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Holding the Big House Accountable: The Sixth Circuit Concludes a Pretrial Detainee's Fourteenth Amendment Deliberate Indifference Claim is a Wholly Objective Determination

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HOLDING THE BIG HOUSE ACCOUNTABLE: THE SIXTH CIRCUIT CONCLUDES A PRETRIAL DETAINEE'S FOURTEENTH AMENDMENT DELIBERATE INDIFFERENCE CLAIM IS A WHOLLY OBJECTIVE DETERMINATION

Noah Speitel*

I. Walking Through the Yard: An Introduction to Pretrial Detainees and the Deliberate Indifference Standard

In the current era of mass incarceration, the United States incarcerates almost two million people across federal, state, and local prisons and jails.[1] Since the 1980s, the United States jail population has nearly tripled, with pretrial detainees accounting for approximately sixty percent of this growth.[2] The fiscal impact of this rapidly increasing pretrial detainee population has costed taxpayers over nine billion dollars per year.[3] Pretrial detainees are individuals detained on suspected criminal charges, prior to any formal adjudication of guilt, who are therefore legally innocent.[4] Although the fiscal impact is staggering, the social

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1. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, Prison Pol'y Initiative (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/72N9-ZSCM] (detailing the rise of incarcerated individuals within the United States during the era of mass incarceration). In 2017, there were 10.6 million jail admissions and at least 4.6 million were unique individual admissions. *Id.*

2. *See* Joshua Aiken, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, Prison Pol'y Initiative (May 31, 2017), https://www.prisonpolicy.org/reports/jailsovertime.html [https://perma.cc/TPM7-PQAU] (explaining the role that pretrial detainees have played in increasing the overall jail population in the United States). Over two-thirds of individuals in city and county jails are pretrial detainees. *See* Sawyer & Wagner, *supra* note 1.

3. *See* Eric Holder, U.S. Att'y Gen., Address at the National Symposium on Pretrial Justice (June 1, 2011), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice [https://perma.cc/72UV-CKVZ] (advocating for the expansion of practices that emphasize pretrial release, diversion within communities, and a safer, more efficient pretrial detention system). Many of the individuals in pretrial detention are nonviolent, non-felonious offenders. *Id.*

4. *See* John Bourdeau & Karl Oakes, *Rights of Pretrial Detainees, Generally*, 72 C.J.S. *Prisons* § 114, Westlaw (database updated Aug. 2023) (explaining the legal distinction between incarcerated individuals and pretrial detainees).

impact on communities of color, poor individuals, and mothers of minors as disproportionately affected groups is devastating.[5]

The devastating and widely publicized case of Kalief Browder is illustrative of the horrific conditions and consequences of the current pretrial detention system when left unchecked.[6] At the age of sixteen, Browder was accused of stealing a man's backpack and was unable to post bail.[7] Browder was sent to Rikers Island where he was confined with adults for over three years despite being a legally innocent minor.[8] In those three years, Browder experienced what President Obama called "unspeakable violence at the hands of inmates and guards."[9] Browder's case was

5. *See* Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), https://www.prisonpolicy.org/reports/incomejails.html [https://perma.cc/P94P-MZEQ] (explaining the disproportionate impact the cash bail system has on poor communities that remain in pretrial detention prior to a formal adjudication of guilt). The United States operates on a system of money bail, which in practice creates a two-tiered system where the wealthy are free of incarceration until proven guilty, as compared to poorer individuals who are incarcerated even when legally innocent. *Id.* Over one-third of defendants are detained pretrial due to an inability to afford money bail. *Id. See also* Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ [https://perma.cc/64EA-LMRB] [hereinafter *How Race Impacts Pretrial Detainees*] (highlighting the disparities in racial composition among the pretrial detainee population). Nearly seventy percent of pretrial detainees are people of color, with Black people in particular making up forty-three percent of the legally innocent detained population. *Id. See also* Joella Adia Jones, Note, *The Failure to Protect Pregnant Pretrial Detainees: The Possibility of Constitutional Relief in the Second Circuit Under a Fourteenth Amendment Analysis*, 10 COLUM. J. RACE & L. 139, 141 (2020) (explaining the impact of pretrial detention on pregnant women); Wendy Sawyer, *How Does Unaffordable Money Bail Affect Families*, PRISON POL'Y INITIATIVE (Aug. 15, 2018), https://www.prisonpolicy.org/blog/2018/08/15/pretrial/ [https://perma.cc/2QRM-8NW3] [hereinafter *Unaffordable Money Bail*] (highlighting that two-thirds of women in pretrial detention are mothers of minor children).

6. *See* Udi Ofer, *Kalief Browder's Tragic Death and the Criminal Injustice of Our Bail System*, AM. C.L. UNION (Mar. 15, 2017), https://www.aclu.org/news/smart-justice/kalief-browders-tragic-death-and-criminal-injustice-our-bail-system [https://perma.cc/8CK5-KR6E] (describing the injustices of the two-tiered American pretrial detention system). The use of bail in the pretrial detention system allows for wealthy individuals to pay their way out of pretrial custody, while poor individuals remain in detention awaiting trials that may take several months or years before they take place or are dismissed. *Id.*

7. *See id.* (explaining the charges leading to Kalief Browder's detainment in adult jail for three years).

8. *See id.* (highlighting the excessive delay Kalief Browder faced while awaiting trial in a New York adult jail in solitary confinement).

9. *See* Peter Holley, *Kalief Browder Hanged Himself After Jail Destroyed Him. Then 'a Broken Heart' Killed His Mother.*, WASH. POST (Oct. 18, 2016, 11:33 AM), https://www.washingtonpost.com/news/post-nation/wp/2016/10/18/kalief-browder-hanged-himself-after-jail-destroyed-him-then-a-broken-heart-killed-his-mother/ [https://perma.cc/DX2J-YHJM] (quoting former United States President Barack Obama in a previous Washington Post op-ed). In 2016, President Obama used the story and death of Kalief Browder to advocate for the end of solitary confinement for minors in federal prisons. *Id.* Following the Obama op-ed and the media scrutiny surrounding Browder's death, the New York City Correction Commissioner announced that the state would no longer place inmates between ages sixteen and twenty-one in solitary confinement. *Id.*

ultimately dismissed without trial and he tragically took his life in 2015 at the age of twenty-two, after expressing the deep mental and emotional anguish he experienced during his time as a pretrial detainee.[10]

In 2022, Fred Harris—a nineteen-year-old, cognitively-disabled, ninety-eight-pound Texas native—died in pretrial detention after a fellow detainee violently attacked him.[11] Jail officials in Harris County, Texas ignored the unique risk Mr. Harris faced as a small, cognitively-disabled individual.[12] They failed to adequately protect him by placing him in a cell without supervision with a large, violent, and unstable individual who ultimately took Mr. Harris's life.[13] Mr. Harris died in custody, legally innocent, vulnerable, and absent a determination of guilt, as his case was dismissed shortly after his death.[14]

Although horrific, Mr. Browder's and Mr. Harris's stories are not anomalies.[15] Between 2008 and 2019, nearly 5,000 people nationwide died in pretrial custody without ever receiving a trial or a formal adjudication of guilt.[16] Studies show that in-custody deaths are most likely to occur during pretrial detention.[17] This is a clear failure of a system that is built on a presumption of innocence.[18]

Under the Fourteenth Amendment of the United States Constitution, legally innocent individuals have a fundamental right under the

10. *See* Matt Keyser, *'I Just Felt So Violated': Pretrial Detention's Devastating Effects*, ARNOLD VENTURES (Mar. 22, 2021), https://www.arnoldventures.org/stories/i-just-felt-so-violated-pretrial-detentions-devastating-effects [https://perma.cc/H2WS-FT2K] (explaining how Kalief Browder waited three years in adult jail for a trial that never came).

11. *See* Shaila Dewan, *Jail Is a Death Sentence for a Growing Number of Americans*, N.Y. TIMES (Nov. 22, 2022), https://www.nytimes.com/2022/11/22/us/jails-deaths.html [https://perma.cc/JK9S-3F7R] (recounting the tragic losses of life in Harris County Jail within recent years).

12. *See* Adam Zuvanich, *Mother of Teen Killed in Harris County Jail Sues County, Sheriff's Department in Federal Court*, HOUS. PUB. MEDIA (Sept. 12, 2022, 5:05 PM), https://www.houstonpublicmedia.org/articles/news/criminal-justice/2022/09/12/432856/mother-of-teen-killed-in-harris-county-jail-sues-county-sheriffs-department-in-federal-court/ [https://perma.cc/5RTY-8UWF] (noting that Mr. Harris was provided with a wristband to denote he was not to be left alone with inmates known to be violent—a direction that was inevitably not followed). Mr. Harris had a reported IQ of sixty-two. *Id.*

13. *See id.* (explaining the violent means that a fellow inmate used to take Mr. Harris's life). The inmate who took his life weighed over 140 pounds more than Mr. Harris and brutally kicked him, slammed him, and stabbed him with a sharpened eating utensil until he died. *Id.*

14. *See id.* (explaining the outcome of the legal proceedings against Mr. Harris).

15. *See* Dewan, *supra* note 11 (explaining that from 2000 to 2019, jail deaths increased eleven percent per capita to 167 deaths for every 100,000).

16. *See* Natalie Lima & Susan Nembhard, *Pretrial Deaths in Custody Are Prevalent but Preventable*, URBAN INST. (Dec. 14, 2022), https://www.urban.org/urban-wire/pretrial-deaths-custody-are-prevalent-preventable [https://perma.cc/Q3RD-N22P] (noting this statistic is only reflective of the deaths counted in the nation's largest jails, which excludes smaller jails and other pretrial detention facilities).

17. *See id.* (explaining that suicide is the leading cause of death in jail and about seventy-seven percent of those who died from suicide were held in pretrial detention without even being convicted of a crime).

18. *See id.* ("There's no need for pretrial deaths in custody to be so prevalent.").

Due Process Clause to be free from punishment prior to a formal adjudication of guilt.[19] Jail officials owe pretrial detainees a duty to safeguard them from reasonably foreseeable physical harm throughout the duration of their detention.[20] When officials either omit to take action or act in a way that evinces an objective disregard of this duty that causes injury, it is considered a form of "deliberate indifference" under the law.[21] Title 42 of the United States Code, Section 1983 provides plaintiffs with a legal avenue to seek compensation through the creation of civil liability for a governmental individual or entity that deprives the plaintiff of a constitutionally secured right, privilege, or immunity.[22]

Within the context of pretrial detention, plaintiffs will often pursue a deliberate indifference § 1983 claim against jail officials for a violation of their constitutional right to be free from punishment.[23] The U.S. Supreme Court in *Kingsley v. Hendrickson*[24] held that under the Fourteenth Amendment, a pretrial detainee's excessive force deliberate indifference claim only required an objective determination of indifference, as compared to past jurisprudence that required both a subjective and objective standard in the Eighth Amendment context.[25] A circuit

19. *See* DeAnna Pratt Swearingen, Comment, *Innocent Until Arrested?: Deliberate Indifference Toward Detainees' Due Process Rights*, 62 ARK. L. REV. 101, 109–13 (2009) (explaining the constitutional rights of pretrial detainees).

