Nos. 19-4118 & 19-4120

IN THE

United States Court of Appeals for the Tenth Circuit

MARTIN CROWSON
Plaintiff-Appellee,

v.

MICHAEL JOHNSON, ET AL.
Defendants-Appellants.

MARTIN CROWSON
Plaintiff-Appellee,

v.

JUDD LAROWE
Defendant-Appellant.

On Appeal from the U.S. District Court for the
District of Utah, No. 2:15-CV-00880-TC
Hon. Judge Tena Campbell

RESPONSE BRIEF OF APPELLEE

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STATEMENT OF RELATED CASES

Crowson v. Washington County, et al. (19-4118) and *Crowson v. LaRowe, et al.* (19-4120) challenge the same decision and were procedurally consolidated.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Crowson's federal and state claims pursuant to 28 U.S.C. §§ 1331 and 1367. On August 16, 2019, Washington County, Cory Pulsipher, and Michael Johnson filed a notice of appeal from the final judgment entered on July 19, 2019. This appeal was timely under Federal Rule of Appellate Procedure 4(a)(1)(A). On August 19, 2019, Judd LaRowe filed a notice of appeal from the same final judgment. This appeal was timely under Federal Rule of Appellate Procedure 4(a)(3).

This Court lacks jurisdiction over these appeals. The individual defendants' qualified immunity arguments are "limited to a discussion of [their] version of the facts and the inferences that can be drawn therefrom." *Castillo v. Day*, 790 F.3d 1013, 1018 (10th Cir. 2015). There is no jurisdiction to review such appeals at the interlocutory stage. *See infra* Part I. Nor is there pendent appellate jurisdiction over the County's appeal from the denial of its motion for summary judgment as it is not "inextricably intertwined" with the individual defendants' appeals. *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995); *see infra* Part III.A.

STATEMENT OF ISSUES

1. Whether this Court lacks appellate jurisdiction over the individual defendants' appeals, which depend entirely on a construction of the facts rejected by the district court.
2. If jurisdiction exists, whether a detainee's claim against a jail nurse overcomes qualified immunity where the nurse (a) knew the detainee was experiencing serious symptoms but did not notify the jail doctor for three days; and (b) even then did not provide the doctor with basic patient history.
3. If jurisdiction exists, whether a detainee's claim against a jail doctor overcomes qualified immunity where the doctor prescribed medication that worsened the detainee's condition because the doctor refused to assess or diagnose the detainee.
4. Whether a parolee awaiting adjudication of an alleged parole violation may prevail against medical personnel who disregarded an obvious and substantial risk of serious harm even if they did not subjectively perceive the obvious risk.
5. Whether this Court lacks pendant appellate jurisdiction over the County's appeal, which is not "inextricably intertwined" with the individual defendants' appeals.
6. If jurisdiction exists, whether a *Monell* claim survives summary judgment when the County fails to provide nurses with written policies or training about how and when to provide basic patient history, complete diagnostic testing, monitor brain

injuries, and elevate care decisions to a doctor or hospital—and a patient suffers severe harm as a result.

STATEMENT OF THE CASE[1]

I. FACTUAL BACKGROUND

A. Johnson Does Not Notify LaRowe About Crowson's Serious Symptoms For Three Days.

In June 2014, Martin Crowson was booked on an alleged parole violation and held in Washington County Purgatory Correctional Facility ("the jail"). A.205. On June 17, he was placed in solitary confinement. *Id*. On June 25, Jail Deputy Brett Lyman noticed that Crowson "was acting slow and lethargic." *Id*. He alerted Nurse Michael Johnson, a defendant here. *Id*.

Johnson evaluated Crowson that morning, recording that Crowson was "dazed and confused" and could not remember the kind of work he did before his arrest. A.213; *id*. In his declaration, Johnson explained that he "was concerned" that Crowson was "suffering from some medical problem." A.213. He asked jail deputies to move Crowson to a medical observation cell and entered a request in the medical recordkeeping system for Physician Assistant Jon Worlton to conduct a psychological evaluation, but did not request any sort of treatment or evaluation of

[1] The facts are recited as the district court found them. At the summary judgment stage, it is "the district court's exclusive job to determine which *facts* a jury could reasonably find" and the appeals court "must take them as true." *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010).

Crowson's *physical* symptoms. A.205. In any case, PA Worlton did not receive the request or check on Crowson. A.206.

While moving Crowson to the medical observation cell, Jail Deputy Fred Keil "noticed that [he] appeared unusually confused." A.205. He was so "disoriented" that "he could not properly dress himself." A.213. When ordered to re-dress himself after a body cavity search, he put on his pants, then put his underwear on over his pants. A.206.

Johnson checked on Crowson again that afternoon and noted in the medical records that Crowson's pupils were dilated. *Id*. Then, "without conducting further physical or mental assessments" and "without contacting Dr. LaRowe," he left. *Id*. "[N]o medical personnel checked on Mr. Crowson for the next two days." *Id*.

Johnson returned to work on June 28 and visited Crowson that afternoon. *Id*. "Crowson seemed confused and disoriented and had elevated blood pressure." *Id*. "He gave one-word answers" to questions "and understood, but could not follow, an instruction to take a deep breath." *Id*. After this visit, Johnson called LaRowe, another defendant here, and told him about Crowson. *Id*. But "he failed to tell Dr. LaRowe that Mr. Crowson had already been in a medical observation cell for three days and in solitary confinement for nine days before that." A.213. This timeline is important because, as the district court found, it meant that "Crowson's symptoms

had persisted beyond the expected timeframe for substance withdrawal" by the time Johnson informed LaRowe about his condition. *Id*.

B. No Tests Are Completed And LaRowe Posits Crowson Is Suffering From Substance Withdrawal.

After hearing from Johnson on June 28, LaRowe ordered a chest x-ray and a blood test for Crowson. A.206. "The blood test . . . could have detected an acid-base imbalance in Mr. Crowson's blood, a symptom of encephalopathy." *Id*. "Johnson tried to draw Mr. Crowson's blood on June 28, but couldn't because of scarring on [his] veins and because [he] would not hold still." *Id*. "Johnson reported his unsuccessful attempt to Dr. LaRowe, who made no further attempts to diagnose." *Id*. "Crowson never received the x-ray or the blood test." *Id*.

The next day, June 29, Johnson noted that Crowson had "an elevated heart rate," "was still acting dazed and confused," and "was experiencing delirium tremens." *Id*. He relayed these observations to LaRowe. A.207. LaRowe, without making any diagnostic attempts, prescribed medication for substance withdrawal and instructed Johnson to administer it. *Id*. That afternoon, Johnson noted that "Crowson was better able to verbalize his thoughts and that his vital signs remained stable." *Id*. "But Mr. Crowson again reported memory loss, telling Nurse Johnson that he could not remember the last five days." *Id*. Johnson simply told Crowson that he would be taking medication. *Id*. He did not report the memory loss to LaRowe or take any further action.

C. Nurse Borrowman Immediately Recognizes The Need For Emergency Medical Care And Hospitalizes Crowson.

On June 30, Nurse Ryan Borrowman was assigned to the medical holding area of the jail and, on July 1, noted that Crowson's "physical movements were delayed and that he struggled to focus and would lose his train of thought." A.207. Borrowman explained that he immediately called LaRowe upon seeing Crowson because of the "severity" of his symptoms and the length of time he had been in the medical holding cell. *Id*. After hearing from Borrowman, LaRowe immediately sent Crowson to Dixie Regional Medical Center. *Id*. Crowson was diagnosed with a degenerative neurologic disorder called metabolic encephalopathy. A.204.

D. Crowson Suffers Severe Aftereffects of Encephalopathy.

Crowson was hospitalized for six days. A.208. He was released to his mother's house where, as the district court found, he "suffered from debilitating aftereffects for months." *Id.*; A.212. The court noted Crowson's testimony: "I really don't have a memory for like the next two-and-a-half months until my brain—it's like my brain checked out sometime. Because I guess—I guess I was still eating food and I was still doing stuff because—and my mom and my girl was changing my diaper, and my little brother. They were changing my diaper the whole time I was in Hooper until like—I don't even—I don't even—I can't even say necessarily a certain time that I checked back in to my brain locker." A.208.

II. PROCEEDINGS BELOW

Crowson brought suit against Washington County, jail officials, and medical personnel who worked at the jail. A.204-05, 217. Remaining are his Section 1983 claims concerning the denial of constitutionally adequate medical care against Johnson and LaRowe, in their individual capacities, and a *Monell* claim against Washington County. A.208-09.[2] The district court denied motions for summary judgment filed by Johnson, LaRowe, and the County. A.222.[3]

First, the district court concluded that a reasonable jury could find that Johnson and LaRowe were deliberately indifferent to Crowson's medical needs. Under the first prong of the deliberate indifference test, the court explained that metabolic encephalopathy is "an undisputedly serious condition warranting immediate care" and a "reasonable jury could find that [Crowson's] medical needs were sufficiently serious." A.212.

