No. 18-684

IN THE

Supreme Court of the United States

PATTI STEVENS-RUCKER,
ADMINISTRATOR OF THE ESTATE OF JASON WHITE,
DECEASED,

Petitioner,

v.

SERGEANT JOHN FRENZ (#5141) AND
OFFICER DUSTIN MCKEE (#2611),

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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February 7, 2019

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REPLY BRIEF OF PETITIONER

I. RESPONDENTS CONCEDE THAT THE CIRCUITS ARE SPLIT OVER WHETHER A POLICE OFFICER EVER HAS A DUTY TO RENDER AID TO AN ARRESTEE.

Sergeant Frenz and Officer McKee[1] shot Jason White five times. After Officer McKee fired the last shot directly into Mr. White's chest, another officer handcuffed Mr. White and walked away. Officer McKee radioed for an ambulance. And while they waited *fifteen minutes* for it to arrive, Sergeant Frenz and Officer McKee, who are both trained first responders, stood over Mr. White with their guns drawn, watching as he was "gasping for air" with "blood pumping out of [his] chest." Neither officer tried to help Mr. White even though they "could clearly see he was dying." *See* Pet. at 10.

Of the four judges that have considered this case, two thought Sergeant Frenz and Officer McKee were not entitled to summary judgment on the claim that they violated Mr. White's Fourteenth Amendment right to medical care. Two thought the opposite. That these judges reached conflicting conclusions reflects the divide in the courts below. Respondents tacitly concede that the circuits are split. They

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[1] Respondents' opposition at one point says that Officer McKee is not a party to the proceedings in this Court, Opp'n at 1, and then at other points, that he is a party. *See, e.g.*, *id.* at 4. Ms. Stevens-Rucker maintains the denial of medical care claim against Officer McKee, and Office McKee is a party to this proceeding.

acknowledge that here, the Sixth Circuit, following the Ninth Circuit, adopted a bright line rule that officers are "not required to personally provide medical intervention" so long as they "act[] promptly in summoning medical assistance." Opp'n at 7. Yet Respondents do not, because they cannot, point to a single case from this Court that supports this rule. Respondents then admit that, rather than embracing a bright line rule, the Eighth and Tenth Circuits have held that sometimes an officer has a constitutional duty to personally provide aid. Opp'n at 7-8 & n.3. This split in authority, which potentially affects thousands (if not millions) of Americans each year in situations where their health and even lives are at stake, requires this Court's attention.

Respondents claim this conflict is not "sufficient," however, because the Sixth and Ninth Circuit cases involve officers "in the field," while the Eighth and Tenth Circuit cases involve officers at "detention centers." *Id.* at 6-7. But the courts of appeals did not draw this distinction, and this Court has never suggested that different standards apply depending on where an alleged constitutional violation occurs. In fact, in excessive force cases, this Court applies the same "objective reasonableness standard" to claims arising from the jail and the field. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474, (2015) (jail); *Graham v. Connor*, 490 U.S. 386, 388 (1989) (field).

Moreover, district courts have applied the Sixth and Ninth Circuits' bright line rule in cases arising from both the field and the jail. *See Henriquez v. City of Bell*, No. CV 14-196-GW(SSX), 2015 WL 13423888 (C.D. Cal. Sept. 10, 2015) (jail); *Tate v. Dunnigan*, No. 1:06CV169, 2007 WL 4353456 (M.D.N.C. Dec. 7, 2007) (jail); *Reyes ex rel. Reyes v. City of Fresno*, No. CV F 13-0418 LJO SKO, 2013 WL 2147023 (E.D. Cal. May 15, 2013) (field); *Stogner v. Sturdivant*, No. CIV.A. 10-125-JJB-CN, 2010 WL 4056217 (M.D. La. Oct. 14, 2010) (field).

And district courts have utilized the Eighth and Tenth Circuits' approach, which rejects the Sixth and Ninth Circuits' bright line rule, in cases arising from both the field and the jail. *See Petro v. Town of W. Warwick ex rel. Moore*, 889 F. Supp. 2d 292 (D.R.I. 2012) (field); *Ashworth v. Round Lake Beach Police Dep't*, No. 03 C 7011, 2005 WL 1785314 (N.D. Ill. July 21, 2005) (field); *Sparks v. Susquehanna County*, No. 3:05CV2274, 2009 WL 922489, at *10 (M.D. Pa. Apr. 3, 2009) (jail).

The question of whether police officers *necessarily* satisfy their due process obligations to arrestees in need of medical care by summoning aid has split the lower courts. This Court should resolve the conflict.

Respondents also do not dispute that the genesis of this confusion is the fact this Court has twice declined to define police officers' "due process obligations" to provide medical care to arrestees in their custody. *See City of Revere v. Mass. Gen. Hosp.*,

463 U.S. 239, 244 (1983); *City of Canton v. Harris*, 489 U.S. 378, 389 n.8 (1989). The *Revere* Court *did* say, however, that arrestees' due process rights "are at least as great as the Eighth Amendment protections available to a convicted prisoner." *Revere*, 463 U.S. at 244. And no reading of the Court's Eighth Amendment precedent supports the bright line rule that the Sixth Circuit, following the Ninth Circuit, adopted in this case.

The Court's failure to provide more specific guidance has also led to confusion in the lower courts beyond the circuit split implicated in this case. The circuits are split over what test even applies to Fourteenth Amendment denial of medical care claims. *See Estate of Vallina v. County of Teller Sheriff's Office*, No. 17-1361, 2018 WL 6331595, at *2 (10th Cir. Dec. 4, 2018) ("Circuits are split on whether *Kingsley* alters the standard for . . . inadequate medical care claims brought by pretrial detainees.").

