IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KATHRYN GREEN, *et al.*	§	
	§	
Plaintiffs	§	
	§	
	§	
v.	§	**CIVIL ACTION NO. 4:16-CV-00893**
	§	
HARRIS COUNTY, TEXAS, *et al.*	§	
	§	
Defendants	§	

DEFENDANT HARRIS COUNTY'S MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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TO THE HONORABLE ANDREW HANEN:

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7, Defendant Harris County respectfully files this Motion for Summary Judgment, and represents as follows:

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING AND STATEMENT OF ISSUES TO BE RULED UPON BY THE COURT

Patrick Green was a long-time heroin addict and drug dealer serving a two-year sentence when he suddenly became ill with a rare and virulent form of bacterial meningitis. Once Jail staff learned he was sick, they transferred him to the hospital, where he died within hours of his symptoms emerging. On April 3, 2016, his family filed suit claiming the Jail was at fault for his death. Their live pleading asserted claims against Harris County under 42 U.S.C. § 1983 for deliberate indifference to a serious medical need and inadequate sanitation. (Doc. 73.) On March 1, 2019, Plaintiffs withdrew their sanitation claim. (Doc. 293.) Discovery is complete.

The issue to be ruled upon is whether to grant summary judgment under Rule 56 because Plaintiffs fail to show an issue of material fact that: (1) No official was aware of a serious medical need until it was too late to save Green's life, (2) no official was deliberately indifferent to that need in violation of the Eighth Amendment, (3) no policymaker adopted a policy or custom that was the moving force behind a constitutional violation, and (4) no policymaker adopted a policy or custom deliberately indifferent to Green's rights.

FACTS

I. The Harris County Jail is a flagship correctional facility.

The Harris County Jail is the third largest jail complex in the United States, and in the five years prior to Green's death, it processed 591,209 inmates and had an average daily population of approximately 9,440 inmates. The Harris County Sheriff's Office is one of only 20 sheriff's departments in the nation to have earned accreditation by the prestigious Commission

on Accreditation for Law Enforcement Agencies, "for demonstrating a commitment to professional excellency in policy and practice." In 2008, Harris County was named a CALEA Flagship Agency and a model for others to follow.[1]

Though the Jail is not required to have a clinic, it maintains two clinics and provides the same care as most urgent care centers or emergency rooms. Physicians, nurses, and other medical personnel are on-site 24-hours per day, 7 days per week. Since 1985, the National Commission on Correctional Health Care has rigorously inspected the Jail and certifies it complies with, or exceeds, national health care standards.[2] Because the Jail treats approximately 2,500 inmates with mental illness, it is often referred to as the largest psychiatric facility in Texas. In 2013, the NCCHC honored Harris County's Downtown Central Jail as the organization's national program of the year for its excellence.[3]

The Harris County Jail is also inspected at least annually by the Texas Commission on Jail Standards, which is an agency of the State of Texas with jurisdiction over Texas county jails. Tex. Gov. Code § 511.001, *et seq*. The Texas Commission on Jail Standards inspected the Jail in December, 2014—only three months before Green's death. The U.S. Marshal Service also regularly inspects the Jail to assure compliance with local, state, and federal laws and has always found the Harris County Jail in full compliance with its standards.[4]

The Harris County Jail has detailed policies to assure cells are maintained in good condition, medical needs are provided for, officers continuously observe and document inmates' health and welfare (twice as often as state law requires), and inmates have redundant ways to

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[1] Exhibit 1, Major Dougherty Affidavit at 4-5.

[2] Exhibit 2, Dr. Laxman Sunder Affidavit at 3-4; Exhibit 3, NCCHC Accreditation for 2014-2016.

[3] Exhibit 2, Dr. Laxman Sunder Affidavit at 4.

[4] Exhibit 1, Major Dougherty Affidavit at 5-6.

alert staff to their concerns.[5] Inmates can access the medical clinic any time by making either verbal or written requests, and staff is required to order an inmate to the clinic if there is any reason to suspect he needs medical attention.[6]

II. Patrick Green died of a rare and virulent illness hours after his symptoms emerged.

In March, 2015, Patrick Green was a heroin addict and drug dealer awaiting transfer from the Harris County 701 North San Jacinto Jail to prison. He was assigned to 3C4, which is a low security cell whose inmates mostly worked in the laundry. Green received both written and oral instructions on how to request medical care, and he was seen by the clinic 10 times for routine checkups, symptoms of his heroin withdrawal, and after getting into a fight.[7]

In the weeks prior to March 24, 2015, neither Green—nor any of his 24 cellmates—gave any indication he might not be feeling well.[8] That morning, he dressed and watched TV until 2:25 p.m., when Officer Malloy entered the cell, confirmed the inmates were in good condition, and checked their armbands for one of three daily counts.[9] The inmates were preparing to leave for their job at the laundry when Green asked Officer Malloy if he could take the day off. The laundry had its quota of workers for the day, and Malloy agreed.[10] Dr. Gary Vilke, who has

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[5] Exhibit 1, Major Dougherty Affidavit at 6-14; Exhibit 4 (CJC-212 – Inmate Health Care); Exhibit 5 (CJC-220 – Inmate Observation); Exhibit 6 (CJC-724 – Inmate Grievance); Exhibit 7 (JCIB-100 – Inmate Quality of Life); Exhibit 8 (D-204 – Inmate Count); Exhibit 9 (D-205 – General Inmate Rules); Exhibit 10 (D-211 – Inmate Grievance); Exhibit 11 (D-231 – Quarantine); Exhibit 12 (Health Services Manual – Policies JA-01 through JJ-26).

