Pretrial Detainee Claims of Excessive Force

Reasonableness, Deliberate Indifference, and *Kingsley v. Hendrickson's* Legacy

By Yordana Wysocki

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In 2014, 744,600 individuals were confined nationally in local detention facilities. According to the U.S. Bureau of Justice Statistics, local jail detainees amounted to 33 percent of the total population of confined persons within the United States. Danielle Kaeble, Lauren Glaze, Anastasios Tsoutis, & Todd Minton, *Correctional Populations in the United States, 2014*, U.S. Bur. Justice Stat. (rev. January 21, 2016), http://www.bjs.gov. Many of these individuals are confined while they await trial. For decades, courts treated claims by these pretrial detainees in a myriad of ways. These inmates sit between the Fourth and Eighth Amendments' protections, with rights defined by the nebulous Due Process Clause of the Fourteenth Amendment and its prohibition against deprivation of liberty without due process of law. How their rights have been interpreted and the standards that should be used in evaluating their claims are issues rarely touched by a Supreme Court that has reviewed hundreds of cases brought by convicted prisoner and arrestees. Last summer, the Supreme Court issued a decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and attempted to provide guidance on assessing pretrial detainee rights for the first time since *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Block v. Rutherford*, 468 US 576, 584 (1984). Although the decision provides guidance about the standard to use in evaluating claims of excessive force, it raises more questions than it answers about other pretrial detainee claims.

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Early Precedent

The Supreme Court's seminal decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), was the first case to address the rights of pretrial detainees comprehensively. *Id. Bell* held that the Due Process Clause of the Fifth and Fourteenth Amendments protect pretrial detainees from conditions of confinement that "amount to punishment of the detainee." *Id.* Whether a condition amounts to "punishment" depends on the purpose for which it is imposed and whether it is rationally related to that purpose. *Id.* at 538. Under *Bell*, a pretrial detainee must prove either that the jail official had intended to punish the detainee or that the condition was not rationally related to a legitimate penological purpose.

In *Bell*, the inmates challenged conditions of confinement in a federal detention facility in New York City. The Supreme Court universally found the challenged restrictions and practices rationally related to the "essential goals" of "maintaining institutional security and preserving internal order and discipline." *Id.* at 546. The Court further noted that there was no evidence presented that the detention officials acted with an intent to punish the detainees or that the restrictions were an exaggerated response to genuine security concerns. *Id.* at 561–62.

Five years later, the Supreme Court reiterated the central holding of *Bell* when it considered a pretrial detainee's claims involving a jail's prohibition against contact visits and its searches of inmate's property. *Block v. Rutherford*, 468 US 576, 584 (1984). Quoting *Bell*, the Court held that "[a]bsent proof of intent to punish," the determination of whether a condition is imposed for punishment "generally will turn on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Id.* at 584 (quoting *Bell*, 441 U.S. at 538).

In the next decade, the Supreme Court established the contours of claims brought by arrestees and convicted prisoners under the Fourth and Eighth Amendments, respectively. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386 (1989); *Whitley v. Albers*, 475 U.S. 312, 318–26 (1986). It held that arrestees must prove only that the actions of the government officials are objectively unreasonable, while convicted prisoners must met a higher standard of a malicious or sadistic intent. Later, in *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court defined the parameters of the "deliberate indifference" standard used in assessing prisoners' claims of denial of medical care and failure to protect. *Farmer* made it clear that deliberate indifference is a subjective standard. It requires that the prison official "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. It is not enough that the official should have known that a substantial risk of serious harm may exist; he or she must draw the inference. *Farmer*, 511 U.S. at 837.

