Case No. 19-4118

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARTIN CROWSON,

PLAINTIFF/APPELLEE;

vs.

MICHAEL JOHNSON, WASHINGTON COUNTY, and
SHERIFF CORY PULSIPHER, in his official capacity,

DEFENDANTS/APPELLANTS;

JUDD LAROWE,

DEFENDANT.

APPELLANTS' REPLY BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
The Honorable Tena Campbell, Judge Presiding
Trial Court Case No. 2:15-cv-880-TC

Frank D. Mylar USB #5116
Andrew R. Hopkins USB #13748
MYLAR LAW, P.C.
2494 Bengal Boulevard
Salt Lake City, Utah 84121
Phone: (801) 858-0700
office@mylarlaw.com

ATTORNEYS FOR APPELLANTS

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REPLY INTRODUCTION

Crowson confuses the three main arguments Johnson makes in his opening brief in an attempt to wrench jurisdiction from this court by claiming Johnson is asking this Court to review the trial court's findings of fact. However, Defendants argue the following three separate issues and none of them prohibit the Court's jurisdiction: (1) Given the district court's purely factual findings, a reasonable nurse, standing in Johnson's shoes, would not know beyond a doubt that he or she is violating constitutional law in light of pre-existing case law based upon Johnson's actions; (2) a reasonable jury could not find a constitutional violation based solely upon the district court's findings, and (3) some parts of the district court's characterization and findings of fact are "blatantly contradicted by the record." *Scott v. Harris*, 550 U.S. 372, 380 (2007). The first two points will be the focus of this Reply Brief.

REPLY ARGUMENT

I. This Court has jurisdiction over this appeal.

Johnson's entire appeal is based upon qualified immunity which this Court has jurisdiction to review. *See Pino v. Higgs*, 75 F.3d 1461, 1467 (10th Cir. 1996), *and Plumhoff v. Rickard*, 572 U.S. 765, 772-773 (2014).[1] Plaintiff argues that the

[1] Crowson failed to argue below that qualified immunity should be rejected as a defense and this argument is waived. *Turner v. Pub. Serv. Co.*, 563 F.3d 1136, 1143

district court's editorial characterizations are not reviewable factual findings on this appeal. However, this Court does not need to consider characterizations of facts.

On interlocutory appeal, the Tenth Circuit "may 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 that law was clearly established at the time of the alleged violation." *Walton v. Gomez (In re Estate of Booker)*, 745 F.3d 405, 409 (10th Cir. 2014) (citations and quotations omitted). Plaintiff cannot show either of these prongs.

If this Court is not convinced of reversal after reviewing the above two points, this Court may conduct its own *de novo* factual review "when the 'version of events' the district court holds a reasonable jury could credit 'is blatantly contradicted by the record.'" *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir. 2010) (*quoting Scott v. Harris*, 550 U.S. 372, 380 (2007)). For example, the district court claims Crowson had "alarming symptoms" and concluded without any evidence that withdrawals only last three days. (Order and Mem. Decision at 10, Aplt. App. Vol. 1 at 213). These are examples of visible fiction that this Court may reject. Although Appellants invite the Court to undertake this review in their opening brief, the Court need only conduct a *de novo* factual review if it does not reverse the district court's

(10th Cir. 2009). Further, the Supreme Court continues to affirm this doctrine almost every year. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1864 (2017).

legal analysis on the second prong of qualified immunity or based upon the argument that a reasonable jury cannot find a constitutional violation based upon the lower court's findings.

II. Johnson is entitled to qualified immunity.

Qualified immunity has two prongs: (1) whether there was a violation of the Constitution and (2) whether an objectively reasonable officer, standing in defendant's "shoes," would know beyond a doubt that he was violating that clearly established right. *See* *Plumhoff*, 572 U.S. at 778-79 ("[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.") (*citing* *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The second prong is the most difficult to prove and for this reason, Johnson will address this argument first. *See* *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). All of the trial court's findings may be accepted as true for this analysis.

A. Johnson's actions were not contrary to clearly established law.

Only a very few facts from the district court decision need be examined to conclude that a reasonable line staff nurse would not have known that he or she was violating clearly established law. However, the cases show that the law is not clearly established, but also require this court to conclude that a reasonable jury could not find a constitutional violation, as addressed in sub-point B below.

It all comes down to a couple of facts on two days: June 25 and 28. First, the district court found that Nurse Johnson failed his "gatekeeper role" by not "referring" Crowson to a doctor on June 25, 2014 and leaving the Jail without scheduling follow up care. (Order and Mem. Decision at 10, Aplt. App. Vol. 1 at 213). Secondly, on June 28, 2014, the trial court found Nurse Johnson was "deliberately indifferent" for failing to tell Dr. LaRowe about Crowson's prior housing assignments. (Order and Mem. Decision at 10-11, Aplt. App. Vol. 1 at 213-214). These are the only two issues where the lower court found liability. The district court exonerated Johnson for all actions taken after that first phone call to Dr. LaRowe on June 28, 2014. Clearly established law in June 2014 does not show, beyond a doubt, that Johnson's actions violated the constitution.

