CASE NO. 19-5623

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TAMMY BRAWNER,
Plaintiff/Appellant,

v.

SCOTT COUNTY, TENNESSEE,
Defendants/Appellee,

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville
(E.D. Tenn. No. 3:17-cv-108)

PETITION FOR REHEARING EN BANC

Arthur F. Knight, III
Caitlin C. Burchette
TAYLOR & KNIGHT, GP
800 South Gay Street, Suite 600
Knoxville, Tennessee 37929
(865) 971-1701
amber@taylorknightlaw.com
cburchette@taylorknightlaw.com

Counsel for Defendant/Appellee Scott County, Tennessee

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RULE 35(b) STATEMENT

En banc review is necessary because the panel's decision to alter the standard used in determining Fourteenth Amendment deliberate indifference cases conflicts with existing Circuit and Supreme Court law setting the long-standing standard for resolving denial of medical care claims brought by pre-trial detainees. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Rafferty v. Trumbull Cty.*, 915 F.3d 1087, 1094 (6th Cir. 2019); *Richmond v. Huq*, 885 F.3d 928, 938-47(6th Cir. 2018); *Baynes v. Cleland*, 799 F.3d 600, 618 (6th Cir. 2015); *Street v. Corrs. Corp. of Am.*, 102 F.3d 810, 816 (6th Cir. 1996). Fed. R. App. P. 35(b)(1)(A). It is further submitted that this Opinion has now posed a question of exceptional importance: whether a divided three-judge panel many overrule Supreme Court and Circuit precedent and create a new rule for determining whether a pre-trial detainee has established a claim for deliberate indifference. Fed. R. App. P. 35(b)(1)(B).

INTRODUCTION

On September 22, 2021, a split panel of this court issued the decision in *Brawner v. Scott County, Tenn.*, -- F.4th --, 2021 WL 4304754 (6th Cir. September 22, 2021), reversing in part, affirming in part the district court's granting of judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure. This split decision has been recommended for full text publication pursuant to Sixth Circuit I.O.P. 32.1, and accordingly can be cited to as precedent of this Court.

In reversing the part of the district court's grant of judgment of a matter of law, this panel applied the reasoning from *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), to the deliberate indifference standard on denial of medical care claims. The panel concluded, that in light of *Kingsley*, a modification of the subjective prong of the deliberate indifference test for pretrial detainees was necessary, requiring them to now prove "more than negligence but less than subjective intent—something akin to reckless disregard." *Brawner v. Scott County, Tenn.*, -- F4th --, 2021 WL 4304754 at *7 (internal quotations omitted).

However, as stated, the panel's decision was split, much like the opinions of other circuits on this matter.[1] A separate dissenting opinion was filed by Circuit Judge Chad Readler who not only would have upheld the district court's grant of judgment as a matter of law in its entirety, but also would not have modified the deliberate indifference standard for pretrial detainees.

It is respectfully submitted that the district court and Circuit Judge Readler's dissenting opinion was correct in upholding judgment as a matter of law and finding

[1] This panel adopted an interpretation similar to that of the Second, Seventh, and Ninth Circuits. *Darnell v. Pineiro*, 849 F.3d 17, 34-35 (2nd Cir. 2017); *Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018); *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018) However, the Fifth, Eighth, Tenth and Eleventh Circuits have upheld the subjective component. *Cope v. Cogdill*, 3 F.4th 198, 207 & n. 7 (5th Cir. 2021); *Whitney v. City of St. Louis*, 887 F.3d 587, 860 n.4 (8th Cir. 2018); *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020); *Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017).

that *Kingsley* is inapplicable to Fourteenth Amendment deliberate indifference standard. Therefore, the Defendant/Appellee respectfully requests this Court grant a rehearing *en banc*.

STATEMENT

Plaintiff/Appellant Tammy Brawner was taken into custody and detained in the Scott County Jail following the revocation of her bail on June 29, 2016. [RE 64, Page ID# 526]. Upon her arrival to the jail, Brawner completed a medical screening where she stated she was taking the following prescription medications: Suboxone, Clonazepam, Gabapentin, and Escitalopram.[2] *Id.*; [RE 155, Page ID# 1665-66]. She also denied having a serious medical condition that required attention and denied having epileptic seizures. *Brawner v. Scott Cty., Tenn.*, -- F4th --, 2021 WL 4304754 at *1.

