No. 23-_____

In the Supreme Court of the United States

DANIEL ERWIN,

Petitioner,

v.

KARLA HOWELL, as Administratrix of the Estate of CORNELIUS PIERRE HOWELL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

John B. Welch
Counsel of Record
Arnold Todaro Welch & Foliano Co., L.P.A.
7385 Far Hills Avenue
Dayton, OH 45459
(937) 296-1600
jwelch@arnoldlaw.net

August 31, 2023 *Counsel for Petitioner Daniel Erwin*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S.Ct. 2466 (2015), applies to claims for deliberate indifference to a serious medical need brought by pretrial detainees under 42 U.S.C. § 1983 and the Fourteenth Amendment, thereby abrogating the subjective prong set forth in *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970 (1994).

PARTIES TO THE PROCEEDINGS

Petitioner and Defendant-Appellee below

- Daniel Erwin

Respondent and Plaintiff-Appellant below

- Karla Howell, as Administratrix of the Estate of Cornelius Pierre Howell

Respondent and Defendant-Appellee below (aligned with Petitioner)

- Christina Jordan (Note: Ms. Jordan will be filing a separate petition for writ of certiorari)

Dismissed Defendants-Appellees (non-parties to this petition)

- NaphCare Inc.
- Pierette Arthur
- Jim Neil
- Matthew Collini
- Brad Buchanan
- Justin Hunt

LIST OF PROCEEDINGS

United States Court of Appeals for the Sixth Circuit

No. 21-4132, 22-3306

Karla Howell, as Administratrix of the Estate of Cornelius Pierre Howell, *Plaintiff-Appellant* v. NaphCare, Inc.; Christina Jordan and Pierette Arthur, individually and in their official capacities; Jim Neil, Matthew Collini, and Daniel Erwin, Individually and in their official capacities in the Hamilton County Sheriff's department; Justin Hunt, *Defendants-Appellees.*

Opinion Date: May 1, 2023

Opinion and Order, U.S. District Court for the Southern District of Ohio

No. 1:19-cv-373

Karla Howell, *Plaintiff* v.
NaphCare, Inc., Et Al., *Defendants*

Opinion Date: March 11, 2022

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

APPENDIX VOLUME 1 (BOUND WITH PETITION)

OPINIONS AND ORDERS

REHEARING ORDER

INTERROGATORIES AND STATEMENTS OF DISPUTED/UNDISPUTED FACTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

DECLARATIONS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Erwin respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is published at 67 F.4th 302 (6th Cir. 2023), App.1a. The Sixth Circuit denied Petitioner's request for rehearing en banc at 2023 U.S. App. Lexis 13821 / 2023 WL 4115607 (6th Cir., June 2, 2023), App.108a.

The district court's orders granting Petitioner's motion for summary judgment and denying Respondent's motion for relief under Fed. R. Civ. P. 60(b), App.33a and 54a.

JURISDICTION

The Sixth Circuit entered judgment on May 1, 2023, and denied rehearing en banc on June 2, 2023. App.108a. This Court's jurisdiction is invoked under 28 U.S. Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fourteenth Amendment § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S. Code § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclu-

sively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

I. Introduction

Petitioner is a deputy sheriff in Hamilton County, Ohio, employed at the Hamilton County Jail. Respondent is the administrator of the estate of Cornelius Howell, a pretrial detainee at the jail who died as a result of a sickle cell crisis following an altercation with his cellmate. Respondent alleges Petitioner, along with other officers and medical personnel at the jail, violated Howell's Fourteenth Amendment right to adequate medical care. The district court granted summary judgment to all of the defendants including Petitioner.

Reversing the district court's grant of summary judgment for Petitioner and one of the nurse defendants only, the Sixth Circuit held a reasonable jury could find that they recklessly failed to act to mitigate an unjustifiably high risk of harm to Howell that a reasonable official would have recognized. This holding was based on a new, relaxed standard now improperly being applied across the board in § 1983 cases in the Sixth Circuit. The standard arises from non-binding dicta in a panel opinion – in which the court expressly held the new standard was not necessary to the determination of the issue on appeal. *Brawner v. Scott Cty.*, 14 F.4th 585, 592 (6th Cir. 2021).