1. The referral to P.A. Worlton on June 25 requires reversal.

The district court found Johnson referred Crowson to the medical administrator, "P.A. Worlton" for a psychological evaluation on June 25. (Order and Mem. Decision at 2, Aplt. App. Vol. 1 at 205). Yet the court found it was deliberate indifference because he did not refer Crowson to Dr. LaRowe. (Order and Mem. Decision at 10-11, Aplt. App. Vol. 1 at 213-214). Worlton is a practitioner who was not only in charge of inmate mental health, he was also the Health Services Administrator. (Order and Mem. Decision at 16, Aplt. App. Vol. 1 at 219). This referral entitles Johnson to qualified immunity in that no reported decisions prior to

2014 show that Johnson's actions violated the constitution. This Court can reverse the district court based solely upon its decision in *Mata v. Saiz*, 427 F.3d 745 (10th Cir. 2005), which contains facts that closely approximate Johnson's conduct.

In *Mata*, Nurse Saiz faxed a report to a doctor and that was sufficient to show that she was not deliberately indifferent to the prisoner's medical needs. *Id*. at 759-760. Nurse Saiz did not do nearly as much as Johnson for the prisoner, although she knew she was suffering from severe chest pains. She only saw her once and reviewed an EKG and then faxed the results to a doctor who was working at another facility that day. There is no evidence that she called him or talked to him. Moreover, another nurse in *Mata*, Amy Hough, was found not to have acted with deliberate indifference because she reported Mata's basic symptoms to a nurse practitioner, despite making other mistakes. *Id*. at 759. On the other hand, another nurse, Weldon, was found to be deliberately indifferent because she failed to report symptoms of severe chest pains to a "physician, physician assistant, or nurse practitioner" as required by prison policy, but also failed to take any action to address her symptoms, telling Mata to come back tomorrow. Moreover, Nurse Quintana in *Mata*, was not deliberately indifferent even though she failed to call the doctor, in violation of policy, because she mistakenly read the EKG as normal, even though she may not have been competent to read an EKG. *Id*. at 760. Not calling a doctor in Quintana's situation seems far worse than Johnson not calling LaRowe but instead referring to Worlton.

The facts the district court found are much more compelling for reversal, yet similar to *Mata*. The lower court found that Johnson knew that Crowson suffered lethargy, confusion, and memory loss because he could not remember what job he had before coming to jail. (Other officers reported problems that suggest confusion, but not necessarily to Johnson). Whatever the symptoms of Crowson by anyone's account, they were not worse than the severe chest pains complained of in *Mata*. Even the trial court acknowledged that Johnson mistakenly thought Crowson was withdrawing from some substance (Order and Mem. Decision at 4, Aplt. App. Vol. 1 at 207). This mistaken impression by Johnson is no different than Quintana in *Mata,* who failed to call the doctor because she misread the EKG results. *Mata*, 427 F.3d at 759.

In Crowson's case, it is reasonable that the substance that caused the toxic metabolic encephalopathy[2] would appear as or be withdrawal symptoms. But Johnson referred Crowson to P.A. Worlton. Quintana in *Mata* did not refer Mata to any provider. Johnson's entering the referral to Worlton into the medical computer program was certainly no less than Nurse Saiz faxing a report to a doctor in *Mata*. To the contrary, Worlton was on site daily at the Jail, was in charge of inmate mental health, but was also in charge of all inmate healthcare for the Jail as an administrator.

[2] (Order and Mem. Decision at 1, Aplt. App. Vol. 1 at 204) ("Crowson began suffering from symptoms of toxic metabolic encephalopathy, a degenerative neurologic disorder caused by exposure to toxic substances.")

It appeared to Johnson that Crowson was withdrawing, but he was concerned about a possible mental health issue with the memory loss. Crowson can claim all sorts of problems with his medical condition on June 25, but in the end, the simple referral to Worlton precludes deliberate indifference and fulfills Johnson's role as a gatekeeper just as it did for the nurses in *Mata*.

The referral to Worlton alone is reason for reversal. The district court faults Johnson for making the referral to Worlton because he never saw Crowson. But nothing in the case law suggests that a nurse is liable for failing to ensure a referral is acted upon, especially when they are off work the next two days and there is a medical scheduler to perform that role. (Worlton Depo. 10:6-17, Aplt. App. Vol. 2 at 478). In any event, the referral to Worlton is sufficient for reversal and no case law suggests it was not enough or that Johnson could somehow be liable on days he did not work at the Jail after this referral. Therefore, there cannot be liability for Johnson when prior case law concludes that referral to a nurse practitioner or physician assistant negates liability.

