No. 21-_____

IN THE

Supreme Court of the United States

WASHINGTON COUNTY, UTAH,
Petitioner,

v.

MARTIN CROWSON,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a municipal government can be liable under the Eighth Amendment of the United States Constitution for a denial of inmate medical care under § 1983 when none of the government's employees or officials acted with deliberate indifference towards the inmate's serious medical needs?

PARTIES TO THE PROCEEDING

Petitioner is Washington County, a County within the State of Utah. Respondent is Martin Crowson. The other parties of this lawsuit are not a part of this proceeding.

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

- *Crowson v. Washington County, et al.*,
  2:15-cv-880-TC
  In the United States District Court for the District of Utah.
  Summary Judgment denied per order and memorandum decision entered July 19, 2019.

- *Crowson v. Washington County, et al.*,
  No. 19-4118; No. 19-4120
  In the United States Court of Appeals for the Tenth Circuit.
  Opinion entered December 29, 2020.

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The opinion of the United States District Court for the District of Utah, App. 57a-78a, is reported at 2019 U.S. Dist. LEXIS 121057 (D. Utah 2019).

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The Tenth Circuit had appellate jurisdiction under 28 U.S.C. § 1291 and filed its opinion on September 9, 2020, which reversed the district court in part and upheld the district court on one point. The Tenth Circuit denied Petitioner's petition for rehearing through its Order of October 26, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United . . . to the deprivation

> of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

STATEMENT OF THE CASE

Martin Crowson was an inmate at the Washington County Purgatory Correctional Facility (the "Jail") when he began suffering from symptoms of toxic metabolic encephalopathy. Nurse Michael Johnson and Dr. Judd LaRowe, two of the medical staff members responsible for Mr. Crowson's care, wrongly concluded Mr. Crowson was experiencing drug or alcohol withdrawal. On the seventh day of medical observation, Mr. Crowson's condition deteriorated, and he was transported to the hospital, where he was accurately diagnosed. After Mr. Crowson recovered, he sued Nurse Johnson, Dr. LaRowe, and Washington County under 42 U.S.C. § 1983, alleging violations of the Eighth and Fourteenth Amendments.

Tenth Circuit Court of Appeals Ruling:

The United States Court of Appeals for the Tenth Circuit concluded that nurse Johnson did not violate Plaintiff's constitutional rights and this conclusion overturned the lower court's decision. The lower court specifically had already dismissed all claims against the Sheriff in his individual capacity, who was the final policymaker, and claims against P.A. Worlton, the Jail's medical administrator, and a Corrections officer. *Crowson v. Wash. Cty.*, 983 F.3d 1166, 1176 n.6 (10th Cir. 2020). No single person, official, or nurse, employed by the County, violated Plaintiff's constitutional right.

Despite the fact that no County officer, official, or nurse violated Plaintiff's constitutional rights, the Tenth Circuit Court of Appeals nonetheless carved out a new form of liability that it defined as "systemic failure" liability which runs directly contrary to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) and its progeny at the United States Supreme Court. *Crowson*, 983 F.3d at 1174 (10th Cir. 2020). This theory was not even pled in Plaintiff's complaint. The theory of liability is not dependent upon a finding of "deliberate indifference" by any employee, policymaker, or official. Not even mere negligence or malpractice is required to support this theory of liability. All that is needed is a "system failure" which was left undefined. If there is a concept of liability called "systemic failure," it certainly could not be this case where Plaintiff received treatment and was later taken to the hospital and his life was spared and he is doing reasonably well, despite the misdiagnosed ailment.

The Court of Appeals did reverse the lower court with respect to the County on the "failure to train claims" but refused to reverse on the "systemic failure" claim. *Id.* Neither of these claims were pled in Plaintiff's pleadings nor were they articulated by the district court order.

Lower Court's Findings and Conclusions:

Defendants Johnson and Washington County moved for summary judgment, with Johnson asserting qualified immunity. The district court denied this motion. With regards to Johnson it found that he failed to seek medical care for Plaintiff and inform Dr. LaRowe with a full accounting of Plaintiff's

symptoms, and that a jury could determine this amounted to deliberate indifference. With regards to Washington County, the district court found a reasonable jury could find the County's policies were deficient. *Crowson v. Wash. Cty.*, 2019 U.S. Dist. LEXIS 121057, *14 (D. Utah 2019). No claim of "system failure" was pled, argued, or ruled upon by the district court.

REASON FOR GRANTING THE PETITION

This Court has never directly addressed the question in this case since its decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). The Court of Appeals decision significantly expands municipal liability contrary to United States Supreme Court precedent. This Petition seeks review of what was termed a "systemic failure" claim against the county, where the Tenth Circuit held that no constitutional violation by any county employee or official was necessary to hold the county liable for an alleged defective county policy, and thus disposed of the direct causation requirement. *See* *Crowson*, 983 F.3d at 1191. This is a new theory of supervisory liability that is not supported by this Court and was never alleged in the complaint.

The similar failure to train "claim" against the County was reversed in favor of the County by the Court of Appeals as were the claims brought against Nurse Johnson and Dr. LaRowe. However, a "failure to train claim" was also not raised in the complaint. No review is sought of the reversed claims or parties. However, the Tenth Circuit's Decision on the new "systemic failure" claim conflicts with this Court's precedents, and those decisions mandate that a

municipality is not liable for an alleged unconstitutional policy when a county employee did not violate a plaintiff's constitutional rights. The Court of Appeals decision is a significant departure from recent and historical rulings and will negatively impact jails and all local governments if not reversed, causing almost all local government cases to proceed to trial, when they should have been dismissed on summary judgment. It has the effect of making local governments liable for any conduct of its employees, even when the conduct does not even rise to the level of negligence or malpractice.

The Tenth Circuit decision does not provide a clear rule of decision but opens the door for trial and appellate courts to individually assess the policies of correctional facilities and governments even though the policies are not unconstitutional and even though no employee was even negligent towards a plaintiff. It further dispenses with the causation requirement of Section 1983 that applies specifically to local governments.

Since the Tenth Circuit's Decision is published, it is expedient that this Court grant Certiorari to further hear this matter or to summarily reverse this ruling that a local government can be held liability without showing at least one employee or a final policymaker acted with deliberate indifference to the plaintiff's constitutional rights. This decision must be promptly reversed to avoid confusion in municipal liability law under 42 U.S.C. § 1983. This is further an important issue for the High Court to address to prevent lower Courts of Appeals and trial courts from substituting their judgment as to corrections policies.

I. United States Supreme Court precedents hold that a municipality is not liable under § 1983 in the absence of an employee or official that deprived a plaintiff of his or her constitutional rights.

The Tenth Circuit's Decision finding Washington County liable under a newly created "systemic failure" theory, even when no single employee or policymaker violated Plaintiff's constitutional rights, is based solely upon the application of an outdated Tenth Circuit Court of Appeals decision, *Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985), that is contrary to United States Supreme Court precedents and to all Tenth Circuit Court of Appeals decisions rendered since *Garcia*. *Garcia* held that several employees could somehow join together, with no wrongful individual acts, and violate a plaintiff's rights even though no single employee actually deprived plaintiff of a constitutional right. However, *Garcia* did not address whether the final policymaker had to be "deliberately indifferent" in implementing an unconstitutional policy that caused this group violation.

The Tenth Circuit opines that an underlying constitutional violation is necessary if the plaintiff brings a "failure to train" claim, but not for a "systemic failure" claim. *Crowson*, 983 F.3d at 1192. This conclusion by the appellate court makes two erroneous assumptions: (1) that a local government can act apart from human beings and (2) that there are various theories of liability that can be asserted

against a municipality under § 1983. Both assumptions are incorrect based upon United States Supreme Court precedents. Numerous Tenth Circuit Court of Appeals opinions follow the United States Supreme Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), which is contrary to the *Garcia* decision. This Court should summarily reverse the Tenth Circuit's decision, consistent with United States Supreme Court precedents.

A. Supreme Court precedents require a municipal policy that directly caused an employee to violate a plaintiff's constitutional rights before liability can be imposed upon a municipality.

Heller clarified what was assumed in prior Supreme Court cases, holding that a municipality cannot be liable when the actions of officers, that were directed at the plaintiff, did not amount to a constitutional violation. *Id.* at 799. In this case, Crowson was treated by Nurse Johnson, a Physician Assistant, other nurses, and Jail officers, yet none of their actions were unconstitutional in their treatment of Crowson. In addition, even the final policymaker was absolved of deliberate indifference in his individual capacity on a motion to dismiss. *Heller* held:

> If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

Id. (emphasis added). There is no doubt that *Heller* is talking about an unconstitutional policy in the above

quote and not mere training. The Tenth Circuit incorrectly holds that the employee constitutional violation requirement only applies to "failure to train claims" as if it was a separate cause of action against a county. *Crowson*, 983 F.3d at 1192.

All municipal claims brought under § 1983 must show a policy directly caused a constitutional violation. *See* *Canton v. Harris*, 489 U.S. 378, 385 (1989) (*quoting* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). There are not a myriad of theories of liabilities against municipalities under Section 1983. Failure to train claims are just another way of saying the policy of failing to train directly caused the violation. A plaintiff must show a widespread pattern of unconstitutional activity that can be said to be a policy or custom. *See generally* *Connick v. Thompson*, 563 U.S. 51, 59-63 (2011). In fact, *Connick*, relying on several prior Supreme Court decisions, states that a city may be liable for failure to train if the failure can be said to have been a policy. It expanded on this issue holding:

> In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official policy for purposes of § 1983.

Id. at 61. *Connick* favorably cites two prior decisions that refer to a failure to train claim as a ". . . policy of 'inadequate training . . . '" *Id.* (*citing* *Oklahoma v. Tuttle*, 471 U.S. 808, 822-23 (1985)). *Connick* demonstrates that the failure to train must be considered a "policy" holding, "Only then 'can such

a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983.'" *Id.* (*citing Canton*, 489 U.S. at 388-89).

These decisions illustrate that all plaintiffs must show that a city implemented an unconstitutional policy that directly caused at least one of their employees to violate the plaintiff's rights under Section 1983. Whether it is termed a failure to train or systemic failure, the causation requirement of showing that the city action rose to the level of being considered a policy must have caused an employee to violate a person's constitutional rights. Therefore, there is no legal basis for the Tenth Circuit to distinguish between "failure to train claims" and "systemic failure claims" since in all instances, the failure must rise to the level of policy to be actionable under § 1983.

Even more pertinent to this Petition is the Supreme Court rule that a city can only act through its employees who are human beings. This principle was established in *Monell* but has been reiterated over the years. For example, in discussing the holding of *Monell* years later the Supreme Court ruled,

> Aware that governmental bodies can act only through natural persons, the Court concluded that these governments should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights.

St. Louis v. Praprotnik, 485 U.S. 112, 122 (1988). This statement alone is cause for reversal of the Tenth Circuit's decision.

Mr. Crowson in this case was cared for by Nurse Johnson. Johnson and his fellow defendants before the lower court all interacted with Mr. Crowson, yet none of them violated his constitutional rights. All Jail employees, including the Sheriff (in his individual capacity), were dismissed by prior motions in the district court (983 F.3d at 1176 n.6; 2019 U.S. Dist. LEXIS 121057, at *7-*8), while Johnson was found not to have violated Crowson's constitutional rights by the Tenth Circuit on appeal. Dr. LaRowe was not a county employee, so his actions could not contribute to county liability as a matter of law. The Tenth Circuit overlooked the above precedents in its published ruling because it incorrectly believed it had to rely upon *Garcia v. Salt Lake County*, 768 F.2d 303 (10th Circuit 1985) as if it were valid precedent after *Heller*.

Garcia holds that a county can be liable even though no county employee violated a plaintiff's rights. *Garcia* arrived at that conclusion by misquoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Numerous Supreme Court cases since *Monell* clarify different aspects of that decision, yet even in *Monell* it is assumed that a city cannot be liable without an underlying constitutional violation. *Id.* at 690. *Garcia* stands alone for its contrary proposition even though multiple cases in the Tenth Circuit reject its holding after the Supreme Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). The *Crowson* decision enables the Tenth Circuit to ignore *Heller* in favor of *Garcia.*

B. *Garcia* misinterpreted *Monell* and other Supreme Court cases.

Monell is largely known for reversing the holding of *Monroe v. Pape*, 365 U.S. 167 (1961), which held that local governments were not "persons" that could be sued within the meaning of 42 U.S.C. § 1983. In this context, *Monell* severely limited under what circumstances a city could be sued, holding that a city could not be held liable merely for the unconstitutional acts of its employees. *Monell*, 436 U.S. at 694. The fact that employees violated plaintiff's Constitutional rights was assumed in *Monell*. For this reason, it was incorrect for the *Garcia* Court to infer that any wording in *Monell* supports Garcia's conclusion that a local government can be liable when no employee violated a plaintiff's constitutional rights. The idea of grouping employees together to cause an entity constitutional violation has never been upheld by the Supreme Court. In fact, an opposite conclusion is supported by *Monell*.

Monell is admittedly the first attempt to define municipal liability under § 1983. Prior to that decision, a city was not a person that could be sued. Toward the conclusion of that decision, *Monell* states, "we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be…and we expressly leave further development of this action to another day." *Id.* at 695. However, it was assumed in *Monell* that the city employees violated the plaintiff class' constitutional rights.

In *Monell*, several individual officials in New York were sued for acting pursuant to an unconstitutional

city policy by compelling "pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons." *Id.* at 661. The district court concluded "that the acts complained of were unconstitutional . . . ." *Id.* On appeal the plaintiff class appealed the district court ruling that the city was not a person who could be sued under § 1983 and the ruling that barred damages against the individual defendants. Both arguments were rejected by the Second Circuit Court of Appeals. The latter argument because the city would have to pay for any damage claims against the individuals sued in their official capacities. Certiorari was granted to decide whether "local governmental officials and/or local independent school boards are persons within the meaning of § 1983 when equitable relief in the form of back pay is sought . . . ." *Id.* at 662.

Monell concluded that local governments could be sued under § 1983 when they adopt and promulgate an unconstitutional policy by its body's officers and that the official policy must be responsible for a constitutional violation. *Id.* at 690. However, the policy need not take the form of a statute but could include a governmental custom so long as the practices were so permanent and well settled that they had the force of law. *Id.* at 691. On the other hand, a city could not be held liable "unless action pursuant to official municipal policy of some nature caused a constitutional tort . . . ." *Id.*

Monell then looked to the specific language of § 1983, which says, "shall subject or cause to be subjected" to determine that a city could cause a person to be deprived of their constitutional rights at

the hands of another person. *Id.* at 691-692. *Monell* then, after quoting the text of § 1983, ruled, "The italicized language plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *Id.* at 692 (underlining added). *Monell* then states Congress intended such causation before a city could be liable. The causation referred to here is that the city's unconstitutional policy caused one of its employees to violate a person's constitutional rights. *Monell* is reason alone to reverse the Tenth Circuit. *Garcia* and the Tenth Circuit's *Crowson* decisions are contrary to *Monell* and other Supreme Court cases.