[6] Exhibit 1, Major Dougherty Affidavit at 6-9; Exhibit 2, Dr. Sunder Affidavit at 5-6; Exhibit 4, CJC-212.

[7] Green was seen by the clinic on December 18, 2013, December 23, 2013, December 27, 2013, December 31, 2013, January 2, 2014, January 4, 2014, January 5, 2014, January 8, 2014, December 31, 2014, January 12, 2015, and March 24, 2015. (Exhibit 13, Jail Clinic Medical Records for Patrick Green at Bates Nos. 156-179.) *See also*, Exhibit 2, Dr. Sunder Affidavit at 11-13.

[8] Exhibit 17 Officer Malloy Affidavit (Green did not request medical care and reported having only a minor illness of little concern); Exhibit 19, Officer Rodriguez Affidavit (she spoke with Green about a book, but there was no indication he was not feeling well during her shifts March 23/March 24); Exhibit 20, Officer Sanchez Affidavit (he is trained to recognize when inmates need medical evaluation, but Green never appeared ill during his shift March 23/March 24 and there was no evidence he vomited.)

[9] Exhibit 17, Officer Malloy Affidavit at 2; Exhibit 16, Pass-On Reports.

[10] Exhibit 18, Officer Malloy deposition at 143:1-8. The laundry worker program is voluntary, and inmates are permitted to leave the program or take an occasional day off work. (Exhibit 1, Major Dougherty Affidavit at 12.)

overseen physicians at seven jails in San Diego, testified that inmates commonly take a day of rest. Without signs of obvious distress, there "is no expectation that a correction officer would make or insist that an inmate go to medical for a simple lay in request." (Exhibit 26 at 8.)

Green napped, and Officer Malloy noted on the Pod Control Visual Check Log that he observed Green at 2:30 p.m., 3:25 p.m., 3:51 p.m., and 4:18 p.m. Around this time, a food worker offered Green dinner, and he said he was "okay."[11] Neither Malloy, nor the worker, suspected anything unusual. Malloy continued to observe Green at 4:46 p.m., 5:13 p.m., and 5:40 p.m.[12] Green's cellmates returned from work around 6:30 and did not notice anything unusual until Green stumbled while walking to his bunk. The inmates alerted Officer Malloy, who called for assistance. The Jail has "rover" officers on standby, and Officer Warner Ervin responded, along with clinic Nurse Michele Johnson. Although Green cursed and declined medical attention, he was transported to the clinic, then Ben Taub Hospital, where he died at 11:59 p.m.[13]

Every medical expert in this case opined that until March 24 around 6:30 p.m., no reasonable lay person would have suspected Green had a serious illness. Dr. Hamill testified that based on Green's recorded phone calls and other evidence, Officer Malloy had no:

> information that would have prompted him to consider a significant illness…The first time that a reasonable jail guard should have considered a significant illness was in the evening of March 24, 2015, and at that time, Officer Ervin did contact the medical clinic to seek medical attention.

(Exhibit 24 at 7.) In fact, Dr. Hamill concluded it is not clear to him that even a reasonable physician would have diagnosed meningitis before this time. *Id.* This is reinforced by the fact that Ben Taub Hospital staff did not know what was wrong with Green until after autopsy.[14]

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[11] Exhibit 17, Officer Malloy Affidavit at 2.

[12] Exhibit 16, Pod Control Center Observation Logs; Exhibit 1, Major Dougherty Affidavit at 11.

[13] Exhibit 21, Internal Affairs Report; Exhibit 22, Homicide Incident Reports.

[14] Exhibit 25, Dr. Ly report at 8; Exhibit 28, Autopsy Report at 1.

Dr. Vilke explained that bacterial meningitis often has mild initial symptoms, and it is common for emergency rooms to send patients home "with the diagnosis of a viral illness or flu" and the patients "then return hours later fully septic and toxic." Accordingly, he concludes, "On March 24, 2015, Mr. Green was not exhibiting signs of a serious medical condition that the guards at the jail should have recognized or acted on earlier."[15]

After a thorough review of the record, Dr. Ly concluded "none of the inmates or detention officers thought Green was ill or seriously ill until the inmates returned from work in the afternoon of March 24th." No reasonable officer would believe Green was sick because he was engaged in conversation, playing chess, reading a book, and getting dressed for work, and even "co-inmates who were more consistently interacting with Green thought he was in his usual state of health until they returned from work in the afternoon on March 24th."[16]

Former Travis County Sheriff Margo Frasier agreed that Green was "capable of advocating for his needs, and Malloy did not observe anything which caused him to believe that Green had a serious medical condition" and when he did, he promptly got help. These actions were reasonable from the perspective of a law enforcement officer.[17]

III. Five investigations found no wrongdoing.

After Green's death, the Sheriff's Office Homicide Division conducted an investigation and forwarded the information it gathered to the District Attorney's Office.[18] On August 25, 2015, Assistant District Attorney Heyward Carter concluded there was no criminal conduct and closed the file.[19] Internal Affairs then completed an administrative investigation to determine

[15] Exhibit 26, Dr. Vilke Report at 7.