After these cases, the lower courts struggled with applying the Supreme Court's precedent to pretrial detainees' claims involving excessive force, failure to protect, and denial of medical care—all claims left unaddressed by *Bell* and *Block*. In evaluating excessive force claims, most focused on the language in *Bell* that required an inquiry into whether the force was imposed for the purpose of punishment. In practice, this inquiry merged the Fourteenth Amendment's prohibition against punishment with the Eighth Amendment's requirement of a subjective standard of fault (generally a malicious or sadistic intent to harm). These circuits concluded that it was impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining institutional security and thus their claims should be evaluated similarly. *See, e.g.*, *Danley v. Allen*, 540 F.3d 1298, 1306 (11th Cir. 2008); *Orem v. Rephann*, 523 F.3d 442 (4th Cir. 2008); *Fuentes v. Wagner*, 206 F.3d 335, 341 (3d Cir. 2000); *United States v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999); *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993). *See also Athill v. Speziale*, No. 06-4941, 2009 U.S. Dist. Lexis 55446, at *21–23 (D. N.J. June 30, 2009) (collecting cases). A few circuits used the Fourth Amendment's objective reasonableness standard to evaluate detainees' excessive force claims and did not require any proof of malevolent intent. *See, e.g.*, *Andrews v. Neer*, 253 F.3d 1052, 1060–61 (8th Cir. 2001); *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002). Others courts fashioned an intermediate standard, which varied circuit to circuit. *See, e.g.*, *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996) (pretrial inmate alleging excessive force must prove that the defendants "acted deliberately or with callous indifference, evidenced by an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights"). Still other courts followed the "shocks the conscience" analysis from *County of Sacramento v. Lewis*, 523 U.S. 833, 858 (1998). *See, e.g.*, *Harris v. City of Circleville*, 583 F.3d 356, 365 (6th Cir. 2009).

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In considering pretrial detainees' claims involving medical care or failure to protect, all circuits analyzed these claims under the Fourteenth Amendment in the same fashion as they would be analyzed under the Eighth Amendment. Thus, such claims required a showing that the jail official or officer acted with "deliberate indifference" as defined in *Farmer v. Brennen*. *See, e.g.*, *Smego v. Mitchell*, 723 F.3d 752, 756 (7th Cir. 2013); *Penn v. Escorsio*, 764 F.3d 102, 110 (1st Cir. 2014); *Jackson v. Buckman*, 756 F.3d 1060, 1065 (8th Cir. 2014); *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013).

The *Kingsley* Decision

Against this backdrop, the Supreme Court granted certiorari to address the conflict and to answer the question of whether a

pretrial detainee must prove a subjective standard or an objective one in making an excessive force claim. *Kingsley*, 135 S. Ct. at 2471–72. Michael Kingsley was arrested on drug charges and held in a Wisconsin county jail pending trial. In May 2010, an officer performing cell checks noticed a piece of paper over the light in Kingsley's cell. Kingsley refused to take it down and, after further exchanges throughout the day and the next morning, the officers decided to transfer Kingsley to a different cell so that they could remove the paper. Kingsley refused to comply with orders, and the officers forcibly removed him from the cell, placed him face down on a bunk in the new cell, and went to remove his handcuffs. Kingsley claimed that although he did not resist their efforts, he was struck with a Taser and his head was slammed into the concrete bunk.

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He filed an action under 42 U.S.C. §1983, alleging excessive use of force. At the conclusion of trial, the jury was instructed on use of force. The instructions contained both objective and subjective components, requiring Kingsley to prove that the officers' use of force was both "unreasonable in light of the facts and circumstances" and that they "recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff" *Kingsley*, 135 S. Ct. at 2471. The jury found in the officers' favor. On appeal, the Seventh Circuit affirmed, holding that the law required a "subjective inquiry" into the officers' statement of mind and that, in order to be found liable, the officers must have "the requisite state of mind—at least recklessness." *Kingsley v. Hendrickson*, 744 F.3d 443, 452 (7th Cir. 2014) (internal quotes omitted).

The Supreme Court majority, in a 5–4 decision, first noted that there are two separate state-of-mind questions: (1) "the defendant's state of mind with respect to his physical acts" and (2) "the defendant's state of mind with respect to whether his use of force was 'excessive.'" *Kingsley*, 135 S. Ct. at 2472. The Court concluded that as pertained to the former, the defendant must possess "a purposeful, a knowing, or possibly a reckless state of mind" since accidental and negligent conduct is not actionable under Section 1983. *Id.* As for the second state of mind question, the Court held that an objective standard is proper and that courts should not consider the defendant's state of mind as to the propriety of the force used. *Id.* at 2472–73.