II. Other Supreme Court decisions support granting certiorari.

Several other Supreme Court decisions seem to indicate that a plaintiff must prove that an unconstitutional policy caused a municipal employee to violate a plaintiff's constitutional rights before the municipality can be held liable under 42 U.S.C. § 1983. One Supreme Court case references the concept of "system injury" but reaches a conclusion consistent with *Monell* and contrary to the Tenth Circuit Court of Appeals decision.

In *Owen v. City of Independence*, 445 U.S. 622, 652 (1980), this Court referenced the concept of preventing "systemic injuries" but says nothing of "systemic claims" against a municipality. *Owen* makes a vague statement in passing that final policymakers will have incentive to enact policies and programs that will prevent various injuries, including "systemic injuries." *Id.* *Owen* is addressing the

defense of qualified immunity and that it does not apply to cities. *Id*. Crowson is similarly attacking Washington County's policies that the Tenth Circuit called "systemic failures." Systemic failures is another way of saying the policy is constitutionally defective.

Another Tenth Circuit case correctly reviews two United States Supreme Court cases that also support this Petition for Certiorari. In *Trigalet v. City of Tulsa*, 239 F.3d 1150 (10th Cir. 2001), the Tenth Circuit was expressly deciding whether a municipality can be held liable when there is no constitutional violation by the employee that interacted with the plaintiff. *Id.* at 1151. That Court made an extensive and careful review of United States Supreme Court and Court of Appeals cases, even from other Circuits. In addition, *Trigalet* relied upon two United States Supreme Court cases which further support Washington County's position: *Collins v. City of Harker Heights, Tex*, 503 U.S. 115 (1992) and *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397 (1997).

Collins holds that a court must answer two questions before a city can be liable, not unlike a court's analysis of individual defendants in addressing qualified immunity, where courts must find both elements before qualified immunity can be overcome. The two questions are: "(1) whether plaintiff's harm was caused by a constitutional violation and (2) if so, whether the city is responsible for that violation. *Collins*, 503 U.S. at 120. The two elements are requirements and are not two different theories of liability against a municipality as some Circuits have hinted. *Collins* points out that *Monell,*

and other Supreme Court cases, assumed an underlying constitutional violation by an employee when assessing municipal liability. *Collins* also cites a portion of § 1983 as further support for the two requirements stating, "'Section 1983 provides a remedy against "any person" who, under color of state law, deprives another of rights protected by the Constitution.'" *Id.* *Collins* assumes that a municipality can only be held liable when both of the two questions are answered affirmatively, when the county has also acted with deliberate indifference in implementing that policy. There can be no liability without both prongs based upon *Collins*. The Tenth Circuit's decision is in clear opposition to *Collins* and the cases *Collins* cites when it ruled otherwise.

Trigalet further cited another key Supreme Court case for the same holding: *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997). *Trigalet* cites to *Brown* as further upholding this well-established rule stating, "'It is not enough, however, that the plaintiff 'identify conduct properly attributable to the municipality.'" *Trigalet*, 239 F.3d at 1154 (*citing Brown*, 520 U.S. at 404).

> The plaintiff must also demonstrate that, through its own *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the

> municipal action and the deprivation of federal rights.

Trigalet, 239 F.3d at 1154 (*citing Brown*, 520 U.S. at 404) (underlining added). *Id*. These Supreme Court cases cited by *Trigalet,* are justification for granting this Petition.

A Court of Appeals should not rule contrary to so many United States Supreme Court cases and create a new theory of liability. If this Court does not fix this mistaken reading of *Heller,* it will have a published opinion that conflicts with numerous holdings of the United States Supreme Court which will be cited by all Circuits throughout the country.

CONCLUSION

The Tenth Circuit failed to accurately apply United States Supreme Court precedents relating to whether a municipality can ever be held liable when no city employee violated a plaintiff's constitutional rights. It did so by relying upon decades old Circuit precedent that was decided prior to the United States Supreme Court's decision in *Heller.* The Tenth Circuit has significantly expanded liability for local governments and failed to create a rule of decision that will allow fair application of this new theory of liability. Other Circuits have hinted at this idea in dicta. There is a reasonable chance that all Circuits will now cite the *Crowson* decision for a proposition that is directly contrary to this Court's precedents and that effectively eliminates the causation requirement of Section 1983 for municipal governments.

For these reasons, the petition for Certiorari should be granted and the Tenth Circuit's decision should be reversed to the extent it does not require a single county official or employee to have acted with deliberate indifference and for creation of a new "systemic failure" form of county liability.

Respectfully submitted this 16th day of July, 2021.

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Appendix

United States Court of Appeals, Tenth Circuit
Opinion in 19-4118
Issued December 29, 2020 ..... 1a

United States District Court, District of Utah
Central Division
Order on Motions to Dismiss
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-4118
D.C. Docket No. 2:15-CV-00880-TC

MARTIN CROWSON,
PLAINTIFF-APPELLEE,

V.

WASHINGTON COUNTY STATE OF UTAH, CORY PULSIPHER, ACTING SHERIFF OF WASHINGTON COUNTY, MICHAEL JOHNSON,
DEFENDANTS-APPELLANTS.

[December 29, 2020]

Appeal from the United States District Court
for the District of Utah

Before MATHESON, BACHARACH, AND MCHUGH, Circuit Judges.

McHugh, Circuit Judge:

Martin Crowson was an inmate at the Washington County Purgatory Correctional Facility (the "Jail") when he began suffering from symptoms of toxic metabolic encephalopathy. Nurse Michael Johnson and Dr. Judd LaRowe, two of the medical staff members responsible for Mr. Crowson's care, wrongly concluded Mr. Crowson was experiencing drug or alcohol withdrawal. On the seventh day of medical observation, Mr. Crowson's condition deteriorated and he was transported to the hospital, where he was accurately diagnosed. After Mr. Crowson recovered, he sued Nurse Johnson, Dr. LaRowe, and Washington County[1] under *42 U.S.C. § 1983*, alleging violations of

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[1] Mr. Crowson also sued Cory Pulsipher, the acting Sheriff of Washington County, in his official capacity. But official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)* (quoting *Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*). "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Id. at 166*. The district court and the parties have treated Mr. Crowson's *Monell*

the *Eighth* and *Fourteenth Amendments*.

The district court denied motions for summary judgment on the issue of qualified immunity by Nurse Johnson and Dr. LaRowe, concluding a reasonable jury could find both were deliberately indifferent to Mr. Crowson's serious medical needs, and that it was clearly established their conduct amounted to a constitutional violation. The district court also denied the County's motion for summary judgment, concluding a reasonable jury could find the treatment failures were an obvious consequence of the County's reliance on Dr. LaRowe's infrequent visits to the Jail and the County's lack of written protocols for monitoring, diagnosing, and treating inmates.

Nurse Johnson, Dr. LaRowe, and the County filed these consolidated interlocutory appeals, which raise threshold questions of jurisdiction. Nurse Johnson and Dr. LaRowe challenge the district court's denial of qualified immunity, while the County contends we should exercise pendent appellate jurisdiction to review the district court's denial of its summary judgment motion.[2]

For the reasons explained below, we exercise limited jurisdiction over Nurse Johnson's and Dr. LaRowe's appeals pursuant to the exception to *28*

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claims against Sheriff Pulsipher accordingly. *See, e.g.*, App., Vol. I at 209 n.1; Appellee Br. at 7 n.2. We therefore refer only to Washington County.

[2] Nurse Johnson and the County's Opening Brief is cited herein as "County Br.," and their Reply Brief is cited as "County Reply." Dr. LaRowe's Opening Brief is cited as "LaRowe Br.," and his Reply brief is cited as "LaRowe Reply." Mr. Crowson's Brief is cited as "Appellee Br."

U.S.C. § 1291 carved out for purely legal issues of qualified immunity through the collateral order doctrine. *See Mitchell v. Forsyth, 472 U.S. 511, 524-30, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)*. We hold Nurse Johnson's conduct did not violate Mr. Crowson's rights and, assuming without deciding that Dr. LaRowe's conduct did, we conclude Dr. LaRowe's conduct did not violate any clearly established rights.

Our holding on Nurse Johnson's appeal is inextricably intertwined with the County's liability on a failure-to-train theory, so we exercise pendent appellate jurisdiction to the extent Mr. Crowson's claims against the County rest on that theory. *See Moore v. City of Wynnewood, 57 F.3d 924, 930 (10th Cir. 1995)*. However, under our binding precedent, our holdings on the individual defendants' appeals are not inextricably intertwined with Mr. Crowson's claims against the County to the extent he advances a systemic failure theory. *See id.* We therefore reverse the district court's denial of summary judgment to Nurse Johnson and Dr. LaRowe, as well as to the County on the failure-to-train theory, and we dismiss the remainder of the County's appeal for lack of jurisdiction.

I. BACKGROUND

A. Factual History[3]

On June 11, 2014, Mr. Crowson was booked into

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[3] Because our interlocutory review of an order denying qualified immunity is typically limited to issues of law, this factual history is drawn from the district court's recitation of the facts. *See Mitchell v. Forsyth, 472 U.S. 511, 524-30, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)*.

the Washington County Purgatory Correctional Facility for a parole violation. On June 17, due to a disciplinary violation, Mr. Crowson was placed in solitary confinement, known as the "A Block."

"On the morning of June 25, while still in solitary confinement, Jail Deputy Brett Lyman noticed that Mr. Crowson was acting slow and lethargic." App., Vol. I at 205. Deputy Lyman asked Nurse Johnson to check Mr. Crowson. "As a registered nurse, Nurse Johnson could not formally diagnose and treat Mr. Crowson." App., Vol. I at 205. Rather, Nurse Johnson assessed inmates and communicated with medical staff. The medical staff available to diagnose were Jon Worlton, a physician assistant ("PA"),[4] and Dr. LaRowe, the Jail's physician.

At all relevant times, PA Worlton was the Jail's health services administrator and also handled mental health care for the inmates. PA Worlton spent half to three quarters of his time in clinical practice at the Jail, primarily in booking. Dr. LaRowe was responsible for diagnosing and treating inmates, but

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[4] There is some ambiguity concerning whether Jon Worlton was, in fact, a PA. The district court found he was a PA. At oral argument, the County asserted that Mr. Worlton was a nurse practitioner, not a PA, but suggested that accorded him similar or greater medical training. In describing his education, Mr. Worlton stated, "I'm a social worker. I have a master's degree in social work. I also have a clinical license, licensed clinical social worker." App., Vol. II at 478. At oral argument before this court, however, counsel for Mr. Crowson answered affirmatively when asked whether Mr. Worlton was a PA and whether he could diagnose inmates. Where neither party has challenged the district court's finding that Mr. Worlton was a PA, and Mr. Crowson's counsel affirmed that professional status at oral argument, we presume it is true for purposes of our analysis.

he visited the Jail only one or two days a week, for two to three hours at a time. Dr. LaRowe relied heavily on the Jail's deputies and nurses. Jail deputies checked on inmates who were in medical observation cells at least once every thirty minutes, and the deputies would notify a Jail nurse when an inmate was "not acting right" or "having problems." App., Vol. I at 219 (quoting App., Vol. II at 504). "Jail nurses—who, by law, could not diagnose inmates—generally spent five to ten minutes with" inmates in medical observation cells once every twelve-hour shift, "to take the inmate's vital signs and conduct follow-up checks." App., Vol. I at 219. If an inmate exhibited symptoms of a cognitive problem, the nurse would inform Dr. LaRowe and PA Worlton. There are no written policies or procedures regarding inmate medical care in the record.

When Nurse Johnson evaluated Mr. Crowson on June 25, he noted Mr. Crowson had normal vital signs and some memory loss. Specifically, "Mr. Crowson was 'dazed and confused,' and 'unable to remember what kind of work he did prior to being arrested.'" App., Vol. I at 213 (quoting App., Vol. II at 374). Nurse Johnson "admitted in his declaration that, despite recording normal vital signs, he 'was concerned [Mr. Crowson] may be suffering from some medical problem.'" App., Vol. I at 213 (alteration in original) (quoting App., Vol. II at 317). Nurse Johnson ordered Mr. Crowson moved to a medical observation cell following the examination. He also "entered a request in the medical recordkeeping system for PA Worlton to conduct a psychological evaluation." App., Vol. I at 205.

When Jail Deputy Fred Keil moved Mr. Crowson

to a medical observation cell, he noticed that Mr. Crowson appeared "unusually confused." App., Vol I at 205. After conducting a visual body cavity search of Mr. Crowson, Deputy Keil ordered Mr. Crowson to redress. Mr. Crowson put on his pants and then put his underwear on over his pants.

Nurse Johnson checked Mr. Crowson again that afternoon. "Mr. Crowson's pupils were dilated but reactive to light" and "Mr. Crowson appeared alert and oriented." App., Vol. I at 206. Nurse Johnson left the Jail at the end of his shift on June 25 without conducting further assessments of Mr. Crowson or contacting Dr. LaRowe. PA Worlton never received Nurse Johnson's file notation requesting a psychological examination of Mr. Crowson.

Nurse Johnson did not work at the Jail on June 26 and 27. There is no documentation in the Jail's medical recordkeeping system for these days to show that medical personnel checked on Mr. Crowson.

On June 28, Nurse Johnson returned to work and visited Mr. Crowson in the early afternoon. "Mr. Crowson seemed confused and disoriented and had elevated blood pressure. He gave one-word answers to Nurse Johnson's questions, and understood, but could not follow, an instruction to take a deep breath." App., Vol. I at 206. At this point, "Mr. Crowson's symptoms had persisted beyond the expected timeframe for substance withdrawal." App., Vol. I at 213.

Following the June 28 examination, Nurse Johnson called Dr. LaRowe and informed him of some of his observations. But Nurse Johnson did not tell Dr. LaRowe that Mr. Crowson had been in a medical observation cell for three days and had been in

solitary confinement for nine days before that. Dr. LaRowe ordered a chest x-ray and a blood test. "The blood test, known as a complete blood count, could have detected an acid-base imbalance in Mr. Crowson's blood, a symptom of encephalopathy." App., Vol. I at 206.

Nurse Johnson attempted to draw Mr. Crowson's blood, but he was unsuccessful due to scarring on Mr. Crowson's veins and Mr. Crowson's unwillingness to hold still. Nurse Johnson reported this unsuccessful blood-draw attempt to Dr. LaRowe. Ultimately, the chest x-ray and blood test were never completed. Dr. LaRowe made no further attempts to diagnose Mr. Crowson at that time.

On the morning of June 29, Nurse Johnson took Mr. Crowson's vital signs and noted an elevated heart rate. "Mr. Crowson was still acting dazed and confused, and was experiencing delirium tremens, a symptom of alcohol withdrawal." App., Vol. I at 206-07. Nurse Johnson reported his observations to Dr. LaRowe, who prescribed Librium and Ativan to treat substance withdrawal. Dr. LaRowe directed Nurse Johnson to administer a dose of Ativan.[5]

"An hour later, Nurse Johnson checked on Mr.