Under the second prong, the district court concluded that there was sufficient evidence to find both defendants deliberately indifferent. A.214-16. As to Johnson, the lower court explained that he "left his shift [on June 25] without ensuring that Mr. Crowson would receive further care," and that he failed to provide even "basic

[2] Crowson brought suit against Washington County and Sheriff Pulsipher in his official capacity. A.31-32. The claims are effectively identical. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

[3] Crowson does not appeal the grant of summary judgment to the County on his claim regarding the County's solitary confinement policy. A.222.

patient history" when he later alerted LaRowe to Crowson's condition, thereby preventing an accurate diagnosis. A.213-14. As to LaRowe, the court found sufficient evidence that he completely "failed to assess, diagnose, or even visit" Crowson, and then "[w]ithout an accurate diagnosis in hand, he prescribed a benzodiazepine drug that worsened [his] encephalopathy." A.215. That is, "despite vague and nonspecific symptoms, he prescribed medication based on his unverified suspicion." *Id*.

The district court denied both defendants qualified immunity because "Tenth Circuit law makes clear that the particular conduct in this case could amount to a constitutional violation." A.216. Johnson is a "'medical professional [who] knows that his role in a particular medical emergency is solely to serve as a gatekeeper for other medical personnel capable of treating the condition,' but who, a reasonable jury could find, 'delay[ed] or refuse[d] to fulfill that gatekeeper role due to deliberate indifference.'" *Id*. (quoting *Sealock v. Colorado*, 218 F.3d 1205, 1211 (10th Cir. 2000)). And LaRowe "'did not simply misdiagnose' Mr. Crowson, he 'refused to assess or diagnose [his] condition at all' and simply assumed he was experiencing substance withdrawals." A.217 (quoting *Mata v. Saiz*, 427 F.3d 745, 758 (10th Cir. 2005)).

Turing to the claim against the County, the district court found the jail's healthcare policies "severely lacking." A.218. It noted that "the Jail had no set policy

to determine when an inmate should be transported to the hospital," LaRowe "only visited the Jail one or two days a week," and "nurses were left largely to their own devices." A.219. In sum, the district court explained, Crowson's "maltreatment can be seen as an obvious consequence of the County's reliance on a largely absentee physician, and an attendant failure to promulgate written protocols for monitoring, diagnosing, and treating inmates." A.220.

STANDARD OF REVIEW

Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and one party is entitled to judgment as a matter of law." *Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004). The Court construes all facts in the light most favorable to the nonmoving party and conducts *de novo* review. *Id*. at 413-14.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction over the individual defendants' interlocutory appeals. In an interlocutory appeal from a denial of qualified immunity, this Court must accept the district court's conclusions about which facts are genuinely disputed, unless those conclusions are blatantly contradicted by the record. Here, the appeals are premised on a rejection of the district court's construction of the facts even though its factual conclusions are not contradicted—must less blatantly

contradicted—by the record. This Court should therefore dismiss these appeals for lack of jurisdiction.

II. If this Court reaches the merits, it should affirm the district court's holding that Johnson and LaRowe were deliberately indifferent to Crowson's serious medical needs and are not entitled to immunity. First, encephalopathy, an undisputedly serious condition that caused debilitating aftereffects for months, satisfies the objective component of the deliberate indifference analysis. Second, a reasonable jury could find that Johnson and LaRowe knew that Crowson faced a substantial risk of harm and nonetheless disregarded that risk—Johnson by failing to fulfill his role as a gatekeeper and LaRowe by refusing to assess or diagnose Crowson. Because it is clearly established that a nurse may not delay referral to higher-level care and that a doctor may not refuse to assess or diagnose a prisoner, neither defendant is entitled to qualified immunity.

When assessing the deliberate indifference claims against Johnson and LaRowe, this Court should apply the objective deliberate indifference standard compelled by the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and this Court's decision in *Colbruno v. Kessler*, 928 F.3d 1155 (10th Cir. 2019). Although Crowson succeeds under both the objective and subjective standards, this Court should address the issue to clarify the proper standard for jury instructions on remand.

III. There is no pendent appellate jurisdiction to review the district court's denial of the County's motion for summary judgment; the County's interlocutory appeal is not inextricably intertwined with the claims against the individual defendants.

But if this Court reaches the merits of the County's appeal, it should affirm. The district court correctly determined that a jury could find that the County ignored an obvious risk of serious harm created by its policies and practices. Jail nurses provided nearly all detainee medical care because the doctor rarely visited the jail. Despite leaving them in charge, the County did not properly train nurses to complete diagnostic testing, communicate effectively with the doctor, monitor and evaluate brain injuries, or recognize when hospitalization or emergency care is needed, nor did it provide them with written policies about any of these items.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THIS APPEAL.

There is no appellate jurisdiction over any part of this appeal. Courts of appeal have interlocutory jurisdiction over only a "subset of appeals from the denial of qualified immunity at the summary judgment stage." *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 753 (10th Cir. 2013). This jurisdiction does not extend to a review of "whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995). Both the Supreme Court and this

Court have explained "time and again" that appellate courts have no jurisdiction to resolve fact-related disputes about the record. *Lynch v. Barrett*, 703 F.3d 1153, 1160 (10th Cir. 2013).

There is an extremely narrow exception to this jurisdictional bar, which would require defendants to show that the district court's factual conclusions were blatantly contradicted by the record and constitute "visible fiction." *Id*. at 1160 n.2. Defendants do not come close to meeting this standard. "The standard is a very difficult one to satisfy" and applies only to the "rare" and "exceptional" case. *Cordero v. Froats*, 613 F. App'x 768, 769 (10th Cir. 2015). The case from which the exception originates— *Scott v. Harris*, 550 U.S. 372 (2007)—illustrates this point. In *Scott*, the Supreme Court was faced with a "videotape [that] quite clearly contradict[ed] the version of the story told by respondent and adopted by the [lower court]." *Id*. at 378. It held that courts should not adopt a version of the facts that is so "blatantly contradicted by the record" that it is "visible fiction." *Id*. at 380-81. This Court has warned litigants to "be cognizant of the limited nature of the exception," *Roosevelt-Hennix*, 717 F.3d at 759, and of the "heavy burden" it imposes, *Spencer v. Abbott*, 731 F. App'x 731, 736 (10th Cir. 2017).

A. This Court Lacks Jurisdiction Over Johnson's Appeal.

1. This Court lacks jurisdiction to review Johnson's challenges to the lower court's factual determinations.

Johnson objects to five specific facts that the district court ruled a reasonable jury could find. Johnson 33-43.[4] But he cannot show any of them are "visible fiction," *Scott*, 550 U.S. at 381, and thus none of them may be reviewed on appeal.

First, he argues that "[t]he record does not suggest Johnson was aware of any 'alarming symptoms' of Plaintiff." Johnson 35. On the contrary, the district court cited to specific evidence from Johnson's own medical notes and declaration, pointing out that "Johnson himself noted" that "Crowson was 'dazed and confused,' and 'unable to remember what kind of work he did prior to being arrested.'" A.213. Johnson also admitted that on June 25 he "was concerned [Crowson] may be suffering from some medical problem." *Id*. This record evidence precludes any claim that the district court's finding is "blatantly contradicted by the record." *Scott*, 550 U.S. at 380.

Second, the record indeed supports the district court's determination that Johnson "placed Mr. Crowson in an observation cell and left his shift without ensuring that [he] would receive further care." A.213; *see* Johnson 37 (contesting

[4] The opening brief filed by Johnson and Washington County is cited throughout this brief as "Johnson [page number]." The opening brief filed by LaRowe is cited throughout this brief as "LaRowe [page number]."

this factual determination). While Johnson placed a request for PA Worlton to evaluate Crowson's *mental* health, Johnson 37, he completely disregarded Crowson's *physical* health. That is, requesting a mental health evaluation from a PA—who never received the request, A.213—did not help to address Crowson's serious physical symptoms. And Johnson does not contest the district court's finding that he failed to alert the jail doctor before leaving his shift on June 25. *Id.*

Third, Johnson says "the district court found that Plaintiff 'did not receive any follow-up evaluation or care from medical staff for the next two days [after June 25].'" Johnson 37. Despite Johnson's discussion about what *should* have happened over those two days, he does not contest that the medical records show no follow-up care. *Id*. at 37-41. Crowson is, of course, entitled to all favorable inferences and it is permissible to infer from a dearth of medical records on June 26-27 that there was no follow-up from medical staff during those two days.[5]

Fourth, Johnson takes issue with the district court's determination that he "failed to tell Dr. LaRowe that Mr. Crowson had already been in a medical observation cell for three days and in solitary confinement for nine days before that." Johnson 41. But to support this finding, the lower court pointed to LaRowe's own testimony that he believed Crowson to be in booking and that he did not know

[5] Johnson's reference to an entry in the medical record showing a visit from Nurse Billings on June 28, Johnson 39, is entirely beside the point because the lower court's statement was confined only to June 26-27, A.213.