In holding as it did herein, the Sixth Circuit cemented its place in a widening split among the cir-

cuits as to whether this Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389, regarding prison officials' alleged use of excessive force against a pretrial detainee, altered the standard for a pretrial detainee's claim for deliberate indifference to serious medical needs, such that it *no longer* considers the officer's state of mind. On one side of the split are the Second, Sixth, Seventh, and Ninth Circuits; on the other side are the Fifth, Eighth, Tenth, and Eleventh Circuits. (The First, Third, and Fourth Circuits still apply their pre-*Kingsley* framework, but have not decided the issue.)

This use of a new standard based on non-binding dicta from a panel opinion and the conflict among circuits warrants this Court's review, and Petitioner's case is an ideal vehicle for resolving it: Petitioner Deputy Erwin was granted summary judgment by the district court under the pre-*Brawner* framework (because there was no basis from which a reasonable jury could conclude he was subjectively aware of a serious medical risk to Howell that he consciously disregarded). On reconsideration, the District Court again granted summary judgment to Petitioner, concluding that these facts did not give rise to a viable deliberate indifference claim "even under *Brawner*." (There was no basis from which a reasonable jury could conclude he was reckless to a known or obvious medical risk because he relied on the judgments of medical professionals.) However, misapplying the standard, the Sixth Circuit held that under the new *Brawner* standard, a jury could infer facts on which to hold Erwin liable for Howell's death. *Opinion*, U.S. Court of Appeals for the Sixth Circuit, App.19a-21a.

II. Facts Relevant to the Question Presented

On December 2, 2018, Cornelius Pierre Howell was incarcerated at the Hamilton County Jail after being arrested and booked for criminal damaging and aggravated menacing. A week later, on December 9, Howell started a fight with his cellmate. Both pretrial detainees were taken by jail deputies to the treatment room to be seen by medical personnel. Death Invest. Rep. App.233a, 239a.

Nursing personnel (Christina Jordan and Pierrette Arthur) examined Howell. During the exam, Howell complained of pain and was yelling and rolling around on the floor. Jordan Depo., App.478a-480a. While Nurse Christina Jordan was aware of Howell's history of sickle cell disease, she determined his condition and symptoms were most consistent with an acute psychological issue and that he needed to be seen by mental health personnel (she sent him "to psych . . . To be evaluated because of the symptoms that he was experiencing with the – with his eyes being, you know, a little large and him just screaming out and yelling, stabbing his roommate, symptoms of like a psychotic issue"). Jordan Depo., App.483a-485a, 490a.

Nurse Jordan concluded that in her best medical judgment, Howell's condition and symptoms were most consistent with an acute psychological issue and that Howell did not need to be sent out to the hospital for evaluation. Jordan Depo., App.512a-515a. In fact, whether to send Howell out to the hospital for evaluation was discussed and considered by nurses, including Jordan. *Id*. Petitioner Deputy Erwin was present in the medical sallyport during the evaluation of Howell. Both Sgt. Hunt and Deputy Erwin heard the medical

providers discussing and considering whether to send this patient out. Sgt. Hunt Depo., App.300a-301a; Erwin Depo., App.592a, 594a-595a, 598a. However, the medical care providers determined Howell did not have a serious medical condition and that sending him to the hospital was not necessary. *Id*., App.303a-304a.

Howell was placed in a restraint chair so that he would calm down and for his own safety; he was then taken to the psych area of the jail. Death Invest. Rep., App.233a, 241a; Sgt. Hunt Depo., App.304a-305a. Howell was placed into the restraint chair at approximately 5:40 p.m. Death Invest. Rep., App.233a. After approximately four hours in the chair, Howell was found non-responsive and subsequently pronounced dead.