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[5] Mr. Crowson's circumstances prior to his incarceration suggest these medications may have been harmful to him beyond worsening his encephalopathy. He was hospitalized at Dixie Regional Medical Center "a few weeks before being arrested and detained" at the Jail. App., Vol. I at 207. The amended complaint indicates medical records from this hospitalization "'would have revealed to Facility staff that [he] should not have been given any drug categorized as a benzodiazepine' (such as Librium)." App., Vol. 1 at 207-08. That prior hospitalization appears to have been the result of a heroin overdose.

Crowson, who was sleeping, and noted that his vital signs had returned to normal." App., Vol. I at 207. He next checked on Mr. Crowson later that afternoon. "He noted that Mr. Crowson was better able to verbalize his thoughts and that his vital signs remained stable." App., Vol. I at 207. But Mr. Crowson continued to report memory loss, telling Nurse Johnson that he could not remember the last five days. Nurse Johnson, believing Mr. Crowson was experiencing substance withdrawal, told Mr. Crowson that he was in a medical observation cell, and he was being given medication for his condition.

The following day (June 30), Nurse Ryan Borrowman was assigned to the medical holding area. Nurse Borrowman did not see Mr. Crowson until July 1, when he noted that Mr. Crowson's "physical movements were delayed and that he struggled to focus and would lose his train of thought." App., Vol. I at 207. "[D]ue to the severity of [Mr. Crowson's] symptoms and the length of time he had been in a medical holding cell, [Nurse Borrowman] immediately called Dr. LaRowe for further medical care." App., Vol. II at 313. Upon Dr. LaRowe's order, Mr. Crowson was transported to the Dixie Regional Medical Center, where he was diagnosed with metabolic encephalopathy. Dr. LaRowe never visited the Jail while Mr. Crowson was in the medical observation cell.

"According to the amended complaint, Mr. Crowson remained in the hospital until July 7, 2014, and continued to suffer from 'residual effects of encephalopathy, liver disease, and other problems.'" App., Vol. I at 208 (quoting App., Vol. I at 39). Mr. Crowson spent two months recovering at his mother's

house, experiencing severe memory and focus problems, before returning to the Jail on September 7, 2014.

B. Procedural History

Mr. Crowson filed a Complaint on December 15, 2015, which he amended on March 14, 2016. The Amended Complaint brings, *inter alia*, *§ 1983* claims against Nurse Johnson and Dr. LaRowe alleging they were deliberately indifferent to Mr. Crowson's serious medical needs in violation of Mr. Crowson's *Eighth* and *Fourteenth Amendment* rights. The Amended Complaint also includes *§ 1983* claims against Washington County pursuant to *Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*.[6]

In 2018, Nurse Johnson, Dr. LaRowe, and Washington County moved for summary judgment. Nurse Johnson and Dr. LaRowe argued they were entitled to qualified immunity. The County argued that none of its employees committed a constitutional violation and that there is no evidence of a County policy or custom that caused the alleged constitutional violation. On July 19, 2019, the district court denied the motions in relevant part. The district court concluded a reasonable jury could find Nurse Johnson and Dr. LaRowe were deliberately indifferent to Mr. Crowson's medical needs, and that it was clearly established their conduct amounted to a constitutional violation. The district court also

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[6] These are the only surviving claims and defendants. Other parties and claims have been dismissed by various court orders and party stipulations.

concluded a reasonable jury could find the treatment failures were an obvious consequence of the County's reliance on Dr. LaRowe's infrequent visits to the Jail and the County's lack of written protocols for monitoring, diagnosing, and treating inmates. Nurse Johnson, Dr. LaRowe, and Washington County filed these consolidated interlocutory appeals.

II. DISCUSSION

We begin our analysis by examining the individual defendants before turning to the County. Mr. Crowson challenges our jurisdiction over this appeal, so each discussion begins with the question of jurisdiction.

A. Individual Defendants

1. Jurisdiction

When examining the denial of summary judgment on the issue of qualified immunity, "this court has jurisdiction to review (1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation." *Roosevelt-Hennix v. Prickett, 717 F.3d 751, 753 (10th Cir. 2013)* (internal quotation marks omitted). Generally, we lack jurisdiction to review factual disputes in this interlocutory posture. *Lynch v. Barrett, 703 F.3d 1153, 1159 (10th Cir. 2013)* ("[I]f a district court concludes a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own de novo review of the record might suggest otherwise as a matter of law." (quotation marks omitted)).

There is an exception to this jurisdictional limitation "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, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*). In such circumstance, we assess the facts de novo. *Id.* "A mere claim that the record 'blatantly' contradicts the district court's factual recitation . . . does not require us to look beyond the facts found and inferences drawn by the district court. Rather, the court's findings must constitute 'visible fiction.'" *Lynch, 703 F.3d at 1160 n.2* (quoting *Scott, 550 U.S. at 380-81*). "The standard is a very difficult one to satisfy." *Cordero v. Froats, 613 F. App'x 768, 769 (10th Cir. 2015)* (unpublished).

Nurse Johnson and Dr. LaRowe argue this case is the unusual one where we may review the facts de novo. Because we find reversal is warranted taking the district court's facts as true, we need not analyze whether we would be permitted to consider the facts de novo.

2. Merits Analysis

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna, 577 U.S 7, 11, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015)* (quoting *Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)*). When a *§ 1983* defendant asserts qualified immunity, this affirmative defense "creates a presumption that [the defendant is] immune from suit." *Perea v. Baca, 817 F.3d 1198, 1202 (10th Cir. 2016)*. "To overcome this presumption," the plaintiff "must show that (1) the officers' alleged conduct

violated a constitutional right, and (2) it was clearly established at the time of the violation, such that 'every reasonable official would have understood,' that such conduct constituted a violation of that right." *Id.* (quoting *Mullenix, 577 U.S. at 11*).

Mr. Crowson alleges Nurse Johnson and Dr. LaRowe violated his *Eighth* and *Fourteenth Amendment* rights. "The *Fourteenth Amendment* prohibits deliberate indifference to a pretrial detainee's serious medical needs." *Strain v. Regalado, 977 F.3d 984, 987 (10th Cir. 2020)*. "[W]e apply the two-part *Eighth Amendment* inquiry when a pretrial detainee alleges deliberate indifference to serious medical needs." *Quintana v. Santa Fe Cnty. Bd. of Comm'rs, 973 F.3d 1022, 1028 (10th Cir. 2020)*. "This exercise requires both an objective and a subjective inquiry." *Id.*[7] "The objective component is met if the deprivation is 'sufficiently serious.' . . . The subjective component is met if a prison official 'knows of and disregards an excessive risk to inmate health or safety.'" *Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir. 2000)* (quoting *Farmer v. Brennan, 511 U.S. 825, 834, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1970)*).

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[7] Mr. Crowson argues the standard should be purely objective under *Kingsley v. Hendrickson, 576 U.S. 389, 135 S. Ct. 2466, 192 L. Ed. 2d 416 (2015)*. But during the pendency of this appeal, a panel of this court held, in a published opinion, "deliberate indifference to a pretrial detainee's serious medical needs includes both an objective and a subjective component, even after *Kingsley*." *Strain v. Regalado, 977 F.3d 984, 989 (10th Cir. 2020)*. We are bound by the holding in *Strain*. *See Acosta v. Paragon Contractors Corp., 957 F.3d 1156, 1162 (10th Cir. 2020)*.

As for the requirement it be clearly established that the conduct constituted a violation, "'the salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan v. Cotton, 572 U.S. 650, 656, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014)* (alterations in original) (quoting *Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)*). "[F]or the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Halley v. Huckaby, 902 F.3d 1136, 1149 (10th Cir. 2018)* (quotation marks omitted). We may not "define clearly established law at a high level of generality." *Mullenix, 577 U.S. at 12* (quoting *Ashcroft v. al-Kidd, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)*. "Nevertheless, our analysis is not a scavenger hunt for prior cases with precisely the same facts, and a prior case need not be exactly parallel to the conduct here for the officials to have been on notice of clearly established law." *Reavis ex rel. Estate of Coale v. Frost, 967 F.3d 978, 992 (10th Cir. 2020)* (quotation marks omitted).

a. Nurse Johnson

We assume without deciding that the harm suffered by Mr. Crowson meets the objective component of the *Eighth Amendment* inquiry. Nurse Johnson argues he was not deliberately indifferent under the subjective component. We agree.

"Our cases recognize two types of conduct constituting deliberate indifference. First, a medical professional may fail to treat a serious medical condition properly";

second, a prison official may "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*. Although medical personnel often face liability for failure to treat under the first type of deliberate indifference, if "the medical professional knows that his role . . . is solely to serve as a gatekeeper for other medical personnel capable of treating the condition, . . . he also may be liable for deliberate indifference from denying access to medical care." *Id.* Mr. Crowson argues Nurse Johnson's conduct falls within this second type of deliberate indifference.

The district court agreed, finding Nurse Johnson was deliberately indifferent on June 25 when he "placed Mr. Crowson in an observation cell and left his shift without ensuring that Mr. Crowson would receive further care," and on June 28 when 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." App., Vol. I at 213. On appeal, Nurse Johnson argues the district court erred in "infer[ring his] knowledge of an excessive risk of inmate harm" and claims that by referring Mr. Crowson to PA Worlton, he "fulfilled any possible gatekeeper role." County Br. at 25, 28. Regarding his June 28 visit to see Mr. Crowson, Nurse Johnson argues "he fully fulfilled his 'gatekeeper' role by simply communicating with Dr. LaRowe" and that "the failure to pass on some information is in the form of negligence and not 'deliberate indifference.'" County Br. at 27, 29.

In response, Mr. Crowson claims Nurse Johnson's June 25 attempted referral to PA Worlton for a

psychological evaluation, without also referring him to Dr. LaRowe for a physical evaluation, "prevent[ed Mr. Crowson's] *physical* symptoms from being evaluated and treated." Appellee Br. at 24. Mr. Crowson also contends Nurse Johnson's admitted concern that Mr. Crowson might be suffering from a medical problem "indicate[s] that the risk of harm was obvious *and* that [Nurse] Johnson was aware of the risk on June 25." *Id.* at 25. Regarding the June 28 conduct, Mr. Crowson argues Nurse Johnson failed to pass on "critical information" that Dr. LaRowe could have used to rule out withdrawal as a possible diagnosis. *Id.*

We address each instance of deliberately indifferent conduct found by the district court.

i. The referral to PA Worlton for psychological evaluation

We agree with the district court that the evidence would allow a jury to conclude Nurse Johnson was aware Mr. Crowson required medical attention. *See* App., Vol. I at 213 ("Nurse Johnson himself noted that Mr. Crowson was 'dazed and confused,' and 'unable to remember what kind of work he did prior to being arrested.' He admitted in his declaration that, despite recording normal vital signs, he 'was concerned [Mr. Crowson] may be suffering from some medical problem.'" (alteration in original) (first quoting App., Vol. II at 374; then quoting App., Vol. II at 317)). Nurse Johnson therefore knew Mr. Crowson had potentially alarming symptoms and suspected there was a medical issue. That knowledge was sufficient to trigger Nurse Johnson's duty as a gatekeeper to provide Mr. Crowson access to medical personnel who could provide care.

On June 25, Nurse Johnson assessed Mr. Crowson and "entered a request in the medical recordkeeping system for PA Worlton to conduct a psychological evaluation." App. I at 205. Nurse Johnson then left the Jail, without also contacting Dr. LaRowe. Upon Nurse Johnson's return on June 28, he did contact Dr. LaRowe about Mr. Crowson's symptoms.

Although the initial referral to PA Worlton was for a psychological examination, rather than a physiological one, that was consistent with Nurse Johnson's belief Mr. Crowson was suffering from psychological issues caused by the ingestion of illicit drugs or alcohol. Further, nothing in the record or the district court's opinion suggests PA Worlton—if presented with clear signs of medical distress—would have limited the examination of Mr. Crowson to psychological issues. Indeed, as the health services administrator for the Jail, PA Worlton could refer Mr. Crowson to Dr. LaRowe as necessary. And, unlike Dr. LaRowe, PA Worlton spent much of his time at the Jail.

In his gatekeeping role, Nurse Johnson was required to inform medical staff who could diagnose and treat a pretrial detainee exhibiting concerning symptoms. He attempted to do so by requesting a psychological evaluation of Mr. Crowson, making notations in Mr. Crowson's file, and having discussions with PA Worlton about Mr. Crowson's condition.[8]

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[8] The district court's statement that PA Worlton "never received Nurse Johnson's request for a psychological examination," App., Vol. I at 206, does not take into account PA Worlton's deposition

It is true that Nurse Johnson could have done more. He could have ensured that the referral reached PA Worlton, communicated the severity of Mr. Crowson's condition, or contacted Dr. LaRowe immediately. But Nurse Johnson did not "deny [Mr. Crowson] access to medical personnel capable of evaluating the need for treatment." *Sealock, 218 F.3d at 1211*. He left a notation in Mr. Crowson's file regarding the referral to PA Worlton, who, as the health services administrator, was not bound by Nurse Johnson's presumption that the examination should focus on psychological issues.

Because Nurse Johnson did not "completely refuse[] to fulfill [his] duty as gatekeeper," and instead, referred the "prisoner to a physician assistant for medical treatment," *Mata v. Saiz, 427 F.3d 745, 758 (10th Cir. 2005)*, he was not deliberately indifferent to his gatekeeper role. *Id.* Nurse Johnson's attempted method of referral may have been negligent, but it was not deliberately indifferent. *See Farmer, 511 U.S. at 835* ("[D]eliberate indifference describes a state of mind more blameworthy than negligence.").

ii. June 28 referral to Dr. LaRowe

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testimony that Nurse Johnson told PA Worlton he was "concerned that [Mr. Crowson] had gotten involved in some drugs or homemade alcohol on the block or something and he asked me to take a look at him," App., Vol. II at 482. On appeal, Mr. Crowson does not ask us to ignore that testimony, but rather argues it is irrelevant because it related to Mr. Crowson's mental health rather than physical health, an argument we reject *supra*. However, the electronic referral sufficed to fulfill Nurse Johnson's duty, even if negligently made; accordingly, we need not determine whether the district court's findings of fact were blatantly contradicted by the record.

