



## Constitutionalizing Negligence

By Charles R. Starnes

Regardless of whether the objective reasonableness test applies to all claims by pretrial detainees, law enforcement and correctional officials must adhere to the highest professional standards.

# Kingsley and Objective Reasonableness

Counsel defending correctional officers, law enforcement officials, and correctional medical providers are likely familiar with a version of the following: “A detainee is entitled under the Due Process Clause of the Fourteenth

Amendment to, at a minimum, no less protection for personal security than that afforded convicted prisoners... and no less a level of medical care than that required for convicted prisoners by the Eighth Amendment.” *Colburn v. Upper Darby Twp.*, 838 F.2d 663, 668 (3d Cir. 1988), *abrogated on other grounds by Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). Such a statement is often followed by some form of “[w]hile there is room for debate over whether the Due Process Clause grants pretrial detainees more protections than the Eighth Amendment does, we need not resolve that debate here.” *Leary v. Livingston Cty.*, 528 F.3d 438, 443 (6th Cir. 2008) (internal citation omitted). This invariably leads to the application of the Eighth Amendment’s “deliberate indifference” standard, including its requirement that a defendant official be subjectively aware of a serious risk of harm, to civil rights claims brought by pretrial detainees.

However, in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), the United States Supreme Court held that a pretrial detainee alleging excessive force need only show that the force used was *objectively* unreasonable. Currently, four circuits have relied on *Kingsley* in expanding the objective reasonableness test to denial of medical treatment and other conditions of confinement claims: the Ninth, Tenth, Second, and Seventh. Other circuits have firmly rejected attempts to apply the objective reasonableness standard outside the excessive force context. *Kingsley* and its subsequent extension by lower courts have created uncertainty for officials throughout the country and raised other questions, previously dormant, about exactly who a pretrial detainee is. With an explicit circuit split, the question of whether the objective reasonableness test applies to all claims by pretrial detainees is ripe for review.



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### State of the Law Before *Kingsley*

The Constitution bars “cruel and unusual punishments.” U.S. Const., amend. VIII. In *Estelle v. Gamble*, the Supreme Court held that a prison official may be liable for inadequate medical care where the official’s actions amount to subjective “deliberate indifference” to an inmate’s health. 429 U.S. 97, 104 (1976). The Court rejected

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an objective test for deliberate indifference and held that a constitutional violation could only be found where “the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (emphasis added). The Supreme Court explained that “an official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.” *Id.* at 838. Medical providers were shielded from liability for mere devi-

ations from the standard of care. As stated by the Supreme Court, “a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.” *Estelle*, 429 U.S. at 106.

However, the rights of pretrial detainees—who may not be punished as they have not been convicted of any crime—are governed by the Fourteenth Amendment’s Due Process Clause, not the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535–36 (1979). The Supreme Court did not provide guidance on the state of mind required for liability under the Fourteenth Amendment. See *City of Canton v. Harris*, 489 U.S. 378, 388 n.8 (1989); *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983). In this absence, lower courts applied the Eighth Amendment deliberate indifference standard as a floor, providing the minimum for protections afforded to pretrial detainees.

### *Kingsley*

Michael Kingsley, a pretrial detainee held in a Wisconsin county jail, repeatedly refused to remove a paper covering a cell light when ordered to do so by correctional officers and the jail administrator. *Kingsley*, 135 S. Ct. at 2470. When told that he would be removed from the cell, he did not comply with officers’ commands. Officers handcuffed Kingsley and were then required to carry him to another cell, and they placed him face down on his new bunk. *Id.* The officers reported that he resisted when they attempted to remove the handcuffs; Kingsley claimed that he did not resist. Kingsley alleged that two officers then slammed his head against the bunk (which they denied), and the same officers admittedly applied a Taser to his back. *Id.*

Kingsley sued, alleging excessive force against the officers who purportedly slammed his head and applied the Taser. *Id.* at 2470–71. He lost at trial. On appeal, Kingsley argued that the excessive force jury instruction, which included the subjective requirement that the officers “knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff’s safety by failing to take reasonable measures to minimize the risk of harm

to plaintiff,” should have instead used an objective reasonableness standard. *Id.* at 2471.

