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United States District Court  
Northern District of California

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**STEPHANY BORGES,**

**Plaintiff,**

**v.**

**COUNTY OF HUMBOLDT, MICHAEL DOWNEY,  
TIM HERSHBERGER, TERRI BITTNER, TIM  
HAMMER AND DAVID SWIM**

**Defendants.**

Case No.: 15-cv-00846 YGR

**PRETRIAL ORDER NO. 4 REGARDING LEGAL  
STANDARD FOR CONSTITUTIONAL CLAIM RE:  
MEDICAL CARE**

Plaintiff is the mother of decedent Daren Borges, who died after being in a state of acute methamphetamine intoxication while detained in a sobering cell of the Humboldt County Correctional Facility (the “County jail”) on June 13, 2014. Plaintiff initially asserted fourteen claims for relief, and five remain. These claims include a Fourth Amendment claim or, in the alternative, a Fourteenth Amendment claim for denial of medical care by the defendant County officers who detained Borges in the sobering cell after he was brought to the County jail. (Dkt. No 111 at 1-2.) The parties dispute the source of the alleged constitutional violation and the standard applied thereto. For the reasons set forth below, the Courts finds the alleged violation arises from the Fourteenth Amendment and the standard is one of objective deliberative indifference.

**I. INTRODUCTION**

On July 10, 2017, the parties filed a revised joint statement regarding proposed jury instructions. (Dkt. No. 203.) Plaintiff’s proposed instruction No. 15 (Fourth Amendment—Unreasonable Seizure of Person—Duty to Obtain Objectively Reasonable Medical Assistance) states that “[u]nder the Fourth Amendment, an officer has a duty to obtain medical assistance for a person who has been seized that is “objectively reasonable” under the circumstances . . . .” (*Id.* at

1 27.) Defendants counter that Borges’ denial of medical assistance claim is properly analyzed under  
2 the Fourteenth Amendment’s “deliberate indifference” standard. (*Id.* at 27-28.) The parties  
3 previously presented the issue of whether plaintiff’s denial of medical care claim is governed by  
4 the Fourth or Fourteen Amendment in their briefs filed in connection with defendant’s motion for  
5 summary judgment. (Dkt. Nos. 67, 78, 94.) The Court requested additional briefing on this issue,  
6 which the parties provided. (Dkt. Nos. 101, 102.) In granting in part and denying in part  
7 defendant’s motion for summary judgment, the Court held that it was “not necessary at [that]  
8 juncture to decide whether Borges had a Fourth Amendment right to medical care, rather than just  
9 a Fourteenth Amendment right.” (Dkt. No. 121).<sup>1</sup> It is now necessary to determine the  
10 constitutional basis and standard of care which apply to Borges’ right to medical care.

11 **II. Legal FRAMEWORK**

12 **A. Constitutional Basis for Right to Medical Care While in Custody**

13 The Ninth Circuit analyzes alleged violations of the right to adequate medical care while in  
14 custody under the due process clause of the Fourteenth Amendment. *Gibson v. County of Washoe,*  
15 *Nev.* 290 F.3d 1175, 1187-88, 1196-97 (9th Cir. 2012) *overruled on other grounds, Castro v.*  
16 *County of Los Angeles,* 833 F.3d 1060, 1076 (9th Cir. 2016) (*en banc*). In *Gibson*, the Court  
17 determined that plaintiff’s constitutional right to medical care while in custody “derive[s] from the  
18 due process clause” and supports an “established right not to have officials remain deliberately  
19 indifferent to their serious medical needs.” *Id.* at 1187.

20 The following year, the Ninth Circuit reaffirmed that “failure to provide care for serious  
21 medical needs, when brought by a detainee . . . who has been neither charged nor convicted of a  
22 crime, are analyzed under the substantive due process clause of the Fourteenth Amendment.” *Lolli*

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25 <sup>1</sup> Specifically, the Court noted that sufficient evidence existed from which a jury could find  
26 that certain defendants violated Borges’ right to medical care even under the defendant-friendly  
27 “deliberate indifference” standard of the Fourteenth Amendment, while insufficient evidence  
28 existed from which a jury could find that another defendant violated Borges’ right to medical care  
even under the plaintiff-friendly “objective reasonableness” standard of the Fourth Amendment.  
The Court must now decide which standard applies.

1 v. *County of Orange*, 351 F.3d 410, 418-19 (9th Cir. 2003). The *Lolli* Court distinguished *Pierce*  
2 v. *Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996), which held that “the Fourth  
3 Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained  
4 without a warrant,” *id.*, on the ground that “[a]lthough the Fourth Amendment provides the proper  
5 framework for [] excessive force claim[s], it does not govern [] medical needs claim[s].” *Lolli*, 351  
6 F.3d 418-419. (Internal citation omitted.) The Court proceeded to apply the substantive due  
7 process “deliberate indifference” standard to plaintiff’s claim for denial of adequate medical care  
8 related to plaintiff’s diabetes. *Id.* at 418-20.

