THE COURT OF APPEALS OF THE STATE OF UTAH

SPENCER CHRISTENSEN, father and personal representative of CASIE MARIE CHRISTENSEN, similarly situated, Appellant/Plaintiff, v. SALT LAKE COUNTY; WELLCON, INC.; TODD WILCOX, MD; JAMES WINDER; and JOHN AND JANE DOES 1-10, whose true names are currently unknown, Appellees/Defendants.	Appellate No. 20200220-CA Trial Case No. 170907640

BRIEF OF APPELLANT

Appeal from Decisions of the Third Judicial District Court of Salt Lake County, The Honorable Laura Scott, District Judge

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INTRODUCTION

Pursuant to Rule 24(a)(4), Utah Rules of Appellate Procedure, Appellant submits the following introduction:

Jurisdiction. The Utah Court of Appeals now has jurisdiction in this matter pursuant to Utah Code Ann. §78A-3-102. The Order of the Third District Court was filed on February 6, 2020. R. 975-980. Appellant filed a timely Notice of Appeal on March 10, 2020. R. 983-985. The Utah Supreme Court **did not** retain jurisdiction of this case and poured it over to the Utah Court of Appeals on March 11, 2020. R. 992-996.

Nature and Context of the Dispute. In 2015, Plaintiff filed a federal civil rights complaint based on an Eighth Amendment cruel and unusual punishment theory. R. 84, 137. No state constitutional or other state causes of action were included in that complaint. Defendants moved for summary judgment on that complaint based upon qualified immunity and no evidence of deliberate indifference under the federal standard. R. 129. Plaintiff's former counsel withdrew. R. 694.

Federal Judge Dee Benson granted summary judgment. R. 137-8, 734-5; Addendum 1. However, in granting the summary judgment, Judge Benson specifically noted in his Order that the dismissal applied only to the federal causes of action and state wrongful death ("Eighth Amendment's Cruel and Unusual Punishment [and] … a wrongful death claim under state law"). R. 137, 734. But,

because of Plaintiff's Response filed by current counsel asking that the dismissal be narrow and not purport to dismiss unpled state causes of action like unnecessary rigor, the Order did not dispose of state matters not in the federal cause of action, such as unnecessary rigor. R. 134-5, 137-8, 734-5.

Current counsel then filed a complaint in state court alleging Utah Constitutional violations for unnecessary rigor and state due process, respectively Articles 9 and 7 of the Utah Constitution. R. 1. This complaint was based upon the failure to appropriately assess the decedent, 21-year-old Casie Christensen, as a withdrawing heroin addict, but instead treating her as a withdrawing alcoholic. R. 4-20. This resulted in Casie's suicide after being in the Salt Lake County Jail (SLCJ) for just two days. *Id.*; *see also,* R. 473-474, 476-477.

Defendants filed a motion for summary judgment arguing issue preclusion. R. 382. They claimed that the facts set forth in the federal summary judgment motion, which were deemed admitted, precluded state unnecessary rigor and due process claims. R. 406. The court granted the motion, resulting in this appeal. R. 975-980; Addendum 3.

Appellant believes that the trial court failed to understand that the same facts that might defeat a federal civil rights claim based on deliberate indifference

do not defeat an unnecessary rigor or state due process claim under the Utah Constitution. R. 693, 707, 712, 718.

Why Appellant Should Prevail on Appeal. Utah's unnecessary rigor clause is unique. It protects inmates: (a) from unreasonably harsh, strict or severe treatment; (b) from being unnecessarily exposed to an increased risk of serious harm; and (c) from treatment that is incompatible with the values of a civilized society. *See,* Point I.A-B below. When Casie was admitted to the SLCJ on minor charges, she was a withdrawing heroin addict that had taken heroin that very day as well as the day before. The jail had in place opiate withdrawal scales to assess Casie, which would have resulted in her being moved to a unit for withdrawing addicts where she could have been watched more closely. Instead, she was assessed with an alcohol withdrawal scale that misses key physical and mental factors that put withdrawing heroin addicts at high risk for suicide. The law and the facts about this support the conclusion that the SLCJ unnecessarily exposed Casie to serious risk of harm by suicide and thus to unnecessary rigor and violations of her due process rights.

The state trial court believed that the Facts from the federal summary judgment proceeding, which were deemed to be admitted in the instant action, showed that Casie generally received adequate, non-negligent care. The trial court also believed that issue preclusion prevented Casie from litigating unnecessary rigor

and due process because of the factual findings by the federal court. The court believed that Casie could therefore not prove unnecessary rigor as a matter of law and granted summary judgment.

These were all errors because factual findings that preclude a federal cause of action do not necessarily preclude state unnecessary rigor or due process claims. These state constitutional claims are based upon different legal standards.

Additionally, there were multitudinous questions of fact implicating unnecessary rigor and due process during Casie's two-day stay at the SLCJ. These matters should be considered by a jury and not ruled upon by a judge.

For all these reasons, Appellant should prevail on appeal.

STATEMENT OF ISSUES

Pursuant to Rule 24(a)(5), Utah Rules of Appellate Procedure, Appellant submits the following Statement of Issues.

1. Unnecessary Rigor. Did the trial court misconstrue the nature and application of the "unnecessary rigor" clause of the Utah Constitution by confusing it with the federal deliberate indifference standard? And did the trial court fail to appreciate that the same facts that barred a federal deliberate indifference claim do not bar an unnecessary rigor claim?

Standard of Review. These are legal errors. The standard of review is correctness. *Kirkham v. McConkie,* 2018 UT App. 100, ¶5, 427 P.3d 444.

Preserved. This issue was preserved when Plaintiff responded to Defendants' Motion for Summary Judgment. R. 693. This was further preserved by Appellant's timely Notice of Appeal, followed by a Docketing Statement listing this issue on appeal. R. 983-5, 992-996.

2. Issue Preclusion. Did the trial court erroneously apply the issue preclusion arm of collateral estoppel to terminate the case, when the federal court never had before it, or considered, unnecessary rigor in its dismissal of the federal Eighth Amendment deliberate indifference claim?

Standard of Review. These are legal errors. The standard of review is correctness. *Kirkham v. McConkie,* 2018 UT App. 100, ¶5, 427 P.3d 444.

Preserved. This issue was preserved when Plaintiff responded to Defendants' Motion for Summary Judgment. R. 693. This was further preserved by Appellant's timely Notice of Appeal, followed by a Docketing Statement listing this issue on appeal. R. 983-5, 992-996.

3. *Due Process*. Did the trial court err in dismissing a State Constitution due process claim based on issue preclusion when that claim was never before the federal court?

Standard of Review. Denial of due process might be considered as a *de novo* standard of review under some circumstances. However, in this case the

grounds for dismissal appeared to be identical to those set forth in unnecessary rigor above. Accordingly, the standard would be the same. These are legal errors. The standard of review is correctness. *Kirkham v. McConkie*, 2018 UT App. 100, ¶5, 427 P.3d 444.

Preserved. This issue was preserved when Plaintiff responded to Defendants' Motion for Summary Judgment. R. 693. This was further preserved by Appellant's timely Notice of Appeal, followed by a Docketing Statement listing this issue on appeal. R. 983-5, 992-996.

STATEMENT OF THE CASE

Pursuant to Rule 24(a)(6), Rules of Appellate Procedure, Appellant offers the following Statement of the Case:

On April 8, 2015, Plaintiff commenced a lawsuit in the United States District Court for the District of Utah, Civil No. 2:15-cv-00238. The case asserted causes of action under 42 U.S.C. § 1983 (Eighth and Fourteenth Amendment) and wrongful death under state law (the federal action). Plaintiff's federal complaint **did not assert unnecessary rigor** in violation of the Utah Constitution, Article I, §9 or **denial of due process** in violation of Utah Constitution, Article I, §7. R. 134-135, 694. Plaintiff was represented by different counsel at that time.

On February 13, 2017, after discovery had been completed in the federal action, Defendants moved for summary judgment, outlining undisputed

material facts and the grounds justifying dismissal on the merits of all claims asserted therein. R. 92. Plaintiff's former counsel withdrew from the case. Under current counsel, Plaintiff did not file a detailed opposition to the motion for summary judgment. Rather, counsel petitioned the court to dismiss *only the exact claims asserted in the federal complaint,* as follows: ***"the [federal] Complaint did not allege*** a cause of action for any matters involving state civil rights violations, such as Article I, §9, or subjecting prisoners to ***unnecessary rigor."*** R.134 (bracketed word and emphasis added). On September 22, 2017, Judge Dee Benson apparently followed that request and granted summary judgment in Defendants' favor and dismissed with prejudice all claims asserted in the federal action, but ***"only as to the exact claims brought in this Complaint at issue and addressed in the summary-judgment motion."*** R. 137-138 (emphasis added); Addendum 1.

Thereafter, Plaintiff under current counsel filed a complaint in the Third District Court asserting only state constitutional claims for unnecessary rigor and due process in violation of the Utah Constitution, Article I, §§ 9 and 7, respectively. R. 1. On March 9, 2018, Defendants moved to dismiss the complaint under both prongs of the doctrine of *res judicata* - claim preclusion and issue preclusion (or collateral estoppel) - pursuant to Utah Rule of Civil Procedure 12(b)(6). R. 71. On August 1, 2018, Judge Scott denied Defendants' Motion to Dismiss as to claim

preclusion because Defendants' did not show that Plaintiff "should have brought the state constitutional claims in the Federal Action." R. 231; Addendum 2.

As to whether collateral estoppel barred Plaintiff's claims, the court ruled that it "was unable [at that juncture] to conclude that Plaintiff's claims were barred by issue preclusion" because Defendants had not "moved to dismiss . . . on the ground that the undisputed material facts – whether based on the allegations of the complaint and/or the undisputed material facts as established in the Federal Action – demonstrate Plaintiff's constitutional claims fail as a matter of law." R. 231-235; Addendum 2.

After a period of discovery, Defendants filed a Motion for Summary Judgment in the state case on July 15, 2019. R. 382. This motion sought dismissal with prejudice on the grounds that the undisputed material facts as established in the federal action barred Plaintiff's pending Utah constitutional claims under the doctrine of claim preclusion as a matter of law. Plaintiff filed an Opposition thereto (R. 693), and the matter came before the Third District Court for oral argument on December 30, 2019. R. 960. On February 6, 2020, Judge Scott granted Defendants' Motion for Summary Judgment as well as Defendants' Motion to Take Judicial Notice of facts from the federal case. R. 975; Addendum 3. Judge Scott then dismissed Plaintiff's claims with prejudice and this timely appeal followed. R. 983.

FACTS REGARDING THE CONFINEMENT

The Facts regarding Casie's confinement are organized as follows:

A. General Background, Facts 1-7 (collectively, **"FACT A"**).
B. Alcohol & Opiate Withdrawal & Screenings, Facts 8-15.
C. Suicide Risk from Heroin Withdrawal, Facts 16-21.
D. Casie's Heroin Withdrawal & Suicide Risk, Facts 22-27.
E. Casie's Last Hours, Facts 28-32.
F. Dr. Wilcox Admissions, Facts 33-46.

When we cite a collective groups of Facts below, we will cite them as "FACT B," for example, in all capital letters, signifying reference to the entire group, i.e., Facts 8-15. When we cite an individual Fact or Facts, we will designate it or them as "Facts 8-9," for example, and only capitalize the word "Fact."

A. GENERAL BACKGROUND

1. **Taken into Custody.** On January 8, 2014, Casie M. Christensen ("Casie") was taken into police custody for suspected shoplifting and criminal mischief. R. 4, 604.

2. **Pain from Rape.** Casie reported that she had recently escaped from a captor who had repeatedly raped her. She reported that she had painful vaginal tearing from the rape. R. 4, 624, 757.

3. **Sexual Assault Exam.** Casie was taken by a Unified Police Department officer to Pioneer Valley Hospital where she requested and submitted to a sexual assault evidence collection exam. R. 4, 624.

4. **Released from Hospital; Taken to Jail.** The hospital treated and released Casie, who was then taken to the Salt Lake County Jail ("SLCJ"). R. 4, 624.

5. **Informed SLCJ of Heroin Addiction.** Casie informed the jail that she had been using "two grams" of heroin per day, as well as cocaine, implying that she would be experiencing the serious physical and psychological effects of heroin and cocaine withdrawal in the upcoming hours and days. R. 4, 754, 756, 757.

6. **Taking Heroin Withdrawal Drugs on Admission.** At the Nursing Pre-Screen Assessment on January 8, 2014, Casie was reported to be on Clonidine, Hydroxyzine, and Methadone - 180 mg. R. 9, 754. These are all drugs commonly used in treating withdrawing heroin addicts. R. 9, 806.

7. **Placed in General Population (Gen Pop).** Casie was screened by a jail official who determined her mental health did not warrant intervention, and she was placed in the jail's general population. R. 4, 756.

B. **ALCOHOL & OPIATE WITHDRAWAL& SCREENINGS**

8. **Screened Only For *Alcohol* Withdrawal.** The various screenings done at the SLCJ employed the CIWA-Ar protocol. The CIWA-Ar protocol is the "Clinical Institute Withdrawal Assessment for Alcohol, Revised,"

and is intended to be used to assess the seriousness of problems resulting from alcohol withdrawal. R. 5; Exhibit 4 at R. 736-738.