Crowson was previously in solitary. *Id*. Johnson does not provide *any* evidence to the contrary.

Finally, Johnson disputes the district court's determination that "when Johnson returned to work on June 28, Plaintiff's 'symptoms had persisted beyond the expected timeframe for substance withdrawal.'" Johnson 43. In fact, Johnson testified that Crowson had been in medical observation for three days "and in solitary confinement for nine days before that." A.213. As Johnson himself recognizes, withdrawal may take up to nine days. Johnson 43. Johnson is free to argue to a jury that Crowson *did* have access to drugs while in solitary confinement, for instance, via jail deputies, and therefore the expected timeframe for withdrawal had not yet elapsed by June 28. But that is far from the only reasonable conclusion based on the evidence.

Thus, Johnson does not show that *any* of the district court's factual determinations are blatantly contradicted by the record, and this Court must take them as true. *Lewis*, 604 F.3d at 1225.

2. This Court lacks jurisdiction over Johnson's legal arguments as they are premised on his version of the facts.

Johnson argues that "[e]ven with the facts exactly as determined by the district court," there is no basis to conclude that he acted with deliberate indifference. Johnson 25. But Johnson does not *actually* take the facts "as determined by the

district court" in this section of his brief. As a result, this Court lacks jurisdiction over his entire appeal.

He begins by summarizing the district court's findings concerning his actions on June 25 and then asserts that "[t]hese facts are insufficient" to conclude that he "violated the constitution prior to June 28." *Id*. at 25-26. But Johnson's summary of the facts omits several findings. He does not mention the finding that he failed to contact LaRowe on June 25. A.206. He does not mention the court's reference to his declaration where he admitted that, on June 25, he "was concerned [Crowson] may be suffering from some medical problem." A.213; A.317. And in saying that he "noted memory loss," Johnson 26, he omits the district court's specific references to medical records where Johnson himself says that "Crowson was 'dazed and confused,' and 'unable to remember what kind of work he did prior to being arrested.'" A.213 (quoting Johnson's medical records). Finally, Johnson does not even mention the district court's determination that on the morning of June 25, Deputy Lyman noticed that Crowson "was acting slow and lethargic," and that he alerted Johnson to that fact. A.205.

Next, Johnson argues that he is not liable because he "made a 'good faith effort' to provide medical care" and "did not turn [Crowson] away." Johnson 32. But the district court did *not* find that Johnson acted in "good faith." Instead, its construction of the facts shows just the opposite: Johnson "left his shift without

ensuring that Mr. Crowson would receive further care" despite there being "evidence that he was aware of the need for prompt medical care." A.213. Thus, Johnson's legal arguments concerning deliberate indifference and immunity are premised on his own construction of the facts, which divests this Court of jurisdiction.

* * *

Johnson objects to five specific facts that the district court ruled a reasonable jury could find, but does not show that any of them are "visible fiction." *Scott*, 550 U.S. at 381. Then he changes course and argues that he was not deliberately indifferent even on the facts found by the district court. But in reality, he continues to fight the factual determinations he must accept, and bases his legal arguments on his own version of the facts. Because this Court's jurisdiction does not extend to a review of "whether or not the pretrial record sets forth a 'genuine' issue of fact for trial," *Johnson*, 515 U.S. at 320, this Court may not review Johnson's appeal.

B. This Court Lacks Jurisdiction Over LaRowe's Appeal.

LaRowe does not distinguish between his legal and factual objections to the district court decision. LaRowe 12-35. Rather, his legal arguments flow only from his factual disagreements with the district court and none of his factual disagreements fit within the *Scott* exception. Accordingly, this Court lacks jurisdiction over LaRowe's entire appeal.

From top to bottom, headers to text, LaRowe's arguments are premised on factual disagreements. Two of the three main headings in his *legal* argument section are in fact all about the facts: "[t]he district court erred in denying summary judgment *by mischaracterizing record evidence* and holding a reasonable jury could conclude . . . deliberate indifference," and "[t]he district court *misapplied the facts of the case* and erred when denying Dr. LaRowe qualified immunity." LaRowe 12, 32 (emphasis added).

In summarizing his legal argument, LaRowe asserts that he "remained vigilant in his efforts to treat, diagnose, and stabilize Crowson's condition." *Id*. at 12. But the district court found exactly the opposite: "LaRowe failed to assess, diagnose, or even visit Mr. Crowson," "he did not follow up to ensure the [blood] test occurred," and "he prescribed medication based on [an] unverified suspicion that Mr. Crowson was suffering from withdrawals." A.215.

Then, in arguing that Crowson did not establish the objective component of his deliberate indifference claim, LaRowe asserts that that "Crowson's claim represents a mere disagreement as to whether he was experiencing encephalopathy in the days prior to his admission to the hospital, which cannot provide a basis for an Eighth Amendment violation." LaRowe 15-16. But whether Crowson had encephalopathy is a factual question the district court addressed: "Crowson suffered from metabolic encephalopathy." A.212. In fact, LaRowe himself said in his

deposition that the appropriate diagnosis for Crowson—from June 25 to July 1 when he was in the jail—was metabolic encephalopathy. A.431. His argument to the contrary at this stage of the proceedings is frivolous.

Next, in arguing that Crowson did not establish the subjective component of his claim, LaRowe asserts that "Crowson has presented no evidence of actual knowledge or recklessness" and that a "reasonable factfinder is unlikely to infer" that LaRowe possessed the requisite culpable state of mind." LaRowe 29. *Scott* requires a blatant contradiction to sanction appellate review of factual findings, 550 U.S. at 380-81. Arguing that a factfinder is "unlikely to infer" a particular fact is completely inappropriate in an interlocutory appeal of a qualified immunity denial. Moreover, LaRowe's claim that Crowson presented "no evidence" of knowledge or recklessness is belied by the record: as the district court noted, "[LaRowe] did not follow up to ensure the [blood] test occurred" and "prescribed medication based on [an] unverified suspicion." A.215.

LaRowe even contests the facts in making his qualified immunity argument. He says: "the district court inaccurately proffers that [he] 'prescribed a benzodiazepine drug that worsened Mr. Crowson's encephalopathy,' but provides no evidence" for this finding. LaRowe 34-35. In truth, the district court pointed out that a review of Crowson's medical history would have revealed "that [he] should not have been given any drug categorized as a benzodiazepine." A.207-08.

LaRowe goes on to argue that "there is no Supreme Court or Tenth Circuit decision holding that a physician's misdiagnosis of a patient's ultimate illness or disease constitutes deliberate indifference where the physician has treated the patient in good faith." LaRowe 36. But in making this argument, LaRowe refuses to accept the district court's conclusion that a reasonable jury could find that he did *not* act in good faith, but instead "fail[ed] to seek an accurate diagnosis." A.216.

LaRowe's legal argument is premised on a brazen recasting of the facts. That move divests this Court of jurisdiction.

II. THE DISTRICT COURT CORRECTLY DENIED SUMMARY JUDGMENT TO THE INDIVIDUAL DEFENDANTS.

This Court should dismiss Johnson's and LaRowe's appeals for lack of jurisdiction. *See* Part I. But, if this Court exercises jurisdiction over these appeals, it should affirm.

The first prong of the deliberate indifference analysis requires showing that the condition is "sufficiently serious." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The second requires showing that "the official kn[e]w[] of and disregard[ed] an excessive risk to inmate health or safety." *Id*. at 837. To satisfy this component, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* The district court correctly determined that a reasonable jury could find both defendants deliberately indifferent and that they were not entitled to qualified immunity.

In so holding, the district court issued a circumspect decision in which it carefully delineated the boundaries of each defendant's liability. It found that a reasonable jury could find Johnson liable for deliberate indifference on the basis of his failures as a "gatekeeper" from June 25-28, but did not hold him liable after he "informed Dr. LaRowe" about his difficulty taking blood because that "shift[ed] the impetus to the doctor." A.212-14. As for LaRowe, the district court found that a reasonable jury could find him liable for deliberate indifference on the basis of his refusal to take necessary diagnostic steps, but did not hold him responsible for failing to act before Johnson alerted him to Crowson's condition on June 28. A.214-16. This Court should affirm the district court's careful allocation of responsibility.