After Howell's death, Erwin told investigators that he recalled hearing discussion about whether medical would send the patient to the hospital but that it was medical's decision. Erwin Depo., App.620a-623a. Erwin's statement that he felt bad because Howell should have gone to the hospital was made after the death and only in retrospect. *Id*.; *see also* Guy Declaration, App.628a. Erwin was not in a position to make any medical determinations about Howell; he relied on the medical professionals' judgment. Howell did not have a serious medical issue but instead needed to calm down for later evaluation, as Erwin testified:

> From my determination, from the discussion between our supervision and the nursing staff, they were talking about him going out to the hospital. But when it was determined that he wasn't going out, it was my assumption that he was coming to us. So, I believed

> that there was nothing else that warranted him to go to the hospital.

Erwin Depo., App.621a-622a.

The evidence demonstrated that between 6:00 p.m. and 6:10 p.m., Howell was noted to be in the chair but yelling. Restraint Chair Form, Depo. (Ex. 6), App.233a; Depo., App.564a. Erwin and Nurse checked on Howell around 6:20 p.m., and determined Howell did not have a serious medical condition or one with a high risk of harm which required further treatment at that time. Depo., App.577a; Depo., App.601a. Nurse noted that Howell was alert and had no signs or symptoms of distress. Depo., App.576a-577a. Erwin again relied on the medical assessment of a nurse. Thus, Erwin performed observational checks on Howell in the restraint chair that evening under circumstances in which medical personnel had, in essence, ruled out a serious or high-risk medical condition in his presence.

Erwin performed subsequent observational checks at approximately 6:23 p.m., 6:41 p.m., 7:07 p.m., and 8:03 p.m. Erwin Amd. Disc. Resps., App.114a-116a. During these checks, Howell appeared to be sleeping and in no distress, *i.e.*, he was not complaining of pain or requesting assistance. Erwin Depo., App.615a. Deputy Collini, also on duty that night, performed observational checks at approximately 7:24 p.m., 7:40 p.m., and 9:14 p.m. Collini Amd. Disc. Resps., App. 125a-126a. During these subsequent checks, Howell appeared calm, sleeping, and in no distress whatsoever. Collini Depo., App.401a. These observational checks were performed by the deputies by looking through the window of the locked cell door. While Howell appeared to be sleeping, he may not have actually been sleeping but instead may have already passed away

from an acute medical condition of which they were unaware. *Id.*, App.419a-420a.

Per policy, corrections officers are supposed to conduct observational checks of inmates in restraint chairs approximately every ten minutes. HCJ Policy and Procedure on Use of Restraints, App.226a, 229a. In this case, checks were not performed every ten minutes. Erwin (and Collini) documented observational checks every ten minutes per the restraint chair form. This is a policy violation as Erwin and Collini documented checks they did not perform; but the mere policy violation occurred in circumstances in which two different medical personnel concluded that Howell did not have a high risk or serious medical condition warranting hospital evaluation.[1]

At 9:45 p.m., Sgt. Hunt came to check on Howell and remove him from the restraint chair. Howell was unresponsive; deputies attempted to waken Howell and called 911. *Id.*; Death Invest. Rep., App.235a, 241a. EMS arrived and noted Howell to be unresponsive. A NaphCare nurse arrived and began performing CPR. Paramedics from the Cincinnati Fire Department arrived a short time later but did not perform life-saving measures.

The next day, Hamilton County Deputy Coroner Dr. Gretel Stephens performed a postmortem examination and determined the cause of Howell's death was a sickle crisis following a physical altercation due to hemoglobin SC (a type of sickle cell disease which can cause a variety of complications, including

---

[1] The Sixth Circuit affirmed summary judgment in favor of Deputy Collini.

sudden cardiac death). Declaration of Stephens, App. 627a.

Howell's sister was appointed Administratrix of his Estate and brought an action against (former) Hamilton County Sheriff Jim Neil, several deputies at the jail including Petitioner Daniel Erwin (collectively, "the County Defendants"), and medical staff at the jail – NaphCare, Inc., and its employees including Nurse Christina Jordan (collectively, "the Medical Defendants"), in the United States District Court for the Southern District of Ohio. The First Amended Complaint alleged violations of Howell's Fourteenth Amendment rights asserting that the deputies and nurses used excessive force against Howell and were deliberately indifferent to his serious medical needs causing him injury and ultimately death. RE.27, PageID## 81-98. Allegations of failure to train and supervise and state law claims for medical negligence and wrongful death were also raised. *Id*.

