No. 18-760

In The
Supreme Court of the United States

OBERIST LEE SAUNDERS,

Petitioner,

v.

WAYNE IVEY, SHERIFF OF BREVARD COUNTY,
In His Official Capacity;
SUSAN JETER, In Her Official Capacity;
JOHN C. WRIGHT, In His Individual Capacity; and
PATRICIA TILLEY, In Her Individual Capacity,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether certiorari review is foreclosed by Petitioner's failure to present in his brief in the circuit court the argument that *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) requires analysis of pretrial detainee conditions-of-confinement claims under an objective standard.

2. Whether certiorari review is inappropriate because Petitioner became *de jure* a convicted inmate and not a pretrial detainee as the result of his subsequent conviction and sentence that included time served, and thus the Eleventh Circuit's analysis of his conditions-of-confinement claims under an Eighth Amendment objective and subjective standard was correct.

3. Whether certiorari review is unjustified because Petitioner's argument as to the grant of qualified immunity is simply a generalized complaint that the Eleventh Circuit misapplied properly stated rules of law to the facts.

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STATEMENT OF THE CASE

It is important to note that Petitioner was ultimately convicted and received 671 days as credit for time served, which "retroactively" encompassed the time of his pretrial detention that is the subject of his constitutional claims. In their initial brief, Respondents requested that the Eleventh Circuit take judicial notice of this fact, and Petitioner did not object or disagree. Initial Brief of Appellants at 31, n.12, *Saunders v. Sheriff of Brevard County*, No. 16-17607 (11th Cir. March 7, 2017). The Eleventh Circuit did not expressly comment on the point, but all of the material analysis in the majority opinion was made under the Eighth Amendment, which is the appropriate standard for a convicted inmate.

REASONS FOR DENYING CERTIORARI

I.

THE *KINGSLEY* OBJECTIVE STANDARD ISSUE WAS NOT PRESSED OR PASSED ON BELOW

Petitioner did not argue in his Answer Brief in the circuit court that *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) required application of an objective standard to constitutional claims by pretrial detainees regarding conditions of confinement.

The general rule of the Court is that a grant of certiorari is precluded when the question presented was not "pressed or passed upon below." *Youakim v. Miller*,

425 U.S. 231, 234 (1976) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court"); *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below"); *Glover v. U.S.*, 531 U.S. 198, 205 (2001) ("[i]n the ordinary course we do not decide questions neither raised nor resolved below").

Petitioner raised the *Kingsley* argument in a petition for rehearing, but that does not avoid the rule that the argument must be timely "pressed." *Hoover v. Ronwin*, 466 U.S. 558 n.25 (1984) (raising issue for first time in response to motion for rehearing precludes consideration on certiorari).

Finally, Petitioner cannot avoid this rule on a theory that he tangentially raised the issue in his brief below by pointing out "tension" in Eleventh Circuit case law. (*See* Pet. p.11, n.2). In fact, Petitioner expressly abandoned any review of the issue in his brief below by confessing that "while it is an interesting academic question, it is not one that this court need resolve in this appeal." Initial Brief of Appellee at 40, n.9, *Saunders v. Sheriff of Brevard County*, No. 16-17607 (11th Cir. March 7, 2017). *See White v. Johnson*, 282 U.S. 367, 373 (1931) ("[n]either this Court nor the court below is authorized to answer academic questions"); *U.S. v. Williams*, 504 U.S. 36, 59 (1992) (explaining that "the adversary process provides the best method of arriving at correct decisions [and that] [r]ules of appellate practice generally require that an issue be

actually raised and deliberated by the parties if it is to be preserved").

The question of whether the *Kinglsey* standard should apply to Petitioner's claims was not pressed by the Petitioner below, and was not considered by the Eleventh Circuit. It is not proper to raise it at this late juncture of the proceedings.

II.

THE ELEVENTH CIRCUIT MUST HAVE CORRECTLY VIEWED PETITIONER AS A CONVICTED INMATE AND HIS CLAIMS THUS SUBJECT TO AN EIGHTH AMENDMENT ANALYSIS, AND THEREFORE THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR REVIEW OF WHETHER THE *KINGSLEY* OBJECTIVE STANDARD APPLIES TO PRETRIAL DETAINEE CONDITIONS-OF-CONFINEMENT CLAIMS

Respondents argued in their brief below that all of Petitioner's conditions-of-confinement claims were subject to an Eighth Amendment evaluation based on Petitioner being *a convicted inmate* – rather than a Fourteenth Amendment evaluation as a pretrial detainee – because of his subsequent sentence giving him credit for jail time served. Respondents argued the sentence "retroactively" encompassed the time of the constitutional violations alleged by Petitioner as follows:

> Also, in terms of the applicable constitutional standard, Plaintiff arguably could be considered

> a convicted prisoner during his time at the Jail in 2008 as well, and thus the Eighth Amendment standard would apply. That is because upon his conviction on April 12, 2010, he was given credit for 671 days time served, which covers the Plaintiff's pretrial detention time in the Brevard Jail that is the subject of his claims.[1]

Respondents cited as authority for this proposition *Ford v. Nassau County Executive*, 41 F.Supp.2d 392, 400 (E.D.N.Y. 1999) (§ 1983 Thirteenth Amendment claim based on forced work as pretrial detainee "vitiated" by jail sentence for time served). Petitioner did not challenge or address this argument in his brief below (or in his petitions for rehearing).