After the Court held in *Kingsley* that there is no subjective element to a Fourteenth Amendment excessive force claim, 135 S. Ct. at 2476, the Second, Seventh, and Ninth Circuits have held there is also no subjective element to a Fourteenth Amendment denial of medical care claim. *See Vallina*, 2018 WL 6331595, at *2 (collecting cases). On the other hand, the Fifth, Eighth, and Eleventh Circuits have held that *Kingsley* does not affect Fourteenth Amendment denial of medical care claims, and thus still adhere to the constitutional floor established in *Revere*,

using the Eighth Amendment's deliberate indifference test, including its "subjective component." *Farmer v. Brennan*, 511 U.S. 825, 838 (1994); *see Vallina*, 2018 WL 6331595 at *2 (collecting cases).

In short, the conflict surrounding Fourteenth Amendment denial of medical care claims is deep, real, and recurring. This Court should grant certiorari, confirm that no bright line rule authorizes officers to ignore the needs of a dying arrestee so long as they summon aid, and finally define police officers' "due process obligations" to provide care to arrestees in their custody.

II. RESPONDENTS' OTHER ARGUMENTS GO BEYOND THE DECISION BELOW AND PROVIDE NO REASON TO DENY CERTIORARI.

Because Respondents cannot dispute that there is a conflict in authority, they resort to fact-based arguments that were not the basis for the ruling below. To be clear, the Sixth Circuit reversed the district court and found that Respondents did not violate Mr. White's constitutional right to medical care because the court of appeals held, *as a matter of law*, that police officers have no duty to "intervene personally." App. 26a. Respondents' argument in the alternative—that even if there are circumstances in which officers have a duty to "intervene personally," those circumstances are not present here, *see* Opp'n at 8-11—should thus be disregarded. Neither the district court nor the Sixth Circuit addressed this

argument, and this Court has reminded time and again that it does "not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); *see also Roberts v. Galen of Va., Inc.,* 525 U.S. 249, 253-254 (1999); *United States v. Bestfoods,* 524 U.S. 51, 72-73 (1998).

In any event, Respondents' arguments miss the mark. At the time of Mr. White's death, Sixth Circuit precedent clearly established that the Eighth Amendment deliberate indifference test applied to Fourteenth Amendment denial of medical care claims. *See Blackmore v. Kalamazoo County*, 390 F.3d 890, 895 (6th Cir. 2004) ("Whether a convicted prisoner or a pretrial detainee, deliberate indifference to one's need for medical attention suffices for a claim under § 1983"). Thus, the question the Sixth Circuit should have asked in this case is whether Respondents "knew of and disregarded a substantial risk of serious harm to [Mr. White's] health and safety." *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596, 603 (6th Cir. 2005) (quotation marks omitted) (holding police officers were not entitled to summary judgment on a Fourteenth Amendment denial of medical care claim when there was evidence that they did not "provide any medical care" to an arrestee in "significant physical distress").

The answer to this question is yes. Mr. White clearly needed medical care; the officers had shot him five times. Whether Respondents knew of and

disregarded the risk of harm to Mr. White's health and safety is also not seriously in dispute; they stood by and watched Mr. White bleed to death without trying to provide any aid despite being trained as first responders and knowing that providing aid is a critical part of their job as police officers. *See, e.g.*, ECF No. 83-4 at 38 (Dep. of Robert Parkey). Indeed, one Columbus City officer testified that their job was to "keep [Mr. White] alive." ECF No. 84-1 at 36 (Dep. of Joel Mefford). Instead, Respondents watched him die. On these facts, as the district court held and Judge Stranch argued in dissent, the denial of medical care claim should have gone to a jury. Respondents are wrong that "the practical outcome of this matter will remain the same" if this Court grants certiorari. Opp'n at 11.

Respondents try to skirt the fact that a jury could find that they were deliberately indifferent to Mr. White's serious medical needs by arguing any aid that they could have provided would have been "futile." Opp'n at 2-3. But the Sixth Circuit did not rely on this argument, and Sixth Circuit precedent is clear that the effect of an unconstitutional delay in providing medical care may be relevant to the amount of damages but not to the existence of a constitutional violation. *See Owensby*, 414 F.3d at 604. Further, Sergeant Frenz said in his sworn affidavit that he did not help Mr. White *not* because it would have been "futile," but because the paramedics were on the way. *See* ECF No. 79 (Aff. of John Frenz) ("Because I believed more thoroughly trained medics would be arriving quickly, I did not

believe it was necessary for me or any of the other [ ] officers on the scene to provide First Aid, CPR, or any other type of medical attention to the suspect."). Given this record, the "futility" of any aid and its relevance to this case must be addressed on remand.

Respondents also contend that a ruling in Ms. Stevens-Rucker's favor would require "new law." Opp'n at 9-10. Quite the opposite; the Sixth Circuit formulated "new law" when it crafted a bright line rule that was inconsistent with both this Court's precedent, and prior Sixth Circuit precedent, to deny Ms. Stevens-Rucker relief. Thirty years before Mr. White's death, this Court held that, "the due process rights of [an arrestee] . . . are at least as great as the Eighth Amendment protections available to a convicted prisoner." *Revere*, 463 U.S. at 244. That means that, under clearly established law, this case must go to a jury so long as a reasonable factfinder could conclude that Respondents "knew of and disregarded a substantial risk of serious harm to [Mr. White's] health and safety." *Owensby*, 414 F.3d at 603. Here, a jury could find that Respondents, who were trained first responders, failed to meet that minimum standard of care when they stood over Mr. White for fifteen minutes as he bled to death without making any effort to help.

The Court should grant review, and ultimately, reverse the Sixth Circuit's judgment.

Respectfully submitted,

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