9 Several district courts have followed *Gibson* and *Lolli* in holding that “[c]laims of failure  
10 to provide care for serious medical needs, when brought by a prearrest detainee . . . who has  
11 neither been charged nor convicted of a crime, are analyzed under the substantive due process  
12 clause of the Fourteenth Amendment.” *Dennison v. Lane*, 2013 WL432935 \*6 (N.D.Cal. 2013)  
13 (quoting *Gibson*, 290 F.3d at 1187); *see also M.H. v. Country of Alameda*, 62 F. Supp. 3d 1049 at  
14 1076 (N.D. Cal. 2014) (holding that pre-trial detainee’s right to adequate medical care “derived  
15 from the Due Process clause”); *Frary v. County of Marin*, 81, F.Supp.3d 811, 823-24 (N.D.Cal.  
16 2015) (same); *Weaver v. City and County of San Francisco*, 2016 WL 913372 at \*7 (N.D. Cal.  
17 2016) (pre-trial detainee’s “right to adequate medical treatment is guaranteed by the Fourteenth  
18 Amendment’s Due Process Clause”); *Green v. County of Sacramento*, 2016 WL 374561 at \*10  
19 (applying Fourteenth Amendment framework to claim that defendant officers delayed plaintiff’s  
20 access to medical care).

21 This Court concurs and finds that plaintiff’s claim for denial of medical care by the County  
22 officers who detained Borges in the sobering cell after he was brought to the County jail is  
23 governed by the Fourteenth Amendment.

24 Plaintiff’s primary reliance on *Pierce* and *Tatum v. City & County of San Francisco*, 441  
25 F.3d 1090, 1097-99 (9th Cir. 2006), in arguing that plaintiff’s medical care claim derives from the  
26 Fourth Amendment, does not ultimately persuade in light of the Ninth Circuit’s holding in *Lolli*,  
27 which specifically contrasted *Pierce* in distinguishing excessive force from medical needs claims.  
28 *See Lolli*, 351 F.3d 418-419. Similarly, *Tatum* involved an excessive force claim brought by a

1 decedent’s mother against arresting offices, supervising offices, and the City and County of San  
 2 Francisco seeking damages for wrongful death and other torts under California law and 42 U.S.C.  
 3 1983. *Tatum*, 441 F.3d. at 1093. There, decedent struggled with arresting officers and was forced  
 4 to the ground and handcuffed. *Id.* After decedent’s breathing became shallow, the officers called  
 5 an ambulance but did not perform cardiopulmonary respiration (CPR). Plaintiff alleged claims for  
 6 false arrest and excessive force. *Id.* at 1093. As in *Pierce*, plaintiff did allege failure to provide  
 7 adequate medical care while in custody. Rather, plaintiff alleged that the arresting officers’ failure  
 8 to perform CPR following the arrest constituted excessive force. *Id.* at 1097. Nowhere does the  
 9 *Tatum* court state that, contrary to *Gibson* and *Lolli*, a plaintiff’s right to medical care while in  
 10 custody is governed by the Fourth Amendment. Notably, *Tatum* does not even reference *Gibson*,  
 11 *Lolli*, or a Fourth Amendment right to medical care.<sup>2</sup> The out-of-circuit cases cited by plaintiffs  
 12 are similarly not apt.<sup>3</sup>

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 14 <sup>2</sup> Plaintiff further argues that *Maddox v. City of Los Angeles*, 793 F.2d 1408, 1415 (9th Cir.  
 15 1986), supports plaintiff’s position that claims for denial of medical care brought by a warrantless  
 16 arrestee are governed by the Fourth Amendment. However, the *Maddox* Court specifically noted  
 that plaintiff’s claims “[arose] under the *fourteenth amendment due process clause.*” *Id.* (Emphasis  
 supplied.) Notably, the *Maddox* opinion does not even mention the Fourth Amendment.