20. *See* Bourdeau & Oakes, *supra* note 4 (explaining the duties jail officials owe to detainees).

21. *See Know Your Rights: Medical, Dental and Mental Health Care*, AM. C.L. UNION NAT'L PRISON PROJECT 1 (Nov. 2005), https://www.aclu.org/sites/default/files/images/asset_upload_file690_25743.pdf [https://perma.cc/NT3L-QVVM] (explaining the deliberate indifference standard). Deliberate indifference, whether under the Eighth Amendment or Fourteenth Amendment, serves a similar purpose; it is the standard that a plaintiff must prove to prevail on a civil claim that a government official deprived them of a constitutional right. *Id.*

22. *See* 42 U.S.C. § 1983 (2018) (creating civil liability for any state official who has deprived another person of their rights, privileges, or immunities secured in the Constitution). A successful claim under § 1983 allows a plaintiff to receive prospective relief comprised of an injunction, declaratory judgement, compensatory damages, punitive damages, attorney fees, and other associated costs. *See* ANNE H. TURNER, PRACTICAL LAW, SECTION 1983: OVERVIEW (2023), Westlaw W-001-8382.

23. Kate Lambroza, Note, *Pretrial Detainees and the Objective Standard After* Kingsley v. Hendrickson, 58 AM. CRIM. L. REV. 429, 433, 441 (2021) (noting the legal utility of a § 1983 claim); *see also* Abby Dockum, Comment, Kingsley, *Unconditioned: Protecting Pretrial Detainees with an Objective Deliberate Indifference Standard in § 1983 Conditions-of-Confinement Claims*, 53 ARIZ. ST. L.J. 707, 711–12 (2021) (noting that an official's deliberate indifference to a substantial risk of physical harm to the pretrial detainee is what causes the pretrial detainee to suffer an injury that amounts to punishment barred under Fourteenth Amendment).

24. 576 U.S. 389 (2015).

25. *See id.* at 395, 400 (holding a plaintiff need not prove a defendant's state of mind because the deliberate indifference requirement only necessitates an objective determination). Within the Eighth Amendment context, there is a greater need to prove a defendant's state of mind to determine whether a punishment was malicious or sadistic under the Eighth Amendment's Cruel and Unusual Punishments Clause. *Id.* at 400. In contrast, the Fourteenth Amendment bars any type of punishment and therefore does not require a plaintiff to prove a defendant's mindset if the conditions amounted to punishment. *Id.*

split over the propriety of a subjective analysis prong in the overall analysis of a pretrial detainee's deliberate indifference claim followed the *Kingsley* Court's decision.[26] Four circuits ruled that the *Kingsley* holding did not extend beyond the facts of that case and retained the subjective prong of the claim's analysis.[27] Three other circuits broadly interpreted the *Kingsley* holding to apply to all pretrial detainee Fourteenth Amendment deliberate indifference claims.[28]

This Note analyzes the United States Court of Appeals for the Sixth Circuit's decision in *Westmoreland v. Butler County*,[29] which evened the circuit split by broadly interpreting the scope of the *Kingsley* decision to apply beyond excessive force claims.[30] This Note argues that the Sixth Circuit's adoption of the reckless disregard standard in *Westmoreland* protects the goals of the pretrial detention system, while simultaneously adhering to Supreme Court and federal appellate court precedent outlining the proper analysis of a pretrial detainee's deliberate indifference claim.[31]

Part II of this Note details the purposes of pretrial detention, the rights of pretrial detainees, individual and municipal liability, and the judicial history of the issue that led to the Sixth Circuit's recent decision. Part III provides the factual and procedural history of the *Westmoreland* decision. Part IV outlines the Sixth Circuit's reasoning in *Westmoreland*. Part V critically analyzes the Sixth Circuit's holding and argues the court properly interpreted *Kingsley* by adhering to the post-*Kingsley* jurisprudence, which broadened the application of the objective standard to all pretrial detainee claims. Finally, Part VI discusses the potential legal and social ramifications of the Sixth Circuit's holding.

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26. For further discussion of how other circuits have implemented the *Kingsley* Court's holding in different factual contexts, see *infra* notes 27–28 and accompanying text.

27. *See* Cope v. Cogdill, 3 F.4th 198, 207 n.7 (5th Cir. 2021) (deciding not to extend the *Kingsley* holding outside the context of the case), *cert. denied*, 142 S. Ct. 2573 (2022); Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018) (same); Strain v. Regalado, 977 F.3d 984, 991 (10th Cir. 2020) (same); Dang *ex rel.* Dang v. Sheriff, Seminole Cnty., 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (same).

28. *See* Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017) (holding a wholly objective determination for a deliberate indifference claim applies in the conditions of confinement context); Miranda v. County of Lake, 900 F.3d 335, 352 (7th Cir. 2018) (holding a wholly objective determination for a deliberate indifference claim applies in the medical needs context); Gordon v. County of Orange, 888 F.3d 1118, 1124 (9th Cir. 2018) (holding a wholly objective determination for a deliberate indifference claim applies in the context of a decedent's health and safety).

29. 29 F.4th 721 (6th Cir. 2022).

30. For further discussion of the Sixth Circuit's decision in *Westmoreland*, see *infra* notes 120–29 and accompanying text.

31. For further discussion of the court's elected approach, see *infra* notes 130–57 and accompanying text.

II. CROWDING THE YARD: THE FEDERAL CIRCUITS DEBATE WHAT IS REASONABLE IN THE UNITED STATES PRETRIAL DETENTION SYSTEM

Although the pretrial detention system is well established in the United States, the federal circuits are split over the depth of the constitutional protections that should be afforded to those within the system.[32] Section A discusses the purposes of pretrial detention as compared to those of incarceration. Section B analyzes the greater protections the Constitution affords to pretrial detainees under the Fourteenth Amendment when compared to the Eighth Amendment protections provided to incarcerated individuals. Section C discusses the liability government actors and municipalities face for malfeasance in the pretrial detention system. Lastly, Section D explains the origins of the circuit split regarding the proper standard applied to a pretrial detainee's deliberate indifference claim and the current state of the split.

A. *Reading the Rap Sheet: The Purposes of Pretrial Detention*

Despite the often interchangeable use of the two terms in popular discourse, the purposes of detention and incarceration practices are not the same; therefore, the legal standards that apply to incarcerated and detained persons must be different.[33] The principal purpose of incarceration is to punish the offender for their violation of the established laws of the nation.[34] Although it is well established in American law that legally innocent individuals may not be punished until proven guilty, it is equally well established that individuals may be detained to ensure their appearance at trial and to guarantee that in the event of a criminal adjudication of guilt, their sentence will be served.[35] In 1966, Congress

32. For further discussion of the circuit split, see *infra* notes 124, 148–57 and accompanying text.

33. *See* Swearingen, *supra* note 19, at 101–02 (arguing the right to medical care guaranteed by the Due Process Clause of the Fourteenth Amendment affords greater protection than the protection afforded under the Eighth Amendment). Deliberate indifference to a convicted prisoner's serious medical needs satisfies the cruel and unusual nature of punishment that the Eighth Amendment bars; however, that is the mere floor for the level of care that prison officials must provide to incarcerated individuals. *Id.* The Eighth Amendment analysis of a pretrial detainee's deliberate indifference claim ignores the fact that these individuals have not yet been convicted of a crime and are, as a matter of law, not subject to punishment. *Id.* at 102.

34. *See id.* at 102–03 (stating the principal purpose of incarceration "is a response to an adjudication of guilt, ostensibly to serve one or more of the four primary goals of punishment: retribution, rehabilitation, deterrence, and prevention"). In the late eighteenth and early nineteenth century, scholars developed theories that attributed criminal behavior to socioeconomic factors which could be rehabilitated if the individual was removed from the environment: this was the inception of the modern American incarceration system. *Id.* at 103. Despite the harsh optics of incarceration, it was viewed as a more humane system of rehabilitation as compared to physical, punitive measures like whipping or castration. *Id.* at 103–04.

35. *See id.* at 107 (stating the permissible purposes of pretrial detention within the American justice system). Before the United States formally adopted an

codified 18 U.S.C. §§ 3146–52, which expanded the purpose of pretrial detention to include preventing danger to society.[36]

Congress's expansion allowed for the detention of legally innocent individuals awaiting a formal adjudication of guilt in circumstances where a judge found the individual posed a danger to society, had a serious criminal history, or committed crimes against children.[37] The Supreme Court in *United States v. Salerno*[38] upheld the government's interest in preventing danger to society, thereby approving the expansion of legitimate purposes of pretrial detention.[39] Although critics argue that the pretrial detention system erodes the fundamental principle of an individual's innocence until proven guilty, Congress' expansion and the Supreme Court's affirmation of the detention system imparted general societal acceptance of it.[40]

B. *You Have the Right to Remain Unpunished: The Rights of Pretrial Detainees as Legally Innocent Persons Within the United States Detention System*

The U.S. Constitution affords pretrial detainees broader rights than those who are formally found guilty of a crime.[41] The Eighth Amendment

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incarceration model, punishments were typically corporal in nature and imprisonment was only used as temporary means to ensure the individual was present for trial and punishment. *Id.*

36. *See id.* at 108 (explaining how pretrial detention has grown as Congress expanded the permissible purposes of the system). In 1966, Congress passed the Bail Reform Act which expanded the permissible purposes of pretrial detention and made changes to the pretrial detention system. *Id.* *See generally* United States v. Salerno, 481 U.S. 739 (1987) (affirming Congress' expansion of the permissible functions of the American pretrial detention system). The Rehnquist-led Court held that the Act's authorization of pretrial detention upon a finding of future danger did not violate substantive due process, and that it was not considered illegal punishment prior to a formal adjudication of guilt. *Id.* at 747. The *Salerno* Court also held that regardless of the duration of detention, due process does not create a categorical prohibition against regulatory pretrial detention based on danger to the community. *Id.* at 748.

37. *See* Swearingen, *supra* note 19, at 108 (noting new permissible functions of the United States' pretrial detention system after the Bail Reform Act of 1966).

38. 481 U.S. 739 (1987).

39. For a discussion of the *Salerno* holding and its implications, see *supra* note 36 and accompanying text (holding Congress did not violate constitutional safeguards when it expanded the permissible functions of pretrial detention through the Bail Reform Act of 1966).

40. *See* John A. Washington, Note, *Preventive Detention: Dangerous Until Proven Innocent*, 38 CATH. U. L. REV. 271, 271 (1988) (suggesting that the legally innocent status of pretrial detainees affords them the full protections under the United States Constitution).

