No. _____

In the Supreme Court of the United States

RICHARD SCHROETER,
Petitioner,
v.

JOAN KEDRA, in her own right and as personal representative of the estate of David Kedra,
Respondent.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Pennsylvania State Police firearms instructor was demonstrating a new handgun's "trigger reset" mechanism in a training class. Though well aware of standard gun safety rules and precautions, he did not have actual knowledge there was a bullet in the weapon at that time. He therefore pulled the trigger to explain the reset function, the gun discharged, and a Trooper in the class suffered a fatal wound.

The questions presented are:

1. May a state actor's recklessness or gross negligence form the basis for a constitutional violation under the Fourteenth Amendment's Substantive Due Process Clause, pursuant to 42 U.S.C. § 1983, when there was no intent to cause the harm that resulted?

2. If a state actor who acts with recklessness or gross negligence—but who lacks actual knowledge of the risk—can be held liable for a constitutional violation under the Fourteenth Amendment's Substantive Due Process Clause, is he entitled to qualified immunity since the right was not clearly established in the law at the time the act causing the harm occurred?

PARTIES TO THE PROCEEDING

Petitioner, Richard Schroeter, a Trooper with the Pennsylvania State Police, was an appellee in the Court of Appeals and, before that, a defendant in the District Court.

Respondents, Joan Kedra, in her own right, and as personal representative of the Estate of David Kedra, was the appellant in the Court of Appeals and the plaintiff in the District Court.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

This is a civil rights case, arising out of a tragic workplace accident, involving a state employee. The appellee, plaintiff in the district court, is Joan Kedra, the mother of Pennsylvania State Police Trooper David Kedra and representative of his estate. The appellant is Richard Schroeter, who at the relevant time was a corporal in the State Police. Kedra's Fourteenth Amendment claim was brought pursuant to 42 U.S.C. § 1983 and, thus, jurisdiction in the District Court was proper pursuant to 28 U.S.C. § 1331.

During a training exercise, then-Corporal Schroeter neglected to ensure that the weapon he was demonstrating was unloaded, and Trooper Kedra was

shot and killed. Mrs. Kedra seeks an award of damages for her son's death.

A. Factual Averments.

Given the procedural posture of this case, the facts set forth in the complaint must be taken as true, but any "bald assertions" and "legal conclusions" in that pleading need not be credited. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009).

On September 30, 2014, Trooper Kedra, a 26-year old member of the State Police, had been "ordered to attend a routine firearms and safety training session" (App. 86, ¶¶ 9-10). The purpose of that session was "to demonstrate to attendees, including David Kedra, the operation and use of a new-model, State Police issued handgun, a Sig Sauer" (*Id*., ¶ 13). Corporal Schroeter, a 20-year veteran of the State Police, was a trained firearms instructor (App. *Id*., ¶ 12). He was assigned to conduct the training session on September 30, 2014. *(Id.,* ¶11).

In general, Corporal Schroeter was well aware of "critical firearms safety rules" and corresponding precautions to be taken before and during training sessions (App. 86-87, ¶¶ 12-14). In fact, at some point before September 30, 2014, he had acknowledged such rules and precautions in writing (App. 87, ¶ 14). On that day, however, Corporal Schroeter went forward with the scheduled training session without fully complying with all relevant rules and precautions (App. 87, ¶ 15).

In that session, one of Corporal Schroeter's responsibilities was to demonstrate the Sig Sauer's "trigger reset" feature (App. 88, ¶ 16). Unaware that

there was a bullet in the gun's chamber – because he had not taken all the precautions he was supposed to take – Corporal Schroeter put his finger on the trigger, raised the firearm, pointed it toward Trooper Kedra, and pulled the trigger, thereby discharging the gun (*Id*., ¶¶ 16-18). As a result, Trooper Kedra received a "massive, ultimately mortal wound" (*Id*., ¶ 18). He was airlifted to a hospital and received emergency treatment, but he died several hours after the incident (*Id*., ¶ 19). Corporal Schroeter later pled guilty to "reckless endangerment of another person" and voluntarily retired from the State Police (*Id*., ¶ 21).