Mr. Crowson next claims he had been in custody too long still to be suffering from withdrawal related to pre-incarceration drug use, and Nurse Johnson's failure to inform Dr. LaRowe on June 28 of how long Mr. Crowson had been in custody thus constitutes deliberate indifference. Based on our decision in *Sealock*, we disagree. There, the plaintiff was incarcerated and experiencing numerous medical symptoms. *Sealock, 218 F.3d at 1208*. After repeated requests, he was moved to the infirmary where he told the nurse "he had chest pain and couldn't breathe." *Id.* The nurse informed the plaintiff "that he had the flu and that there was nothing she could do for him until the physician's assistant arrived at 8:00 a.m." *Id.* Whether the nurse informed the PA that the plaintiff was experiencing chest pains was a disputed fact—the nurse testified she had, the PA testified she had not. *Id. at 1212*. According to the PA, had he been informed of the chest pains, he would have called an ambulance to take the plaintiff to the emergency room. *Id. at 1208*. Instead the PA prescribed medication and the plaintiff was not treated for his actual condition—a heart attack—until the next day. *Id.* We affirmed the district court's grant of summary judgment to the nurse, reasoning, "[a]t worst," the nurse "misdiagnosed" the inmate and failed to pass on information to the PA about the inmate's chest pain. *Id. at 1211*. Although the nurse omitted this critical symptom, we concluded it did not demonstrate that she behaved with deliberate indifference. *See id.*

The same is true here. On June 28, Nurse Johnson did "alert Dr. LaRowe to Mr. Crowson's condition." App., Vol. I at 213. Via that telephone call, Nurse Johnson fulfilled his gatekeeping role "by communicating the inmate's symptoms to a higher-up." *Burke v.*

Regalado, 935 F.3d 960, 993 (10th Cir. 2019). To be sure, Nurse Johnson could have volunteered information about the length of Mr. Crowson's detention that might have assisted Dr. LaRowe in reaching a diagnosis. As in *Sealock*, however, Nurse Johnson did not act with deliberate indifference by failing to do so. At worst, Nurse Johnson incorrectly concluded Mr. Crowson was suffering withdrawal, based on an assumption that Mr. Crowson had obtained an illicit substance while incarcerated, and Nurse Johnson then negligently failed to pass along information concerning the length of Mr. Crowson's incarceration.

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In summary, Nurse Johnson did not violate Mr. Crowson's *Fourteenth Amendment* rights on June 25 or June 28. The referral to PA Worlton fulfilled Nurse Johnson's gatekeeping function by passing Mr. Crowson to the health services administrator who was capable of making a further referral. Likewise, Nurse Johnson was not deliberately indifferent to Mr. Crowson's medical needs on June 28, despite his failure to notify Dr. LaRowe of the length of Mr. Crowson's detention. We therefore reverse the district court's denial of qualified immunity to Nurse Johnson.

b. Dr. LaRowe

Mr. Crowson contends that, by failing to obtain a blood test, Dr. LaRowe exhibited deliberate indifference to Mr. Crowson's serious medical condition. For purposes of this analysis, we assume without deciding that Mr. Crowson has satisfied the first requirement to overcome a claim of qualified immunity: violation of Mr. Crowson's constitutional

right. We therefore proceed directly to the second prong of the qualified immunity analysis: whether the violation was clearly established.[9] *See Pearson, 555 U.S at 236* (holding courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

The district court relied on our decision in *Mata* to conclude it was clearly established that Dr. LaRowe's failure to complete the blood test violated Mr.

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[9] Mr. Crowson asserts that Dr. LaRowe is a private contractor who is not entitled to assert a defense of qualified immunity under *Richardson v. McKnight, 521 U.S. 399, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997)*. Although Mr. Crowson concedes he did not raise this argument before the district court, he requests we consider it as an argument for affirmance on alternate grounds. Not only did Mr. Crowson fail to raise this argument before the district court, his briefing on appeal treats it only perfunctorily. The entirety of his legal argument relies on *Richardson* and consists of one sentence: "[T]he 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.'" Appellee Br. at 38 (quoting *Richardson, 521 U.S. at 412*). Mr. Crowson's one-sentence argument not only overlooks the limited nature of the Supreme Court's holding in *Richardson*, but also does not address the rule outlined in *Richardson* and reiterated in *Filarsky v. Delia, 566 U.S. 377, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012)*, for determining when a private party may assert a qualified immunity defense. Mr. Crowson also does not acknowledge that other circuits are split on whether private health care providers hired by the state may assert a qualified immunity defense. If we were to consider this argument, the result would be deepening a circuit split without the benefit of adequate adversarial briefing on the issue. We therefore decline to reach this argument. *See Elkins v. Comfort, 392 F.3d 1159, 1162 (10th Cir. 2004)*.

Crowson's constitutional rights. In doing so, the district court stated that "Dr. 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." App., Vol. I at 216-17 (alteration in original) (quoting *Mata, 427 F.3d at 758*). Dr. LaRowe argues he "is entitled to qualified immunity because no law characterized misdiagnosis of an inmate's substance withdrawal as a constitutional violation at the time he treated [Mr.] Crowson." LaRowe Reply at 19.

In the district court's view, Dr. LaRowe failed to assess or diagnose Mr. Crowson because Dr. LaRowe did not ensure complete diagnostic testing before prescribing medication for withdrawal. The district court reasoned that Dr. LaRowe "did not *mis*diagnose Mr. Crowson, but rather failed to conduct diagnostic tests that would have informed him of Mr. Crowson's medical needs" because, "despite vague and nonspecific symptoms, he prescribed medication based on his unverified suspicion that Mr. Crowson was suffering from withdrawals." App., Vol. I at 215-216. We do not reconsider the facts found by the district court, but we are not bound by the district court's conclusion that those facts amounted to a failure to diagnose rather than a misdiagnosis as a matter of law.

Although Dr. LaRowe failed to obtain complete diagnostic testing, he ultimately prescribed medication to treat withdrawal. Thus, Dr. LaRowe apparently determined Mr. Crowson's symptoms were caused by withdrawal, and prescribed medication to treat that condition. Although Dr. LaRowe's diagnosis would have been better informed by the blood test, we

cannot conclude that Dr. LaRowe failed to make a diagnosis at all.

The question presented, then, is whether it was clearly established that reaching a diagnosis without blood test results violated the plaintiff's rights where the plaintiff's symptoms were consistent with either withdrawal or encephalopathy. For law to be clearly established, "[t]he precedent must be *clear enough* that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Brown v. Flowers, 974 F.3d 1178, 1184 (10th Cir. 2020)* (alteration in original) (quoting *District of Columbia v. Wesby, 138 S. Ct. 577, 590, 199 L. Ed. 2d 453 (2018)*). "But even when such a precedent exists, subsequent [controlling] cases may conflict with or clarify the earlier precedent, rendering the law unclear." *Apodaca v. Raemisch, 864 F.3d 1071, 1076 (10th Cir. 2017)*. When "the question is within the realm of reasonable debate," the law is not clearly established. *Id. at 1078*.

The facts of this case fall between two lines of precedent. On the one hand, "[a] medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment[;] [a]t most it is medical malpractice." *Estelle v. Gamble, 429 U.S. 97, 107, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*. If he had never ordered it, then, Dr. LaRowe's failure to obtain a blood test would be at most medical malpractice. *See id.* Similarly, if Dr. LaRowe had treated Mr. Crowson for withdrawal based on vague, nonspecific symptoms, that alone would not be enough to prove deliberate indifference. *See Self v. Crum, 439 F.3d 1227, 1234 (10th Cir. 2006)* ("Where a doctor faces symptoms that could suggest either indigestion or stomach cancer,

and the doctor mistakenly treats indigestion, the doctor's culpable state of mind [i.e., deliberate indifference] is not established even if the doctor's medical judgment may have been objectively unreasonable.").

On the other hand, in *Mata* we concluded that a nurse who did a physical exam and performed an EKG that produced normal results before sending an inmate away was not deliberately indifferent because she "made a good faith effort to diagnose and treat" the inmate. *Mata, 427 F.3d at 760-61*. *Mata* establishes that a medical professional faced with symptoms of a serious medical condition must make some effort to assess and treat the patient. *See Quintana, 973 F.3d at 1033* ("[I]t [is] clearly established that when a detainee has obvious and serious medical needs, ignoring those needs necessarily violates the detainee's constitutional rights."). But *Mata* does not require a medical professional to perform any diagnostic testing, let alone any specific diagnostic testing, to avoid liability.

Here, Dr. LaRowe ordered diagnostic testing, was informed the testing could not be completed, and did not make further attempts to test. Instead, he began treatment for what he deemed the likely cause of Mr. Crowson's symptoms. Even where the blood test would have provided information that could have better informed the diagnosis, the parties do not cite, and we have not found, any decision from the Supreme Court or this court that would have put Dr. LaRowe on notice that his conduct violated Mr. Crowson's *Fourteenth Amendment* rights.

Mr. Crowson points to our decision in *Mata* and asserts that an official can be liable if he "declined to

confirm inferences of risk that he strongly suspected to exist." *Mata, 427 F.3d at 752* (quoting *Farmer, 511 U.S. at 843 n.8*). But there is nothing that suggests Dr. LaRowe strongly suspected Mr. Crowson was suffering from encephalopathy. To the contrary, Dr. LaRowe suspected Mr. Crowson was suffering from withdrawal, as is indicated by the medication he prescribed. And, like the inmate in *Estelle*, Mr. Crowson's symptoms were consistent with either diagnosis.

To conclude *Mata* put all reasonable doctors on notice that failing to obtain a test result violates an inmate's rights would place the notice at too high a level of generality. As discussed, *Mata* does not require testing and, consequently, Dr. LaRowe's conduct falls into a grey area created by the holdings of *Estelle* and *Self* on the one hand and *Mata* on the other. We therefore cannot conclude that every reasonable official would have known it was a violation of Mr. Crowson's constitutional rights to proceed with a diagnosis in the absence of blood test results. Rather, it fell within the realm of reasonable debate. *See Apodaca, 864 F.3d at 1078*.

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For purposes of our analysis, we assume Dr. LaRowe violated Mr. Crowson's *Fourteenth Amendment* rights by treating him for withdrawal without first obtaining the results from a previously ordered blood test. Because we have found no decisions from the Supreme Court or this court that clearly establish the unconstitutionality of such conduct, we conclude Dr. LaRowe is entitled to qualified immunity, and we reverse the district court's denial of summary judgment.

B. Institutional Defendant

Mr. Crowson also claims the County is liable because it "failed to enact adequate policies and properly train its nurses despite relying on the nurses to provide the bulk of medical care." Appellee Br. at 49. To state a claim against a municipal entity in this context, "plaintiffs must allege facts showing: (1) an official policy or custom, (2) causation, and (3) deliberate indifference." *Quintana, 973 F.3d at 1034*. Under our precedent, any of the following constitute an official policy:

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Waller v. City & County of Denver, 932 F.3d 1277, 1283 (10th Cir. 2019) (quotation marks omitted).

Mr. Crowson argued to the district court that the County was "deliberately indifferent to the risk of having nurses who were not trained and did not have policies to follow." App., Vol. I at 137. The district court treated this issue as encompassing both a

failure-to-train claim and a systemic-failure claim: "Mr. Crowson alleges that Washington County is liable for its failure to train Jail nurses—specifically, for its failure to promulgate written policies for Jail nurses to follow," and cited the proper standard for failure to train. App., Vol. I at 218. The district court found that the "County's healthcare policies at the time of Mr. Crowson's incarceration seem severely lacking." App., Vol. I at 218. It further noted that there were "no written policies in the record," and that the Jail's general practices for providing medical care to inmates had to be pieced together from the deposition testimony of various medical personnel. App., Vol. I at 218-19. The district court also considered Jail policy that required Dr. LaRowe to rely heavily on the Jail's deputies and nurses because although he "was responsible for diagnosing and treating inmates, [he] only visited the Jail one or two day[s] a week." App., Vol. I at 219. These deficiencies were compounded by the practices at the Jail. The district court observed:

> When an inmate was placed in a medical observation cell, Jail deputies observed inmates at least once every thirty minutes, and would notify a Jail nurse when "this guy is not acting right or this guy is having problems." (Dep. of Michael Johnson at 32:4-10 (ECF No. 76-7).) Jail nurses—who, by law, could not diagnose inmates—generally spent five to ten minutes with the inmate once every twelve-hour shift, to take the inmate's vital signs and conduct follow-up checks. If an inmate exhibited symptoms of a cognitive problem (as did Mr. Crowson), the nurse would inform Dr. LaRowe and PA Worlton, who, in addition to his role as

> the Jail's health services administrator, handles mental health care.

App., Vol. I at 219.

The district court found that the Jail's practices left the nurses "largely to their own devices." App., Vol. I at 219. This was particularly true as to brain injuries because the "Jail has no guidelines or written policies" for assessing them. App., Vol. I at 219. While Dr. LaRowe did provide training for alcohol withdrawal, Nurse Johnson "could not remember a protocol or standards for assessing withdrawal symptoms," and PA Worlton testified the Jail did not have a written policy governing placement of inmates in observation cells for detox or evaluation of the inmate thereafter. App., Vol. I at 219. The district court also found it significant that Dr. LaRowe was unaware of any Jail policy for nurses to follow in determining when an inmate should be transported to the hospital. App., Vol. I at 219. From this evidence, the district court found: "Remarkably, it appears from the record that Washington County failed to promulgate written policies pertaining to the Jail's core healthcare functions." App., Vol. I at 220. And it further concluded that a reasonable jury could find that Mr. Crowson's injuries were "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." App., Vol. I at 220. The district court, therefore, considered the problems created both by the failure to train and by the failure to adopt written policies.

Before we reach the merits of Mr. Crowson's claims against the County, we must determine whether we

have jurisdiction to consider those claims in this interlocutory appeal. We have discretion to exercise pendent appellate jurisdiction over the County's appeal to the extent the issues it raises are "inextricably intertwined" with the district court's denial of qualified immunity to the individual defendants. *See* *Moore, 57 F.3d at 930* (quoting *Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)*. If resolution of the collateral qualified immunity appeal "*necessarily* resolves" the County's issues on appeal, then those otherwise nonappealable issues are "inextricably intertwined" with the appealable decision. *Id.* But "if our ruling on the merits of the collateral qualified immunity appeal [would] not resolve all of the remaining issues presented by the [County]," then we lack jurisdiction to consider the County's appeal. *Id.*

To place the analysis of our jurisdiction over the claims against the County in context, we pause to set forth the relevant legal background.

1. Legal Background

Mr. Crowson asserts two related claims against the County: (1) failure to train its nurses; and (2) reliance on policies and procedures that were deliberately indifferent to prisoners' medical needs. Only the first of these claims is inextricably intertwined with the claims of the individual defendants, as we shall now explain.

In *Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985)*, we addressed a claim for deliberate indifference against a municipality under circumstances like the present. There, the family of a pretrial detainee who died while housed in the Salt Lake County Jail sued

various officials and the county. *Id. at 305*. According to the plaintiffs, the detainee's death was the result of official policies and practices of the county that were deliberately indifferent to the serious medical needs of persons confined in the Salt Lake County Jail. *Id.* A panel of this court allowed the jury verdict against the county to stand despite the absence of individual liability as to any county employee. *Id.* The panel concluded that where the county's policy, or lack of policies, evinces deliberate indifference, the county can be liable even in the absence of individual liability by any county actor. *See id. at 306-07*. We explained: "Deliberate indifference to serious medical needs may be shown by proving there are such gross deficiencies in staffing, facilities, equipment, or procedures that the inmate is effectively denied access to adequate medical care." *Id. at 308*. And even where "the acts or omissions of no one employee may 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. at 310*.