17 <sup>3</sup> The portion of *Williams v. Rodriguez*, 509 F.3d 392 (7th Cir. 2007), on which plaintiffs  
 18 rely is dicta and, in any event, has never been adopted by a Ninth Circuit Court. There, after  
 19 rejecting plaintiff’s medical needs claim under a Fourteenth Amendment deliberate indifference  
 20 standard, the Seventh Circuit noted that claims regarding conditions of confinement for pretrial  
 21 detainees are governed by the Fourth Amendment’s objectively unreasonable standard but held  
 that plaintiff “waived any Fourth Amendment claim by failing to amend or supplement his motion  
 22 for summary judgment or raise the issue on appeal.” *Id.* at 402-403. Further, *Sides v. City of*  
*Champaign*, 496 F.3d 820 (7th Cir. 2007), noted that “[b]etween arrest and conviction the Due  
 Process Clause of the *Fifth Amendment* supplies the standard.” *Id.* at 828. (Emphasis supplied.) In  
 any event, the Ninth Circuit has not adopted *Sides*.

23 *Freece v. Young*, 756 F. Supp. 699 (W.D.N.Y. 1991), another case on which plaintiff  
 24 relies, reflects a “split of authority within [the Second] Circuit as to the proper constitutional basis  
 25 for denial of medical care claims brought by pre-trial arrestee against law enforcement officials.”  
 See *Goodwin v. Kennedy*, 2015 WL 1040663 at \*7 (E.D.N.Y. 2015). In *Goodwin*, the court noted  
 26 that the Eastern District of New York and its sister district courts “generally apply the ‘deliberate  
 27 indifference’ standard of the Due Process Clause of the Fourteenth Amendment” and adopted that  
 approach. *Id.*; See also *Mowry v. Noone*, 2004 WL 2202645, at \*4 (W.D.N.Y. 2004); *Bradley v.*  
*Rell*, 703 F.Supp.2d 109, 117 (N.D.N.Y.2010); *Jordan v. Masterson*, 2012 WL 1340796 at \*3 (D.  
 28 Conn. 2012); *Paulin v. Figlia*, 916 F.Supp.2d 524, 534 (S.D.N.Y.2013).

1           Accordingly, the Court finds that plaintiff’s medical care claim is governed by the  
2 Fourteenth Amendment.<sup>4</sup>

3           **B. Fourteenth Amendment Standard Governing Right to Medical Care in Custody**

4           Although the Fourteenth Amendment governs plaintiff’s medical needs claim, the Ninth  
5 Circuit’s holding in *Castro v. County of Los Angeles*, 833 F.3d 1060, raises serious questions as to  
6 whether application of the Fourteenth Amendment “subjective” deliberate indifference standard  
7 articulated in *Gibson* and *Lolli* is proper here. *Castro* analyzed a Fourteenth Amendment claim  
8 against officers who failed to prevent an attack against a pretrial detainee by another inmate with  
9 whom he was jailed. The *Castro* court announced a new, objective “deliberate indifference”  
10 standard for analyzing a pretrial detainee’s “failure-to-protect” claim, which no longer required  
11 proof of an officer’s subjective awareness of the risk to which he was exposing the detainee. *See*  
12 *id.* at 1070-71.

13           In this Court’s order granting in part and denying in part defendant’s motion for summary  
14 judgment, (Dkt. No. 121), the Court addressed how *Castro* changed the Fourteenth Amendment  
15 “deliberate indifference” standard in “failure-to-protect” cases, and its application in this case.  
16 This Court’s prior discussion is instructive. Prior to *Castro*, the Ninth Circuit had held that a single  
17 “deliberate indifference” test existed under both the Eighth and Fourteenth Amendments. *Castro*,  
18 833 F.3d 1060, 1068.

19 (Citations omitted). This was a subjective “deliberate indifference” test, derived from the Eighth  
20 Amendment, which required the plaintiff to prove an officer’s punitive intent or subjective  
21 awareness of the risk of harm. *Id.* (citations omitted). In *Castro*, the court found that this prior  
22 Ninth Circuit precedent was cast into “serious doubt” as a result of the Supreme Court’s ruling in  
23 *Kingsley*, which held that a pretrial detainee need not prove an officer’s “subjective intent to  
24 punish” to support a Fourteenth Amendment excessive force claim (as opposed to an Eighth  
25 Amendment claim). *Id.* at 1068-70 (citing *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015)).

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28           <sup>4</sup> The Court notes that this impacts numerous proposed jury instructions to be resolved  
with the parties.

1           After examining *Kingsley* at length, the *Castro* court held that “the broad wording of  
2 *Kingsley* . . . did not limit its holding to ‘force’ but spoke to ‘the challenged governmental action’  
3 generally.” *Id.* at 1070 (citing 135 S.Ct. at 2473–74). The *Castro* court thus extended *Kingsley*’s  
4 elimination of the subjective awareness requirement beyond Fourteenth Amendment excessive  
5 force cases, holding that *Kingsley* also applied to Fourteenth Amendment failure-to-protect claims.  
6 *Id.* In so holding, *Castro* overruled the single, subjective “deliberate indifference” standard  
7 previously used to analyze both Eighth and Fourteenth Amendment claims, finding that *Kingsley*  
8 required these two types of claims to have different “deliberate indifference” standards. *Id.* In its  
9 place, *Castro* articulated an objective “deliberate indifference” test for Fourteenth Amendment  
10 failure-to-protect claims, in which the plaintiff need only prove that the officer’s conduct was  
11 subjectively “intentional,” but may then otherwise rely on “purely objective” evidence, rather than  
12 having to prove punitive intent or subjective awareness of risk. *Id.* at 1068-70.