2. The phone call with Dr. LaRowe cannot result in liability.

The second point the district court relies upon to deny summary judgment was that Johnson supposedly did not provide enough information about Crowson's housing assignments at the Jail during his first phone call with Dr. LaRowe on June 28. (Order and Mem. Decision at 10, Aplt. App. Vol. 1 at 213). Since the record

unequivocally shows that Crowson's first symptoms occurred on June 25, 2014, when he was observed to be acting "lethargic and slow," any time period before that date is irrelevant. (See Jail Log, Aplt. App. Vol. 2 at 389). Again, *Mata* is determinative that failing to provide information during a referral is insufficient to show deliberate indifference. But that is not the standard for the second prong of qualified immunity. It is Crowson's burden to find case law prior to 2014 which clearly establishes that Johnson's phone call did not fulfill his "gatekeeper" responsibilities. Neither the lower court nor Crowson can find a case where the simple omission of an inmate's housing assignment resulted in liability in talking to a medical provider.

The fact that Johnson called Dr. LaRowe several times on June 28 and 29 precludes liability regardless of whether he discussed housing assignments. Although Johnson contends there is no evidence that moving Crowson to a medical cell was not discussed, for purposes of this point, he concedes that it was not discussed with Dr. LaRowe. It is undisputed that Dr. LaRowe received enough information from Johnson to order diagnostic tests to further his care. (Order and Mem. Decision at 11, Aplt. App. Vol. 1 at 214). Johnson's reporting the physical symptoms is more important than discussing his housing assignments.

In *Mata* it was sufficient that Nurse Hough reported Mata's symptoms to a nurse practitioner. *Mata*, 427 F.3d at 759. This mere reporting exonerated her from

liability even though she initially told Mata to come back to the infirmary an hour later, when it opened, before assessing her. Moreover, Nurse Saiz did not report any symptoms of "severe chest pain" even though she was aware of those complaints, but merely faxed an EKG report to a doctor. Such action was enough to hold that a reasonable jury could not conclude she was deliberately indifferent. *Id*. at 760. Nurse Saiz concluded after reviewing the EKG that Mata was only suffering from "chest lining inflammation." Such a mistaken diagnosis by Saiz is similar to Johnson's conclusion that Crowson was having withdrawal symptoms.[3]

In addition, *Mata* cites the seminal case of *Sealock v. Colorado*, 218 F.3d 1205 (10th Cir. 2000), for further support that the nurses conduct was not unconstitutional. In *Sealock*, this Court concluded that Nurse Huber could not be held liable for failing to provide critical information to a physician assistant over the telephone. *Sealock*, 218 F.3d at 1208. The inmate told Huber he had "chest pain and couldn't breathe. She told him that he had the flu and there was nothing she could do for him until the physician assistant arrived at 8:00 a.m." *Id*. The P.A. testified that "Huber never mentioned chest pain to him over the telephone. If she had, he said he would have

[3] Certainly having "severe chest pains" is more likely a symptom of serious heart trouble than confusion or memory loss is of "metabolic encephalopathy" which rarely ever happens in any jail. In fact, no appeals cases could be found dealing with metabolic encephalopathy in the country. It is far more likely that a nurse would link severe heart pains to a heart attack than they would memory loss and confusion to metabolic encephalopathy.

called an ambulance immediately." *Id*. This Court, however, despite those facts, concluded that Huber was entitled to summary judgment because she was not deliberately indifferent to the plaintiff. The Court held, "[a]t worst, she misdiagnosed appellant and failed to pass on information to P.A. Havens about appellant's chest pain." *Id*. at 1211.

The actions of Johnson are far better than those of Huber. Johnson, according to the district court's opinion, should have told Dr. LaRowe that Crowson had been in the medical unit since June 25, 2014 and in a punitive confinement block before that, even though his symptoms had only persisted since June 25. Such information is far less "alarming" than failing to tell a medical provider about severe chest pains. In any event, there is no dispute that Johnson told Dr. LaRowe about his symptoms and gave LaRowe a history of his problems. (Order and Mem. Decision at 11, Aplt. App. Vol. 1 at 214; LaRowe Depo. 13:17-14:3, Aplt. App. Vol. 2 at 426). It was just his housing assignments that Johnson did not convey to Dr. LaRowe. Failing to provide such information cannot be worse than Nurse Huber's failure to "pass on information" in *Sealock*. Again, just as with the referral to P.A. Worlton, the failing to pass on information about Crowson's housing assignments is not contrary to clearly established law. In fact, the law concluded that such actions cannot be considered deliberate indifference by a reasonable jury in both *Sealock* and *Mata*.