There is some tension in our subsequent caselaw with respect to this conclusion in *Garcia*. In multiple cases we have made statements that suggest a claim against a municipality may never lie where none of the municipality's individual officers are liable under *§ 1983*. When examined more carefully, however, most of these decisions can be harmonized with the Supreme Court's and our prior decisions. Demarcating the precise dividing line in our precedent, moreover, demonstrates why our jurisdiction in this posture extends to only one of Mr. Crowson's theories of municipal liability.

To frame our prior decisions, it is important to begin with the Supreme Court's direction in *Collins v. City of Harker Heights* that "proper analysis requires us to separate two different issues when a *§ 1983* claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *503 U.S. 115, 120, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)*. The absence of an affirmative answer to either of these questions is fatal to a claim against the municipality.

With respect to the first question, a claim under *§ 1983* against either an individual actor or a municipality cannot survive a determination that there has been no constitutional violation. *Id. at 130* (affirming dismissal of action where none of plaintiff's allegations set forth a constitutional violation). In *Washington v. Unified Government of Wyandotte County*, for example, we acknowledged that "a municipality may be liable under *§ 1983* where the plaintiff identifies an unconstitutional policy that caused the claimed injury." *847 F.3d 1192, 1197 (10th Cir. 2017)*. However, once we concluded the plaintiff had failed to show any constitutional violation, we affirmed the district court's decision rejecting the claims against all defendants, including the county. *Id. at 1197-1203*; *see also Lindsey v. Hyler, 918 F.3d 1109, 1116-17 (10th Cir. 2019)* (rejecting plaintiffs' failure-to-train claim against municipality upon concluding there was no constitutional violation); *Jennings v. City of Stillwater, 383 F.3d 1199, 1205 n.1 (10th Cir. 2004)* (rejecting claims against city after affirming summary judgment for individual actors due to the lack of any constitutional violation); *Livsey v. Salt Lake County, 275 F.3d 952, 958 (10th Cir.*

2001) (rejecting claims against county because the individual officer had not violated constitutional right to privacy or substantive due process of surviving wife and children); *Trigalet v. City of Tulsa, 239 F.3d 1150, 1152, 1154-55 (10th Cir. 2001)* (rejecting claims against county for failure to train and failure to adopt appropriate policies where individual officers had not violated the constitutional rights of driver killed by suspect fleeing police).

We turn next to the second question identified in *Collins*: whether the municipality is responsible for the constitutional violation. Sometimes the municipality's failures are the driving force behind a constitutional violation by a specific municipal employee. A failure-to-train claim is an example of these types of *§ 1983* claims against municipalities.

In *Williams v. City & County of Denver*, we "emphasize[d] the distinction between cases in which a plaintiff seeks to hold a municipality liable for failing to train an employee who as a result acts unconstitutionally, and cases in which the city's failure is itself an unconstitutional denial of substantive due process." *99 F.3d 1009, 1019 (10th Cir. 1996)*, *reh'g en banc granted on other grounds, opinion vacated*, *140 F.3d 855 (10th Cir. 1997)*, *reh'g en banc sub nom. Williams v. Denver, 153 F.3d 730 (10th Cir. 1998)* (unpublished).[10] We explained that a

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[10] Although the opinion in *Williams* was vacated, it was not reversed by the en banc court. *See* ***153 F.3d 730 (10th Cir. 1998)*** (unpublished). Thus, its expressions on the merits may have at least persuasive value. *See* *Los Angeles County v. Davis, 440*

city may not be held liable for failure to train "when there has been no underlying constitutional violation by one of its employees." *99 F.3d at 1018*. By contrast, where the claim is premised upon a formally promulgated policy, well-settled custom or practice, or final decision by a policymaker, we held "the inquiry is whether the policy or custom itself is unconstitutional so as to impose liability on the city for its own unconstitutional conduct in implementing an unconstitutional policy." *Id.*

Although *Williams* has a complex subsequent history, nothing in that history casts doubt on the determination that a failure-to-train claim may not be maintained without a showing of a constitutional violation by the allegedly un-, under-, or improperly-trained officer. *See 99 F.3d at 1018*; *see also Myers v. Okla. Cnty. Bd. of Cnty. Comm'rs, 151 F.3d 1313, 1317 (10th Cir. 1998)* (stating that "failure[-]to[-]train claims . . . require[] a predicate showing that the officers did in fact" violate the decedent's rights). Thus, under *Williams*, our conclusion that the claim against Nurse Johnson fails on summary judgment

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U.S. 625, 646 n.10, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979) (Powell, J., dissenting) (explaining, in regard to a Ninth Circuit judgment vacated by the Supreme Court, that "the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law of the Ninth Circuit"); *cf. Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1133 (10th Cir. 2010)* (explaining that "since the district court's opinion[s] will remain 'on the books' even if vacated, albeit without any preclusive effect, future courts [and litigants] will be able to consult [their] reasoning" (alterations in original) (quoting *Nat'l Black Police Ass'n v. District of Columbia, 108 F.3d 346, 354, 323 U.S. App. D.C. 292 (D.C. Cir. 1997)*)).

necessarily also defeats the failure-to-train claim against the County, which is premised only upon the County's failure to train its nurses.

Where the claim against the municipality is not dependent upon the liability of any individual actor, however, our precedent is less clear. Recall that in *Garcia*, we held: "Deliberate indifference to serious medical needs may be shown by proving there are such gross deficiencies in staffing, facilities, equipment, or procedures that the inmate is effectively denied access to adequate medical care." *768 F.2d at 308*. More recently, however, we reached a contrary conclusion. *See Martinez v. Beggs, 563 F.3d 1082 (10th Cir. 2009)*.

In *Martinez*, an estate brought *§ 1983* claims against individual jailers and against the Sheriff acting in his official capacity for the county after a man died in police custody. *Id. at 1084*. The decedent's estate alleged the individual defendants were deliberately indifferent to the decedent's serious medical needs, resulting in a violation of his constitutional rights. *Id.* We affirmed the district court's summary judgment in favor of the individual defendants because there was no evidence they had subjective knowledge of the decedent's serious medical condition. *Id. at 1090-91*. And therefore, we held the Sheriff acting in his official capacity could not be "liable for the actions of the officers he trained and supervised" in the absence of a constitutional violation by any of his officers. *Id. at 1091*.

So far, then, *Martinez* tracks our precedent. But next, the panel considered the estate's claim that even "if no single individual county employee is found liable, the county may still be liable for a 'systemic injury' caused

by 'the interactive behavior of several government officials, each of whom may be acting in good faith.'" *Id. at 1092*. We rejected that claim, stating, "[t]o the extent this argument suggests that the county can be liable, even if no individual government actor is liable, it is precluded by our prior precedent." *Id.*

In support, we cited *Olsen v. Layton Hills Mall, 312 F.3d 1304 (10th Cir. 2002)*. Although *Olsen* did acknowledge that municipalities could not be held liable absent an underlying violation by their officers, *id. at 1317-18*, the claim asserted in that case was for failure to train rather than for a systemic lack of policies and procedures. *Compare Garcia, 768 F.2d at 310*. And in *Olsen*, we ultimately reversed the grant of summary judgment for the officer while affirming the grant of summary judgment for the city on a wholly different ground—that the plaintiff had not produced evidence of deliberate indifference on the city's part. *312 F.3d at 1312-13, 1317-19*.

In *Martinez*, however, we went beyond *Olsen* in holding that a *§ 1983* deliberate indifference claim against a municipality based on systemic failures cannot survive in the absence of a constitutional violation by at least one individual defendant. *563 F.3d at 1092*. That holding does not turn on whether the injury was caused by a constitutional violation for which the municipality was responsible, as mandated by *Collins*. *See 503 U.S. at 120*. Instead, it directs that no claim against the municipality can prevail in the absence of a liable individual.

We are unable to reconcile the holdings in *Martinez* and *Garcia*. However, *Garcia* is the earlier published decision, and "when faced with an intra-circuit conflict, a panel should follow earlier, settled

precedent over a subsequent deviation therefrom." *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996). This rule does not hold if our earlier precedent has been reconsidered. *See id.* But we have not overruled *Garcia*; to the contrary, we have relied on it recently. *See Quintana*, 973 F.3d at 1033-34 (marshaling *Garcia* to reject the district court's conclusion that a § 1983 claim premised on deficient medical intake protocol could not lie absent "a viable claim against an individual defendant," because it "does not square with circuit precedent holding that municipal liability under *Monell* may exist without individual liability"). Furthermore, we are not the only circuit to cite *Garcia* recently in the context of this theory of municipal liability. *See Griffith v. Franklin County*, 975 F.3d 554, 581-82 (6th Cir. 2020) (expressing willingness to entertain *Garcia*'s theory of municipal liability, but declining to decide the issue because plaintiff failed to establish a constitutional violation); *Barnett v. MacArthur*, 956 F.3d 1291, 1301-02 (11th Cir. 2020) (allowing § 1983 claim against county to proceed despite a jury finding that the individual officer did not violate the plaintiff's constitutional rights, while determining *Garcia*'s theory of municipal liability to be "not a controversial concept"), *petition for cert. filed sub nom Lemma v. Barnett*, No. 20-595; *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 604 & n.11 (9th Cir. 2019) (holding that city could be liable for deliberate indifference to safety of pretrial detainee even where no individual officer had violated a clearly established constitutional right).

We are also unconvinced that subsequent pronouncements from the Supreme Court permit us to depart from our published decision in *Garcia*. *See*

Haynes, 88 F.3d at 900 n.4. We decided *Garcia* in 1985. The following year, the Supreme Court held that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *City of Los Angeles v. Heller, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986)*. But in *City of Los Angeles v. Heller*, the issue was whether damages could be awarded "against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm." *Id.*

The subsequent development of our municipal liability caselaw confirms that *Heller* did not undermine *Garcia*. In *Apodaca v. Rio Arriba County Sheriff's Department*, we cited *Heller* in holding, "[w]hen there is no underlying constitutional violation by a county officer, there cannot be an action *for failing to train or supervise the officer*." *905 F.2d 1445, 1447 (10th Cir. 1990)* (emphasis added). Three years later, we stated this rule more broadly: "A municipality may not be held liable where there was no underlying constitutional violation by any of its officers." *Hinton v. City of Elwood, 997 F.2d 774, 782 (10th Cir. 1993)* (citing *Heller, 475 U.S. at 799*). But again, we made this statement in the context of the city's failure to train "regarding, or to adopt any written policies regulating, the use of force." *Id. at 777*. Relying on *Heller*, we explained that "where a municipality is 'sued only because [it was] thought legally responsible' for the actions of its officers, it is 'inconceivable' to hold the municipality liable if its officers inflict no constitutional harm, regardless of

whether the municipality's policies might have 'authorized' such harm." *Id. at 782* (alteration in original) (quoting *Heller, 475 U.S. at 799*). "As in *Heller*, Hinton's excessive force claim against the City of Elwood seeks to hold the city liable solely because of the actions of its individual officers." *Id.*

As previously discussed, in *Collins* the Supreme Court recognized a type of *§ 1983* claim against a municipality that may survive even in the absence of a constitutional violation by a municipal employee. *See 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261*. There, the widow of a municipal employee who died after entering a manhole to service a sewer line, sued the city, claiming the decedent "had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the city of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees." *Id. at 117*. The widow's constitutional claim was based on "the substantive component of the [Due Process] Clause that protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Id. at 125* (quoting *Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)*). The Court noted this claim fairly advanced two theories: "that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, or that the city's 'deliberate indifference' to [the decedent's] safety was arbitrary government action that must 'shock the conscience' of federal judges." *Id. at 126*. After rejecting the first theory as inconsistent with substantive due process precedent, the Court rejected the widow's second theory because

her claim was "analogous to a fairly typical state-law tort claim," *id. at 126-128*. As such, it did not meet the requirement of arbitrary government action that shocks the conscience. *Id.* Importantly, the analysis in *Collins* was not driven by the absence of a finding of liability with respect to any individual city employee.

We dissected the meaning of *Collins* for *§ 1983* municipal liability in *Williams. See 99 F.3d 1009*. There, an estate sued the City and County of Denver for the death of a motorist as a result of a collision with a police officer who sped through an intersection against the light and without using a siren. *Id. at 1012*. The estate brought a failure-to-train claim, as well as a substantive due process claim based solely on the city's own actions. *Id. at 1018*. "In light of *Collins*," a panel of this court held a municipality "may be liable for its own unconstitutional policy even if [the individual defendant] is ultimately exonerated," by drawing a "distinction between cases in which a plaintiff seeks to hold a municipality liable for failing to train an employee who as a result acts unconstitutionally, and cases in which the city's failure is itself an unconstitutional denial of substantive due process." *Id. at 1019*. We further held the standard for a substantive due process violation is whether the conduct was conscience-shocking; mere recklessness is insufficient. *Id. at 1015*.

The en banc court granted the municipal defendants' petition for rehearing to address: (1) the proper standard for determining whether the conduct of the officer violated the decedent's constitutional rights, (2) whether under that standard the constitutional determination should be made by a judge or a jury, and (3) whether the municipality could be found liable

"by its own conduct or policies in hiring and/or failing to train [the officer], even if the officer's conduct did not violate the constitutional rights of decedent." *Williams v. City & County of Denver, 140 F.3d 855, 855 (10th Cir. 1997)*.

The rehearing in *Williams* was subsequently abated pending the Supreme Court's decision in *County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)*, which directly considered whether the substantive due process analysis in *Williams* was correct. *Id. at 839-840* (citing *Williams* as part of the circuit split the case was accepted on certiorari to resolve). In *Lewis*, the Court explained it had "always been reluctant to expand the concept of substantive due process." *Id. at 842* (quoting *Collins, 503 U.S. at 125*). Thus, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Id.* (alteration in original) (quoting *Albright v. Oliver, 510 U.S. 266, 273, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)* (plurality opinion)). Where such explicit protection is not provided by another amendment, however, "the substantive component of the *Due Process Clause* is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Id. at 847* (quoting *Collins, 503 U.S. at 128*). Thus, the Court's decision in *Lewis* is consistent with the substantive due process standard we applied in *Williams*. *Id. at 839-40* (reversing a decision on the other side of a circuit split from *Williams*).

While the *Williams* rehearing was pending, the Supreme Court also decided *Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)*. There, the Court ruled that to hold a municipality liable under *§ 1983*, "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id. at 404*. In response to these intervening Supreme Court decisions, we vacated the district court's judgment in *Williams* and remanded for the district court to consider their effect. *Williams v. Denver, 153 F.3d 730, 1998 WL 380518, at *1 (10th Cir. 1998)* (unpublished).

We returned to the relevant question in *Trigalet v. City of Tulsa. See 239 F.3d 1150*. There, "we consider[ed] whether a municipality can be held liable for the actions of its employees if those actions do not constitute a violation of a plaintiff's constitutional rights." *Id. at 1154*. We held "even if it could be said that Tulsa's policies, training, and supervision were unconstitutional, the City cannot be held liable where, as here, the officers did not commit a constitutional violation." *Id. at 1155-56*.