Corporal Schroeter's failure to comply with familiar gun safety rules on September 30, 2014, as outlined above, is admitted. There are no averments in the complaint regarding *why* this occurred. Relatedly, as the District Court later observed:

> "It is undisputed that Defendant did not know there was a bullet in the gun – or, at the least, Defendant claims he did not know there was a bullet in the gun, and counsel for Plaintiff has affirmatively stated (during the hearing on the Motion to Dismiss) that *Plaintiff could not and would not plead that defendant knew there was a bullet in the gun* (App. 77 (emphasis added)).

B. Lower Court Proceedings.

Mrs. Kedra, in her own right and as administratrix of Trooper Kedra's estate, filed a one-count civil rights complaint against Corporal Schroeter, based on "Schroeter's culpable conduct in violation of David Kedra's rights under the Fourteenth Amendment of the U.S. Constitution" (*See* App. 84-91). Corporal Schroeter

moved to dismiss on several grounds, including qualified immunity. After reviewing both sides' written submissions and conducting a "Motion Hearing", the District Court granted the motion to dismiss (App.71-83).

Analyzing the single claim before it, asserted under the "state-created danger" doctrine, the District Court concluded that Corporal Schroeter was entitled to qualified immunity. Although the Court recognized that a state-created danger claim has four elements (*see* App. 75), only the second – that the defendant acted "with a degree of culpability that shocks the conscience" – was addressed in detail (*see* App. 76-80).

The operative question in this case, according to the District Court, was whether Corporal Schroeter acted with "deliberate indifference" (App. 76-77). In light of *Sanford v. Stiles*, 456 F.3d 298 (3d Cir. 2006), the court reasoned that the legal standard by which such a determination must be made remains an "open question" (App.78). Thus, the District Court pointed out, it is unclear whether a state actor acts with deliberate indifference if that actor "proceed[s] despite a patently obvious risk that the actor should have recognized, but without actual knowledge that the risk existed" (*Id.*). If he did act with deliberate indifference, the state-created-danger culpability requirement would be met in this instance; if not, there would be no constitutional violation (*Id.*).

The District Court did not attempt to answer this thorny and unsettled legal question (App 79). Rather, the Court concluded, it was "evident that regardless of the answer… the right at issue is not clearly established by existing precedent" (*Id.*). On that basis,

Corporal Schroeter was entitled to qualified immunity (App. 80-83).

On the Plaintiff's appeal, the Third Circuit Court of Appeals reversed and remanded with respect to the District Court's finding that Corporal Schroeter was entitled to qualified immunity. The Court of Appeals analyzed the Plaintiff's claim and found that the Plaintiff had a cognizable substantive Due Process claim based on a state-created danger theory.

The Court of Appeals also held that Plaintiff's Complaint sufficiently stated a § 1983 claim alleging a violation of substantive due process under the state-created danger doctrine. Finally, the Court determined that the decedent's right not to be subjected, defenseless, to a police officer's demonstration of the use of deadly force in a manner contrary to all applicable safety protocols, was clearly established at the time of the alleged violation.

REASONS FOR GRANTING THE WRIT

A review of jurisprudence from this Court reflects that unintentional, accidental conduct by a state actor that is reckless and grossly negligent cannot form the basis for a constitutional violation under the Fourteenth Amendment's Substantive Due Process Clause, pursuant to 42 U.S.C. § 1983. It is conduct that is *deliberately intended* to injure in some way, but that is unjustifiable by any government interest, that rises to the conscience-shocking level needed for such claims. *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). *See also Daniels v. Williams,* 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986) ("Historically, this guarantee of

due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property" (emphasis in original)).

"The Due Process Clause of the Fourteenth Amendment was not intended to "transform every tort committed by a state actor into a constitutional violation." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989); *see also Lewis*, 523 U.S. at 845 ("We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government"). Consequently, only the most egregious official conduct can be said to be "arbitrary" in the constitutional sense.

