APPEAL NO. 19-4118

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARTIN CROWSON,

Plaintiff/Appellee

vs.

JUDD LAROWE, ET. AL.,

Defendant/Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
THE HONORABLE Tena Campbell PRESIDING
CASE NO. 2:15-CV-00880-TC

DEFENDANT/APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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DISCLOSURE STATEMENT

None.

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REPLY INTRODUCTION

This Court has jurisdiction over the entirety of Dr. LaRowe's appeal. Ignoring Crowson's reliance upon visible fiction, no reasonable jury could determine Dr. LaRowe acted with deliberate indifference when providing medical care to Crowson. Moreover, Dr. LaRowe is entitled to qualified immunity. Crowson's attempt to elevate simple negligence allegations to a constitutional violation cannot stand. The District Court's denial of summary judgment should be reversed.

REPLY ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THE TOTALITY OF DR. LAROWE'S APPEAL

Dr. LaRowe contends: (A) the facts the District Court ruled a reasonable jury could find—other than those constituting visible fiction—are insufficient to show Dr. LaRowe acted with deliberate indifference; and (B) the District Court incorrectly held the law was "clearly established" at the time of Dr. LaRowe's alleged violation of Crowson's constitutional rights. Both issues are entitled to review at this juncture.

While it is true that "[o]rders denying summary judgment are ordinarily not appealable," *Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1266 (10th Cir.2013), this Court retains interlocutory jurisdiction "over a subset of appeals from the denial of qualified immunity at the summary judgment stage," *Fogarty v. Gallegos*, 523 F.3d 1147, 1153 (10th Cir.2008). Where an appeal turns on an "abstract issue of

law," as is the case here, this Court has jurisdiction "to review denial of qualified immunity." *Allstate Sweeping*, 706 F.3d at 1266–67. In other words, this Court has jurisdiction to review "(1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether the law was clearly established at the time of the alleged violation." *Id.* at 1267 (quotation omitted). Dr. LaRowe's appeal seeks review of these two elements. Accordingly, this Court has jurisdiction.

A. Dr. LaRowe Contends the Facts a Reasonable Jury Could Find Are Insufficient to Show a Constitutional Violation

Although the Court has no jurisdiction to review whether "the pretrial record sets forth a genuine issue of fact for trial," *Johnson v. Jones*, 515 U.S. 304, 320, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), this Court maintains jurisdiction to determine whether "the facts" a jury could find are sufficient to show a constitutional violation. *Allstate Sweeping*, 706 F.3d at 1267. When considering the factual sufficiency of the District Court's Ruling, this Court has another level of review within its jurisdictional authority—to determine whether the District Court's factual conclusions constitute "visible fiction." Crowson 19; *Scott v. Harris,* 550 U.S. 372 (2007).

In *Scott*, the Supreme Court overturned the decisions of the district and appellate courts, which had denied summary judgment to a defendant who claimed qualified immunity. *Scott,* 550 U.S.at 372. There, the plaintiff argued he was

unreasonably seized by a police officer when his car was rammed off the road to end a high-speed car chase, leaving the plaintiff paralyzed. *Id*. After reviewing video footage of the chase, the Court determined there was no genuine issue of material fact as to whether the plaintiff posed a danger to the community, making the officer's seizure of the plaintiff objectively reasonable. Because an objectively reasonable seizure does not violate clearly established Fourth Amendment rights, the officer enjoyed qualified immunity from the suit. *Id*.

Following the reasoning in *Scott*, Appellate courts have held that if the record as a whole sufficiently discredits a party's evidence, the reviewing court must disregard such visible fiction and, basing its decision on the remaining evidence, determine whether the officer's actions were reasonable as a matter of law. *Scott*, 550 U.S. at 380; *Kellum v Mares*, 657 Fed.App'x. 763 (10th Cir. 2016) (citing *Lewis v. Tripp*, 604 F.3d 1221, 1225–26 (10th Cir. 2010)) (recognizing this Court may conduct its own "de novo view of which facts a reasonable jury could accept as true" where the district court's findings are blatantly contradicted by the record). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record so no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment [based on qualified immunity]." *Scott*, 550 U.S. at 380.

In order to support its Ruling, the District Court found that "Dr. LaRowe 'did not simply misdiagnose' Crowson, he 'refused to assess or diagnose [his] condition at all.'" A. 217. However, this finding constitutes visible fiction, inasmuch as record evidence "blatantly contradicts" the District Court's finding that Dr. LaRowe "refused to assess or diagnose" Crowson's condition. A. 217; Crowson 40. To "diagnose" is "to recognize (something, such as a disease) by signs and symptoms." *Diagnose*, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/diagnose. Dr. LaRowe prescribed medications to *treat* Crowson consistent with his working diagnosis of substance withdrawal, testifying: "[i]t sounded like he was having symptoms that would be consistent with withdrawal." A. 102; A. 207; A:433-34. And those treatments provided Crowson with relief. A.102; A.433-34.