A. A Reasonable Jury Could Find That Johnson And LaRowe Were Deliberately Indifferent To Crowson's Medical Needs.

1. Crowson's medical needs were sufficiently serious to satisfy the objective prong of the deliberate indifference test.

Applying this Court's clear precedent, the district court reasoned that it "must consider the ultimate harm as alleged by the plaintiff" when determining whether his medical need is sufficiently serious to satisfy the objective prong of the deliberate indifference test. A.212 (quotation marks omitted). Because encephalopathy is "an undisputedly serious condition," and caused "debilitating aftereffects," the district court determined that a reasonable jury could find that Crowson's medical needs were sufficiently serious. *Id*.

Indeed, Crowson explained that he has no "memory [of about] two-and-a-half months" and it was "like [his] brain checked out" during that time. A.328. He was so unwell that he not only needed diapers, but was unable to change them himself. *Id*. Johnson even concedes that Crowson "ultimately was diagnosed and treated for a serious condition." Johnson 21.

But defendants urge this Court to ignore the ultimate harm and ask only whether Crowson's symptoms were "so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999); Johnson 20; LaRowe 14. This argument is at odds with binding precedent. In *Mata v. Saiz*, this Court held that "the test for the objective component applies to . . . the alleged harm to the prisoner." 427 F.3d 745, 753 (10th Cir. 2005). The Court *explicitly rejected* the very position that defendants now assert, explaining that the sufficiently serious inquiry is *not* "to be made exclusively by the symptoms." *Id.*; *see also Duran v. Donaldson*, 663 F. App'x 684, 688 (10th Cir. 2016) (reiterating that the inquiry requires consideration of "both the symptoms initially presented to the prison employee as well as any resulting harm").[6]

[6] Even under the "lay person" test defendants urge, a reasonable jury could find that Crowson satisfied the "sufficiently serious" prong. In fact, there is no need to speculate about whether "a lay person" would recognize the need for medical care, *Hunt*, 199 F.3d at 1224, as that is exactly what happened here. 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.

2. Johnson was deliberately indifferent.

"[D]eliberate indifference occurs when prison officials prevent an inmate from receiving treatment or deny him access to medical personnel capable of evaluating the need for treatment." *Sealock v. Colorado*, 218 F.3d 1205, 1211 (10th Cir. 2000); *see also Burke v. Regalado*, 935 F.3d 960, 993 (10th Cir. 2019). Put simply, jail officials who act as gatekeepers are deliberately indifferent when they "deny[] or delay[] access to medical care." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). They cannot "refuse[] to perform [their] gatekeeping role." *Mata*, 427 F.3d at 756.

As a nurse, Johnson was a gatekeeper for medical personnel capable of treating Crowson's condition. The jail doctor was only at the jail twice a week. A.462. And those visits were brief, sometimes lasting only 30-40 minutes. *Id*. Moreover, LaRowe would sometimes skip even those brief visits and send a PA or nurse in his place. *Id*. Because he was there so infrequently, LaRowe testified that he relied on the nurses to evaluate patients. A.427. He reiterated more than once that the nurses were his "eyes and ears," and that "[t]here is not" any other way to do it. A.427; A.434. Borrowman agreed that he and the other nurses were "the eyes and ears of the doctor" since "the doctor [wa]sn't out there every day." A.463. There is no question, then, that Johnson's role was to serve as a gatekeeper. Thus, if he

delayed or refused to fulfill that role, he may be liable for deliberate indifference. *Burke*, 935 F.3d at 993.

As the district court found, Johnson failed to fulfill his gatekeeper role in two ways. First, on June 25, he "left his shift without ensuring that Mr. Crowson would receive further care." A.213. Johnson disagrees that this constitutes deliberate indifference, arguing that his attempted referral to PA Worlton for a *psychological* evaluation "fulfilled any possible gatekeeper role" he may have had. Johnson 28-29. But Johnson did not refer Crowson to a *doctor* for three more days, A.206, thereby preventing Johnson's *physical* symptoms from being evaluated and treated. This is inexcusable in light of Johnson's role: the only way for Crowson to access the care of a doctor was to have Johnson request it for him. When a gatekeeper "delay[s] a long period before seeking assistance," a reasonable jury may find him deliberately indifferent. *Blackmon v. Sutton*, 734 F.3d 1237, 1245 (10th Cir. 2013) (Gorsuch, J.).

Moreover, there is sufficient evidence to conclude that Johnson was aware of a serious risk of harm to Crowson on June 25. He admitted in his declaration that he "was concerned [Crowson] may be suffering from some medical problem." A.317. And his medical notes explain that Crowson was "dazed and confused," "unable to remember what kind of work he did prior to being arrested," and had dilated pupils. A.374. In fact, Crowson's symptoms were already so serious on June 25 that two non-medical officers noticed them. A.205-06. These contemporaneous

observations—from Johnson and others—indicate that the risk of harm was obvious *and* that Johnson was aware of the risk on June 25. Nevertheless, he "left his shift without ensuring . . . further care." A.213. Because a medical professional is liable when he "denies care although presented with recognizable symptoms," *Self v. Crum*, 439 F.3d 1227, 1232 (10th Cir. 2006), the district court rightly held that a reasonable jury could conclude that Johnson's "failures to seek medical care" amounted to deliberate indifference, A.214.

Second, the district court found that when Johnson finally alerted LaRowe to Crowson's condition on June 28, he failed to tell LaRowe about the time Crowson had already spent in medical observation and in solitary. A.213. "[B]y failing to provide even this basic patient history," the court reasoned, a reasonable jury could conclude that Johnson "again prevented Mr. Crowson from receiving an accurate diagnosis or appropriate treatment." A.213-14.

Johnson responds that "the failure to pass on some information is . . . negligence" and does not rise to deliberate indifference. Johnson 29. But he ignores the centrality of an accurate patient history to an accurate diagnosis. As Johnson himself recognizes, withdrawal can take up to nine days. Johnson 43. By June 28, the time Crowson spent in medical observation and solitary had exceeded that timeframe. A.213. This was critical information. LaRowe himself explained that "there are times when inmates can have access to [drugs] despite being

incarcerated," but that he had "no idea" that Crowson had been in solitary confinement. A.430; *see also* A.434. Inmates in solitary are completely segregated from others and so have no access to drugs or alcohol. Thus, a reasonable jury could find that if LaRowe knew Crowson had been in solitary, he would have been able to rule out substance withdrawal and give Crowson the medical care he so needed. But there is no evidence that Johnson told LaRowe that Crowson had been in jail before being moved to booking, let alone in solitary confinement where he had no access to substances.

Johnson simply did not fulfill his gatekeeper role and it was only when Borrowman entered the picture that Crowson began to receive appropriate care. Indeed, LaRowe said as much: he agreed to immediate hospitalization on the recommendation of Borrowman, A.432, A.434, and said that he would have done the same if Johnson had recommended it, A.433.

Where two non-medical personnel recognized a serious issue, Johnson himself made note of serious symptoms, and a second nurse quickly saw the need for hospitalization, a factfinder can easily conclude that Johnson recognized the risk of harm to Crowson and nonetheless failed to fulfill his gatekeeper role. The district court's decision should thus be affirmed.

3. LaRowe was deliberately indifferent.

There is a meaningful difference between a medical professional who "simply misdiagnose[s]" a detainee and one who "completely refuse[s] to assess or diagnose [the detainee's] medical condition at all." *Mata*, 427 F.3d at 758. Here, LaRowe attempts to characterize the relevant issue as one of "alleged misdiagnosis" or "potential misdiagnosis." LaRowe 18-19, 26. But these arguments are misplaced. As the district court determined, LaRowe "did not misdiagnose Mr. Crowson," but rather "failed to assess, diagnose, or even visit" him. A.215-16.

LaRowe was first informed of Crowson's condition on June 28. A.214. Medical records from that day show that "Crowson continued to appear confused and disoriented, gave one-word answers to questions, and had elevated blood pressure." *Id*. Confronted with these symptoms, LaRowe ordered a blood test and a chest x-ray. A.206. These steps suggest he *knew* Crowson was at risk, and could have been suffering from a serious condition.

But after learning that Johnson could not draw Crowson's blood, LaRowe "did not follow up to ensure the [blood] test occurred," A.215, even though he could have easily obtained a blood test through other means. Borrowman explained that when he is unable to draw blood, he "always send[s] [the detainee] to the hospital because they've got [a] Doppler ultrasound that they can [use to] find veins." A.463. This was an easy next step as the jail had access to "an ER that was always available

to [it]." *Id*. Moreover, the blood test was a critical diagnostic tool: it "could have detected an acid-base imbalance," which is "a symptom of encephalopathy." A.206. LaRowe himself admitted that Crowson's "case was not clear-cut" and a blood test would have been "quite valuable in assessment." A.427.