Such conduct failed to meet the first prong of qualified immunity in that no constitutional violation had occurred.

Case law did not put Johnson on notice that it was "beyond debate" that his actions on these two days violated clearly established law. *See* *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). It is insufficient for a court to simply conclude that a nurse is deliberately indifferent without comparing the particular acts of the nurse to pre-existing caselaw relevant to Nurse Johnson's actual conduct. *See generally* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866-1867 (2017). In fact, Johnson could not have violated clearly established law "unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff*, 572 U.S. at 779 (*quoting* *Ashcroft v. al-Kidd*, 563 U.S. at 741). Both *Sealock* and *Mata* preclude such a conclusion.

B. A reasonable jury could not find a constitutional violation.

This portion of the reply brief will focus on whether a reasonable jury could find that Johnson violated Crowson's constitutional rights as it relates to qualified immunity and will only address the subjective element of deliberate indifference as stated in *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000). The subjective prong of this test it is only met when a plaintiff shows each defendant "knows of and disregards an excessive risk to inmate health or safety," (i.e., acts with "deliberate indifference"). *Sealock*, 218 F.3d at 1209 (*quoting* *Farmer v. Brennan*, 511 U.S. 825,

837 (1994)). Johnson is not responsible for harm that Plaintiff may have suffered in general, since "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." *Farmer*, 511 U.S. at 834. The deliberate indifference standard is the mental state of criminal recklessness. *Id*. at 836-38. The district court and Crowson fail to point to any factual evidence, beyond the lack of referral on June 25 and the inadequate phone call on June 28 as evidence of Johnson's mental state. Such a leap is legally insufficient to satisfy the subjective prong.

Farmer v. Brennen discusses the situation of when knowledge can be inferred because of the obvious nature of a condition. *Farmer*, 511 U.S. at 842. The Supreme Court opined about an example of the circumstances under which a plaintiff could "infer" actual knowledge based upon the "obviousness" of a substantial risk of serious harm stating that a plaintiff would have to present evidence that the same problem alleged in the complaint was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find the defendant-official had actual knowledge of the risk." *Id*. There is no such evidence in this case.

The *Mata* and *Sealock* cases cited in sub-point A above, hold that the nurses who referred an inmate to another healthcare provider and failed to provide

important symptoms to the provider were not deliberately indifferent based upon similar actions. The Court of Appeals' conclusions in those cases was not that they did not violate clearly established law, but that they could not met the deliberate indifference standard. Those two cases show that a reasonable jury could not conclude that Johnson actions could infer deliberate indifference compared to the nurses in *Mata* and *Sealock*.

The trial court applied a standard of perfection for Johnson, rather than the culpable mental state of deliberate indifference. The actions of Johnson are far more attentive to the medical needs of Crowson as compared to other appellate decisions. "[I]nadvertent or negligent failure to provide medical care, however serious the consequences, does not rise to deliberate indifference to serious medical needs and is not a constitutional violation." *Hood v. Prisoner Health Servs.*, 180 F.App'x 21, 25 (10th Cir. 2006) (internal quotations omitted). Not only did the referral to P.A. Worlton and to Dr. LaRowe prevent a finding of deliberate indifference, but that is not all Johnson did.

Johnson displayed significant attentiveness in caring for the medical needs of Crowson the entire time Johnson worked in and around Crowson. Johnson first, never turned Crowson away as did Nurse Amy Hough in *Mata*, 427 F.3d at 759. (In fact, Crowson never requested treatment). He ordered that Crowson be moved to the medical cell in the booking area the morning of June 25, 2014, so he would receive

nursing visits twice a day and be monitored every thirty minutes by corrections staff. (Jail Medical Records, Aplt. App. Vol. 2 at 354; *see also* Johnson Depo. 46:6-25, 47:4-16, Aplt. App. Vol. 2 at 508; LaRowe Depo. 39:13-19, Aplt. App. Vol. 2 at 433). He took his vitals twice on June 25 and they were normal and he found he was alert and oriented and his pupils were reactive to light. (Jail Medical Records, Aplt. App. Vol. 2 at 374). Memory loss and confusion were the only negative symptoms and he still referred Crowson to P.A. Worlton.[4] He did not work the next two days, but he could expect that two shifts of nurses per day would be seeing him and that he would be closely watched by officers in addition to the referral. As a matter of law, Johnson cannot be held liable for days he was not at work.