Similarly, the District Court resorted to visible fiction when finding that Dr. LaRowe "wrongly assumed that Crowson was experiencing drug withdrawals."[1] A. 214-15. There is nothing in the record indicating Crowson was *not* experiencing withdrawal. As the District Court's opinion recognizes, encephalopathy is "caused by exposure to toxic substances." A. 204. Moreover, the opinion references Crowson's heroin overdose hospitalization just one month prior. A. 207-8. Crowson

[1] Note that, by stating Dr. LaRowe "wrongly assumed" Crowson was experiencing withdrawal, the District Court contradicts its own finding that Dr. LaRowe failed to diagnose Crowson.

admitted taking heroin "two days prior" during his intake interview on June 11, 2014. A.361-2. This finding by the District Court is pure speculation.

The record "blatantly contradicts" the District Court's finding that Dr. LaRowe "failed or refused to assess" Crowson. A. 215; A. 217. Dr. LaRowe's assessments came through the prison staff, which Dr. LaRowe referred to as his "eyes and ears." A. 427; A. 433. Dr. LaRowe testified there is "no other way" to evaluate patients at the prison when he is not present. A. 427. Dr. LaRowe received assessments from Nurse Johnson on June 28 and 29, 2014, as well as an updated assessment from Nurse Borrowman on July 1, 2014, at which time Crowson was transported to the hospital. A. 374; A.430; A. 433-34. These assessments included obtaining Crowson's vital signs: his blood pressure, pulse, and temperature. A. 426-27. Moreover, Dr. LaRowe ordered a chest x-ray, which came back negative. A. 152; A. 347; A. 427-28. Based on his assessment, Dr. LaRowe diagnosed Crowson with substance withdrawal. A. 427; A. 434-5. Accordingly, the record blatantly contradicts the District Court's finding that Dr. LaRowe did not assess Crowson.

Like the video in *Scott*, the foregoing findings constitute visible fiction—entitling this Court to jurisdiction for a "de novo" review of the record. *Kellum*, 657 Fed.App'x. at 763 (citing *Lewis*, 604 F.3d at 1225–26). When left with actual record facts, Crowson cannot survive summary judgment. This is Dr. LaRowe's argument, and the Court has jurisdiction to review it.

B. Dr. LaRowe Contends the Law Was Not Clearly Established at the Time of the Subject Medical Treatment

"Whether a given constitutional or statutory right was clearly established at the time the defendant acted presents a purely legal question." *Garrett v. Stratman*, 254 F.3d 946, 951 (10th Cir. 2001). This Court may review whether Dr. LaRowe's conduct, as alleged by Crowson and relied upon the District Court, violated clearly established law. *See Cox v. Glanz*, 800 F.3d 1231, 1242 (10th Cir. 2015) (quoting *Holland ex. Rel Overdorff v. Harrington*, 268 F.3d 1179, 1186 (10th Cir. 2001)). Dr. LaRowe contends the treatment at issue was not clearly established as a constitutional violation. This was argued at the District Court level and again in Dr. LaRowe's opening brief. A. 102; A. 196-8; LaRowe: 34-38. While Crowson ignores this when analyzing jurisdiction, Dr. LaRowe has consistently argued this point and does so again here. Thus, the Court has jurisdiction over the entirety of Dr. LaRowe's appeal.

II. DR. LAROWE'S MEDICAL TREATMENT CANNOT MEET THE DELIBERATE INDIFFERENCE STANDARD

The eighth Amendment guarantees prisoners the right to freedom from "cruel and unusual punishments" while in custody. *Whitley v. Albers*, 475 U.S. 312, 318 (1986) (quoting U.S. Const. amend. VIII). "The unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment. … [A]mong unnecessary and wanton inflictions of pain are those that

are totally without penological justification." *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (alterations and internal quotation marks omitted). Crowson alleges Dr. LaRowe violated his right to be free from cruel and unusual punishment based on the deliberate indifference standard. Crowson 2.

A prison official violates the Eighth Amendment only if (A) the constitutional deprivation is "objectively sufficiently serious"; and (B) the prison official has a "sufficiently culpable state of mind." *Farmer v. Brennan,* 511 U.S. 825, 834 (1994) (Internal quotation marks omitted). To state a claim for deliberate indifference against a prison official under the Eighth Amendment, a plaintiff must satisfy both the objective and subjective components. Crowson cannot satisfy either.

A. Crowson Cannot Meet the Objective Prong of the Deliberate Indifference Standard

To satisfy the objective component, a prisoner must show the alleged deprivation was "sufficiently serious." *Id.* A delay in medical care—which is what Crowson contends took place here—is sufficiently serious only if "the delay *resulted* in substantial harm." *Id*. (quoting *Oxendine v. Kaplan*, 241 F.3d 1272, 1276 (10th Cir. 2001) (emphasis added)).