Respondent argues that the way in which Petitioner was deliberately indifferent to Howell's serious medical needs boils down to not sending him to the hospital after his fight with his cellmate, and then putting him in the restraint chair and not checking on him often enough.

III. The District Court's Rulings

The County Defendants, including Petitioner Erwin, moved the district court for summary judgment. RE.84, PageID## 1508-1547. The Medical Defendants also moved for summary judgment. RE.85, PageID## 1548-1588. Plaintiff-Respondent opposed the motions and oral argument proceeded before Judge Cole on October 14, 2021. The district court

granted all of the defendants' motions for summary judgment, dismissed the federal claims, and declined to exercise jurisdiction over the state claims. *Opinion and Order*, U.S. District Court for the Southern District of Ohio, App.54a.

At the time of the events at issue herein, it was well-established that the standard used for a claim for deliberate indifference to a serious medical need in violation of the Fourteenth Amendment brought by a pretrial detainee pursuant to 42 U.S. 1983 had two prongs, one objective and one subjective. *Winkler v. Madison County*, 893 F.3d 877, 890 (6th Cir. 2018). A plaintiff's failure to provide evidence sufficient to create a question of fact as to either the subjective or objective component was fatal to her § 1983 claim. *Napier v. Madison Cnty.*, 238 F.3d 739, 743 (6th Cir. 2001).

To satisfy the objective component, a plaintiff was required to identify a serious medical need, which is one that was 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. *Jones v. Muskegon Cnty.*, 625 F.3d 935, 941 (6th Cir. 2010).

To meet the subjective component, a pretrial detainee was required to show the defendant (1) subjectively perceived facts from which he could infer a substantial risk to the detainee's health; (2) did in fact draw that inference; and (3) disregarded that risk by failing to act. *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001). The plaintiff was required to show the officer possessed a sufficiently culpable state of mind in denying medical care. *Spears v. Ruth*, 589 F.3d 249, 254 (6th Cir. 2009). A defendant has a

sufficiently culpable state of mind if he "knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837. In other words, the plaintiff was required to show the defendant "*consciously* exposed [him] to an *excessive* risk of *serious* harm." *Rhinehart v. Scutt*, 894 F.3d 721, 738-739 (6th Cir. 2018), *emphasis sic*.

In its initial *Opinion* herein, the district court held, "the record evidence provides no basis from which a reasonable jury could conclude that Erwin (and Collini) were subjectively aware of a serious medical risk to Howell that they consciously disregarded." App.78a. Additionally, "a reasonable jury could not conclude that the Hamilton County Defendants used excessive force against Howell when they placed him in the restraint chair and allowed him to remain there, apparently resting calmly, for at most four hours before he died." App.88a.

Respondent appealed, and shortly thereafter also filed a motion for relief from judgment under Fed. Civ.R. 60(b)(6).[2] RE.107, PageID## 2037-2038; RE.112, PageID## 2096-2101. In her 60(b) motion, Respondent argued that the Sixth Circuit Court of Appeals changed the law six weeks before the district court's opinion was published, and consequently, the district court used the wrong standard in determining the claim for deliberate indifference to serious medical needs by a pretrial detainee such as Howell.

---

[2] Respondent also filed a state court action following dismissal in the district court, and that case currently remains pending against all of the original defendants including Petitioner herein. *Howell v. NaphCare Inc., et al*, Hamilton County Common Pleas no. A 2200043.

That new standard was set forth in *Brawner v. Scott Cnty.*, 14 F.4th 585, and was based on the Sixth Circuit's interpretation of *Kingsley v. Hendrickson*, 576 U.S. 389. *Kingsley* held that to prevail on an excessive force claim under 42 U.S.C. § 1983, a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable. Thus, in *Brawner*, the appellate court held that on a claim for deliberate indifference to a serious medical need, the detainee must still show a serious medical need, but instead of the subjective prong (showing that the defendant had a sufficiently culpable state of mind), the detainee must only show that the defendant "not only acted deliberately (not accidentally), but also recklessly in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Brawner*, at 596, citing *Farmer*, 511 U.S. at 836.

