjective intent—something akin to reckless disregard."[4] *Id*.

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[4] This differs from the inquiry under the Eighth Amendment which requires that the "prison official must *subjectively* have a sufficiently culpable state of mind." *Id*. at 1070–71 (quoting *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1049 (9th Cir. 2002) (emphasis in original)). "A prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Estate of Ford*, 301 F.3d at 1050 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). By contrast "a pretrial detainee need not prove those

Because the district court applied a subjective standard to the plaintiff's claim of inadequate medical care, the grant of summary judgment was in error.

C. Qualified Immunity Under an Objective Standard

The Individual Defendants argue that even under an objective deliberate indifference standard they are immune from liability under the doctrine of qualified immunity. The district court did not reach this issue. Accordingly, we decline to address the question of qualified immunity in the first instance.

D. The *Monell* Claim against the Entity Defendants

The district court also granted summary judgment for the Entity Defendants on the ground that the plaintiff could not establish a custom or practice sufficient under *Monell*. In light of this opinion, the grant of summary judgment was improper. We also leave this question for the district court to address in the first instance using the proper standard.

Accordingly, summary judgment as to all defendants is **VACATED** and **REMANDED** for further proceedings consistent with this opinion.

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subjective elements about the officer's actual awareness of the level of risk." *Castro*, 833 F.3d at 1071.

APPENDIX B

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No.: SACV 14-01050-CJC(DFMx)

[Filed June 14, 2016]

MARY GORDON, successor-in-interest for decedent, Matthew Shawn Gordon, individually,	)
Plaintiff,	)
v.	)
COUNTY OF ORANGE; ORANGE COUNTY SHERIFF'S DEPARTMENT; ORANGE COUNTY SHERIFF-CORONER SANDRA HUTCHENS; ORANGE COUNTY CENTRAL MEN'S JAIL; ORANGE COUNTY HEALTH CARE AGENCY; ROBERT DENNEY, an individual; BRIAN TUNQUE, an individual; BRIANNE GARCIA, an individual; DEBRA FINLEY, an individual; and DOES 5	)

through 10, inclusive,)
)
Defendants.)
_____)

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case concerns the death of Matthew Gordon while in custody at Orange County Men's Central Jail (the "Jail"). His mother and successor-in-interest, Mary Gordon, has brought this action against Orange County, numerous County subdivisions, Jail nurses Debra Finley and Brianne Garcia, and Jail guards Deputy Robert Denney and Sergeant Brian Tunque. This order addresses two separate motions for summary judgment, one filed by the entity defendants, (Dkt. 69), and the other filed by the individual defendants. (Dkt. 71.) For the following reasons, the Court GRANTS both motions.

II. BACKGROUND

On September 8, 2013, the Placencia Police Department arrested Mr. Gordon on heroin-related charges. (Dkt. 71-1, Individual Defs.' Statement of Undisputed Facts (ISUF) ¶ 1; Dkt. 71-2, Lin Decl. Ex. C at OCP 107-10.) Mr. Gordon was booked into the Jail that evening. (ISUF ¶ 2; Lin Decl. Ex C at OCP 107-110.) At 6:47 p.m. on September 8, during the intake evaluation at the Jail, Mr. Gordon informed the intake nurse, defendant Debra Finley, that he was addicted to heroin. The Correctional Health Services medical intake and triage sheet completed by Nurse Finley on that date asks: "Do you use any street drugs?" to which

Gordon responded: "Heroin, by IV, at 3 grams a day." (Dkt. 92, Pl.'s Statement of Additional Undisputed Facts (PAUF) ¶ 20.)