Under *Trigalet*, there is no question that where the actions of a municipality's officers do not rise to the level of a constitutional violation and the claim against the municipality is based on it serving as the driving force behind those actions, liability cannot lie. But the question here, and in *Garcia*, is different: whether, even where no individual action by a single officer rises to a constitutional violation, a municipality may be held liable where the sum of

actions nonetheless violates the plaintiff's constitutional rights. *Garcia* answers that question in the affirmative. And the Supreme Court's subsequent decision in *Heller* does not cast doubt on *Garcia*; in *Heller* the theory of municipality liability was predicated on the actions of one officer who was determined not to have violated the plaintiff's constitutional rights.

Because *Garcia* is not undermined by a subsequent Supreme Court decision, and it also predates *Martinez*, *Garcia* is controlling here. *See Haynes, 88 F.3d at 900 n.4*.

Moreover, assuming the expansion of the *Collins* analysis outside the substantive due process context is appropriate, the reasoning of *Garcia* remains sound. A core principle of *Monell* liability is that municipal entities are liable for only their own actions and not vicariously liable for the actions of their employees. *See Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760, 770 (10th Cir. 2013)*. Because municipalities act through officers, ordinarily there will be a municipal violation only where an individual officer commits a constitutional violation. But, as in *Garcia*, sometimes the municipal policy devolves responsibility across multiple officers. In those situations, the policies may be unconstitutional precisely because they fail to ensure that any single officer is positioned to prevent the constitutional violation. Where the sum of multiple officers' actions taken pursuant to municipal policy results in a constitutional violation, the municipality may be directly liable. That is, the municipality may not escape liability by acting through twenty hands rather than two.

The general rule in *Trigalet* is that there must be a constitutional violation, not just an unconstitutional policy, for a municipality to be held liable. In most cases, this makes the question of whether a municipality is liable dependent on whether a specific municipal officer violated an individual's constitutional rights. But *Garcia* remains as a limited exception where the alleged violation occurred as a result of multiple officials' actions or inactions.

With this legal background in place, we now proceed to the question of whether our resolution of the claims against the individual defendants forecloses the County's liability. We conclude that it does with respect to the failure-to-train claim, but not as to the theory based on a systemic failure of medical policies and procedures. Accordingly, we reverse the district court's denial of summary judgment to the County on the failure-to-train claim, but we lack jurisdiction over the claim against the County based on its allegedly deficient policies and procedures.

2. Dr. LaRowe

Recall that we did not decide whether Dr. LaRowe violated Mr. Crowson's constitutional rights, instead concluding that even if we assume a violation, the right was not clearly established. Leaving the question of a constitutional violation by Dr. LaRowe unresolved does not impact our jurisdiction over the claims against the County on interlocutory appeal because Mr. Crowson's failure-to-train claim respects only the nurses employed at the Jail. Mr. Crowson does not allege the County failed to train Dr. LaRowe. And to the extent Mr. Crowson argues the County's policies constituted deliberate indifference to his rights, that claim does not depend upon an individual

employee (or contractor, in Dr. LaRowe's case) having independently violated his rights. Accordingly, neither of the two claims against the County are inextricably intertwined with the claim against Dr. LaRowe.

3. Nurse Johnson

We have concluded Nurse Johnson did not violate Mr. Crowson's constitutional rights. As a result, we have pendent appellate jurisdiction only if we also conclude Mr. Crowson's claims against the County are dependent upon Nurse Johnson violating his constitutional rights.[11] *Id.* Put another way, if Mr. Crowson's claims against the County can succeed despite our holding that Nurse Johnson did not violate his rights, we lack jurisdiction over those claims. *See id.*

The County contends that to succeed on his municipal liability claims, Mr. Crowson must "show an underlying constitutional violation by at least one Washington County employee and that the underlying constitutional violation was directly caused by a county policy." County Br. at 48. But as previously explained, we agree with Mr. Crowson that even if we conclude Nurse Johnson and Dr. LaRowe "did not violate the Constitution individually, . . . their *combined* acts may be sufficient for *Monell* liability" such that Mr. Crowson still has a claim for municipal liability irrespective of whether Nurse Johnson violated his rights. Appellee Br. at 48. In a similar

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[11] We lack jurisdiction to consider the County's attacks on the other elements of either *Monell* claim. *See* *Moore v. City of Wynnewood, 57 F.3d 924, 930 (10th Cir. 1995)*.

vein, Mr. Crowson argues the claims against the County "depend[] on the actions of policymakers" and their alleged "*systemic* failures" which are distinct "from the claims against the individual defendants." Appellee Br. at 48-49.

Mr. Crowson does assert a failure-to-train claim that, for the reasons discussed above, is dependent upon a predicate violation by Nurse Johnson. This claim is therefore inextricably intertwined with our decision that Nurse Johnson did not violate Mr. Crowson's rights. Accordingly, we exercise jurisdiction over the failure-to-train claim and reverse. But Mr. Crowson also asserts a claim arising out of the County's systemic failure. For the reasons explained above, we lack jurisdiction over this claim.

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Our conclusion that Nurse Johnson did not violate Mr. Crowson's constitutional rights does not completely resolve Mr. Crowson's claims against the County. The absence of a constitutional violation by Nurse Johnson forecloses Mr. Crowson's failure-to-train claim. However, it does not resolve the broader claim that the County's policy of failing to properly train nurses and guards, combined with its policy of relying on a largely absentee physician, evidenced deliberate indifference to Mr. Crowson's serious medical condition. Because this claim is not inextricably intertwined with the claim against any individual defendant, we lack jurisdiction over it in this interlocutory appeal. We therefore dismiss the County's appeal with respect to the systemic failure claim, and we remand for proceedings consistent with this opinion. In doing so, we express no view as to the

merits of this claim. We simply decide we lack jurisdiction to consider it.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's denial of summary judgment to Nurse Johnson and Dr. LaRowe. We **REVERSE** the district court's denial of summary judgment to the County on the failure-to-train theory of liability, **DISMISS** the County's appeal for lack of appellate jurisdiction as to the systemic failure theory, and **REMAND** for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:15-CV-00880-TC

Martin Crowson, Plaintiff,

v.

Washington County, Utah, Cory C. Pulsipher, acting Sheriff of Washington County, Judd LaRowe, and Michael Johnson, Defendants.

[February 22, 2017]

ORDER ON MOTIONS TO DISMISS

Tena Campbell, United States District Judge.

Claiming that he was mistreated during his incarceration at Washington County Purgatory Correctional Facility (the Facility), Martin Crowson sued Washington County, the Facility, Dr. Judd Larowe, Sheriff Cory Pulsipher, the Washington County Sheriff's Department, and individual law-enforcement officers who worked at the Facility. Mr. Crowson alleged that the Defendants violated Utah state law as well as 42 U.S.C. § 1983. After some of the Defendants filed motions to dismiss, Mr. Crowson

agreed to the dismissal of his state-law claims. Mr. Crowson also agreed to the dismissal of his § 1983 claim against the Facility and the Washington County Sheriff's Department. But Mr.Crowson opposed the dismissal with prejudice of his § 1983 claim against Sheriff Pulsipher and Dr. Larowe. As explained below, the court GRANTS in part and DENIES in part the motions to dismiss.

BACKGROUND[1]

Mr. Crowson was arrested for violating the terms of his probation and was detained at the Facility. A few days before his arrest, Mr. Crowson had been hospitalized as the result of "serious medical needs." (Am. Compl. ¶ 15, ECF No 7.) While incarcerated at the Facility, the Facility's staff placed Mr. Crowson in solitary confinement even though he had begun "acting dazed and confused." (Id. ¶ 16). While in solitary confinement, Mr. Crowson "began to exhibit numerous symptoms commensurate with serious medical needs." (Id. ¶ 17.) These symptoms rendered Mr. Crowson unable to communicate effectively, which prevented him from explaining his need for emergency medical attention. The Facility's staff wrongly "assumed [Mr. Crowson] was under the influence of or detoxing from drugs or alcohol." (Id. ¶ 30.) Dr. Larowe then prescribed Mr. Crowson medications based on an incorrect diagnosis. The prescription medications worsened rather than alleviated Mr. Crowson's symptoms. When the

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[1] In ruling on a motion to dismiss, the court assumes as true all well-pleaded facts in a complaint. Gammons v. City & Cty. of Denver, 505 F. App'x 785, 786 (10th Cir. 2012). Accordingly, the court recites the facts in this case based on Mr. Crowson's allegations in the Amended Complaint.

Facility's staff realized that Mr. Crowson's condition had deteriorated, he was transported to a hospital where he received treatment for the next six days.

Mr. Crowson sued. In his Amended Complaint, Mr. Crowson alleges four causes of action against the Defendants, one based on federal law and three based on state law. His federal-law claim alleges that Defendants violated 42 U.S.C. § 1983 by subjecting him to cruel and unusual punishment, and his state-law claims allege negligence, negligent infliction of emotional distress, and a violation of the Utah Constitution.

Defendants filed motions to dismiss, asking the court to dismiss with prejudice Mr. Crowson's state-law claims against all defendants and Mr. Crowson's § 1983 claims against Sheriff Pulsipher, the Facility, Washington County Sheriff's Department, and Dr. Judd Larowe. (See Def. Judd Larowe M.D.'s Mot. to Dismiss, ECF No. 30; Mot. for J. on the Pleadings, ECF No. 38.) Mr. Crowson initially agreed to the dismissal of his state-law claims against all Defendants but asked that they be dismissed without prejudice. However, at a hearing before the court, Mr. Crowson indicated that he agreed to the dismissal with prejudice of his state-law claims against all Defendants and to the dismissal with prejudice of his § 1983 claim against the Facility and Washington County Sheriff's Department. (See Jan. 31, 2017, Hr'g 16–18.) Mr. Crowson also agreed to the dismissal of his § 1983 claim against Sheriff Pulsipher but asked that it be dismissed without prejudice. (Id.)

Now the parties dispute only the following issues: (1) whether Mr. Crowson's § 1983 claim against Sheriff Pulsipher should be dismissed with prejudice, (2)

whether the court should abstain from exercising jurisdiction over Mr. Crowson's § 1983 claim against Dr. Judd Larowe, and (3) whether attorney fees should be awarded.

DISCUSSION

I. Mr. Crowson's § 1983 Claim Against Sheriff Pulsipher Is Dismissed With Prejudice.

Sheriff Pulsipher asserts that the court should dismiss Mr. Crowson's § 1983 claim against him because he is entitled to qualified immunity. Mr. Crowson agrees that the court should dismiss the claim, but argues that it should be dismissed without prejudice.[2] When a defendant asserts "the affirmative defense of qualified immunity, the plaintiff initially bears a heavy two-part burden." Romero v. Bd. of Cty. Comm'rs of Cty. of Lake, State of Colo., 60 F.3d 702, 704 (10th Cir. 1995) (citation and internal quotation marks omitted). To meet this two-part burden, a 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." Id. (citation and internal quotation marks omitted). "[I]n order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the

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[2] Sheriff Pulsipher also asserts that the court should dismiss Mr. Crowson's § 1983 claim because it is not "plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). Because the court concludes that the § 1983 claim against Sheriff Pulsipher fails on qualified-immunity grounds, the court need not address this argument.

plaintiff maintains." Woodward v. City of Worland, 977 F.2d 1392, 1397 (10th Cir. 1992) (citation and internal quotation marks omitted).

Here, Mr. Crowson's Amended Complaint contains little reference to Sheriff Pulsipher. The Amended Complaint first alleges that Sheriff Pulsipher is "vicariously liable" for the actions of the Facility's staff and second alleges that he and other defendants had "policies in place designed to deprive inmates of their right to remain free of cruel and unusual punishment." (Am. Compl. ¶¶ 45–46, ECF No 7.) But Mr. Crowson's first allegation fails because "[a] supervisor is not liable under § 1983 unless an affirmative link exists between the [constitutional] deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise." Specht v. Jensen, 832 F.2d 1516, 1524 (10th Cir. 1987). As a result, "[v]icarious liability is inapplicable to . . . § 1983 suits." Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009). And Mr. Crowson's second allegation fails because it is too conclusory: it fails to name the alleged policies, describe their implementation, or define Sheriff Pulsipher's control, direction, or supervision over them. Also, Mr. Crowson points to no caselaw indicating that Sheriff Pulsipher violated any clearly established law.

Understanding the shortcomings of his § 1983 claim against Sheriff Pulsipher, Mr. Crowson agrees that the claim should be dismissed, but asks that the court dismiss it without prejudice. The court finds that such a result would prejudice Sheriff Pulsipher. Sheriff Pulsipher has now spent time and resources briefing and arguing his motion to dismiss. And Sheriff Pulsipher has shown that Mr. Crowson's § 1983 claim

is legally deficient. Consequently, the court will dismiss the claim with prejudice. See Bartlett v. Wells, 2009 WL 1146990, at *6 (D. Utah Apr. 28, 2009) (denying the plaintiff's request for dismissal without prejudice because the plaintiff's claim had "no merit"); see also Oliver v. Vasbinder, 2009 WL 4584102, at *2 (E.D. Mich. Dec. 2, 2009) (noting that where the defendant has filed and argued a motion to dismiss, he would suffer "plain legal prejudice" if the plaintiff's claims were dismissed without prejudice).

II. The Court Will Not Abstain from Addressing Mr. Crowson's § 1983 Claim Against Dr. Larowe.

Dr. Larowe argues that Mr. Crowson's § 1983 claim against him would frustrate the purpose of Utah's medical-malpractice statutory scheme and that, consequently, this court should abstain from exercising jurisdiction over it. Mr. Crowson responds that the court's exercise of jurisdiction over his § 1983 claim against Dr. Larowe would not offend Utah's medical-malpractice scheme.

In general, a federal court may "abstain in a case where a decision from the federal court may frustrate the purpose of a complex state administrative system." Oklahoma ex rel. Doak v. Acrisure Bus. Outsourcing Servs., LLC, 529 F. App'x 886, 896 (10th Cir. 2013). This is known as the Burford abstention doctrine. Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943). But the Burford abstention doctrine provides only a narrow discretionary exception to the exercise of federal jurisdiction:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District

> Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) (citation and internal quotation marks omitted).

Dr. Larowe argues that the court should abstain from exercising jurisdiction over Mr. Crowson's § 1983 claim because of the Utah Health Care Malpractice Act (UHCMA), a complex statutory scheme regarding medical- malpractice lawsuits. Utah enacted the UHCMA to address the rising number of suits for medical malpractice, the amount of judgments and settlements arising from medical-malpractice suits, the rising cost of medical-malpractice insurance for health-care providers, the rising cost of health care, and health-care providers' reluctance in providing certain services. Utah Code Ann. § 78B-3-402 (LexisNexis 2012). The UHCMA encourages parties to "expedite early evaluation and settlement of" their medical-malpractice claims. Id. § 78B-3-402(3). To fulfill its goals, the UHCMA requires medical-malpractice plaintiffs to take certain steps including "(1) giving notice to the health care provider ninety days before commencement of the action . . . ; (2) participating in a prelitigation panel review . . . ; and (3) filing the complaint within the abbreviated two-

year statute of limitations period." Carter v. Milford Valley Mem'l Hosp., 996 P.2d 1076, 1079 (Utah Ct. App. 2000).