41. *See* Bourdeau & Oakes, *supra* note 4 (explaining that the Fourteenth Amendment provides a criminal defendant the due process right to be free from punishment). "A condition may amount to punishment if it is not reasonably related to a legitimate . . . goal" of pretrial detention. *Id.* Therefore, "arbitrary or purposeless" restrictions may amount to a condition that constitutes punishment. *Id.* Not every restriction during a condition of confinement that interferes with an individual's ability to live as comfortably as possible is a per se constitutional violation. *Id.*

protects incarcerated individuals against cruel and unusual punishment, but punishment that falls outside of this standard is permissible under the Eighth Amendment for individuals who are convicted.[42] The Supreme Court in *Kingsley* noted the separate protections that the Eighth and Fourteenth Amendments offer, and held that the legally innocent status of pretrial detainees protects them from punishment in any form.[43] Therefore, the Court found that pretrial detainees' claims must be analyzed under the broader protections of the Fourteenth Amendment.[44]

Jail officials owe pretrial detainees a duty to safeguard them from reasonably foreseeable violence by other individuals within the facility.[45] Nevertheless, a jail official's episodic act or omission does not violate the pretrial detainee's due process right to be free from punishment unless the detainee shows the official was deliberately indifferent to their needs.[46] A deliberate indifference claim under the Fourteenth Amendment requires that a defendant show: (1) the official acted intentionally, (2) in a manner that places the detainee in a substantial risk of harm, (3) without taking reasonable steps to abate the risk of harm to the pretrial detainee, (4) and that doing so was the cause of the pretrial detainee's injuries.[47]

C. *When the Accused Becomes the Victim: The Liability of Officials and Municipalities from a Pretrial Detainee's § 1983 Deliberate Indifference Claim*

A plaintiff asserting a deliberate indifference claim against an official for their injuries will do so under 42 U.S.C. § 1983.[48] This statute

42. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see also* Lambroza, *supra* note 23, at 440–41 (explaining convicted criminals can be punished but not cruelly and unusually). "Convicted criminals [may] bring their § 1983 claims under the Eighth Amendment's Cruel and Unusual Punishment Clause." *Id.* at 434. To prevail under an Eighth Amendment standard, the convicted individual must show that the officer acted "maliciously and sadistically," which requires a specific state of mind that necessarily implicates a subjective analysis. *Id.* at 434–35 (quoting Kingsley v. Hendrickson, 576 U.S. 389, 400 (2015)).

43. *See Kingsley*, 576 U.S. at 400–01 (explaining the different protections offered under the Eighth and Fourteenth Amendments).

44. *See id.* (clarifying that the Eighth and Fourteenth Amendments protect different rights and that claims under the distinct amendments cannot be reasonably analogized); Lambroza, *supra* note 23, at 440–41 (highlighting the Fourteenth Amendment's broad protections for legally innocent people).

45. *See* Lambroza, *supra* note 23, at 447 (noting prison officials owe prisoners a duty to "protect prisoners from violence at the hands of other prisoners" (quoting Farmer v. Brennan, 511 U.S. 825, 833 (1994))).

46. *See* Bourdeau & Oakes, *supra* note 4 (explaining the duties and points of liability for state jail officials in dealing with pretrial detainees).

47. *See* Westmoreland v. Butler County, 29 F.4th 721, 729 (6th Cir. 2022) (noting the elemental components a pretrial detainee must show to prevail on a deliberate indifference claim under the Fourteenth Amendment (citing Castro v. County of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016))).

48. *See* Dockum, *supra* note 23, at 712 (explaining that § 1983 "provides a civil remedy to those who have been deprived by a state official of a right held under federal law").

creates civil liability for any state official who has deprived a person of their rights, privileges, or immunities secured by the Constitution.[49] A successful claim under § 1983 allows a plaintiff to receive prospective relief comprised of an injunction or declaratory judgement, compensatory damages, punitive damages, attorney fees, and other associated costs.[50] Section 1983 holds historical roots dating back to the Reconstruction Era.[51] The statute's underlying purpose is to compensate individuals for inadequate enforcement of their constitutionally secured rights, privileges, and immunities at the hands of the government and its agents due to prejudice, neglect, or mismanagement.[52]

According to the Supreme Court's holding in *Harlow v. Fitzgerald*,[53] government actors can legally rebut a § 1983 claim to avoid liability under the theory of qualified immunity.[54] *Harlow* created a two-pronged qualified immunity analysis that first considers whether the facts of a given case make out a constitutional violation, and then looks to whether the right was clearly established at the time of misconduct or violated constitutional rights which a reasonable person would have recognized.[55] Although the Supreme Court in *Pearson v. Callahan*[56] reaffirmed its decision in *Saucier v. Katz*[57] to relax the rigidity of its earlier qualified immunity analysis, the *Pearson* Court held that the two-pronged test is often still applicable.[58] In the event that qualified immunity does not protect an

49. *See* TURNER, *supra* note 22 (explaining the purpose of § 1983).

50. *See id.* (discussing the potential remedies afforded to a plaintiff bringing a § 1983 claim).

51. *See* Susanah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517, 518 (1987) (explaining the historical roots of 42 U.S.C. § 1983). Section 1 of the Civil Rights Act of 1871 was the predecessor to § 1983 and was originally intended to protect Black Americans from Southern governments' abuse through discriminatory laws and failure to enforce laws against the Ku Klux Klan. *Id.*

52. *See id.* (explaining that the purpose of Section 1 of the Civil Rights Act of 1871—now codified as 42 U.S.C. § 1983—focused on creating liability for state government representatives who abused Black Americans in the South following the Civil War).

53. 457 U.S. 800 (1982).

54. *See id.* at 818 ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). In evaluating an official's actions, the Court attempted to strike a balance between the public interest of deterring unlawful conduct using an objective reasonableness standard and the public interest in allowing officers to take action "with independence and without fear of consequences." *Id.* at 819 (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

55. *Id.* at 818–19 (describing the two-pronged analysis courts should apply when determining the merits of an asserted qualified immunity defense).

56. 555 U.S. 223 (2009).

57. 533 U.S. 194 (2001).

58. *See Pearson*, 555 U.S. at 236 (holding that the two-pronged analysis to evaluate the propriety of qualified immunity is often appropriate but is no longer mandatory). The Court noted the high price of judicial expenditures that is associated with cases where there is not a clearly established constitutional right, but there is substantial debate as to whether such a right exists. *Id.* at 236–37.

official from liability, the Supreme Court in *Monell v. Department of Social Services*[59] determined that municipalities could also be held liable for infringing upon one's constitutional rights if the infringement occurred as a result of an official policy.[60] The Sixth Circuit in *Watkins v. City of Battle Creek*[61] determined that if plaintiffs cannot show an individually named defendant deprived them of certain constitutional rights, then the municipality for which the defendant works cannot be held liable.[62]

D. *The Road to Justice: The Pretrial Detainee Deliberate Indifference Debate*

Historically, courts have analyzed a pretrial detainee's deliberate indifference claim using the Fourteenth and Eighth Amendment protections as interchangeable analyses that are virtually the same.[63] The term "deliberate indifference" first arose in the 1976 Supreme Court case *Estelle v. Gamble*.[64] In *Estelle*, the Supreme Court used the term "deliberate indifference" to denote a state of mind more blameworthy than negligence.[65] The Court in *Estelle* recognized that inadequate prison medical care violated the Eighth Amendment's Cruel and Unusual Punishments Clause.[66] Following the Supreme Court's decision in *Estelle*, there was much debate as to whether the standard was an objective or subjective

59. 436 U.S. 658 (1978).

60. *See id.* at 690 (concluding the legislative history of the Civil Rights Act of 1871—the precursor to § 1983—indicated that Congress intended to include municipalities among the parties potentially liable under § 1983). This ruling allowed for local governing bodies to be sued directly for an officer's unconstitutional action which the governing body officially implemented through a policy, statement, ordinance, regulation or decision, or a governmental custom, even if "such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 690–91.

61. 273 F.3d 682 (6th Cir. 2001).

62. *See id.* at 687 (citing City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986)). The plaintiff in this case argued that the city failed to properly train officers in violation of § 1983; however, the Sixth Circuit determined that without an individual constitutional violation, there was no basis for holding the municipality liable. *Id.*

63. *See* Lambroza, *supra* note 23, at 436 (noting that prior to the *Kingsley* decision, "some circuits applied the subjective malicious and sadistic standard to pretrial detainees' excessive force claims, while others applied the objective reasonableness standard articulated in *Graham*" (citing Graham v. Connor, 490 U.S. 386, 397 (1989))).

64. 429 U.S. 97 (1976).

65. *See id.* at 104 (articulating the first use of deliberate indifference, but failing to provide any guidance as to what the term means); *see also* Farmer v. Brennan, 511 U.S. 825, 835 (1994) (noting that the Supreme Court in *Estelle* first articulated the idea of deliberate indifference but did not explain the meaning of the term). The *Farmer* Court acknowledged *Estelle*'s conclusion that deliberate indifference required more than negligence, but determined that it can also be satisfied by "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id.*

66. *See Estelle*, 429 U.S. at 104 (holding that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment" (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976))).

determination.[67] Courts understood that the deliberate indifference standard rested between the mens rea of negligence and knowledge; therefore, many courts equated deliberate indifference with recklessness.[68] Nevertheless, the debate then became whether a deliberate indifference claim would be analyzed under civil law recklessness—that is, an objective standard—or under the criminal law standard, which requires both a subjective and objective determination of recklessness.[69]

The Supreme Court in *Farmer v. Brennan*[70] settled the debate when it held that a prison official cannot be found liable under the Eighth Amendment's Cruel and Unusual Punishments Clause unless the official knew that an inference of risk existed, drew the inference, and failed to act.[71] The *Farmer* Court reasoned that the subjective standard of an Eighth Amendment deliberate indifference claim was consistent with the Court's interpretation of the Amendment's language because an official's failure to perceive a risk, while not commendable, cannot constitute an infliction of punishment.[72] Therefore, an Eighth Amendment analysis of a deliberate indifference claim requires a subjective component to accurately determine whether a prison official was intentionally cruel or unusual in the administration of the individual's punishment.[73]

The Supreme Court in *Kingsley* recognized the unique status of pretrial detainees who are legally innocent and therefore are owed a constitutional due process right to be free from punishment prior to a

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67. *See Farmer*, 511 U.S. at 832 (stating the Court granted certiorari because "Courts of Appeals had adopted inconsistent tests for 'deliberate indifference'").

68. *See id.* at 836 (first citing LaMarca v. Turner, 995 F.2d 1526, 1535 (11th Cir. 1993); then citing Manarite v. Springfield, 957 F.2d 953, 957 (1st Cir. 1992); then citing Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991), *abrogated by* Perez v. Cox, 788 F. App'x 438 (9th Cir. 2019); then citing McGill v. Duckworth, 944 F.2d 344, 347 (7th Cir. 1991), *overruled by* Gevas v. McLaughlin, 798 F.3d 475 (7th Cir. 2015); then citing Miltier v. Beorn, 896 F.2d 848, 851–52 (4th Cir. 1990), *overruled by* Stevens v. Holler, 68 F.4th 921 (4th Cir. 2023); and then citing Martin v. White, 742 F.2d 469, 474 (8th Cir. 1984), *abrogated by* Jensen v. Clarke, 73 F.3d 808 (8th Cir. 1996)) (explaining the common interpretation of the deliberate indifference standard at the time). The Court cited six circuits that equated the deliberate indifference standard to recklessness prior to the *Farmer* decision. *Id.*

69. *See id.* (noting "the term recklessness is not self-defining"). The Court determined that criminal law permits a finding of recklessness only when people disregard risks that they are aware of. *Id.* at 836–37. Nevertheless, "civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 836.

70. 511 U.S. 825 (1994).