The district court denied Respondent's motion, holding that it would have reached the same result under the new standard set forth in *Brawner*. *Opinion and Order*, U.S. District Court for the Southern District of Ohio, App.33a.

Addressing the 60(b) motion, the district court found that in *Brawner*, the Sixth Circuit determined that as a result of *Kingsley*, courts must apply a "lower" standard to Fourteenth Amendment deliberate indifference claims by pretrial detainees than it used for such claims under the Eighth Amendment brought by postconviction inmates. App.39a. Having abrogated the subjective component, *Brawner* held that rather than showing "subjective intent," the pretrial detainee need only prove "something akin to reckless disregard." App.42a.

The district court again found that, "even under *Brawner*," Howell's death did not give rise to a deliberate indifference claim. App.53a. The district court found, under *Brawner*, that Erwin could rely on the medical opinions of professionals such that he did not act recklessly in relying on medical's determination that Howell was having a psychiatric episode and one that did not require outside care such that a reasonable jury could not conclude that he acted recklessly or that any medical risk to Howell was known or so obvious it should have been known by Erwin during the time after Howell's placement in the restraint chair. App.46a-48a. The district court also held that Howell received medical attention almost immediately after his fight with the other inmate and died four hours after receiving medical attention – the relatively short duration of time that Howell went without medical care combined with the absence of symptoms or other circumstances that would have made a need for urgent medical care apparent, did not support a finding of deliberate indifference. App. 51a. Respondent appealed again (and her appeals were consolidated). RE.121, PageID## 2235-2236. She did not appeal the dismissal of the excessive force claims against the County Defendants (including Petitioner), *only* the claim for deliberate indifference to serious medical needs.

IV. The Sixth Circuit's rulings

The Sixth Circuit affirmed in part and reversed in part; it held the lower court erred in granting summary judgment to Nurse Jordan and Deputy Erwin (Petitioner herein) "because, pursuant to *Brawner*, a reasonable jury could find that they recklessly failed to act to mitigate an unjustifiably high risk of harm

to Howell that a reasonable official would have recognized." *Opinion*, U.S. Court of Appeals for the Sixth Circuit, App.1a. It affirmed dismissal of the other parties and claims, including Deputy Collini. As to Petitioner Erwin, the court found:

> The infrequency and inadequacy of Erwin's observational checks is compounded by the record evidence that he knew, or should have known, that Howell faced a high risk of harm. Erwin himself believed that Howell should have gone to the hospital after observing Howell's condition in the sallyport. He knew the medical staff considered sending Howell to the hospital prior to deciding that Howell would be restrained for further observation.

Thus, the court held, "a jury could determine that Erwin's actions *crossed the line* from negligence to reckless disregard." *Id.* at App.20a. It reversed the district court's grant of summary judgment to Deputy Erwin. App.20a-21a.

The County and Medical Defendants all moved for reconsideration en banc because the panel decision in the *Howell* case conflicted with other decisions by the Sixth Circuit Court of Appeals, including *Brawner* itself, *Trozzi v. Lake Cnty.*, 29 F.4th 745 (6th Cir. 2022), and *Stein v. Gunkel*, 43 F.4th 633 (6th Cir. 2022), regarding the required showing for the defendant's mental state to succeed on a 42 U.S.C. § 1983 case asserting violation of the constitutional right to adequate medical care while being held in jail as a pretrial detainee. RE.74 and RE.73-1.

In addition, while the panel held that a reasonable jury could find Erwin was deliberately indifferent based on the new *Brawner* standard, it never found that, after the nurses determined Howell did not need to go to the hospital, a reasonable official in Erwin's position would have known that Howell had a serious medical need, or that there was any risk to Howell, much less an excessive risk, as required by each of those cases – *Brawner, Trozzi*, and *Stein*. Erwin first encountered Howell in the sallyport during his medical evaluation at which time a medical professional (Jordan) concluded Howell did not have a serious medical need warranting an evaluation at the hospital. After Howell was placed in the restraint chair (which admittedly caused no harm) and was taken to his cell, a second different medical professional (Arthur) evaluated Howell and again concluded he did not have a serious medical need requiring additional or outside attention – all in Erwin's presence.

