FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.*	No. 19-56032 D.C. No. 8:14-cv-01050-CJC-DFM OPINION

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

Argued and Submitted April 30, 2021
San Francisco, California

Filed July 26, 2021

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

Opinion by Judge Gonzalez Rogers

SUMMARY[**]

Civil Rights

The panel affirmed in part and reversed in part the district court's summary judgment in favor of jail officials in an action brought pursuant to 42 U.S.C. § 1983 alleging that plaintiff's son, Matthew Gordon, received inadequate medical care under the due process clause of the Fourteenth Amendment after he was admitted as a pretrial detainee to the Orange County Central Men's Jail.

In Gordon's previous appeal, this Court held that inadequate medical care claims brought by pretrial detainees require a showing of objective, not subjective, deliberate indifference. *See Gordon v. County of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018). Following remand, the district court allowed additional expert discovery and ultimately granted summary judgment for the individual defendants on the basis of qualified immunity and for the entity defendant on the ground that the plaintiff could not

[*] 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.

establish a custom or practice sufficient under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

The panel affirmed as to plaintiff's *Monell* claim, holding that the record lacked evidence of any other event involving similar conduct or constitutional violations and plaintiff's reference to subsequent changes to operating procedures was insufficient to demonstrate the existence of a custom. The panel also affirmed the district court's grant of summary judgment to individual defendants Nurse Garcia and Sergeant Tunque because plaintiff failed to articulate any basis for an appeal.

With respect to defendants Nurse Finley and Deputy Robert Denney, the panel held that the district court committed legal error by using a subjective standard in analyzing the clearly established prong of the qualified immunity test. Further, as to Nurse Finley, summary judgment was not proper because the available law at the time of the incident clearly established Matthew Gordon's constitutional rights to proper medical screening to ensure medically appropriate protocol was initiated. Given that the County instituted two screening forms to ensure the initiation of a medically appropriate protocol, the panel remanded the case for a factual analysis of the remaining prong of the qualified immunity test.

As to Deputy Denney, the panel stated that it was not aware of any precedent expressly recognizing a detainee's right to direct-view safety checks sufficient to determine whether the detainee's presentation indicated the need for medical treatment. Accordingly, Deputy Denney was entitled to qualified immunity because the due process right to an adequate safety check for pretrial detainees was not clearly established at the time of the incident. The panel

nevertheless held that pre-trial detainees do have a right to direct-view safety checks sufficient to determine whether their presentation indicates the need for medical treatment. The panel stated that law enforcement and prison personnel should heed this warning because the recognition of this constitutional right would protect future detainees.

COUNSEL

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

S. Frank Harrell (argued) and Jesse K. Cox, Lynberg & Watkins PC, Orange, California, for Defendants-Appellees.

OPINION

GONZALEZ ROGERS, District Judge:

This is the second appeal arising from the death of Matthew Gordon within 30 hours after he was admitted as a pretrial detainee in the Orange County Central Men's Jail. His mother, plaintiff Mary Gordon, alleges Section 1983 claims of inadequate medical care under the due process clause of the Fourteenth Amendment. In a previous appeal, this Court held that inadequate medical care claims brought by pretrial detainees require a showing of objective, not subjective, deliberate indifference. *See Gordon v. County of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018) ("*Gordon I*"). Following remand, the district court allowed additional expert discovery and ultimately granted summary judgment for the individual defendants on the basis of qualified

immunity and for the entity defendant on the ground that the plaintiff could not establish a custom or practice sufficient under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Plaintiff timely appealed.

Based upon a de novo review, and for the reasons set forth below, we affirm as to plaintiff's *Monell* claim and individual defendants Deputy Robert Denney, Nurse Brianna Garcia, and Sergeant Brian Tunque.[1] However, we reverse and remand as to individual defendant Nurse Debbie Finley.