Here, Crowson contends he was experiencing metabolic encephalopathy during the time Dr. LaRowe provided treatment.[2] Crowson 21. He is critical of Dr. LaRowe for failing to identify and treat his encephalopathy sooner. Crowson 17.

Crowson argues this Court should ignore the "lay person"[3] test and focus solely on the "ultimate harm" test. However, similar to the District Court, Crowson skips over the causal requirement and focuses solely on Crowson's ultimate diagnosis of metabolic encephalopathy. A. 211-12; Crowson 22. "[A] delay in medical care "only constitutes an Eighth Amendment violation where the plaintiff can show the delay resulted in substantial harm." *Mata v. Saiz*, 427 F.3d 745, 751

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[2] There is no evidence in the record indicating Crowson had metabolic encephalopathy when Dr. LaRowe was providing treatment. While this condition was later named in several medical records, there is some question regarding whether Crowson actually developed encephalopathy. Once admitted to Dixie Regional Hospital, Librium was ruled out as a contributing factor. A. 347 (Sealed DRM 20). Furthermore, the vague symptoms exhibited by Crowson, coupled with normal diagnostic testing, prompted hospital officials to seek a psychological examination, where it was noted: "this case is not making medical or psychological sense, unless the [patient] is malingering with symptoms . . . no definite diagnosis. A. 347 (Sealed DRM 20, 29).

[3] Crowson only provides footnote service to Dr. LaRowe's argument that Crowson cannot meet the "lay person" test, arguing "Crowson's symptoms were so obvious that two non-medical jail officials were concerned and recognized the need for medical attention." A.205, A.213. However, the events referenced by Crowson occurred prior to June 28, when Dr. LaRowe was first notified of Crowson's condition. A. 206. Crowson's own brief recognizes Dr. LaRowe cannot be liable for events prior to June 28. "[T]he district court issued a circumspect decision in which it carefully delineated the boundaries of each defendant's liability." Crowson 28. The District Court "did not hold [him] responsible for failing to act before Johnson alerted him to Crowson's condition on June 28." *Id*. Dr. LaRowe's "lay person" recognition arguments, outlined in his opening brief, therefore stand.

(10th Cir. 2005). Crowson skips over this key element of the objective prong, focusing on his allegedly "debilitating aftereffects" of memory loss and inability to care for himself. A. 211-12; Crowson 22. However, as outlined in Dr. LaRowe's opening brief (LaRowe 15), there is no record evidence that Crowson's allegedly delayed medical care caused his metabolic encephalopathy, nor is there any record evidence that a delayed diagnosis of encephalopathy caused Crowson's alleged memory loss or inability to care for himself.[4]

Because Crowson is missing that crucial link, he cannot establish the objective prong of the deliberate indifference standard.[5] Accordingly, this Court should reverse the District Court's ruling and grant summary judgment to Dr. LaRowe.

B. Dr. LaRowe's Actions Do Not Satisfy the Subjective Component of Deliberate Indifference

In order to satisfy the subjective prong, a plaintiff must show the defendant acted with a "sufficiently culpable state of mind." *Redmond v. Crowther*, 882, F.3d 927, 936 (10th Cir. 2018) (quoting *Giron v. Corr. Corp. of Am*. 191 F.3d 1281, 1289

[4] Crowson's inability to establish this required causal link in order to establish the objective prong was argued before the District Court. A. 173.

[5] It is possible, for example, Crowson's injuries occurred because of his habitual drug use—which proceeded his incarceration by only two days. A. 351. Indeed, the District Court recognizes that metabolic encephalopathy is "caused by exposure to toxic substances." A. 204. While Crowson is convinced Dr. LaRowe's diagnosis of withdrawal was flat-out wrong, he has never identified the "toxic substance" which caused his encephalopathy—if he ever had such a condition.

(10th Cir. 1999)). A defendant has the necessary state of mind if he knew an inmate "faced a substantial risk of harm and disregarded that risk." *Id*. at 939 (quoting *Martinez v. Beggs*, 563 F.3d 1082, 1088-89 (10th Cir. 2009)). While an inmate need not prove the defendant had actual knowledge of the danger or actually intended that harm befall the inmate, there must be enough circumstantial evidence to support an inference that a defendant failed to verify or confirm a "risk that he strongly suspected to exist." *Id*. (quoting *Farmer*, 511 U.S. at 843 n.8). As conceded by Crowson, Dr. LaRowe had to "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed]," and "draw the inference." *Farmer v. Brennan*, 511 U.S. at 837.