Justice Breyer, writing for the majority, first noted that negligence is not sufficient for a constitutional violation. Rather, “a defendant must possess a purposeful, a knowing, or possibly a reckless state of mind.” *Id.* at 2472. The Court then held that “a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.” *Id.* at 2473. This standard cannot be applied mechanically as “objective reasonableness turns on the ‘facts and circumstances of each particular case.’” *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Courts are to “make this determination 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.” *Id.* This analysis should also consider “the ‘legitimate interests that stem from [the government’s] need to manage the facility in which the individual is detained,’ appropriately deferring to ‘policies and practices that in th[e] judgment’ of jail officials ‘are needed to preserve internal order and discipline and to maintain institutional security.’” *Id.* (quoting *Bell*, 441 U.S. at 540, 547). The Court provided a familiar, though non-exhaustive, list of factors to be used when assessing the objective reasonableness of the force used:

the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff’s injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

*Id.* (citing *Graham*, 490 U.S. at 396).

The Court explained that *Bell* previously held that a pretrial detainee need not demonstrate an intent to punish but must show only that a correctional official’s “actions are not ‘rationally related to a legitimate nonpunitive governmental purpose’ or that the actions ‘appear excessive in relation to that purpose.’” *Id.* at 2473 (quoting *Bell*, 441 U.S. at 561). Justice Breyer stated a belief that an objective standard was a workable one as the officers sued had been trained on such a standard, and objective reasonableness was already the standard applied in the

pattern jury instructions of some circuits. *Id.* at 2474. The Court also believed that an objective standard adequately protected officers since the reasonableness of the force used must be judged based on the facts known to the officer at the time. *Id.* As the standard for excessive force claims by detainees was objective, the jury instruction used in *Kingsley*'s case was in error in that it required him to prove that the officers used force recklessly or acted in reckless disregard of his safety. *Id.* at 2476. In doing so, the instructions asked jurors to assess what the officers subjectively believed at the time of the incident. *Id.* at 2476–77.

Justice Scalia dissented, arguing “[o]ur cases hold that the intentional infliction of punishment upon a pretrial detainee may violate the Fourteenth Amendment; but the infliction of ‘objectively unreasonable’ force, without more, is not the intentional infliction of punishment.” *Id.* at 2477. He explained that *Bell* “held that the Due Process Clause forbids holding pretrial detainees in conditions that ‘amount to punishment.’ Conditions amount to punishment, we explained, when they are ‘imposed for the purpose of punishment.’” *Id.* (quoting *Bell*, 441 U.S. at 535, 538) (internal citation omitted). “Acting with the intent to punish means taking a ‘deliberate act intended to chastise or deter.’” *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 300 (1991)). A detainee is not required to show an express intent to punish; such an intent may be inferred through circumstantial evidence. The dissent further argued that “if the condition of confinement being challenged ‘is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment.” *Id.* (quoting *Bell*, 441 U.S. at 539).

Justice Scalia further explained that the *Bell* “reasonable relation” language was in the context of conditions of confinement and security policies that are subject to deliberation by correctional authorities. *Id.* at 2478. Punitive intent could be inferred where such conditions and policies were not reasonably related to a legitimate, non-punitive purpose. However, an intent to punish could not be inferred simply because the force used was excessive. The use of excessive force could be a mistake by an officer required to act “in haste,

under pressure, and frequently without the luxury of a second chance.” *Id.* (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)).

### Ninth Circuit

A year after *Kingsley*, the Ninth Circuit was asked to determine whether a pretrial detainee’s failure to protect claim was also governed by an objective standard. In *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir.), the court of appeals found that it did. *Castro* was arrested for public drunkenness and placed in a “sober cell” at the stationhouse. *Castro*, 833 F.3d at 1064–65. Gonzalez was later arrested for breaking glass at a nightclub, described as acting “bizarre” at the time of arrest, and listed as combative during intake. *Id.* at 1065. He was placed in the sober cell with *Castro*. Police policy and state building code required that sober cells allow for maximum visual supervision by officers. State code also required such units to include an audio monitoring system. The sober cell used in this case did not meet either requirement. *Id.*