[16] Exhibit 25, Dr. Ly Report at 9.

[17] Exhibit 30, Margo Frasier Report, at 9.

[18] Exhibit 32, Major Pair Affidavit at 3-4; Exhibit 22, Homicide Incident Reports.

[19] Exhibit 32, Major Pair Affidavit at 4; Exhibit 33, Letter from District Attorney.

whether any officer violated Sheriff's Office policy, procedures, or post orders, and whether all required logs and reports were accurately completed. Internal Affairs interviewed 19 witnesses and found no evidence of policy violations.[20] It forwarded a 31-page report to the Administrative Discipline Committee, which found no reason to take action against any employee.[21]

In addition, the Texas Commission on Jail Standards investigated Green's death and concluded on April 8, 2015, "[a]fter careful review of all paperwork, it was determined that there appears to be no violation of minimum standards and no further action is warranted at this time."[22] The Sheriff's Office also promptly notified the appropriate people of Green's death, both internally and externally. This included the Bureau of Justice Statistics and Texas Attorney General.[23] No investigation ever found wrongdoing by any individual, or any systemic problems with the policies, practices, or training of the Harris County Jail.[24]

SUMMARY OF THE ARGUMENT

Harris County is entitled to summary judgment under *Monell v. Dep't of Soc. Servs. of City of New York*, 98 S. Ct. 2018 (1978), because there is no Harris County policy, pattern, or practice of disregarding bacterial meningitis symptoms or denying inmates care when needed or requested. Jail staff complied with TCOLE certified training and policies, and there is no failure to train or supervise officers to recognize symptoms of a disease so rare that even physicians have trouble diagnosing it in time to save a patient's life.

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[20] Exhibit 32, Major Pair Affidavit at 4; Exhibit 21, Internal Affairs Report No. DIC2015-00013.

[21] Exhibit 32, Major Pair Affidavit at 4; Exhibit 34, Administrative Review Board.

[22] Exhibit 35, Texas Commission on Jail Standards letter, April 8, 2015.

[23] Exhibit 36, Death-in-custody notifications.

[24] Exhibit 1, Major Dougherty Affidavit at 16; Exhibit 32, Major Pair Affidavit at 5.

ARGUMENT

I. Summary Judgment Standard.

Under Rule 56, summary judgment should be granted if the movant shows there is no genuine dispute as to any material fact and is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant need not prove the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). But if the movant shows the absence of a genuine issue of material fact, the nonmovant must provide "specific facts showing the existence of a genuine issue for trial." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmovant may not rely on conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

II. Plaintiffs' claim is analyzed as an Eighth Amendment "episodic act or omission."

A county cannot be liable under 42 U.S.C. § 1983 for negligence or gross negligence. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015). A county cannot be vicariously liable for the acts of employees. *Estate of Davis v. City of N. Richland Hills,* 406 F.3d 375, 381 (5th Cir.2005). To state a claim against Harris County, Plaintiffs must show an official policymaker adopted an unconstitutional policy or custom with deliberate indifference to the fact that a constitutional violation would occur. *Monell*, 98 S. Ct. at 2037 (1978).

This Court has determined that Green's constitutional claim is for cruel and unusual punishment under the Eighth Amendment based on deliberate indifference to a serious medical need,[25] stemming from Officer Michael Malloy's failure to respond to Green's illness.[26] When

[25] Doc. 245 at 11-15. Green dismissed his excessive force claim against Officer Warner Ervin and claim of unsanitary conditions. (Doc. 293.) Though Plaintiffs' live complaint is amorphous, Harris County believes the only claim remaining is deliberate indifference to a serious medical need. If the Court determines there are other live claims, Harris County requests the opportunity for additional briefing.

an inmate's alleged harm is caused by a specific event perpetuated by actors interposed between the inmate and the government, the case is an "episodic act or omission"[27] and the municipality cannot be liable until after a plaintiff "demonstrates that the official acted or failed to act with deliberate indifference to the detainee's needs." *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 648 (5th Cir. 1996). Accordingly, to find liability against Harris County, Plaintiffs must first show Officer Malloy violated Green's Eighth Amendment rights with deliberate indifference.

III. Green's constitutional rights were not violated.

Harris County incorporates Officer Malloy's summary judgment argument and evidence that Green's constitutional rights were not violated. To establish that an inmate's Eighth Amendment right to medical care was violated, a plaintiff must show there was a deliberate indifference to a serious medical need sufficient to create "unnecessary and wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976).

Serious medical need. A serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."[28]

Deliberate indifference. To show deliberate indifference to that serious medical need, Plaintiffs must meet the "stringent" standard of proving defendants (1) subjectively knew Green faced a substantial risk of serious bodily harm and (2) disregarded that risk by failing to take reasonable measures to abate it. *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006).

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[26] Claims against all other individual defendants have been dismissed, leaving only Officer Malloy. *See*, Doc. 73 at ¶¶ 69, 74-75, 90-91, 95-97, 99-102; Doc. 245 at 22-25; and Doc. 293.