9. Alcohol and Heroin Withdrawal Look Different. Withdrawal from heroin looks considerably different than withdrawal from alcohol. R. 6. **Heroin withdrawal** can mimic a severe flu with *vomiting, diarrhea, aching bones and joints, runny nose, watery eyes, and "goose bumps."* R. 6, 894. None of these symptoms or characteristics are assessed using the CIWA-Ar withdrawal protocol. R. 6, 800.

10. Viable Options for Heroin Withdrawal. In 2014, there were several known and viable options for safe and appropriate screening and treatment of heroin and opioid withdrawal. R. 740, 797, 802, 817, 835, 894.

11. Other Screening Protocols for Heroin Withdrawal in 2014. Dr. Wilcox, the SLCJ's medical director, was aware in January 2014 that there were other long-established screening tools that were more appropriate to assess heroin and opiate withdrawal. Among those screening tools at the time were **COWS** (Clinical Opiate Withdrawal Scale), **SOWS** (Subjective Opiate Withdrawal Scale) and **WOWS** (Defendant's Wilcox Opiate Withdrawal Scale). *See,* R. 693, but particularly R. 740, 741 and 835; *see also,* Addenda 4, 5. These screening tools are far more effective to determine the seriousness of opiate withdrawal symptoms,

including the risk of suicide for the inmate. *Id*. The CIWA protocol used with Casie is geared toward alcohol withdrawal, not drug withdrawal, and does not evaluate suicide risk. R. 740, 741 and 835; Addenda 4, 5. As a result, use of an alcohol withdrawal protocol on opiate withdrawing inmates in the SLCJ is certain to miss inmates at risk for suicide. R. 740, "Managing Opiate Withdrawal: The WOWS Method," Todd Wilcox, MD (a defendant herein), Summer 2016, CorrectCare, pp.12-13, Addendum 5.

12. <u>Opiate Withdrawal Guidelines</u>. By way of example, one such modality was the 2013 version of the Federal Bureau of Prisons guidelines known as "Detoxification of Chemically Dependent Inmates," published in February 2014. R. 10, 762. Although published in February 2014, the principles stated therein were widely known and applied in the corrections industry in January 2014. R. 10, 740, 835. The guidelines address "Opiate Withdrawal" on pages 15, 16 and 17. R. 779-781. Therein is a recommendation for "Clonidine Treatment" as "an acceptable alternative for opiate detoxification and should be considered if the institution does not have a methadone license or when otherwise medically indicated." R. 10, 781. Such treatment arguably should have been considered for Casie but it was not.

13. <u>CIWA for Alcohol; COWS for Opiate Withdrawal</u>. In the Summer of 201<u>3</u>, months before Casie's suicide, Dr. Wilcox affirmed that CIWA

was a scale used for *alcohol* withdrawal, and COWS[1] was used for "*managing opiate withdrawal*." R. 835; Addendum 4. In the correctional medicine publication entitled CorrectCare, Dr. Wilcox wrote a series of three articles entitled "Critical Commandments in Correctional Health Care." In the Summer 2013 issue, he explained that these "commandments" would "help correctional medical directors and administrators deal with these problems." R. 835, p.19; Addendum 4. The aim was "to identify potential areas of risk that are frequently part of litigation and offer long-term strategies to address those problem areas." *Id.* One of the "Commandments" in that particular edition was "Thou Shalt Implement an Effective Withdrawal Screening and Management Program." That Commandment states:

> ***For alcohol withdrawal,*** program components include screenings at least twice daily for five days, with a full set of vital signs and ***CIWA*** scores. Track ***CIWA*** scores serially and treat to suppress.

Addendum 4; R. 835 (emphasis and double emphasis added). Next is the "Commandment" for "opiate withdrawal":

> Managing ***opiate withdrawal*** includes obtaining a ***COWS*** score, assessing for ***suicidality*** and assessing and treating for dehydration….

[1] The Clinical Opiate Withdrawal Scale, or COWS, had been used for opiate withdrawal since at least 2003. R. 896.

Id. (emphasis and double emphasis added). *See*, R. 894-896 for a description of COWS, which is very similar to SOWS[2] and WOWS[3]; *see also,* chart comparing the various opiate withdrawal scales. R. 797.

14. Casie Monitored Only for Alcohol Withdrawal. Casie had the CIWA-Ar screening protocol administered to her at least four times during her 2-day stay at the SLCJ. R. 6, 755, 800. CIWA-Ar scores lower than 12 required no further action. R. 6. Casie's CIWA-Ar screenings scored as follows:

a. Jan 9, 2014, 10:00 a.m. Score = 1
b. Jan 9, 2014, 2:00 p.m. Score = 0
c. Jan 10, 2014, 8:00 a.m. Score = 3
d. Jan 10, 2014, 2:00 p.m. Score = 5

Because Casie scores were under 12 for *alcohol withdrawal*, under SLCJ guidelines, she required no further or special observation or monitoring. R. 6, 754-760.

15. Salt Lake County Criminal Justice Advisory. In July 2014, the Salt Lake County Criminal Justice Advisory Council (CJAC) published a study relevant to Salt Lake County's political, criminal justice, and behavioral health leadership. R. 13, 837. Its objective was to "identify ways to improve the efficiency and effectiveness of policies, programs, and practices to achieve better public health and safety outcomes," related to the criminal justice system, among other things.

[2] SOWS = the Subjective Opiate Withdrawal Scale. R. 818.
[3] WOWS = the Wilcox Opiate Withdrawal Scale. R. 802.

See, Salt Lake County, Utah, A County Justice and Behavioral Health Systems Improvement Project, September 2015. R. 837. That study reported that "at the time of this study [2014], ***there was no systematic screening or assessment for substance use disorders in the jail***, so the CSG Justice Center could not identify the prevalence of substance use disorders in jail." *Id*. at 839 (emphasis added). The importance of this Fact is that arguably, at a minimum, there was no available screening at SLCJ for withdrawing heroin addicts in January 2014, which creates a question of fact.

C. SUICIDE RISK FROM HEROIN WITHDRAWAL

16. Heroin Withdrawal is Horrifically Distressful. Defendant Wilcox stated the following regarding the extreme distress of heroin withdrawal:

> **Self-harm.** Severe opiate withdrawal puts patients ***in such physical distress*** that self-harm and ***suicide are extremely frequent*** in this population. Indeed, ***many patients who die of opiate withdrawal die as a result of suicide.*** Therefore, when the nurses assess patients using the WOWS protocol, we found it necessary for them to do an assessment for self-harm.

Addendum 5; R. 740 (bold italic emphasis and double emphasis added).

17. Life-Threatening Complications of Heroin Withdrawal. Some studies indicate that while withdrawal from heroin isn't generally considered life-threatening on its own, some of the medical and psychological symptoms may have complications that may be life-threatening. R. 12, 740, 835, 837. Depression, for example, may lead a withdrawing heroin addict to consider suicide. *Id.* These

studies indicate that heroin should never be stopped suddenly without the ongoing and continuous support of medical and/or mental health professionals who can employ multiple methods for managing the side effects of withdrawal and keep the individual safe. *Id.* This procedure was arguably not followed in Casie's case and constituted unnecessary rigor in her confinement. *Id.* It arguably led directly to her suicide. *Id.*

18. <u>Suicide Is a Well-Known Heroin Withdrawal Symptom</u>. Rapid or precipitous discontinuation of opiates like heroin, especially after long-term use, puts a patient at significant risk of suffering severe withdrawal symptoms, one of those symptoms or risks is a sudden decision to commit suicide. R. 9, 740, 835; Addenda 4, 5.

19. <u>Sudden Suicide Is an Enhanced Risk of Opiate Withdrawal</u>. Part of the unnecessary rigor imposed upon Casie was the greatly enhanced risk that, in her emergent depressive and seriously ill state, she could suddenly decide to commit suicide. Sudden suicidal ideation is a known consequence of opiate and cocaine withdrawal. R. 7, 740 ("severe opiate withdrawal puts patients in such physical distress that self-harm and suicide are extremely frequent"); Addendum 5.

20. <u>Extra Care Required to Prevent Suicide</u>. Patients in active substance withdrawal are at increased risk of suicide, and extra care is therefore

required, including frequent monitoring of inmates for thoughts of self-harm. R. 10, 740, 835; Addenda 4, 5.

21. <u>High Degree of Anxiety for Heroin Withdrawal</u>. Many inmates with opiate dependence have experienced multiple episodes of withdrawal prior to incarceration and are typically highly anxious during opiate withdrawal. R. 12, 740-741. Psychological support and monitoring are required to help ease these anxieties which can lead to suicide. *Id.* The inmate's mental health status must be monitored on an ongoing basis during withdrawal. *Id.*

D. <u>CASIE'S HEROIN WITHDRAWAL & SUICIDE RISK</u>

22. <u>Active Heroin & Cocaine Withdrawal</u>. Casie was going through heroin and cocaine withdrawal when she entered the Salt Lake County Jail on January 8, 2014. R. 7, 757. The following factors are relevant to Casie's withdrawal:

a. **Used Heroin "Today" & "Dope Sick."** During the Nursing Pre-screen Examination, Casie admitted to using heroin and cocaine "today," on January 8, 2014. R. 8, 755. Her "history of withdrawal related complications" was noted as "dope sick." R. 8, 755. She also reported a history of mental illness - anxiety and depression - for which she had been prescribed medication. R. 8, 758.

b. **Used Heroin the Day Before.** Casie stated during her visit to Pioneer Valley Hospital on 1/8/2014 that she had used two grams of heroin the day prior to being booked into the jail. This was reported to jail personnel. R. 8, 757.

c. **"Continuing Withdrawal Symptoms."** When Casie was evaluated by a nurse at approximately 2:52 p.m. on January 9, the nurse reported "heroin use and continuing withdrawal symptoms." R. 8. As a result, the nurse called the on-call physician, Dr. Yarbrough, to advise him of Casie's complaints. R. 757.

d. **Characterized as Needing "No Intervention."** During the Comprehensive Nurse Evaluation on January 9, 2014, Casie admitted to cocaine and heroin use, which was consistent with the earlier information she provided during the Nursing Prescreen Examination. R. 8, 755. Despite her reports of being a heroin addict and "dope sick" she was categorized as having "No risk factors or symptoms of withdrawal present – no intervention needed." R. 759. She was also characterized as having "minor medical problems." *Id.*

e. **In Pain and Currently Withdrawing from Heroin.** When mental health professional (MHP) Gibbs evaluated Casie, she took into account that not only did Casie have a history of being raped prior to coming to the jail, she noted

that Casie was currently "withdrawing from heroin," and "appears to be in a lot of pain." R. 8-9; 760.

23. <u>Heroin Withdrawal Treatment Drugs Not Provided</u>. Casie was on three (3) heroin withdrawal drugs on admission to the SLCJ. Fact 6 above and R. 754. During Casie's incarceration at the SLCJ, on January 8-10, 2014, the SLCJ obviously discontinued, forbade, and prevented further heroin and cocaine use. R. 9, 754-760. But in so doing, it also failed to provide known drugs and/or other treatment for withdrawal from heroin, which treatment was necessary to prevent the severe consequences known to occur from opiate withdrawal, such as greatly increased risk of suicide. R. 9, 740-741, 754-760; Addendum 5.

24. <u>Buprenorphine Treatment for Heroin Withdrawal</u>. Buprenorphine is an additional treatment that is acceptable and recommended for opiate withdrawal. R. 10; 781. It is used for "helping opioid-dependent patients achieve abstinence from opioids." *Id.* Dr. Wilcox described its success with heroin addicts as "incredible, almost magical." Fact 45 below; Addendum 5. Buprenorphine treatment should have been but was not considered for Casie, and the failure to do so is arguably unnecessary rigor. R. 11.

25. <u>Adjunctive Treatment for Heroin Withdrawal</u>. The Federal Bureau of Prisons also recommends adjunctive treatment for opioid withdrawal. R.

11, 781. Where the SLCJ seeks to detoxify an inmate from heroin use, the recommended treatment should be provided over five to ten days, using standard doses of the following medications unless otherwise contraindicated (R. 11, 781):

a. NSAIDS. Nonsteroidal anti-inflammatory agents, to be used for pain and fever, which Casie had (R. 11, 781);

b. Antidiarrheals & Anti-Emetics. Antidiarrheals and anti-emetics are used to control known and common gastrointestinal symptoms, which Casie had (R. 11, 781);

c. Benzodiazepines. Benzodiazepines are used for insomnia and restlessness, which Casie probably had (R. 11, 781); and/or

d. Buspirone. Buspirone, is used to reduce anxiety and symptoms associated with opiate withdrawal, which Casie had, and which may be prescribed as needed on a case-by-case basis. R. 11, 781.

Such treatments arguably should have been, but were not, considered or administered to Casie. The failure to provide this treatment arguably subjected Casie to unnecessary rigor. R. 11, 781.

26. <u>Psychological Support</u>. The Federal Bureau of Prisons also recommends that "[p]sychological support is often necessary to help ease these anxieties" that come with heroin or opiate withdrawal. R. 11, 781. The BOP further

notes that "[t]he inmate's mental health status should be ***monitored on an ongoing basis during withdrawal"*** (emphasis added). R. 12, 781. At most, Casie arguably received occasional monitoring, which is insufficient for a potentially suicidal heroin addict during withdrawal. R. 12, 781. Casie was arguably entitled to have such "ongoing" monitoring due to opiate withdrawal, but it was not provided, which arguably subjected her to unnecessary rigor. R. 12, 781.