71. *See id.* at 837 (rejecting the civil law recklessness definition in favor of the criminal law subjective standard).

72. *See id.* at 837–38 ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"). The Court distinguished between tort liability based on harm caused without knowledge of the risk of harm, and the impropriety of holding officials liable for a constitutional violation based on failing to alleviate a risk they had no knowledge of. *Id.*

73. *See id.* at 839–40 (noting the criminal law subjective standard provides "a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause").

formal adjudication of guilt.[74] Accordingly, the Court in *Kingsley* determined that a pretrial detainee's excessive force claim is analyzed under the Fourteenth Amendment, and held that it is a wholly objective determination as to whether the official's conduct was unreasonable as to constitute a constitutional violation.[75]

To support its holding, the *Kingsley* Court cited *Graham v. Connor*.[76] In *Graham*, the Court held that in a § 1983 claim, an officer's actions must be judged against those of a reasonable officer, and the reasonableness determination must consider what the officer knew at the time of the incident.[77] Nevertheless, the *Kingsley* Court did not provide clear guidance to lower courts as to whether its decision to eliminate the subjective prong of a pretrial detainee's excessive force claim applied to other constitutional claims under the Fourteenth Amendment.[78]

Following the *Kingsley* Court's holding, a circuit split emerged.[79] Some circuits have broadly interpreted the Court's decision to require the modification of the subjective prong of a deliberate indifference claim's analysis beyond the excessive force context, while other circuits have narrowly construed the Court's holding to the specific facts of the *Kingsley* case, retaining the subjective prong of the claim's analysis.[80] The Ninth Circuit in *Gordon v. County of Orange*[81] held the deliberate

74. *See* Kingsley v. Hendrickson, 576 U.S. 389, 400 (2015) ("[P]retrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'" (quoting Ingraham v. Wright, 430 U.S. 651, 671–72 n.40 (1977))).

75. *See id.* at 396–97 (holding a "pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable"). The Court noted several considerations that supported its finding that the objective standard is proper in the pretrial detainee excessive force context, including: (1) precedent, which supports that the Due Process Clause protects a pretrial detainee from excessive force amounting to punishment; (2) the objective standard is workable, as shown by its consistent use in the jury instructions of several circuits and in its use for evaluating and training officers on how to interact with all detainees; and (3) the "objective standard adequately protects an officer who acts in good faith." *Id.* at 398–99.

76. 490 U.S. 386 (1989); *Kingsley*, 576 U.S. at 397–98 (citing *Graham*, 490 U.S. at 396).

77. *See Graham*, 490 U.S. at 397 (reasoning that jail officials "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving"). Therefore, in accordance with *Graham*, the *Kingsley* Court determined the reasonableness decision should be made "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Kingsley*, 576 U.S. at 397.

78. *See* Brawner v. Scott County, 14 F.4th 585, 592 (6th Cir. 2021) ("*Kingsley* did not address whether an objective standard applies in other Fourteenth Amendment pretrial-detainment contexts.").

79. For a discussion of the circuit split that emerged after *Kingsley*, see *infra* note 124 and accompanying text.

80. *See* Lambroza, *supra* note 23, at 437 (explaining how some circuits continue to require actual knowledge of risk to the detainee, while other circuits use a standard of knowledge that only requires a finding that a reasonable officer under the circumstances should have known of the risk to the pretrial detainee). The circuit split results in a pretrial detainee in one jurisdiction having a more difficult standard to satisfy than one with the same claim in a different jurisdiction. *Id.*

81. 888 F.3d 1118 (9th Cir. 2018).

indifference claim, which turns on the reasonableness of the official's conduct, requires the plaintiff to show more than negligence but less than subjective intent.[82] The Ninth Circuit deemed this threshold to be a standard of reckless disregard.[83] The Ninth Circuit identified four elements a plaintiff must show to establish reckless disregard:

> (i) [T]he defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries.[84]

The Ninth Circuit cited *Kingsley* to support its conclusion that courts are to decide the third element of reasonableness on a case-by-case basis depending on the factual context under which the claim arose.[85]

Circuits that have declined to extend *Kingsley* beyond the excessive force context emphasize that the claim requires a very high bar of egregious conduct.[86] Other circuits argue that the excessive force claim, under which *Kingsley* was decided, is an entirely different constitutional claim that does not abrogate their precedent for deliberate indifference claims.[87] For example, the Fifth Circuit in *Cope v. Cogdill*[88] reasoned that a deliberate indifference claim is centered on an individual's conduct; therefore, there must be subjective knowledge of a potential risk to the pretrial detainee.[89] The Fifth Circuit only identified two elements that

82. *See id.* at 1124–25 (holding a wholly objective determination for a deliberate indifference claim applies in the context of a detainee's health and safety); *accord* Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017); Miranda v. County of Lake, 900 F.3d 335, 352 (7th Cir. 2018).

83. *See Gordon*, 888 F.3d at 1125 ("'[M]ere lack of due care by a state official' does not deprive an individual of life, liberty, or property under the Fourteenth Amendment." (quoting Castro v. County of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016))). In accordance with *Castro*, the Ninth Circuit quoted its own precedent to state: "[t]hus, the plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.'" *Id.* (quoting *Castro*, 833 F.3d at 1071).

84. *See id.* (explaining the elements a pretrial detainee must establish to successfully allege a deliberate indifference claim in the medical care context).

85. *See id.* (citing Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015)).

86. *See* Cope v. Cogdill, 3 F.4th 198, 206–07 (5th Cir. 2021) (highlighting the egregious nature of conduct that must occur to rise to the legal standard of deliberate indifference), *cert. denied*, 142 S. Ct. 2573 (2022).

87. *See, e.g.*, *id.* at 207 n.7; Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018); Strain v. Regalado, 977 F.3d 984, 991 (10th Cir. 2020); Dang *ex rel.* Dang v. Sheriff, Seminole Cnty., 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (all deciding not to extend the *Kingsley* holding outside the context of the case).

88. 3 F.4th 198 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2573 (2022).

89. *See id.* at 207 (noting the defendant's "actions fall under a 'deliberate indifference' standard '[b]ecause the focus of the claim is one individual's misconduct'"

a plaintiff must show to prevail on the claim: (1) the defendant had subjective knowledge of a substantial risk of serious harm, and (2) the defendant responded to that risk with deliberate indifference.[90] The Fifth Circuit deviated from the Ninth Circuit's holding by concluding that wanton disregard is the proper standard for evaluating a pretrial detainee's claim, whereas the Ninth Circuit adopted a reckless disregard standard.[91]

The Sixth Circuit in *Brawner v. Scott County*[92] addressed this issue regarding a pretrial detainee's deliberate indifference claim against a jail nurse, holding *Kingsley* eliminated the subjective element of a pretrial detainee's deliberate indifference claim.[93] In *Greene v. Crawford County*,[94] the Sixth Circuit reaffirmed its *Brawner* decision.[95] Nevertheless, prior to hearing *Westmoreland*, the Sixth Circuit had not addressed the issue of deliberate indifference beyond the context of medical needs.[96]

III. ESTABLISHING THE RECORD: THE SIXTH CIRCUIT MAKES REASON OF *WESTMORELAND*

Bretton Westmoreland, a pretrial detainee in Butler County Jail (BCJ), suffered severe physical injuries resulting from a violent detainee

(alteration in original) (quoting Shepherd v. Dallas County, 591 F.3d 445, 452 (5th Cir. 2009))).

90. *See id.* at 206–07 ("An official 'violates a pretrial detainee's constitutional right to be secure in his basic human needs only when the official had subjective knowledge of a substantial risk of serious harm to the detainee and responded to that risk with deliberate indifference.'" (quoting Est. of Henson v. Wichita County, 795 F.3d 456, 464 (5th Cir. 2015))).

91. *Compare id.* at 207 ("'Deliberate indifference is an extremely high standard to meet' but can be satisfied by a 'wanton disregard for [an inmate's] serious medical needs.'" (alteration in original) (quoting Domino v. Tex. Dep't of Crim. Just., 239 F.3d 752, 756 (5th Cir. 2001))), *with* Gordon v. County of Orange, 888 F.3d 1118, 1125 (9th Cir. 2018) (holding the correct standard is akin to reckless disregard).

92. 14 F.4th 585 (6th Cir. 2021).

93. *See id.* at 596 ("Given *Kingsley*'s clear delineation between claims brought by convicted prisoners under the Eighth Amendment and claims brought by pretrial detainees under the Fourteenth Amendment, applying the same analysis to these constitutionally distinct groups is no longer tenable."). The *Brawner* court reiterated that the legally innocent nature of pretrial detainees affords them different constitutional standing than convicted criminals, and therefore the punishment model under the Eighth Amendment is not applicable regardless of the factual context. *Id.*

94. 22 F.4th 593 (6th Cir. 2022).

95. *See id.* at 607 (affirming the *Brawner* court's holding that requires an objective standard in evaluating a pretrial detainee's deliberate indifference claim in the medical context). The *Greene* court definitively determined that the *Brawner* court answered the question *Kingsley* left open; namely, that the objective standard applies outside of the excessive force context and requires a deliberate indifference test that is akin to reckless disregard. *Id.* at 606.

96. *See* Westmoreland v. Butler County, 29 F.4th 721, 728 (6th Cir. 2022) (stating the Sixth Circuit had not applied the objective standard outside of the medical needs context). The Sixth Circuit faced an issue of first impression in determining the proper standard to apply to a pretrial detainee's "failure-to-protect" deliberate indifference claim against an individual officer. *Id.*

attack.[97] Westmoreland had requested to be separated from another detainee, Jerry St. Clair, because St. Clair believed that Westmoreland "snitched" on him while at another facility prior to coming to BCJ.[98] BCJ administration granted Westmoreland's request and transferred him to a multi-occupancy cell away from St. Clair.[99] Nevertheless, St. Clair was allowed to mop floors near Westmoreland's new cell and told Westmoreland's new cellmates that Westmoreland was a "rat."[100] This angered Westmoreland's inmates, and he relayed his safety concerns to his mother over the phone; his mother then contacted a BCJ jail coordinator to share her son's concerns.[101]

Rocky Tyree, the BCJ supervising jail official assigned to this case, claimed to have spoken with Westmoreland just before receiving notice of his mother's concern.[102] Tyree recalled that Westmoreland said he was "fine" and did not feel the need to follow up on the call; however, Westmoreland denied having any such conversation with Tyree.[103] Westmoreland called his mother again, voicing his fear for his wellbeing, and Westmoreland's mother stated that Tyree would "take care of everything."[104] Westmoreland then asked another official, Jesse Kidd, to remove him from the cell.[105] Kidd, however, claimed that Westmoreland

97. *See id.* at 723 (explaining Westmoreland was attacked from behind in his cell for being a "snitch"). Westmoreland was detained on March 27, 2018, as a result of an active bench warrant for failure to appear. *Id.* at 724.

98. *See id.* (explaining how St. Clair believed Westmoreland was a government informant who provided information against him during their prior incarceration at another facility).