When Johnson returned to work on June 28, he called Dr. LaRowe at least twice that day. He further saw Crowson and took his vitals twice. He returned to the Jail the next day and saw Crowson three times, took his vitals three times, called Dr. LaRowe, provided him prescribed medication, and finally observed that Crowson had improved by the end of the day. Although the Judge did not find fault with

[4] The district court characterized symptoms of confusion, observed by corrections officers who did not talk to Johnson, as "alarming," but no witness ever made that characterization. See Order and Mem. Decision at 10, Aplt. App. Vol. 1 at 213. Johnson only noted that he had lethargy, could not remember what job he had before he went to jail, and confusion. (See Jail Medical Records, Aplt. App. Vol. 2 at 374 and Johnson Depo. 45:9-18, Aplt. App. Vol. 2 at 507).

Johnson after the June 28 phone call, it further shows that Johnson was constantly attentive to Crowson's needs and not deliberately indifferent.

Based upon Johnson's actions, there is no basis for even a negligence claim. Johnson's conduct does not rise to the culpable standard of "criminal recklessness" as required for deliberate indifference." *Farmer*, 511 U.S. at 836-838. Johnson's reasonable actions in response to the threat he perceived precludes a reasonable jury finding of deliberate indifference. *Id*. at 837. "To establish deliberate indifference, a plaintiff must present evidence that an individual defendant intentionally disregarded an excessive risk to inmate health or safety. A defendant with knowledge of a risk need not take perfect action or even reasonable action[,] . . . his action must be reckless before § 1983 liability can be found." *Collins v. Seeman*, 462 F.3d 757, 762 (7th Cir. 2006) (internal citations and quotation marks omitted). This is even more true when the district court found that Johnson misdiagnosed Crowson. (Order and Mem. Decision at 1, 3-4, Aplt. App. Vol. 1 at 204, 206-207). *See also Self v. Crum*, 439 F.3d 1227 (10th Cir. 2006) (where a jail doctor was not deliberately indifferent even though the plaintiff's medical condition was misdiagnosed). The district court fails to find facts that could support deliberate indifference.

Further, as described in sub-point A above, the nurses that were not found liable in *Mata* and *Sealock* similarly misdiagnosed the inmates and this was further evidence of a lack the required mental state. *Sealock*, 218 F.3d at 1211, and *Mata*,

427 F.3d at 759-761. Therefore, the facts found by the district court, including the misdiagnosis, preclude a reasonable jury finding of deliberate indifference.

III. The district court appropriately did not apply *Kingsley*.

Plaintiff, for the first time in his Response Brief, urges the Court to adopt the standard from *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) in lieu of the Eighth Amendment deliberate indifference standard derived from *Estelle v. Gamble*, 429 U.S. 97 (1976). (Aplee. Br. at 42-43). There are several reasons the Court should reject the application of *Kingsley*. First, Plaintiff never argued *Kingsley* in the district court. Second, *Kingsley* does not apply to medical claims. Third, *Kingsley* was decided in 2015, after the 2014 events that led to this suit. Finally, Plaintiff was not a pre-trial detainee, but a convicted prisoner serving a sentence.

A. Plaintiff failed to argue *Kingsley* in the district court.

"Absent extraordinary circumstances, [the Tenth Circuit] will not consider arguments raised for the first time on appeal." *Turner v. Pub. Serv. Co.*, 563 F.3d 1136, 1143 (10th Cir. 2009). Plaintiff never mentions *Kingsley*, nor did he claim he was a pretrial detainee, in his summary judgment briefing, but exclusively argued the application of the Eighth Amendment's deliberate indifference standard. (Pl.'s Mem. in Opp. to Mot. for Summ. J., Aplt. App. Vol. 1 at 106-145). Neither did the trial court raise Kingsley. Accordingly, this court should not hear issues not raised below.

Plaintiff argued that the deliberate indifference was the correct standard. (Pl.'s Mem. in Opp. to Mot. for Summ. J. at 24, Aplt. App. Vol. 1 at 129). This is sufficient reason to forfeit any argument regarding *Kingsley* and could potentially be inviting error. *See* *Estate of Vallina v. Cty. of Teller Sheriff's Office & Its Det. Facility*, 757 F. App'x 643, 647 (10th Cir. 2018) (where the plaintiff forfeited deviating from the deliberate indifference standard because it was not argued in the district court, and noting that they may have also invited error) (*citing* *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1204 (10th Cir. 2009)). "The invited-error doctrine 'precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt.'" *F.T.C. v. Accusearch*, Inc., 570 F.3d 1187, 1204 (10th Cir. 2009) (*quoting* *United States v. Deberry*, 430 F.3d 1294, 1302 (10th Cir. 2005)). In fact, this Court has already declined to analyze *Kingsley* in another case for exactly this reason. *See* *Crocker v. Glanz*, 752 Fed. App'x. 564, 569 (10th Cir. 2018) ("Finally, Grant argues for the first time on appeal that the Supreme Court's decision in [*Kingsley*], eliminated the subjective component of the deliberate-indifference requirement for Fourteenth Amendment claims by pretrial detainees. We decline to review this argument because Grant did not raise it in district court."). For these reasons, the Court should reject Plaintiff's new arguments.

