

the interviews on May 20 and May 27 did not negate her role as an agent of law enforcement.

The court concluded that even though Ms. Brown acted as an agent of law enforcement, her involvement was insufficient to overcome Mr. Higgins-Vogt's free will. The confessions he gave on May 20 and May 27 were made knowingly and voluntarily. While the court acknowledged Ms. Brown's unique position to earn his trust and exert influence over him by portraying herself as a mental health provider and pledging to maintain his confidentiality, the record indicates that Mr. Higgins-Vogt took numerous steps to confess on his own. Mr. Higgins-Vogt initiated and requested both police interviews. He attributed his May 27 confession to a conversation with his girlfriend rather than any undue influence from Ms. Brown. Finally, Mr. Higgins-Vogt was not influenced by any false promises of leniency made by Ms. Brown. The court concluded that Mr. Higgins-Vogt's confession was the product of his own free will and affirmed the district court's ruling that his confession was not coerced. They also admonished Ms. Brown's portrayal of herself as a "mental health professional" who served the dual role of therapist and law enforcement agent.

**Discussion**

*Higgins-Vogt* is instructive for several reasons. First, persons who profess to offer mental health services must possess the requisite education, licensure, and expertise to qualify as a mental health professional. Second, mental health professionals must accurately portray their qualifications (or lack thereof) to potential clients to truly obtain informed consent for evaluation and treatment. Third, dual agency should be avoided in treatment encounters. In those situations wherein dual agency is inherent to the treatment setting and unavoidable (most often in correctional and military settings), informed consent requires that the mental health professional inform the client or patient of the exceptions to confidentiality. In *Higgins-Vogt*, the purported "counselor" was not professionally qualified to render mental health services, and the dual and competing objectives (promising confidentiality yet prodding disclosure) were exposed in this case.

*Higgins-Vogt* is also a reminder that the U.S. Supreme Court emphasized in *Colorado v. Connelly*, 479 U.S. 157 (1986) that some form of overreaching by the state must be present before a confession will

be deemed involuntary: "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause" (p 167).

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**Pretrial Detainee's Right to Medical Care**

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**Evaluation of Alleged Violations of a Pretrial Detainee's Right to Adequate Medical Care Requires Objective Deliberate Indifference Standard**

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In *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018), the Ninth Circuit Court of Appeals reviewed the decision by the U.S. District Court for the Central District of California regarding the death of a pretrial detainee. The successor-in-interest to the detainee brought a 42 U.S.C. § 1983 (1996) action against jail staff, county, and other entities, alleging that the detainee's right to adequate medical care had been violated under the Fourteenth Amendment's due process clause. The district court granted summary judgment in favor of the defendants. On appeal, the Ninth Circuit held that claims for violations of the right to adequate medical care for pretrial detainees made under the Fourteenth Amendment should be evaluated under an objective deliberate indifference standard.

**Facts of the Case**

Matthew Gordon was arrested by the Placentia Police Department on heroin-related charges on September 8, 2013, and taken to the Orange County Men's Central Jail. Nurse Debra Finley conducted an intake evaluation of Mr. Gordon and learned that he had been using heroin daily. Ms. Finley used the Clinical Institute Withdrawal Assessment for Alcohol (CIWA) to evaluate Mr. Gordon's heroin with-

drawal, rather than the county's Clinical Opiate Withdrawal Scale (COWS) assessment form.

Ms. Finley then consulted with Dr. Thomas Le, who issued an Opiate Withdrawal Order for Mr. Gordon and ordered that he be placed in regular housing rather than the medical unit. On Mr. Gordon's paperwork, Dr. Le apparently crossed out the statement "COWS and Vital Signs on admission and daily x 5" under the heading Nursing Detox Assessments, and instead wrote "CIWA x 4 days" (*Gordon*, p 1121).

Approximately ten hours later, Mr. Gordon was placed in general population. Another detainee observed that Mr. Gordon vomited continuously for 30 to 45 minutes. On September 9, 2013, at approximately 8:30 a.m., Mr. Gordon was transferred to Module C, Tank 11, along with a "module card" indicating that he was in need of medical attention. While there, Nurse Brianna Garcia administered medications to Mr. Gordon. Deputy Robert Denny conducted three welfare checks of Module C during the evening, which involved direct visual observation of each inmate from a corridor that was twelve to fifteen feet away and elevated approximately six feet above the Tank 11 floor. Evidence also suggested that visibility was obscured by a glass corridor. Deputy Denny acknowledged that he was unable to determine if a detainee was alive, breathing, or showing "potential indicators" of distress from the viewing area.

At approximately 10:46 p.m. on September 9, 2013, inmates yelled "man down," indicating that Mr. Gordon was in distress. Deputy Denny arrived a couple of minutes later and found Mr. Gordon unresponsive. Medical staff members arrived shortly thereafter and administered care. At 11:00 p.m., Mr. Gordon was transferred to a local hospital and pronounced dead.

Mary Gordon, successor-in-interest for Mr. Gordon, sued individual defendants Mr. Denny, Ms. Garcia, Ms. Finley, and the supervising officer, Sergeant Brian Tunque, as well as the County of Orange and associated entities (entity defendants) under 42 U.S.C. § 1983 (2006), alleging that Mr. Gordon's right to adequate medical care was violated under the due process clause of the Fourteenth Amendment. Ms. Gordon alleged that systematic use of the wrong intake assessment form (i.e., CIWA instead of COWS) resulted in detainees being misclassified and incorrectly housed. She also alleged that jail staff systematically failed to conduct welfare

checks from a location allowing visual observation of inmates to ensure safety.