After Gonzalez was placed in the cell, *Castro* banged on the door window. No one responded. *Id.* The supervising officer had assigned an unpaid community volunteer to monitor the cell. The volunteer checked the cell twenty minutes after *Castro* called for help and saw Gonzalez touching the thigh of *Castro*, who was lying on the ground and apparently asleep. Even though Gonzalez’ touching violated jail policy, the volunteer did not investigate and only reported this to the supervising officer. Six minutes elapsed before the officer arrived. He witnessed Gonzalez stomping on *Castro*’s head and *Castro* lying unconscious in a pool of his own blood. *Id.* *Castro* was hospitalized for a month, moved to a long-term assisted living facility, and experienced memory loss and cognitive difficulties after the attack. *Id.*

*Castro* sued, alleging that his rights were violated when he was housed with Gonzalez and by the failure to monitor his cell. *Id.* He was awarded \$2 million in damages at trial, and the defendants appealed, arguing that *Castro* failed to show the officers were deliberately indifferent to a substantial risk of serious harm. *Id.* at 1065–66. The Ninth Circuit turned to *Kingsley*, stating that the Supreme Court had left open the question of whether the objective standard applied only to excessive force claims by pretrial

detainees. *Id.* at 1068–69. The court of appeals determined that *Kingsley* was not so limited, stating that the Supreme Court “did not limit its holding to ‘force’ but spoke to ‘the challenged governmental action’ generally.” *Id.* at 1070 (quoting *Kingsley*, 135 S. Ct. at 2474).

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cient for liability, the Ninth Circuit stated, “the test to be applied... require[s] a pretrial detainee who asserts a due process claim for failure to protect to prove more than negligence but less than subjective intent—something akin to reckless disregard.” *Id.* at 1071. For a failure to protect claim, a pretrial detainee must prove the following:

- (1) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
- (2) those conditions put the plaintiff at substantial risk of suffering serious harm;
- (3) the defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the

circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and (4) by not taking such measures, the defendant caused the plaintiff’s injuries. *Id.* The third element was to be assessed objectively, based on the particular facts of each case. *Id.*

**The Seventh Circuit held in *Miranda v. County of Lake*, 900 F.3d 335 (7th Cir. 2018), that denial of medical treatment claims by pretrial detainees were no longer subject to subjective deliberate indifference but were to be analyzed under an objective reasonableness standard.**

The Ninth Circuit later extended the reasoning of *Castro* to the denial of medical care context in *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018). Concluding that the Supreme Court treated inadequate medical treatment claims “substantially the same as other conditions of confinement violations,” the Ninth Circuit held that claims of inadequate medical treatment by detainees were subject to “an objective deliberate indifference standard.” *Gordon*, 888 F.3d at 1124–25.

### Second Circuit

The Second Circuit was faced with various conditions of confinement claims by twenty detainees in *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017). These included overcrowding, lack of sanitation, inadequate food and water, extreme temperatures,

sleep deprivation, and assault and intimidation by other detainees. *Darnell*, 849 F.3d at 23–26. The district court granted summary judgment as the detainees could not show that the defendants were subjectively aware that the conditions posed an excessive risk to the plaintiffs’ health or safety. *Id.* at 27–28.

On appeal, the Second Circuit reviewed *Kingsley* and found there was no reason to continue applying the subjective standard of the Eighth Amendment to claims brought by detainees under the Fourteenth Amendment. *Id.* at 33–35. Rather, “an officer’s appreciation of the risks associated with an unlawful condition of confinement” were to be considered using an objective analysis. *Id.* at 35. The court of appeals minimized the defendants’ argument that officials would be constitutionally liable for mere acts of negligence, stating, “any §1983 claim for a violation of due process requires proof of a *mens rea* greater than mere negligence. A detainee must prove that an official acted intentionally or recklessly, and not merely negligently.” *Id.* at 36 (internal citation omitted). The Second Circuit, following *Darnell*, explicitly extended *Kingsley* to denial of medical treatment claims in *Bruno v. City of Schenectady*, 727 Fed. App’x. 717 (2d Cir. 2018).