With respect to Nurse Finley and Deputy Denney, we conclude that the district court committed legal error by using a subjective standard in analyzing the clearly established prong of the qualified immunity test. Further, as to Nurse Finley, summary judgment was not proper because the available law at the time of the incident clearly established Gordon's constitutional rights to proper medical screening to ensure the medically appropriate protocol was initiated. However, as to Deputy Denney, although we now hold that Gordon had a constitutional right to direct-view safety checks, that right was not clearly established at the time of the incident.

[1] With respect to defendants Garcia and Tunque, we affirm the district court's grant of summary judgment because the plaintiff failed to articulate any basis for an appeal. "We review only issues which are argued specifically and distinctly." *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994); *see also United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010) ("Arguments made in passing and not supported by citations to the record or to case authority are generally deemed waived.").

FACTUAL BACKGROUND

On September 8, 2013, Gordon was arrested by the Placentia Police Department on heroin-related charges and booked into the Orange County Central Men's Jail. During his intake at approximately 6:47 p.m. that day, Gordon informed defendant Debbie Finley, a registered nurse, of his 3-grams-a-day heroin habit.

At the time, two detoxification protocols existed for purposes of assessing inmates suffering from substance withdrawal: (1) the Clinical Institute Withdrawal Assessment for Alcohol ("CIWA"), and (2) the Clinical Opiate Withdrawal Scale ("COWS"). Despite Gordon reporting his heroin use, jail medical staff never utilized the COWS protocol. Instead, non-party Dr. Thomas Le, a consulting physician, ordered that Gordon be evaluated under CIWA. Indeed, although the form that Dr. Le completed was titled "Opiate WD [Withdrawal] Orders," it was amended to direct an alcohol withdrawal protocol. Specifically, the form contained a section titled "Nursing Detox Assessments." Under that section, a checkbox denoted as "COWS and Vital Signs on admission and daily x 5" was crossed out, and "CIWA x 4 days" was handwritten instead. In other words, Gordon was to receive the ordered alcohol protocol for four days. In addition, Dr. Le 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.

After remand, Dr. Le submitted a declaration attesting that the CIWA protocol was appropriate for a poly-drug abuser such as Gordon. Conversely, the plaintiff's nursing expert opined that the 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. In accordance with Dr. Le's orders, Nurse Finley used the CIWA form to assess his symptoms. However, the record contains only one CIWA assessment dated September 8, 2013.

After his intake assessment, Gordon began the "loop" phase of the booking process during which time he waited nearly ten hours to enter the general population. During this period, another inmate had observed Gordon vomiting and dry heaving for 45 minutes. Nurse Finley testified that she did not assess Gordon during this timeframe.

Gordon exited the loop at approximately 8:30 a.m. the next day, September 9, when he was transferred to Tank 11 in Module C of the jail. There, he presented his identification card which stated: "Medical Attention Required."[2] Gordon was administered his detoxification medications three times over the course of his first day in Module C. However, no CIWA form or other evaluation of Gordon occurred that day, despite the ordered daily CIWA assessment. Defendant Brianna Garcia, a licensed vocational nurse, completed Gordon's last pill pass at approximately 8:30 p.m. that evening.

Meanwhile, deputies were responsible for conducting safety checks of the inmates in Module C at least every 60 minutes. Based on the safety check log, at approximately 6:47 p.m., defendant Deputy Robert Denney and another deputy conducted a check that included a physical count of

[2] Further detail of the card is not in the record.

all the inmates in the module. Thereafter, additional safety checks were conducted at approximately 8:03 p.m., 8:31 p.m., 9:29 p.m., and 10:10 p.m., as indicated by the log.

According to the plaintiff, the two safety checks conducted by Deputy Denney at 8:31 p.m. and 9:29 p.m. did not comply with applicable law. Specifically, Section 1027 of Title 15 of the California Code of Regulations, in effect at the time, required that "[a] sufficient number of personnel shall be employed in each local detention facility to conduct at least hourly safety checks of inmates through direct visual observation of all inmates." 15 C.C.R. § 1027 (effective September 19, 2012).[3] Moreover, the Orange County Sheriff's Department had a policy that correctional staff "will conduct safety checks from a location which provides a clear, direct view of each inmate"; "observe each inmate's presence and apparent condition and investigate any unusual circumstances or situations"; and "pay special attention to areas with low visibility." None of the deputies could account for who conducted the 10:10 p.m. safety check.