In fact, after the medical staff concluded Howell did not need to go to the hospital, there was no reason for Erwin to believe Howell had a serious medical need or that there was any risk, let alone an excessive risk. Erwin Depo., App.620a-622a. Erwin's post-death interview statement that he though Howell "should have gone to the hospital" was obviously made in retrospect but prior to medical's diagnosis and decision. *Id*. Erwin testified that once that decision not to send Howell to the hospital was made by the nurses, there was nothing else in his mind that warranted Howell going to the hospital. *Id*. Howell appeared to be sleeping and safe after a short period in the chair, consistent with officers' experience with restraint chairs. Erwin Depo., App.615a-616a; Collini Depo., App.401a-402a.

Erwin is not a medical professional. Under these circumstances, Deputy Erwin could not have known and had no reason to know that Howell was suffering or in the midst of an acute death from a sickle cell crisis or a sudden cardiac death. Erwin could not have known and had no reason to know that his failure to check every ten minutes would pose a serious risk of harm to Howell. As such, no reasonable juror could conclude that Erwin disregarded a known substantial risk to Howell or that any medical risk to Howell was so obvious that it should be known.

The appellants' petitions for reconsideration were denied. *Order Denying Rehearing*, U.S. Court of Appeals for the Sixth Circuit, App.108a-109a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision conflicts with several other circuits regarding whether this Court's holding in *Kingsley v. Hendrickson*, 576 U.S. 389, regarding excessive force claims compels the use of a solely objective standard when determining a pretrial detainee's claim of deliberate indifference to a serious medical need. This conflict on an important question of federal law warrants this Court's review.

Further, even though the Sixth Circuit's new standard was formulated in a 2-1 panel decision that has not been adopted by that court en banc, it is being widely used, and use of the new standard reversed summary judgment for the Petitioner. Thus, this case is an ideal vehicle for resolving the circuit split and settling the *Kingsley* question – whether its

holding requires abrogation or modification of the subjective prong of the test for deliberate indifference to a serious medical need.

I. The Sixth circuit Changed the Standard for a Pretrial Detainee's § 1983 Claim for Deliberate Indifference to Serious Medical Needs in *Brawner* When *Kingsley* Spoke Only to Excessive Force Claims and Did Not Deal with Medical Care. Further, the Sixth Circuit's New "Relaxed" Standard Is Based on Dicta in a Panel Opinion That Is Now Being Applied Across the Board.

Brawner's new "lower" standard for deliberate indifference claims was decided two-to-one by a panel of three judges of the Sixth Circuit. *Brawner*, 14 F.4th 585. While the holding of a published panel opinion binds all later panels unless overruled or abrogated by the Sixth Circuit en banc or by this Court, *only* holdings are binding, and one panel of the Sixth Circuit is *not* bound by dicta in an earlier published panel opinion. *Freed v. Thomas*, 976 F.3d 729, 738 (6th Cir. 2020). "Dictum is anything not necessary to the determination of the issue on appeal." *Id., citation omitted*. *Brawner* clearly stated: "Although the facts here, viewed in the light most favorable to Brawner, support a finding of deliberate indifference under either *Farmer's* subjective or *Kingsley's* objective standard," the court held it must address the issue "because the standard will be relevant on remand." *Brawner*, at 592.

Brawner's change of the deliberate indifference standard was not necessary to the determination of the issue on appeal; it was dicta that is not binding,

thus is not the law in the Sixth Circuit, yet it is being applied extensively.

While *Brawner* held that *Kingsley* was an inconsistent Supreme Court decision requiring modification of the deliberate indifference standard, *Brawner* at 596, other panels within the Sixth Circuit have held that *Kingsley* is not an inconsistent decision of this Court that would authorize a change in the standard. *See e.g.*, *Trozzi v. Lake Cnty*., 29 F.4th 745. But because *Brawner* was decided first, it has been found to be controlling throughout the circuit. *Helphenstine v. Lewis Cnty*., 60 F.4th 305, 317 (6th Cir. 2023).