[27] This is true even when plaintiff generally complains of inadequate jail staffing or funding. *See, Scott v. Moore*, 114 F.3d 51,53 (5th Cir. 1997); *Hare v. City of Corinth,* Miss., 74 F.3d 633, 648-49 (5th Cir. 1996); *Nazerzadeh v. Harris Cnty*, No H-08-0499, 2010 WL 3817149, at *4 (S.D. Tex. Sept. 27, 2010). If the Court finds this to be a "conditions of confinement" case, Harris County respectfully requests the opportunity to brief those issues.

[28] *Nam Dang by & through Vina Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272, 1280 (11th Cir. 2017); *Baker v. Wilkinson*, 635 F. Supp. 2d 514, 520 (W.D. La. 2009).

As explained, Green did not have a serious medical need until after 6:30 p.m. on March 24, 2015, which is when the medical experts agree a lay person would recognize the need for a doctor's attention. However, by then, it was already too late to save Green's life. Though Green was provided with medical attention within—at most—one or two hours, treatment would have needed to start much earlier in the day, before his cellmates left for work.[29]

There is no official liability when an inmate presents symptoms that a layperson does not recognize as serious. In *Manemann*, a pretrial detainee was denied prescription footwear and missed work because his foot and leg were swollen to twice their normal size. Jailers denied requests for medical care for several hours, and his leg was amputated because of the delay. The Fifth Circuit held there was no evidence jailers were subjectively aware of the risk caused by the infection. *Manemann v. Garrett*, 484 F. App'x 857, 859 (5th Cir. 2012).

In *Gracia*, a jail was not deliberately indifferent to a diabetic inmate's medical needs by denying medical care four hours and not bringing him to a physician until the following Monday. *Gracia Ledezma v. United States*, 382 F. App'x 381, 383 (5th Cir. 2010). There was also no deliberate indifference when an inmate lost his leg to a rare post-surgical infection while being treated at the jail with antibiotics. *Fuller v. Harris Cty.*, 294 F. App'x 167, 169 (5th Cir. 2008).

The Eleventh Circuit affirmed summary judgment after an inmate contracted a mild case of meningitis. He lost weight, and jail staff knew for weeks he was having headache, fever, stiff neck, bizarre behavior, low blood pressure, and drooling before anyone realized he had meningitis. *Nam Dang by & through Vina Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272, 1280 (11th Cir. 2017). That was not deliberate indifference, and there is certainly no deliberate

[29] Dr. Hamill concluded: "**I do not believe that one can say with medical certainty that Patrick Green would have survived had he been administered antibiotics earlier in the afternoon on March 24, 2015. Even if he had been administered antibiotics when he was first found to have altered mental status, his disease had already progressed significantly**…" (Exhibit 24 at 7)(emphasis added). Dr. Moran concluded antibiotics needed to be administered "early to mid afternoon" to have a chance of saving Green's life. (Doc. 261-7 at 6.)

indifference to Green's medical needs when his meningitis symptoms exploded without warning, he never reported them, and he died hours after they became apparent.

IV. Harris County is not liable under 42 U.S.C. §1983.

A. Plaintiffs have no evidence of a policy or custom that was the moving force behind any constitutional violation.

Assuming Plaintiffs could establish a constitutional injury by an official, Harris County would still not be liable unless Plaintiffs could meet their burden of showing: (1) an official policy or custom, (2) attributed to a policymaker, (3) that was the moving force behind Green's constitutional injury. *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002).

The Harris County Sheriff is the official policymaker for the Sheriff's Office,[30] and Plaintiffs do not identify any official policy by the sheriff that caused their injury. Instead, Plaintiffs infer a custom of ignoring serious medical needs. To show a custom, plaintiffs must establish that a practice was so persistent and widespread that it fairly represented the policy causing the constitutional injury. *Colle v. Brazos Cnty, Tex.,* 981 F.2d 237, 244 (5th Cir. 1993).

Plaintiffs rely on: (1) nine incidents between 2001 and 2017 that had nothing to do with meningitis—and often nothing to do with medical care at all,[31] (2) inaccurate opinions about Jail policy, training, and staffing gleaned from unverified newspaper articles,[32] and (3) a letter from the U.S. DOJ five years before Green's death about matters that had nothing to do with this case, was never substantiated, and to which the Jail thoroughly responded.[33] This disjointed

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[30] *Baughman v. Garcia*, 254 F.Supp.2d 848, 887 (S.D. Tex. 2017).

[31] Doc. 73 at ¶¶ 56-66.

[32] *See*, Doc. 73 at ¶¶ 50-67. At times, Plaintiffs' pleadings torpedo their case by pointing out the Jail disciplines, fires, and indicts staff who violate policy. (Doc. 73 at ¶¶ 50, 53.)

[33] Exhibit 1, Dougherty Affidavit at 16-17; Exhibit 29, Harris County's Response to U.S. DOJ Letter. Based on what little data he claimed to have, Plaintiffs' expert Roger Clark admits conditions in the Jail "improved" after the U.S. DOJ letter was sent in 2009. (Exhibit 37, Clark deposition at 282:14-287:8.)

smörgåsbord of hearsay and anecdotes do not come close to establishing a persistent and widespread practice that caused Green's alleged injury.

In *Pineda*, the Fifth Circuit illustrated the high burden of showing custom by rejecting plaintiff's argument that 11 incidents of unconstitutional searches out of 500 narcotics incidents could constitute a widespread practice "in one of the Nation's largest cities and police forces." *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002).