A medical professional's "accidental or inadvertent failure to provide adequate medical care, or negligent diagnosis or treatment of a medical condition do not constitute a medical wrong under the Eighth Amendment." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980)) (citing *Estelle v. Gamble*, 429 U.S. 97 105-06 (1976)); *see also Whitley*, 475 U.S. at 319 (holding Eighth Amendment requires "more than ordinary lack of due care for the prisoner's interests or safety"). "Where the necessity for treatment would not be obvious to a lay person, the medical judgment of the physician, even if grossly negligent, is not subject to second-guessing in the guise of an Eighth Amendment claim." *Mata*, 427 F.3d at 751. Where there is evidence of a "series of sick calls, examinations, diagnoses, and medication

… it cannot be said there was deliberate indifference to the prisoner's complaints." *Smart v. Villar*, 547 F.2d 112, 114 (10th Cir. 1976).

Crowson has presented no evidence of actual knowledge or recklessness. Instead, he relies on the District Court's finding that Dr. LaRowe did not "assess, treat, or diagnose." Crowson 34; A. 215-16. As set forth more fully above, these findings constitute visible fiction. It is undisputed that (1) Dr. LaRowe assessed Crowson through his "eyes and ears," the prison medical staff, A. 427; (2) he received reports regarding vital signs and ordered diagnostic tests, Id.; (3) he believed Crowson was suffering from withdrawal symptoms, A. 434; (4) he treated Crowson's withdrawal symptoms with medications, A. 433-34; (5) Crowson responded positively to those medications—at least for a time, A. 371; A. 522; A. 525; and (6) Dr. LaRowe ordered Crowson be sent to the hospital as soon as he became aware his condition had worsened, A. 426-27; A. 465-66. The finding regarding Dr. LaRowe's alleged failure to "assess" or "diagnose" Crowson blatantly contradicts the record and should therefore wholly be disregarded by this Court pursuant to *Scott*.[6]

[6] The District Court, and now Crowson, are similarly critical of Dr. LaRowe for failing to "even visit" Crowson 15, 18, 36, 47; A. 215-16. However, this finding ignores the record. Dr. LaRowe only visited the prison once a week. A. 429; A. 462; A. 480; A. 500. And he was only contacted regarding Crowson on June 28, June 29, and July 1. A. 317; A.428; A. 433-34; A. 439; A. 525-26. There is no evidence in the record indicating he was scheduled to visit the prison between June

Contrary to his own argument about Dr. LaRowe's alleged failure to assess him, Crowson concedes Dr. LaRowe "ordered a blood test and chest x-ray" when "confronted with these symptoms." Crowson 34; A. 206. The reasonable inference is not that Dr. LaRowe knew Crowson was at substantial risk. Crowson 34. Rather, the reasonable inference is that Dr. LaRowe ordered basic lab studies to aid in his ongoing assessment of Crowson, a common approach by physicians. A. 427.

After contending Dr. LaRowe provided no assessment, diagnosis, or treatment, Crowson goes on to present simple negligence arguments regarding Dr. LaRowe's assessment, diagnosis, and treatment. Crowson 47. For example, Crowson criticizes Dr. LaRowe for not ensuring the blood test he ordered was completed. Crowson 25-26. However, it was reported to Dr. LaRowe the blood work could not be completed due to Crowson's excessive past drug use—which had resulted in significant scarring—and his refusal to cooperate. A. 374; A. 428; A. 525. Dr. LaRowe was not purposely sticking his head "in the sand to avoid learning of a risk," as argued by Crowson. Crowson 36. Rather, he actively tried to run diagnostic tests, which failed through no fault of his own. More importantly, these facts cut against Crowson's argument regarding Dr. LaRowe's subjective belief. Had Dr.

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28 and July 1. Dr. LaRowe testified he could not remember. A. 429. To use this against him as evidence of a constitutional violation does not comport with this Court's clear precedent regarding cruel and unusual punishment in the context of medical treatment.

LaRowe "strongly suspected" Crowson was at significant risk, he would have sent Crowson to the hospital for more invasive testing after the blood draw failed. Crowson cannot have it both ways.

Crowson is next critical of the manner by which Dr. LaRowe responded to his symptom of delirium tremens—a condition that can lead to seizures (but didn't here). Crowson 35, 38 A. 206-07. Although delirium tremens can be a serious and life-threatening condition, it is typically treated at the prison facility. A. 440. Rather than putting Dr. LaRowe on notice of a significant health issue, Dr. LaRowe believed Plaintiff's delirium tremens were related to substance withdrawal—which was his working diagnosis. A. 431; A. 440. Moreover, it is undisputed the treatment Dr. LaRowe provided after learning about delirium tremens caused Crowson to improve for a time. A. 371; A. 522; A. 525. At best, Crowson's arguments represent simple negligence claims.

Even in the light most favorable to Crowson, a reasonable juror could not find that Dr. LaRowe "displayed a conscious disregard of a substantial risk of harm arising from his symptoms." *Self*, 439 F.3d 1227, 1233 (10th Cir. 2006). Dr. LaRowe provided ongoing observation, ordered tests, administered medications, and ultimately transferred Crowson to the hospital for further evaluation after his condition worsened. A. 426-27. There is nothing indicating Dr. LaRowe knew

Crowson's symptoms represented anything other than classic withdrawal. To infer otherwise is simply not reasonable.