Deputy Denney testified that he was aware that Gordon required medical attention based on the module identification card, though he did not know his specific ailment. Deputy Denney conducted his safety check of Gordon from a corridor that was approximately six feet elevated from the tank floor and 12 to 15 feet away from the foot of Gordon's bunk. Deputy Denney admitted that, from his vantage point, he was unable to ascertain whether

[3] The current version of Section 1027 no longer addresses safety checks, which are now addressed in Section 1027.5, though that section was not in effect at the time of the incident.

Gordon was breathing, alive, sweating profusely, drooling, or had any potential indicators of a physical problem.

At approximately 10:45 p.m. that evening, deputies heard inmates from Tanks 11 and 12 yelling "man down." Deputies summoned jail medical staff immediately, and they responded within minutes. Deputy Denney testified that upon his arrival on the scene, he observed that Gordon's "face was blue, he was unresponsive, and his skin was cold to the touch." Paramedics arrived at approximately 11:00 p.m. and transported Gordon to a local hospital 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 these events.

Shortly thereafter, in October 2013, a new policy issued referencing the use of COWS that required jail medical staff to screen "inmates who may be at risk for developing drug or alcohol related problems." Then, at some point between late 2014 and early 2015, policy changed to require deputies to conduct safety checks from an area immediately adjacent to the module for a more direct visual observation of the inmates.

PROCEDURAL HISTORY AND STANDARD OF REVIEW

After *Gordon I*, the case was remanded, and the district court permitted time for additional expert discovery. Thereafter, the individual defendants and the County renewed their separate motions for summary judgment. The district court granted summary judgment both for the individual defendants on grounds of qualified immunity and for the County for failure to show a custom or practice

sufficient under *Monell*, 436 U.S. at 658. The plaintiff timely appealed.

We review a district court's decision to grant summary judgment de novo. *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011) (citation omitted). "Viewing the evidence and drawing all inferences in the light most favorable to the non-moving party, we must determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law." *Id.*

DISCUSSION

I. Qualified Immunity

A. Legal Framework for the Two-Prong Approach

In evaluating a grant of qualified immunity, a court considers whether (1) the state actor's conduct violated a constitutional right and (2) the right was clearly established at the time of the alleged misconduct. *See Saucier v. Katz*, 533 U.S. 194, 200–01 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. 223 (2009). "While the constitutional violation prong concerns the reasonableness of the officer's *mistake of fact*, the clearly established prong concerns the reasonableness of the officer's *mistake of law*." *Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011) (emphasis in original). Either question may be addressed first, and if the answer to either is "no," then the state actor cannot be held liable for damages. *See Pearson*, 555 U.S. at 236.

Whether a constitutional right is clearly established is purely a question of law for the court to decide. *See Elder v. Holloway*, 510 U.S. 510, 511 (1994) ("Whether a federal

right was clearly established at a particular time is a question of law, not 'legal facts[.]'"); *Morales v. Fry*, 873 F.3d 817, 825 (9th Cir. 2017) ("[T]he district court erred in submitting the 'clearly established' inquiry to the jury."). Moreover, a detainee's mental state has no bearing on the analysis. *See Sandoval v. County of San Diego*, 985 F.3d 657, 675 (9th Cir. 2021) ("We are not aware of a single case in which we have examined the defendant's mental state in assessing the clearly established law prong of qualified immunity."). The "qualified immunity analysis remains objective even when the constitutional claim at issue involves subjective elements." *Id.* at 674 (citing *Crawford-El v. Britton*, 523 U.S. 574, 588–89 (1998) ("[A]lthough evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case.")).