Major Patrick Dougherty is in charge of the facility where Green was housed, and Major Bryan Pair is in charge of Internal Affairs. Both men confirmed the cases Plaintiffs identified in their complaint and expert report are not remotely similar to Green's case. Those inmates either did not die, did not have a medical condition, did not die of anything related to bacterial meningitis, and/or were not housed in the 701 Jail or Clinic.[34]

Former Sheriff Frasier concluded Green was "supervised in accordance with the regulations of TCJS" and that there was no evidence of a "policy, custom, or practice of ignoring the medical health needs of its inmates."[35] Plaintiffs' police practices expert, Roger Clark, admits he has no evidence of a custom of ignoring infectious diseases at the Jail or falsifying observation logs. His primary source of information was Plaintiffs' complaint,[36] and he has not even tried to compare the Jail's mortality rate with other facilities.[37]

In dismissing former Sheriff Adrian Garcia, the Court already recognized the lack of both custom and causation by pointing out Plaintiffs "do not allege a single other instance prior to

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[34] Exhibit 1, Dougherty Affidavit at 17; Exhibit 32, Major Pair Affidavit at 6.

[35] Exhibit 30, Frasier Report at 8-9.

[36] Exhibit 37, Clark deposition at 170:1-193:14. Clark does not cite facts because it is not his "style" to do so (*Id.* at 237:4-23) and he so thoroughly plagiarizes Plaintiffs' complaint that his conclusion inadvertently includes typos from the complaint. (*Id.* at 281:4-282:9.) Mr. Clark further admits the only jail policy he has ever written dealt with chaplains. (*Id.* at 218:13-219:23.) Defendants are filing a joint motion to strike Clark's conclusions.

[37] Exhibit 37, Clark deposition at 287:9-287:20. Clark has also never worked in a Texas jail, and has not worked in any jail since 1980. *Id.* at 15:11-20.

Patrick's case" where the Jail incorrectly treated bacterial meningitis. (Doc. 281 at 14.) In fact, there are no known cases of bacterial meningitis, viral meningitis, parasitic meningitis, or any other type of meningitis among the 591,209 inmates processed at the Harris County Jail in the five years prior to Green's death—despite Plaintiffs' claim that this is a "common" disease.[38]

B. Harris County's policies and practices protected Green's rights.

The Jail is not required to even have a clinic, but as noted, it maintains two clinics accredited by the National Commission on Corrective Health Care and has doctors on duty 24 hours per day, 7 days per week. The Fifth Circuit does not require the Jail to have written policies for inmate supervision or medical care, but the Jail has detailed written policies—and it enforces them. *Brumfield v. Hollins*, 551 F.3d 322, 328 (5th Cir. 2008).

Dr. Laxman Sunder, interim executive director of Health Services, confirms that the Jail respects medical autonomy, staff does not override medical decisions or hinder inmates from receiving prescribed treatments, and officers often call the clinic when they believe an inmate is having a medical problem. (Exhibit 2 at 6.) Further, Dr. Sunder testified the clinic "does not hesitate" to refer inmates to outside hospitals, as provided by Policy J-D-05 and J-E-08. The Jail is only five miles from the world's largest medical center, and Dr. Sunder has never known cost to be a factor in determining whether to send an inmate to a hospital. *Id.* at 4-6.

Under medical Policy J-A-01-2, all inmates are provided health screenings upon booking and after 14 days. Policy J-A-01 and J-E-01 require that inmates be notified orally, in writing, and through signage, on how to receive health care. Green received this information in his Inmate Handbook and during clinic appointments on December 27, 2013 and January 12, 2015.[39]

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[38] Exhibit 1, Major Dougherty Affidavit at 4-5, 17; Exhibit 2, Dr. Sunder Affidavit at 8; Exhibit 32, Major Pear Affidavit at 3 & 6.

[39] Exhibit 2, Dr. Sunder Affidavit at 11-12; Exhibit 44, Inmate Handbook at 40-56; Exhibit 13, Medical Records at 166 & 178.

Major Pair confirmed that in his 13 years with Internal Affairs, he has heard of only one instance of an officer being accused of delaying medical care to an inmate, and that was for a relatively minor complaint more than three years after Green's death. Internal Affairs took the allegation seriously, and the officer was disciplined because the Jail, "has no tolerance for any officer denying or delaying medical care to inmates." (Exhibit 32, Major Pair Affidavit at 5.)

Green did not submit an I-60/Sick Call Request. Policies CJC-212(F) and J-E-07 provide a process for inmates to request routine, non-emergency clinic appointments by submitting an I-60/Sick Call Request form into a locked medical box in each pod. These boxes are available to inmates at least once per shift, and Pass-On Books confirm Green had access to the box continuously on March 23 and March 24, 2015.[40] Clinic staff have keys to the boxes, pick up the forms daily, and enter them into a "Triage Log" database. After the forms are logged, the redundant paper form is either given to the patient or discarded after his appointment.[41]

In his nine years with the Jail, Dr. Sunder is not aware of any Sick Call Requests being lost, dropped, or thrown away.[42] Under Policy J-E-07, the clinic collects these forms daily, reviews them for urgent problems, and responds to even routine requests within 48 hours. Nurses respond to non-medical requests such as dispensing over-the-counter medication and nail-clippers. Inmates with medical problems see a doctor. Neither detention officers, nor nurses, serve as gatekeepers for medical care.[43] Clark has no criticism of this policy,[44] and Dr. Moran conceded, "I would not have a problem with the process."[45]

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[40] Exhibit 1, Major Dougherty Affidavit at 11-12; Exhibit 16, Pass-On Reports.