No Circuit, including the Tenth Circuit, holds that deliberate indifference claims necessarily arise whenever prison medical care is inadequate. Such a holding would stretch the Eight Amendment well past its breaking point. *Estelle v. Gamble*, 429 U.S. at 104. Here, Crowson's claim of inadequate medical care does not rise to the level of deliberate indifference. Therefore, the District Court should be reversed.

III. DR. LAROWE IS ENTITLED TO QUALIFIED IMMUNITY

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity balances two important interests—[1] the need to hold public officials accountable when they exercise power irresponsibly and [2] the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id*. The purpose of the doctrine is to provide government officials room to make "reasonable but mistaken judgments about open legal questions." *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1866 (2017) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

A. Crowson Waived the Issue of Dr. LaRowe's Status as a Private Physician Prison Contractor Entitled to Qualified Immunity

Generally, an issue not brought in the district court is considered waived and cannot be brought for the first time on appeal. Because Crowson did not challenge Dr. LaRowe's private contractor qualified immunity status in the District Court, he has forfeited this issue. See *Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1203 (10th Cir. 2014) ("[I]f a theory simply wasn't raised before the district court, we usually hold it forfeited."). And while the Court *may* affirm on other grounds supported by the record, *see* Crowson 37–38, "[a]ffirming on legal grounds not considered by the trial court is disfavored," *United States v. Hall*, 798 Fed. App'x 215, 221 (10th Cir. 2019) (citation omitted). "In other words, forfeiture—and [the Court's] accompanying discretion to overlook it—is relevant when deciding whether to exercise [the Court's] discretion to affirm on alternative grounds." *Id.* at 220.

Crowson admits he failed to raise the issue of Dr. LaRowe's status as a private-contract prison physician under qualified immunity in the District Court. Crowson 44. Accordingly, this Court need not—and should not—take up the issue on appeal, especially given Crowson's paltry discussion of when qualified immunity applies to private individuals. *See* Crowson 38 (devoting a single sentence to the argument that qualified immunity does not apply).

Crowson relies solely on *Richardson v. McKnight*, 521 U.S. 399 (1997), to support his claim that Dr. LaRowe, "like prison guards," should be denied qualified

immunity. Crowson 45. But the *Richardson* court emphasized that its holding was "not meant to foreclose all claims of immunity by private individuals." *Richardson*, 521 U.S. at 413. Its holding was limited to "the context in which it arose": "a private firm, systematically organized to assume a major lengthy administrative task … with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms." *Id.* Such is not the case here. Dr. LaRowe is a private physician contracted with a state facility (not private) and is entirely under the supervision of the prison. *Richardson* was not intended to apply to the typical case of an individual hired by the government to assist in carrying out the government's work, such as in Dr. LaRowe's case. *Richardson*, 521 U.S. at 413.

In fact, since *Richardson*, the Supreme Court has extended qualified immunity to private parties performing governmental functions under contract or governmental request. *See Filarsky v. Delia*, 566 U.S. 377, 390 (2012) ("Affording immunity … to others acting on behalf of the government similarly serves to 'ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service." (quoting *Richardson*, 521 U.S. at 408)). And though the Tenth Circuit has not yet addressed whether a private individual providing medical services to inmates is entitled to qualified immunity, *see Kellum v. Mares*, 657 Fed. App'x 763, 768 n.3 (10th Cir. 2016), other courts have. The Sixth, Seventh, Ninth, and Eleventh Circuits have held that qualified immunity is unavailable to private

health care providers, generally reasoning that there is no apparent "history of immunity from suit at common law for a privately paid physician working for the public." *See McCullum v. Tepe*, 693 F.3d 696, 697 (6th Cir. 2012); *see also Estate of Clark v. Walker*, 865 F.3d 544, 550–51 (7th Cir. 2017); *Jensen v. Lane County*, 222 F.3d 570, 576 (9th Cir. 2000); *Hinson v. Edmond*, 192 F.3d 1342, 1347 (11th Cir. 1999).[7]

On the other hand, the First, Second, Third, and Fifth Circuit permit such a qualified immunity defense, reasoning that private doctors hired by the state are the functional equivalent of a public official. *See Burke v. Town of Walpole*, 405 F.3d 66, 88 (1st Cir. 2005) (finding that doctor was "both subject to suit under section 1983 and eligible for the balm of qualified immunity); *Pabon v. Wright*, 459 F.3d 241, 255 & n.4 (2d Cir. 2006); *Michtavi v. Scism*, 808 F.3d 203, 204 (3d Cir. 2015); *Estate of Henson v. Wichita County*, 795 F.3d 456, 460 (5th Cir. 2015); *see also Ross v. Schackel*, 920 P.2d 1159, 1165 (Utah 1996) ("Prison doctors would seem to be especially entitled to immunity given that their official duties are integral to the performance of a uniquely governmental function.").[8]

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[7] The Ninth and Eleventh Circuits' decisions predate the Supreme Court's decision in *Filarsky*, which clarified the ability of private actors performing government functions to claim qualified immunity.