Here, the district court erred in analyzing the clearly established prong by incorporating a subjective standard. "The [individual defendant's] actual subjective appreciation of the risk is not an element of the established-law inquiry." *Sandoval*, 985 F.3d at 678; *see also id.* at 671–72 (rejecting approach of "apply[ing] all elements of an inadequate medical care claim" in determining whether qualified immunity exists); *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 601 (9th Cir. 2019) ("[W]hether or not Officer Brice was in fact deliberately indifferent to a substantial risk that Horton would attempt suicide in the time before he was checked, there was no case law at the time of the incident clearly establishing that a reasonable officer should have perceived the substantial risk."). We now conduct the analysis de novo.

B. The Clearly Established Prong

1. Legal Framework for This Prong

Qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)); *see Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (qualified immunity shields reasonable, even if constitutionally deficient, misapprehensions of the law). For a constitutional right to be clearly established, a court must define the right at issue with "specificity" and "'not . . . at a high level of generality.'" *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam)).

"[T]he right allegedly violated must be defined at the appropriate level of specificity *before* a court can determine if it was clearly established." *Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009) (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)) (emphasis supplied). "Our goal is to define the contours of the right allegedly violated in a way that expresses what is really being litigated." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1158 (9th Cir. 2000). The right should be defined in a way that is neither "too general" nor "too particularized." *Id.* Qualified immunity is not meant to be analyzed in terms of a "general constitutional guarantee," but rather the application of general constitutional principles "in a particular context." *Id.* (quoting *Todd v. United States*, 849 F.2d 365, 370 (9th Cir. 1988)). On the other hand, casting an allegedly violated right too particularly, "would be to allow [the instant defendants], and future defendants, to define away all potential claims." *Id.* (quoting *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995)); *see also Simon v. City of New York*, 893 F.3d 83, 96–97 (2d Cir. 2018) ("This

task involves striking a balance between defining the right specifically enough that officers can fairly be said to be on notice that their conduct was forbidden, but with a sufficient measure of abstraction to avoid a regime under which rights are deemed clearly established only if the precise fact pattern has already been condemned.") (citations and internal quotation marks omitted).

"[A] court must ask whether it would have been clear to a reasonable officer that the alleged conduct 'was unlawful in the situation he confronted.'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017) (quoting *Saucier*, 533 U.S. at 202). "While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate," *Emmons*, 139 S. Ct. at 504 (alteration in original) (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 581 (2018) (internal quotation marks omitted)), and must "'squarely govern[ ]' the specific facts at issue," *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix*, 577 U.S. at 15). *See Jessop v. City of Fresno*, 936 F.3d 937, 940–41 (9th Cir. 2019) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The plaintiff "bears the burden of showing that the rights allegedly violated were clearly established." *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017) (internal quotation marks and citation omitted). However, because resolving whether the asserted federal right was clearly established presents a pure question of law, we draw on our "full knowledge" of relevant precedent rather than restricting our review to cases identified by the plaintiff. *See Elder*, 510 U.S. at 516 (holding appellate court must review qualified immunity judgment de novo and

resolve whether federal right was clearly established in light of its "full knowledge of its own [and other relevant] precedents") (alteration in original) (citation omitted). Ultimately, "the prior precedent must be 'controlling'—from the Ninth Circuit or Supreme Court—or otherwise be embraced by a 'consensus' of courts outside the relevant jurisdiction." *Sharp v. City of Orange*, 871 F.3d 901, 911 (9th Cir. 2017) (citing *Wilson*, 526 U.S. at 617); *see also Wesby*, 138 S. Ct. at 589–90 ("The rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority. It is not enough that the rule is suggested by then-existing precedent.") (internal quotation marks and citations omitted); *Carroll v. Carman*, 574 U.S. 13, 17 (2014) (per curiam) (assuming without deciding that controlling circuit precedent could constitute clearly established federal law).