Based on Mr. Gordon's stated use of heroin, Jail medical staff concluded that Mr. Gordon should be placed on an opiate withdrawal program. (ISUF ¶ 6.) Dr. Thomas Le, who is apparently affiliated with the Jail in some capacity but is not a party to this case, was consulted and issued "Opiate Withdrawal Orders" for Mr. Gordon on September 8, 2013. (Dkt. 87, Sehat Decl. Ex. K.) Those orders indicated that (1) Mr. Gordon should be placed in regular housing rather than medical unit housing; (2) that he be administrated Tylenol for pain, Zofran for nausea, Atarax for anxiety, and Imodium for diarrhea and abdominal pain; and (3) that he be given a "nursing detox assessment" called CIWA for four days. (*Id.*) CIWA stands for Clinical Institute Withdrawal Assessment for Alcohol. (Sehat Decl. Ex. I.) In the Opiate Withdrawal Orders, Dr. Le wrote in "CIWA x 4 Days" next to the Nursing Detox Assessments and crossed out an option under the same heading labeled "COWS and Vital Signs on admission and daily x5." (Sehat Decl. Ex. K.) COWS stands for "Clinical Opiate Withdrawal Scale." (Sehat Decl. Ex G, Le Dep. at 50:13-15.) The COWS form measures symptoms specific to opiate withdrawal such as pupil size, bone/joint aches, runny nose or tearing, GI upset, yawning, and gooseflesh skin, whereas the CIWA form does not. (Sehat Decl. Ex. I and Ex. J.)

Dr. Le did not prescribe either methadone or Suboxone to Mr. Gordon, though he had prescribed those two medicines in the past to inmates withdrawing from heroin. (PAUF ¶ 31.) Suboxone is

used to alleviate pain and other heroin withdrawal symptoms, and to mitigate the risk of complications from withdrawal. (PAUF ¶ 32.)

Nurse Finley conducted Mr. Gordon's first and only documented CIWA evaluation at 6:47 p.m. on September 8. (PAUF ¶ 23.)[1] Nurse Finley recommended that he be housed on a lower bunk rather than a top bunk because it was easier to get in and out of a lower bunk and because of the possibility of Mr. Gordon having a seizure triggered by heroin withdrawal. (Dkt. 87, Sehat Decl. Ex. F, Finley Dep. at 103:1-10.) When asked whether a seizure can cause someone to die as a result of heroin withdrawal, Nurse Finley indicated that "seizures can cause people to die whether they're heroin addicts or not." (Finley Dep. at 103:14-19.) Nurse Finley recommended that Mr. Gordon be housed in regular housing rather than the infirmary. (*Id*. at 113:2-14.) Mr. Gordon was transferred to Module C, Tank 11 in the Jail at approximately 8:30 a.m. on September 9. (PAUF ¶ 45.) Between the 6:47 p.m. intake the night before and the 8:30 a.m. transfer, Nurse Finley did not assess Mr. Gordon for opiate withdrawal symptoms and she was not aware of any of her colleagues having done so.

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[1] Defendants have objected to the assertion that this was the only CIWA evaluation conducted because this fact is, as they would have it, "irrelevant." (Dkt. 96-1, Indiv. Defs.' Resp. to PAUF ¶ 23.) Because the care Mr. Gordon received while in custody is obviously material to a death case asserting defendants' deliberate indifference and negligence with respect to his medical care, this objection is overruled. The Court will not rule on Defendants' many other relevance-based objections individually. If a given fact that had been objected to on relevance grounds appears in this opinion, the Court found the fact relevant and overruled the objection.

(Finley Dep. at 55:5-19.) When Mr. Gordon was transferred to Module C, his "module card"—a document given to the deputies in charge of the module—indicated "Medical Attention Required." (Sehat Decl. Ex. A, Denney Dep. at 158:1-10.)

Multiple inmates testified that Mr. Gordon exhibited withdrawal symptoms on September 8 and 9. One testified that during new inmate processing, Mr. Gordon had problems with "continuous vomiting" for a half an hour or 45 minutes, and that during that time he would cycle between curling up in a ball, getting up to vomit, and dry heaving. (Sehat Decl. Ex. D, Wood Dep. at 26:6-14.) That inmate continued to observe Mr. Gordon on September 9, after they were housed near each other in Module C, and noted that Mr. Gordon looked sick and worse than he had when he arrived. (*Id.* at 43:10-44:2.) A second inmate, David Magar also noted that Mr. Gordon appeared ill. (Sehat Decl. Ex. E, Magar Dep. at 52:10-20.)

Once Mr. Gordon arrived in Module C, Mr. Magar approached him and introduced himself. (Magar Dep. at 18:8-9.) Mr. Magar had taken on the role of orienting new inmates and explaining the house rules to them. (*Id.* at 21:3-11.) Mr. Gordon told Mr. Magar that he was very sick because he was withdrawing from heroin. (*Id.* at 18:11-12.) Despite Nurse Finley's direction to put Mr. Gordon in a bottom bunk, Mr. Gordon wound up in a top bunk because other inmates had already taken all the bottom ones. (*Id.* at 40:2-15.)