27. **Gen Pop Prisoners Not Appropriately Monitored.** By using an inappropriate and ineffective alcohol protocol (CIWA-Ar) in assessing the severity and risks of Casie's heroin withdrawal, Defendants left Casie in the jail's general population and arguably did not closely monitor her, as required for inmates withdrawing from heroin addiction. R. 13, 740, 835. Defendants were therefore unprepared for Casie's foreseeable emergent depression and suicidal ideation, which arguably subjected Casie to unnecessary rigor and directly resulted in her death by suicide. *Id.*

E. CASIE'S LAST HOURS

28. **Vomiting Blood, Loss of Bowel Control, Much Pain, 4:00 pm.** At 4:00 p.m. on January 10, 2014, about six (6) hours before her suicide, Casie was "complaining"/reporting serious and ominous problems:

a. Withdrawal. "complaining of w/d [withdrawal] related problems." R. 757.

b. Sexual assault pain. "complications related to her sexual assault prior to her incarceration," and that she was still experiencing pain from her prior rape. R. 757, 760.

c. Vomiting blood. She informed a jail official that she was "vomiting blood." R. 757.

d. Lost bowel control. "She reports that she has not had control of her bowels …" R. 760. [and]

e. Cannot get comfortable. "She cannot get comfortable and is in a lot of pain." R. 760.

R. 14, 757, 760. These are at least arguably the symptoms of opiate withdrawal characterized by Defendant Wilcox himself as "put[ting] patients in such physical distress that self-harm and suicide are extremely frequent." R. 740.

29. "**Not Thinking Right" on January 10th, 5:11 pm.** At about 5:11 p.m. on January 10, 2014, five (5) hours before her death, Casie asked to speak with a mental health worker at the jail, stating that she was "not thinking right." R. 14, 473.

30. **Spoke with Mental Health.** Casie was subsequently able to speak with someone from the jail's Mental Health Department on Friday, January 10, 2014. R.14, 760. Thereafter, she was scheduled to go to the women's clinic on the following Monday [three days later], so she would subsequently be seen by the Mental Health Department for follow-up. R. 14, 760.

31. **Left in Gen. Pop.** But after speaking with the mental health worker, Casie was left in the jail's general population and *not moved* to an Acute Mental Health cell. R. 14, 760.

32. **Found Dead, January 10, at 10:08 PM.** At about 10:08 p.m. on January 10, 2014, Casie was found nonresponsive in her cell, having hanged herself. R. 14. She was taken to St. Mark's hospital and proclaimed dead. R. 14.

F. FACTS ABOUT DR. WILCOX AND WELLCON

33. **Wilcox Was Medical Director of SLCJ for Many Years.** Todd Wilcox, M.D., was the Medical Director of the Salt Lake County Jail (SLCJ) during the years 1996 to the present, and had that position on January 10, 2014, when Casie Christensen committed suicide. He had also been Chief Executive Officer for Defendant Wellcon during the same period. R. 703, 810.

34. **Wilcox Develops Medical Policies for SLCJ.** Dr. Wilcox and his company Wellcon "participates" with the County in developing medical policy for the SLCJ. R. 744, p.48:1-15.

35. **Wilcox Authors Opiate Withdrawal Article.** Dr. Wilcox authored the article "Managing Opiate Withdrawal: The WOWS Method" in the Summer 2016 Issue of CorrectCare, published by the National Commission on Correctional Health Care. R. 740; Addendum 5.

36. **<u>Opiate Withdrawal Has Changed</u>.** Dr. Wilcox has stated:

> Over the course of my medical career, everything about opiate management and treatment has changed. This is particularly true for opiate withdrawal. Like most of us, I learned early in my career that opiate withdrawal could be treated cold turkey. In fact, a well-known correctional medical textbook instructs the following: "Opiate withdrawal is known to be very unpleasant for patients but is not generally associated with life-threatening complications."

R. 740, p.12; Addendum 5.

37. **<u>Stronger Opiates Are Available to Inmates</u>.** Dr. Wilcox states "we live in a new world of opiates that present far greater challenges clinically." "Patients" have access to far stronger and purer opiates "and ***opiate withdrawal is more clinically severe*** and can ***frequently result in death*** if not managed appropriately." R. 740 (emphasis added); Addendum 5.

38. **<u>Wilcox Redesigned the SLCJ Policy for Opiate Withdrawal</u>.** Because of these problems, Dr. Wilcox "redesigned" the practices of the Salt Lake County Jail in order to change how "we managed opiate withdrawal to minimize morbidity and mortality." R. 704, p.12. They found that the literature "did not address the issues that we were facing in a correctional setting." *Id.*

39. **<u>Wilcox Develops WOWS Protocol for Opiate Withdrawal</u>.** For the reasons set forth above, Dr. Wilcox designed his own method to measure opiate withdrawal, which he called the WOWS Method, meaning the Wilcox Opiate

Withdrawal Scale. R. 740 (Addendum 5), complete with a scoring sheet, R. 802. It is very similar to COWS. *See*, R. 797, 894. This arguably suggests that Dr. Wilcox knew about the importance of a screening tool for heroin addicts in January 2014, but did not take steps to insure that Casie Christensen got the benefit of that tool, thus subjecting her to unnecessary rigor.

40. Opiate Withdrawal is Life-Threatening. Dr. Wilcox stated: "In the modern world, ***opiate withdrawal is a life-threatening medical condition***." R. 740, p.12 (emphasis added); Addendum 5. This again suggests that Casie was knowingly and "unnecessarily exposed to an increased risk of serious harm" by not being screened and treated for heroin withdrawal, despite the jail's Medical Director knowing how important it is for the safety of inmates. *Dexter v. Bosko*, 2008 UT 29, ¶19, 184 P.3d 592.

41. WOWS Identifies Inmates at Risk. Dr. Wilcox stated: "The primary focus of WOWS is to identify clinical scenarios that cause dehydration and electrolyte abnormalities. These are the two main areas where patients can get in trouble, and an earlier intervention for vomiting and diarrhea and targeted assessment for clinically relevant dehydration became the focus of the WOWS protocol." R. 740, p.12; Addendum 5. Casie had vomiting and diarrhea. Fact 28(c) and (d) above. This once again arguably suggests that failure to identify Casie

Christensen as an inmate at risk for suicide in January 2014 "unnecessarily exposed [her] to an increased risk of serious harm." *Dexter*, ¶19.

42. <u>WOWS Was Implemented Before 2014</u>. In 2016, Dr. Wilcox stated: "We have used the WOWS protocol for about ***two years*** and have found it to be a ***much more sensitive tool for identifying patients who need additional medical assistance early enough in the withdrawal process*** to intervene effectively without having to send out patients in crisis." R. 740, p.12 (emphasis added); Addendum 5. Dr. Wilcox testified at least four (4) times at deposition that WOWS was implemented **<u>before January 2014</u>**. R. 747, 748, 750 (Wilcox Depo., pp.74:7-9, 78:6-8, 80:10-12, 85:8-11). This once again arguably suggests that WOWS was in effect in January 2014, and that Dr. Wilcox knew how important it was, i.e., a "sensitive tool for identifying patients who need additional medical assistance early enough in the withdrawal process to intervene effectively." R. 740; Addendum 5. The failure to administer this tool to Casie Christensen again suggests that she was "unnecessarily exposed to an increased risk of serious harm." *Dexter*, ¶19.

43. <u>Suicide Is "Extremely Frequent</u>." Dr. Wilcox stated: "Severe opiate withdrawal puts patients in such physical distress that ***<u>self-harm and suicide are extremely frequent</u> in this population.*** Indeed, many patients who ***die of opiate withdrawal die as a result of <u>suicide</u>."*** R. 740, p.12 (emphasis and <u>double</u> emphasis

added); Addendum 5. This again suggests that even though Dr. Wilcox, as Medical Director of the SLCJ, knew in January 2014 that suicide was "extremely frequent in this [heroin withdrawing] population," and that many opiate withdrawing inmates "[die] as a result of [suicide]," the WOWS protocol was withheld from Casie Christensen, thus unnecessarily exposing her "to an increased risk of serious harm," and therefore to unnecessary rigor. *Dexter,* ¶19.

44. <u>Suicide Prevention is a Critical Component</u>. Dr. Wilcox stated: "Consequently, we view adequate ***opiate withdrawal treatment to be a <u>critical component</u> of our <u>suicide prevention</u> plan***. Since implementation of this protocol, we have seen significant decreases in suicide attempts and suicide completions in our patient population." R. 740, p.13 (emphasis and <u>double</u> emphasis added); Addendum 5. Since opiate withdrawal treatment is "a critical component of our suicide prevention plan," and it significantly "decreases … suicide attempts and suicide completions" in the inmate population, it was critical that Casie be administered "opiate withdrawal treatment," especially since she was a known addict. To withhold that treatment from her unnecessarily exposed her to "to an increased risk of serious harm," and thus met the standard of unnecessary rigor. *Dexter,* ¶19.

45. <u>Buprenorphine Drug Treatment is Critical</u>. Dr. Wilcox stated: "Treatment [of opiate withdrawing patients] in the inpatient setting also allows for much more aggressive medical management. When clinically appropriate, a primary therapy used to manage these serious opiate withdrawal patients is the initiation of a ***<u>buprenorphine</u>/naloxone (Suboxone) taper. We have found <u>incredible, almost magical, success</u> with this medication.*** We typically start these patients at 76 mg buprenorphine / 4 mg naloxone and cut that dose in half every two to three days. The clinical ***turnarounds*** you can see in these patients is ***<u>nothing short of miraculous</u>***." R. 740, p.13 (emphasis and <u>double</u> emphasis added); Addendum 5. Since identifying opiate withdrawing patients allows for the proper medication and treatment, where Dr. Wilcox has "found incredible, almost magical success," and the "turnarounds" are "nothing short of miraculous," it is quite arguable (i.e., a question of fact) that Casie would have benefitted from this "miraculous" treatment, and would have been saved from suicide. To deny this treatment for an opiate withdrawing addict "unnecessarily exposed [Casie] to an increased risk of serious harm," thus meeting the standard for unnecessary rigor. *Dexter*, ¶19.

46. <u>Contradiction and Question of Fact on Buprenorphine</u>. Dr. Wilcox testified at his deposition contrary to what he wrote in 2016:

> Yes. All of these are used in long-term substance abuse therapy. They're not used in acute opiate withdrawal.

R. 706, Wilcox Depo., p. 38:14-20. Yet, in Fact 45 above, he touts the "incredible, almost magical success … nothing short of miraculous" of the drug Buprenorphine. This contradiction creates a question of fact about when the Buprenorphine should have been used with Casie, acutely or long-term. It also suggests arguably that Casie was "unnecessarily exposed to an increased risk of serious harm," meeting the definition of unnecessary rigor. *Dexter*, ¶19.

SUMMARY OF ARGUMENT

Pursuant to Rule 24(a)(7), Appellant submits this Summary of Argument:

On January 8, 2014, 21-year-old Casie Christensen, mother of two very young children, was arrested on a minor charge of causing a disruption at a mall and taken to the SLCJ. When she was booked and admitted to SLCJ, it was noted in several places in her record that she was an actively withdrawing opiate addict, who had taken heroin the very day she was arrested. She had several medical problems characteristic of a withdrawing opiate addict. Casie was at the time on three heroin withdrawal drugs. She was admitted into the jail and ***immediately put on an alcohol withdrawal*** protocol, even though the SLCJ and its medical director, Dr. Wilcox, knew that she was not withdrawing from alcohol but was ***withdrawing from heroin, an opiate.*** Alcohol and heroin (opiate) withdrawals are much different.

At the time of her admission and short stay at the SLCJ, the Jail and its medical staff knew that there were separate and different protocols for detainees who were withdrawing from opiates like heroin. They also knew that withdrawing opiate addicts were at a significantly greater risk of suicide than were persons withdrawing from alcohol. The Jail did not treat Casie as a withdrawing opiate addict, which would have required a different protocol and placement in a special wing with more watchfulness to prevent suicide. Young Casie committed suicide two days later, January 10, 2014, leaving children aged 2 and 4 to be raised by a grandmother.

On April 8, 2015, Casie's father, Spencer Christensen (Spencer), through other counsel, filed a federal civil rights lawsuit against Defendants in the United States District Court for the District of Utah, alleging violation of the Eighth Amendment cruel and unusual punishment clause and a state wrongful death claim. R. 693. Defendants moved for summary judgment in federal court. R. 694. New counsel, through Robert B. Sykes of Sykes McAllister Law Offices, filed a two page "Response to Defendant's [Pending] Motion for Summary Judgment." *See*, Fed. Doc. 42, filed 9/19/2017, R. 694. That Response noted that the federal complaint "***did not allege a cause of action for any matters involving state civil rights violations*** such as Article 1, Section 9" of the Utah Constitution which deals with "subjecting prisoners to ***unnecessary rigor***." R. 694 (emphasis added). The

Response asked that the Order arising out of the Summary Judgment "be narrowly tailored so as to grant summary judgment only on the matters that were brought before the [Federal] Court in the Motion for Summary Judgment." Fed. Doc. 42, filed 9/19/2017, R. 694.