Further, this argument makes sense because time spent as a pretrial detainee is subject to close evaluation as true "custody" – in a punishment sense – in order to qualify as credit for time served. There is no question here that Saunders' time in custody at the Brevard County jail as a pretrial detainee so qualified. *Cf. Dawson v. Scott*, 50 F.3d 884 (11th Cir. 1995) (time spent at halfway house on "release status" is not considered "incarcerated" and thus not creditable towards the imposed sentence).

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[1] Initial Brief of Appellants at 30-31, *Saunders v. Sheriff of Brevard County*, No. 16-17607 (11th Cir. March 7, 2017) (requesting at footnote 12 that the court take judicial notice of this fact from public records with citation to state court online docket reflecting same).

The majority opinion below must have accepted this argument because while initially acknowledging that Petitioner made both Eighth and Fourteenth Amendment claims, the majority proceeded to carefully evaluate each of the discrete conditions-of-confinement claims *only* under the Eighth Amendment (which clearly does require a subjective element).

Thus, whatever general debate there may be as to the applicability of the *Kingsley* objective standard to pretrial detainee conditions-of-confinement claims, this case does not present an appropriate platform for that discussion because by operation of his sentence, Petitioner effectively became a convicted inmate for the relevant time period. *Liverpool, N.Y. & P.S.S. Co. v. Emigration Com'rs*, 113 U.S. 33, 39 (1885) ("[The Court] is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully.").

This view also makes short work of Petitioner's argument for review that this case presents a conflict between the circuits. This Court has unequivocally held that the evaluation of conditions-of-confinement claims by a convicted inmate under the Eighth Amendment contains both an objective and a subjective element. *Farmer v. Brennan*, 511 U.S. 825 (1994). The Eleventh Circuit applied that settled rule in this case.

There is no indication from Petitioner that there is difficulty in the circuits with application of *Farmer*. Thus, the unpublished opinion in this case is not a decision "in conflict with the decision of another United States court of appeals on the same important matter" that would justify certiorari review. *Supreme Court Rule* 10(a).

III.

AS TO QUALIFIED IMMUNITY, THE ALLEGED ERROR CONSISTS OF A MISAPPLICATION OF A PROPERLY STATED RULE FOR WHICH CERTIORARI REVIEW IS RARELY GRANTED

The Eleventh Circuit correctly defined the outlines of the state of the law as to an Eighth Amendment sanitary conditions-of-confinement claim and the mechanics of the qualified immunity defense. Neither of those is expressly challenged by Petitioner. The Eleventh Circuit noted that deprivation of basic sanitary conditions could constitute an Eighth Amendment violation, but found that the summary judgment evidentiary record in this case did not establish the "subjective prong" of an Eighth Amendment violation so as to defeat the "muscular doctrine" of qualified immunity as to Respondents.

The Eleventh Circuit concluded that Petitioner failed to produce sufficient summary judgment evidence to establish the subjective prong of the Eighth Amendment conditions-of-confinement claims, or causation. Specifically, the Eleventh Circuit concluded

that the three pieces of evidence relied on by Petitioner as to the supervisory liability claims against Respondent Jeter could not establish the necessary subjective knowledge on her part because of relevancy and hearsay problems. Petitioner does not comment on or challenge that evaluation of that evidence. And, as to Respondent Wright, the Eleventh Circuit concluded the summary judgment evidence did not establish that Wright "in particular" was present at the times the conditions existed. Petitioner does not expressly challenge this view of the evidentiary record.

The academic discussion by Petitioner of conditions-of-confinement cases does not argue or establish that the Eleventh Circuit misapprehended the state of the law as to Eighth Amendment claims and qualified immunity applications. His argument is that the Eleventh Circuit misapplied the law to the facts. But, there is no specific argument in the Petition as to how the law was misapplied, or as to why the evidentiary evaluation as to Respondents' subjective knowledge was wrong, other than a sort of global and argumentative complaint that the circuit court was obviously incorrect.

At the end of the day, Petitioner's argument as to qualified immunity is simply a generalized complaint that the Eleventh Circuit misapplied a properly stated rule of law to the particular facts in this case. A petition for a writ of certiorari is "rarely granted" under those circumstances, and this case does not present

a good reason to abandon that philosophy. *Supreme Court Rule* 10(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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