It was stipulated to that "[i]t is the Jail's longstanding practice for the booking officer to print two copies of the Inmate Medical Form listing prescription medication or other medical issues. [RE 155, Page ID#1063] One copy is placed in the inmate's custodial (or jail) file, and the second copy is placed in Nurse Massengale's 'box.'" *Id.* After the initial medical screening, an inmate is required to

[2] It should be noted that there was nothing in the record, outside of Brawner's own statements on the Inmate Medical Form, that indicates that the Plaintiff was regularly taking these medications or that they were prescribed to her by a physician.

receive a physical, including an inquiry into inmate medication, within fourteen (14) days of being booked into the Scott County Jail. [Pl.'s Trial Ex. 11, Scott County Detention Facility Policies and Procedures 11.01, Examination; RE 155, Page ID# 1063; RE 207, Page ID# 1381].

On July 7, eight days after her booking, Brawner suffered multiple seizures and was taken to a local hospital where she was diagnosed with epilepsy. [Pl. Trial Ex. 2; Pl. Trial Ex. 3a; RE 155, Page ID# 1063-64]. She was then prescribed Phenobarbital and it was recommended that she see a physician within two days. *Brawner v. Scott Cty., Tenn.*, -- F4th --, 2021 WL 4304754 at *2. Upon her return to the jail Brawner was seen by Nurse Massengale, who was instructed by Dr. Capparelli to discontinue the Phenobarbital and administer daily doses of Dilantin instead. [RE 207, Page ID# 1389; Pl. Trial Ex. 5].

Four days later, on July 11, Brawner suffered another seizure in the early morning hours when the nurse was not present. [Pl. Trial Ex. 7; RE 207, Page ID# 1393-94] A corrections officer called the jail doctor, who directed the officer to record Brawner's vitals and administer Dilantin. [Pl. Trial Ex. 7; RE 155, Page ID# 1064].

The next day, which was within the state-required fourteen days, Brawner was given a physical by Nurse Massengale. [Pl. Trial Ex. 8; RE 207, Page ID# 1401]; *See also* [Pl.'s Trial Ex. 11, Scott County Detention Facility Policies and Procedures

11.01, Examination; RE 155, Page ID# 1063] During the physical, it was noted that Brawner suffered from a "seizure disorder or cerebral trauma." [Pl. Trial Ex. 8; RE 207, Page ID# 1402]. The examination was reviewed and signed off on by the jail physician. [Pl. Trial Ex. 8a].

On July 14, officers observed Brawner exhibiting bizarre behavior, such as drinking water out of the toilet, and acting erratically. [Pl. Trial Ex. 23]. Believing this behavior could be related to Brawner's history of mental health issues, Nurse Massengale contacted the Mobile Crisis Unit. *Id*. Brawner was evaluated by a licensed social worker who was made aware that the Plaintiff had been suffering from seizures and concluded that Brawner's symptoms were likely due to drug withdrawal. *Id.*

Early the next morning, officers observed Brawner experiencing another seizure, followed by an additional seizure an hour later. [RE 155, Page ID# 1064]; [Pl. Trial Ex. 23]. Following the second seizure, the jail officers took Brawner's blood pressure and pulse and noted that there were no signs or symptoms of distress. [Pl. Trial Ex. 23]. The officers gave Brawner her daily dose of Dilantin. *Id.*

Brawner's cellmates reported yet another seizure around 9:00am. *Id.* By this point, Nurse Massengale had arrived at the jail. Massengale then moved Brawner to a holding cell and placed her on a fifteen-minute medical watch. [RE 207, Page ID# 1396-97; Pl. Trial Ex. 23; Pl. Trial Ex. 6]. Within an hour, Brawner had six more

seizures. [Pl. Trial Ex. 23; RE 207, Page ID# 1398] Nurse Massengale called the jail doctor, who instructed her to give Brawner a dose of valproic acid. *Id.* Ultimately, Massengale determined it was necessary to call 911 as Brawner had three more "tremors." [Pl. Trial Ex. 23]. Plaintiff was transported to the LaFollette Medical Center for evaluation and was later transferred to another hospital's intensive care unit. *Id.*

Brawner then sued Scott County and various County jail employees and medical staff under § 1983 for allegedly violating her Fourteenth Amendment rights to adequate medical care and to be free from excessive force. Brawner and her husband also brought state law claims. [RE 64, Page ID# 534-543]