B. *Kingsley* does not change the standard for medical claims.

Kingsley is limited to excessive force claims. *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). *Kingsley* was responding to the fact that the highest standard was applied to use of force cases inside a prison which required that a plaintiff prove that the use of force applied was, "malicious and sadistic, for the very purposes of causing harm" and not a good faith effort to restore discipline. *See Whitley v. Albers*, 475 U.S. 312, 320 (1986). The deliberate indifference standard is a much lower culpability standard by comparison.

Most appellate courts limit *Kingsley* to excessive force claims. The Seventh Circuit noted that "[t]he Eighth, Eleventh, and Fifth Circuits have chosen to confine *Kingsley* to its facts—that is, to Fourteenth-Amendment claims based on excessive-force allegations in a pretrial setting." *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018). Other circuits, "have continued to analyze inadequate medical treatment claims under the deliberate indifference standard without grappling with the potential implications of *Kingsley*. E.g. *Duff v. Potter*, 665 F. App'x 242, 244-45 (4th Cir. 2016)." *Id*.

Even those Circuits (the Second, Seventh, and Ninth) that have expanded *Kingsley* beyond excessive force have done it in ways that can be distinguished from the facts here. For example, those Circuit's medical care cases applying *Kingsley* all concerned pretrial detainees who were not on probation or parole. *See Miranda v.*

Cty. of Lake, 900 F.3d 335 (7th Cir. 2018); *Gordon v. Cty. of Orange*, 888 F.3d 1118 (9th Cir. 2018); *Bruno v. City of Schenectady*, 727 F. App'x 717 (2nd Cir. 2018).

The United States Supreme Court continues to recognize, post Kingsley, that deliberate indifference is the proper standard for medical claims. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1864 (2017) ("The Court has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner—'deliberate indifference to serious medical needs.'") (*quoting Estelle v. Gamble*, 429 U. S. 97, 104 (1976)).

Further, although it was pre-*Kingsley*, the Tenth Circuit expressly held, that for pre-trial detainees, the Eighth Amendment and Fourteenth Amendment standards are the same. *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002) (*citing Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10th Cir. 1999)). While the Tenth Circuit has not determined whether *Kingsley* changes the standard, it has noted that "Circuits are split on whether *Kingsley* alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees." *Estate of Vallina v. Cty. of Teller Sheriff's Office & Its Det. Facility*, 757 F. App'x 643, 646 (10th Cir. 2018) (noting that the Fifth, Eighth, and Eleventh Circuits have held *Kingsley* does not apply to claims of inadequate medical care).

C. *Kingsley* was decided after the events of this case.

Any requirements *Kingsley* might impose were not clearly established law in 2014. *Perry v. Durborow*, 892 F.3d 1116, 1122 n. 1 (10th Cir. 2018) (noting that to overcome qualified immunity defense, 'plaintiff must demonstrate . . . that the right was clearly established *at the time of the alleged unlawful activity*.') (emphasis in original) (*quoting Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009)).

D. Plaintiff was not a pre-trial detainee.

Crowson claims for the first time that he was a pre-trial detainee. (Aplee. Br. at 42-43). However, Crowson admits he was convicted of a crime and sentenced, and he was sent back to jail by the judge on that same sentence. (1st Am. Compl. ¶ 15, Aplt. App. Vol. 1 at 33).

Pretrial detainees, whose claims arise under the Fourteenth Amendment, are "those persons who have been charged with a crime but who have not yet been tried on the charge." *Bell v. Wolfish*, 441 U.S. 520, 523 (1979). On the other hand, those who are on probation/parole but not incarcerated have not stopped being punished for their conviction until they have successfully completed probation/parole. *See generally Morrissey v. Brewer*, 408 U.S. 471 (1972.

As the Fifth and Seventh Circuit Courts of Appeal have noted, for probation and parole violators '"detention and reincarceration are justified by the prior conviction.'" *Hamilton v. Lyons*, 74 F.3d 99, 106 (5th Cir. 1996) (*quoting Faheem-*

El v. Klincar, 841 F.2d 712, 717 (7th Cir. 1988)). Since Plaintiff was a probation violator, he was "unlike the pretrial detainee envisioned by the Supreme Court in *Bell*. The *Bell* Court's descriptions of pretrial detainees, as those persons who have not been found guilty of any crime, strongly suggest that the Court spoke with the 'typical' pretrial detainee in mind." *Id.* at 105; *see also Peterson v. Yeates*, No. 1:08-cv-40 BCW, 2011 U.S. Dist. LEXIS 66330, *19 (D. Utah June 21, 2011) (holding that the Eighth Amendment would apply to an alleged parole violator). Plaintiff, as a probation violator, was being punished for a pre-existing conviction, therefore, his confinement claim arises from the Eighth Amendment.