[8] *See also* Athina Pentsou, *Assertion of Qualified Immunity by Private State Actors After* Filarsky*: An Application to the Employees of Prison Health Care Contractors*, 43 S. Ill. U. L.J. 361 (2019) (detailing circuit split and advocating that courts extend qualified immunity to private state actors providing healthcare).

Before deepening a circuit split on the issue, the Court should accept Crowson's concession that the issue "was not raised below," that qualified immunity is "the law of the land," and note that Crowson devotes only a single sentence to his argument that qualified immunity does not apply. Crowson 37. And even if the Court is inclined to wade into these murky waters, it should follow those Courts that permit a qualified immunity defense. Dr. LaRowe is a private physician who contracted with a state prison facility to perform a needed governmental function. The Supreme Court has long held that a physician employed to provide medical services to prison inmates acts "under color of state law for purposes of § 1983." *West v. Atkins*, 487 U.S. 42, 54 (1988). A physician hired by the state should therefore be entitled to the same protections afforded other public officials.

B. Dr. LaRowe's Treatment of Crowson Was Not Clearly Established to Violate the Constitution at the Time Crowson Was Treated

When a defendant raises a qualified-immunity defense, the plaintiff must establish (1) the defendant violated a federal statutory or constitutional right and (2) the right was clearly established at the time of the defendant's conduct. *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018). Using this test, "immunity protects all but the plainly incompetent or those who knowingly violate the law." *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (10th Cir. 2018) (quoting *White v. Pauly*, 137 S.Ct. 548, 551 (2017)).

In determining whether a right was "clearly established," the Supreme Court has repeatedly told courts "not to define clearly established law at a high level of generality." *Kisela*, 138 S. Ct. at 1151. Though "a case directly on point" is not necessary, "existing precedent must have placed the constitutional question regarding the illegality of the defendant's conduct beyond debate." *Cummings v. Dean*, 913 F.3d 1227, 1239 (10th Cir. 2019), *cert. denied sub nom. Cummings v. Bussey*, 140 S. Ct. 81 (2019). "Ordinarily . . . there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the Plaintiff maintains." *Toevs v. Reid*, 685 F.3d 903, 916 (10th Cir. 2012) (internal quotation marks omitted).

Here, Dr. LaRowe is entitled to qualified immunity because no law characterized misdiagnosis of an inmate's substance withdrawal as a constitutional violation at the time he treated Crowson. Indeed, there is still no such legal precedent. Instead, Crowson again relies upon visible fiction to argue against Dr. LaRowe's right to qualified immunity, contending Dr. LaRowe did not "assess or diagnose Crowson." Crowson 45. As set forth above, these positions blatantly contradict the record.

Crowson assumes Dr. LaRowe had knowledge that his symptoms indicated life-threatening illness and treating them as he did was clearly unlawful. However, the standard is, "whether it would have been clear to a reasonable officer that the

alleged conduct 'was unlawful in the situation he confronted.'" *Ziglar v. Abbasi*, 582 U.S. __, 2017 WL 2621317, slip. Op. at 29 (June 19, 2017) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2002)). Such is not the case here. At best, Crowson presents a simple negligence claim of misdiagnosis.

This Court's precedent shows Dr. LaRowe's treatment of Crowson did not violate clearly established constitutional law. A claim under the Eighth Amendment is only actionable "in cases where the need for additional treatment or referral to a medical specialist is obvious." *Self*, 439 F.3d at 1232. And obviousness can only occur where (1) "a medical professional recognizes an inability to treat the patient due to the seriousness of the condition and his corresponding lack of expertise but nevertheless declines or unnecessarily delays referral "; (2) "a medical professional fails to treat a medical condition so obvious that even a layman would recognize the condition"; and (3) "a medical professional completely denies care although presented with recognizable symptoms which potentially create a medical emergency." *Id*.

In *Self*, the patient had nonspecific symptoms and received treatment for what was believed to be a respiratory infection. *Self*, 439 F.3d at 1234. Laboratory testing was ordered, and Self was treated with aspirin, providing symptomatic improvement. *Id*. The Court held, "the facts, in the light most favorable to Self, do

not show conscious disregard to Self's medical needs." *Id.* "Self cannot argue he was denied medical treatment. He was not." *Id*.

Like *Self*, the facts, taken in the light most favorable to Crowson, do not show Dr. LaRowe consciously disregarded Crowson's medical needs. Crowson presented with non-specific symptoms and was placed in observation. Dr. LaRowe then ordered testing and initiated treatment for the symptoms presented. A. 435; A. 438. "The mere possibility that symptoms could also point to other conditions is not sufficient to create an inference of deliberate indifference." *Self*, 439 F.3d at 1234. As soon as it became apparent the treatment for Crowson's withdrawal was not succeeding, Dr. LaRowe sent Crowson to the hospital. A. 427.