2. Application

Commonly, plaintiffs seek to define an allegedly violated constitutional right too broadly, while defendants do so too narrowly. The same occurred here with plaintiff arguing that Gordon "had a clearly established right under the Due Process Clause to adequate medical care for his heroin withdrawal" and defendants framing the alleged violation as "a difference of opinion" on the specific facts of this case. Neither articulation strikes the appropriate balance. However, the district court did not resolve the issue of defining the constitutional rights at issue. Instead, it merely distinguished plaintiff's authorities based on an erroneous understanding of the applicable standard. We consider the issue de novo, first as to Nurse Finley and then as to Deputy Denney.

a. Proper Medical Screening to Ensure Initiation of the Medically Appropriate Protocol (Nurse Finley)

The core of "what is really being litigated" against Nurse Finley is whether she used the proper medical screening form to ensure the initiation of a medically appropriate protocol while Gordon was detained. *See LSO*, 205 F.3d at 1158. Although we have not used those precise words in stating that a constitutional right exists, our precedent confirms that a pretrial detainee's right to proper medical screening was clearly established.

At the time of the incident here, it was well settled that prison officials violate the Constitution when they choose a course of treatment that is "medically unacceptable under all of the circumstances." *Snow v. McDaniel*, 681 F.3d 978, 988 (9th Cir. 2012), *overruled in part on other grounds by Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc). In cases involving "choices between alternative courses of treatment," plaintiff "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances" and that "they chose this course in conscious disregard of an excessive risk to plaintiff's health." *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (citation omitted), *overruled in part on other grounds by Peralta*, 744 F.3d at 1076.

Almost twenty years ago, the Ninth Circuit in *Gibson v. County of Washoe*, 290 F.3d 1175, 1194–96 (9th Cir. 2002), *overruled on other grounds by Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016), determined that a jury could find a constitutional violation by an intake nurse who "knew that [the plaintiff] was in the throes of a manic state" but "fail[ed] to provide for the identification of [his urgent mental health] needs." *Id.* at 1193–96 (addressing

municipal liability based on non-party employee's constitutional violation). *Gibson* has been recognized for the proposition that the "failure to medically screen new inmates may constitute deliberate indifference to medical needs." *M.H. v. County of Alameda*, 62 F. Supp. 3d 1049, 1077 (N.D. Cal. 2014).[4]

As early as 1990, the Second Circuit agreed in a similar situation that appropriate medical screening is critical. In *Liscio v. Warren*, 901 F.2d 274 (2d Cir. 1990), *overruled in part on other grounds by Caiozzo v. Koreman*, 581 F.3d 63, 66 n.1 (2d Cir. 2009), the Second Circuit reversed summary judgment for a doctor who "was on notice that Liscio might be suffering from ailments other than withdrawal from the heroin addiction Liscio mentioned when first booked." *Id.* at 276. The doctor was "on notice that the particular ailment might be alcohol withdrawal because Liscio's symptoms—delirium and bizarre behavior—are commonly associated with alcohol withdrawal and not with simple heroin withdrawal." *Id.* at 276–77. Rather than responding to these

[4] *See also Kodimer ex rel. Lyn Ramskill v. County of San Diego*, No. 07-CV-2221 (RTB), 2010 WL 2635548, at *3–4 (S.D. Cal. June 30, 2010) (relying on *Gibson* to deny screening nurse's motion for summary judgment where the nurse declined to order immediate psychological evaluation for inmate despite clinical indications of psychiatric symptoms); *Bravo v. City of Santa Maria*, No. 06-CV-6851 (FMO), 2013 WL 12224038, at *13 (C.D. Cal. July 19, 2013) ("[I]n *Gibson*, the Ninth Circuit ruled that a plaintiff could establish 'direct' liability of a County by showing its policies and procedures failed to adequately screen and protect the rights of mentally ill detainees to medical care.") (citation omitted); *Fricano v. Lane County*, No. 16-CV-1339 (MJM), 2018 WL 2770643, at *11 (D. Or. June 8, 2018) ("[T]he failure to screen for an entire category of serious medical need (i.e., mental health crises)—a category which may require outside treatment prior to jail admission—could be viewed as creating a substantial risk of serious harm.") (citing *Gibson*, 290 F.3d at 1189).