IV. The County is inextricably intertwined to whether Johnson is liable.

Plaintiff must show an underlying constitutional violation by at least one Washington County employee and that the violation was directly caused by a county policy. *See Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993); *see also City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), *and Mann v. Hyler*, 918 F.3d 1109, 1117 (10th Cir. 2019) ("A municipality may not be held liable for the actions of its employees if those actions do not constitute a violation of a plaintiff's constitutional rights."). "[A] pendent appellate claim can be regarded as inextricably intertwined with a properly reviewable claim on collateral appeal . . . when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995). Therefore,

since Johnson did not violate Crowson's rights, there cannot be liability imposed on the County.

Plaintiff argues that Johnson and LaRowe's combined actions equate to County liability. But this assumes Johnson and LaRowe violated his rights. However, LaRowe is not employed by Washington County. He was not working pursuant to a county policy. He is a private contractor that provides medical care at the Jail pursuant to a contract. (LaRowe Depo. 9:17-10:5, Aplt. App. Vol. 2 at 425-26). A contract and not policy dictate his responsibilities and he practices medicine at the Jail by exercising his discretion based upon his training, licensing, and experience. Although he can be sued as an individual under Section 1983 this does not make him a County employee or acting pursuant to County policy. Plaintiff even acknowledges that LaRowe is a private contractor. (Aplee. Br. at 37). Therefore, his alleged actions or lack thereof cannot be used to show County liability. Plaintiff does not identify any other county employee that may have contributed to an alleged constitutional violation. Moreover, Plaintiff must prove he suffered cruel and unusual "punishment," not cruel and unusual "conditions." *See* *Farmer*, 511 U.S. at 837. As such, Plaintiff cannot piecemeal liability together from different County employees.

Moreover, it is completely reasonable for the County to rely on the medical judgments of medical professionals. The Jail cannot practice medicine and must rely

upon professional medical personnel to provide for inmate medical needs. The district court characterize the Jail's medical policies as "severely lacking," and that there are no written policies. (Order and Mem. Decision at 15, Aplt. App. Vol. 1 at 218). Obviously, the Jail has written medical policies, but they were not part of the record in this case because Crowson's medical treatment was a matter of medical judgment and discretion on the part of Dr. LaRowe and medical assessments conducted by nurses. There is no specific medical policies that instruct staff how to deal with "toxic metabolic encephalopathy," but the Jail could not have such a policy, since it would functionally be practicing medicine if it did. The doctor must order the diagnosis and treatment he or she deems appropriate based upon the symptoms. The doctor may have protocols, but the County would be practicing medicine to have protocols for diagnosis and treatment.

It is undisputed that the County employed nurses, mid-level providers, and a healthcare administrator to deal with inmate medical problems. (Worlton Depo. 11:11-15:11, 19:16-25, Aplt. App. Vol. 2 at 478-480). These nurses and providers were to take medical issues to the contract physicians who supervised medical, diagnosis, and treatment decisions in the Jail (Dr. LaRowe provided care to county prisoners while other doctors provided care to state inmates from the Department of Corrections. (Johnson Depo. 13:3-14:7, Aplt. App. Vol. 2, 499-500). In addition, the Jail had medical cells in the booking area which were monitored every 30 minutes

and nurses attended to such prisoners at least once per shift or two times a day. (Johnson Depo. 46:14-47:16, Aplt. App. Vol. 2 at 508; Worlton Depo. 45:9-20, Aplt. App. Vol. 2 at 486). This cannot be characterized as "no policies."

Doctors and nurses are licensed and regulated by the state, not the County, and it is not unreasonable for the County to assume, by nature of their credentials, that they are capable of adequately providing medical care to inmates. Doctors were in charge of the medical care for inmates at the Jail. (Worlton Depo. 19:16-20:7, 22:1-12, Aplt. App. Vol. 2 at 480, 481; Johnson Depo. 40:7-11, Aplt. App. Vol. 2 at 506, LaRowe Depo. 57:10-60:23, Aplt. App. Vol. 2 at 437-438). The County's reliance on the services of medical professionals, practicing medicine, did not deprive Crowson of any of his constitutional rights. *See* *Graham v. Cty. of Washtenaw*, 358 F.3d 377, 384 (6th Cir. 2004) (finding that it is not unconstitutional for municipalities and their employees to rely on the medical judgments made by medical professionals, including nurses, responsible for prisoner care and noting "most would find such a policy laudable in many respects"); *and* *Kosloski v. Dunlap*, 347 F. App'x 177, 180 (6th Cir. 2009) (upholding the use of nurses to triage inmate requests for medical care).