Thus the abrogation of the subjective prong of a deliberate indifference claim in the dicta of a panel decision is now the law in the Sixth Circuit, where that dicta was based on a ruling by this Court on another issue entirely, and when this Court stated that it was only answering the exact question before it: "We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today." *Kingsley,* 576 U.S. at 402. *Brawner* recognized that *Kingsley* spoke only to excessive force cases, and "did not address whether an objective standard applies in other Fourteenth Amendment pretrial-detainment contexts," *Brawner* at 592, but ignored *Kingsley's* instruction that it not be applied broadly.

Further, a wholly objective standard for deliberate indifference that ignored the specific defendant's know-

ledge would boil down to a negligence standard, which has been repeatedly rejected by the Sixth Circuit and this Court. *Trozzi*, 29 F.4th at 755; *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285 (1976) ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner"); *Comstock v. McCrary*, 273 F.3d 693, 703 ("The requirement that the official has subjectively perceived a risk of harm and then disregarded it is meant to prevent the constitutionalization of medical malpractice claims"). As argued by the dissent in *Brawner*, "Without any manner of inquiry into a party's intent, courts cannot fairly distinguish negligent deprivation of care – which does not give rise to a constitutional claim – from an intentional deprivation of care that amounts to punishment – which violates the Fourteenth Amendment." *Brawner*, 14 F.4th at 609 (Readler, dissenting).

Kingsley does not mention deliberate indifference claims, and does not mention the cases upon which such claims are based – *Farmer*, 511 U.S. 825, and *Estelle*, 429 U.S. 97. It is important to note that in *Farmer*, when crafting the deliberate indifference standard, this Court expressly differentiated those cases from the types of cases *Kingsley* applies to: "application of the deliberate indifference standard is inappropriate in one class of prison cases: when officials stand accused of using excessive physical force." *Farmer,* 511 U.S. at 835, *internal citation and quotation marks omitted.* Just as this Court held application of the deliberate indifference standard to excessive force cases would be inappropriate, so too the reverse: it would be inappropriate to apply the excessive force standard to deliberate indifference cases.

While causes of action by pretrial detainees for excessive force and deliberate indifference to serious medical needs both arise under the Fourteenth Amendment, a pretrial detainee's cause of action for excessive force serves a different purpose than that for deliberate indifference: an excessive force cause of action protects a pretrial detainee from the use of force that amounts to punishment; a deliberate indifference cause of action safeguards a pretrial detainee's access to adequate medical care. *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020). Excessive force requires an affirmative act, while deliberate indifference often stems from inaction. *Id.,* citing *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1069 (9th Cir. 2016). "Because the two categories of claims protect different rights for different purposes, the claims require different state-of-mind inquiries." *Strain, supra,* at 991.

This raises a compelling argument made by the *Castro* dissent as to why the *Kingsley* standard is not applicable to deliberate indifference cases where, as here, the allegation is that a government official failed to act. In analyzing a pretrial detainee's excessive force claim, the key question is whether the situation at issue amounts to punishment; "While punitive intent may be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the mere failure to act does not raise the same inference. Rather, a person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most." *Castro,* 833 F.3d at 1086 (Ikuta, dissenting). As discussed above, negligence is insufficient to demonstrate deliberate indifference under § 1983; "liability for negligently inflicted harm is categorically beneath the threshold

of constitutional due process." *Kingsley*, at 396, *citations omitted*.

Caselaw that survives post-*Kingsley* demonstrates that other aspects of deliberate indifference claims remain the same. For example, a non-medically trained officer is not deliberately indifferent when he reasonably defers to the opinion of a medical professional. *Greene v. Crawford Cty*. 22 F.4th 593, 608 (6th Cir. 2022). Thus, even though after the fact, Erwin stated that he thought Howell should have been taken to the hospital, the fact that at the time Howell was being examined by the nurses, Erwin heard them discuss sending him to the hospital and determine he did not need to go, does not demonstrate he was deliberately indifferent to Howell's serious medical needs. In fact, this tends to show that he was *not* deliberately indifferent. After Howell's fight with his cellmate, Erwin took Howell to the nurses and they examined him and Erwin then reasonably relied on their decision.