alcohol-specific symptoms, the doctor "erroneously presumed the cause of [Liscio's] condition to be heroin withdrawal." *Id.* at 276. According to the plaintiff's substance abuse expert, "it is crucial that medical personnel at correctional facilities distinguish between heroin withdrawal, which is uncomfortable but not life-threatening, and alcohol withdrawal, which has a 'serious' mortality rate." *Id.* The expert opined that the doctor had "severely mismanaged" Liscio's case, causing "unnecessary injury and suffering, and placing him in a life-threatening condition." *Id.*

The principles drawn from *Snow* and *Gibson*, and by extension *Liscio*, demonstrate that, at a minimum, medical personnel at jail facilities are required to screen pretrial detainees for critical medical needs. Thus, at the time of the incident, Gordon had a clearly established constitutional right to have a proper medical screen conducted to ensure the medically appropriate protocol was initiated.[5] As

[5] This conclusion is further corroborated by numerous other district courts that reached the same conclusion albeit after the date of the incident. *See*, *e.g.*, *Paugh v. Uintah County*, No. 17-CV-1249 (JNP), 2020 WL 4597062, at *8 (D. Utah Aug. 11, 2020) (denying summary judgment for individual and entity defendants where "[j]ail officers had access to a CIWA form" but failed to administer protocol for inmate suffering from alcohol withdrawal, leading to death); *Aus v. Salt Lake County*, No. 16-CV-2666 (JNP), 2019 WL 3021217, at *10 (D. Utah July 10, 2019) (denying summary judgment for entity defendants where "the absence of any established protocol for benzodiazepine withdrawal syndrome—a clear policy choice in light of the [e]ntity [d]efendants' promulgation of withdrawal protocols for alcohol and opioids" could support *Monell* claim); *Thornhill for Estate of Berry v. Aylor*, No. 15-CV-24 (GEC), 2017 WL 4685986, at *10–11 (W.D. Va. Oct. 18, 2017) (denying summary judgment for screening nurse who "knew that [inmate] had a history of alcohol abuse and that the signs of alcohol withdrawal would develop later" but failed to initiate CIWA protocol

applied here, Finley acted as gatekeeper by serving as the screening nurse and was therefore responsible for identifying an inmate's urgent medical needs. Whether she failed to do so is properly considered under the first prong of the qualified immunity analysis.

Accordingly, the district court's grant of qualified immunity based on the clearly established prong is reversed as to Nurse Finley. Given that the County instituted two screening forms to ensure the initiation of a medically appropriate protocol, the case is remanded for a factual analysis of the remaining prong of the qualified immunity test.

b. Direct-View Safety Check Sufficient to Evaluate an Apparent Medical Condition (Deputy Denney)

The gravamen of the action against Deputy Denney is whether, as a pretrial detainee, Gordon had a constitutional right to direct-view safety checks when he was known to

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because she believed he "was at a risk for only heroin, and not alcohol, withdrawal"); *Hernandez v. County of Monterey*, 110 F. Supp. 3d 929, 959 (N.D. Cal. 2015) (class action lawsuit of former and current inmates addressing problems with the detoxification treatment in the county jail where a preliminary injunction issued requiring the County to file a plan including, among other components: "Detoxifying inmates [who] shall be adequately monitored using the CIWA protocol or equivalent validated monitoring protocol, shall receive pharmacological treatment as indicated and be appropriately housed based on their clinical conditions"; and "Defendants shall develop separate treatment protocols for opiate, alcohol and benzodiazepine withdrawal"); *M.H.*, 62 F. Supp. 3d at 1077 (district court "conclud[ing] that a reasonable jury could find [a screening nurse] was deliberately indifferent to the risk of severe alcohol withdrawal when she failed to initiate a CIWA protocol or otherwise ensure [an inmate's] medical needs would be addressed").

require medical attention. It has long been held that "a prison official who is aware that an inmate is suffering from a serious acute medical condition violates the Constitution when he stands idly by rather than responding with reasonable diligence to treat the condition." *Sandoval*, 985 F.3d at 679–80 (discussing *Jett v. Penner*, 439 F.3d 1091, 1097–98 (9th Cir. 2006); *Clement v. Gomez*, 298 F.3d 898, 902, 904–05 (9th Cir. 2002); and *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989)).