### Seventh Circuit

The Seventh Circuit held in *Miranda v. County of Lake*, 900 F.3d 335 (7th Cir. 2018), that denial of medical treatment claims by pretrial detainees were no longer subject to subjective deliberate indifference but were to be analyzed under an objective reasonableness standard. In *Miranda*, Gomes was arrested on October 12, 2011, for failing to appear for jury duty and resisting arrest. 900 F.3d at 341. After failing to appear for her court date, she was arrested for a second time and sent to Lake County Jail on December 14, 2011. Gomes was placed in general population and received a mental health evaluation two days later. After it was noted that she had not eaten or had anything to drink since her arrival, Gomes was placed in medical housing and later on suicide watch. At that point, she had already gone without food or drink for four days and weighed 146 pounds. Ten days later, she was 128 pounds. *Id.* During this period, Gomes was monitored

by medical staff and seen by an internist twice. *Id.* at 341–42. Due to her unresponsiveness to questioning and refusal to eat or drink, medical personnel could not take her vital signs or take blood or urine samples. *Id.* at 342.

A court ordered Gomes to undergo a mental fitness exam. *Id.* She was seen by a psychiatrist who diagnosed her with a “psychotic disorder not otherwise specified” but did not prescribe any medication. The psychiatrist determined that Gomes could not understand the risks of not eating or drinking. However, he did not support another doctor’s plan to draw blood samples involuntarily for monitoring, saying that this could occur only “if push came to shove.” *Id.* Jail officials were notified that Gomes was refusing medical treatment and testing. Officials were informed that medical staff were monitoring Gomes and would provide updates. On December 29, 2011, Gomes was sent by ambulance to the hospital. However, she died of complications from starvation and dehydration on January 3, 2012, with the cause of death determined to be suicide. *Id.*

Gomes’s estate sued the county, jail officials, and medical and mental health providers for denial of medical treatment in violation of the Fourteenth Amendment. Following a trial against the medical defendants, the estate challenged the district court’s jury instruction as to intent. *Id.* at 342–43. After an extensive discussion of the subjective deliberate indifference standard under the Eighth Amendment, the Seventh Circuit chose to follow the Ninth and Second Circuits to extend the *Kingsley* objective reasonableness standard. *Id.* at 350–52.

Addressing the defendant medical providers’ argument that the objective reasonableness standard would constitutionalize medical malpractice claims, the court of appeals stated that negligence would continue to fall below the state of mind requirement to raise a constitutional claim. *Id.* at 353. When assessing a defendant’s state of mind, the Seventh Circuit directed lower courts to first “ask[] whether the medical defendants acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their” actions. *Id.* Negligence or even gross negligence would not suffice. With this question answered, courts must then determine

whether a defendant's actions were objectively reasonable. *Id.* at 353–54.

The Seventh Circuit elaborated on its reasoning:

[a] properly instructed jury could find that [medical defendants] Drs. Elazegui and Singh made the decision to continue observing Gomes in the jail, rather than transporting her to the hospital, with purposeful, knowing, or reckless disregard of the consequences. (The jury could also reject such a conclusion.) It would be a different matter if, for example, the medical defendants had forgotten that Gomes was in the jail, or mixed up her chart with that of another detainee, or if Dr. Elazegui forgot to take over coverage for Dr. Kim when he went on vacation. Such negligence would be insufficient to support liability under the Fourteenth Amendment, even though it might support state-law liability. Here, there is evidence that Drs. Elazegui and Singh deliberately chose a “wait and see” monitoring plan, knowing that Gomes was neither eating nor drinking nor competent to care for herself. Because the Estate does not claim merely negligent conduct, a jury must decide whether the doctors’ deliberate failure to act was objectively reasonable. *Id.* (internal citations omitted). Thus, every medical decision—even the decision not to take a given action or to choose one course of treatment over another—must be objectively reasonable. Only where no intentional act was taken, such as forgetting the patient, could a medical provider’s act or omission be considered negligence beneath the threshold for constitutional liability. The Seventh Circuit later extended the objective reasonableness standard to all conditions of confinement claims by detainees. See *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019).

