A GUIDE TO GETTING YOUR CASE TO SCOTUS IN FIVE EASY STEPS

DuPage County Bar Association

Joint Appellate Law & Practice and Local Government Law Sections

April 27, 2023

G. David Mathues, *Hervas, Condon, & Bersani, PC*

FUSION SESSION; FUSION TOPIC

For appellate lawyers: a practical discussion of how cases get to SCOTUS (spoiler alert: it's not random)

For local government lawyers: a realpolitik discussion of the circuit split over denial of medical care claims brought by pretrial detainees

For everyone: how and why this circuit split will end up before SCOTUS

PROLOGUE
STATS ON SCOTUS CERT PETITIONS

- Around 8,000 filed per year
- About 70 per year accepted (plus summary reversals and GVRs)
- Roughly 1 in 100 cert petitions addressed, but …
  - Few cases have a 1% chance of being granted—most have none
  - Grant rate in cases where party represented is 4-6%
  - Handful of mega cases almost certain grants
  - Handful of factors, discussed today, may raise odds from almost zero to perhaps 1 in 4

STEP 1
CHANGE IN THE STATUS QUO

- Cert for “mere error correction” very rare
- Extensive precedent means *something new* often required to warrant SCOTUS attention
  - New statute, agency rule, or presidential order
  - Technology or social change prompts new question reconsidering old answer
  - Domestic or international political event
  - SCOTUS decision creates new questions

STEP 1, ILLUSTRATED
KINGSLEY V. HENDRICKSON, 576 U.S. 389 (2015)

The status quo

Claims by convicted prisoners and pretrial detainees treated identically even though they arise under different constitutional provisions

Kingsley changes this

Different constitutional provisions require different standards, so pretrial detainee's excessive force claim judged by objective reasonableness, *not* deliberate indifference

STEP 2
DISAGREEMENT IN THE LOWER COURTS

- If all lower courts agree, there's nothing for SCOTUS to decide!
- Sometimes SCOTUS lets a dispute "percolate" to refine the issues
- Common estimate: 70% of SCOTUS cases arise from circuit splits.
  - Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 521 (2003).
  - David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981 (2007)

STEP 2 DISAGREEMENT IN THE LOWER COURTS

A petition for a writ of certiorari will be granted only for compelling reasons. The following [non-exhaustive] list indicates the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court

U.S. Supreme Court Rule 10 (emphasis added)

STEP 2, ILLUSTRATED
HOW BROADLY DOES *KINGSLEY* APPLY?

ALL PRETRIAL DETAINEE CLAIMS?
2ND, 6TH, 7TH, & 9TH CIRCUITS

- *Kingsley* was about the pretrial detainee/convicted prisoner dichotomy
- Different language + different clause = different legal tests
- *Kingsley* uses broad language about "government action," not specific language about "force"

ONLY EXCESSIVE FORCE CLAIMS?
5TH, 8TH, 10TH, & 11TH CIRCUITS

- *Kingsley* was about use of force claims
- Claims based on action (e.g., force) differ from those based on omission (e.g., medical care, protection)
- SCOTUS previously rejected a purely objective standard for medical claims
- It's unwise to treat broad language as resolving an issue not presented

STEP 2, ILLUSTRATED

MIRANDA V. COUNTY OF LAKE, 900 F.3D 335, 352-53 (7TH CIR. 2018)

- COA 7 adopts broad reading of *Kingsley*
  - New standard for medical claims by pretrial detainees is “objective reasonableness”
  - Acknowledges circuit split, finds logic of pretrial detainees / convicted prisoners dichotomy persuasive
  - No dissent in this or subsequent cases

STEP 2, ILLUSTRATED

MIRANDA V. COUNTY OF LAKE, 900 F.3D 335, 352-53 (7TH CIR. 2018)

- New two-part test instead of 8th Amend. "deliberate indifference"
  - Did the "defendants act[] purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their handling of [the plaintiff's] case"?
  - Were their *actions* objectively reasonable?
- Claims that negligence or even gross negligence not enough
  - Unclear how to square circle of "objective reasonableness" but not "negligence"
  - Miranda contrasts a mix-up of patient's charts with a deliberate "wait and see"
  - But Med Mal law treats acts and omissions the same, and "reasonable care" is the standard
  - In Miranda's own words, a choice for one kind of treatment, if "unreasonable" means liability—which is the hallmark of a Med Mal claim

STEP 3
AN APPROPRIATE VEHICLE

Case should present disputed issue cleanly and decisively

- Disputed issue not waived or moot
- Case turns on this issue, not cluttered by other
- SCOTUS will deny cert or "DIG" these problems exist

Debate well-developed in lower courts

- If it's a 1-1 split, SCOTUS may wait to see what happens
- "Premature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles." *California v. Carney*, 471 U.S. 386, 399 (1985) (Stevens, J., dissenting)

STEP 3, ILLUSTRATED

BRAWNER V. SCOTT CNTY., TENNESSEE, 14 F.4TH 585, 588 (6TH CIR. 2021)

THE PETITION FOR CERT

"This growing divide within the circuits has been well-acknowledged as each new court addresses the question at hand. However, since 2018, this Court has declined to weigh in, resulting in an increasing and unpredictable patchwork of legal tests. … It is time for this Court to unite the circuits in the application of a consistent legal standard"

Brawner, Amici Supporting Cert. pp. 10-11

THE OPPOSITION TO CERT

This case is a remarkably bad vehicle because the question presented is obviously not outcome-determinative. *Both the panel majority and dissent explicitly state that Brawner would succeed no matter which standard applied*. The dissent went even further, characterizing the majority's discussion of the question presented here as "non-binding dicta."

Brawner, Amici Opposing Cert. p. 9.