At worst, the evidence shows Dr. LaRowe misdiagnosed Crowson's condition. *Self*, 439 F.3d at 1234. A misdiagnosis is insufficient to satisfy the subjective component of a deliberate indifference claim. *Id*. For example, "[w]here a doctor faces symptoms suggesting either indigestion or stomach cancer and mistakenly treats indigestion, the doctor's culpable state of mind is not established even if the doctor's medical judgment may have been objectively unreasonable." *Id*.

The vague symptoms presented by Crowson, neither individually nor collectively, obviously pointed to encephalopathy. A. 427. Only where symptoms obviously point to a substantial risk of harm can there be an inference the medical

professional consciously disregarded an inmate's medical emergency. *Oxendine*, 241 F.3d at 1279.

Crowson relies on *Kellum*, arguing Dr. LaRowe's alleged inaction in the presence of obvious symptoms constitutes deliberate indifference. *Kellum*, 657 Fed. App'x at 763; Crowson 47. But Crowson's reliance on *Kellum* is misplaced. Unlike the nurse in *Kellum*, Dr. LaRowe ordered testing, medication, observation, and hospital transport to Crowson. A. 427. This is action, not inaction.

So long as a medical professional provides a level of care consistent with the symptoms presented by the inmate, absent evidence of actual knowledge or recklessness, the requisite state of mind cannot be met. *Self*, 439 F.3d at 1233. Indeed, the subjective inquiry is limited to consideration of the doctor's knowledge at the time he prescribed treatment for the symptoms presented, not to the ultimate treatment necessary. *Id*.; *see Mata*, 427 F.3d at 753 (stating the symptoms presented at the time the physician has contact with the patient is relevant to the subjective inquiry only; objective seriousness is based on the ultimate harm presented).

Even assuming (without conceding) that Dr. LaRowe's medical judgment constituted medical negligence, it would be speculation to take the extraordinary next step and conclude Dr. LaRowe had a culpable state of mind. At the time Dr. LaRowe provided treatment to Crowson, no law clearly established that

misdiagnosis—or application of medications to treat a working diagnosis—violates the constitution. Dr. LaRowe is therefore entitled to qualified immunity.

IV. QUALIFIED IMMUNITY APPLIES TO THIS CASE

Although he concedes qualified immunity is "the law of the land," Crowson requests this Court reconsider decades of settled qualified immunity precedent. Crowson 49. Even if this Court were inclined to modify or reject the doctrine of qualified immunity, doing so in this case would not change the outcome: Crowson has not proven his Eighth Amendment claim.

Despite his significant request, Crowson does not mention stare decisis. "Overruling precedent is never a small matter." *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015). Stare decisis "is a foundation stone of the rule of law," *id*. (internal quotation marks omitted) and "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id*. The Court's cases identify "factors that should be taken into account' before deciding whether to revisit and overrule prior decisions." *Janus v. Am Fed. Of State, Cty. & Mun. Employees*, 138 S. Ct. 2448, 2478 (2018).

The Supreme Court's own docket confirms the doctrine of qualified immunity is eminently workable and has engendered overpowering reliance interests. "[I]n the

last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases." *White*, 137 S.Ct. at 551 (citing *City & Cty. Of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015). In 2018, the Court added two more opinions to that list, *Kisela*, 138 S. Ct. at 1152 (summarily reversing denial of qualified immunity) and *Wesby*, 138 S.Ct. at 582 (holding officers are entitled to qualified immunity).

Meanwhile, Crowson claims the doctrine of qualified immunity should be limited based on a "widespread dissatisfaction and uncertain future." Crowson 42. Such conjecture is based on the dissent of *Kisela* and the *N.Y.U. Law Review*. *Id.* Crowson's reliance on the dissent in *Kisela* is neither precedential nor persuasive. The majority opinion in *Kisela* favored qualified immunity. *Kisela*, 138 S. Ct. at 1152. Crowson's use of the dissenting opinion to present the illusion of "widespread dissatisfaction and uncertain future" is unpersuasive.

The large number of this Court's recent cases regarding the doctrine of qualified immunity fatally undermine Crowson's suggestion that qualified immunity has widespread dissatisfaction and an uncertain future. Like this Court's recent holdings, qualified immunity should be extended to Dr. LaRowe.

V. THE SAME TEST FOR DELIBERATE INDIFFERENCE APPLIES TO PRISONERS UNDER THE EIGHTH AMENDMENT AND PRETRIAL DETAINEES UNDER THE FOURTEENTH AMENDMENT

"A pretrial detainee enjoys at least the same constitutional protections as a convicted criminal." *Blackmon v. Sutton*, 734 F.3d 1237, 1240-41 (10th Cir. 2013). This Court has historically applied the same test for deliberate indifference to serious medical needs to both Eighth Amendment claims brought by prisoners and Fourteenth Amendment claims brought by pretrial detainees. *Clark v. Colbert*, 895 F.3d 1258, 1267 (10th Cir. 2018); *Martinez*, 563 F.3d at 1088; *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002); *Lopez v. LeMaster*, 172 F.3d 756, 759 n.2. (10th Cir. 1999).