LaRowe's testimony suggests that he continued to know that Crowson was at risk on June 29. He testified that it "can be a life-threatening event" when someone "go[es] into delirium tremens" or even when "they're on the verge of [delirium tremens]." A.440. He explained: "that's when we send them [to the hospital]." *Id*. But he was *told directly* that Crowson had delirium tremens on June 29 and he did not send Crowson to the hospital for two more days. A.206-07.[7]

On top of this, LaRowe did not evaluate—or even visit—Crowson at all. Even though it was LaRowe's stated practice to visit the jail once or twice a week, A.429, and Crowson was in the medical observation unit of the jail for almost a full week, A.205-07, LaRowe testified that he did not "recall ever seeing Mr. Crowson" and conceded that there are "no records of [his] personal evaluation of Mr. Crowson," A.429-30. Thus, even though LaRowe acknowledged that the "case was not clear-

[7] LaRowe argues that he believed the delirium tremens to be a symptom of substance withdrawal. LaRowe 20. But that is beside the point. Whatever the cause, there is no question he knew delirium tremens was life-threatening and that he failed to respond appropriately.

cut," A.427, he did not take any diagnostic steps, nor did he visit or evaluate Crowson at all.

Instead, LaRowe ignored the risk to Crowson's health and prescribed medication to treat substance withdrawal alone. A.207. He took this step without so much as performing a drug and alcohol screen to confirm that Crowson was suffering from withdrawal. When asked why he did not first test Crowson for drugs or alcohol, LaRowe responded, "I don't have a specific reason why. I didn't order them." A.436. So, even though LaRowe acknowledged that the "case was not clear-cut," A.427, he failed to follow-up on the blood test, A.206, failed to evaluate or even visit Crowson, A.429-30, and then failed to order a drug and alcohol screen, A.436. He blindly prescribed medication for the wrong condition—medication that "worsened Mr. Crowson's encephalopathy." A.215.

Under the deliberate indifference standard, prison officials may not stick their heads in the sand to avoid learning of a risk, as LaRowe did here. Officers "would not escape liability," the Supreme Court has stated, "if the evidence showed that [they] . . . declined to confirm inferences of risk that [they] strongly suspected to exist." *Farmer*, 511 U.S. at 843 n.8. When there is a risk of harm, the deliberate indifference standard requires at least a minimal inquiry to confirm or remove the risk. As such, a medical professional who knows that medical protocol requires

"minimal diagnostic testing to confirm [] symptoms" may not refuse to take those steps. *Self*, 439 F.3d at 1232.

This Court has found a medical professional deliberately indifferent when she was aware of prisoner complaints but nonetheless "completely refused to assess or diagnose [the] medical condition at all by, for instance, taking [the prisoner's] blood pressure, listening to her heart with a stethoscope, and performing a cardiac work-up." *Mata*, 427 F.3d at 758. Similarly, this Court found that a doctor who "refused to examine [a] neck injury," but nonetheless discontinued pain medication for the injury could be deliberately indifferent. *Purkey v. Green*, 28 F. App'x 736, 743 (10th Cir. 2001). The district court was therefore correct to conclude that a reasonable jury could find that LaRowe was deliberately indifferent. And none of LaRowe's scattershot arguments to the contrary have merit.

First, LaRowe argues that there "is no evidence [he] knew that Crowson was suffering from encephalopathy and disregarded the serious nature of his condition." LaRowe 21. But that is not the legal test. To be deliberately indifferent, LaRowe did not have to know that Crowson was suffering from any particular condition. Rather, he had to be "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and "draw the inference." *Garrett v. Stratman*, 254 F.3d 946, 949 (10th Cir. 2001) (quoting *Farmer*, 511 U.S. at 837).

Here, LaRowe was undoubtedly aware that a serious risk of harm existed: Johnson explained to him that Crowson was confused, disoriented, had high blood pressure, could only give one-word answers to questions, could not follow simple instructions to take a deep breath, had an elevated heart rate, and was experiencing delirium tremens. A.206-07. Moreover, LaRowe admitted that he did not believe Crowson's case was "clear-cut" at the time, A.427, that he ordered a blood test because it would have been "quite valuable in assessment," *id.*, and that he knew delirium tremens could be "life-threatening," A.440. Thus, LaRowe's own testimony and actions indicate that he was aware of a serious risk of harm.

Second, LaRowe argues that he cannot be deliberately indifferent because he performed a "differential diagnosis." LaRowe 34. But this is disingenuous. A differential diagnosis involves actually "distinguishing [] a disease or condition from others presenting with similar signs and symptoms." *Differential Diagnosis*, MERRIAM-WEBSTER, *available at* https://www.merriam-webster.com/dictionary/differential%20diagnosis. Here, LaRowe did not take any diagnostic steps to come to his conclusion. Instead, he said it was substance withdrawal, assumed away any risk that it was another serious condition, and then doled out an inappropriate treatment. That is not a differential diagnosis. It is a guess.

LaRowe's attempt to argue otherwise merely highlights his refusal to diagnose Crowson. He says, for instance, that he "affirmatively acted to address

Crowson's medical issues by ordering radiographs, blood work, and treating with medications." LaRowe 26. He omits the fact that he failed to follow up on the radiograph and blood work when they were not completed despite knowing that they would reveal relevant diagnostic information. A.427. He also omits that he provided treatment for substance withdrawal without first performing a drug and alcohol screen, A.436, and that the drug worsened Crowson's condition, A.215. Thus, LaRowe's argument merely highlights a string of refusals to take reasonable diagnostic steps.

Finally, as discussed in more detail above, LaRowe challenges the district court's factual determinations and makes arguments over which this Court lacks jurisdiction. He asserts, for instance, that "there is nothing in the record" indicating that he "deliberately chose to decline testing or treating Crowson" and that he "actively treated" him. LaRowe 19. Of course, the district court found exactly the opposite:

> Dr. LaRowe failed to assess, diagnose, or even visit Mr. Crowson. Though he saw reason to order a blood test, he did not follow up to ensure the test occurred after Nurse Johnson's unsuccessful attempt to draw Mr. Crowson's blood. Instead, and despite vague and nonspecific symptoms, he prescribed medication based on his unverified suspicion that Mr. Crowson was suffering from withdrawals. He did not <u>mis</u>diagnose Mr. Crowson, but rather failed to conduct diagnostic tests that would have informed him of Mr. Crowson's medical needs.

A.215-16. LaRowe also asserts that the medication he prescribed did not worsen Crowson's encephalopathy, LaRowe 35, despite the district court's express finding

to the contrary, A.215 ("Without an accurate diagnosis in hand, [LaRowe] prescribed a benzodiazepine drug that worsened Mr. Crowson's encephalopathy."). For the reasons discussed in Part I, the lower court already passed upon these factual determinations and this Court does not have jurisdiction to review them. *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

A reasonable jury could determine that LaRowe was aware of a serious risk of harm and nonetheless refused to evaluate and diagnose Crowson. The district court's decision should thus be affirmed.

B. Johnson And LaRowe Are Not Entitled To Qualified Immunity.

To defeat qualified immunity, the "plaintiff must show (1) that the defendant's actions violated a constitutional or statutory right, and (2) that the right allegedly violated was clearly established at the time of the conduct at issue." *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996) (quotation marks and alterations omitted). To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Dodds v. Richardson*, 614 F.3d 1185, 1206 (10th Cir. 2010). Here, the district court rightly determined that neither Johnson nor LaRowe were entitled to qualified immunity.

1. Johnson

At the time of Crowson's ordeal, the law governing Johnson's conduct was clear. The Supreme Court established long ago the unlawfulness of "intentionally denying or delaying access to medical care." *Estelle*, 429 U.S. at 104-05. This Court, too, has been clear that "deliberate indifference occurs when prison officials prevent an inmate from receiving treatment or deny him access to medical personnel capable of evaluating the need for treatment." *Sealock*, 218 F.3d at 1211. Thus, "if the official knows his role in a particular medical emergency is solely to serve as a gatekeeper for other medical personnel capable of treating the condition, and if he delays or refuses to fulfill that gatekeeper role . . . he [] may be liable for deliberate indifference." *Burke*, 935 F.3d at 993 (quotation marks omitted). A gatekeeper must "follow the required protocols, contact the appropriate medical personnel, and/or attempt to assist [the detainee]." *Mata*, 427 F.3d at 758.