According to Mr. Magar, the inmates tend to talk to the guards in a group and are not "allowed" to talk to the guards individually, based on fear that one inmate will give information about another inmate to the

guards. (Magar Dep. at 30:1-31:10.) Mr. Magar himself was able to talk to the guards individually because he had been there for a long time and was trusted to talk to the guards without divulging information about other inmate. (*Id.*) It was Mr. Magar's role, therefore, to get toilet paper, medical slips, and other supplies from the guards. (*Id.*) When an inmate is sick, he will ask Mr. Magar for a medical slip. (*Id.*) Mr. Magar never requested a medical slip for Mr. Gordon. (*Id.* at 31:19-21.) According to Mr. Magar, Mr. Gordon got in bed and never got off of his bunk. (*Id.* at 20:15-17.)

On September 9, 2013, Mr. Gordon was administered the medicine Dr. Le prescribed three times. (ISUF ¶ 9.) Nurse Garcia's records indicate that she dispensed the last of Mr. Gordon's medication at approximately 8:30 p.m. on September 9, 2013. (PAUF ¶ 52.) She had no interaction with him other than to give him the medication. (PAUF ¶ 53.)

At approximately 6:47 p.m. that evening, Deputy Denney and nonparty Deputy Rivas conducted a check of the inmates that included a physical count of all the inmates in Module C, including Tank 11. (ISUF ¶ 12.) Deputy Denney conducted two welfare checks of Module C after lights out on September 9, 2013, one at 8:31 p.m. and one at 9:29 p.m. (PAUF ¶ 55.) According to Deputy Denney, the corridor from where he did the safety checks on September 9, 2013 was about 12 to 15 feet from Mr. Gordon's bunk and is elevated about six feet from the Tank 11 floor. (Denney Dep. at 139:7-20.) When asked what the purpose of the inmate welfare checks was, he indicated that it was to "make sure inmates are breathing, they aren't involved in physical altercations, they're not bleeding, they're in the cell or

dorm, they're alive, they're—they're not asking for help. If they are, that's why we're there." (*Id.* at 138:1-7.) When further questioned, however, Deputy Denny acknowledged that from the corridor where he performed the check, he could not see whether an inmate was breathing, alive, sweating profusely, drooling, or had any potential indicators of a physical problem. (*Id.* at 138:11-139:6.) Deputy Denney testified that in late 2014 or early 2015, after Mr. Gordon's death, guards began doing inmate welfare checks from a close vantage point that gave them a better view of sleeping inmates, but that before that time the checks were done from the corridor. (*Id.*at 135:4-23.)

Plaintiff's briefing references an additional welfare check performed by Sergeant Tunque at 9:55 p.m. and asserts that it was deficient, (PAUF ¶¶ 66-67), but the pages of Sergeant Tunque's deposition cited for that proposition are not included in Plaintiff's filing. (*See* Sehat Decl. Ex. B.) It is therefore impossible for the Court to consider the evidence supporting that allegation. The welfare check log indicates that another deputy conducted a welfare check at 10:10 p.m. on September 9, but it is not clear who conducted the check or whether it occurred. (PAUF ¶ 64.)

At about 10:45 p.m. on September 9, inmates in Module C alerted of a "man down." (PAUF ¶ 69.) Deputy Denney arrived at Module C within a couple minutes of the inmates' alert. (PAUF ¶ 69.) It took about 10 minutes for the medical staff to arrive. (*Id.*) When Deputy Denney first arrived, Mr. Gordon's face was blue, he was unresponsive, and his skin was cold to the touch. (Denney Dep. ¶ 199:15-18.) Mr. Gordon's eyes were open and there was a 10-inch pool of sweat

on his sheets. (*Id.* at 199:19-20; 205:5-9.) Mr. Gordon was eventually pronounced dead and Dr. Cohen, the county coroner, performed an autopsy on Mr. Gordon's body. The cause of death was deemed to be "acute cardiorespiratory arrest due to chronic substance abuse with hypertrophy and dilation of the heart." (Dkt. 69-2, Lin Decl. ¶ 6, Ex. E at 3.) The autopsy report also noted that Mr. Gordon exhibited signs of "opioid (heroin) toxicity." (*Id.*) Plaintiff's expert, Dr. John Hiserodt, contests this conclusion, faulting Dr. Cohen for not performing a microscopic examination of the various preserved organs in order to rule out other possible causes of death. (Dkt. 88, Hiserodt Decl. ¶ 5.) Dr. Hiserodt asserts that it was not possible to determine the immediate cause of death in this case without a complete autopsy. (*Id.* ¶ 6.) He also asserts that Mr. Gordon was not experiencing opioid toxicity at the time of his death, as evidenced by the level of morphine in Mr. Gordon's blood at the time of his death. (*Id.* ¶ 8.)