To determine whether the use of force was objectively reasonable, the Court instructed lower courts (and juries) to consider the unique facts and circumstances of each case, to make the determination from the perspective of a reasonable officer at the scene, to consider what the officer knew at the time, and to account for the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained." *Id.* at 2473. The Court admonished that deference should be given to jail officials "to preserve internal order and discipline and to maintain institutional security," and it made a nonexhaustive list of factors to consider in evaluating excessive force claims. *Id.* (*quoting Bell*, 441 U.S. at 547 and *citing Graham*, 490 U.S. at 396).

The majority opinion then turned to the history of its pretrial detainee cases, starting with *Bell*. The Court observed that these cases universally held that an objective standard was to be used in evaluating pretrial detainees' claims. The Court noted that "*Bell*'s focus on 'punishment' does not mean that proof of intent (or motive) to punish is required." *Id.* at 2474. Rather, the Court noted that "as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." *Id.* (emphasis added). The Court did not limit these comments to excessive force claims.

Justice Scalia, joined by Justices Roberts and Thomas, dissented and argued that the majority misread *Bell*. Justice Scalia distinguished between excessive force claims and conditions of confinement claims. For the latter, he argued that an objective reasonable relation test was logical since detention conditions "are the result of considered deliberation by the authority imposing the detention." *Id.* at 2478. In contrast, he found that it was illogical "automatically to infer punitive intent from the fact that a prison guard used more force against a pretrial detainee than was necessary." *Id.* Justice Scalia concluded that such excessive force would not amount to punishment and thus would not be actionable under the Fourteenth Amendment. *Id.*

Kingsley's Effect

It is clear that *Kingsley* has changed the landscape for excessive force claims brought by pretrial detainees, as acknowledged by numerous lower courts. *See*, *e.g.*, *Coley v. Lucas County, Ohio*, 799 F.3d 530 (6th Cir. 2015); *David v. Wessel*, 792 F.3d 793 (7th Cir. 2015). However, by revisiting *Bell* and casting it in the light of an objective reasonableness standard, the Supreme Court has hinted that other pretrial detainee claims, such as deliberate indifference to medical needs and failure to protect, may be analyzed without inquiring into the jail official's subjective intent. Justice Scalia's dissent adds to the puzzle, suggesting that he would have applied a reasonableness standard to all conditions of confinement claims, even if he would keep a subjective intent requirement when evaluating excessive force claims.

As noted above, before *Kingsley*, it was well settled that claims involving medical care or the failure to protect would be analyzed in the same manner regardless of whether they were brought by pretrial detainees or convicted prisoners. However, the deliberate indifference standard used

to evaluate such claims is, under *Farmer*, a subjective standard. Several lower courts have noted the uncertainty of addressing conditions of confinement, failure to protect, and medical care claims after *Kingsley*. *See, e.g.*, *Barton v. Taber*, No. 14-3280, 2016 U.S. App. Lexis 7604 (8th Cir. Apr. 27, 2016) (noting a disagreement regarding the proper standard to apply in denial of medical care claims); *Ross v. Doe*, 610 F. App'x 75, 76 n.1 (2d Cir. 2015); *Garcia v. Eau Clarie Cnty. Jail & Staff*, No. 16-cv-18-jdp, 2016 U.S. Dist. Lexis 72930 (W. Dist. Wis. Jun 3, 2016); *Johnson v. Clafton*, No. 13-14922, 2015 U.S. Dist. Lexis 132318, at *11–12 (E.D. Mich. Sept. 30, 2015); *Saetrum v. Raney*, No. CIV. NO. 1:13-425 WBS, 2015 U.S. Dist. Lexis 105871, at *31–32 n.5 (D. Idaho Aug. 7, 2015).

Less than two months after the *Kingsley* decision, the Ninth Circuit issued an opinion in *Castro v. County of L.A.*, 797 F.3d 654, 681 (9th Cir. 2015), in which it considered the application of *Kingsley* to failure to protect claims. The opinion was later withdrawn *sua sponte* for rehearing *en blanc*. *Castro v. County Of L.A.*, 809 F.3d 536, 536 (9th Cir. 2015). No new *en banc* opinion has been issued to date. However, the panel's discussion is enlightening.