### Tenth Circuit

The Tenth Circuit appears to have an intra-circuit conflict on the application of *Kingsley*. In *Colbruno v. Kessler*, a detainee asserted that his rights were violated when officers walked him through a hospital while unclothed but for a pair of orange mittens. 928 F.3d 1156, 1159 (10th Cir. 2019). While noting that Tenth Circuit precedent was unclear as to whether

detainees asserting a due process claim must prove an intent to punish, the court of appeals stated that *Kingsley* put the question to rest. The court held that “a pretrial detainee can establish a due-process violation 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.* at 1163 (quoting *Kingsley*, 135 S. Ct. at 2473–74).

A few months later, a different panel of the Tenth Circuit was faced with both an excessive force and denial of medical treatment claim in *McCowan v. Morales*, 945 F.3d 1276 (10th Cir. 2019). The *McCowan* court acknowledged the circuit split on whether *Kingsley* applied to conditions of confinement and inadequate medical treatment claims. *Id.* at 1291, n 12. Explaining that the issue was not properly before the court as it had not been briefed, the Tenth Circuit stated, “[w]e do note, however, that a claim of deliberate indifference to serious medical needs by its very terminology seems to require both a subjective and an objective test. ‘Deliberate’ certainly invokes a subjective analysis and ‘serious medical needs’ invokes an objective analysis.” *Id.*

As *Colbruno* directly addressed the issue and *McCowan* only discussed *Kingsley* in dicta, the objective reasonableness standard for due process claims by detainees appears—for the moment—to be controlling law in the Tenth Circuit.

### Other Circuits Limit *Kingsley* to Use of Force Claims

Some circuits have examined *Kingsley* and limited the objective reasonableness standard to excessive force claims by detainees, while others have not yet considered the limits of *Kingsley*.

#### First Circuit

In *Miranda-Rivera v. Toledo-Dávila*, Rojas was arrested for driving under the influence. 813 F.3d 64, 67 (1st Cir. 2016). At the scene, he appeared to be paranoid, screamed obscenities, and scuffled with officers. *Id.* at 67–68. As officers did not see any visible injuries and were concerned that Rojas might injure caregivers if taken to a medical facility, they took him to the police station. *Id.* at 68. At the station, his condition deteriorated, and paramedics

were called. Rojas died and multiple injuries were discovered throughout his body. The cause of death was determined to be bodily trauma and cocaine intoxication. *Id.* at 68–69.

The defendant officers were granted summary judgment on the plaintiff’s excessive force claim. They also received summary judgment on the denial of med-

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ical treatment claims as there was insufficient evidence to show that they acted with deliberate indifference. *Id.* at 69. On review, the First Circuit analyzed the excessive force claim in light of the Supreme Court’s decision in *Kingsley*. *Id.* at 70–73. However, when addressing the claim of inadequate medical treatment, the court of appeals continued to apply the subjective awareness standard for Eighth Amendment deliberate indifference. *Id.* at 74.

#### Third Circuit

The Third Circuit has not yet had the opportunity to rule squarely on whether the objective standard outlined in *Kingsley* is limited to excessive force claims. See *Moore v. Luffey*, 767 Fed. App’x. 335, 340 n. 2 (3d Cir. 2019) (declining to address whether *Kingsley* applies to denial of medical treatment claims as the plaintiff’s claims failed under both the subjective and objective standard). However, in discussing a state-created danger claim involving the accidental shooting of a state trooper during a firearms demonstration, the court of appeals reviewed *Kingsley* and noted its prior decision to apply an objective standard in the context of a substantive due process, state-created danger claim involving schoolchildren. See *Kedra v. Schroeter*, 876 F.3d 424, 432–33, 438–39 (3d Cir. 2017) (citing *L.R. v. School District of Philadelphia*, 836 F.3d 235 (3d Cir. 2016)). Although it rejected the application of the



objective standard in that case, the Third Circuit may be poised to extend the objective standard for other substantive due process claims. *Id.* at 439–40.

#### Fourth Circuit

The Fourth Circuit has not had the opportunity to review *Kingsley* outside the excessive force context.