Section 1716 of the Orange County Sheriff's Department jail safety check policy provides that "[a] safety check is a direct visual observation of each inmate located in an area of responsibility to provide for their health and welfare. The purpose of the safety checks is to maintain the safety and health of the inmates and the security of the facilities." (PAUF ¶ 59.) Despite this requirement, the majority of the Module C, Tank 11 safety checks conducted before late 2014 or early 2015 were done from the corridor at a distance that made it hard to determine whether individual inmates were alive or breathing. (PAUF ¶ 61.)

Plaintiff's expert on proper prison and jail procedures asserts that under Title 15, § 1027 of the

California Code of Regulations, staff must be close enough to the inmate to see the inmate's skin, if the inmate is alive, if the inmate is in medical distress (health and welfare), if the inmate has been assaulted, if the inmate is involved in criminality, and if the inmate is there at all. (Dkt. 90, Lichten Decl. ¶ 6.) That list of requirements does not, however, appear in the text of § 1027 itself and the expert does not indicate its source.

Nothing in the record indicates that Mr. Gordon was ever checked under either the CIWA protocol that was administered or under the more rigorous COWS protocol after Nurse Finley first evaluated him at 6:47 p.m. on September 8. (PAUF ¶ 33.) Mr. Gordon was supposed to have undergone his second CIWA on September 9, 2013, but no evidence in the record indicates that he did. (PAUF ¶ 33.)

III. LEGAL STANDARD

The Court may grant summary judgment on "each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). Summary judgment is proper where the pleadings, the discovery and disclosure materials on file, and any affidavits show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.*; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 325. A factual issue is "genuine" when there is sufficient evidence such that a reasonable trier of fact could resolve the issue in the nonmovant's favor. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" when its resolution might affect the outcome of the suit under the governing law, and is determined by looking to the substantive law. *Id*. "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 249.

Where—as here—the nonmovant will have the burden of proof on an issue at trial, the moving party may discharge its burden of production by either (1) negating an essential element of the opposing party's claim or defense, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-60 (1970), or (2) showing that there is an absence of evidence to support the nonmoving party's case, *Celotex Corp.*, 477 U.S. at 325. Once this burden is met, the party resisting the motion must set forth, by affidavit, or as otherwise provided under Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The opposing party must show more than the "mere existence of a scintilla of evidence"; rather, "there must be evidence on which the jury could reasonably find for the [opposing party]." *Anderson*, 477 U.S. at 252. In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party, and draw all justifiable inferences in its favor. *Id.* at 255.

IV. ANALYSIS

A. The § 1983 Claim against the Individual Defendants

Here, Plaintiff is asserting a constitutional claim based on Defendants' failure to prevent harm to Mr. Gordon. This claim has both an objective and a

subjective component. *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1242 (9th Cir. 2010) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). The first, objective component is met if the inmate shows that "he is incarcerated under conditions posing a substantial risk of serious harm." *Id*. The Court will assume that this first requirement was met. The second, subjective component "is met if the claimant shows that the detention official's state of mind is one of deliberate indifference to the inmate's health or safety." *Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013); *Clouthier*, 591 F.3d at 1242-43 (internal quotation marks removed). The Ninth Circuit has defined deliberate indifference to be the "conscious or reckless disregard of the consequences of one's acts or omissions. It entails something more than negligence but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Gantt v. City of Los Angeles*, 717 F.3d 702, 708 (9th Cir. 2013); *Tatum v. Moody*, 768 F.3d 806, 821 (9th Cir. 2014). The test for deliberate indifference is "a subjective test in that 'the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Clouthier*, 591 F.3d at 1242 (citing *Farmer*, 511 U.S. at 837). "An official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under out cases be condemned as the infliction of punishment." *Id.* (quoting *Farmer*, 511 U.S. at 838). There is not sufficient evidence in the record with respect to any of the individual defendants for a reasonable trier of fact to conclude that their actions rose to the level of deliberate indifference.