Relying on *DeShaney*, several Circuits have recognized a state created danger theory for establishing a constitutional claim under § 1983. "At least eight sister circuits have recognized the existence of the state-created danger theory." *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006). This Court has yet to adopt the standard for culpability in this type of case. As such, it has not recognized any one version of the various models of the Circuits Courts' state created danger theory, or whether such a theory is applicable in this case.

As pertinent here, the precise framework for liability under the state–created danger theory varies among the circuits. For example, the Court of Appeals for the Third Circuit, in *Kneipp v. Tedder*, 95 F.3d 1199, (3d Cir. 1996), employed a four–part test to determine what state actions constitute a state–created danger. The circuit requires (1) foreseeable and fairly direct harm; (2) willful disregard of the harm to the plaintiff by the government actor; (3) a relationship

between the plaintiff and the defendants; and (4) use of the defendant's authority to create a danger that otherwise would not have existed.

The Court of Appeals for the Fifth Circuit, in *Johnson v. Dallas Independent School Dist.*, 38 F.3d 198, 95 Ed. Law Rep. 68 (5th Cir. 1994), *reh'g denied*, (Dec. 14, 1994), has indicated that to prevail under the theory in that circuit "the environment created by the state actors must be dangerous; they [the state actors] must know it is dangerous; and, …, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur."

The Court of Appeals for the Tenth Circuit, in *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), articulated a five–part test to determine if a defendant created a "special danger" to support liability under the theory. The court explained that the plaintiff must establish that (1) the plaintiff "was a member of a limited and specifically definable group"; (2) the conduct of the defendants "put [Plaintiff] … at substantial risk of serious, immediate and proximate harm"; (3) the risk was obvious or known; (4) the defendants acted recklessly in conscious disregard of the risk; and (5) such conduct, when viewed in total, is "conscience shocking."

Beyond the differing elements for a state created danger claim, the Circuit Courts have similarly failed to uniformly address whether a state actor's recklessness or gross negligence form the basis for a constitutional violation under the Fourteenth Amendment's Substantive Due Process Clause, pursuant to 42 U.S.C. § 1983.

The Ninth Circuit, for example, has developed a four-part test to determine whether an official affirmatively placed an individual in danger: "(1) whether any affirmative actions of the official placed the individual in danger he otherwise would not have faced; (2) whether the danger was known or obvious; and (3) whether the officer acted with deliberate indifference to that danger. *Kennedy* at 1062-64." In application of this test, the Court has determined that "deliberate indifference to a known, or so obvious as to imply knowledge of, danger, by a supervisor who participated in creating the danger, is enough." *Henry A. v. Wilden*, 678 F.3d 991, 1002 (9th Cir. 2012).

The Eleventh Circuit has been explicit in stating that "deliberate indifference" is insufficient to constitute a due-process violation in a non-custodial setting: "While deliberate indifference to the safety of government employees in the workplace may constitute a tort under state law, it does not rise to the level of a substantive due process violation under the federal Constitution." *White v. Lemacks*, 183 F.3d 1253, 1259 (11th Cir. 1999).

In sum, the various frameworks developed by the Circuit Courts of Appeals illustrate that there is no clearly established right and supports, at a minimum, the Court granting a finding of qualified immunity.

I. Although the actions of Corporal Schroeter were reckless and grossly negligent, they do not result in a constitutional violation under the Fourteenth Amendment's Substantive Due Process Clause, pursuant to 42 U.S.C. § 1983.

This Court has "expressly left open whether, in a context in which the individual has *not* been deprived of the ability to care for himself in the relevant respect, something less than intentional conduct, such as recklessness or gross negligence, can ever constitute a deprivation under the Due Process Clause." *Lewis*, 523 U.S. at 863 (Scalia, J., concurring in the judgment).

Negligently inflicted harm is categorically beneath the threshold of constitutional due process" while "conduct *intended* to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Lewis*, at 849. "Whether the point of the conscience shocking is reached when injuries are produced following from something more than negligence but less than intentional conduct, such as recklessness or gross negligence, is a matter for closer calls." *Id*.

This case is precisely one of those "close calls" envisioned by the Court in *Lewis* but not yet decided. It is undisputed that, despite his grossly negligent and/or reckless behavior, Corporal Schroeter did not know that there was a bullet in the handgun he was using to demonstrate the "trigger release" during the training and thus his actions were certainly not intentional; rather, they constitute a horrible accident.