Traditionally, "deliberate indifference has contained both objective and subjective components." *Callahan v. Poppell*, 471 F.3d 1155, 1159 (10th Cir. 2006). Crowson now argues that, for pretrial detainees, the traditional standard has been overruled by *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015).[9] Crowson 49-54. In *Kingsley*, the Supreme Court held the requirement that defendants acted with a culpable state of mind under the Eighth Amendment excessive force standard is inapplicable to Fourteenth Amendment excessive force claims brought by pretrial detainees. *Kingsley*, 135 S. Ct. at 2473. Instead, to prevail on an excessive force

[9] Crowson waived this argument by failing to raise it before the District Court. Dr. LaRowe adopts and incorporates the facts and arguments outlined by Washington County as they relate to the *Kingsley* decision's inapplicability here.

claim, a pretrial detainee must only show the force purposefully or knowingly used against him was "objectively unreasonable." *Id*.

This Court has noted other "circuits are split on whether *Kingsley* alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees." *Burke v. Regalado*, 935 F.3d 960, 991-92 n.9 (10th Cir. 2019) (quoting *Estate of Vallina v. Cty. Of Teller Sheriff's Office*, No. 17-1361, 2018 WL 6331595, at *2 (10th Cir. Dec. 4, 2018)). Observing the claim in *Kingsley* was "an excessive-force claim where there was no question about the intentional use of force against the prisoner," *Crocker v. Glanz*, 752 F. App'x 564, 569 (10th Cir. 2018) (unpublished), this Court's panel majority in *Crocker* suggested the "analysis in *Kingsley* may not apply to a failure to provide adequate medical care or screening, where there is no such intentional action." *Id*.

This Court held in *Burke* that, because *Kingsley* did not address the standard applicable to a pretrial detainee's denial of medical care claim, this court follows the existing Tenth Circuit precedent as to the appropriate standard. *Burke*, 935 F.3d at 991 n.9; *see Garrett v. Dupont*, No. 18-CV-284-TCK-JFJ, 2018 WL 2760028, at *3 n.2 (N.D. Okla. June 8, 2018); *Moore v. Goodman*, No. 17-CV-196-CVE-JFJ, 2017 WL 4079401, at *3 n.1 (N.D. Okla. Sept. 14, 2017); *Kerns v. Sw. Colo. Mental Health Ctr., Inc.*, No. 18-CV-2962-WJM- SKC, 2019 WL 6893022, at **9-10 (D. Colo. Dec. 18, 2019) (applying existing precedent and distinguishing *Colbruno v.*

Kessler, 928 F.3d 1155 (10th Cir. 2019)); *see also McCowan v. Morales*, 2019 WL 7206045, at *11 n.12 ("We do note, however, that a claim of deliberate indifference to serious medical needs by its very terminology seems to require both a subjective and an objective test. 'Deliberate' certainly invokes a subjective analysis and 'serious medical needs' invokes an objective analysis."). The Court should continue following that clear precedent here.

However, even if the Court applied the lower standard, Crowson cannot show Dr. LaRowe acted with objective deliberate indifference. Moreover, under this lesser standard, Dr. LaRowe is still entitled to qualified immunity unless Crowson can show the right was clearly established at the time. Crowson fails on both fronts.

CONCLUSION

For the foregoing reasons, this Court has jurisdiction over the totality of Dr. LaRowe's appeal. Dr. LaRowe did not act with deliberate indifference and is otherwise entitled to qualified immunity. This Court should reverse.

DATED this 7th day of May, 2020.

KIPP AND CHRISTIAN, P.C.

/s/ *Gary T. Wight*
SHAWN MCGARRY
GARY T. WIGHT
JURHEE A. RICE

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an electronic copy of the foregoing **REPLY BRIEF OF THE DEFENDANT/APPELLANT** was served via electronic court filing, this 7th day of May 2020, to the following:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,426 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word in Times New Roman size 14 font.

DATED this 7th day of May 2020.

KIPP AND CHRISTIAN, P.C.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I HEREBY CERTIFY that the foregoing Appellant's Reply Brief was scanned for viruses using Super Anti-Spyware, and that according to that program, it is free of viruses. In addition, I certify all required privacy redactions have been made.

/s/ Gary T. Wight
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CERTIFICATION OF DIGITAL SUBMISSIONS

I HEREBY CERTIFY that the copy of the foregoing Appellant's Reply Brief was submitted in digital form via the court's ECF system. Pursuant to this Court's general order number 95-1 filed March 16, 2020 a paper copy will not be submitted until further ordered by the Court.

/s/ *Gary T. Wight*
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