1. Nurse Finley

Plaintiff faults Nurse Finley for "evaluating a person suffering from obvious signs of narcotic withdrawal with a checklist for alcohol withdrawal, all the while when an appropriate form for opiate withdrawal was available which could have led to the proper treatment being given." (Pl.'s Opp'n Br. at 20.) This criticism of Nurse Finley's actions fails to acknowledge the fact that on the Opiate Withdrawal Orders, Dr. Le crossed out COWS and wrote in CIWA. (Sehat Decl. ¶ K.) The record does not indicate why he did this. Nurse Finley implemented the CIWA protocol as Dr. Le instructed. There is nothing in the record indicating—with respect to the subjective deliberate indifference standard—that Nurse Finley knew that applying the CIWA protocol rather than the COWS protocol would put Mr. Gordon in danger.

Nurse Finley did acknowledge that it is possible for a person withdrawing from heroin to have a seizure, and that a seizure can lead to death, but there is no indication that she subjectively believed that implementing the CIWA protocol rather than the COWS protocol would leave Mr. Gordon at a heightened risk of having a seizure or with inadequate care in the event that he did have one. And though Nurse Finley acknowledges that she assigned Mr. Gordon to regular inmate housing rather than the medical unit, this, too, was in accord with the instructions provided by Dr. Le on the Opiate Withdrawal Orders he completed for Mr. Gordon. (Sehat Decl. ¶ K.) Nothing in the record suggests that Nurse Finley believed this left Mr. Gordon with a substantial risk of serious harm.

2. Nurse Garcia

Plaintiff argues that Nurse Garcia was supposed to evaluate whether Mr. Gordon was suffering from any signs of withdrawal but failed to do so, and that she had no interaction with Mr. Gordon other than giving him his over-the-counter medications during the last pill call. (Pl.'s Opp'n Br. at 21.) Plaintiff's brief argues that "a jury could conclude that she . . . was simply oblivious to Mr. Gordon's distress, something amounting to deliberate indifference because it could lead to the denial of proper medical treatment." (*Id.*) Simple obliviousness, however, is insufficient for Nurse Garcia to be liable under the high subjective standard for deliberate indifference. There is no indication in the record that Nurse Garcia was aware of the dangers of heroin withdrawal, noticed anything about Mr. Gordon's symptoms, or otherwise learned of and then ignored a danger to Mr. Gordon. It is therefore clear that no jury could reasonably find her to be deliberately indifferent to Mr. Gordon's distress based on the evidence Plaintiff has pointed to here.

3. Deputy Denney and Sgt. Tunque

Plaintiff faults Deputy Denney and Sgt. Tunque for ignoring Mr. Gordon's obvious signs of heroin withdrawal, which were observed by other inmates. (*See* PAUF ¶¶ 26, 27, 28, 47.) But the testimony of the other inmates in Module C with Mr. Gordon was that he spent almost the entire day in bed. And rather than asserting that the defendant guards saw and ignored Mr. Gordon in distress, the briefing asserts that the guards were remiss by failing to get close enough to Mr. Gordon to even see whether he was breathing or alive. There is no testimony or other evidence in the

record indicating that either guard saw Mr. Gordon in trouble and then ignored him. There is also no evidence in the record indicating that either guard was aware that Mr. Gordon was in acute heroin withdrawal and was aware of the potential dangers of that withdrawal, as would be required to conclude that either officer was deliberately indifferent to Mr. Gordon's medical needs.

B. The *Monell* Claim against Orange County

Though Plaintiff has brought claims against a number of different entity defendants, a subsidiary of a public entity is a non-suable entity inasmuch as it is not a public entity itself, but rather is part of a suable public entity. *See United States v. Kama*, 394 F.3d 1236, 1239-40 (9th Cir. 2005) ("municipal police departments and bureaus are generally not considered 'persons' within the meaning of 42 U.S.C. § 1983"); *Vance v. Cty. of Santa Clara*, 928 F. Supp. 993, 996 (N.D. Cal. 1996) ("The County is a proper defendant in a § 1983 claim, an agency of the County is not.") Here, Plaintiff does not contest Defendants' assertion that Orange County Sheriff's Department, Orange County Sheriff-Coroner, Orange County Central Men's Jail, and Orange County Health Care Agency are non-suable subdivisions of defendant Orange County. (*See* Pl.'s Opp'n at 1 n.1; PAUF ¶¶ 8, 9, 10, 11) Accordingly, those subdivisions are dismissed from the case, and this section will solely address the claim against the one remaining entity defendant, Orange County.