Similarly, the failure to follow an internal policy does not give rise to a deliberate indifference claim. *Helphenstine v. Lewis Cty*., 60 F.4th 305, 322. An intentional violation of jail operating procedures does not mean the officer intentionally ignored a detainees serious medical needs. *Hyman v. Lewis*, 27 F.4th 1233, 1238 (6th Cir. 2022). Thus, Erwin documenting that he checked on Howell more often than he actually did, so as to comply with policy, when he heard the nurses determine Howell did not need to go to the hospital, had no signs or symptoms of distress after being placed in the restraint chair after which Howell appeared to be sleeping does not demonstrate deliberate indifference; "even in a post-*Brawner* world, [the

officer's] violation of the operating procedures does not rise above negligence to become a constitutional violation under the Fourteenth Amendment." *Id.*

Petitioner maintains that even under *Brawner*, he was not deliberately indifferent to Howell's serious medical needs. However, he should not be held to a standard that is not properly the law of the Sixth Circuit, but that was simply dicta from a panel decision. He should be held to the standard used pre-*Brawner*, as was used in the district court's first opinion. App.54a.

II. The Split Among Circuit Courts Merits This Court's Review and Intervention.

In *Kingsley*, this Court held that in a § 1983 excessive-force claim, a pretrial detainee must show only that the officers' use of force was objectively unreasonable and need not show the officers were subjectively aware their use of force was unreasonable; it did not, however, address whether a solely objective standard applies in other Fourteenth Amendment pretrial detainment contexts. *Westmoreland v. Butler Cnty.*, 29 F.4th 721, 727 (6th Cir. 2022). The standard to be used in a § 1983 claim for deliberate indifference to serious medical needs is an issue of exceptional importance not only because of the great importance of the rights at issue and the number of such cases in the federal courts, but also because of the disagreement as to whether *Kingsley* applies at all.

As mentioned above, there is a split among the circuits as to whether *Kingsley* requires modification /rejection of the subjective component for pretrial detainees who bring Fourteenth Amendment claims for deliberate indifference to serious medical needs.

Brawner, 14 F.4th at 593. The Second, Sixth, Seventh, and Ninth Circuits say yes; the Fifth, Eighth, Tenth, and Eleventh say no. *Brawner* at 593-594.[3]

As noted by one judge in the Sixth Circuit discussing *Brawner* and the application of *Kingsley* to deliberate indifference claims: "at some point, intervention is needed. With confusion rampant coast-to-coast, the Supreme Court would appear to be the proper forum." *Helphenstine v. Lewis Cty.*, 2023 U.S. App. Lexis 9186 (6th Cir. 2023) (statement of Circuit Judge Readler on denial of hearing en banc).

This Court should step in and determine whether *Kingsley* requires rejection or modification of the subjective component for pretrial detainees who bring Fourteenth Amendment claims for deliberate indifference to serious medical needs, or whether the old standard, as set forth by the district court in its original opinion herein, stands.

---

[3] Other circuit courts stating *Kingsley* requires modification: *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017); *Miranda v. Cty. of Lake*, 900 F.3d 335 (7th Cir. 2018); *Gordon v. Cty. of Orange*, 888 F.3d 1118 (9th Cir. 2018). Those stating *Kingsley* does not require modification: *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021); *Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. 2018); *Strain v. Regalado*, 977 F.3d 984; *Nam Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272 (11th Cir. 2017). Those not deciding the issue: *Miranda-Rivera v. Toledo-Dávila*, 813 F.3d 64 (1st Cir. 2016); *Moy v. Deparlos*, 2023 U.S. App. LEXIS 13232 (3d Cir. 2023); *Mays v. Sprinkle*, 992 F.3d 295 (4th Cir. 2021).

CONCLUSION

This Court should grant a writ of certiorari, accept this case for review, and hold that *Kingsley* does not apply to cases alleging deliberate indifference to a serious medical need.

Respectfully submitted,

John B. Welch
Counsel of Record
Arnold Todaro Welch & Foliano Co., L.P.A.
7385 Far Hills Avenue
Dayton, OH 45459
(937) 296-1600
jwelch@arnoldlaw.net

Counsel for Petitioner Daniel Erwin

August 31, 2023