When reviewing the allegations in the complaint, the Court will recognize that at some point prior to this firearms training session, Corporal Schroeter had acknowledged important "firearms safety rules" in writing, but on the day in question he neglected to fully comply with those precautions (App. 87, ¶¶ 14-15). Corporal Schroeter's failure to act was an accident, it was not a "deliberate or intentional" affirmative act.

Further, the complaint alleges that, "while discussing a 'trigger reset,'" Corporal Schroeter put his finger on the trigger of his gun, raised it, and pulled the trigger (App. 88, ¶¶ 16-17). That, of course, was an affirmative act and, tragically, it caused enormous harm, but only because, unbeknownst to Corporal Schroeter, there was a bullet in the chamber of the gun. To put it another way, Trooper Kedra's death flowed directly from Corporal Schroeter's antecedent *failure* to act.

As a firearms instructor, it was Corporal Schroeter's responsibility to teach a group of troopers about a new state-issued weapon, including its trigger reset mechanism, so for him to touch the trigger, raise the gun, and even pull the trigger was not, in and of itself, reckless or even negligent. The failure on Corporal Schroeter's part was his failure to follow cardinal firearm safety rules and precautions while demonstrating the trigger release. That lapse was reckless and grossly negligent, but a substantive due process claim cannot be premised on a state actor's recklessness or gross negligence alone; *there must be deliberate intent to harm*. *Lewis*, 523 U.S. at 855 (emphasis added).

To date, *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L.Ed.2d 811, (1994), sets forth the most definitive discussion of the concept of deliberate indifference.[1] Even though *Farmer* arose in the Eighth Amendment context, this Court considered and rejected an objective test for determining when an official may be found deliberately indifferent. *Id.*, 511 U.S. at 836-837, 839. Rather, the official must know of and disregard an excessive risk. *Ibid.* That means, in turn, that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Ibid.*

Under the *Farmer* standard, then, Corporal Schroeter's conduct cannot be seen as deliberately indifferent. As indicated, it is acknowledged that Corporal Schroeter, by virtue of his profession as a State Trooper and his training as a firearms instructor, had specialized instruction and knowledge of the cardinal rules of firearms safety. (App. X, ¶¶ 12-14). Nevertheless, the Plaintiff did not plead, and admits she cannot plead, that Corporal Schroeter knew the gun he was using to demonstrate the "trigger release" contained a bullet. If, as he believed, the gun was

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[1] While this Court has acknowledged that recklessness or gross negligence *may be* actionable in a substantive due process claim in some cases, it has only recognized it in *City of Revere v. Massachusetts General Hospital,* 463 U.S. 239 (1983) *holding* "the Due process clause requires responsible government or governmental agency to provide medical care to persons who have been injured while being apprehended by police, and such due process rights are at least as great as Eighth Amendment protections available to convicted prisoner."

empty, he did not "know of and disregard an excessive risk," *Farmer*, 522 U.S. at 837.

In other words, because Corporal Schroeter was not aware of the bullet, the complaint against him cannot be read to say that he was aware of facts from which he could infer, as he began demonstrating the trigger reset mechanism, "that a substantial risk of serious harm existed." *Ibid*. Nor can the complaint be read to say that Corporal Schroeter in fact drew that inference.

Knowledge of safety rules in general cannot equate to knowledge of a specific risk for a deliberate indifference evaluation for a substantive due process claim. If it did, then a constitutional claim would lie for every harm inflicted by the gross negligence of a state actor, such as, for example, a police officer who drives distracted while texting, or on the phone, or talking on the police radio.