Before the trial, the parties stipulated to the dismissal of the individual Scott County Defendants.[3] [RE 182, Page ID# 1205-1206]. During the trial, the parties agreed to dismiss the state law claims against Scott County. *Brawner v. Scott Cty., Tenn.*—F.4th--, 2021 WL 4304754 at *3. Accordingly, the only claims that remained at trial were the § 1983 claims alleging violations of Plaintiff's Fourteenth Amendment rights. *Id.*

After presenting her case at trial, the district court Judge Ronnie Greer granted Scott County's Rule 50(a) motion for judgment as a matter of law. [RE 201, Page

[3] Advanced Correctional Healthcare, Dr. Capparelli and Nurse Massengale were dismissed well in advance of trial. [RE 120, Page ID#957-59];[RE 121, Page ID# 960-62].

ID#1263]. As to Brawner's medical care claim, the district court held while her medical needs were sufficiently serious, thereby satisfying the objective component, she failed to meet the subjective component as she could not show that the jail staff was actually aware that she was at a substantial risk of serious harm. [*Id.* at 1277-79]. The district court also found that no jail staff actually drew that inference as they followed the standard booking procedure and responded to the seizures by monitoring her and calling for medical aid. *Id.*at 1278-79. Further, because seizure suppression was not the most prevalent use of any of the medication Brawner stated that she was taking, those medications were not evidence from which the staff should have inferred that Brawner was at risk for seizures. *Id.* at 1279 Therefore, the district court concluded that Brawner's medical care claim against Scott County could not succeed because she had not established that any individual had violated her constitutional rights. *Id* at 1277.

The district court then addressed county liability and reasoned, as did Judge Readler, that Brawner did not show that Scott County's policies or customs were the moving force behind her injuries. *Id.* at 1283-85, The district court also rejected Brawner's claims based on Scott County's policies and customs regarding prescription medication and medical supervision as well as her claim that Scott County officials used excessive force by tasing her rather than helping during her

seizures. *Id.*at 1283-90. However, the excessive force claim was abandoned on appeal.

More than two years after the appeal was filed, a divided panel of this Court determined that Brawner had presented sufficient evidence for a jury to find that Nurse Massengale violated the Plaintiff's constitution rights and tie that violation to the execution of Scott County policy, specifically that of having up to fourteen days to perform a physical and a blanket ban on controlled substances.[4] In making this determination, the majority panel also took up the standard used to determine deliberate indifference for Fourteenth Amendment claims. The majority panel found that in light of *Kingsley*, modification of the subjective prong of the deliberate indifference test for pretrial detainees is required. They then held that a pretrial detainee must prove that a defendant acted with "more than negligence but less than subjective intent—something akin to reckless disregard." *Brawner v. Scott County, Tenn.*, -- F4th --, 2021 WL 4304754 at *7.

Judge Readler dissented in part.[5] He explained that he would have affirmed the district court's judgment in favor of Scott County as to the deliberate indifference claim." *Brawner v. Scott County, Tenn.*, -- F4th --, 2021 WL 4304754 at *11-12. He

[4] The majority, however, determined that Brawner failed to present sufficient evidence for a jury to find Scott County liable on her other theories.
[5] Judge Readler concurred with section III E of the majority opinion which affirmed the rejection of many of Brawner's other theories of municipal liability.

found that Brawner failed to establish a direct causal link between her asserted injury and a county policy. *Id.* at 12. He further took issue with the majority's attempt to adopt the *Kingsley* standard for Fourteenth Amendment deliberate indifference medical care claims. First, Judge Readler asserts that that resolution of the issue was not necessary to resolve the appeal. *Id.* at *12-13. However, he also found that *Kingsley*'s excessive force holding does not abrogate the subjective standard for deliberate indifference claims brought by pretrial detainees. *Id.* at 14. Instead, Judge Readler reasoned that "[a]t best *Kingsley*'s relinquishment of the subjective inquiry applies only to a pretrial detainee's excessive force claims. It does not extend to claims premised on a failure to act, the essence of a deliberate indifference claim." *Id.*

ARGUMENTS FOR REHEARING *EN BANC*

For the following reasons, the Court should grant a hearing en banc to review the panel's order:

I. The *Kingsley* Decision is Not an Inconsistent Decision of the Supreme Court

In the majority opinion, the panel explains that a prior published opinion may only be overruled if there is an "'inconsistent decision of the Supreme Court or [by] … a decision of the en banc court.'" *Brumbach v. United States*, 929 F.3d 791, 795 (6th Cir. 2019)(quoting *Salmi v. Sec'y of Health and Human Servs.*, 774 F.2d 685,

689 (6th Cir. 1985)). However, *Kingsley* is not an inconsistent decision of the Supreme Court as it pertains to Fourteenth Amendment deliberate indifference claims.