99. *See id.* (explaining Westmoreland had to sign a document acknowledging he received and understood the rules of BCJ, including the transfer process from other detainees if he felt threatened). Westmoreland requested to be transferred away from St. Clair on the same day he signed the document acknowledging the rules. *Id.*

100. *See id.* (noting Westmoreland called his mother to let her know St. Clair was allowed to mop floors by his cell). On June 3, 2018, during the phone call with his mother, Westmoreland shared that St. Clair told Westmoreland's six cellmates that Westmoreland "told on him." *Id.*

101. *See id.* (clarifying that defendant Rocky Tyree did not receive the initial phone call from Westmoreland's mother). Instead, Tara McMillin, the jail's coordinator, received the call from Westmoreland's mother. *Id.* She filed an incident report and passed the report and a note to her supervisor, Rocky Tyree. *Id.*

102. *See id.* (explaining Tyree claimed to have spoken with Westmoreland just fifteen minutes before McMillian informed Tyree of the call from Westmoreland's mother).

103. *See id.* at 724–25 (quoting Defendant's Motion for Summary Judgment at 198, *Westmoreland*, 29 F.4th 721 (No. 21-5168)) (noting Tyree and Westmoreland have different accounts as to whether a conversation about being transferred from the cell ever occurred). Tyree claimed that he spoke to Westmoreland, who allegedly said he did not want to move cells. *Id.* This led Tyree to believe he did not need to follow up with Westmoreland after the report was filed. *Id.*

104. *See id.* at 725 (quoting Plaintiff's Response to Defendant's Motion for Summary Judgment at 247, *Westmoreland*, 29 F.4th 721 (No. 21-5168)) (noting Westmoreland called his mother again to voice his concern on June 4, 2018, after the incident report had been filed).

105. *See id.* (explaining the number of times Westmoreland alluded to an impending potential danger to his wellbeing).

complained about not getting along with the other cellmates—not about a fear for his wellbeing.[106]

Westmoreland's cellmates attacked him later that night.[107] His assailants knocked him unconscious, and prison officials took him to the emergency room where he was diagnosed with a broken jaw.[108] His injuries resulted in two surgeries, which required his jaw to remain wired shut for eight months and to eat a purely liquid diet.[109]

Westmoreland filed a § 1983 action in the Western District of Kentucky Bowling Green Division against Tyree, two other BCJ officials, and the BCJ generally, asserting claims for failure to protect him in violation of his Eighth and Fourteenth Amendment rights.[110] The district court applied a two-pronged deliberate indifference standard to assess whether the law entitled Tyree to qualified immunity.[111]

The district court ruled that Westmoreland alleged facts to support the objective prong of his claim because he was labeled a "snitch" and then suffered severe physical harm.[112] Nevertheless, the district court did not find that the subjective component was met.[113] The court first explained that Westmoreland failed to show Tyree knew of the substantial risk of harm he faced and that Tyree did not take reasonable steps to ensure Westmoreland was safe from harm.[114] Westmoreland had to

106. *See id.* (explaining the jail has a policy that prohibits the transfer of detainees due to mere dislike of other detainees). Westmoreland again claimed that he voiced a concern about his own wellbeing and not a mere disdain for his cellmates. *Id.*

107. *Id.* (noting that Westmoreland was attacked just hours after warning jail officials of his concern for his own wellbeing).

108. *See id.* (explaining Ricky Mullikan, one of the other detainees in Westmoreland's cell, struck him from behind while two other cellmates prevented Westmoreland from fighting back or escaping). Westmoreland was attacked the same day he allegedly shared his concerns with Kidd. *Id.*

109. *See id.* (noting Westmoreland still experienced symptoms at the time the appeal was brought, over three years after the attack). Westmoreland continues to suffer from numbness in his jaw and a painful popping of his jaw when he eats. *Id.*

110. *See* Westmoreland v. Butler County, No. 19-CV-00073, 2021 WL 698859, at *2 (W.D. Ky. Feb. 23, 2021) (explaining the basis of the initial federal civil action), *vacated and remanded*, 29 F.4th 721 (6th Cir. 2022). "Westmoreland voluntarily dismissed his claims against McMillin and Fugate." *Westmoreland*, 29 F.4th at 725.

111. *See Westmoreland*, 2021 WL 698859, at *2–5 (applying a partially subjective analysis to Westmoreland's deliberate indifference claim); *see also Westmoreland*, 29 F.4th at 725–26 (explaining the differing approaches the Sixth Circuit and the district court took in analyzing Westmoreland's claims). The district court treated the Eighth Amendment and Fourteenth Amendment analysis of Westmoreland's deliberate indifference claim as virtually the same. *Id.* at 728. The district court, however, decided the case before the Sixth Circuit expanded the reach of the *Kingsley* holding in *Brawner*. *Id.*

112. *See Westmoreland*, 2021 WL 698859, at *3–4 (finding that Westmoreland's claim satisfied the first prong of a deliberate indifference claim).

113. *See id.* at *4 (explaining where Westmoreland's claim fell short).

114. *See id.* at *5 (explaining Westmoreland could "not support an inference that Tyree 'was aware of an obvious, substantial risk to inmate safety'" (quoting Farmer v. Brennan, 511 U.S. 825, 843 (1994))). The district court stated that "[u]nder the subjective component of the failure-to-protect claim, a prisoner must show the defendant knew the prisoner faced 'a substantial risk of serious harm and

demonstrate facts that would lead Tyree to reasonably infer Westmoreland faced a substantial risk and then consciously disregarded that risk.[115] The district court also noted that despite the known risks associated with a pretrial detainee obtaining a "snitch" label, it was not enough to show Tyree automatically had knowledge of the substantial risk of harm Westmoreland faced.[116] The court then determined that because Tyree did not act with deliberate indifference, Westmoreland did not suffer a constitutional violation and Tyree was entitled to qualified immunity.[117] Because there was no constitutional violation, the court concluded there was no *Monell* liability to support holding BCJ liable under a theory of municipal liability.[118] Westmoreland sought appeal to reverse the district court's ruling on his § 1983 deliberate indifference claim.[119]

IV. THE POD BOSS POWER STRUGGLE: THE SIXTH CIRCUIT EVENS THE DEBATE OVER THE CORRECT STANDARD FOR A PRETRIAL DETAINEE'S DELIBERATE INDIFFERENCE CLAIM

On appeal, the Sixth Circuit considered whether a court's analysis of a pretrial detainee's failure-to-protect deliberate indifference claim is evaluated under a two-pronged subjective and objective determination

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disregard[ed] that risk by failing to take reasonable measures to abate it.'" *Id.* at *4 (second alteration in original) (quoting *Farmer*, 511 U.S. at 847). The court stated that at most, Westmoreland could show Tyree knew Westmoreland's mother was concerned about Westmoreland's wellbeing when he was labeled as a "rat" by other inmates whereas there was no evidence that the conversation between Westmoreland and Tyree occurred. *Id.* at *5.

115. *See id.* at *4 (explaining the burden of proof Westmoreland had to meet for the court to find Tyree liable for his injuries). The court explained: "[A] plaintiff must produce evidence showing 'that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk.'" *Id.* (alteration in original) (quoting Perez v. Oakland County, 466 F.3d 416, 424 (6th Cir. 2006)).

116. *See id.* at *5 (noting the illogical precedent surrounding known risks associated with negative jailhouse labels and the inability to categorically find an official liable for the injuries suffered by those with known labels). The district court then cited precedent that held:

> [J]ust because a correctional officer knows an inmate has been branded a snitch—and its common knowledge that snitches face unique risks in prison does not mean that an officer violates the Constitution if the inmate gets attacked. Each case must be examined individually, with particular focus on what the officer knew and how he responded.

Id. (emphasis omitted) (quoting Kennedy v. Wilson, No. 10-CV-299, 2013 WL 5234435, at *8–9 (E.D. Ky. Sept. 17, 2013)).

117. *See id.* at *6 (explaining Tyree lacked the requisite intent to satisfy the subjective prong of the deliberate indifference claim analysis).

118. *See id.* ("A municipality cannot be liable under *Monell* absent an underlying constitutional violation." (quoting Martin v. Maurer, 581 F. App'x 509, 512 (6th Cir. 2014))).

119. *See* Westmoreland v. Butler County, 29 F.4th 721, 726 (6th Cir. 2022) (explaining the district court's ruling that led Westmoreland to file an appeal with the Sixth Circuit Court of Appeals).

or a wholly objective test.[120] The court first confronted whether the constitutional basis for a pretrial detainee's deliberate indifference claim should be evaluated under the Eighth or Fourteenth Amendment.[121] On this issue, the Sixth Circuit looked to *Kingsley*, finding that the Court's removal of the subjective component from a pretrial detainee's deliberate indifference analysis meant the protections offered by the Eighth Amendment and Fourteenth Amendment are not the same.[122] The court thus analyzed Westmoreland's § 1983 deliberate indifference claim under the Fourteenth Amendment.[123]

The court then addressed the circuit split on the issue arising from *Kingsley*.[124] The Sixth Circuit turned to its own precedent in *Brawner* to support its modification of the subjective prong pursuant to the *Kingsley* decision.[125] The court aligned itself with the Seventh and Ninth Circuits'

120. *See id.* at 724 (highlighting that the court's conclusion largely hinged on whether Westmoreland's claim should solely be viewed as a Fourteenth Amendment claim governed by the Supreme Court's holding in *Kingsley* or whether it should be analyzed under the Eighth Amendment).

121. *See id.* at 726 (noting the claim hinged on whether Tyree violated a clearly established constitutional right). For the court to establish whether a constitutional violation occurred, it had to determine which amendment applied to Westmoreland's claim. *Id.* at 726–27. The court reiterated the test for the applicability of qualified immunity that the Supreme Court articulated in *Pearson v. Callahan*: "To determine whether an officer is entitled to qualified immunity, a court must evaluate two independent questions: (1) whether the actor's conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the incident." *Id.* at 726 (citing Pearson v. Callahan, 555 U.S. 223, 232 (2009)).

122. *See id.* at 727 (explaining the protections offered under the Eighth and Fourteenth Amendments are different). The Sixth Circuit, relying on *Kingsley*, removed the subjective prong from the deliberate indifference analysis. *Id.* at 728. According to the Sixth Circuit, *Kingsley* is evidence of the Court's intention that the Eighth and Fourteenth Amendments offer different protections and be applied in different circumstances. *Id.* at 727 (citing Kingsley v. Hendrickson, 576 U.S. 389, 391–92 (2015)).

123. *See id.* (holding the Fourteenth Amendment is the applicable amendment to analyze whether a constitutional violation occurred in the pretrial detainment context). The Sixth Circuit agreed with *Kingsley* that the Eighth Amendment's protections against cruel and unusual punishment allows for a prisoner to be punished so long as the punishment is not of the type the Eighth Amendment prohibits. *Id.* at 726–27. However, pretrial detainees are afforded a due process right to be free from punishment prior to a formal adjudication of guilt because they are legally innocent until any formal disposition is made. *See* Swearingen, *supra* note 19, at 102.

