No. 22-614

In the Supreme Court of the United States

TROY CHRISMAN; MATTHEW HUNTLEY; CHADWICK MOBLEY; STEVE JOHNSON; BONITA J. HOFFNER; STEVE RIVARD; HEIDI E. WASHINGTON; RUSSELL RURKA, PETITIONERS

v.

ESTATE OF SETH MICHAEL ZAKORA; BRANDY ZAKORA, IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SETH MICHAEL ZAKORA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

Ann M. Sherman
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
ShermanA@michigan.gov
(517) 335-7628

B. Eric Restuccia
Deputy Solicitor General

Zachary Zurek
Assistant Attorney General
Corrections Division

Attorneys for Petitioners

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INTRODUCTION

A prisoner's voluntary criminal act of ingesting a drug that is banned in the prison system cannot give rise to an Eighth Amendment claim. The types of risks that give rise to Eighth Amendment claims are those "an inmate cannot reasonably be expected to avoid on his own," App. 60a—not those he could have and was expected to have avoided, such as taking illegal drugs.

The Estate's brief in opposition confirms these arguments. The Estate argues that these Corrections officials had "a duty to provide a reasonably safe environment for prisoners," which is black-letter law, but then links that duty to essentially providing a drug-free environment in prison, by asserting that the case law "leaves no room for debate regarding the danger posed by narcotics and illegal contraband in a prison environment." Br. Opp. at 14. But as the petition explained, nothing about Zakora's incarceration made him unable to refrain from voluntarily ingesting illegal drugs. And that makes all the difference. Corrections officials do not "inflict" cruel and unusual punishment upon a prisoner where the prisoner's voluntary and illegal actions cause the harm.

The Estate does not cite any cases that suggest a contrary rule. Nor does the Estate contend that Zakora's consumption of illegal drugs was involuntary or that his actions were based on suicidal ideations. Rather, the Estate claims that the complaint did not concede the voluntariness of the illegal-drug consumption, that Zakora was vulnerable to overdose, and that the decision here will have no effect on the administration of prisons. These claims are not well-taken.

On the voluntariness point, the Estate fails to address the concessions at oral argument by its counsel on the issue. App. 121a ("this is a voluntariness issue"). And the Sixth Circuit majority held that the claim remains viable where the drugs were "voluntarily ingested." App. 26a ("an inmate who suffers a drug overdose will not automatically lose a failure-to-protect claim simply because he voluntarily ingested the drugs"). Thus, the petition argues that an inmate fails to bring a cognizable Eighth Amendment claim where the inmate voluntarily ingests an illegal drug.

Addressing the Estate's point that, according to the majority, Corrections officials "knew of a substantial risk of harm to Zakora," App. 30a, this risk was not rooted in a claim that Zakora was addicted to drugs. A fair reading of the complaint is that Zakora was scared based on the danger that drug transactions presented, which is why he "feared for his life" and might "not make it out alive," App. 150a—not that he was unable to resist drugs. And as the dissent noted, there is no more substantial risk of harm to the prisoner from the presence of drugs in the prison than outside the prison. App. 61a.

The Estate claims the ruling will not affect prison administration, but it does not address either the petition's arguments on that point, Pet. 18–19, or those of the other States in the Circuit, which explain that "[t]he decision below will frustrate the ability of States within the Sixth Circuit to address the issue of drugs in prisons," Amicus of Ohio, et al, p. 7.

This Court should grant the petition.

ARGUMENT

I. This Court should review the Sixth Circuit's ruling that a prisoner's voluntary ingestion of illegal drugs can provide the basis for liability under the Eighth Amendment.

The Sixth Circuit erred in concluding that a prisoner's voluntary ingestion of illegal drugs can provide the basis for liability under the Eighth Amendment. The risks inherent in such behavior stand in stark contrast to circumstances that "an inmate cannot reasonably be expected to avoid on his own." App. 60a (Sutton, J., dissenting). This Court's review is warranted.

Zakora's Estate attempts to discourage this Court's review by emphasizing the factual posture of the case, asserting as a threshold point that the issue whether Zakora ingested drugs voluntarily is not a settled matter. This is wrong. This issue was settled at oral argument by the Estate's counsel's express concession, and it served as the basis for the majority decision below. It is a settled point for this petition.