Federal Judge Dee Benson granted Defendants' MSJ but specifically limited the scope of dismissal to the claims that were made in the federal action, noting in his order that its scope was "***only as to the exact claims brought in this Complaint*** at issue and addressed in the Summary-Judgment Motion." Federal Doc. 43, R. 694, 734 (emphasis added); Addendum 1.

When this case was refiled in state court, Defendants made a Motion to Dismiss (MTD) on or about March 9, 2018 (with Wellcon and Wilcox filing a Joinder on March 14, 2018). R. 71. Because of Judge Benson's limiting language on the dismissal, the district court denied the MTD and rejected Defendants' *res judicata* arguments. R. 231. Judge Scott ruled that because ***"the state and federal standards for determining whether a plaintiff is entitled to damages for a constitutional violation are different***, a federal court determination that the material undisputed facts do not give rise to a federal constitutional violation does not preclude a state court from deciding ***whether those same facts*** will give rise to a state constitutional violation." *See*, Addendum 2, R. 234, Order Re: Motion to

Dismiss (citing *Jensen v. Cunningham*, 2011 UT 17, ¶49, 250 P.3d 465) (emphasis added).

A year later, Defendants filed a Motion for Summary Judgment (MSJ) claiming issue preclusion. R. 429. This Motion was granted by the court, which in effect reversed the court's earlier ruling. R. 975-980; Addendum 3.

The essence of the trial court's decision was based upon two key legal errors, (a) a misunderstanding of the law of unnecessary rigor and (b) an erroneous application of issue preclusion to preclude unnecessary rigor and due process in state court when those issues had not even been raised in federal court.

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ARGUMENT

POINT I

~ Prohibition Against "Unnecessary Rigor" ~

THE UTAH CONSTITUTION PROHIBITS PRISONERS FROM BEING "TREATED WITH UNNECESSARY RIGOR." THIS MEANS BEING FREE FROM UNREASONABLY HARSH, STRICT OR SEVERE CONDITIONS OF CONFINEMENT, AND NOT BEING "UNNECESSARILY EXPOSED TO AN INCREASED RISK OF SERIOUS HARM." QUESTIONS OF FACT REGARDING UNNECESSARY RIGOR REQUIRED DENIAL OF THE MOTION FOR SUMMARY JUDGMENT.

A. Utah's "Unnecessary Rigor" Clause – Article I, §9.

The Utah Constitution Art. I, § 9 reads:

> Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. ***Persons arrested or imprisoned shall not be treated with unnecessary rigor.***

Emphasis added.

B. A Unique Inmate Right in Utah.

Article I, Section 9 "protects ... imprisoned individuals from the infliction of treatment during their confinement that is ***incompatible with the values of a civilized society***." *State v. Houston*, 2015 UT 40, ¶50, 353 P.3d 55 (emphasis added) (citing *State v. Perea*, 2013 UT 68, ¶124, 322 P.3d 624). Only *four* other state constitutions have a similar provision. *Dexter v. Bosko*, 2008 UT 29, ¶7, 184 P.3d 592.

"A prisoner suffers from unnecessary rigor when subject to ***unreasonably harsh, strict, or severe treatment.***" *Dexter*, ¶19 (emphasis added). The Utah Supreme Court has clarified this right:

> The unnecessary rigor clause of the Utah Constitution protects persons arrested or imprisoned from the imposition of circumstances on them during their confinement that ***demand more of the prisoner than society is entitled to require. The restriction on unnecessary rigor is focused on the circumstances and nature of the process and conditions of confinement.***

Dexter, ¶17 (emphasis and double emphasis added). "This may include being ***unnecessarily exposed to an increased risk of serious harm***." *Id*. ¶19 (emphasis added).

C. The Court's Errors.

The essence of the court's erroneous ruling on unnecessary rigor was:

> However, even if the Court assumes for purposes of the motion for summary judgment Plaintiff's position that ***there is a better or more accurate protocol*** that should have been used by Defendants ***to assess*** Ms. Christensen during her incarceration, based on the remaining undisputed facts ***this Court cannot possibly conclude Defendants were deliberately indifferent*** or otherwise violated Ms. Christiansen's [sic] constitutional rights to be free from "unnecessary rigor" or due process under the Utah Constitution. Thus, the ***inadequate medical care*** claims against Defendants fail as a matter of law.

Memorandum and Order, 2/6/2020, R. 979 (emphasis and double emphasis added).

First, the distinguished trial court erroneously viewed this case as a question about "inadequate [i.e., negligent] medical care." The trial court simply

missed the issue. Plaintiff is not arguing inadequate or negligent care. Instead, Plaintiff argues unnecessary rigor because the failure to assess and treat Casie with an opiate withdrawal standard (a) subjected her to "unreasonably harsh, strict or severe treatment" in her confinement (*Dexter,* ¶19); (b) "unnecessarily exposed her to an increased risk of serious harm," i.e., death by suicide (*Dexter,* ¶19); and (c) "demand[ed] more … than society is entitled to require" *(Dexter*, ¶19). These are classic, well-established unnecessary rigor standards as set forth in *Dexter* and in other cases. They are overwhelmingly supported by the Facts set forth above (FACTS C, D and E), particularly by Defendant Wilcox's own admissions. *See,* FACT F above; *see also*, Addenda 4 and 5. At a bare minimum, there are substantial questions of fact about unnecessary rigor in this case.

Second, the trial court misunderstood that Plaintiff is <u>not</u> claiming "deliberate indifference." The trial court held that "based on the remaining ***undisputed facts*** this Court cannot possibly conclude Defendants were ***deliberately indifferent***." R. 979 (emphasis added). Plaintiff's position is that the unnecessary rigor clause should have protected Casie Christensen from the "unreasonably harsh, strict, or severe treatment" of heroin withdrawal without the available protocols for withdrawing opiate addicts that would likely have saved her life. Defendants "unnecessarily exposed [Casie] to an increased risk of serious harm" by suicide

when they screened and treated her as an alcoholic instead of as a withdrawing heroin addict. Together, the improper screening and lack of heroin withdrawal treatment, combined with leaving her untreated in gen pop, senselessly and unnecessarily exposed Casie to the extreme rigors, pains and horrors of opiate withdrawal, including the greatly enhanced risk of suicide. *See*, FACTS B, C and D ("Severe opiate withdrawal puts patients in such physical distress that self-harm and suicide are extremely frequent." Facts 16, 19, 43; Dr. Wilcox Statement, Addendum 5). *See in particular,* Fact 28 for the horror Casie endured alone in her cell in her final hours.

Third, the trial court failed to appreciate that the same facts that might justify dismissal of a deliberate indifference claim in federal court do not preclude an unnecessary rigor claim in state court. This is discussed in detail in Point II below.

D. ***Dexter* & Subsequent Federal Cases.**

The last major Utah Supreme Court civil case dealing in detail with the unnecessary rigor clause of the Utah Constitution was *Dexter v. Bosko,* 2008 UT 29, 184 P.3d 592. *Dexter* explained that the unnecessary rigor clause focuses *inter alia* on (1) the circumstances, nature and "conditions of confinement," and (2) whether a prisoner is "unnecessarily exposed to an increased risk of harm." *Dexter,* ¶¶17, 19.

Inmate Dexter and other inmates were being transferred from the Utah State Prison to the Beaver County Jail in a 15-passenger van. The inmates were hand-cuffed and shackled, but "unable to buckle their own seatbelts." *Dexter,* ¶3. Dexter asked to have his seatbelt fastened but Bosko refused. *Id.* Bosko later drifted into the median and rolled the van, ejecting Dexter and paralyzing him. *Id.* Defendants made a motion to dismiss, which was denied. *Id.* at ¶4. The Utah Supreme Court affirmed the trial court's decision in favor of the plaintiff. *Id.*, ¶27. Two major take-aways from *Dexter* are (a) the mere failure to buckle a seatbelt could be unnecessary rigor, and (b) it is a question of fact for the jury.

In *Miranda v. Utah,* 2009 WL 383387 (D. Utah), Federal District Judge Ted Stewart considered a case where Healey, a Utah State Prison guard, opened the cell door of a white supremacist inmate while an African American inmate was completing his recreation time. The white supremacist inmate attacked and severely injured the African American inmate. *Id.* at *1.

The court reviewed *Dexter* in detail. *Miranda* at *9-10. Judge Stewart concluded:

> Thus, in order to proceed on his claim, Plaintiff must produce evidence that the nature of the act presented an ***obvious and known serious risk of harm*** to the arrested or imprisoned person; and, knowing of that risk, the official ***acted without other reasonable justification.***

Miranda, *10 (emphasis added). Because guard Healey left a door open, the plaintiff was "***unnecessarily exposed to an increased risk of serious harm.***" *Id.* (quoting *Dexter;* emphasis added). Further, "whether Defendant Healey's act of opening Kell's cell door was justified is one for the jury." *Id.*, *10.

In *Finlinson v. Millard County*, --- F.Supp.3d --- (2020 WL 1939174) (D. Utah), Judge Tena Campbell addressed an unnecessary rigor claim. Mr. Finlinson was involved in a low speed "chase," where he was shot and tased. *Id.*, *1-2. Later, he was incarcerated in the Utah County Jail where the unnecessary rigor claims arose. He was (a) placed on suicide watch, (b) in administrative segregation, and (c) denied his anti-psychotic medication, all of which were quite onerous. *Id.* at *4. The Court discussed *Dexter* at length. *Finlinson* at *5-8.

The *Finlinson* court held that under *Dexter*, a reasonable jury could conclude that Mr. Finlinson had been subjected to "administrative segregation" because of the desire of the Lieutenant to "punish him for unproved charges of violence against law enforcement officers, rather than for any legitimate penological reason such as the safety, security, control, or order of the Jail." *Finlinson* at *6 (internal punctuation and case citations omitted). Suicide watch for six weeks had no reasonable relation to a governmental purpose and the haphazard medication

administration could likewise be viewed by a reasonable jury as meeting the standards of "unduly harsh restrictions" set forth in *Dexter*. *Finlinson*, *7.

The take-away from *Finlinson* is that conditions of confinement such as administrative segregation, suicide watch and denial of the proper medications qualify as unnecessary rigor under *Dexter*.

E. "Broader Than Its Federal Counterpart."

Plaintiff claims that the "Defendants had a duty to ensure that Casie was not unnecessarily exposed to an increased risk of harm." R. 16, Complaint, ¶57. The Utah Supreme Court has stated, "Although the first sentence of article I, section 9 closely approximates the language of the Eighth Amendment to the United States Constitution, the unnecessary rigor provision has ***no federal counterpart.*** *" Dexter*, ¶7 (emphasis added). The Utah Supreme Court elaborated:

> [T]he last sentence [of Article I, section 9] makes section 9 ***broader than its federal counterpart.*** … Article I, section 9 is also a self-executing provision that prohibits specific evils that can be remedied without implementing legislation.

State v. Lafferty, 2001 UT 19, ¶73, 20 P.3d 342, 365 (emphasis added; citation omitted).

F. Flagrant Violation of Casie's Rights.

Casie must establish that (1) there was a "flagrant" violation of her constitutional rights, (2) that existing remedies do not redress her injuries, and (3)

equitable relief is "wholly inadequate." *Dexter*, ¶22 (citations omitted). In the context of a confinement injury, a flagrant constitutional rights violation is shown "If an official ***knowingly and unjustifiably subjects an inmate to circumstances*** previously identified as being unnecessarily rigorous…." *Dexter,* ¶25 (emphasis added). "[T]hat is obviously a flagrant violation." *Id.*

A "flagrant" constitutional violation is made out when the act complained of "presents an ***obvious and known serious risk of harm*** to the arrested or imprisoned person," and "knowing of that risk, the official acts without other reasonable justification." *Id.* at ¶25 (emphasis added).

Casie has made out a flagrant violation. In January 2014, there was considerable evidence that was well-known in correctional medicine generally, and to Dr. Wilcox specifically, that opiate withdrawal presented a significant risk of suicide by an inmate if it was not handled properly. FACTS B, C, D and F. Dr. Wilcox even suggested in a 2013 "Commandment" to correctional institutions to manage opiate withdrawal with COWS, thereby "assessing for suicidality." Fact 13; R. 835; Addendum 4. Dr. Wilcox was so concerned about the *suicide risk to inmates* that he developed his own WOWS scale and wrote a detailed article on opiate withdrawal for CorrectCare (a medical correctional care magazine) in the Summer of 2016. Addendum 5. He noted therein that opiate withdrawal puts patients in such

physical distress "that self-harm and suicide are extremely frequent in this population." Fact 13; R. 835; Addendum 5.

Casie Christensen suffered a flagrant violation of her rights under Article I, Section 9 of the Utah Constitution when Defendants knowingly and willfully used CIWA, an alcohol withdrawal protocol, to evaluate a heroin withdrawing addict. This occurred even though Defendants knew there were a variety of heroin and opiate withdrawal protocols available. FACTS B, C, D; R. 800, 835 and 743, Wilcox Depo pp. 72-73. This "unnecessary rigor" greatly increased the suffering and risk of suicide in Casie, an opiate withdrawing inmate. Facts 43-45. The correct protocol would have necessitated that Casie be placed in the jail's mental health unit where she would be constantly monitored by jail staff, thus likely preventing her suicide. Defendants knew in 2014 that there were "more sensitive" methods for evaluating opioid withdrawal and had not implemented such protocol. R. 748, Wilcox Depo., p. 78:2-3. Pursuant to the unnecessary rigor clause, Defendants had a duty to ensure that Casie was not "unnecessarily exposed to an ***increased risk of serious harm,***" or to "unreasonably harsh, strict, or severe treatment." *Dexter,* ¶19 (emphasis added).