In *Monell v. New York City Dept. of Social Services*, the Supreme Court held that liability under 42 U.S.C. § 1983 may be imposed on local governments when their official policies or customs cause their employees to violate another's constitutional rights. 436 U.S. 658,

690-91 (1978). A plaintiff may establish *Monell* liability by showing that a city employee committed an alleged constitutional violation pursuant to a formal governmental policy or a "longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992). A "policy" is a "deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Fogel v. Collins*, 531 F.3d 824, 834 (9th Cir. 2008). A practice of inadequate training also constitutes a policy giving rise to § 1983 liability. *Merritt v. Cty. of Los Angeles*, 875 F.2d 765, 769 (9th Cir. 1989). A municipality may be liable under § 1983 where "that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants." *City of Canton v. Harris*, 489 U.S. 378, 392 (1989).

A "custom" is a "widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quotes omitted). A municipal government may be liable as a result of a "governmental custom even though such a 'custom' has not received formal approval through the body's official decision-making channels." *Monell*, 436 U.S. at 691. Nonetheless, "[l]iability for custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

Here, Plaintiff concedes that she is not arguing that Mr. Gordon suffered a deprivation of his constitutional rights on the basis of a consciously adopted policy by a final decision maker. (Pl.'s Opp'n Br. at 14:4-5.) She also characterizes her allegations of inadequate training as "an alternate theory that was not vigorously followed," (*Id.* at 13:18-19), and offers no argument to support a failure to train theory in her briefing. Accordingly, the Court concludes that she is grounding her *Monell* claim solely in the argument that the County engaged in customs or practices that resulted in the violation of Mr. Gordon's constitutional rights. Plaintiff points to two alleged customs in particular: the use of the CIWA form rather than the COWS form on intake and the guards' practice of conducting inmate safety checks from the corridor rather than a place where they would have a better view of inmates.

With respect to the CIWA form, nothing in Plaintiff's briefing says anything at all about how "permanent and well settled" the practice of using the CIWA form rather than the COWS form was. (*See* Pl.'s Opp'n Br. at 2-3, 14-15.) The briefing asserts that "[t]he use of the wrong substance abuse assessment tool apparently was standard practice by defendant County" and cites PAUF ¶ 25 as evidentiary support for that statement. (Pl.'s Opp'n Br. at 3.) PAUF ¶ 25 states that "[t]he county had been using a generic alcohol related CIWA to treat inmate withdrawing from opiates despite the availability of the COWS assessment on the day of Matthews of death (sic)." As evidentiary support for this, it cites Nurse Finley's deposition at 64:8-13, testimony with no apparent relation to the issue. (Sehat Decl. Ex. F, Finley Dep. at

64:8-13.) In addition, it cites the County's response to Plaintiff's Request for Production No. 51, which was for any documents "relating to the Orange County Healthcare Agency Service's Clinical Opiate Withdrawal Symptoms ("COWS) policies and procedures including the actual COWS chart currently in use at the Central Men's Jail. (Sehat Decl. Ex. J at 3-4.) In response, Orange County produces the COWS form used in 2013, the COWS form in use as of January 2014, and the current policy referencing the use of COWS, which did not go into effect until October 2013. (*Id.*) None of this establishes what the custom or practice with regard to CIWA and COWS was or was not on the date of Mr. Gordon's death, September 9, 2013 and nothing cited from the record indicates why Dr. Le opted to cross out COWS on the Opiate Withdrawal Orders and write in CIWA instead.