However, we are not aware of any precedent expressly recognizing a detainee's right to direct-view safety checks sufficient to determine whether their presentation indicates the need for medical treatment. At the time of the incident, some lower courts had recognized a right to direct-view safety checks even where medical attention was not required. For example, in *Wereb v. Maui County*, 727 F. Supp. 2d 898 (D. Haw. 2010), the court concluded that "a reasonable factfinder could find that the failure to provide detainees with the right to medical care was an obvious consequence of Maui County's employees' failure to closely monitor detainees or view them in person." *Id.* at 923. There, the defendants had failed to follow police department protocols, which required in-person visual checks of detainees, and instead used video monitoring. *Id.* at 903. Despite the defendants purportedly monitoring the detainee every fifteen minutes via video, Wereb was found dead in his cell around twenty-seven hours after his last recorded movement. *Id.*; *see also Estate of Abdollahi v. County of Sacramento*, 405 F. Supp. 2d 1194, 1206–07 (E.D. Cal. 2005) (denying county's summary judgment motion where a reasonable jury could find the jail's failure to conduct

regular safety checks as stated in 15 C.C.R. § 1027 posed a substantial risk to inmates).[6]

Nevertheless, Deputy Denney is entitled to qualified immunity because the due process right to an adequate safety check for pretrial detainees was not clearly established at the time of the incident. We now hold that pre-trial detainees do have a right to direct-view safety checks sufficient to

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[6] Further corroborating this analysis, in one post-incident case, a lower court expressed the obviousness of failing to actually observe the inmate during safety checks:

> [T]he Court easily concludes that Plaintiffs can make out at least a triable issue of fact with respect to each of the elements of this claim . . . . [The] defendants knowingly failed to perform safety checks required by policy and law, and were charged with performing them (under the view of the facts resolved in Plaintiffs' favor); there are facts supporting a conclusion that safety-checks are designed with the purpose of ensuring that inmates are alive-and-well and to determine whether they need any medical treatment, and that failure to perform—or a delay in performing—them increases the inmates' risk of harm and could threaten their health or at the very least delay medical assistance and emergency response; and there are disputes concerning whether, had they performed the safety checks as required, they would have discovered Decedent and Decedent's condition in time to aid or save him.

Medina v. County of Los Angeles, No.19-CV-3808 (GHW), 2020 WL 3964793, at *16 (C.D. Cal. Mar. 9, 2020); *see also Frary v. County of Marin*, 81 F. Supp. 3d 811, 820, 837 (N.D. Cal. 2015) (post-incident) (denying County's summary judgment motion where "a reasonable jury could conclude that the County's tower checks [from which no portion of the inmate's cell-bed could be seen] would not allow deputies to adequately observe inmates").

determine whether their presentation indicates the need for medical treatment. *Accord Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1075–77 (9th Cir. 2013). It is undisputed that upon admission into the general population, Gordon's identification module card notified jail officials that he required medical attention. Because Deputy Denney is entitled to qualified immunity, whether he in fact conducted an adequate safety check will not be decided in this case. However, law enforcement and prison personnel should heed this warning because the recognition of this constitutional right will protect future detainees.

II. *Monell* Liability

To impose *Monell* liability on a municipality under Section 1983, plaintiff must prove: (1) Gordon had a constitutional right of which he was deprived; (2) the municipality had a policy; (3) the policy amounts to deliberate indifference to his constitutional right; and (4) "the policy is the moving force behind the constitutional violation." *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011).