Dr. Wilcox's actions were especially egregious because there were established opioid withdrawal protocols available in 2014. *See,* FACTS B, C; *see*

also, R. 747, pp. 75:15-22. Further, Dr. Wilcox had, in 201**3**, written and lectured about the proper methods to handle opioid withdrawal. Facts 11, 13, 35-45; R. 835; Addendum 4. Dr. Wilcox's own admissions show that he, and therefore SLCJ, knew prior to January 2014 about the extreme suicide dangers and suffering associated with opioid withdrawal. FACTS B, C, D and F; R. 835; Addendum 4. As the Jail's Medical Director, Dr. Wilcox failed to implement proper protocols to accurately assess Casie when she was admitted to the jail. As a result, she died in agony because of the unnecessarily rigorous conditions of opiate withdrawal (pain, vomiting, bowel incontinence, severe anxiety, not thinking right, etc.) that Casie was forced to endure. FACTS D, E ("appears to be in a lot of pain"). Defendants' actions "unnecessarily exposed [Casie] to an increased risk of serious harm." *Dexter*, ¶19. Arguably, Defendants "knowingly and unjustifiably subject[ed] an inmate to circumstances previously identified as being unnecessarily rigorous," which "is obviously a flagrant violation." *Dexter*, ¶25. These are manifestly questions of fact for a jury.

G. ***Bott v. DeLand*: Choosing "Less Efficacious Treatment."**

Bott v. DeLand, 922 P.2d 732 (Utah 1996), sets forth some conduct that does not violate the unnecessary rigor clause. Defendants' MSJ cited the case below. R. 717. "On the other hand, a prison physician would be liable … for ***choosing an***

'easier and less efficacious treatment' than professional judgment dictates." *Id.* at 741 (emphasis added). Such is the case here. Dr. Wilcox and SLCJ chose the easier, less efficacious CIWA and caused Casie's death. At a minimum, there are significant questions of fact as to whether a "less efficacious" evaluation (CIWA) was chosen, as Plaintiff contends.

H. <u>Deliberate Indifference v. Unnecessary Rigor</u>.

It is also important here to distinguish between the "deliberate indifference" standard "unnecessary rigor." *Bott's* "unnecessary abuse" is inherent in unnecessary rigor cases. The Utah Supreme Court drew this distinction in *Bott:*

> It has been recognized that the guarantee against cruel and unusual punishment focuses specifically on the methods or conditions of punishment, while the guarantee against unnecessarily rigorous treatment extends both to prisoners and to arrestees and ***protects them against unnecessary abuse.***

Bott, 922 P.2d at 737 (emphasis added; citation omitted). *Bott* held that an aggrieved plaintiff may sue under either theory, deliberate indifference or unnecessary abuse. *Bott*, 922 P.2d at 740. The "deliberate indifference standard protects prisoners from cruel and unusual punishments," while the "unnecessary abuse standard protects prisoners from unnecessary rigor." *Id.* The court then discusses the federal deliberate indifference standard. In a nutshell, it requires that the defendant know of a specific medical condition that is crucial to a person's health, and then

deliberately ignores that condition. *Id.* (discussing a variety of federal and Tenth Circuit cases). Plaintiffs do not make a deliberate indifference claim here. Casie's problems dealt not with punishment but with "unnecessarily rigorous treatment" and "unnecessarily expos[ing Casie] to an increased risk of serious harm." *Dexter*, ¶19.

Defendants framed their MSJ arguments below as though deliberate indifference is the standard that Plaintiff must prove. The trial court mistakenly agreed with Defendants, holding that "this Court cannot possibly conclude Defendants were deliberately indifferent." *See*, Point I.C above. But that was error. We must only prove "unnecessary abuse" or unnecessary exposure "to an increased risk of serious harm" to establish unnecessary rigor under Article I, Section 9. We believe the facts show that Casie meets that standard because Dr. Wilcox and the SLCJ clearly understood, earlier than January 2014, that it was important to evaluate opiate withdrawal in inmates with the proper scale so that they could be treated and guarded against suicide. FACT F. This did not happen. At a minimum, it is a question of fact for the jury.

An even more powerful example of the clear difference between federal and state constitutional protections is provided in *Finlinson*, *10, which describes the history of *Dexter*. Prior to Dexter filing an unnecessary rigor case in state court, he filed a §1983 case in federal court claiming that his federal due process rights

were violated when his seatbelt was not fastened by the prison guard. He simultaneously brought a state unnecessary rigor claim in the federal case as explained in *Dexter v. Ford Motor Co*., 92 F.App'x 637, 638, 644 (10th Cir. 2004). *Finlinson*, *10. "The Tenth Circuit held that the officers responsible for not placing a seatbelt on the plaintiff were protected by qualified immunity because there was no clearly established right to be seatbelted during a prison transport." *Finlinson*, *10, citing *Dexter v. Ford Motor Co., supra* at 643-644. That conclusion "fully eliminated the plaintiff's federal claim," but the Tenth Circuit instructed the district court "to remand the unnecessary rigor claim to the state courts." *Finlinson*, *10.

Upon remand, the state district court made the same mistake urged by Defendants in the instant case, i.e. "the state trial court dismissed the suit because, in its view, the Tenth Circuit's findings regarding §1983 applied equally to the unnecessary rigor claim." *Finlinson*, *10. Finlinson then noted:

> But the Utah Supreme Court reversed, holding that ***the inquiries were not the same*** and that the trial court (or, if the evidence was sufficient, ***a jury) must determine whether a state constitutional violation had occurred,*** independent of the Tenth Circuit's findings regarding the lack of any federal constitutional violation.

Finlinson, *10 (emphasis added). The court further stated "[b]ecause it is possible that a jury could allow Mr. Finlinson to ***recover under his state constitution claim while still denying his federal claim***, it would be premature to hold that Mr.

Finlinson has an existing remedy under federal law that bars his state claim." *Finlinson*, *11 (emphasis added).

Appellant makes the same observation and request in this case. "The inquiries [are] not the same," and a jury must determine whether or not Casie was subjected to unnecessary rigor and the denial of due process.

I. Many Questions of Fact Regarding Unnecessary Rigor.

The discussion above raises important questions of fact that need to be resolved by a jury. These questions include at least the following:

(1) Why was Casie not given an opiate withdrawal scale? Heroin withdrawal is obviously very painful and stressful and has a very high risk of inducing suicide to those withdrawing from it. R. 740 and Addendum 5 (suicide is "extremely frequent"). If Dr. Wilcox and the SLCJ knew about the importance of the various opiate withdrawal scales that existed in mid-2013, well prior to January 8, 2014, and if Dr. Wilcox had himself developed his comparable and similar WOWS scale prior to Casie's incarceration (Fact 42), why was Casie not given an opiate withdrawal scale? A jury should determine if this was unnecessary rigor.

(2) "Unnecessarily exposed to an increased risk of serious harm." There are arguable questions of fact as to whether or not the Defendants unnecessarily exposed Casie to an increased risk of serious harm. In other words,

did the failure to properly evaluate her for heroin withdrawal unnecessarily expose her to a risk of death by suicide, as Dr. Wilcox himself explains in FACT F (35-45)? That is a question of fact for a jury.

(3) How serious was Casie's condition? Dr. Wilcox claims that Casie's condition was not that serious (R. 746, pp. 72-73), but her records belie that claim. Late on January 10th, Casie was vomiting blood, had uncontrollable diarrhea, was in great pain and could not get comfortable. Fact 28. She was "not thinking right." Fact 29. She had been raped, had painful vaginal tears, was "dope sick," had used heroin the very day of her arrest and had used 2 grams of heroin the day before being booked. Fact 22 (she was "withdrawing from heroin" and "appears to be in a lot of pain"). She was already on at least three heroin withdrawal drugs. Fact 6. These present important questions of fact about whether the seriousness of Casie's condition was ignored, thus exposing her to the risk of serious harm. The jury should hear this evidence.

(4) Factual disputes over opiate scales. Dr. Wilcox claims that CIWA was adequate for drug withdrawal in January 2014 (R. 746, p. 69:18-23), but medical experts disagree with him, and *Dr. Wilcox disagrees with himself. See,* the extensive discussion and Facts set forth above in FACT F, particularly Facts 35-45. The COWS and WOWS scales, as well as other similar scales, have numerous

evaluative criteria not found in CIWA. Facts 11-13; FACT B; *see also,* comparison of scales in R. 797-802 and 895. For example, both R. 895 (the COWS scale recommended by Dr. Wilcox in his 2013 "Commandments" article), and his own WOWS scale (R. 802), have at least six (6) evaluative areas not included in CIWA: yawning, pupil size, anxiety, bone or joint aches, gooseflesh skin and runny nose. *Id.* So, the factual question arises as to whether CIWA was indeed adequate, as claimed by Dr. Wilcox, or whether in January 2014 it was knowingly inadequate and exposed Casie unnecessarily to significant harm. This is for the jury.

(5) Knowledge of inadequacy for years. Dr. Wilcox was aware for years of the SLCJ's inadequacy in treating inmates for opiate withdrawal. For example, a 25-year-old heroin and cocaine addict landed in the Salt Lake County Jail in 2010. R. 858 ("County jail sued over Utah inmate's heroin withdrawal death," Salt Lake Tribune, January 17, 2012). She told the nurse at the jail that she had been using 2 grams of heroin a day, like Casie's use. The young woman died five days later, and a federal lawsuit was filed claiming that the Defendants, including Dr. Wilcox, were deliberately indifferent to the plaintiff's medical needs. *Id*. So, the factual question arises as to the length of time which Defendants had to rectify a knowing inadequacy in the treatment of withdrawing heroin addicts. This is a jury question.

(6) Official finding of no screening for substance abuse. In September 2015, Salt Lake County published a 20-page study entitled "A County Justice and Behavioral Health Systems Improvement Project." R. 837. This Council of State Governments (CSG) Justice Center study included a 12-month intensive look at the SLCJ's data. R. 838. One particular finding screams out: "[a]t the time of the study [August 2013-July 2014], there was ***no systematic screening or assessment for substance use disorders in the jail,*** so the CSG Justice Center could not identify the prevalence of substance use disorders in jail." R. 839 (emphasis and bracketed words added). This is consistent with Plaintiff's claimed lack of screening for opiate withdrawal inmates in January 2014. It presents a question of fact for a jury.

(7) Defendants claim "appropriate treatment" was given. Defendants in this case have stated that "all care and treatment was appropriate" in Casie's case. R. 942. This statement alone is a fundamental question of fact. It is arguable that Casie ***did not*** receive the level of care that Dr. Wilcox argues is best practice and known to SLCJ staff at the time. R. 835 (2013: "managing opiate recovery requires a COWS score, assessing for suicidality"). "Severe opiate withdrawal puts patients in such physical distress that self-harm and suicide are extremely frequent." R. 740. "For patients who do not respond to outpatient

interventions, more aggressive surveillance and treatment are necessary." R. 741. At the very least, there is a significant question of fact regarding how SLCJ staff responded to Casie at roughly 5:11 p.m. on January 10, 2014 when she, on her own, reported to the duty officer that she was "not thinking right." Fact 29, R. 473. Casie knew she was in trouble. She was pleading for help. Why was Casie not moved immediately to the Acute Mental Health wing where she could have been monitored much more closely? What criteria was used? This decision was made at a critical juncture in Casie's withdrawal process because the heightened monitoring may arguably have saved her life. These are fact questions. As such, Casie's unnecessary rigor because of SLCJ's treatment and care really is a matter for a jury to decide.

In summary, there are many contested issues of fact in this case that preclude summary judgment for Defendants.

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POINT II

~ Issue Preclusion is Inapplicable ~

ISSUE PRECLUSION DOES NOT BAR THIS CASE BECAUSE THE FEDERAL COURT SPECIFICALLY DID NOT CONSIDER OR HAVE THE "UNNECESSARY RIGOR" ISSUE BEFORE IT. FURTHER, A CLAIM FOR UNNECESSARY RIGOR MAY EXIST EVEN WHEN BASED ON THE SAME UNDERLYING FACTS OF A DISMISSED CLAIM.

A. Summary of Error.

The trial court held:

> [B]ecause [in the federal case] Plaintiff neither opposed the ***undisputed facts*** nor entry of judgment in Defendants' favor on the merits for all the claims before the Federal Court, the ***material facts*** were deemed admitted for purposes of summary judgment, and the court took judicial notice of them.

Memorandum and Order, 02/06/2020, p.4, R. 978 (emphasis and bracketed words added). The trial court evidently believed that because hundreds of "facts" from the federal summary judgment motion were deemed admitted, and these facts show Casie received adequate care, that Plaintiff was precluded from litigating the issue of unnecessary rigor. This was error.