The extension of the objective reasonableness standard by the Second, Seventh, Ninth, and Tenth Circuits creates significant uncertainty for law enforcement and correctional officials.

#### Fifth Circuit

In *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415 (5th Cir. 2017), the Fifth Circuit determined that denial of medical care claims by pretrial detainees continues to be governed by a subjective deliberate indifference standard post-*Kingsley*. While a concurring opinion argued that *Kingsley* may require the circuit to revisit its prior decisions regarding detainee rights, the majority noted that other Fifth Circuit cases continued to apply a subjective standard post-*Kingsley*. *Alderson*, 848 F.3d at 419 n.4, 424–25.

#### Sixth Circuit

The Sixth Circuit has continued to apply the subjective standard for detainee claims of inadequate medical treatment. In *Guy v. Metropolitan Government of Nashville*, a detainee sued after she informed the defendant officer that she wanted to see a nurse and her request was refused. 687 Fed. App'x. 471, 472–73 (6th Cir. 2017). When ordered to go to her room, the detainee refused, and the officer directed her by placing her hand on the detain-

ee's shoulder. After the detainee stopped and turned toward the officer, she was sprayed in the face with a chemical agent. *Id.* at 473. The Sixth Circuit followed the same pattern as the First Circuit in *Miranda-Rivera*, first deciding the detainee's excessive force claim under the *Kingsley* objective reasonableness rubric before analyzing her denial of medical treatment claim using a subjective standard. *Id.* at 474–75, 477–79.

#### Eighth Circuit

In *Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. 2018), the Eighth Circuit explicitly limited *Kingsley* to excessive force claims. *Whitney* involved claims for failure to monitor, inadequate medical care, and failure to timely intervene after a detainee committed suicide. 887 F.3d at 858–59. The court held the plaintiff's claims of deliberate indifference required a showing that the defendant officer was subjectively aware of a substantial risk that the detainee would commit suicide. *Id.* at 860. In response to the plaintiff's argument that the applicable standard was objective, the Eighth Circuit stated, "*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case." *Id.* at 860 n.4.

#### Eleventh Circuit

The Eleventh Circuit has rejected the extension of *Kingsley* to conditions of confinement or denial of medical treatment claims. In *Nam Dang v. Sheriff, Seminole County Florida*, a detainee argued that his denial of medical treatment claim was governed by an objective reasonableness standard. 871 F.3d 1272, 1279 n.2 (11th Cir. 2017). The court explained that *Kingsley* was an excessive force case, so it did not conflict with the Eleventh Circuit's caselaw applying a subjective standard for inadequate medical care claims. *Id.* This was reiterated in *Johnson v. Bessemer*, 741 Fed. App'x. 694 (11th Cir. 2018), which involved a pretrial detainee's claim for inadequate care. *Johnson* echoed *Nam Dang*, stating, "*Kingsley* involved an excessive force claim, not a deliberate indifference to serious medical need claim. *Kingsley* does not undermine our earlier Eighth Amendment deliberate indifference precedents." 741 Fed. App'x. at 699 n.5 (internal citations omitted).

#### Consequences of *Kingsley*

The extension of the objective reasonableness standard by the Second, Seventh, Ninth, and Tenth Circuits creates significant uncertainty for law enforcement and correctional officials. They will be subjected to differing standards determined solely on the status of the plaintiff. More concerning, *Kingsley* and its expansion represent a reluctance by courts to defer to the experience and judgment of jailors. See *Bell*, 441 U.S. at 547 ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

The willingness of courts to intervene in the operations of detention facilities is cyclical, and we appear to be in a moment of increasing scrutiny. While this is to be expected, given the historical moment and the steady flow of news stories about abuse or neglect of inmates throughout the country, use of the objective reasonableness standard significantly raises the bar for professionals who are often required to make snap decisions based on limited information. This will inevitably affect institutional culture. Increased concern for liability will promote second-guessing, which could undermine efficiency and morale. Although facilities should always seek to provide more training to line staff, it is unclear whether additional education can prevent lawsuits or adverse judgments where the standard is no longer whether an officer engaged in a good-faith attempt "to preserve internal order and discipline and to maintain institutional security." *Id.*