It has been equally well-established—"since at least 2006"—that a medical professional may not deny care when "presented with recognizable symptoms which potentially create a medical emergency." *Al-Turki v. Robinson*, 762 F.3d 1188, 1192, 1194 (10th Cir. 2014). In *Mata*, for instance, a nurse became aware of a prisoner's chest pain but took no action, instead telling the prisoner "to return to sick call at the infirmary the following morning." 427 F.3d at 750. As a result of the nurse's "absolute failure to follow the required protocols" or "contact the appropriate

medical personnel," the prisoner "had to endure unnecessary pain and suffering for several additional hours that did not serve any penological purpose." *Id*. at 758 (quotation marks omitted). Thus, the nurse "completely refused to fulfill her duty as gatekeeper " and "a jury could reasonably find that [the nurse's] alleged inaction" demonstrated deliberate indifference. *Id*. at 758-59.

Just like the nurse in *Mata*, Johnson did not take any action on June 25 despite Crowson's serious symptoms. On that date, Johnson wrote in his medical notes that Crowson was "dazed and confused" and "unable to remember what kind of work he did prior to being arrested." A.374. And in his declaration, Johnson admits that after seeing Crowson that morning, he "was concerned that [Crowson] may be suffering from some medical problem." A.317. Yet he did not call the doctor. Instead, he left Crowson "in an observation cell and left his shift without ensuring . . . further care." A.213. He did not "contact the appropriate medical personnel" and, accordingly, he "refused to fulfill h[is] duty as gatekeeper." *Mata*, 427 F.3d at 758.

Since *Mata*, this Court has repeatedly held that medical providers may be held liable for deliberate indifference when they "abdicate[] their gatekeeping roles by failing to relay the problem." *Burke*, 935 F.3d at 994. By contrast, they can avoid liability "by communicating the inmate's symptoms to a higher-up." *Id*. at 993. It is clearly established, then, that "a plausible inference of deliberate indifference can be drawn" where there is evidence that a nurse did not act despite awareness of "specific

medical symptoms" that indicate "a need for further assessment, testing, diagnosis, and emergency medical treatment." *Kellum v. Mares*, 657 F. App'x 763, 770 (10th Cir. 2016).

Johnson may not avoid this clearly established law by noting that he *eventually* called LaRowe after several days had passed. *See* Johnson 46. "[D]eliberate indifference is assessed at the time of the alleged omission," so the "eventual provision of medical care does not insulate [medical professionals] from liability." *Estate of Booker v. Gomez*, 745 F.3d 405, 433 (10th Cir. 2014). That is, subsequent events are "irrelevant to whether [the medical professional] knew of and disregarded an excessive risk to [the prisoner's] safety" at the time of the alleged deliberate indifference. *Mata*, 427 F.3d at 756. What Johnson did or did not do on June 28 cannot immunize him for his failure to fulfill his gatekeeper duties on June 25.

Johnson also argues that he did not violate clearly established law because he did a few minimal things—he took vital signs and attempted to draw blood. Johnson 46. But it is not dispositive that a prisoner "received at least some treatment . . . during the time period when he alleged that he received inadequate and delayed medical care." *Oxendine v. Kaplan*, 241 F.3d 1272, 1277 n.7 (10th Cir. 2001). Taking *some* steps does not automatically transform a case about inadequate or delayed medical care into one about "mere disagreement between the parties." *Id.*

Rather, it is the "denial of *meaningful* access to care" that matters. *Blackmon*, 734 F.3d at 1245-46 (Gorsuch, J.) (emphasis added).

Finally, Johnson argues that he is entitled to qualified immunity because there are no "appellate cases in the country that have decided a metabolic encephalopathy issue." Johnson 45. This is specious. Qualified immunity analysis is not a "scavenger hunt for prior cases with precisely the same facts," *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007), and "a prior case need not be exactly parallel to the conduct here," *Halley v. Huckaby*, 902 F.3d 1136, 1149 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1347 (2019); *see also Kellum*, 657 F. App'x at 770 ("[T]he relevant question is the *risk* of substantial harm, not whether the official knew of the specific medical condition causing the symptoms presented by the prisoner.").

The district court rightly concluded that "Tenth Circuit law makes clear that the particular conduct in this case could amount to a constitutional violation." A.216. This Court should affirm the denial of qualified immunity.

2. LaRowe

As an initial matter, LaRowe is a private contractor and therefore is not entitled to qualified immunity under *Richardson v. McKnight*, 521 U.S. 399 (1997). In his deposition, LaRowe said he was "a private consultant or a private contractor." A.425-26. While the qualified immunity exemption for private contractors like LaRowe was not raised below, this Court may affirm the district court "on any

ground adequately supported by the record." *United States v. Greer*, 881 F.3d 1241, 1244 (10th Cir. 2018). And the Supreme Court has concluded that similarly-situated "private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case." *Richardson*, 521 U.S. at 412.

But even if this Court decides that *Richardson* does not apply, LaRowe is still not entitled to qualified immunity because his conduct—refusing to assess or diagnose Crowson—was held to be unconstitutional long ago. In 1994, the Supreme Court explained that an official "would not escape liability" for deliberate indifference if the evidence showed that he "refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." *Farmer*, 511 U.S. at 843 n.8.

Since then, this circuit has reiterated that principle. In *Mata*, it found that there was sufficient evidence to establish deliberate indifference—and deny qualified immunity—to a medical professional who "refused to assess or diagnose [the prisoner's] medical condition." 427 F.3d at 758. The nurse knew that the prisoner was experiencing chest pain, but she made no effort to diagnose the prisoner "by, for instance, taking [the prisoner's] blood pressure, listening to her heart with a stethoscope, and performing a cardiac work-up." *Id*. "[Her] conduct was reckless under acceptable medical norms." *Id*. at 759. Evidence of her inaction in conjunction with evidence that she knew the prisoner was suffering serious symptoms, this Court

reasoned, was sufficient for "a jury [to] reasonably find that [the nurse's] alleged inaction on that date demonstrated deliberate indifference to [the prisoner's] serious medical needs." *Id*. at 758-59.

Another nurse in *Mata,* however, was granted qualified immunity. The second nurse checked the prisoner's pulse, performed an EKG that produced normal results, noted that the prisoner's lungs were clear, and told the prisoner to return to the infirmary if the pain got worse. *Id*. at 760. Accordingly, this Court concluded that she "made a good faith effort to diagnose and treat [the prisoner's medical condition," and so "was entitled to qualified immunity." *Id*. at 761.

Thus, in *Mata* it was clearly established that a medical professional must take diagnostic steps when presented with serious symptoms, and the failure to make a good faith effort to diagnose constitutes deliberate indifference. Indeed, in a subsequent case, this Court explained the *Mata* decision as follows: "we allowed a claim against a nurse who knew the inmate was suffering from severe chest pains yet completely refused to assess or diagnose the potential cardiac emergency in violation of prison medical protocols" but "we denied a claim against a different nurse who established a good faith effort to diagnose and treat the inmate's medical condition despite failing to diagnose a heart attack." *Self*, 439 F.3d at 1232 (internal quotation marks, citations, and alterations omitted).

Similarly, in *Kellum*, a prisoner alleged that a medical professional was aware of "severe, obvious, recognizable symptoms" that "required urgent medical attention and indicated a need for an ECG and other diagnostic testing to assess the reason for these symptoms." 657 F. App'x at 770. But the nurse "did not take an x-ray, perform an ECG or any other laboratory testing to assess or diagnose the reason for [the prisoner's] condition." *Id*. at 769. This Court confirmed that "a plausible inference of deliberate indifference can be drawn" where there is evidence that a nurse did not act despite awareness of "specific medical symptoms" that indicate "a need for further assessment, testing, diagnosis, and emergency medical treatment." *Id*. at 770.

So, when a medical professional "know[s] that medical protocol requires referral or minimal diagnostic testing to confirm the symptoms," but does nothing, he may be deliberately indifferent. *Self*, 439 F.3d at 1232. LaRowe violated this clearly established law when he failed to follow-up on the blood test, A.206, failed to evaluate or even visit Crowson, A.429-30, and then failed to order a drug and alcohol screen before prescribing a dangerous medication, A.436; A.215.

LaRowe argues that he is more like the second nurse in *Mata* and points to the fact that he ordered tests and prescribed medication. LaRowe 40. But ordering tests (then promptly abandoning them) and prescribing medication (that harms the patient) do not constitute good faith treatment. "If a prison doctor . . . responds to an obvious risk with treatment that is patently unreasonable, a jury may infer conscious

disregard." *Self*, 439 F.3d at 1232. For instance, "a case in which prison staff did provide an inmate with mild antacids in response to a badly bleeding ulcer but failed to provide him with access to obviously needed medical care for what was clearly a life-threatening condition" suggested deliberate indifference. *Blackmon*, 734 F.3d at 1245-46 (Gorsuch, J.); *see also Purkey*, 28 F. App'x at 743 (explaining that when a doctor makes medication decisions without examining a patient he may be deliberately indifferent). LaRowe's "patently unreasonable," *Self*, 439 F.3d at 1232, decision to provide medication does not entitle him to immunity.