There are several problems. *First*, unnecessary rigor was **never pled** in the federal case. Compare the federal complaint at R. 84 with the state complaint at R. 1. *Second*, Defendants' federal motion for summary judgment never mentioned state claims or unnecessary rigor. R. 92. *Third*, although current counsel did not

represent Plaintiff at that time, there is nothing in the record which indicates that unnecessary rigor was ever argued in federal court. *Fourth*, unnecessary rigor appeared for the first time when this current action was filed in state court after the dismissal of the federal case. *Fifth*, just because the "facts" show some care for Casie (e.g., alcohol withdrawal) does not mean that a state claim for unnecessary rigor is precluded under those same facts.

In short, the unnecessary rigor claim was never before the federal court. So, not only was unnecessary rigor not decided by the federal court, it was never completely, fully and fairly litigated. R. 734-735; and compare R. 731-732. The trial court misconstrued the law, failing to realize that the same facts that justified a federal dismissal are "not dispositive as to a question arising under state law." *See*, Point II.D below. Accordingly, there can be no issue preclusion as a matter of law.

B. Federal Order Did Not Consider State Claims.

The April 8, 2015, federal civil rights suit (through other counsel) alleged **only** federal violations of the Eighth Amendment cruel and unusual punishment clause due to the death of Casie. R. 84, 693. Defendants moved for summary judgment in federal court. R. 92. Prior counsel withdrew. New counsel, Robert B. Sykes of Sykes McAllister Law Offices, filed a two page "Response to

Defendant's [Pending] Motion for Summary Judgment." R. 134; *see also*, Fed. Doc. 42, filed 9/19/2017, R. 694. That Response noted that the federal complaint "***did not allege a cause of action for any matters involving state civil rights violations*** such as Article 1, Section 9" of the Utah Constitution which deals with "subjecting prisoners to ***unnecessary rigor***." *Id.*, R. 134, 694 (emphasis added). The Response asked that the Order arising out of the MSJ "be narrowly tailored so as to grant summary judgment only on the matters that were brought before the [Federal] Court in the Motion for Summary Judgment." R. 134, 694; *see also*, Fed. Doc. 42, filed 9/19/2017. "Unnecessary rigor" was **specifically not dismissed** by Judge Benson's dismissal in the federal case. R. 137, 734. Issue preclusion is therefore not applicable, and the Defendant's Motion for Summary Judgment based on this theory must fail.

In the state case, Defendants provided no other evidence pertaining to the merits of Plaintiff's case or Defendants' argument. Defendants simply implied that because Mr. Christensen's state court claim is between the same parties, and arises out of the same general facts, that this somehow barred the unnecessary rigor claim. This argument appeared to distract the trial court case from the outset.

Federal Judge Dee Benson granted Defendants' MSJ. But Judge Benson specifically limited the scope of dismissal to "***only as to the exact claims***

brought in this [federal] Complaint at issue and addressed in the summary-judgment motion," and unnecessary rigor was not one of "the exact claims." Federal Doc. 43, R. 137, 694, 734-735 (emphasis added).

C. Unnecessary Rigor Survived the Dismissal.

The Utah Supreme Court has held that in order to prevail on a claim of issue preclusion, the Defendants must prove four elements: (1) the party against whom issue preclusion is asserted [was] a party to or in privity with a party to the prior adjudication; (2) the **issue** decided in the prior adjudication **[was] identical** to the one presented in the instant action; (3) the **issue** in the first action [was] **completely, fully, and fairly litigated;** and (4) the first suit ... resulted in a final judgment on the merits. *See, Jensen v. Cunningham*, 2011 UT 17, ¶41, 250 P.3d 465 (quoting *Collins v. Sandy City Bd. Adjustment*, 2002 UT 77, ¶12, 52 P.3d 1267).

Elements 1 and 4 are arguably met; elements 2 and 3 are definitely not met. The issue of unnecessary rigor is not identical to any issue in the federal action, and it wasn't completely, fully and fairly litigated. Accordingly, the Defendants' issue preclusion claims are improper and should have failed.

D. The "Facts" Support the State Unnecessary Rigor Claims.

The trial court's position in a nutshell, as urged by Defendants, is that ***the same facts*** that the federal court considered in granting summary judgment in

the federal case on the Eighth Amendment cruel and unusual punishment claims should somehow preclude Plaintiff from filing suit on unnecessary rigor. But the law holds just the opposite. The same facts that might justify dismissal of a federal claim do not justify dismissal of a state constitutional claim.

Jensen v. Cunningham requires that the issue in the prior adjudication be "identical" to the instant action. It also must be "completely, fully and fairly litigated." But unnecessary rigor was never even mentioned in the federal case. One will search in vain in the federal complaint for reference to any state cause of action, much less unnecessary rigor. R. 84, 92. As a matter of law, the summary judgment should have been denied because unnecessary rigor was not an issue in the federal case, and certainly wasn't litigated at all.

Rather, the question in the instant case is whether the admissible facts give rise to "state" constitutional violations under state law. Plaintiff alleged state constitutional violations of Article I, Sections 7 and 9. R. 15, 19. In such situations, the Utah Supreme Court has ruled:

> The determinations made by the federal judge, under federal law, regarding the materiality of the facts or the inferences that could be drawn from those facts were ***not dispositive as to questions arising under state law.***

Jensen v. Cunningham, 2011 UT 17, ¶44, 250 P.3d 465 (emphasis added). The Supreme Court clarifies that the similarity of language in the federal and state

constitutions "does not... foreclose our ability to decide in the future that our ***state constitutional provisions afford more rights*** than the federal Constitution." *Id.* ¶46 (emphasis added). "The framework for making out a claim for damages for a violation of one's constitutional rights is different under state and federal law." *Id.* at ¶47 (emphasis added). Of particular relevance here, "a federal court determination that the ***material undisputed facts*** do not give rise to a federal constitutional violation does not preclude a state court from deciding ***whether those same facts*** will give rise to a state constitutional violation." *Id.* at ¶49 (emphasis and double emphasis added).

E. Primacy Approach–Utah Constitution Affords More Rights.

Issue preclusion must fail for yet another important reason. Judge Scott did not consider or ignored the "primacy approach" required when interpreting state constitutional provisions. The *Jensen* court observed:

> While some of the language of our state and federal constitutions is "substantially the same," similarity of language "does not indicate that this court moves in 'lockstep' with the United States Supreme Court's [constitutional] analysis or foreclose our ability to decide in the future that our state constitutional provisions afford more rights than the federal Constitution." This idea underlies our reasoning in those cases where we have adopted the ***primacy approach***, ***which dictates an analysis of state constitutional law before addressing any federal constitutional claims.***

Jensen, ¶46 (emphasis and double emphasis added; citations omitted).

When interpreting state constitutional provisions, the Utah Supreme Court encourages a primacy approach. Under the primacy model, the trial court should have *looked first* to state constitutional law. It then should have developed independent doctrine and precedent and decided federal questions only when state law was not dispositive. *State v. Worwood*, 2007 UT 47, ¶15, 164 P.3d 397 . The *Worwood* court notes "that article I, section 14 of the Utah Constitution often ***provides greater protections*** to Utah citizens than the Fourth Amendment, despite nearly identical language." *Worwood*, ¶16 (emphasis added). Likewise, Article I, Section 7 due process rights are similar in both constitutions. *Spackman v. Bd. of Edu*., 2000 UT 87, ¶10, 16 P.3d 533.

In short, there was simply no basis for Defendants to claim that state constitutional matters had somehow been decided by the federal court, when (1) the federal court specifically disclaimed such, and (2) the unnecessary rigor provisions of the Utah Constitution "provide greater protections" than does the Fourth or Eighth Amendments of the U.S. Constitution. This Court should look first to state constitutional law and only address federal questions when state law is not dispositive. Here, state law is dispositive. *See, Dexter*, ¶¶17, 19; *see also, State v. Hoffman*, 2013 UT App 290, ¶¶53-55, 318 P.3d 225.

Clearly, Defendants should not have been able to secure a dismissal in the case by hanging onto the coattails of the federal district court's decision. This is especially true when such decision disclaimed jurisdiction of the state constitutional claim, and where the instant case was based on distinct state causes of action.

This Court should reverse the grant of summary judgment and send the matter back for trial.

POINT III

~ *State Violations of Due Process* ~

STATE DUE PROCESS CLAIMS ARE VIABLE AND NOT SUBJECT TO ISSUE PRECLUSION FOR THE SAME REASONS SET FORTH ABOVE.

Plaintiff also filed claims for violation of due process of law under the Utah State Constitution. *See*, R. 1, Complaint, ¶¶70-74. The complaint alleged:

> Casie Christensen suffered a flagrant violation of her constitutional right not to be deprived of her life without due process when Defendants knowingly and willfully used an incorrect and inaccurate protocol to evaluate Casie's physical and mental health status, when the correct protocol would have necessitated Casie to be placed in the jail's mental health unit where she would be constantly monitored by jail staff, thus preventing her suicide.

R. 1, ¶73. This claim is based upon the same facts, and subject to the same defenses, as outlined above. Accordingly, we incorporate those arguments by reference, and ask this Court to reverse the trial court's decision granting summary judgment on the due process claim.

Additionally, the Utah Supreme Court stated in *Kuchcinski v. Box Elder County*, 2019 UT 21, ¶42, 450 P.3d 1056, that when determining if an individual's due process rights have been violated the Court will look at the issue in two steps:

> First, we ask " 'whether the [complaining party] has been deprived of a protected interest' in [life], property or liberty." Second, if we find a "deprivation of a protected interest, we consider whether the procedures at issue compl[ied] with due process. If the deprivation at issue was not justified by sufficient due process, then the due process rights of the person who suffered the deprivation have been violated.

Id. (internal citations omitted; bracketed words added).

In this case, Casie was deprived of her life by not being properly screened as a withdrawing heroin addict, but instead screened as an alcoholic. Defendants deprived Casie of her due process when they knowingly and recklessly withheld opioid withdrawal treatment and left her at serious risk for "extremely frequent" suicide in general population rather than in an opiate withdrawal unit.

Casie was entitled to have the proper process applied to her while at the SLCJ, which meant access to opiate withdrawal treatment, including increased monitoring, because her life depended on it. Defendants' failure here denied Casie due process under the Utah Constitution.

This claim was never litigated in the federal court action. It therefore cannot be issue precluded. It also involves materially disputed facts. It should go before a factfinder.

This Court should reverse the grant of summary judgment and send the matter to a jury.

CONCLUSION

The trial court took judicial notice of the "undisputed facts" established "before the Federal Court," and deemed those facts "admitted for the purposes of summary judgment" in the instant case. Based on those "admitted facts," the trial court found the care Casie received in the SLCJ was not "inadequate" nor "deliberately indifferent," and therefore, the claim of unnecessary rigor was precluded (issue preclusion) and "fail[s] as a matter of law." R. 978-979.

The trial court erred for several reasons. As a threshold matter, the trial court failed to appreciate that unnecessary rigor easily *can arise out of the same facts* that may fail to establish a federal claim for deliberate indifference under the Eighth Amendment. Under *Dexter,* for example, to prove unnecessary rigor, a plaintiff is only required to prove unnecessarily harsh, strict or severe treatment, or being "unnecessarily exposed to an increased risk of serious harm." *Dexter*, ¶19. Under federal "deliberate indifference," a plaintiff must prove that a defendant knew of some substantial harm and was deliberately indifferent to that harm. The federal standard would be almost impossible to meet in this case. But state unnecessary rigor is far easier to prove because one doesn't have to prove actual advance knowledge of a harm.

It is also notable that issue preclusion clearly requires that the issue sought to be precluded be "identical to the one presented in the instant action," and that "the issue in the first action [was] completely, fully, and fairly litigated." *Jensen v. Cunningham*, ¶41. Neither unnecessary rigor nor state due process were raised: (a) in the federal complaint, (b) in the federal summary judgment motion, or (c) in the federal court's decision. In fact, federal judge Dee Benson went out of his way to make clear that only the claims in the federal complaint were dismissed. Unnecessary rigor and state due process, as issues, were therefore not identical to any federal issues, nor were they completely, fully, and fairly litigated. Accordingly, the issues of unnecessary rigor and state due process were not precluded in the state case.

For these compelling reasons, Plaintiff respectfully requests this Court to overturn the trial court's decision and remand to the trial court for further proceedings consistent with the recommendations of this Court.

Dated this 17th day of September, 2020.

/s/ Robert B. Sykes
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Brief of Appellant** to be served upon counsel for Appellees via e-mail on this 17th day of September, 2020, as follows:

Jacque M. Ramos
DEPUTY ATTORNEY FOR SALT LAKE COUNTY
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jmramos@slco.org

/s/ Robert B. Sykes

CERTIFICATE OF COMPLIANCE WITH URAP 24(a)(11)

I hereby certify that this brief complies with:

(A) Rule 24, Paragraph (g), in that Appellant's Brief contains 13,942 words, excluding the table of contents, table of authorities, addendum, and certificates of counsel.

(B) Rule 21, governing public and private records, in that Appellant's Brief and Addendum do not contain non-public information.