[41] Exhibit 2, Dr. Sunder Affidavit at 8; Exhibit 39, Triage Log for March, 2015.

[42] Exhibit 2, Dr. Sunder Affidavit at 8. Similarly, Nurse Michele Johnson has never heard of a Sick Call Request being lost or ignored. (Exhibit 23 at 54:3-4.)

[43] Exhibit 2, Dr. Sunder Affidavit at 9, citing Policy J-E-11 (Exhibit 12 at Bates No. 2416.)

[44] Exhibit 37, Clark deposition at 238:8-239:3.

[45] Exhibit 27, Dr. Moran deposition at 202:1-220:4 at 203:7-8.

Green knew how to submit a Sick Call Request, and he did so on December 22, 2013 and received an appointment two days later.[46] Dr. Sunder testified that the 701 Clinic processed **1,472** Sick Call Requests in March, 2015—including many from Green's cell. Two of Green's cellmates submitted Sick Call Requests in the 24 hours before Green died—one for headache and the other for a cold. On the day Green died, his two cellmates were called to the clinic, but both refused treatment by writing: (1) "***Problem has been solved***." and (2) "***I'm okay***." (Exhibit 45, Medical Refusals, at Bates Nos. 12731 & 12746.) Dr. Sunder and Clark agree that if Green had submitted a Sick Call Request, he would have also been brought to the clinic.[47]

Courts recognize jail Sick Call Requests are "standard procedure," and a jail's medical policies and practices are not deliberately indifferent when an inmate's care is delayed because he failed to advocate for himself. In *White*, a diabetic inmate developed gangrene and lost his toe after he declined to follow a nurse's advice to submit a sick call request. Because White "did not consider his own condition to be sufficiently serious…much of the delay he complains about was of his own making." *White v. Univ. of Texas Med. Branch*, No. CIV.A. H-06-2734, 2009 WL 814113, at *6-7 (S.D. Tex. Mar. 25, 2009). Similarly, if Green had symptoms on March 23 or March 24, he had a duty to alert staff, rather than delay his own treatment.

Green did not ask a detention officer or sergeant to go to the clinic. Policy CJC-212 (D) provides: "All inmates may access emergency care by contacting a deputy or staff member." (Exhibit 4.) An inmate can bypass the Sick Call Request process by asking an officer or supervisor on any of the three daily shifts to bring him to the Clinic. (Exhibit 2 at 5-6.) Clark finds no fault with this, which he says provides "access and opportunity" for medical care.[48]

[46] Exhibit 2, Dr. Sunder Affidavit at 11-12; Exhibit 13, Medical Records. Green also used I-60 forms for non-medical requests, as evidenced by Exhibit 43.

[47] Exhibit 2, Dr. Sunder Affidavit at 10; Exhibit 37, Clark deposition at 254:16-256:16.

[48] Exhibit 37, Clark deposition at 257:17-260:25.

Green utilized this process at least twice in the past. On December 23, 2013, he was withdrawing from heroin and told an officer he was dizzy. The officer called the clinic, and Green was placed on a stretcher and brought to a doctor.[49] On December 31, 2013, Green notified an officer he had gotten into a fight and cut his lip. (Exhibit 14.) He was brought to the clinic once again. After he was treated by a doctor, the clinic automatically called back him every day—even though he had a pain level of 0 and his wound was closed. He eventually had to sign a medical refusal to stop his daily visits to the clinic.[50]

While Green successfully utilized this policy in the past, he never asked to see a doctor in the three months before his illness on March 24, 2015. Other than that night, Green was not among the approximately **2,800** of his peers who went to the clinic in March, 2015.[51]

Staff properly observed Green, but he had no obvious symptoms. Policy CJC-212 requires staff to watch for signs of illness and "override the decisions of inmates and notify the clinic if there is any reason to believe an inmate needs care but will not ask for it."[52] Policy CJC-712 requires officers in the Pod Control Center (picket) to be familiar with CJC-212 and "Notify Medical of any medical emergency."[53] Further, officers working in the Pod Control Center must "[o]bserve the physical, mental, and emotional condition of each inmate to detect signs of distress or need for medical, psychological, or other special services."[54] At the beginning of each

[49] Exhibit 2, Dr. Sunder Affidavit at 11-12; Exhibit 13, Medical Records at Bates Nos. 160, 211.

[50] Exhibit 2, Dr. Sunder Affidavit at 12; Exhibit 13, Medical Records at Bates No. 211.

[51] Exhibit 2, Dr. Sunder Affidavit at 5-6; Exhibit 4.

[52] In addition to the Triage Log, which documents 1,472 inmate appointments in March, 2015 (Exhibit 39), there is also an Appointment Log, which documents approximately 2,800 total visits (counting walk-ins) to the clinic that month. (Exhibit 40, Appointment Log); Exhibit 2, Dr. Sunder Affidavit at 8-11.