From a litigation perspective, *Kingsley* and its progeny present two difficult questions. The first is, "Exactly who is a pretrial detainee?" For first-time arrestees, this is not an issue. However, many of those currently incarcerated have some passing familiarity with the judicial system. What is the status of someone, previously convicted and sentenced to probation or granted parole, after they are arrested and held on new charges, or for a violation of their conditions of probation or release? This is very much a live issue with little guidance; courts simply were able to avoid the question when the subjective deliber-

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ate indifference standard governed both pretrial detainees and convicted inmates. Further, the status of parolees and probationers is complicated by the diverse criminal and administrative systems across the country. Exactly who a detainee is will likely require courts to answer the question on a state-by-state basis, analyzing the unique framework established by each state's legislature.

Long after this definitional question is answered, courts will wrestle with drawing a line between mere negligence and an objectively unreasonable act that violates the Constitution. This is especially true in the denial of medical treatment context. The Ninth Circuit, examining a failure to protect claim, explained, "[T]he test to be applied under *Kingsley* must require a pretrial detainee who asserts a due process claim for failure to protect to prove more than negligence but less than subjective intent—something akin to reckless disregard." *Castro*, 833 F.3d at 1071. The Ninth Circuit also stated that "liability will attach only in cases where the defendant's conduct is more egregious than mere negligence." *Id.* at 1071 n.4. The Second Circuit, faced with a variety of conditions of confinement claims unrelated to medical care, stated that "any §1983 claim for a violation of due process requires proof of a *mens rea* greater than mere negligence. A detainee must prove that an official acted intentionally or recklessly, and not merely negligently." *Darnell*, 849 F.3d at 36 (internal citation and footnote omitted).

The Seventh Circuit directly addressed the negligence versus objectively unreasonable dichotomy in inadequate treatment claims against medical professionals. *Miranda v. Lake* stated, "The defendants here worry that an objective-reasonableness standard will impermissibly constitutionalize medical malpractice claims, because it would allow mere negligence to suffice for liability. A careful look at *Kingsley*, however, shows that this is not the case; the state-of-mind requirement for constitutional cases remains higher." 900 F.3d at 353. The Seventh Circuit explained that liability requires a medical defendant to have "acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their handling of [the detainee's] case." *Id.* "[I]t will

not be enough to show negligence or gross negligence." *Id.* So, the objective unreasonableness standard is higher than gross negligence and at least reckless disregard. As noted above, a defendant forgetting about the detainee is insufficient. A medical provider must have actually considered a detainee and made some choice regarding the detainee's care, even if the decision is simply to wait and see. *Id.* at 353–54.

Since negligence is categorically insufficient for a constitutional violation, one district court—struggling to implement *Miranda's* formulation—has stated succinctly, "[A]sking whether the jail doctor's conduct is objectively reasonable is equivalent to asking whether they were negligent—that is, whether they failed to demonstrate ordinary, reasonable care in the face of a risk of harm." *Terry v. Cty. of Milwaukee*, 357 F. Supp. 3d 732, 745 (E.D. Wis. 2019). This court correctly recognized that objective reasonableness, at least in claims of inadequate medical treatment against medical providers, inherently constitutionalizes medical negligence claims. Violating a professional standard of care could now violate the Fourteenth Amendment. It is difficult to predict whether district courts will be able to sort mere medical malpractice claims from Fourteenth Amendment claims effectively.

In short, *Kingsley* has the potential for additional expansion in the absence of further direction from the Supreme Court. Lower courts are probing the exact boundaries between negligence, gross negligence, and recklessness. In the meantime, practitioners should advise clients to update their training materials to incorporate an objective reasonableness standard. This is a call for all those working in detention facilities to ensure their actions meet the highest standards of professionalism. In particular, medical providers should be cautioned that their decisions will be subjected to much greater scrutiny. Thorough and complete documentation and record keeping will become even more important to support medical decision making. As the state of the law is in flux and moving quickly, counsel should closely follow the evolution of the objective reasonableness standard. 