The Estate also contends that Zakora was "specifically vulnerable to overdose," Br. Opp. at 5, and that the majority based its analysis on the fact that Corrections officials knew of the "risk to Zakora in particular," App. 30a. But the natural reading of the complaint, see App. 150a, is that Zakora feared for his life from the danger of drug activity, not from an overdose. Notably, he did not allege an addiction.

The factual claims then point back toward the Estate's question whether there is an "involuntary

requirement" in the Eighth Amendment. Br. Opp. at 15. While asked in the wrong way, it does pose the central question presented by the petition: are Corrections officials subject to possible liability when a prisoner voluntarily partakes in illegal activity and harms himself? The answer is no.

A. It is a settled matter that Seth Zakora voluntarily ingested drugs.

The first argument raised in the Estate's response is that "Defendants [*sic*] framing of their issue to this Court flatly contradicts the allegations in the operative complaint." Br. Opp. at 11. See also App. 148a (Complaint) ("Zakora died from a fentanyl overdose, but it was not determined whether Mr. Zakora intentionally took these drugs."). But this argument fails to address two central points.

First, the issue was addressed at oral argument in the Sixth Circuit, and Zakora's counsel twice expressly agreed that the ingestion here was voluntary:

> JUDGE SUTTON: [S]o when they are involuntarily subjected to conditions, are not looked at—their medical needs are not looked after, you know, that makes some sense because the government took away their liberty, they can't protect themselves, and you can understand that world. *But here it's a voluntary decision*, like it's not guards saying take the fentanyl, it's not guards coercing someone into injuring themselves, *it's a voluntary decision*. That's what seems different to me about this case from other Eighth Amendment cases.

> MS. SINKOVICH [counsel for the Estate]: *Agreed*. But, however, [y]our Honor, this would be similar to a suicide case . . .

App. 117a (emphasis added).

And the argument in the Sixth Circuit returned to the point about the voluntariness of ingestion, and again the Estate's counsel conceded the point:

> JUDGE SUTTON: What's your best case on the clearly established prong for this kind of voluntary conduct by inmates?
>
> MS. SINKOVICH: Well, *this is a voluntariness issue*. Recently in Rhodes verse Michigan this court actually addressed the voluntariness issue, and in that case there was an—it's an Eighth . . . Amendment claim—

App. 121a (emphasis added). As the dissent noted, "Zakora never argues that her son consumed fentanyl involuntarily." App. 61a.[1]

Second, the Sixth Circuit majority expressly predicated its decision on the voluntariness of the ingestion. The opinion noted the argument raised here that the voluntariness of ingestion foreclosed relief:

> The MDOC Defendants respond by arguing that an inmate who suffers an overdose from

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[1] Indeed, during oral argument, although counsel for Zakora stated that it was not known whether the ingestion was voluntary, when questioned she conceded that there was nothing in the record stating that the ingestion was involuntary. App. 118a. See also Zakora's Reply, Sixth Cir. 21-1620, Doc 14, pp. 4–9.

> drugs that he *voluntarily ingested* cannot establish an Eighth Amendment claim because the "intentional and criminal decision to take the drugs" severs the causal connection between the defendants' actions and the inmate's death. But this court's Eighth Amendment jurisprudence does not support such a broad rule.

App. 25a–26a (emphasis added). The majority then ruled that the voluntariness of the ingestion did not bar relief, by initially comparing this to a case of suicide and then determining that the risk was serious:

> Similarly [to a suicide], an inmate who suffers a drug overdose will not automatically lose a failure-to-protect claim *simply because he voluntarily ingested the drugs*. Such a claim is cognizable if the inmate alleges, and ultimately establishes, that he was at serious risk of injury from the presence of drugs before the injury occurred. Here, the Estate has met its burden by alleging the widespread presence of drugs that resulted in two prior overdoses in Zakora's small C-Unit in the days immediately preceding his own death.

App. 26a. (emphasis added).

This is the nub of the analysis the petition challenges. It is the basis of the question presented.