In *Castro*, the plaintiff was arrested for public intoxication and placed in the "sobering cell" with another intoxicated individual. The other inmate attacked the plaintiff and severely injured him. After the trial, the jury awarded the plaintiff over $2.6 million in past and future damages against two jail officers and the county. The relevant question on appeal was whether the evidence was sufficient to show deliberate indifference. The defendant officer denied actual knowledge of the plaintiff's plight. The plaintiff argued that given where the officer was located, he must have heard the plaintiff banging on the cell door, and thus, the officer either had actual knowledge and testified untruthfully, or the officer should have known of the altercation. The panel considered whether proof of constructive knowledge (should have known of the altercation) was sufficient after *Kingsley*.

The majority determined that the "deliberate indifference" test was "the same for pretrial detainees and for convicted prisoners" in spite of the different constitutional origins. *Id.* at 664 (citing *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1242 (9th Cir. 2010)). The Ninth Circuit panel majority held that *Kingsley* did not apply to failure to protect claims for two reasons. First, since *Kingsley* only addressed the rights of pretrial detainees under the Fourteenth Amendment, it "does not necessarily impose different standards for claims brought under the Eighth Amendment as opposed to the Fourteenth Amendment." *Id.* The majority thus concluded that "*Kingsley* does not establish that excessive-force claims brought under the Fourteenth Amendment are governed by a different standard than excessive-force claims brought under the Eighth Amendment." *Id.* at 665. Presumably, therefore, the panel majority would apply an objective reasonableness standard to excessive force claims brought by convicted prisoners.

Second, the Ninth Circuit panel majority reasoned, even if *Kingsley* established different standards for excessive force claims brought by pretrial detainees and convicted prisoners, the holding would "have no bearing on the failure-to-protect claims." *Id.* The majority held that failure to protect claims require proof of deliberate indifference to a substantial risk of serious harm, which is "completely different from the standard for an excessive-force claim," because failure to protect claims involve no affirmative act by the defendant. *Id.*

Judge Graber dissented in part, concluding that "*Kingsley* strongly suggests that proof of actual knowledge of the risk is not required for a claim arising under the Fourteenth Amendment." *Id.* at 681 (J. Graber, dissenting). Judge Graber would have applied an objective reasonableness standard and found that the plaintiff need only show that a reasonable officer in the defendants' shoes should have known of the risk of harm to the plaintiff.

Other courts have continued to use a subjective test for claims involving deliberate indifference on the grounds that similar claims by arrestees are also analyzed with a subjective component. For example, in *Saetrum v. Raney*, No. CIV. NO. 1:13-425 WBS, 2015 U.S. Dist. Lexis 105871 (D. Idaho Aug. 7, 2015), the district court used the Eighth Amendment test to evaluate a pretrial detainee's medical care claim. The district court reasoned that the subjective intent test explained in *Farmer* and *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), is the same irrespective of the party bringing the claims—arrestees, pretrial detainees, or convicted prisoners. *Saetrum*, 2015 U.S. Dist. Lexis 105871, at *35 (collecting cases). This reasoning is not without flaws. Claims by arrestees that they were denied medical treatment immediately after arrest are brought under the Fourteenth Amendment, not the Fourth Amendment. *Revere v. Mass. Gen. Hospital*, 463 U.S. 239, 244 (1983) (holding that the Due Process Clause requires the government to provide medical care to persons injured during arrest without defining how that right should be analyzed). If *Kingsley* changed the contours of claims brought under the Fourteenth Amendment, there is no reason to believe that *Farmer*'s subjective deliberate indifference test (which involved a claim brought under the Eighth Amendment) remains applicable for these claims.