[53] Exhibit 46, Policy CJC-712, Pod Control Center, at Bates No. 8406.

[54] Exhibit 46, Policy CJC-712, Pod Control Center, at Bates No. 8407.

shift, Policy D-204 requires officers to count inmates by lining them up, talking to them, and checking their armbands while evaluating their "health and physical well being."[55] (Exhibit 8.)

37 Tex. Admin. Code § 275.1 requires that all (low risk) inmates be observed every 60 minutes. Harris County exceeds that policy by requiring "continuous" observation through cell windows that are documented every 30 minutes.[56] The Jail also requires an officer to physically enter each cell at least three times every eight hours and get a close look at inmates. Finally, at least once every eight hours, a supervisor assures officers are properly observing inmates.[57]

These observations are kept on two logs—the Pod Control Center Visual Jail Check Log and the Pass-On Reports. These documents establish that in the 44 hours before he became ill, at least six officers on six shifts kept continuous observation over Green. Green was also observed by four supervisors, rovers who came in and out of the pod, and workers who delivered food to the pod. None of them heard Green request care or exhibit symptoms until March 24 around 6:30 p.m,[58] which is consistent with the medical testimony discussed above.

The Jail's Pass-On Reports also require officers to certify each shift that cells are clean and in good condition, that inmates are served meals and allowed access to the medical/grievance boxes, and that fresh laundry, religious services, and the library are available. The Pass-On Reports alert future shifts of any problems. These reports establish that all officers and supervisors completed their rounds properly. Majors Dougherty and Pair estimate that officers conduct more than 165 million inmate observation-instances per year, and there is no evidence of any custom of officers not properly observing inmates.[59]

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[55] Exhibit 8, Policy D-204.

[56] Exhibit 1, Major Dougherty Affidavit at 10; Exhibit 5 at Bates No. 8298.

[57] Exhibit 1, Major Dougherty Affidavit at 10; Exhibit 5 at Bates No. 8302.

[58] Exhibit 1, Major Dougherty Affidavit at 10-12; Exhibit 17, Officer Malloy Affidavit; Exhibit 19, Officer Maria Rodriguez Affidavit; Exhibit 20, Officer Jose Sanchez Affidavit.

[59] Exhibit 1, Major Dougherty Affidavit at 18; Exhibit 32, Major Pair Affidavit at 7.

Green did not use his armband to access the clinic. Under Policy CJC-212(C), the clinic accepts walk-ins. Green worked in the laundry, and at autopsy, he was still wearing his worker armband, which provided him more access to the Jail than most inmates.[60] He was not handcuffed or physically restrained, and every day, he used his armband to pass near the clinic on the way to work. Both of his laundry supervisors testified they would have freely permitted him to go to the clinic and would have required him to go if he looked sick. Green never looked sick, and no one told them he was sick.[61] Nurse Michele Johnson confirmed that she sees laundry workers come into the clinic unescorted.[62]

Clark acknowledged there is no reason to believe laundry supervisors would have stopped Green from seeing a doctor, and the laundry was in "closer proximity to the clinic" than Green's cell.[63] On March 24, around 2:30 p.m., Green was dressed and preparing to go to work next to the clinic. Instead, he chose to stay in his cell.

Green did not phone for medical assistance. Under Policy D-205, Green had access to a phone from 7 a.m. until 10:30 p.m.[64] Records show Green made 72 calls in the 82 days of his last incarceration, including several to his family on March 22.[65] If Green believed he was denied medical attention, Policy JCIB-100 allowed him to ask his family—or anyone else—to submit a Quality of Life concern by phone or website, 24 hours per day. When a medical Quality of Life concern is made, the clinic immediately orders the inmate to be evaluated.[66] Both Dr. Sunder

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[60] Exhibit 31, Green's laundry armband.

[61] Exhibit 1, Major Dougherty Affidavit at 10-12; Exhibit 17, Officer Malloy Affidavit; Exhibit 19, Officer Maria Rodriguez Affidavit; Exhibit 20, Officer Jose Sanchez Affidavit.

[62] Exhibit 23, deposition of Nurse Johnson at 117:15-17; 168:21-24; 170:4-171:7; 173:18-23.

[63] Exhibit 37, Clark deposition at 265:8-267:11.

[64] Exhibit 9, Policy D-205.

[65] Exhibit 38, Call log and transcripts.

[66] Exhibit 1, Major Dougherty Affidavit at 13; Exhibit 2, Dr. Sunder Affidavit at 11.

and Nurse Johnson confirm that the clinic receives these calls and responds to them.[67] Frasier explained this policy is an "additional step" beyond what is required by any jail standards.[68] Clark acknowledged this is a "good" policy and practice.[69] Green never utilized this option.

Green never filed a grievance regarding lack of medical care. Green also had an opportunity to file an Inmate Grievance under Policy CJC-724 if he believed he was being denied medical care. Emergency complaints receive substantive action within eight hours of receipt. There is no evidence Green utilized this option either.[70]

Green failed to advocate for himself. Dr. Ly best summarizes the facts of this case and explains the responsibility Green had to let others know about his non-obvious symptoms:

> Green was college educated and literate. Green had the ability to effectively communicate and had successfully accessed medical care for an urgent condition while incarcerated in Harris County jail. Green was aware of the numerous mechanisms by which he could access urgent and non-urgent medical care. There was no evidence that Green advocated for himself by clearly and explicitly requesting medical attention.