/s/ Robert B. Sykes

ADDENDA

1. Memorandum Decision & Dismissal Order; Judge Benson, 09/21/17; R. 734

2. Order Re: Motion to Dismiss, Judge Scott, 08/01/18, R. 231

3. Memorandum and Order Re: Motion to Take Judicial Notice and for Summary Judgment, Judge Scott, 02/06/20, R. 975

4. Critical Commandments in Correctional Health Care (Part 2), Summer 2013, CorrectCare, R 835.

5. Managing Opiate Withdrawal: The WOWS Method, Summer 2016, CorrectCare, R. 740

A D D E N D U M 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

SPENCER CHRISTENSEN, Plaintiff, v. SALT LAKE COUNTY et al., Defendants.	**MEMORANDUM DECISION & DISMISSAL ORDER** Case No. 2:15-CV-238-DB District Judge Dee Benson

Plaintiff is the father of an inmate who was in Salt Lake County Jail, where she apparently committed suicide. His complaint brings claims of cruel and unusual punishment and wrongful death against Defendants Salt Lake County and Unified Police Department.

Defendants move for summary judgment, contending that the undisputed facts neither support a federal civil-rights claim of inadequate medical care under the Eight Amendment's Cruel and Unusual Punishment Clause, nor a wrongful death claim under state law. *See* Utah Code Ann. § 78B-3-106(1) (2017).

Plaintiff does not oppose the summary-judgment motion, asking only that the Court's order granting summary judgment "be narrowly tailored so as to grant summary judgment only on the matters that were brought before the Court in the Motion for Summary Judgment." (*See* Docket Entry # 42.)

IT IS THEREFORE ORDERED that Defendant's summary-judgment is GRANTED. (*See id*. # 25.) Plaintiff's action is DISMISSED with prejudice only as to the exact claims

brought in the Complaint at issue and addressed in the summary-judgment motion. This case is CLOSED.

DATED this 21st day of September, 2017.

BY THE COURT:

JUDGE DEE BENSON
United States District Court

A D D E N D U M 2

The Order of the Court is stated below:
Dated: August 01, 2018 03:41:32 PM **/s/** LAURA SCOTT District Court Judge

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Attorneys for Salt Lake County

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

SPENCER CHRISTENSEN, father and personal representative of CASIE MARIE CHRISTENSEN, deceased, Plaintiff, v. SALT LAKE COUNTY, WELLCON, INC., TODD WILCOX, M.D.; JAMES WINDER and JOHN AND JANE DOES 1-10, whose true names are unknown, Defendants.	**ORDER RE: MOTION TO DISMISS (AS MODIFIED BY THE COURT)** Case No.: 170907640 Judge: Laura Scott

Before the Court is Defendants' (Salt Lake County, Wellcon, Inc., Todd Wilcox, M.D., and James Winder, collectively) motion seeking to dismiss Plaintiff's complaint on the grounds it is barred under the doctrine of res judicata. Having considered the pleadings on file, briefing by the parties, statements made by each during oral argument on July 5, 2018, as well as the papers filed in the related federal action through judicial notice, the Court hereby issues the following decision:

Procedural History

On or about April 8, 2015, Plaintiff commenced a lawsuit in the United States District Court for the District of Utah asserting causes of action under 42 U.S.C. § 1983 (Eighth and Fourteenth Amendment) and wrongful death under state law (Federal Action). Plaintiff's complaint did not assert causes of action for unnecessary rigor in violation of the Utah Constitution, Article I, § 9 or a denial of due process in violation of Utah Constitution, Article I, Section 7.

On February 13, 2017, after discovery had been completed in the Federal Action, Defendants moved for summary judgment, outlining undisputed material facts and the grounds justifying dismissal on the merits of all claims asserted therein. On September 19, 2017, Plaintiff filed a response to the motion for summary judgment which stated:

> Plaintiff does not intend to oppose Defendants' Motion for Summary Judgment, for a host of reasons. Plaintiff only requests that the Order that arises out of Defendants' Motion for Summary Judgment be narrowly tailored so as to grant summary judgment only on the matters that were brought before the Court in the Motion for Summary Judgment. For example, the Complaint did not allege a cause of action for any matters involving state civil rights violations, such as Article I, Sec. 9, or subjecting prisoners to unnecessary rigor. Such matters are still within the statute of limitations and may yet be filed in state court.

Defendants did not object to Plaintiff's request or otherwise indicate that such an order would be improper because the state constitutional claims should be brought in the Federal Action. On September 22, 2017, Judge Dee Benson granted the motion for summary judgment in Defendants' favor and dismissed with prejudice the claims asserted in the Federal Action. The order entered by Judge Benson specifically states that the Federal Action is being dismissed with prejudice "only as to the exact claims brought in this Complaint at issue and addressed in the summary-judgment motion."

Thereafter, Plaintiff filed the complaint in this action asserting claims for unnecessary rigor in violation of the Utah Constitution, Article I, § 9 and denial of due process in violation of

Utah Constitution, Article I, Section 7. On March 9, 2018, Defendants filed a motion to dismiss the complaint under both prongs of the doctrine of res judicata - claim preclusion and issue preclusion (or collateral estoppel).

Legal Analysis and Ruling

For a claim to be barred under claim preclusion: (1) both cases must involve the same parties or their privies; (2) the claim that is alleged to be barred must have been presented in the first suit or be one that could and should have been raised in the first action; and (3) the first suit must have resulted in a final judgment on the merits. *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 34, 73 P.3d 325, 332 (quoting *Miller v. USAA Cas. Ins. Co*., 2002 UT 6, ¶ 57, 44 P.3d 663). The Court concludes that elements 1 and 3 are met here. There is no dispute that the Federal Action and this action involve the same parties and that the Federal Action resulted in a judgment on the merits. There is also no dispute that Plaintiff *could* have brought his state constitutional claims in the Federal Action. Thus, the question is whether Plaintiff *should* have brought these claims in the Federal Action.

Defendants argue that Plaintiff should have brought the state constitutional claims in the Federal Action because they arose from the same operative facts underlying the claims in the Federal Action. Thus, Defendants argue, Plaintiff should have moved to amend the complaint in the Federal Action to include these claims notwithstanding the unopposed motion for summary judgment on the federal claims. Defendants concede that even if Plaintiff had done so and the motion to amend had been granted, it is likely that Judge Benson would have declined to exercise supplemental jurisdiction over them once he granted the motion for summary judgment on the federal claims. Defendants further concede that if Judge Benson had declined to exercise supplemental jurisdiction, Plaintiff's state constitutional claims would not be barred by res judicata.

Under these circumstances, the Court determines that Defendants have not met their burden of showing that Plaintiff *should* have brought the state constitutional claims in the

Federal Action. Accordingly, the Court denies the motion to dismiss on the ground of claim preclusion.

Defendants also contend that Plaintiff's claims are barred by issue preclusion, also known as collateral estoppel. A party seeking to invoke collateral estoppel must establish that: (1) the issue decided in the prior adjudication is identical to the one presented in the instant action; (2) the party against whom issue preclusion is asserted was a party, or in privy with a party, to the prior adjudication; (3) the issue in the first action was completely, fully, and fairly litigated; and (4) the first suit resulted in a final judgment on the merits. *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 35, 73 P.3d at 333.

For purposes of issue preclusion, it is undisputed that (1) the Federal Action and the present matter involves the same parties, (2) the issues in the first action were completely, fully, and fairly litigated, and (3) the Federal Action resulted in a final judgment on the merits. However, the Federal Action was based primarily on federal constitutional violations and the claims here are based on state constitutional violations. "Because the state and federal standards for determining whether a plaintiff is entitled to damages for a constitutional violation are different, a federal court determination that the material undisputed facts do not give rise to a federal constitutional violation does not preclude a state court from deciding whether those same facts will give rise to a state constitutional violation." *Jensen v. Cunningham*, 2011 UT 17, ¶ 49, 250 P.3d 465, 478. Defendants have not moved to dismiss the complaint on the ground that the undisputed material facts -- whether based on the allegations of the complaint and/or the undisputed material facts as established in the Federal Action -- demonstrate Plaintiff's state constitutional claims fail as a matter of law. Thus, at this juncture, the Court is unable to conclude that Plaintiff's claims are barred by issue preclusion. Accordingly, the Court denies the motion to dismiss without prejudice on the ground of issue preclusion.

Finally, as discussed at the hearing, the Court's denial of the motion to dismiss does not mean that Plaintiff may re-litigate any facts or issues determined in the Federal Action in connection with Defendants' unopposed motion for summary judgment.

For the reasons set forth above, **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss is **DENIED**.

Entered as Indicated by the Court's Seal at the Top of the First Page

CERTIFICATE OF SERVICE

I certify that on July 25, 2018, a true and correct copy of the foregoing Memorandum & Order Re: Motion to Dismiss was electronically filed with the Clerk of the Court, utilizing the Court's electronic filing system, which automatically sent notification of such filing to the following:

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/s/ Iris Pittman
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A D D E N D U M 3

The Order of the Court is stated below:
Dated: February 06, 2020 03:47:29 PM **/s/** LAURA SCOTT District Court Judge

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

SPENCER CHRISTENSEN, father and personal representative of CASIE MARIE CHRISTENSEN, deceased, Plaintiff, v. SALT LAKE COUNTY, WELLCON, INC., TODD WILCOX, M.D.; JAMES WINDER and JOHN AND JANE DOES 1-10, whose true names are unknown, Defendants.	**MEMORANDUM AND ORDER RE: MOTION TO TAKE JUDICIAL NOTICE AND FOR SUMMARY JUDGMENT** Case No.: 170907640 Judge: Laura Scott

Before the Court is Defendants' (Salt Lake County, Wellcon, Inc., Todd Wilcox, M.D., and James Winder, collectively) Motion to Take Judicial Notice and Motion for Summary Judgment seeking to dismiss Plaintiff's complaint on the grounds it is barred under the doctrine of res judicata, specifically issue preclusion. Having considered the pleadings on file, briefing by the parties, statements made by each during oral argument on December 30, 2019, as well as

the papers filed in the related federal action through judicial notice, the Court hereby issues the following decision:

Procedural History

On or about April 8, 2015, Plaintiff commenced a lawsuit in the United States District Court for the District of Utah asserting causes of action under 42 U.S.C. § 1983 (Eighth and Fourteenth Amendment) and wrongful death under state law (the Federal Action). Plaintiff's complaint did not assert causes of action for unnecessary rigor in violation of the Utah Constitution, Article I, § 9 or a denial of due process in violation of Utah Constitution, Article I, Section 7, nor did Plaintiff move to amend the Federal Action to include those claims.

On February 13, 2017, after discovery had been completed in the Federal Action, Defendants moved for summary judgment, outlining undisputed material facts and the grounds justifying dismissal on the merits of all claims asserted therein. Plaintiff neither opposed the undisputed material facts nor entry of judgment in Defendants' favor on the merits for all the claims before the Federal Court. On September 22, 2017, Judge Dee Benson granted summary judgment in Defendants' favor and dismissed with prejudice all claims asserted in the Federal Action. The order entered by Judge Benson specifically states that the Federal Action is being dismissed with prejudice "only as to the exact claims brought in this Complaint at issue and addressed in the summary-judgment motion."

Thereafter, Plaintiff filed a complaint in this action asserting claims for unnecessary rigor in violation of the Utah Constitution, Article I, § 9 and denial of due process in violation of Utah

Constitution, Article I, Section 7. On March 9, 2018, Defendants moved to dismiss the complaint under both prongs of the doctrine of res judicata - claim preclusion and issue preclusion (or collateral estoppel) pursuant to Utah Rule of Civil Procedure 12(b)(6). However, on August 1, 2018, this Court denied Defendants' motion to dismiss as to claim preclusion because Defendants' did not show that Plaintiff "should have brought the state constitutional claims in the Federal Action." As to whether collateral estoppel barred Plaintiff's claims, the court ruled that it "was unable [at this juncture] to conclude that Plaintiff's claims are barred by issue preclusion" because Defendants' had not "moved to dismiss . . . on the ground that the undisputed material facts – whether based on the allegations of the complaint and/or the undisputed material facts as established in the Federal Action – demonstrate Plaintiff's constitutional claims fail as a matter of law."

On July 15, 2019, Defendants filed its motion for summary judgment seeking dismissal with prejudice on the grounds that the undisputed materials facts as established in the Federal Action bar Plaintiff's pending Utah constitutional claims under the doctrine of collateral estoppel as a matter of law. Plaintiff filed an opposition thereto, and the matter came before this Court for oral argument on December 30, 2019.

Legal Analysis and Ruling

A party seeking to invoke collateral estoppel must establish that: (1) the issue decided in the prior adjudication is identical to the one presented in the instant action; (2) the party against whom issue preclusion is asserted was a party, or in privy with a party, to the prior adjudication;

(3) the issue in the first action was completely, fully, and fairly litigated; and (4) the first suit resulted in a final judgment on the merits. *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 35, 73 P.3d at 333.

For purposes of issue preclusion, there is no dispute that the Federal Action and this action involve the same parties and that the Federal Action resulted in a judgment on the merits. Additionally, because Plaintiff neither opposed the undisputed material facts nor entry of judgment in Defendants' favor on the merits for all the claims before the Federal Court, the material facts were deemed admitted for purposes of summary judgment and the court must take judicial notice of them. Utah R. Evid. 201(c)(2).