This Court has also noted that "there is no *per se* requirement that a jail provide its inmates around-the-clock access to a medical doctor." *Boyett v. County of Washington*, 282 F. App'x 667, 673 (10th Cir. 2008). "While jailers are ultimately

responsible for their inmates' medical needs, they can provide that care in a variety of ways, including access to trained personnel such as guards in the first instance, nurses, and physicians' assistants." *Id*. (internal citation omitted).

No evidence exists that Johnson or LaRowe were acting pursuant to an unconstitutional county policy that directly caused a constitutional deprivation. They worked according to their professional training, not as a corrections officer. Plaintiff must demonstrate that the policy defect was "so obvious, and the inadequacy so likely to result in the violation of [plaintiff's constitutional] right, that the policymakers of the [county] can reasonably be said to have been deliberately indifferent . . . ." *See* *Porro v. Barnes*, 624 F.3d 1322, 1327-28 (10th Cir. 2010) (*quoting* *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996)).

Persistent practices may amount to policy within a municipality, but they must be "so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 60 (2011). There was no proof of that in the lower court. Plaintiffs must also show more than a mere single instance of unconstitutional activity, unless the policy itself is inherently unconstitutional *City of Oklahoma v. Tuttle*, 471 U.S. 808, 823-24 (1985). No pattern of misconduct was ever shown.

Johnson was following normal Jail procedure by providing medical care to Crowson and requesting that he receive further evaluations. There is nothing unconstitutional about the actions of Johnson or the policies of the County. Further,

the County had no notice that any of the medical practices in the Jail were deficient (Pulsipher Decl. ¶ 4, Aplt. App. Vol. 2 at 321). *See generally* *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) and *Connick*, 563 U.S. at 61 ("Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.").

CONCLUSION

This Court must reverse the judgment against Johnson because he referred Crowson to Worlton and Dr. LaRowe and those actions negate deliberate indifference. Further, Washington County cannot be liable because a reasonable jury could not find that a county employee violated Crowson's constitutional right and that the violation was caused by an unconstitutional policy.

Dated this 7th day of May, 2020.

/s/ Frank D. Mylar

Frank D. Mylar, Utah Bar No. 5116
Andrew R. Hopkins, Utah Bar No. 13748
MYLAR LAW, P.C.
2494 Bengal Boulevard
Salt Lake City, Utah 84121
Phone: (801) 858-0700
Email: office@mylarlaw.com
Attorneys for Appellants/Defendants

May 7, 2020

CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,458 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 in 14-point Times New Roman.

/s/ Frank D. Mylar

Frank D. Mylar, Utah Bar No. 5116
Andrew R. Hopkins, Utah Bar No. 13748
MYLAR LAW, P.C.
2494 Bengal Boulevard
Salt Lake City, Utah 84121
Phone: (801) 858-0700
Email: office@mylarlaw.com
Attorneys for Appellants/Defendants

May 7, 2020

CERTIFICATE OF SERVICE

I certify that on this 7th day of May, 2020, a true and correct copy of the foregoing Appellants' Reply Brief was served by the Court's CM/ECF system, to the following:

Ryan J. Schriever
THE SCHRIEVER LAW FIRM
51 East 800 North
Spanish Fork, UT 84660
ryan@schrieverlaw.com

Megha Ram
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
777 6th Street NW, 11th Floor
Washington D.C. 20001
Megha.ram@macarthurjustice.org

David M. Shapiro
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
Northwestern Pritzker School of Law
375 E. Chicago Ave.
Chicago, IL 60611
David.shapiro@law.northwestern.edu

Counsel for Appellee Martin Crowson

Shawn McGarry
Jurhee A. Rice
Gary T. Wight
KIPP AND CHRISTIAN
10 Exchange Place
Fourth Floor
Salt Lake City, UT 84111

Counsel for Dr. Judd LaRowe

/s/ Frank D. Mylar

Frank D. Mylar, Utah Bar No. 5116
Andrew R. Hopkins, Utah Bar No. 13748
MYLAR LAW, P.C.
2494 Bengal Boulevard
Salt Lake City, Utah 84121
Phone: (801) 858-0700
Email: office@mylarlaw.com
Attorneys for Appellants/Defendants

May 7, 2020

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/s/ Frank D. Mylar

Frank D. Mylar, Utah Bar No. 5116
Andrew R. Hopkins, Utah Bar No. 13748
MYLAR LAW, P.C.
2494 Bengal Boulevard
Salt Lake City, Utah 84121
Phone: (801) 858-0700
Email: office@mylarlaw.com
Attorneys for Appellants/Defendants

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