A governmental policy is "a deliberate choice to follow a course of action . . . by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). A plaintiff can satisfy *Monell*'s policy requirement in one of three ways. *See Thomas v. County of Riverside*, 763 F.3d 1167, 1170 (9th Cir. 2014) (per curiam). First, a local government may be held liable when it acts "pursuant to an expressly adopted official policy." *Id.* (citing *Monell*, 436 U.S. at 694); *Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004).

Second, a public entity may be held liable for a "longstanding practice or custom." *Thomas*, 763 F.3d at 1170 (citation omitted). Such circumstances may arise when, for instance, the public entity "fail[s] to implement procedural safeguards to prevent constitutional violations" or, sometimes, when it fails to train its employees adequately. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012) (citing *Oviatt v. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992)); *see also Connick v. Thompson*, 563 U.S. 51, 61 (2011) ("A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." (citation omitted)); *Flores v. County of Los Angeles*, 758 F.3d 1154, 1159 (9th Cir. 2014) (requiring a plaintiff asserting a claim based on a failure to train to allege facts showing that defendants "disregarded the known or obvious consequence that a particular omission in their training program would cause municipal employees to violate citizens' constitutional rights") (internal alterations omitted) (quoting *Connick*, 563 U.S. at 61).

Third, "a local government may be held liable under [Section] 1983 when 'the individual who committed the constitutional tort was an official with final policy-making authority' or such an official 'ratified a subordinate's unconstitutional decision or action and the basis for it.'" *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1250 (9th Cir. 2010) (quoting *Gillette v. Delmore*, 979 F.2d 1342, 1346–47 (9th Cir. 1992)), *overruled on other grounds by Castro*, 833 F.3d at 1070).

Here, plaintiff's *Monell* claim is premised on the County's alleged policies, customs, or practices. An unconstitutional policy need not be formal or written to create municipal liability under Section 1983; however, it must be "so permanent and well settled as to constitute a

'custom or usage' with the force of law." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68 (1970); *see also Monell*, 436 U.S. at 691 (unwritten policy or custom must be so "persistent and widespread" that it constitutes a "permanent and well settled" practice) (quoting *Adickes*, 398 U.S. at 167–68)). "Liability for improper 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).

Because plaintiff did not identify any other instance in which jail personnel used the CIWA protocol for inmates withdrawing on opiate use or a low-visibility safety check resulted in the provision of inadequate medical care, the district court concluded that the *Monell* claim failed. Generally, "a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985). Where no argument exists that the express policies themselves were unconstitutional, plaintiff was required to produce evidence creating a triable issue of fact regarding the existence of an unconstitutional practice or custom. *See Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999) ("A single constitutional deprivation ordinarily is insufficient to establish a longstanding practice or custom."). However, the record lacks evidence of any other event involving similar conduct or constitutional violations and plaintiff's reference to the subsequent changes to operating procedures is insufficient.[7] Thus, the district court properly granted

[7] Where post-event evidence is the fact of corrective action and no other evidence is offered to demonstrate the existence of a custom, the custom element is not satisfied. *See*, *e.g.*, *Chavez v. Las Vegas Metro.*

summary judgment in favor of the County on plaintiff's claim for municipal liability.

CONCLUSION

For the reasons stated herein, the district court's grant of summary judgment is **AFFIRMED** as to Deputy Denney, Nurse Garcia, Sergeant Tunque, and the County and **REVERSED** and **REMANDED** as to defendant Nurse Finley.

Police Dep't, 648 F. App'x 657, 658 (9th Cir. 2016) ("[Plaintiff's] assertion that LVMPD revamped its use of force policy subsequent to the shooting of Olivas, even if true, is insufficient to raise a triable issue that at the time of the shooting LVMPD had a policy or practice of tolerating constitutional violations.") (citing *Nadell v. Las Vegas Metro. Police Dep't*, 268 F.3d 924, 930 (9th Cir. 2001), *abrogated on other grounds as recognized in Beck v. City of Upland*, 527 F.3d 853, 862 n.8 (9th Cir. 2008)).