Exhibit 25 at 8-9. Any delay in Green's medical care was not due to the deliberate indifference of policymakers, who painstakingly established a system of redundant safeguards that successfully meet the medical needs of nearly 10,000 people every day. The responsibility for telling someone about his symptoms rested with Green—who in all likelihood did not realize he was seriously ill until it was too late.

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[67] Exhibit 1, Major Dougherty Affidavit at 13; Exhibit 2, Dr. Sunder Affidavit at 11; Exhibit 23, deposition of Nurse Johnson at 175:2-177:2.

[68] Exhibit 30, Frasier Report at 9-10.

[69] Exhibit 37, Clark deposition at 267:12-268:22 and 269:21-273:2.

[70] Exhibit 1, Major Dougherty Affidavit at 13; Exhibit 6, Policy CJC-724 at Bates No. 8495.

C. Plaintiffs fail to state a claim for failure to train or supervise.

Plaintiffs suggest Harris County is liable for failing to train officers to recognize symptoms of bacterial meningitis—an illness even physicians have difficulty diagnosing.[71] To state a § 1983 case for lack of training or supervision, a plaintiff must show a pattern of similar violations and that the inadequacy of training is "obvious and obviously likely to result in a constitutional violation." *Thompson v. Upshur Cty., TX*, 245 F.3d 447, 459 (5th Cir. 2001).

The Fifth Circuit does not require a sheriff to provide formal medical training, and it is reasonable to allow deputies to use common sense and call for help if a deputy perceives an inmate to need it. *Brumfield v. Hollins*, 551 F.3d 322, 328 (5th Cir. 2008). Harris County does provide training that meets or exceeds state standards in training its officers.

As Major Dougherty explains, all Harris County staff is TCOLE-certified and state-licensed. Jail detention officers and supervisors complete a seven-week Basic County Corrections Course. This training includes how to document inmate observations, handle I-60 inmate requests and emergency requests for medical treatment, and handle grievances. Module 5 includes an entire section on Inmate Health Care, including communicable diseases, ways to identify sick inmates, and how to handle medical emergencies.[72]

Medical staff must be licensed and take at least 20 hours of relevant annual training, but even non-medical detention officers receive some medical training. In fact, under Policy J-C-04, on every shift, 75 percent of detention officers have been re-trained within the prior two years in a number of health skills, such as CPR, first aid, infection control and communicable diseases, referral of inmates to health professionals, recognizing acute manifestations of certain diseases,

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[71] Even Clark admitted "officers are not required to have training on meningitis." (Exhibit 37 at 289:18-290:22.)

[72] Exhibit 47, New Officer Training at Bates Nos. 6236-6239, 6497-6523, & 6610); Exhibit 1, Major Dougherty Affidavit at 14-15.

procedures with respect to infectious and communicable diseases, and how to obtain assistance.[73] In fact, one of Green's own laundry supervisors, Kevyn Taylor, used his CPR training to save an inmate's life in 2014 after he was found unresponsive while working in the laundry.[74]

Officer Malloy has 368 hours of training. Officer Ervin has received several advanced certificates after 2,520 hours of training. Former Sheriff Margo Frasier found, "[a]ll the deputies/detention officers who encountered Green met or exceeded the requirements for training for deputies/correction officers for the State of Texas as outlined by TCOLE standards" and that there is no indication that any policymaker knew of any pattern that might indicate inadequate training.[75] Even Clark agreed, "I'm not critical of TCOLE training" and "it was clear to me that they [Officers Malloy and Ervin] were TCOLE-certified."[76]

CONCLUSION AND PRAYER

On March 24, 2015, Green suddenly became ill with a rare and virulent form of bacterial meningitis. Once Jail staff learned he was sick, they transferred him to the hospital, where he died within hours of his symptoms emerging. Green's Eighth Amendment rights were not violated, there was no policy, pattern, or practice at the Harris County Jail that could have been the moving force of any constitutional violation, and there was no deliberate indifference by any policymaker. This Court has determined the Jail's medical staff acted appropriately. The Jail's detention staff and policymakers also acted appropriately, and there is no *Monell* liability.

WHEREFORE, Defendant Harris County respectfully requests that summary judgment be GRANTED, and Plaintiffs' case be dismissed with prejudice, with all costs taxed to Plaintiffs.

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[73] Exhibit 2, Dr. Sunder Affidavit at 7; Exhibit 12, Health Services Manual at Bates No. 2376.

[74] Exhibit 41, Kevyn Taylor Affidavit at 2.

[75] Exhibit 30, Frasier Report at 8.

[76] Exhibit 37, Clark deposition at 226:19, 228:19-20.

Respectfully submitted,

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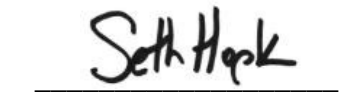

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CERTIFICATE OF SERVICE

I certify that on the 4th day of March, 2019, a true and correct copy of the foregoing document was delivered to all counsel of record via the CM/ECF system and served by electronic notice to all parties of record.

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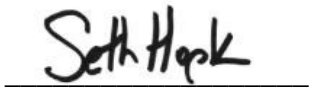

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