Gross negligence and recklessness are cognizable under state tort law, and the Supreme Court has "rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 129 112 S. Ct. 1061, 1070, 117 L. Ed. 2d 261 (1992).[2]

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[2] There, a widow's claim was described as "analogous to a fairly typical state-law tort claim" and, as such, beyond the reach of the Due Process Clause. *Id.*, 503 U.S. at 128. This principle, the Court added, "applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship." *Id.* For that reason, public employees who are hurt, sickened, or even killed on the job may – like their private counterparts – seek

Moreover, *Collins* examined the constitutional claim of a municipal employee and held that the Due Process Clause does not guarantee municipal employees a workplace that is free of unreasonable risks of harm. *Id.*

Thus, the Court's denial of the constitutional violation in these circumstances, would not leave the Plaintiff without redress[3] for this incident. The Plaintiff can bring tort claims and/or wrongful death claim against the defendant alleging gross negligence.

II. Summary reversal is warranted since Corporal Schroeter was entitled to qualified immunity from the damages claim against him because the law on the applicable culpability standard was not clearly established.

"Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (*per curiam*) (quoting *Reichele v. Howards*, 132 S. Ct. 2088, 2093 (2012)).

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redress by suing in tort, or may seek compensation under applicable Workers' Compensation statutes, or perhaps both.

[3] Survivors of law enforcement officers killed in the line of duty have yet another layer of legislatively enacted protection. Such survivors are eligible for benefits under the federal Public Safety Officers' Benefits Act, 42 U.S.C. § 3796 *et seq.* and, in Pennsylvania, under the Emergency and Law Enforcement Personnel Death Benefits Act, 53 P.S. §§ 891-992.1.17

When qualified immunity is at issue, the right allegedly violated must not be defined at "a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), but rather "in light of the specific context of the case," *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). There need not be caselaw "directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741.

In the absence of binding decisions by this Court, a "'robust consensus of cases of persuasive authority' in the Courts of Appeals" may suffice for this purpose. *Taylor*, 135 S. Ct. at 2044 (quoting *City and Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1778 (2015)).

As discussed supra, this Court has never addressed whether gross negligence or recklessness can form the basis of a constitutional violation under the Fourteenth Amendment's Substantive Due Process Clause, pursuant to 42 U.S.C. § 1983. Likewise, there is no clear "'robust consensus of cases of persuasive authority' in the Courts of Appeals" that addresses this issue either. In fact, there is a conflict among the Circuits over whether gross negligence without actual knowledge of harm can constitute deliberate indifference that would shock the conscience.

Even beyond the silence of this Court on this dispositive issue and the lack of clear precedent from a consensus of the Circuits, Corporal Schroeter is shielded by qualified immunity due to uncertainty of the law in the Third Circuit itself. The seminal case on point in the Third Circuit Court of Appeals is *Sanford v. Stiles*, 456 F.3d 298, 311 (3d Cir. 2006). In *Sanford*, the Third Circuit Court of Appeals meticulously

summarized and synthesized numerous state-created danger precedents and other types of substantive due process cases, including the pivotal decision in *Lewis*. *Sanford* confirmed "that in *any* state created danger case, the state actor's behavior must *always* shock the conscience. But what is required to meet the conscience-shocking level will depend upon the circumstances of each case[.]" *Sanford,* 456 F.3d at 310 (emphasis by the Court). The Court "note[d] the *possibility* that deliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known." *Id.,* 456 F.3d at 309 (emphasis added). But the Court also said, "we leave to another day the question whether actual knowledge is required to meet the culpability requirement in state-created danger cases." *Id.*, 456 F.3d at 309 n.13.

At the time of the tragic accident that forms the basis of this case, that question was (and still is) unresolved. *See Benedict v. SW Pa. Human Servs.*, 98 F. Supp. 3d 809, 826 (W.D. Pa. 2015); *Customers Bank v. Municipality of Norristown*, 942 F. Supp.2d 534, 542 (E.D. Pa. 2013), *aff'd*, 563 Fed. Appx. 201 (3d Cir. 2014) (non-precedential). In summary, Corporal Schroeter can be liable only if deliberate indifference can exist *absent actual knowledg*e of a particular risk. The law on that point was not established at all, let alone clearly established, at the time of the tragic accident.

In the absence of clearly established law, proscribing the actions at issue in this matter, summary reversal of the Court of Appeals decision is justified.

CONCLUSION

For the foregoing reasons and in the interests of justice, this Honorable Court should grant the petition.

Respectfully submitted,

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