124. *See Westmoreland*, 29 F.4th at 727 (highlighting the circuit split). The Second, Seventh, and Ninth Circuits determined that *Kingsley* required a modification to the subjective prong of the deliberate indifference analysis. *Id.* (first citing Darnell v. Pineiro, 849 F.3d 17, 34–35 (2d Cir. 2017); then citing Miranda v. County of Lake, 900 F.3d 335, 352 (7th Cir. 2018); and then citing Gordon v. County of Orange, 888 F.3d 1118, 1124–25 (9th Cir. 2018)). In contrast, the Fifth, Eighth, Tenth, and Eleventh Circuits elected to preserve the subjective prong of a Fourteenth Amendment deliberate indifference claim analysis. *Id.* (first citing Cope v. Cogdill, 3 F.4th 198, 207 n.7 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2573 (2022); then citing Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018); then citing Strain v. Regalado, 977 F.3d 984, 991 (10th Cir. 2020); and then citing Dang *ex rel.* Dang v. Sheriff, Seminole Cnty., 871 F.3d 1272, 1278 n.2 (11th Cir. 2017)).

125. *See id.* at 727–28 (identifying the applicable Sixth Circuit precedent). The *Brawner* court was the first appellate review of a deliberate indifference claim in the

analytical framework for a pretrial detainee's deliberate indifference claim.[126] The Sixth Circuit ultimately vacated the district court's grant of summary judgement and held that the analysis of whether Tyree was deliberately indifferent to a substantial risk of physical harm to Westmoreland is a wholly objective consideration.[127] The court remanded the case to the district court after determining that "[t]he outcome of this analysis"—under the clarified pretrial detainee deliberate indifference framework—"is necessary to determine whether Tyree violated a clearly established constitutional right."[128] The Sixth Circuit noted that the lower court's decision would determine whether Tyree is entitled to qualified immunity, and likewise whether the BCJ can be held liable under *Monell* for violating Westmoreland's constitutional rights.[129]

V. SEARCHING THE CELLS: TAKING A CRITICAL LOOK AT THE SIXTH CIRCUIT'S HOLDING IN *WESTMORELAND*

The Sixth Circuit in *Westmoreland* aligned itself with the Supreme Court's precedent in *Kingsley*.[130] In following the Court's guidance, the Sixth Circuit evened the circuit split on the issue by siding with the Second, Seventh, and Ninth Circuits' interpretation of *Kingsley* and avoided the interpretive pitfalls of its sister circuits.[131] Although the Sixth Circuit's adoption of the reckless disregard standard does not go as far as legally possible to afford greater protections to pretrial detainees, it is the accepted standard within adult criminal justice jurisprudence and affords more protection than the alternative subjective standard.[132]

Sixth Circuit and determined that the *Kingsley* Court's elimination of the subjective prong of a deliberate indifference analysis under the Fourteenth Amendment extended beyond the excessive force context. *Id.* (citing Brawner v. Scott County, 14 F.4th 585 (6th Cir. 2021)). The *Brawner* court adopted the Ninth Circuit's reckless disregard standard to determine whether the official acted in a reasonable manner in disregarding the risk of harm to the detainee. *Id.* at 728.

126. *See id.* at 729–30 (using the Ninth Circuit's framework as guidance for the district court to evaluate Westmoreland's Fourteenth Amendment failure-to-protect deliberate indifference claim on remand).

127. *See id.* at 730 (rejecting the district court's use of a two-pronged deliberate indifference claim analysis).

128. *See id.* (remanding *Westmoreland* to the district court for a factual determination).

129. *See id.* at 731 (explaining why *Westmoreland* needed to be remanded for further findings).

130. For a discussion of how *Westmoreland* comports with the Supreme Court's precedent in *Kingsley*, see *infra* note 137 and accompanying text.

131. For a discussion of how *Westmoreland* aligns the Sixth Circuit with the Second, Seventh, and Ninth Circuits, see *infra* notes 149–52 and accompanying text.

132. For an explanation of why the reckless disregard standard is the most appropriate standard for courts to apply, see *infra* notes 158–66 and accompanying text.

A. *Staying on the Right Side of the Bars:* Westmoreland *Aligns with Supreme Court and Sixth Circuit Precedent*

The court in *Westmoreland* followed the *Kingsley* Court's guidance on the delineation between claims of incarcerated individuals and pretrial detainees arising under the Eighth and Fourteenth Amendments, respectively.[133] The Eighth and Fourteenth Amendments provide fundamentally different protections to constitutionally distinct groups.[134] The *Kingsley* Court made this distinction clear when expressing its reasoning for eliminating the subjective prong of the Fourteenth Amendment deliberate indifference analysis, and the Sixth Circuit correctly adhered to the Supreme Court's rationale.[135] Had the Sixth Circuit followed its sister circuits in narrowly construing the *Kingsley* holding, it would have missed the intentional distinction the Supreme Court made between the purposes of pretrial detention and incarceration, and the differences in constitutional protections afforded to the individuals that each system serves.[136]

Although the Sixth Circuit decided *Westmoreland* under different facts than *Kingsley*, the court properly understood the intent behind the *Kingsley* decision.[137] The *Kingsley* Court highlighted the distinction between

133. *See* Brawner v. Scott County, 14 F.4th 585, 596 (6th Cir. 2021) (holding the *Kingsley* Court created a clear delineation between pretrial detainees' Fourteenth Amendment claims and incarcerated individuals' Eighth Amendment claims); *see also* Greene v. Crawford County, 22 F.4th 593, 607 (6th Cir. 2022) (concluding the *Brawner* court's decision regarding the applicability of an objective standard after *Kingsley* was not dictum).

134. *See Brawner*, 14 F.4th at 596 ("Given *Kingsley*'s clear delineation between claims brought by convicted prisoners under the Eighth Amendment and claims brought by pretrial detainees under the Fourteenth Amendment, applying the same analysis to these constitutionally distinct groups is no longer tenable."). The *Brawner* court reiterated that the legally innocent status of pretrial detainees affords them different constitutional standing than convicted criminals, and therefore the punishment model under the Eighth Amendment is not applicable. *Id.*

135. *See* Kingsley v. Hendrickson, 576 U.S. 389, 400–01 (2015) (holding that a pretrial detainee's claim of deliberate indifference under the Fourteenth Amendment is a wholly objective analysis); *see also* Lambroza, *supra* note 23, at 451 (arguing the objective standard should apply to all pretrial detainee claims). "The objective standard accounts for the distinct demands of the Fourteenth Amendment, is consistent with *Kingsley*'s interpretation of *Bell v. Wolfish*, and can be applied in a way that protects officials from liability for negligence." *Id.*

136. *See* Dockum, *supra* note 23, at 739 (arguing the "appropriate state-of-mind requirement" for pretrial detainee "conditions-of-confinement claims" under the Fourteenth Amendment is the objective deliberate indifference standard). Although the Supreme Court has not defined the requisite mental state for pretrial detainee conditions-of-confinement claims, the language used by the Court in *Kingsley* provides some guidance as to the scope of a pretrial detainee's Fourteenth Amendment rights. *Id.* at 739–40.

137. *See* Lambroza, *supra* note 23, at 439 (stating the *Kingsley* Court carefully decided the case to ensure officials would not be held liable for mere negligence because negligence cannot be a basis for liability under § 1983, and also eliminated the relevancy of the internal state of mind of the official); *see also* Dockum, *supra* note 23, at 710 (stating the holdings of *Kingsley* and its progeny reflect the rights of pretrial detainee inmates as they developed in the latter half of the twentieth century, with legal practitioners coming to recognize the different protections that exist

incarcerated and detained individuals in the context of a plaintiff who suffered extreme injury because of excessive force from law enforcement.[138] Westmoreland suffered similar extreme injury because of a jail official's deliberate indifference to the high degree of risk associated with being labeled a jailhouse "snitch."[139] In both instances, legally innocent plaintiffs detained in government custody suffered harm because of the deliberate action, or inaction, of jail officials.[140] As such, the Sixth Circuit properly understood that the injuries Westmoreland suffered, as a result of a government official's deliberate indifference, amounted to punishment forbidden by the Fourteenth Amendment's Due Process Clause.[141]

Furthermore, the *Westmoreland* court properly understood *Brawner* as controlling precedent on deliberate indifference claims, despite the differing facts of that case.[142] Accordingly, the court uniformly applied the reckless disregard standard.[143] The *Brawner* court expressly held that *Kingsley* requires a modification of the subjective prong of a deliberate indifference claim and did not limit its language to suggest that *Kingsley* should only be extended in isolated contexts.[144] To deviate from the reckless disregard standard that both the Sixth Circuit and other circuits have applied in the post-*Kingsley* era would unnecessarily complicate an already controversial standard.[145]

Additionally, the Sixth Circuit's holding protects the goals of pretrial detention, while also not drastically increasing individual and municipal liability.[146] The Sixth Circuit's decision recognizes that the goal of

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for convicted criminals versus pretrial detainee inmates). *Westmoreland* was deliberate in adopting the *Kingsley* standard, which requires more than mere negligence but also made the subjective intent of the official irrelevant to find liability under § 1983. *See* Westmoreland v. Butler County, 29 F.4th 721, 728–29 (6th Cir. 2022).

138. *See Kingsley*, 576 U.S. at 392–93 (explaining how the plaintiff in *Kingsley* alleged excessive force by officers who tased him while face down and handcuffed).

139. *See Westmoreland*, 29 F.4th at 724–25 (noting Westmoreland was attacked because a fellow pretrial detainee informed his cellmates that Westmoreland "snitched" on him during a prior encounter).

140. For a discussion of the factual circumstances that led to the plaintiffs' harm in *Kingsley* and *Westmoreland*, see *supra* notes 98–107, 138 and accompanying text.

141. *See* Dockum, *supra* note 23, at 711–12 (explaining what amounts to punishment under the Due Process Clause of the Fourteenth Amendment). The Due Process Clause states that an individual may not be deprived of "life, liberty, or property without the due process of law," which in the context of pretrial detention and incarceration, would be a formal adjudication of guilt from a lawful conviction. *Id.*

142. *See Westmoreland*, 29 F.4th at 727–28 (citing Brawner v. Scott County, 14 F.4th 585 (6th Cir. 2021)) (discussing the court's rationale in *Brawner*).

143. *Id.* at 729 (adhering to previous Sixth Circuit precedent).

144. *See Brawner*, 14 F.4th at 596 (electing to broadly apply the *Kingsley* Court's decision).

145. *See* Dockum, *supra* note 23, at 743–44 (arguing the objective standard is clear and familiar, as multiple circuits have already employed such a standard).

146. *See* Kingsley v. Hendrickson, 576 U.S. 389, 399 (2015) ("Finally, the use of an objective standard adequately protects an officer who acts in good faith. We recognize that '[r]unning a prison is an inordinately difficult undertaking,' and

the pretrial detention system is not to punish individuals, but to ensure community safety, secure an individual's participation in trial, and allow the government to guarantee the individual is available to serve their sentence in the event of a formal adjudication of guilt.[147]

B. *Picking Sides: The Sixth Circuit Follows its Sister Circuits' Lead*

The Sixth Circuit's holding is consistent with the Second, Seventh, and Ninth Circuits' interpretation of *Kingsley*, all of which applied *Kingsley* beyond the excessive force context.[148] There is no language in *Kingsley* to suggest that the Court intended to limit the application of its holding to the factual context on which the merits of the case were decided.[149]

Additionally, the preservation of the reckless disregard standard preserves the original intent of the deliberate indifference analysis while simultaneously recognizing the civil context under which it arises.[150] The deliberate indifference standard affords individuals greater protection against abuse through the threat of a lower burden of proof to demonstrate official malfeasance.[151] The elimination of the subjective intent element of a deliberate indifference claim thus makes it easier for a pretrial detainee to show that an official's actions, or lack thereof, injured them in an unconstitutional manner.[152]

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that 'safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face.'" (alteration in original) (first quoting Turner v. Safley, 482 U.S. 78, 84–85 (1987); and then quoting Florence v. Bd. of Chosen Freeholders, 566 U.S 318, 326 (2012))).