The district court granted summary judgment in favor of the individual defendants, concluding that a due process challenge regarding inadequate medical care required a showing of subjective deliberate indifference, for which there was inadequate evidence. Ms. Gordon appealed.

#### Ruling and Reasoning

The court ruled that claims for violations of the right to adequate medical care for pretrial detainees made under the Fourteenth Amendment should be evaluated under an objective deliberate indifference standard, not a subjective deliberate indifference standard. Because the district court applied a subjective standard, the granting of summary judgment to individual plaintiffs was in error. Therefore, the summary judgment was vacated and the case remanded.

In *Estelle v. Gamble*, 429 U.S. 97 (1976), the U.S. Supreme Court held that deliberate indifference by prison officials to serious medical needs of prisoners violated the Eighth Amendment's Cruel and Unusual Punishment Clause. The Ninth Circuit Court of Appeals held in *Carnell v. Grimm*, 74 F.3d 977 (9th Cir. 1996) that, even though the claims of pretrial detainees arise under the Due Process Clause of the Fourteenth Amendment, the Eighth Amendment provides a minimum standard of care for determining medical care and other rights as a pretrial detainee. As a result, the Ninth Circuit previously analyzed all conditions of confinement claims (including those related to medical care) under a subjective deliberate indifference standard, whether they arose from a convicted prisoner under the Eighth Amendment or a pretrial detainee under the Fourteenth Amendment.

Subsequently, in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), the U.S. Supreme Court held that a pretrial detainee alleging excessive force must prove that the force used by officers was excessive according to an objective standard, rather than a subjective standard.

Drawing on the U.S. Supreme Court's decision in *Kingsley*, the Ninth Circuit extended the objective indifference standard to failure-to-protect claims in *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir.2016). This decision recognized that there is not a single deliberate indifference standard that applies to all 42 U.S.C. § 1983 claims.

In the case at hand, the Ninth Circuit found no logical reason not to extend *Castro's* objective indifference standard to medical claims because 42 U.S.C. § 1983 contains no state-of-mind requirement independent of what is necessary to state a violation of the underlying federal right. The Ninth Circuit noted that *Kingsley* was broadly worded such that its holding was not limited to force but applied to the “challenged governmental action” generally. Furthermore, the U.S. Supreme Court had a history of treating “medical care claims substantially the same as other conditions of confinement violations” (*Gordon*, p 1124). Similarly, the Ninth Circuit had long analyzed claims of failure to address pretrial detainees’ medical needs under the same standard as alleged failure-to-protect cases for pretrial detainees. Therefore, a medical care claim against an individual defendant brought under the Due Process Clause of the Fourteenth Amendment must be evaluated under an objective deliberate indifference standard.

The requisite elements of the claim are as follows: First, the defendant made an intentional decision regarding the conditions in which the plaintiff was confined. Second, those conditions put the plaintiff at substantial risk of serious harm. Third, the defendant did not take reasonable measures that were available to address that risk, even though a reasonable individual in said circumstances would have appreciated the high level of risk involved. This conduct must be objectively unreasonable. Finally, due to not taking such measures, the defendant caused the plaintiff’s injuries.

#### Discussion

In general, a prison official can only be found liable under the Eighth Amendment for denying a prisoner humane conditions of confinement if the official knew of and disregarded (i.e., was subjectively aware of) an excessive risk to the prisoner’s health and safety. In contrast, the Ninth Circuit’s ruling in *Gordon v. County of Orange* allows a case to proceed under 42 U.S.C. §1983 for failure to provide adequate medical care under the Fourteenth Amendment Due Process clause upon showing that “a reasonable official in the circumstances would have appreciated the high degree of risk” (*Gordon*, p13), (i.e., the conduct was objectively unreasonable). Under *Gordon*, the claimant must “prove more than negligence but less than subjective intent—something akin to reckless disregard” (*Gordon*, p 1125).

The *Gordon* ruling may make it easier for pretrial detainees to succeed on 42 U.S.C. § 1983 claims of failure to provide adequate medical care because they will not have the burden of proving the subjective state of mind of the defendant.

The ruling in *Gordon* relied heavily on the U.S. Supreme Court decision in *Kingsley*. It is worth noting that the dissenting opinion in *Kingsley*, written by Justice Scalia, raised concern that the majority opinion served to “tortify” the Fourteenth Amendment. He referenced the immense body of state and statutory law under which abused individuals can seek relief, rather than via a constitutional claim. In terms of implications for psychiatry, considering this ruling under the lens of Scalia’s *Kingsley* dissent raises concern for increased frequency of successful 42 U.S.C. § 1983 claims against correctional psychiatrists for failure to provide adequate medical care.

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## Sex Reassignment Surgery for Inmates with Gender Dysphoria

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### **Refusal of Sex Reassignment Surgery for Inmates with Gender Dysphoria Does Not Constitute Deliberate Indifference**

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In *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019), the Fifth Circuit Court of Appeals affirmed the district court’s decision to grant summary judgment for the director of the Texas Department of Criminal Justice, Bryan Collier, who had refused sex reassignment surgery (SRS) for Scott Gibson (also known as Vanessa Lynn Gibson), who was a transgender prison inmate. The Fifth Circuit considered the opposing views about SRS in the medical community and concluded that refusal of SRS did not constitute deliberate indifference.