Zakora's Estate also relies on the claim that he was "vulnerable to overdose" and that he feared for his life as a result of the influx of drugs. Br. Opp. at 5, 12. The Sixth Circuit also stated that, based on the

complaint, the Corrections officials "knew of a substantial risk of harm to Zakora." App. 30a. While there was allegedly information about "individuals supplying large amounts of drugs" to Zakora, App. 149a, the complaint alleges only that he was "vulnerable to overdose and/or injury do [*sic*] to his involvement with drugs at Lakeland Facility," App. 155a, and nowhere alleges that he had a drug addiction.[2] In other words, as alleged, Zakora's vulnerability was no different from that of the prison population at large.

And the natural reading of the complaint is that the danger presented by the drug activity arose from the transactions themselves and the violent conduct of other prisoners. App. 150a ("Prior to his death, Mr. Zakora was moved to C-Unit. He also spent some time in segregation. While in segregation Mr. Zakora feared for his life and told his grandmother what was happening in the prison, how drugs were coming in from the outside, and how he was afraid he would not make it out alive."); *id.* ("Upon information and belief, prior to his death, Mr. Zakora was scared for his life and had requested protection from MDOC but his request was denied."). If Zakora's fear was based on his addiction and the possibility of overdose, it is not clear why making it "out alive" would secure his safety.

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[2] Nor does the Estate allege mental infirmity. Quite the opposite—it conceded at oral argument that this was "not a serious medical needs case, it's a general danger in the prison case." App. 118a. Even in a future case where addiction or mental infirmity is alleged, a prisoner's act of taking illegal drugs would push such a claim "outside the Eighth Amendment's ambit" where prison officials did not "inflict this harm" on the prisoner. App. 59a (Sutton, J., dissenting).

Bottom line: the Corrections officials cannot be held liable for not predicting when a prisoner will overdose.

The Estate's factual argument about Zakora's vulnerability underscores the fundamental error in the decision below and the need for review.

B. The Estate's arguments in defense of the decision below only confirm the importance of the question presented.

After questioning the factual predicate to the question presented, the response turns to the law. It argues that the Corrections officials have a duty to keep the prisons safe, and that means protecting them from "the danger posed by narcotics and illegal contraband." Br. Opp. at 14. That is precisely what the Sixth Circuit held, and precisely why review is warranted. That sweeping rule would, for the first time, subject Corrections officials to liability for failing to protect prisoners from harming themselves through their own voluntary criminality.

Indeed, while continuing to resist the factual concession about voluntariness, the response eschews any suggestion that "voluntariness" might foreclose a claim under the Eighth Amendment. Br. Opp. at 15–16 ("Knowing that it is firmly established that narcotics pose a serious danger in prisons and that prisons must take reasonable steps to guard against serious dangers, *Defendants ask this Court to inject a 'involuntary' requirement into Eighth Amendment jurisprudence for the first time*.") (Emphasis added).

These arguments underscore the significance of the answer to the question presented. The Corrections

officials argue that the basis for their duty under the Eighth Amendment to provide reasonable safety for prisoners explains why no action can lie here.

As this Court explained in *DeShaney* v. *Winnebago County Dep't of Social Services*, 489 U.S. 189, 199–200 (1989), when the State restrains an individual's liberty such that he cannot care for himself, it must provide for his "basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety." *Id*. (internal citations omitted). This analysis is predicated on the categorical distinction between a person taken into state custody and one who lives in the community. *Id*. In restraining a person's liberty, the incarceration renders the prisoner "unable to care for himself," regarding "food, clothing, shelter, medical care, and reasonable safety." *Id*. at 201.

But that is not true for illegal drugs and the dangers they present. As to those dangers, Zakora was in the same position as any ordinary resident of Michigan. Zakora's incarceration did not "restrain[ ] [his] freedom to act on his own behalf" to refrain from taking drugs. *DeShaney*, 489 U.S. at 200. This is the fundamental error of the Sixth Circuit's majority decision. Zakora's ability to protect himself from dangerous drugs remained within his control. As noted in the petition, the decision to use drugs was Zakora's and his alone. That the Corrections officials might have been able to act more quickly or effectively in preventing the spread of drugs in the facility, or even in a particular unit, does not give rise to a claim under the Eighth Amendment where the danger to the inmate remains within the inmate's own control.