13           The *Castro* court did not specifically address whether this new objective “deliberate  
14 indifference” test should apply to pretrial detainees’ Fourteenth Amendment claims arising from  
15 untreated serious medical needs. However, the Supreme Court has stated that medical care claims  
16 are substantially the same as claims for failure to protect against other inmates. *See Wilson v.*  
17 *Seiter*, 501 U.S. 294, 303 (1991) (stating that the “medical care a prisoner receives is just as much  
18 a “condition” of his confinement as . . . protection he is afforded against other inmates”).  
19 (Emphasis supplied.) Similarly, the Ninth Circuit has long analyzed claims that government  
20 officials failed to address pretrial detainees’ serious medical needs using the same standard as  
21 cases alleging that government officials failed to protect pretrial detainees in some other way. *See*  
22 *Castro*, 833 F.3d at 1085 (Ikuta, J., dissenting) (collecting cases). In addition, *Castro* expressly  
23 overruled *Clouthier v. County of Contra Costa*, 591 F.3d 1232 (9th Cir. 2010)—a case which itself  
24 involved claims that correction facility officials failed to address the serious medical needs of a  
25 pretrial detainee—for interpreting “deliberate indifference” as requiring proof of the officer’s  
26 subjective intent to punish. *Id.* at 1070. Thus, when considered alongside *Castro*’s broad  
27 interpretation of *Kingsley*, the Court finds that applying *Castro*’s objective “deliberate  
28 indifference” test to this case is an appropriate lens through which to evaluate the claim. *See also*

1 *Guerra v. Sweeny*, 2016 WL 5404407, at \*3 (E.D. Cal. Sept. 27, 2016) (finding that *Castro* should  
2 apply to pretrial detainees’ claims of injury resulting from untreated serious medical needs).<sup>5</sup>

3 Defendants’ proposed jury instruction No. 15 is therefore **DENIED**.

4 **III. Application**

5 Under *Castro*, the elements of plaintiffs’ claim for denial of access to adequate medical  
6 care are:

- 7 (1) The defendant made an intentional decision with respect to the conditions under which  
8 plaintiff was confined;
- 9 (2) Those conditions put plaintiff at substantial risk of suffering serious harm;
- 10 (3) The defendant did not take reasonable available measures to abate that risk, even  
11 though a reasonable officer in the circumstances would have appreciated the high degree of  
12 risk involved—making the consequences of the defendant’s conduct obvious; and
- 13 (4) By not taking such measures, the defendant caused plaintiff’s injuries.

14 *Castro*, 833 F.3d at 1071. (Emphasis supplied.) Only a purely accidental act or inaction would fail  
15 to satisfy the first element. *See Id.* at 1070 (noting this element “would not be satisfied in the  
16 failure-to-protect context if the officer’s inaction resulted from something totally unintentional,”  
17 such as “an accident or sudden illness that rendered him unconscious and thus unable to monitor  
18 the cell”). “With respect to the third element, the defendant’s conduct must be objectively  
19 unreasonable, a test that will necessarily turn on the facts and circumstances of each particular  
20 case.” *Id.* at 1071 (citations and internal quotation marks omitted). The *Castro* court held that this  
21 required only that there be “substantial evidence that a reasonable officer in the circumstances  
22 would have appreciated the high degree of risk involved . . . .” *Id.* at 1072.

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24 \_\_\_\_\_  
25 <sup>5</sup> Other Circuit courts similarly treat failure to protect claims the same as claims alleging  
26 failure to provide adequate medical care. *See Young v. City of Mount Rainier*, 238 F.3d at 575 (4th  
27 Cir.) (2001) (stating that a claim of failure to protect from harm “is no different in any meaningful  
28 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”).

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**IV. CONCLUSION**

Accordingly, in light of the Court’s finding herein, plaintiff’s Fourth Amendment claim for denial of medical assistance for decedent is **DISMISSED** as the claim arises from the Fourteenth Amendment. The jury will be instructed consisted with the standard set forth herein.

**IT IS SO ORDERED.**

Dated: July 25, 2017

  
YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT COURT JUDGE