In *Kingsley*, the Court decided the narrow issue of the standard for determining "whether the force deliberately used is, constitutionally speaking, 'excessive.'" 576 U.S. 389, 396. In deciding this narrow issue, the Court held that the subjective component does not apply to excessive force claims brought by pretrial detainees, but is instead, a solely objective standard. *Id.* at 397-98. Accordingly, a pretrial detainee no longer needs to show that an officer intended to punish them, but instead can prevail by providing evidence that the use of force is not "not rationally related to a legitimate government objective or that it is excessive in relation to that purpose. *Id.* at 398.

While *Kingsley* certainly altered the standard for pretrial detainee *excessive force* cases, it is difficult to see how the same abrogates the subjective component of the Fourteenth Amendment deliberate indifference standard. As Judge Readler noted, "nothing in *Kingsley* purports to address, let alone modify the deliberate indifference standards." *Brawner v. Scott Cty., Tenn.*, --F.4th--, 2021 WL 4304754 at*15. He further noted that

> [the decision] made no mention of *Farmer*, the genesis of the subjective deliberate indifference standard. And it took pains to emphasize the limited scope of its ruling, acknowledging, for example, 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,' yet declining to resolve even that latter issue, let alone issues regarding an entirely different theory of recovery.

Id. As *Kingsley* decided an exceedingly narrow issue, it is not an inconsistent decision of the Court as it pertains to Fourteenth Amendment deliberate indifference claims. Therefore, the majority panel erred in extending the applicability of *Kingsley* beyond excessive force cases, and thereby contributing to a circuit split.

II. The alteration of the deliberate indifference defies binding precedent

In keeping with the Eighth Amendment's Prohibitions Clause, the Supreme Court has recognized that the government has an obligation "to provide medical care for those whom it is punishing by incarceration." *Estelle v Gamble*, 429 U.S. 97, 103 (1976). The Court further recognized a corresponding prohibition on the "unnecessary and wanton infliction of pain" caused by the deliberate withholding of treatment for a "serious" medical need. *Id.* at 104-05.

Accordingly, it is well established that it is a two-pronged inquiry, one objective and one subjective, to show that prison official acted with deliberate indifference to a prisoner's medical needs. *Farmer v. Brennan*, 511 U.S. at 834. The goal of the subjective inquiry into the defendant's state of mind is to isolate those who inflict punishment from those who were merely negligent. *Id.* at 839.

Invoking the precedent established by *Estelle* and *Farmer*, this Circuit has extended the same protections to pretrial detainees through the Fourteenth Amendment. *Roberts v. City of Troy*, 773 F.2d 720, 724-25 (6th Cir. 1985). Therefore, "[t]his court has consistently applied the same 'deliberate indifference' framework to Eighth-Amendment claims brought by prisoners as Fourteenth Amendment claims brought by pretrial detainees." *Griffith v. Franklin County, Kentucky*, 975 F.3d 554, 567 (6th Cir. 2021). *See, e. g.*, *Rhinehart v. Scutt*, 894 F.3d 721, 737 (6th Cir. 2018) (Eighth Amendment); *Blackmore v. Kalamazoo Cty.*, 390 F.3d 890,895 (6th Cir. 2004)(Fourteenth Amendment); *see also Richmond v. Huq*, 885 F.3d 928, 937 (6th Cir. 2018). This two-part framework applied to pretrial detainees "contains both an objective component—a '"sufficiently serious" medical need'—and a subjective component—a 'sufficiently culpable state of mind.'" *Griffith*, 975 F.3d at 567 (quoting *Blackmore*, 390 F.3d at 895).