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Most circuits have either determined that *Kingsley* does not apply to claims concerning deliberate indifference, or they have continued to apply the subjective

deliberate indifference test without considering how such claims are affected by *Kingsley*. *See e.g.*, *Miranda-Rivera v. Toledo-Dávila*, 813 F.3d 64 (1st Cir. 2016); *Morabito v. Holmes*, No. 14-3612, – Fed. Appx. – (6th Cir. 2016); *Burton v. Downey*, 805 F.3d 776 (7th Cir. 2015) (applying the subjective deliberate indifference test without considering *Kingsley*); *Davis v. Hinds Cnty.*, No. 3:15-cv-874-CWR-LRA, 2016 U.S. Dist. Lexis 67405 (S.D. Miss., May 23, 2016) (discussing *Kingsley* when addressing the plaintiff's excessive force claims but ignoring it when considering her lack of medical care claim); *Oliver v. Cnty. of Gregory*, No. 3:14-CV-03013-RAL, 2016 U.S. Dist. Lexis 29130, at *22 n.11 (D. S.D. Mar. 8, 2016) (determining that *Kingsley* does not apply to deliberate indifference claims).

Conditions of confinement claims are less provocative after *Kingsley*, since *Bell* and *Block* both involved conditions of confinement and established the standards and tests for evaluating such claims. However, some circuits had used a subjective test to evaluate those claims, and courts in those circuits have questioned the continued viability of those tests. *See*, *e.g.*, *Colbert v. Gumusdere*, No. 15CV1537-LTS-DCF, 2016 U.S. Dist. Lexis 39178, at *10 n.4 (S.D.N.Y. Mar. 25, 2016); *Hatter v. Dyer* (*GJS*), No. 2:14-cv-616-AG (GJS), 2015 U.S. Dist. Lexis 173700, at *28 (C.D. Cal. Nov. 20, 2015); *c.f. Quiroga v. King*, No. 1:15-cv-1697-AWI-MJS, 2016 U.S. Dist. Lexis 60601 (E.D. Cal. May 5, 2016) (questioning whether, following *Kingsley*, a pretrial detainee must allege deliberate indifference in alleging a conditions of confinement claim).

Defending Jail Officials Against Pretrial Detainee's Deliberate Indifference Claims

At this time, the landscape post-*Kingsley* is unfinished. Although many circuits have declined, either with deliberation or absentmindedness, to expand *Kingsley* beyond excessive force claims, some courts have questioned the appropriateness of such positions and have moved toward a purely objective reasonableness standard, and they may fully adopt it in the future. It is important to note that this movement in the direction of an objective standard for all pretrial detainee claims does not foreclose arguments concerning a defendant's subjective intent. As noted by the district court in *Hatter*, "adopting the *Bell-Kingsley* test does not render the government official's intent irrelevant in a Section 1983 lawsuit." *Hatter*, 2015 U.S. Dist. Lexis 173700, at *28. Pretrial detainees still must prove "either actual intent or that 'the action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.'" *Id.* (*quoting Kingsley*, 135 S. Ct. at 2474). Thus, whether a legitimate penological interest exists encompasses some consideration into "the official's mindset at the time he or she acted." *Id.*

Moreover, the "deliberate indifference" inquiry arguably overlaps with the first state of mind question addressed in *Kingsley*, that is, the defendant's state of mind as it pertained to his or her physical acts. Negligence is insufficient to impose liability under Section 1983. Recklessness or intentional conduct is needed. Likewise, for a traditional deliberate indifference claim, a plaintiff must prove more than negligence. He or she must show knowledge of the risk of harm and then disregard that risk. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). An argument may be made that *Kingsley* does not change the deliberate indifference analysis.

Finally, as noted by the Supreme Court in *Kingsley*, officers protected by qualified immunity are not liable unless they violated "clearly established" rights. *Kingsley*, 135 S. Ct. at 2474 (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). The Court opined that the qualified immunity test (whether it would have been clear to a reasonable officer that his conduct was unlawful) "protects an officer who acts in good faith." *Id.* at 2474.

On remand in *Kingsley*, a retrial was held, and the jury found in the officers' favor, despite the new objective reasonableness instruction. *Kingsley v. Hendrickson*, No. 3:10-cv-832, d/e 234, 2/26/16. All in all, Kingsley's claim that excessive force was used against him was unsuccessful regardless of whether the officers' subjective intent was considered. Before a jury, the nuances of the intent inquiry carefully presented by the Supreme Court may prove merely academic. FD