Here, the parties have agreed to the dismissal of Mr. Crowson's state-law claims against Dr. Larowe. However, Mr. Crowson continues pursuing his § 1983 claim, alleging that Dr. Larowe violated his civil rights by prescribing him the wrong medications in the wrong dosages, failing "to take any reasonable steps" to provide "proper medical treatment" even after noticing his elevated heart rate, and failing to "follow-up on his significant cognitive and functional deficiencies and symptoms." (Am. Compl. ¶¶ 23–24, 28.)

Mr. Crowson's case is not the typical medical-malpractice case. Rather, it falls within a narrower class of cases in which an inmate in a correctional facility brings a § 1983 claim against an alleged state actor for medical mistreatment while in custody. For this reason, exercising jurisdiction here would not "frustrate the purpose" of the UHCMA. Doak, 529 F. App'x at 896. Dr. Larowe disagrees with this conclusion, arguing that the court's exercise of jurisdiction over Mr. Crowson's § 1983 claim "would have the effect of permitting any litigant to avoid the requirements of the statute by inappropriately pleading medical negligence causes of action as civil rights claims." (See Def. Judd Larowe M.D.'s Reply Mem. 2, ECF No. 44.) The court disagrees. Again, Mr. Crowson's § 1983 claim is not a typical medical-malpractice claim. Claims under § 1983 apply only "to persons who both deprive others of a right secured by the Constitution or laws of the United States and act under color of a state statute, ordinance, regulation,

custom or usage." Carey v. Cont'l Airlines, Inc., 823 F.2d 1402, 1404 (10th Cir. 1987). These claims are usually not available to the typical medical-malpractice litigant.

III. Mr. Crowson Must Pay Attorney Fees to Sheriff Pulsipher.

A Utah statute requires plaintiffs who sue "law enforcement officer[s] acting within the scope of [their] official duties" to submit a bond to guarantee payment of all costs, including "a reasonable attorney's fee" as a "condition precedent" to filing suit. Utah Code Ann. § 78B-3-104(1), (2) (LexisNexis 2012). The statute also provides that the "prevailing party shall recover from the losing party all costs and attorney fees allowed by the court." Id. § 78B-3-104(1), (3).

Mr. Crowson, without citing to supporting caselaw, argues that this statute violates the Utah Constitution. Mr. Crowson asserts that the statute precludes him, and other inmates, from access to the courts and denies him equal protection under the law. However, Mr. Crowson fails to allege that he was "unable to furnish the bond or that [he] offered to provide the bond and was rebuffed." Snyder v. Cook, 688 P.2d 496, 498 (Utah 1984). Moreover, Mr. Crowson fails to establish how the provision providing for attorney fees to the prevailing party violates his equal protection.

At this point, the parties have agreed that all state-law claims should be dismissed against all parties and the court has determined that Mr. Crowson's§ 1983 claim against Sheriff Pulsipher fails as a matter of law. Consequently, Sheriff Pulsipher merits attorney

fees under Utah's statute as the prevailing party. However, because the case is ongoing, and several law-enforcement officers remain, the court defers an accounting and payment of attorney fees until this case is resolved in its entirety.

ORDER

As explained above, the court GRANTS in part and DENIES in part the motions to dismiss. (ECF No. 30; ECF No. 38.) Specifically, the court dismisses with prejudice all claims against Sheriff Pulsipher, the Facility, and Washington County Sheriff's Department. The court also dismisses with prejudice the state- law claims against all Defendants. But the court will continue exercising jurisdiction over Mr. Crowson's § 1983 claim against Dr. Larowe. And though Sheriff Pulsipher merits attorney fees, the court defers an accounting and payment of those fees until the case is completed.

DATED this 22nd day of February, 2017.

BY THE COURT:

TENA CAMPBELL

U.S. District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:15-CV-00880-TC

Martin Crowson, Plaintiff,

v.

Washington County, Utah, Cory C. Pulsipher, acting Sheriff of Washington County, Judd LaRowe, and Michael Johnson, Defendants.

[July 19, 2019]

ORDER AND MEMORANDUM DECISION

Tena Campbell, United States District Judge.

While an inmate at the Washington County Purgatory Correctional Facility, Plaintiff Martin Crowson began suffering from symptoms of toxic metabolic encephalopathy, a degenerative neurologic disorder caused by exposure to toxic substances. Rather give him medical care, medical staff wrongly assumed that he was withdrawing from drugs or alcohol and placed him in an observation cell for seven days without treatment. Mr. Crowson brings claims under *42 U.S.C. § 1983*, alleging that the lack of medical care violated the *Eight Amendment*'s ban on cruel and

unusual punishment, as applied to him as a pre-hearing detainee by the *Fourteenth Amendment*. The remaining Defendants in the case—Michael Johnson (a nurse), Dr. Judd LaRowe, and Washington County—have moved for summary judgment. For the reasons below, the court denies their motions in most respects.

BACKGROUND FACTS

This case arises from Mr. Crowson's stay in the Washington County Purgatory Correctional Facility (the Jail) from June 11, 2014, when he was booked for a parole violation, until July 1, 2014, when he was taken to the hospital for what would be diagnosed as metabolic encephalopathy.

On June 17, 2014, Mr. Crowson was placed in solitary confinement, known as the "A Block," because of a disciplinary charge. On the morning of June 25, while still in solitary confinement, Jail Deputy Brett Lyman noticed that Mr. Crowson was acting slow and lethargic. The deputy alerted Defendant Michael Johnson. As a registered nurse, Nurse Johnson could not formally diagnose and treat Mr. Crowson. His role was to assess inmates and communicate with medical staff who could make diagnoses—in this case, Jon Worlton, a physician assistant (PA), and Judd LaRowe, the Jail's physician.

Nurse Johnson evaluated Mr. Crowson that morning. He noted normal vital signs, but also memory loss: Mr. Crowson could not remember the kind of work he did before his arrest. Nurse Johnson instructed jail deputies to move Mr. Crowson to a medical observation cell, and entered a request in the medical

recordkeeping system for PA Worlton to conduct a psychological evaluation.

While being moved to the medical observation cell, another deputy, Fred Keil, noticed that Mr. Crowson appeared unusually confused. Deputy Keil performed a body cavity search on Mr. Crowson; when ordered to re-dress himself, Mr. Crowson first put on his pants, then put his underwear on over his pants.

Nurse Johnson checked Mr. Crowson again that afternoon. He observed that Mr. Crowson's pupils were dilated but reactive to light, and that Mr. Crowson appeared alert and oriented. He left the Jail at the end of his shift without conducting further physical or mental assessments, and without contacting Dr. LaRowe. PA Worlton never received Nurse Johnson's request for a psychological examination and, according to the Jail's medical recordkeeping system, no medical personnel checked on Mr. Crowson for the next two days.

Nurse Johnson returned to work on June 28 and visited Mr. Crowson in the early afternoon. Mr. Crowson seemed confused and disoriented and had elevated blood pressure. He gave one-word answers to Nurse Johnson's questions, and understood, but could not follow, an instruction to take a deep breath. After his visit, Nurse Johnson relayed his observations to Dr. LaRowe by telephone. Dr. LaRowe ordered that Mr. Crowson undergo a chest x-ray and a blood test. The blood test, known as a complete blood count, could have detected an acid-base imbalance in Mr. Crowson's blood, a symptom of encephalopathy.

Mr. Crowson never received the x-ray or the blood test. Nurse Johnson tried to draw Mr. Crowson's blood

on June 28, but couldn't because of scarring on Mr. Crowson's veins and because Mr. Crowson would not hold still. Nurse Johnson reported his unsuccessful attempt to Dr. LaRowe, who made no further attempts to diagnose Mr. Crowson.

On the morning of June 29, Nurse Johnson again took Mr. Crowson's vital signs and noted an elevated heart rate. He also observed noted in the medical recordkeeping system that Mr. Crowson was still acting dazed and confused, and was experiencing delirium tremens, a symptom of alcohol withdrawal. He again reported his observations to Dr. LaRowe, who prescribed Librium and Ativan—medicines used to treat substance withdrawal—and instructed Nurse Johnson to administer a dose of Ativan. An hour later, Nurse Johnson checked on Mr. Crowson, who was sleeping, and noted that his vital signs had returned to normal.

Nurse Johnson visited Mr. Crowson again that afternoon. He noted that Mr. Crowson was better able to verbalize his thoughts and that his vital signs remained stable. But Mr. Crowson again reported memory loss, telling Nurse Johnson that he could not remember the last five days. Nurse Johnson, who still assumed that that Mr. Crowson was suffering from substance withdrawal, told Mr. Crowson that he was in a medical observation cell, and that he would begin taking medication to help his condition.

The following day, Nurse Ryan Borrowman was assigned to the medical holding area. Nurse Borrowman first saw Mr. Crowson on July 1 and noted that his physical movements were delayed and that he struggled to focus and would lose his train of thought. As Nurse Borrowman recounted in his

declaration, "[d]ue to the severity of [Mr. Crowson's] symptoms and the length of time he had been in a medical holding cell, I immediately called Dr. LaRowe for immediate medical care." (Decl. of Ryan Borrowman ¶ 9 (ECF No. 67).) Dr. LaRowe ordered Nurse Borrowman to send Mr. Crowson to the hospital, and Mr. Crowson was transported to the Dixie Regional Medical Center.

The parties' summary judgment briefs allude to, but do not explain, Mr. Crowson's circumstances before and after his incarceration at the Jail. The amended complaint refers to a hospitalization at Dixie Regional Medical Center "a few weeks before being arrested and detained" at the Jail, and states cryptically that medical history "would have revealed to Facility staff that Crowson should not have been given any drug categorized as a benzodiazepine" (such as Librium). (Am. Compl. ¶ 37 (ECF No. 7).) The hospitalization appears to have been the result of a heroin overdose. (Dep. of Martin Crowson at 5:15-6:19, 49:19-22 (ECF No. 66-2) [hereinafter "Crowson Dep."].)

The parties also do not discuss the after-effects of Mr. Crowson's encephalopathy. According to the amended complaint, Mr. Crowson remained in the hospital until July 7, 2014, and continued to suffer from "residual effects of encephalopathy, liver disease, and other problems." (Am. Compl. ¶ 43.) He testified in his deposition that he spent months recovering at his mother's house in Hooper, Utah before returning to the Jail on September 7, 2014:

> And then 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.

(Crowson Dep. at 19:7-15.)

PROCEDURAL BACKGROUND

Mr. Crowson filed this case against Washington County, the Jail and Jail personnel (including Sheriff Pulsipher in his individual and official capacities), alleging negligence under state law, violations of the Utah Constitution, and violations of the *Eighth* and *Fourteenth Amendments*. A number of parties and claims have already been dismissed, both by court order and stipulation of the parties. Most recently, the court, at the December 19, 2019 hearing on the present motions, dismissed PA Worlton from the case because of Mr. Crowson's failure to serve him. Mr. Crowson's only remaining claims are his *§ 1983* claims against Washington County (including Sheriff Pulsipher in his official capacity), Nurse Johnson, and Dr. LaRowe.

These remaining Defendants have moved for summary judgment. Nurse Johnson and Dr. LaRowe argue that their care did not violate constitutional standards, and that they are, consequently, entitled to qualified immunity. Washington County[1] seeks

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[1] Sheriff Pulsipher only remains in this case in his official

summary judgment on the grounds that none of its employees committed an underlying constitutional violation, and that Mr. Crowson cannot show that a County policy or custom caused Mr. Crowson's injuries.

The Defendants also argue that Mr. Crowson's claims should be dismissed because he failed to comply with the Prison Litigation Reform Act, *42 U.S.C. § 1997e(a)*, which requires that prisoners exhaust all available administrative remedies before filing suit under *§ 1983*.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. "Judgment as a matter of law is appropriate when the nonmoving party has failed to make a sufficient showing on an essential element of his or her case with respect to which he or she has the burden of proof." *Koch v. City of Del City, 660 F.3d 1228, 1238 (10th Cir. 2011)* (quoting *Shero v. City of Grove, Okl., 510 F.3d 1196, 1200 (10th Cir.2007))*. When evaluating a motion for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party. Id.

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capacity, and "an official-capacity suit brought under *§ 1983* . . . is, in all respects other than name, to be treated as a suit against the entity." *Moss v. Kopp, 559 F.3d 1155, 1168 n.13 (10th Cir. 2009)*. Accordingly, and to avoid confusion about the manner in which he is being sued, the court will omit reference to Sheriff Pulsipher when discussing the liability of Washington County.

Nurse Johnson and Dr. LaRowe both raise the defense of qualified immunity, so the burden on summary judgment shifts somewhat. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)* (quoting *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*). It provides "immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)* (emphasis omitted). Though the court must still view the evidence in a light most favorable to Mr. Crowson, he bears the two-part burden of demonstrating (1) that Nurse Johnson and Dr. LaRowe violated his constitutional rights, and (2) that the law supporting the violations was clearly established when the alleged violations occurred. *Tenorio v. Pitzer, 802 F.3d 1160, 1164 (10th Cir. 2015)*.

ANALYSIS

Individual Defendants

The *Eight Amendment* imposes an obligation on the government "to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*. "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." Id. And sufficiently egregious failures—those reflecting "deliberate indifference to serious medical needs of prisoners"—violate the *Eight Amendment* and are actionable under *§ 1983*. Id. This

constitutional protection "applies to pretrial detainees through the *due process clause of the Fourteenth Amendment*." *Howard v. Dickerson, 34 F.3d 978, 980 (10th Cir. 1994)*.

The deliberate indifference test has two parts—one objective, the other subjective. First, "the deprivation alleged must be, objectively, 'sufficiently serious.'" *Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)* (quoting *Wilson v. Seiter, 501 U.S. 294, 298, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991))*. "[A] medical need is sufficiently serious 'if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Hunt v. Uphoff, 199 F.3d 1220, 1224 (10th Cir. 1999)* (quoting *Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir.1980))*.

The subjective component requires that a prison official "knows of and disregards an excessive risk to inmate health or safety." *Farmer, 511 U.S. at 837*. That is, "the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference"—a standard equivalent to criminal-law recklessness. Id.

I. Sufficiently Serious

Nurse Johnson and Dr. LaRowe argue that Mr. Crowson cannot show that his medical need was sufficiently serious because he "was not known to be suffering from a serious medical ailment by anybody," and "nobody noticed [that he] had a serious injury after being examined by multiple medical personnel."

(Cnty. Defs.' Mot. Summ. J. at 12 (ECF No. 66).) Their argument misses the mark.

The determination of whether a medical need is sufficiently serious should not "be made exclusively by the symptoms presented at the time the prison employee has contact with the prisoner." *Mata v. Saiz, 427 F.3d 745, 753 (10th Cir. 2005)*. Rather, the court must consider "the ultimate harm" as alleged by the plaintiff. *Id. at 754*.

In this case, Mr. Crowson suffered from metabolic encephalopathy, an undisputedly serious condition warranting immediate care. He suffered from debilitating aftereffects for months. A reasonable jury could find that his medical needs were sufficiently serious to satisfy the objective prong of the deliberate indifference test, even absent obvious symptoms or an accurate diagnosis.