Based on the foregoing, it is clear that the binding precedent set forth not only by this Circuit, but the Supreme Court requires that Fourteenth Amendment deliberate indifference claims be decided in the same manner as Eighth Amendment claims, considering both objective and subjective components. In fact, this Court as recently as this year, has decided and analyzed cases under this two-part framework. *See Griffith*, 975 F.3d at 567; *Burwell v. City of Lansing, Michigan*, 7 F.4th 456, 463 (6th Cir. 2021)(applying the two part framework to the Fourteenth Amendment

deliberate indifference claims); *Bowles v. Bourbon County, Kentucky*, No. 21-5012, 2021 WL 3028128 at *6-8 (6th Cir. July 19, 2021). Accordingly, it is clear that there is established precedent in this Circuit that the two-pronged test is controlling. Therefore, this Defendant/Appellee respectfully asserts that the majority panel erred in altering this standard to deviate from clearly established, binding precedent.

III. The Majority Panel Erred When the Issue Could Have Been Decided on Alternative Grounds

The Supreme Court has stated that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality … unless such adjudication is unavoidable. *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944); *Clinton v. Jones*, 520 U.S. 681, 690 (1997). The Sixth Circuit has routinely avoided deciding the *Kingsley* issue when the matters could clearly be decided on alternative grounds. For example, in *Griffith* the district court and Plaintiff both asserted that *Kingsley*'s objective standard was the appropriate standard to be used. 975 F.3d at 569. However, the panel in *Griffith* determined that the plaintiff could not prevail under either the subjective or *Kingsley* objective standard, and accordingly reserved the question on the applicability of the *Kingsley* standard for another day. *Id.* at 570. *See also Bowles v. Bourbon County, Kentucky*, No. 21-5012, 2021 WL

3028128 at *8 (6th Cir. July 19, 2021)("Regardless of whether we analyze Plaintiffs' claims under the objective-unreasonableness standard … or under the more stringent subjective deliberate-indifference standard, Plaintiffs' claims fail …. Accordingly, we do not contribute to the circuit split on the relevant test."); *Burwell v. City of Lansing, Michigan*, 7 F4th 456, 466 (6th Cir. 2021)(declining to take a position on *Kingsley* as it was not argued before the district court).

Here, the majority panel did not have to make any ruling on the application of *Kingsley*. The majority opinion clearly finds that "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, …." *Brawner v. Scott Cty., Tenn.*, --F.4th--, 2021 WL 4304754 at *4. Accordingly, the majority panel should have exercised judicial modesty, as many other judges across the Sixth Circuit have done, and reserved ruling on the *Kingsley* issue as it is "neither 'absolutely necessary' to the appeal's outcome nor 'unavoidable' in ways not previously faced by many past panels." *Id.* at *13.

Therefore, because the majority panel acted opposite established precedent, and despite the ability to decide the matter on alternative grounds, rehearing *en banc* is necessary to determine if it was necessary to address

Kingsley thereby contributing to a circuit split, and to determine what the proper standard in the Sixth Circuit is for Fourteenth Amendment deliberate indifference claims moving forward.

CONCLUSION

For each and all of the foregoing reasons, Defendant/Appellee Scott County, Tennessee respectfully requests that this appeal be reheard by this Court *en banc*, and that the decision below be reversed in part and the judgment of the district court upheld.

RESPECTFULLY SUBMITTED this 6th day of October, 2021

TAYLOR & KNIGHT, GP

s/Caitlin C. Burchette
Arthur F. Knight, III, TN BPR 016178
Caitlin C. Burchette, TN BPR 037026
800 S. Gay Street, Suite 600
Knoxville, TN 37929
Phone: (865) 971-1701
cburchette@taylorknightlaw.com
amber@taylorknightlaw.com

Attorneys for Scott County, Tennessee

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,444 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman in 14 point font.

s/Caitlin C. Burchette
Caitlin C. Burchette, TN BPR No. 037026

CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 25 and 6 Cir. I.O.P. 25, I hereby certify that on this 6th day of October, 2021, I electronically filed with the Clerk's Office of the United States Court of Appeals for the Sixth Circuit this Petition for Rehearign *En Banc*. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served via regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

TAYLOR & KNIGHT, GP

s/Caitlin C. Burchette
Arthur F. Knight, III, TN BPR 016178
Caitlin C. Burchette, TN BPR 037026
800 S. Gay Street, Suite 600
Knoxville, TN 37929
Phone: (865) 971-1701
cburchette@taylorknightlaw.com
amber@taylorknightlaw.com

Attorneys for Scott County, Tennessee