147. *See* Swearingen, *supra* note 19, at 116–19 (arguing for the elimination of the subjective deliberate indifference standard prior to the *Kingsley* holding—an argument that the *Kingsley* Court validated in its decision).

148. *See supra* notes 124–26 and accompanying text (aligning with the Second, Seventh, and Ninth Circuits' approach).

149. *See* Lambroza, *supra* note 23, at 443 (arguing "[t]he objective standard could not plausibly be limited to excessive force claims because the Fourteenth Amendment guarantees the protection of the objective standard, regardless of the claim pleaded"). The *Kingsley* Court acknowledged that the Fourteenth Amendment affords pretrial detainees rights separate and apart from those guaranteed to convicted inmates under the Eighth Amendment, without qualifying these distinctions based on the claim. *Id.*

150. *See* Farmer v. Brennan, 511 U.S. 825, 839–40 (1994) (holding the subjective requirement of a deliberate indifference standard is analogous to the criminal law standard of recklessness); Lambroza, *supra* note 23, at 452 (arguing that courts requiring the subjective standard rather than the objective recklessness standard narrow the rights of pretrial detainees to the Eighth Amendment, which is overly restrictive and does not afford the correct breadth of protections to pretrial detainees under the Due Process Clause of the Fourteenth Amendment).

151. *See* Lambroza, *supra* note 23, at 452–53 (arguing that the Eighth Amendment subjective analysis is overly restrictive in this context and the Fourteenth Amendment does not require a pretrial detainee to show a specific state of an official's mind to prevail on a deliberate indifference claim).

152. *See id.* at 457 (noting that the subjective prong requires a pretrial detainee prove the official had actual knowledge of the harm they would inflict through their actions, or lack thereof). An objective standard does not require the pretrial detainee to prove the official had knowledge of the consequences of their actions;

In contrast, by failing to eliminate the subjective prong of the analysis, the Fifth, Eighth, Tenth, and Eleventh Circuits have ignored the Supreme Court's intent.[153] Those courts look to the *Farmer* decision as guidance for how to evaluate a deliberate indifference claim and highlight *Farmer*'s holding that the recklessness inquiry is determined pursuant to a criminal law standard.[154]

Notably, however, these courts overlook the fact that recklessness is to be determined under a civil law standard, and that *Farmer*'s reasoning was rooted in courts' interpretations of the Eighth Amendment at the time.[155] Had the Sixth Circuit adopted the interpretation of those circuits by applying a subjective element to all pretrial detainee deliberate indifference claims outside of the excessive force context, it would have too narrowly interpreted the controlling *Kingsley* Court's precedent on the issue—deliberate indifference claims brought under § 1983 are brought in the civil law context and therefore should be evaluated as such.[156] If the Sixth Circuit had aligned itself with this approach, which preserves a subjective and virtually quasi-Eighth Amendment standard, the permissible goals of pretrial detention would impermissibly begin to blend into the goals of incarceration.[157]

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rather, the pretrial detainee must only show that a reasonable official under similar circumstances would have acted differently, such that the official's actions evinced a deliberate indifference to the pretrial detainee's wellbeing. *Id.* at 436–37.

153. *See id.* at 452 (arguing courts that have not extended the *Kingsley* holding ignore the fundamental distinctions between the Eighth and Fourteenth Amendments).

154. *See Farmer*, 511 U.S. at 836–38 (rejecting the petitioner's argument for use of civil law recklessness and electing to use the criminal law subjective recklessness standard for a pretrial detainee's deliberate indifference claim); *see also* Cope v. Cogdill, 3 F.4th 198, 206–07 (5th Cir. 2021) (requiring subjective knowledge of a substantial risk of harm to the pretrial detainee), *cert. denied*, 142 S. Ct. 2573 (2022); Whitney v. City of St. Louis, 887 F.3d 857, 860 (8th Cir. 2018) (same); Strain v. Regalado, 977 F.3d 984, 990 (10th Cir. 2020) (same); Dang *ex rel.* Dang v. Sheriff, Seminole Cnty., 871 F.3d 1272, 1280, 1283 (11th Cir. 2017) (same).

155. *See Farmer*, 511 U.S. at 837–40 (reasoning the subjective recklessness standard "is a familiar and workable standard that is consistent with" the text of the Eighth Amendment as the Supreme Court has interpreted it). Prior to *Farmer*, the Supreme Court had rejected the ability to hold prison officials liable under the Eighth Amendment for "objectively inhumane prison conditions." *Id.* at 838 (citing Wilson v. Seiter, 501 U.S. 294, 299–302 (1991)).

156. *See* Jessica Lewis, Note, *Objective Deliberate Indifference Only: Pretrial Detainees' Fourteenth Amendment Substantive Due Process Rights Demand Protection in the Context of Mental Illness and Substance Use Disorder*, 110 KY. L.J. 589, 596–97 (2022) (noting how circuit courts still apply the Eighth Amendment prisoner standard to pretrial detainees relying on the *Farmer* holding).

157. *See* Dockum, *supra* note 23, at 740–41 (arguing an objective standard vindicates the constitutional rights afforded to pretrial detainees which are greater than those afforded to convicted individuals).

C. *Innocent but Not Perfect: Criticism of the Sixth Circuit's Reckless Disregard Standard*

The reckless disregard standard recognizes that jails are inherently risky environments and therefore requires a showing of more than mere negligence to find liability against an individual and municipality—a standard that is consistent with the *Kingsley* and *Farmer* holdings.[158] However, this standard is not without criticism.[159] The reckless disregard standard still requires that a prison official consciously disregard a substantial and unjustifiable risk of harm to the pretrial detainee.[160] This means that even if an officer should have known of a substantial and unjustifiable risk of harm but failed to perceive it with respect to a pretrial detainee, they are not liable under the standard that the Sixth Circuit adopted.[161] Some critics, in other contexts, have expressed concerns over the reckless disregard standard's relatively high burden of proof and advocate instead for the professional judgement standard's lower burden of proof, which would offer greater protections to detained individuals and has been used in the juvenile detention context.[162] An official is liable under the professional judgement standard when they substantially depart from the accepted standards of their profession, regardless of the intent of any specific employee.[163]

Through the *Westmoreland* court's use of an objective reckless disregard standard, the Sixth Circuit made an important stride by improving legal protections and recourse for pretrial detainees; however, it failed to apply an available standard that would offer greater protections to legally innocent individuals.[164] At the same time, courts have not applied the professional judgment standard consistently outside the juvenile detention context and have not come to a consensus about when it should be

158. *See* Westmoreland v. Butler County, 29 F.4th 721, 728–29 (6th Cir. 2022) (stating the Ninth Circuit's reckless disregard standard, the same standard the *Westmoreland* court ultimately adopted, "parallels the subjective component of the failure-to-protect claim outlined in *Farmer*, but with updated language to comport with the objectiveness required by *Kingsley*").

159. *See generally* Matthew Skolnick, Note, *The Doctor Will See You Now: The Fourth Circuit Revives the Juvenile Detainee's Right to Treatment by Adopting the Professional Judgment Standard in* Doe 4, 67 VILL. L. REV. 377, 404 (2022) (arguing for the use of a professional judgement standard in evaluating § 1983 claims brought by minors in the juvenile justice system).

160. *See supra* notes 82–85, 89–90 and accompanying text for a discussion of what a plaintiff must show to establish reckless disregard.

161. *See supra* note 50 and accompanying text for a discussion of § 1983 liability under the reckless disregard standard.

162. *See* Skolnick, *supra* note 159, at 383 (explaining the professional judgement standard and the elements the plaintiff must show to prevail on a claim under the standard).

163. *See id.* (citing Doe 4 *ex rel.* Lopez v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 342 (4th Cir. 2021)).

164. *Compare id.* (arguing for the use of the professional judgement standard over deliberate indifference), *with* Dockum, *supra* note 23, at 739–42 (noting the protections under the wholly objective deliberate indifference standard).

applied.[165] Therefore, this Note submits that the Sixth Circuit decided on the only available standard that offers strong legal protections for pretrial detainees and aligns with current Supreme Court and federal appellate court precedent in the adult criminal justice system.[166]

VI. OPENING THE CELL DOORS: HOW THE SIXTH CIRCUIT'S HOLDING IN *WESTMORELAND* CREATES GREATER PROTECTIONS FOR PRETRIAL DETAINEES

The consequences of the Sixth Circuit's decision are not confined to one court's legal ideology prevailing over another.[167] The families of individuals like Fred Harris remain in painful limbo as to whether justice will be served for their son's passing.[168] Since Mr. Harris's death, his family has brought a § 1983 claim against Harris County alleging that "Harris County (and its governmental branch, Harris County Sheriff's Office), including its officials and employees in an official capacity engaged in a *policy and practice of deliberate indifference to the care and custody* of citizens and detainees that resulted in the injury and death of Fred [Harris]."[169]

Although this case may seem like a clear failure of the pretrial detention system, justice is far from certain to prevail.[170] When Jason Spencer, the Chief of Staff for the Harris County Sheriff, was asked whether the jail was at fault for Mr. Harris's death, he simply responded "[t]hat's hard to say. I mean, those kinds of things, you know, sadly, have always happened in jails and prisons."[171] The irony of this statement is that it was made within the Fifth Circuit's jurisdiction the same year the court ruled to maintain the higher burden of proof needed to prevail on a deliberate indifference claim in *Cope v. Cogdill*.[172] The U.S. Supreme Court also missed an opportunity to weigh in on this issue when it denied

165. *See* Skolnick, *supra* note 159, at 384, 388 (noting the professional judgment standard's use in the juvenile justice context but also its sparse use in the adult criminal justice system).

166. *See supra* note 137 and accompanying text for additional information regarding the protections and benefits of the objective deliberate indifference standard.

167. *See* Jones, *supra* note 5, at 152 (noting the pragmatic differences in legal outcomes for pretrial detainees' § 1983 claims between a wholly objective standard and a mixed standard).

168. *See* Dewan, *supra* note 11 (discussing how the Harris family awaits resolution of the suit against the jail).

169. Plaintiff's Original Complaint at 14, Garcia v. Harris County, No. 22cv3093 (S.D. Tex. filed Sept. 11, 2022) (emphasis added). The complaint alleged deliberate indifference twice. *Id.* at 14, 17. The deliberate indifference stems from staffing shortages that placed detainees at a greater risk of harm and violence. *Id.* at 16.

170. *See* Dewan, *supra* note 11 (demonstrating how representatives of the jail continue to deflect responsibility for what happened to Fred Harris).