The district court rightly denied LaRowe qualified immunity. This Court should affirm.

3. The doctrine of qualified immunity should not be extended unnecessarily in this case.

The reasons above are more than sufficient to demonstrate that the district court was correct in denying qualified immunity to the individual defendants. But it bears mentioning nonetheless that in recent years a growing chorus of jurists have registered their concern with qualified immunity jurisprudence. Justice Thomas noted that qualified immunity analysis "is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act," and has devolved into "freewheeling policy choice[s]," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring). Justice Sotomayor has written, "a one-sided approach to qualified immunity transforms the doctrine into an absolute shield." *Kisela v.*

Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). The functional rationale for qualified immunity—that it is necessary to insulate defendants from personal financial exposure—has also been discredited because indemnification practices ensure that they virtually never pay out of pocket. Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 888, 890 (2014).

Of course, qualified immunity remains the law of the land.[8] But given the widespread dissatisfaction and uncertain future, this Court should not expand the doctrine by reversing the district court and taking qualified immunity to an extreme.

C. Pretrial Detention Officers Who Disregard Obvious Risks Of Serious Medical Harm Violate The Fourteenth Amendment, Regardless Of Whether They Subjectively Perceive The Risk.

As the district court noted, Crowson was "booked for a parole violation" and was a "pre-hearing detainee" at all relevant times because his alleged parole violation had not yet been adjudicated. A.204-05; *see also* A.33. As such, the district court explained, his Section 1983 claims arise under the Fourteenth Amendment. A.204. This is because "individuals awaiting adjudication on pending accusations that they have violated the terms of their probation or parole" are "[p]retrial detainees." *Chrisco v. Hayes*, 2017 WL 5404191 at *4 (D. Colo. Nov. 14, 2017); *see*

[8] That said, Crowson raises and preserves for potential further review the argument that qualified immunity should be rejected entirely for the reasons stated here.

also Smith v. Harris Cty., 198 F.3d 241 (5th Cir. 1999) (explaining that an individual "awaiting a probation revocation hearing . . . [is] a pretrial detainee").

Here, the district court determined that the deliberate indifference standard applicable to post-conviction prisoners also applies to claims by pretrial detainees. A.211. But this is not so. In *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), the Supreme Court explained that Eighth Amendment state-of-mind rules cannot be extended to pretrial detainees, whose claims arise under the Fourteenth Amendment. "The language of the two Clauses differs," the Court reasoned, and "pretrial detainees (unlike convicted prisoners) cannot be punished at all." *Id*. at 2475. Therefore, when analyzing an excessive force claim by a pretrial detainee, "the relevant standard" to determine excessiveness "is objective not subjective." *Id*. at 2472. Under the objective standard, "the defendant's state of mind is not a matter that a plaintiff is required to prove." *Id*. Although the Supreme Court did not expressly consider whether an objective standard of fault also governs deliberate indifference claims brought by pretrial detainees, all the circuits to decide that question in a reasoned opinion since *Kingsley* have concluded that it does. This Court should follow suit.

It should decide the question now even though Crowson succeeds under both the objective and subjective standards because, in the event this Court remands some or all the claims for trial, resolving the issue will clarify the appropriate jury

instruction. *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (explaining that it is "appropriate to address the proper standard" after *Kingsley* because "the answer may make a difference in the retrial").

1. After Kingsley, federal courts of appeal have applied objective standards to non-force claims brought by pretrial detainees.

The logic of *Kingsley*'s rationale extends beyond excessive force claims to medical needs claims such as this one. In *Kingsley* itself, the Court relied heavily on its earlier decision in *Bell v. Wolfish*, 441 U.S. 520 (1979) and understood that decision to require the use of an objective standard for many claims brought by pretrial detainees: "The *Bell* Court applied [an] objective standard to evaluate a variety of prison conditions . . . . In doing so, it did not consider the prison officials' subjective beliefs about the policy." *Kingsley*, 135 S. Ct. at 2473. Thus, *Kingsley* mandates that objective standards, not subjective standards that characterize Eighth Amendment jurisprudence, must govern all claims by pretrial detainees. *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018) ("Notably, the broad wording of *Kingsley* . . . did not limit its holding to force but spoke to the challenged governmental action generally.") (quotation marks omitted).

This is the unanimous view of federal appellate courts that have considered the issue in reasoned decisions. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2nd Cir. 2017) (overruling contrary pre-*Kingsley* precedent and applying the objective standard to a deliberate indifference claim because "[a]fter *Kingsley*, it is plain that punishment

has no place in defining the *mens rea* element of a pretrial detainee's claim"); *Bruno v. City of Schenectady*, 727 F. App'x 717, 720-21 (2d Cir. 2018) (applying the objective standard to a medical needs case); *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1068, 1070 (9th Cir. 2016) (applying the objective standard to a failure-to-protect claim and explaining that *Kingsley* "cast [contrary circuit precedent] into serious doubt"); *Gordon*, 888 F.3d at 1124 (explaining that "logic dictates" applying the objective test to a medical care claim after *Kingsley*); *Miranda*, 900 F.3d at 352 (holding, "along with the Ninth and Second Circuits, that medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*").[9]

In fact, *this* Court has itself explained that *Kingsley* "eliminated any ambiguity" about the proper standard for claims by pretrial detainees. In *Colbruno*, a group of officers unnecessarily walked a pretrial detainee naked through the public halls of a hospital rather than obtaining clothing. 928 F.3d at 1165. After *Kingsley*, this Court explained, "a pretrial detainee can establish a due-process violation by providing only objective evidence." *Id*. at 1163 (quotation marks omitted). In

[9] These well-reasoned opinions stand in stark contrast to those issued by the Fifth, Eighth, and Eleventh Circuits, which addressed the issue only in cursory footnotes and either declined to decide the issue or decided not to apply *Kingsley* to non-force claims. *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Nam Dang v. Seminole Cty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017).

applying an objective standard, the *Colbruno* Court recognized that *Kingsley*'s logic applied equally to non-force claims. *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019) (citing *Colbruno* for the proposition that "the Tenth Circuit has joined those [circuits] that apply *Kingsley*'s objective inquiry to a claim other than excessive use of force."). This Court should not change course here.

2. The objective deliberate indifference test requires pretrial detainees to prove more than negligence but less than subjective intent.

The objective deliberate indifference standard asks whether a defendant disregarded an obvious risk of substantial harm to a plaintiff, irrespective of whether the defendant subjectively knew of the risk. *Farmer*, 511 U.S. at 836-37. It requires pretrial detainees "to prove more than negligence but less than subjective intent—something akin to reckless disregard." *Castro*, 833 F.3d at 1071; *see also Darnell*, 849 F.3d at 35. This standard strikes an appropriate balance. On the one hand, it ensures that jail officials receive more protection in constitutional claims than in mere tort actions. On the other hand, it ensures the reasonable safety of pretrial detainees, who have not been convicted of any crime, but who are exposed to danger as an incident of their incarceration.

* * *

Here, because there are genuine disputes of material fact as to whether Johnson and LaRowe were deliberately indifferent to Crowson's serious medical

needs under the more exacting subjective standard, the same finding is necessarily warranted under the proper objective standard. And even though Crowson succeeds under either standard, this Court should reach the question in order to clarify the appropriate jury instruction on remand.

III. THE DISTRICT COURT CORRECTLY DENIED SUMMARY JUDGMENT TO WASHINGTON COUNTY.

A. This Court Lacks Jurisdiction To Review The f's Decision Denying Washington County's Motion For Summary Judgment.

Pendent appellate jurisdiction is the only possible basis to review the claim against Washington County. Thus, the County does not dispute that there is no jurisdiction over its appeal if this Court dismisses the individual defendants' appeals—which it should. But even if the Court assumes jurisdiction over the individual claims, pendent jurisdiction still is lacking over the County's appeal because it is not "inextricably intertwined" with the individual claims. *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995). This standard requires the pendent claim to be "coterminous with, or subsumed in, the claim before the court on interlocutory appeal." *Id*. The standard is met only when "the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." *Id*. Here, the claims against Johnson and LaRowe are not "inextricably intertwined" with the claim against the County, and there is no pendent appellate jurisdiction.

First, there is no jurisdiction even if this Court reverses the lower court's decision and awards the individual defendants qualified immunity, if it does so on

the basis that the law is not clearly established. *Hinton v. City of Elwood*, 997 F.2d 774, 783 (10th Cir. 1993); *Cox v. Glanz*, 800 F.3d 1231, 1256 (10th Cir. 2015); *Watson v. City of Kan. City*, 857 F.2d 690, 697 (10th Cir. 1988).