With respect to the safety checks, Plaintiff argues that the County had a custom or policy of allowing the checks to be performed in an manner that violated both the Jail's own policy and Title 15 § 1027 of the California Code of Regulations. The Jail's policy requires staff to "conduct safety checks from a location which provides a clear, direct view of each inmate. Staff will observe each inmate's presence and apparent condition and investigate any unusual circumstances or situations." (Sehat Decl. Ex T.) And Plaintiff argues that compliance with Title 15 requires the staff member conducting the safety check to be close enough to determine whether or not a given inmate needs medical attention. (PAUF ¶ 60.) Plaintiff's expert opined that "[h]ad the safety checks been properly performed from inside the housing location (where you can see if the inmate is breathing or not, whether the

inmate was in medical distress, etc.), Mr. Gordon would have been found in medical distress hours earlier. Because he was not, he was not given prompt medical care for his medical needs." (Dkt. 90, Lichten Decl. ¶ 7.)

But even assuming that the acts of the guards violated Jail policy and Title 15, those violations do not themselves establish a constitutional violation. As one Court in this district has concluded, "[t]o the extent that the violation of a state law amounts to the deprivation of a state-created interest that reaches beyond that guaranteed by the federal Constitution, Section 1983 offers no redress. Accordingly, Plaintiff's claims for violation of California Code of Regulations, Title 15 must be dismissed . . . ." *King v. L.A. Cty. Sheriff's Dep't*, 2013 U.S. Dist. LEXIS 185955, *16-17 (C.D. Cal. 2013) (citing *Sweaney v. Ada Cty., Idaho*, 119 F.3d 1385, 1391 (9th Cir. 1996)).

Proof of repeated constitutional violations is a threshold requirement for *Monell* "custom" and "practice" claims. *Monell*, 436 U.S. at 690 (misconduct must be "persistent and widespread"). A plaintiff cannot satisfy this burden by pointing to the single incident about which he complains. *See Okla. City v. Tuttle*, 471 U.S. 808, 823-24 (1985). Here, there is no indication in the record that the failure to use COWS rather than CIWA or the failure to conduct a sufficiently thorough bed check harmed any inmate at all aside from Mr. Gordon.

Given the lack of evidence in the record in this case, it is impossible for the Court to conclude that Plaintiff's *Monell* claim can survive summary judgment based either on a custom of using the CIWA form rather than the COWS form for inmates in opiate withdrawal or

based on a custom of conducting inadequate bed checks. Plaintiff appears to concede this point in her brief, saying "[a]t this point in time there is no definitive answer as to the County's practices and customs concerning intake forms (CIWA or COWS) or inspection practices (from the glass corridor or from the "beach") in the Fall of 2013." (Pl.'s Br. at 16:20-22.) Plaintiff adds that "[t]hese are matters that could possibly be answered if the County's Person Most Knowledgeable regarding the County's protocols and procedures was deposed. The County has been stonewalling on the taking of the deposition of its PMK in this regard." (*Id.* at 16:25-28.)

The County's alleged "stonewalling" with respect to the deposition of its PMK was the subject of a recent order from the magistrate judge assigned to this case. (Dkt. 97.) In response to Plaintiff's motion to compel the depositions of two County defendants, Judge McCormick rejected Plaintiff's arguments that Defendants had waived the April 12, 2016 discovery cut-off date or were estopped from asserting it. (*Id.* at 2.) Rather, Judge McCormick concluded that "Plaintiff let the discovery cut-off date come and go without taking affirmative steps to solve the issues related to" scheduling the depositions of the relevant County employees. (*Id.*)

The deadline for discovery has lapsed and this Court finds that there is no good cause to alter the scheduling order in this case. In September 2015, this Court altered the scheduling order and allowed Plaintiff to amend her complaint even after discovery had closed and defendants had moved for summary judgment. (Dkt. 47.) After issuing that order, the Court

issued a scheduling order moving the deadline for non-expert discovery from August 6, 2015 to April 12, 2016 (Dkt. Nos. 47, 50.) As discussed in Judge McCormick's order, after the parties had a disagreement about the depositions at issue, Plaintiff waited before seeking the Court's assistance in resolving the matter, and the discovery deadline lapsed in the meantime. (Dkt. 97 at 2.) Given the lack of good cause for a change to the scheduling order exhibited here and the Court's past extension of the discovery deadline by over eight months, the Court refuses to alter the scheduling order once again.

Plaintiff also seeks to invoke Federal Rule of Civil Procedure 56(d) to defer the Court's ruling on the *Monell* claim. Under Rule 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to . . . take discovery; or (3) issue any other appropriate order." With respect to Rule 56(d), "[t]he burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment." *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n.6 (9th Cir. 2001). Here, Plaintiff merely makes the vague assertion that questions concerning *Monell* liability "could possibly be answered" with the help of the additional depositions. This assertion is insufficient to warrant the relief sought under Rule 56(d). The evidence in the record falls far short of what would be sufficient to allow Plaintiff's *Monell* claim to survive summary judgment.