Further, with respect to the present motion for summary judgment, Plaintiff only opposed Defendants' statement of material facts at "aa." and "bb." and did not oppose any other material statement of facts, thus pursuant to Utah R. Civ. P. 56(a)(4), they are deemed admitted. The two disputed facts along with Plaintiff's response are:

> aa. One of the assessments for withdrawal from drugs or alcohol that is routinely used by medical personnel at the Jail and most other correctional facilities and hospitals in the United States is a "CIWA score," which stands for "Clinical Institute Withdrawal Assessment."
>
> **RESPONSE: Deny.** CIWA stands for "Clinical Institute Withdrawal Assessment," but it is used for alcohol withdrawal. *See* Exhibit 4, Wikipedia article. It is not appropriately used for "withdrawal from drugs." *See* Exhibits 4 and 5 herein; also, compare Casie's CIWA protocol to Wilcox's WOW.
>
> bb. The CIWA score is an internationally validated assessment tool that has been in use for many years and is the gold standard for assessing patients experiencing signs and symptoms of withdrawal.

RESPONSE: Deny. The CIWA test is not appropriate for assessing withdrawal from opiate drugs. This was admitted by Dr. Wilcox in 2013, at least six months before Casie died.

However, even if the Court assumes for purposes of the motion for summary judgment Plaintiff's position that there is a better or more accurate protocol that should have been used by Defendants to assess Ms. Christensen during her incarceration, based on the remaining undisputed facts this Court cannot possibly conclude Defendants were deliberately indifferent or otherwise violated Ms. Christiansen's constitutional rights to be free from "unnecessary rigor" or due process under the Utah Constitution. Thus, the inadequate medical care claims against Defendants fail as a matter of law.

Therefore, it is hereby **ORDERED**:

1. Defendants' Motion to Take Judicial Notice is hereby granted;
2. Defendants' Motion for Summary Judgment is granted; and
3. Plaintiff's claims against Defendants are dismissed with prejudice.

Entered as Indicated by the Court's Seal at the Top of the First Page

APPROVED AS TO FORM:

/s/Robert B. Sykes
ROBERT B. SYKES
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Attorney for Plaintiff
Signed by Jacque Ramos with permission

CERTIFICATE OF SERVICE

I certify that on January 30, 2020, a true and correct copy of the foregoing **MEMORANDUM AND ORDER RE: MOTION TO TAKE JUDICIAL NOTICE AND FOR SUMMARY JUDGMENT** was emailed and sent via U.S. Mail, postage prepaid to the following:

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/s/ Iris Pittman
Paralegal

A D D E N D U M 4

Critical Commandments in Correctional Health Care (Part 2)

Ex. 15

by Todd Wilcox, MD, MBA, CCHP-A

Correctional systems are rife with difficult institutional problems that impact health care services. To help correctional medical directors and administrators deal with these problems, Todd Wilcox, MD, MPH, CCHP-A, has prepared a list of "critical commandments." The aim is to identify potential areas of risk that are frequently part of litigation and to offer long-term strategies to address these problem areas. This three-part series presents these commandments, some of which are relevant mainly to jail settings, along with a brief discussion of each.

Thou Shalt Own the Drunk Tank as Thine Own Unit

When inmates arrive intoxicated on alcohol, it is important to gauge the baseline mental status and to perform nursing assessments every two hours. Obtain a full set of vital signs as well as CIWA and Glasgow coma scale scores. Be sure to hydrate and feed the patient. The facility also needs clear guidelines on transferring patients to a higher level of care.

Thou Shalt Implement an Effective Withdrawal Screening and Management Program

For alcohol withdrawal, program components include screenings at least twice daily for five days, with a full set of vital signs and CIWA scores. Track CIWA scores serially and treat to suppress. Use benzodiazepines liberally, and assess and treat for dehydration. Fully assess nonresponders.

In cases of benzodiazepine withdrawal, patients on high doses are extremely prone to complications. Expect a high degree of anxiety, acting-out and self-injury. High doses must be tapered, preferably using long-acting benzodiazepines.

Managing opiate withdrawal includes obtaining a COWS score, assessing for suicidality and assessing and treating for dehydration, with attention to orthostatics, specific gravity on urine, electrolytes, BUN, creatinine and clinical signs. Be alert to comorbidities.

Thou Shalt Ensure All Prisoner Health Requests Are Triaged Properly

To conduct triage, a proper scope of license is required. All five vital signs must be completed through face-to-face triage; paper triage is not safe or effective and should not be used. The facility must adhere to to triage timelines. Finally, use triage aging reports to determine staffing.

Thou Shalt Understand and Control the Pharmacy Operation

It is essential that prescription orders are executed legally. Ensure that patient medication allergies are checked. For optimal operations, administrators must understand ordering timelines, stock levels, nursing administration practices, packaging practices, medication administration records and nursing documentation, medication return practices and standard-of-care discharge medication practices.

Thou Shalt Understand and Control All Scheduled Drugs

Management of scheduled drugs includes drug storage, accounting, administration, ordering and destruction.

Thou Shalt Develop an Institutional Method for Dealing With Risky Medications

Among the medications that can present risk in a correctional setting are tricyclic antidepressants, anticoagulants (Coumadin, heparin), digoxin, lithium, steroids, controlled substances, immunosuppressive agents and insulins.

Thou Shalt Ensure Medication Security

This includes the physical security of the pharmacy, inventory reconciliation and management of stock and return medications. Medication inventory must be reconciled against billing invoices and against the inmate roster.

Thou Shalt Implement Appropriate Intensive Medical Management Practices

Determine the legal requirements for intensive medical management and the legally defensible documentation for its use. Know the difference between custody use of force and medical use of force, as well as the timelines and restrictions for each. Physical restraints, forced medication and strip cells are all treated the same. Use the least restrictive means, and escalate the use of force only when necesssary.

Thou Shalt Make Providers View X-Rays

X-ray reports may be helpful but are frequently incorrect. It is impossible for a provider to determine management of the patient without seeing the actual X-ray.

Thou Shall Not Allow Health Care Myths to Propagate

How many times have you heard staff repeat myths such as the following? These beliefs jeopardize patient care.

- "It isn't a seizure because she wasn't incontinent."
- "His chest pain disappeared with Maalox so it isn't cardiac in origin."
- "He has no rebound tenderness."
- "She wasn't posticta so she is faking."
- "If he is trading, selling or not taking his medications, he obviously does not need them."

Todd Wilcox, MD, MBA, CCHP-A, is the medical director for the Salt Lake County (UT) Jail System and a frequent speaker at NCCHC educational conferences. He presented on this topic at the 2013 Correctional Health Care Leadership Institutes, held July 19-20 in Las Vegas.

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A D D E N D U M 5

Managing Opiate Withdrawal: The WOWS Method

by Todd Wilcox, MD, MBA, CCHP-P, CCHP-A

Over the course of my medical career, everything about opiate management and treatment has changed. This is particularly true for opiate withdrawal. Like most of us, I learned early in my career that opiate withdrawal could be treated cold turkey. In fact, a well-known correctional medical textbook instructs the following: "Opiate withdrawal is known to be very unpleasant for patients but is not generally associated with life-threatening complications."

While that may have been true when it was written, we live in a new world of opiates that present far greater challenges clinically. As a result of multiple changes outside of our sphere of practice, we now have more patients coming in on opiates, the prescription strength of opiates is substantially stronger, illegal opiates are now of much higher purity, and opiate withdrawal is more clinically severe and can frequently result in death if not managed appropriately.

As a result of all of these factors, the Salt Lake County Jail practice group felt that it was imperative to redesign how we managed opiate withdrawal to minimize morbidity and mortality. Accordingly, we undertook a comprehensive review of the medical literature and we found that the literature really did not address the issues that we were facing in a correctional setting.

Consequently, the only option we were left with was to design our own program using the literature as a guideline but customizing the program for what could be accomplished and what the priorities are in a correctional setting.

Find the WOWS protocol online at www.ncchc.org/correctcare

Takeaway Points

- In the modern world, opiate withdrawal is a life-threatening medical condition.
- In large institutional settings, a targeted serial screening tool like WOWS is extremely effective at standardizing treatment.
- Assessment, including vital signs and self-harm assessment, should be done twice per day for five days minimum.
- Assess for dehydration.
- Assess for comorbidities including advanced age, underlying chronic diseases and malnourishment.
- Begin targeted treatment for diarrhea and vomiting early in the withdrawal process.
- Hydrate, hydrate, hydrate using something that the patients will actually drink.
- Obtain lab work on any patients not responding to the basic protocol.
- Admit to an inpatient setting if the patient's clinical presentation or laboratory results dictate.
- Become buprenorphine certified and use it to treat severe opiate withdrawal.

I was asked to write up this program by several clinicians at a recent NCCHC conference and to disseminate it as quickly as possible to try to improve the care for this serious condition nationally.

Identification and Monitoring

The first major step in redesigning our practices for opiate withdrawal was to develop a targeted tool for opiate withdrawal that was customized to correctional health. We ultimately created the Wilcox Opiate Withdrawal Scale protocol. The primary focus of WOWS is to identify clinical scenarios that cause dehydration and electrolyte abnormalities. These are the two main areas where patients can get in trouble, and an earlier intervention for vomiting and diarrhea and targeted assessment for clinically relevant dehydration became the focus of the WOWS protocol.

In my facility, any patient undergoing opiate withdrawal is assessed twice per day for a minimum of five days by nurses who have been trained in the WOWS protocol. The assessment includes a full set of vital signs, serial tracking of the patient's clinical progress and interventions as necessary based on clinical presentation. We have used the WOWS protocol for about two years and have found it to be a much more sensitive tool for identifying patients who need additional medical assistance early enough in the withdrawal process to intervene effectively without having to send out patients in crisis.

In running this program, we have found that many of our opiate withdrawal patients are physiologically fragile and require medical support to withdraw from opiates safely. Patients with an abnormally low body mass index are common and they frequently experience extreme distress during opiate withdrawal. One of the changes we made with this program was to implement a mandatory height and weight measurement in the intake process using a standardized industrial scale. Patients with a body mass index less than 18 receive heightened scrutiny during their opiate withdrawal.

We also have found that young patients present a serious diagnostic challenge in the opiate withdrawal syndrome because they have tremendous physiologic reserve and they are able to maintain their vital signs in a normal range right up to the point in which they are in crisis. Thus, we have a high level of suspicion for young opiate addicts and we emphasize relying on laboratory results as opposed to vital signs in these patients to determine their need for additional medical care.

Self-Harm

Severe opiate withdrawal puts patients in such physical distress that self-harm and suicide are extremely frequent in this population. Indeed, many patients who die of opiate withdrawal die as a result of suicide. Therefore, when the nurses assess patients using the WOWS protocol, we found it necessary for them to do an assessment for self-harm.

In this scenario, it is common to encounter patients who are thinking about self-harm, and merely treating their opiate withdrawal adequately resolves the issue for them. Consequently, we view adequate opiate withdrawal treatment to be a critical component of our suicide prevention plan. Since implementation of this protocol, we have seen significant decreases in suicide attempts and suicide completions in our patient population.

Targeted Outpatient Treatment

In the general population setting, this program prompts aggressive targeted treatment for diarrhea, vomiting and dehydration. For diarrhea, we typically use loperamide. For vomiting, the first drug of choice is promethazine, followed by ondansetron if the patient has clinical issues with the promethazine.

We also place a significant emphasis on oral hydration. All nurses are supplied with bottles of Gatorade that they hand out freely to any patient on the withdrawal protocol. In addition, custody staff has created "hydration stations" that consist of large coolers of Gatorade that offer open and unlimited access to patients who are withdrawing. This program has proven to be invaluable in minimizing complications from withdrawal syndrome. Say what you want, the water in correctional facilities is disgusting. The pipes are old, the water tastes bad, the water is not cold and inmates will not drink it, especially when they are sick. Believing that your inmates have adequate access to water, that it is sufficient to meet their hydration needs and that they will actually drink it is a deviation from rational clinical thought.

Additionally, patients with a low body mass index are immediately started on double portion diets as well as nutritional supplementation like Ensure, and that supplementation is continued while they are on the withdrawal protocol.

Targeted Inpatient Treatment

For patients who do not respond to the early outpatient interventions, more aggressive surveillance and treatment are necessary. We estimate that between 5% and 10% of our patients undergoing opiate withdrawal need care at this level.

The first step in caring for these patients is to obtain basic laboratory assessments, including a CBC and a CMP to assess their electrolytes, renal function and critical blood components. It is common to identify abnormalities that require correction or additional workup in these patients. These individuals are typically admitted to an inpatient setting where they can be monitored much more closely and appropriate interventions, including IV fluids and electrolyte replacement, can occur.

Treatment in the inpatient setting also allows for much more aggressive medical management. When clinically appropriate, a primary therapy used to manage these serious opiate withdrawal patients is the initiation of a buprenorphine/naloxone (Suboxone) taper. We have found incredible, almost magical, success with this medication. We typically start these patients at 16 mg buprenorphine / 4 mg naloxone and cut that dose in half every two to three days. The clinical turnarounds you can see in these patients is nothing short of miraculous.

Todd Wilcox MD, MBA, CCHP-P, CCHP-A, is the medical director of the Salt Lake County (UT) Metro Jail. He also is the president of the American College of Correctional Physicians. This article is reprinted in slightly abridged form from the Summer 2016 issue of CorrDocs, *the newsletter of the ACCP. Find* CorrDocs *at www.accpmed.org.*

To download the WOWS protocol, visit www.ncchc.org/correctcare.