II. The Sixth Circuit's ruling is not narrow or rooted in precedent and will have a significant effect on the administration of the prisons.

Zakora's Estate attempts to downplay the significance of the unprecedented and novel nature of the decision here. But as Judge Sutton noted in dissent, "[I]n nearly twenty years on the bench, I have never seen [a claim] like this." App. 52a. Indeed, the Estate's inability to cite any cases that recognize a cognizable Eighth Amendment claim for a prisoner who is harmed from voluntarily ingesting illegal drugs only confirms that the majority ruling here is contrary to settled law. And the fact that it will dramatically affect the administration of prisons is confirmed by the amicus filed by the other States in the Sixth Circuit.

A. The Sixth Circuit's majority decision is not narrow or rooted in precedent.

In addressing the question's merits, Zakora's Estate argues that the Sixth Circuit's majority decision is fact-bound and merely falls within established precedent. Br. Opp. at 9, 17–20. Not so as to either.

The Estate asserts that the Sixth Circuit sought to limit its decision by stating that "[p]rison officials are not required to show that they have prevented all drugs from entering their facility in order to be protected from liability." App. 27a–28a. But this statement was followed by its holding: "we hold that unfettered access to drugs in a prison, as evidenced here by the officials' failure to promptly investigate the two prior overdoses in Zakora's C-Unit, is sufficiently serious to satisfy the objective prong of an Eighth

Amendment claim." App. 28a. That broad rule unsettles the law governing prison officials' liability.

An inmate can bring an Eighth Amendment claim only for those risks that the inmate "cannot reasonably be expected to avoid on his own." App. 60a (Sutton, J., dissenting). This bright-line rule enables prison officials to avoid the second-guessing of their efforts to combat the scourge of drugs in prison invited by the Sixth Circuit's contrary rule. The State of Ohio's amicus brief predicts such an outcome, stating that "virtually any overdose claim is guaranteed to survive to summary judgment because a prisoner can always allege that the prison administrators did too little to stop the flow of drugs into prisons." Amicus of Ohio, et al, p. 7. This Court should grant the petition to prevent that outcome.

Nor does the decision below fall within established precedent. The Estate argues that "the Eighth Amendment obligates prisons to take reasonable steps to ensure the safety of prisoners." Br. Opp. at 15. That is true. But that rule applies only where the Corrections officials are the ones who control the prisoner's safety, see *DeShaney*, 489 U.S. at 200, whereas here the safety is in the prisoner's own hands. The same would have been true for Zakora while incarcerated or when released.

A prisoner who voluntarily ingests an illegal substance cannot file an Eighth Amendment claim on this basis. That is the bright-line rule. A prisoner can avoid any risk by merely deciding not to take the drugs. A prison official does not "inflict" cruel and unusual punishment upon the prisoner when the prisoner takes that risk.

B. The Sixth Circuit's decision will have an adverse effect on the administration of prisons, as confirmed by the State of Ohio's amicus brief.

Zakora's Estate contends that this decision "will not impact the administration of prisons." Br. Opp. at 17. This claim is contradicted by those who face the avalanche of prisoner suits.

On that point, this Court need not take the Corrections officials' word alone, as the States in this Circuit are in agreement that the decision below permitting money damages for overdoses will both worsen the problem of drugs in prisons (by creating a perverse incentive to smuggle drugs into prison) and distract prison officials from their duty to safely and securely manage prisons. Amicus of Ohio et al, p. 7.

In the end, there can be no constitutional violation under the Eighth Amendment for any injury that arises from a prisoner's voluntary criminal act of using illegal drugs. That prisoner stands in the same position as any other resident in Michigan: he is not at risk until he chooses to use illegal drugs. As Judge Sutton noted in dissent, "What was true outside prison was true inside prison." App. 61a.

CONCLUSION

This Court should grant the petition and reverse.

Respectfully submitted,

Ann M. Sherman
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
ShermanA@michigan.gov
(517) 335-7628

B. Eric Restuccia
Deputy Solicitor General

Zachary Zurek
Assistant Attorney General
Corrections Division

Attorneys for Petitioners

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