171. *Id.* (quoting Jason Spencer, the Chief of Staff for Sheriff Ed Gonzalez, whose department runs the jail in Harris County, Texas, where Fred Harris lost his life in custody). Mr. Spencer was asked if the jail bore any responsibility for Mr. Harris's death. *Id.*

172. *See* Cope v. Cogdill, 3 F.4th 198, 206–07 (5th Cir. 2021) (holding that a pretrial detainee's deliberate indifference claim is to be evaluated under both an objective and subjective analysis), *cert. denied*, 142 S. Ct. 2573 (2022).

certiorari in that case.[173] Now, Mr. Harris's mother has a simple plea of the Harris County justice system and the American legal system more broadly: "I don't want anyone else to experience that . . . . I don't want there to be a lack of human decency in these places."[174]

With the understanding that the pretrial detention system disproportionately touches low-income individuals and communities of color, creating an incentive to improve conditions in jails for pretrial detainees is imperative to ensure that these individuals are not faced with a separate criminal justice system that punishes them for their poverty.[175] Nearly seventy percent of pretrial detainees are people of color, with Black people making up forty-three percent of the pretrial detainee population.[176] Further, over one-third of defendants are detained pretrial due to an inability to afford money bail.[177] The subjective standard creates a more difficult burden of proof for harmed individuals to hold officials accountable than the objective standard—a difference that will disproportionately affect impoverished communities and people of color.[178] These vulnerable groups will thus carry the brunt of a circuit court's decision to increase or decrease the potential for government liability through the standard that is adopted to prevail on a § 1983 deliberate indifference claim.[179]

The Sixth Circuit's holding creates an easier pathway for pretrial detainees to recover for harms suffered while legally innocent and detained.[180] The subjective standard that other circuits have retained in every context outside of an excessive force deliberate indifference claim is nearly unworkable given the inherent risks of prison.[181] Circuits that have used the subjective standard in Eighth Amendment contexts have

173. *See* Cope v. Cogdill, 142 S. Ct. 2573 (2022) (denying the petition for a writ of certiorari).

174. *See* Dewan, *supra* note 11 (quoting the mother of Fred Harris).

175. *See* Rabuy & Kopf, *supra* note 5 (noting how the pretrial detention system disproportionately affects some communities more than others); *see also* Jones, *supra* note 5 (same); *Unaffordable Money Bail*, *supra* note 5 (same); *How Race Impacts Pretrial Detainees*, *supra* note 5 (same).

176. *See How Race Impacts Pretrial Detainees*, *supra* note 5 (explaining the disparate racial composition of the pretrial detainee population).

177. *See* Rabuy & Kopf, *supra* note 5 (highlighting how the justice system's use of bail can cause lower income individuals to remain detained at higher rates than their wealthy counterparts).

178. *See* Lambroza, *supra* note 23, at 431 (highlighting the inconsistent use of judicial standards with respect to claims brought by pretrial detainees).

179. For a discussion of how low-income communities and people of color are disproportionally impacted by the pretrial detention system, see *supra* note 5 and accompanying text.

180. *See* Jones, *supra* note 5, at 195 (arguing the Second Circuit's objective deliberate indifference framework, which the Sixth Circuit adopted in *Westmoreland*, makes it possible for pretrial detainees to prevail on failure-to-protect claims under the Fourteenth Amendment).

181. *See* Westmoreland v. Butler County, 29 F.4th 721, 735 (6th Cir. 2022) (Bush, J., dissenting) (acknowledging the inherent risks of prison); *see also infra* note 182 (detailing how the Seventh Circuit acknowledged the known risk that an inmate faces after being labeled a "snitch" in prison, and still failing to find that an

held that even being labeled a "snitch" in jail is not enough to prove an official had subjective knowledge of the substantial risk of harm to the incarcerated individual.[182] Use of such a standard in the pretrial detention context allows for an official's evasion of liability, which decreases government incentives to improve the abhorrent conditions of jails that house large populations of legally innocent detained individuals in this country.[183] The objective standard that the Sixth Circuit adopted works to close the legal loopholes that some sister circuits have adopted to allow jail officials and governments to escape liability.[184]

Although a higher bar than mere negligence, the reckless disregard standard maintains the objective requirement that *Kingsley* necessitates and provides a clearer path for pretrial detainees to hold individuals liable—a critical step to increasing municipal liability.[185] Jails present uniquely hazardous conditions with high incident rates.[186] Thus, it is important to ensure that the threshold for legal liability does not incentivize prison officials to shirk their duties.[187] The reckless disregard standard serves as a compromise between the competing considerations of maintaining jail workforce participation and providing pretrial detainees with a clear legal remedy for violations of their constitutional

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official's knowledge of an inmate's "snitch" label would satisfy the subjective prong of an Eighth Amendment deliberate indifference analysis).

182. *See* Dale v. Poston, 548 F.3d 563, 568 (7th Cir. 2008) (stating just "because a correctional officer knows an inmate has been branded a snitch—and it's common knowledge that snitches face unique risks in prison—does not mean that an officer violates the Constitution if the inmate gets attacked").

183. *See* Dockum, *supra* note 23, at 732–33 (providing statistics on the number of individuals that suffer inhumane conditions, abuse, and death while in detention). The article elaborates:

> In the pretrial context specifically, a Reuters investigation found that from 2008 to 2019, at least 4,998 people died in jail, including about 1,500 who died by suicide, despite not having been convicted of the offense for which they were being held and being constitutionally entitled to freedom from punishment.

Id. (citing Peter Eisler, Linda So, Jason Szep, Grant Smith & Ned Parker, *Why 4,998 Died in U.S. Jails Without Getting Their Day in Court*, REUTERS (Oct. 16, 2020, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-jails-deaths/ [https://perma.cc/7SWV-PQP6]).

184. *See* Lambroza, *supra* note 23, at 458–59 (arguing the subjective standard makes it harder to achieve justice and hold officials and municipalities liable for constitutional violations against pretrial detainees).

185. *See* Jones, *supra* note 5, at 195 (arguing the objective standard provides an easier pathway for pretrial detainees to obtain justice for harms suffered as a result of a violation of their constitutional rights).

186. *See supra* notes 9–17 and accompanying text for a discussion of hazardous conditions in jail.

187. *See* Kingsley v. Hendrickson, 576 U.S. 389, 399 (2015) ("We recognize that '[r]unning a prison is an inordinately difficult undertaking.'" (alteration in original) (quoting Turner v. Safley, 482 U.S. 78, 84–85 (1987))). The *Kingsley* Court, in its decision to remove the subjective standard for a pretrial detainee's claim, was keenly aware of the challenges associated with running a prison and recognized the importance of officials having the proper discretion to do so effectively. *Id.* at 399–400.

rights.[188] The Sixth Circuit recognized this balance that the *Kingsley* Court and its sister circuits struck to ensure that the objective standard did not create an overabundance of liability that would depress jail employment and thereby create inherently more dangerous conditions for pretrial detainees.[189]

Moreover, the increased liability for jail officials and municipalities incentivizes them to improve detention conditions and ultimately protects the fundamental goals of pretrial detention and the Fourteenth Amendment rights of the legally innocent in an era of mass incarceration.[190] The pretrial detention system's legitimacy relies on the understanding that detention does not constitute punishment.[191] The Sixth Circuit's decision in *Westmoreland* upholds the Fourteenth Amendment's protections that guarantee legally innocent individuals the due process right to be free from punishment while detained and awaiting a formal trial.[192]

If the Supreme Court considered this issue, it would have to decide whether to protect the original goals of the congressionally approved pretrial detention system through the protections of the Fourteenth Amendment.[193] Otherwise, courts may continue to perform an improper

188. *See* Dockum, *supra* note 23, at 745 (arguing the objective standard of reckless disregard protects officers who have acted reasonably and in good faith even if the pretrial detainee is still harmed).

189. *See* Keri Blakinger, Jamiles Lartey, Beth Schwartzapfel, Mike Sisak & Christie Thompson, *As Corrections Officers Quit in Droves, Prisons Get Even More Dangerous*, MARSHALL PROJECT (Nov. 1, 2021, 6:00 AM), https://www.themarshallproject.org/2021/11/01/as-corrections-officers-quit-in-droves-prisons-get-even-more-dangerous [https://perma.cc/2UNQ-2Q69] (emphasizing the dangers of understaffed detention facilities); *see also* Westmoreland v. Butler County, 29 F.4th 721, 729 (6th Cir. 2022) (following the Ninth and Seventh Circuits' holdings, the Supreme Court's intention in *Kingsley*, and its own circuit's precedent to hold that: "a defendant officer must act intentionally in a manner that puts the plaintiff at substantial risk of harm, without taking reasonable steps to abate that risk, and by failing to do so actually cause the plaintiff's injuries").

190. *See* Dockum, *supra* note 23, at 745 (arguing the objective recklessness standard is the proper standard to determine liability). The objective recklessness standard requires more than mere negligence, determines the reasonableness of the official's actions from the perspective of the facts and circumstances known at the time, and still allows for qualified immunity to apply when there is not a clearly established constitutional right. *Id.* All of these factors put together bar an individual from imposing liability on an official who is acting in good faith. *Id.*

191. *See* Washington, *supra* note 40, at 298 (arguing pretrial detention goals create uncomfortable choices when attempting to ensure community safety and positing that future abuses against legally innocent people will have the eye of the Supreme Court and state legislators); *see also supra* notes 124–26 and accompanying text for a discussion of cases that recognize pretrial detainees are distinct from the criminally convicted and cannot legally be punished.

192. *See* Swearingen, *supra* note 19, at 101–02 (arguing the pre-*Kingsley* federal deliberate indifference standard that was attached to the Eighth Amendment Cruel and Unusual Punishments Clause was unjust in the pretrial detainee context and that the Fourteenth Amendment required more protections than afforded under the Eighth Amendment).

193. *See* Dockum, *supra* note 23, at 738–39 (arguing for the Supreme Court to uniformly adopt the objective standard for all pretrial detainee claims to eliminate any constitutional interpretation inconsistencies from circuit to circuit). A uniform

quasi-Eighth Amendment analysis.[194] The Supreme Court's reconsideration of the proper deliberate indifference standard to analyze a pretrial detainee's deliberate indifference claim may not solve or prevent every tragic incident within the pretrial detention system.[195] Nevertheless, it would be an important step in moving the justice system towards greater accountability and preserving the institution's original principals if the Court were to align itself with the Sixth Circuit and adopt the wholly objective standard.[196]

application of the objective deliberate indifference standard would validate the notion that the same constitutional rights are shared by all individuals in this country regardless of geographic location. *Id.* The validation of this fundamental notion is important for public trust and accountability within the American justice system. *Id.*

194. *See id.* at 741–42 (explaining why the Eleventh Circuit's continued reliance on pre-*Kingsley* circuit precedent is inconsistent with the *Kingsley* Court's reasoning and impermissibly continues to adhere to precedent that did not separate the Eighth and Fourteenth Amendments in a pretrial detainee deliberate indifference analysis).

195. *See supra* note 137 and accompanying text (explaining the deliberate indifference standard does not hold jail officials liable for harm caused to inmates as a result of the official's negligence).

196. *See supra* note 193 and accompanying text.