Second, there is no jurisdiction over the County's appeal even if this Court finds that Johnson and LaRowe did not violate the Constitution individually, because their *combined* acts may be sufficient for *Monell* liability. "*Monell* does not require that a jury find an individual defendant liable before it can find a local governmental body liable." *Garcia v. Salt Lake Cty.*, 768 F.2d 303, 310 (10th Cir. 1985). So, even where "the acts or omissions of no one employee []violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights." *Id*. The County may therefore be liable for the combined actions of LaRowe and Johnson even if, individually, they are not liable.

Finally, there is no pendant appellate jurisdiction over the claim against the County because it depends on the actions of policymakers rather than those of Johnson and LaRowe, and therefore is not "coterminous with" or "subsumed in" their appeals. *Moore*, 57 F.3d at 930. This is clear from the district court's decision which explains that the County "fail[ed] to promulgate written protocols for monitoring, diagnosing, and treating inmates." A.220. Indeed, the jail does not have "guidelines or written policies for assessing brain injuries," "a written policy or

procedure for nurses to follow when placing an inmate in an observation cell to detox," "a written protocol for evaluating inmates once in detox," or a "policy to determine when an inmate should be transported to the hospital." A.219. Nevertheless, as the district court noted, the County structured its medical system such that the physician was only at the jail once or twice a week, for just a few hours each time. *Id*. The district court's focus on *systemic* failures illustrates just how distinct the claim against the County is from the claims against the individual defendants. Pendent appellate jurisdiction does not extend to such cases.

B. A Reasonable Jury Could Find The County Liable For Failing To Enact Written Policies And Properly Train Its Nurses.

If this Court exercises pendent appellate jurisdiction over this claim, it should affirm the denial of the County's motion for summary judgment. The County failed to enact adequate policies and properly train its nurses despite relying on the nurses to provide the bulk of medical care. Under *Monell v. Department of Social Services* and its progeny, the County may be liable for these failures and the resulting constitutional violations. 436 U.S. 658, 692 (1978). To establish liability, Crowson must show the existence of (1) "a municipal policy or custom," (2) "a direct causal link between the policy or custom and the injury alleged," and (3) "that the municipal action was taken with 'deliberate indifference.'" *Waller v. City & Cty. of Denver*, 932 F.3d 1277, 1283-84 (10th Cir. 2019). "A municipal policy or custom can be a formal regulation, an informal custom that develops into a well-settled practice, or

deliberately indifferent training or supervision." *Ernst v. Creek Cty. Pub. Facilities Auth.*, 697 F. App'x 931, 933 (10th Cir. 2017).

Here, the jail doctor was only at the jail two times a week, and sometimes those visits were as short as 30 to 40 minutes. A.462. And other times, the doctor would skip even those brief visits and send a PA or nurse in his place. *Id*. Because he was there so infrequently, the doctor testified that the nurses were his "eyes and ears," and that he relied on them to evaluate patients. A.427; A.434. In other words, detainees received almost all their medical care from a nurse. In this situation, a reasonable jury could easily find that failing to provide the nurses with written policies or training about how and when to provide basic patient history, complete diagnostic testing, monitor brain injuries, and elevate care decisions to a doctor created an obvious risk of serious harm.

The point is not that jails must always provide written policies and training for nurses. Nor is it that jails must always have an on-site doctor. But *if* a jail does not have an on-site doctor for long periods of time, *then* a reasonable juror could find that a total absence of training and policy creates the obvious risk that a detainee will experience a serious medical condition and no one will recognize the need to monitor him closely, inform the doctor about his condition in a timely manner, or call for hospitalization or other higher-level care.

In *Olsen v. Layton Hills Mall*, this Court denied summary judgment to a municipality that "manifested deliberate indifference by failing to train its jail's prebooking officers to recognize OCD and handle sufferers appropriately." 312 F.3d 1304, 1319 (10th Cir. 2002). It explained that "prebooking officers receive[d] absolutely no training on OCD" and the policy manual that officers were required to consult when unsure about an inmate's condition contained "no discussion of OCD." *Id*. Despite the lack of training and the incomplete policy manual, the officers were "left with discretion in determining whether an inmate suffers from a psychological disorder requiring medical attention." *Id*.

More recently, in *Burke v. Regalado*, 935 F.3d 960 (10th Cir. 2019), this Court found *Monell* liability where "the staff were inadequately trained" and "jail personnel failed to timely address or follow-up on inmates' medical issues." 935 F.3d at 999. This Court determined that "[a] reasonable jury could infer that understaffing, inadequate training, or poor follow-up" explained why jail personnel left the detainee in a cell for hours and took days to send a physician to examine him. *Id*. at 1000. It went on to note that the nurses did not follow up or report issues to their supervisors after seeing concerning symptoms, and that a reasonable jury could conclude that "lack of training" contributed to their decisions not to act promptly. *Id*.

The same is true here. "There are no written policies in the record" and the County resorted to describing the jail's "general customs and practices for providing medical care to inmates using the deposition testimony of various medical personnel." A.218-19. Their testimony depicts a medical system so lacking as to create an obvious risk of serious harm: "Nurse Johnson testified that the Jail has no guidelines or written policies for assessing brain injuries, such as the type suffered by Mr. Crowson." A.219. "PA Worlton testified that the Jail does not have a written policy or procedure for nurses to follow when placing an inmate in an observation cell to detox, or a written protocol for evaluating inmates once in detox." *Id*. And "Dr. LaRowe testified that the Jail had no set policy to determine when an inmate should be transported to the hospital." *Id*.

Each of these policy failures was further compounded by a lack of training. For instance, the decision to elevate care to a hospital was central to this case, yet not only were there no written policies about when to elevate care, but the medical personnel were completely confused about who was empowered to make that decision in the first place. Johnson believed that he was not allowed to recommend hospitalization, A.519, while LaRowe believed the opposite, A.433. On this evidence, a reasonable jury could easily find that the County failed to enact adequate policies or properly train its nurses.

The requisite causation may be shown by establishing that "the identified deficiency" is "closely related to the ultimate injury so that it actually caused the constitutional violation." *Brown v. Gray*, 227 F.3d 1278, 1290 (10th Cir. 2000) (quotation marks and citations omitted). This involves asking whether "the injury [would] have been avoided had the employee been trained under a program that was not deficient in the identified respect." *City of Canton v. Harris*, 489 U.S. 378, 391 (1989). The jury must "[p]redict[] how a hypothetically well-trained officer would have acted under the circumstances." *Id*. Here, a reasonable jury could find that if Johnson had been properly trained or had access to relevant written policies, he would have known, for instance, to transport Crowson to the hospital for a blood draw when he could not do it himself, would have known to tell LaRowe when Crowson last had access to drugs and alcohol, or would have known to recommend hospitalization on June 25.[10]

Finally, Crowson must show that the County acted with deliberate indifference. "In the municipal liability context, deliberate indifference is an objective standard." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 n.5 (10th Cir. 1998).

[10] The County is simply incorrect when it says that "the district court never found that a county policy directly caused a constitutional violation." Johnson 48. The district court explicitly said "that [the County's] policy deficiencies *caused* Mr. Crowson's injury." A.220 (emphasis added). The district court also explained that the County may be held liable on a failure-to-train theory, A.218, and "failure to provide proper training may fairly be said to represent a policy for which the city is responsible," *City of Canton*, 489 U.S. at 390.

This standard may be satisfied if, "in light of the duties assigned to specific officers or employees[,] the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390.

Here, policymakers knew "to a moral certainty," *id.* at 390 n.10, that the jail nurses were providing the bulk of care to detainees because the doctor was almost never at the facility. In this context, where detainees are left at the mercy of the nurses' decision-making, the need to properly train nurses to complete diagnostic testing, communicate effectively with the doctor, and recognize when hospitalization or emergency care is needed is obvious, and the failure to do so constitutes deliberate indifference to the rights of detainees. Thus, the district court rightly denied summary judgment to the County. This Court should affirm.

CONCLUSION

For the foregoing reasons, the Court lacks jurisdiction over this case, but if it chooses to exercise jurisdiction, it should affirm the decision below as to Johnson, LaRowe, and the County.

Dated: March 19, 2020

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Appellee does not request oral argument in this matter.

CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) because it contains 12,879 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: March 19, 2020

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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

a. all required privacy redactions have been made; and

b. the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program, VIPRE Endpoint Security, version 82356, last updated March 19, 2020, and according to the program is free of viruses.

Dated: March 19, 2020

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CERTIFICATE OF SERVICE

I certify that on March 19, 2020, I filed a true, correct, and complete copy of the foregoing Brief of Appellee with the Court and served it on the following people via the Court's ECF System:

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