STEP 3, ILLUSTRATED

"Petitioner claims a "deep" and "intractable" split among the circuits "as to whether the Court's holding in *Kingsley* can be expanded to claims by pretrial detainees for insufficient medical care." Pet. 10, 13. The split is not nearly as deep as petitioner imagines, and the issue requires further percolation in the lower courts." *Id.* at 10

"But even the dissenting opinion below—the very position petitioner and amici urge this Court to adopt—reasons that "it is not entirely clear how [the majority's] objective reasonableness standard differs from [the Sixth Circuit's] traditional subjective indifference standard." Where even the dissent cannot tease apart the difference in the two standards, it makes little sense to suggest that the change in standard is one of 'pro-found importance.'" *Id.* at 13-14

STEP 4
CALL IN REINFORCEMENTS

- Prominent amici – e.g., ACLU, NACDL, Chamber of Commerce, famous law professors
- Prominent SCOTUS attorney – e.g., Paul Clement, Lisa Blatt, Neal Katyal
- The US Solicitor General
- Underrated but perhaps most influential: *COA dissenting judges*
  - "The audience of a dissenting opinion often includes another entity--the United States Supreme Court. … [Sometimes] I write the dissent with the Supreme Court in mind." – Hon. Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 Stetson L. Rev. 247, 268 (2003).
  - "Dissentals and concurrals are essentially judicial petitions for certiorari." Hon. Marsha S. Berzon, *Dissent, 'Dissentals,' and Decision Making*, 100 Cal L. Rev. 1479, 1491 (2012).

STEP 4, ILLUSTRATED

“We should not be enlisting a case about excessive force to disturb our deliberate indifference to medical needs jurisprudence. …

The majority opinion is yet another example of our Circuit transforming constitutional prohibitions against punishment into a “freestanding right to be free from jailhouse medical malpractice.” The *Brawner* majority opinion did so by forgoing any examination of the Fourteenth Amendment's text or original public meaning.

The Supreme Court's refrain rings clear today: “[C]ourts are particularly ill equipped to deal with the[ ] problems” of prison administration. Regrettably, we have turned a deaf ear to these concerns. **Perhaps others, hearing this growing chorus, will decide to take action.**

Brawner v. Scott Cnty., Tennessee, 18 F 4th 551, 552-57 (6th Cir. 2021) (Readler, J., dissenting from denial of rehearing en banc) (emphasis added)

The panel opinion has none of the ambition that Judge Kavanaugh, dissenting from denial of rehearing *en banc,* attributes to it. It does not alter the law of probable cause or the law of qualified immunity. **The panel agrees with virtually everything the dissent says about the law. Our disagreement is about the facts.**

The dissent accuses us of establishing new rules of law. We have done no such thing. In fact, we view the law the same way the dissent does. …

Our disagreement with the dissent comes down to our case-specific assessment of the circumstantial evidence in the record.

Wesby v. D.C., 816 F.3d 96, 97 (D.C. Cir. 2016) (Pillard, J., concurring in denial of rehearing en banc) (emphasis added)

"In my view, the panel opinion in this case contravenes those emphatic Supreme Court directives. …

This should have been a fairly easy case for qualified immunity. **Instead, the panel opinion did what the Supreme Court has repeatedly told us not to do:** The panel opinion created a new rule and then applied that new rule retroactively against the police officers. …

What case had ever articulated such a counterintuitive rule? Crickets."

Wesby v. D.C., 816 F.3d 96, 97 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing en banc) (emphasis added)

STEP 4, ILLUSTRATED, PT 2

STEP 5, LUCK

- Luck plays a huge role in cases
  - What judges / jurors we draw
  - Current events at time of trial
  - Who happens to witness event
- Luck matters for SCOTUS
  - Which clerk(s) review petition
  - When SCOTUS feels time is right
  - Competition for SCOTUS attention

- SCOTUS has denied at least 4 petitions so far on this split
- Some were poor vehicles
- One was “relisted” several times, indicative of SCOTUS interest
- SCOTUS highly likely to address this issue in the next five years

APPELLATE PRACTICE POINTS

- Odds of getting to SCOTUS obviously low
- Still, it’s useful to recognize a lottery ticket if you see one
  - Be on the lookout for factors that might warrant cert
  - Always preserve the issue
  - If you have the right setup, take a chance on cert (otherwise, don’t waste your time or your client’s money)
- Know relevant potential SCOTUS issues, give advice accordingly

LOCAL GOVERNMENT PRACTICE POINTS

Preserve	Preserve this issue
Argue	Argue that the change is marginal
Advise	Advise your clients that what was good enough 10 years ago might not be good enough today
Watch	Keep watching to see how much the standard changes
Pick	If you find a lottery ticket, pick it up!

"The majority opinion arguably has simply dressed up the *Farmer* test in *Kingsley* language for no apparent reason[,] … conflat[ing] the two standards only to end up where we started."

Brawner, 14 F.4th at, 610 (Readler, J., dissenting) (repeating dissent in another circuit that made same point)

QUESTIONS OR COMMENTS

G. David Mathues is a partner at Hervas, Condon & Bersani, P.C in Itasca, Illinois. His practice is exclusively devoted to defending local governments in tort, employment, and Section 1983 matters at all stages of litigation. He has conducted eight federal civil jury trials, including successfully defending a fatal officer-involved shooting, and argued five times to the Seventh Circuit. David previously worked as an Assistant State's Attorney for Cook County, a Litigation Associate for Kirkland & Ellis, and a law clerk for the Hon. Danny J. Boggs, Chief Judge of the U.S. Court of Appeals for the Sixth Circuit. David graduated Notre Dame Law School *summa cum laude* in 2007.