C. The State Law Claims

Plaintiff's state law claims cannot survive summary judgment in light of statutory limits on liability for public entities and employees who fail to furnish or obtain medical care for a prisoner. California Government Code §845.6 states that:

> Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but except as otherwise provided by Sections 855.8 and 856, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care.

Cal. Gov. Code § 845.6. California Courts have interpreted this provision as follows: "Liability of public entities and public employees under Government Code section 845.6 is limited to serious and obvious medical conditions requiring immediate care. Their duty to provide medical care to prisoners is limited to . . . cases where there is *actual or constructive knowledge* that the prisoner is in need of immediate medical care. The public employee must know or have reason to know of the need of immediate medical care and fail to summon such care." *Lucas v. Cty. of Los Angeles*, 47 Cal. App. 4th 277, 288 (1996) (internal citations and quotation marks removed).

Once an inmate is receiving medical care, § 845.6 does not create a duty to provide adequate or appropriate care. *Watson v. California*, 21 Cal. App. 4th 836, 841-843 (1993). Jail officials do not run afoul of § 845.6 by failing "to provide further treatment, or to ensure further diagnosis or treatment, or to monitor [the inmate] or follow up on his progress." *Castaneda v. Dep't Corrs. & Rehab.*, 212 Cal. App. 4th 1051, 1072 (2013). California courts have held that § 845.6 does not impose an obligation to provide necessary medication or treatment, *Nelson v. California*, 139 Cal. App. 3d 72, 81 (1982), nor does the duty to summon immediate medical care pursuant to § 845.6 encompass a duty to assure that medical staff properly diagnose and treat the condition or a duty to monitor the quality of care provided. *Watson*, 21 Cal. App. 4th at 841-43. Thus, once a prisoner is receiving medical care, prison employees are under no further obligation under § 845.6.

To counter Defendants' assertion that they are immune from liability for the state law claims, Plaintiff's only argument is that the defendants have no immunity under § 845.6 if the employee knows or has reason to know that the prisoner is in need of immediate medical care and fails to summon it. (Pl.'s Opp'n at 22:26-23:4.) But the record indicates that Mr. Gordon received medical care from Nurse Finley and Dr. Le during his intake on September 8 and that Nurse Garcia provided some medical care on September 9. The record also indicates that the deputies promptly summoned medical care when the inmates alerted them that Mr. Gordon was in medical distress. (PAUF ¶¶ 68-69). In such circumstances, the

County and Jail officials cannot be held liable under § 845.6. *See Castaneda*, 212 Cal. App. 4th at 1072.

V. CONCLUSION

The Court takes no position on whether the care Mr. Gordon received here was actually adequate. Given Mr. Gordon's daily heroin use and clear signs of withdrawal, it may or may not have been a substantial deviation from the appropriate standard of care for him not to have been prescribed a medicine such as Suboxone or methadone, not to be evaluated using an opiate-specific protocol such as COWS, or not to be put on closer medical supervision. Nonetheless, Plaintiff has not submitted nearly enough evidence on these issues for the Court to conclude that a jury could find in her favor under the deliberate indifference standard, or that the Defendants were not entitled to immunity for the state law claims. Accordingly, Defendants' motions for summary judgment are GRANTED.

DATED: June 14, 2016

/s/Cormac J. Carney
CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-56005
D.C. No. 8:14-cv-01050-CJC-DFM

[Filed June 14, 2018]

MARY GORDON, successor-in-interest for decedent, Matthew Shawn Gordon, individually,	)
Plaintiff-Appellant,	)
v.	)
COUNTY OF ORANGE; et al.,	)
Defendants-Appellees.	)

ORDER

Before: WARDLAW and GOULD, Circuit Judges, and GONZALEZ ROGERS,[*] District Judge.

The panel has voted to deny the petition for panel rehearing. Judges Wardlaw and Gould voted to deny

[*] The Honorable Yvonne Gonzalez Rogers, United States District Judge for the Northern District of California, sitting by designation.

the petition for rehearing en banc, and Judge Gonzalez Rogers so recommended. The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore **DENIED.**