II. Deliberate Indifference

The subjective prong of the deliberate indifference test asks whether Nurse Johnson and Dr. LaRowe were aware of a substantial risk of serious harm. "Whether a prison official has the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer, 511 U.S. at 842*. While actual knowledge would certainly suffice, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id.

A. Nurse Johnson

The Tenth Circuit recognizes two ways in which healthcare providers may be deliberately indifferent. "First, a medical professional may fail to treat a

serious medical condition properly." *Sealock v. Colorado, 218 F.3d 1205, 1211 (10th Cir. 2000)*. Second, a prison official may "prevent an inmate from receiving treatment or deny him access to medical personnel capable of evaluating the need for treatment." Id. In the Jail's healthcare scheme, Nurse Johnson acted as a "gatekeeper" for further medical care, implicating the second theory of liability.

Nurse Johnson did not know that Mr. Crowson was suffering from encephalopathy. Still, there is evidence that he was aware of the need for prompt medical care. The two deputies who interacted with Mr. Crowson on the morning of June 25 noticed alarming symptoms. Deputy Lyman, who summoned Nurse Johnson, observed Mr. Crowson acting with uncharacteristic lethargy. Deputy Keil recalled that Mr. Crowson was disoriented to the point that he could not properly dress himself.

Nurse Johnson himself noted that Mr. Crowson was "dazed and confused," and "unable to remember what kind of work he did prior to being arrested." (Medical Records at 28 (ECF No. 71) [hereinafter "Medical Records"].) He admitted in his declaration that, despite recording normal vital signs, he "was concerned [Mr. Crowson] may be suffering from some medical problem." (Decl. of Michael Johnson ¶ 11 (ECF No. 68).) But, despite his gatekeeper role, Nurse Johnson placed Mr. Crowson in an observation cell and left his shift without ensuring that Mr. Crowson would receive further care. He did not alert Dr. LaRowe, and PA Worlton never received Nurse Johnson's request for a mental health evaluation. According to medical records, Mr. Crowson did not

receive any follow-up evaluation or care from medical staff for the next two days.

When Nurse Johnson returned to work on June 28, Mr. Crowson's symptoms had persisted beyond the expected timeframe for substance withdrawal. Though Nurse Johnson did then alert Dr. LaRowe to Mr. Crowson's condition, 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. (See Dep. of Judd LaRowe at 44:1-17 (ECF No. 91-2).) Mr. Crowson is entitled to the inference that Nurse Johnson, by failing to provide even this basic patient history, again prevented Mr. Crowson from receiving an accurate diagnosis or appropriate treatment.

This is not to say that all of Nurse Johnson's conduct suggests deliberate indifference. When Nurse Johnson tried and failed to take Mr. Crowson's blood, he informed Dr. LaRowe—shifting the impetus to the doctor to order Mr. Crowson to the hospital for a blood draw. Under a theory of gatekeeper liability, Nurse Johnson satisfied his obligation to pass on key information to the treating physician. Nonetheless, a reasonable jury could conclude that Nurse Johnson's earlier inactions—the failures to seek medical care and provide Dr. LaRowe with a full accounting of Mr. Crowson's symptoms—amounted to deliberate indifference.

B. Dr. LaRowe

Dr. LaRowe never visited the Jail during Mr. Crowson's stay in the medical observation cell. Still, as Mr. Crowson's treating physician, he may be liable for his "fail[ure] to treat a medical condition properly."

Sealock, 218 F.3d at 1211. While Dr. LaRowe "has available the defense that he was merely negligent in diagnosing or treating the medical condition," id., there is sufficient evidence in the record from which a jury could conclude that he instead acted with deliberate indifference.

Nurse Johnson alerted Dr. LaRowe to Mr. Crowson's condition on June 28; according to that day's medical records, Mr. Crowson continued to appear confused and disoriented, gave one-word answers to questions, and had elevated blood pressure. Despite knowing of these symptoms, Dr. LaRowe made only minimal efforts to diagnose Mr. Crowson's condition. He ordered a blood test, an effective diagnostic tool. Yet after learning that Nurse Johnson could not perform the blood draw, he ended his inquiry and wrongly assumed that Mr. Crowson was experiencing drug withdrawals. Without an accurate diagnosis in hand, he prescribed a benzodiazepine drug that worsened Mr. Crowson's encephalopathy.

Dr. LaRowe argues that there is no evidence that he "was aware, drew any inferences, or strongly suspected that Plaintiff could be suffering from encephalopathy or any other serious condition." (LaRowe Reply in Supp. of Mot. Summ. J. at 13 (ECF No. 86).) Instead, he argues that "the undisputed facts show that [he] understood that Mr. Crowson exhibited nonspecific— or vague—symptoms, which could have been characterized any number of diagnoses, one of which being substance withdrawal—a common occurrence in the jail." (LaRowe Mot. Summ. J. at 7 (ECF No. 73).)

In support, Dr. LaRowe cites to Mata v. Saiz, a case in which an inmate suffered a heart attack. A nurse in

that case, Donna Quintana, performed an EKG test on the inmate after the inmate reported chest pain, but the test produced normal results. Trusting the test results, she released the inmate from the infirmary with instructions to return if the pain worsened. The panel found that Nurse Quintana had not acted with deliberate indifference because she subjectively believed that the inmate was not suffering a heart attack, and "made a good faith effort to diagnose to diagnose and treat [the plaintiff's] medical condition." *Mata, 427 F.3d at 760-61*.

Unlike Nurse Quintana, 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 misdiagnose Mr. Crowson, but rather failed to conduct diagnostic tests that would have informed him of Mr. Crowson's medical needs. A reasonable jury could find that Dr. LaRowe's failure to seek an accurate diagnosis amounted to deliberate indifference.

III. Qualified Immunity

As discussed above, Mr. Crowson has presented sufficient evidence from which a reasonable jury could find that Nurse Johnson and Dr. LaRowe acted with deliberate indifference. But because Nurse Johnson and Dr. LaRowe raise the defense of qualified immunity, the court must consider whether the alleged constitutional violations were clearly established at the time they occurred—that is,

"whether 'the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Estate of Booker v. Gomez, 745 F.3d 405, 411 (10th Cir. 2014)* (quoting *Ashcroft v. al-Kidd, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)*). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Id. at 427* (quoting *Fogarty v. Gallegos, 523 F.3d 1147, 1161 (10th Cir. 2008)*).

As the Tenth Circuit has recognized, "there is little doubt that deliberate indifference to an inmate's serious medical need is a clearly established constitutional right." *Mata, 427 F.3d at 749*. Further, Tenth Circuit law makes clear that the particular conduct in this case could amount to a constitutional violation. Nurse 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." *Sealock, 218 F.3d at 1211*. Dr. 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. *Mata, 427 F.3d at 758*. Neither Nurse Johnson nor Dr. LaRowe are entitled to qualified immunity.

Washington County

Mr. Crowson also seeks to hold Washington County liable under *§ 1983*. Local governments can be held

liable for constitutional violations, but not simply for the unconstitutional acts of their employees. *Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*. Rather, a plaintiff "must show 1) the existence of a municipal policy or custom, and 2) that there is a direct causal link between the policy or custom and the injury alleged." *Bryson v. City of Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010)* (quoting *Hinton v. City of Elwood, 997 F.2d 774, 782 (10th Cir.1993))*. "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson, 563 U.S. 51, 61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011)*.

A plaintiff must also "demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 407, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)*. Importantly, the deliberate indifference standard used to determine municipal liability differs from the deliberate indifference standard used to determine individual liability. With individual liability, "deliberate indifference is a subjective standard requiring actual knowledge of a risk by the official." *Barney v. Pulsipher, 143 F.3d 1299, 1308 n.5 (10th Cir. 1998)*. But here, "[i]n the municipal liability context, deliberate indifference is an objective standard which is satisfied if the risk is so obvious that the official should have known of it." Id.

Mr. Crowson alleges that Washington County is liable for its failure to train Jail nurses—specifically, for its

failure to promulgate written policies for Jail nurses to follow. To prevail on such a failure-to-train theory, a plaintiff must typically show "a pattern of tortious conduct by inadequately trained employees." *Brown, 520 U.S. at 407-08*. The "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." *Id. at 407* (quoting *City of Canton, Ohio v. Harris, 489 U.S. 378, 390 n.10, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)*).

Mr. Crowson has not alleged—or proffered evidence to show—a pattern of constitutional violations. But "in a narrow range of circumstances," a pattern of violations may not be necessary to establish liability. *Id. at 409*. Instead, a single violation "may be a highly predictable consequence of a failure to equip [municipal employees] with specific tools to handle recurring situations." Id. "The high degree of predictability may also support an inference of causation—that the municipality's indifference led directly to the very consequence that was so predictable." *Id. at 409-10*.

Based on the evidence submitted by the parties, the County's healthcare policies at the time of Mr. Crowson's incarceration seem severely lacking. There are no written policies in the record. Instead, the County describes the Jail's general customs and practices for providing medical care to inmates using the deposition testimony of various medical

personnel.[2] Dr. LaRowe was responsible for diagnosing and treating inmates, but only visited the Jail one or two day a week, for two to three hours at a time. He relied heavily on the Jail's deputies and nurses. When an inmate was placed in a medical observation cell, Jail deputies observed inmates at least once every thirty minutes, and would notify a Jail nurse when "this guy is not acting right or this guy is having problems." (Dep. of Michael Johnson at 32:4-10 (ECF No. 76-7).) Jail nurses—who, by law, could not diagnose inmates—generally spent five to ten minutes with the inmate once every twelve-hour shift, to take the inmate's vital signs and conduct follow-up checks. If an inmate exhibited symptoms of a cognitive problem (as did Mr. Crowson), the nurse would inform Dr. LaRowe and PA Worlton, who, in addition to his role as the Jail's health services administrator, handles mental health care.

Within this framework, nurses were left largely to their own devices. Nurse Johnson testified that the Jail has no guidelines or written policies for assessing brain injuries, such as the type suffered by Mr. Crowson. He testified that Dr. LaRowe provided training for alcohol withdrawal, but that he could not remember a protocol or standards for assessing withdrawal symptoms (the parties have not cited to a written policy in the record). PA Worlton testified that the Jail does not have a written policy or procedure for nurses to follow when placing an inmate in an

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[2] After the hearing on the present motions, Nurse Johnson and Washington County filed a motion (ECF No. 91) to supplement the record with additional pages of deposition testimony. Mr. Crowson has not filed an opposition, and court will grant the motion.

observation cell to detox, or a written protocol for evaluating inmates once in detox. Additionally, Dr. LaRowe testified that the Jail had no set policy to determine when an inmate should be transported to the hospital. Such a decision was usually based on a discussion between Dr. LaRowe and the nurses. Remarkably, it appears from the record that Washington County failed to promulgate written policies pertaining to the Jail's core healthcare functions.

A reasonable factfinder could conclude that these policy deficiencies caused Mr. Crowson's injury. Mr. Crowson required immediate hospitalization on June 25, but instead spent days in a medical observation cell with only intermittent medical attention. Later, the Jail's medical staff treated Mr. Crowson as if he were withdrawing from drugs or alcohol, and without a diagnosis in hand. The drug protocol for withdrawal may have worsened Mr. Crowson's actual condition. This 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.[3] In light of these

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[3] As an additional basis for county liability, Mr. Crowson challenges County's failure to provide access to medical treatment to inmates in solitary confinement. But Mr. Crowson has not presented any evidence that he suffered symptoms of encephalopathy before June 25, when Deputy Lyman observed him acting strangely and summoned Nurse Johnson. Without such evidence, a factfinder cannot infer that a County policy or custom concerning solitary confinement actually caused Mr. Crowson's injury. Washington County is entitled to summary judgment on this theory of liability.

policy deficiencies, the County is not entitled to summary judgment.

Prison Litigation Reform Act

As a final matter, the Defendants contend that Mr. Crowson has not complied with the Prison Litigation Reform Act (PLRA), which states that "[n]o action shall be brought with respect to prison conditions under *section 1983* of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." *42 U.S.C. § 1997e(a)*. But the court cannot resolve this issue based on the present record.

Though the PLRA requires exhaustion, "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007)*. The court must evaluate the precise grievance procedures in place at the time of the inmate's detention, see *Cantwell v. Sterling, 788 F.3d 507, 509 (5th Cir. 2015)*, and consider whether the procedures were available to the inmate—that is, "'capable of use' to obtain 'some relief for the action complained of.'" *Ross v. Blake, 136 S. Ct. 1850, 1859, 195 L. Ed. 2d 117 (2016)* (quoting *Booth v. Churner, 532 U.S. 731, 738, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001))*.

Washington County has not provided its actual grievance procedures to the court. Instead, it cites to Sheriff Pulsipher's declaration, in which he gives a general overview of "a comprehensive grievance system" available to inmates:

> Any grievances or complaints are handled by the first line supervisor, and any appeals are

> handled by the next line supervisor (e.g. a complaint against a deputy would be handled by a sergeant and the appeal would be handled by a lieutenant), after two levels of appeals, an inmate has exhausted their administrative remedies and the issue would be ripe for a lawsuit. I would only receive an appeal for a grievance or complaint if it was made against a chief or undersheriff. Any policy issues related to prisoners, jail staff, or any other issues related to the jail are appealed to me. If an inmate appellant disagrees with my decision, he or she can file a lawsuit.
>
> The grievance policy was always available for inmates to file grievances and complaints to address any type of harm.

(Decl. of Cory Pulsipher ¶¶ 10-11 (ECF No. 69).)

From this bare description, the court cannot determine the process an inmate would use to lodge a grievance, or whether Mr. Crowson could have effectively used the procedure during his incarceration. The Defendants have not met their burden of showing that Mr. Crowson failed to exhaust his available remedies.

ORDER

For the foregoing reasons, the court orders as follows:

1. Nurse Johnson's and Washington County's Motion to Supplement the Record (ECF No. 91) is GRANTED;

2. Nurse Johnson's and Washington County's Motion for Summary Judgment (ECF No. 66) is GRANTED IN PART AND DENIED IN PART—Washington County is entitled to summary judgment on Mr.

Crowson's *§ 1983* claim based on its solitary confinement policy (see note 3, supra), but the Motion is otherwise denied;

3. Dr. LaRowe's Motion for Summary Judgment (ECF No. 73) is DENIED; and

4. Defendant Jon Worlton is hereby DISMISSED from this case for Mr. Crowson's failure to effect timely service.

DATED this 19th day of July, 2019.

BY THE COURT:

/s/ Tena Campbell

TENA CAMPBELL

U.S. District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-4118
D.C. Docket No. 2:15-CV-00880-CW-TC

MARTIN CROWSON,
PLAINTIFF-APPELLEE,

V.

WASHINGTON COUNTY STATE OF UTAH, ET AL.,
DEFENDANTS-APPELLANTS.

ORDER
[February 18, 2021]

Appeal from the United States District Court
for the District of Utah

Before MATHESON, BACHARACH, AND MCHUGH, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk