Another recent case further eroding qualified immunity for officers and jail personnel; Amicus Curiae Brief in support of Application for Writ to United States Supreme Court.

As we discussed last year, there was a significant change in the law as it pertains to the care of pre-trial detainees. Previously, an officer had to know of the serious medical need and intentionally disregard that need. The new standard is simply a recklessness standard. If an officer "should have known" there was a serious medical need, they will not be entitled to qualified immunity. This will allow for the second-guessing of every decision of an officer. It also essentially requires officers to make decisions previously made by doctors, nurses and other healthcare professionals, and then to have those second-guessed. It is a palpable erosion of qualified immunity protections.

As we discussed, the MACP and similar organizations throughout the country may wish to have their voices heard on this issue as they did on *Brawner* in 2022. They can do this by joining on an amicus curiae brief to be filed with the United States Supreme Court in the matter of *Helphenstine v Lewis County*. We would need approval on or before October 7, 2023, as the brief is due on October 16.

The initial ruling in 2022 was in the case of *Brawner v. Scott Cnty., Tennessee*, 14 F.4th 585, 591 (6th Cir.2021), from the United States Court of Appeals for the 6th Circuit. The 6th Circuit is located in Cincinatti and is the court where the appeals are heard for all federal cases in Michigan, Ohio, Kentucky and Tennessee. 6th Circuit precedent is directly applicable to all police agencies in Michigan, Ohio, Kentucky and Tennessee. The 2nd Circuit (NY, VT, CT), 7th Circuit (IN, IL, WI) and 9th Circuit (CA, OR, WA, AZ, NV, ID, MT) have all adopted this "recklessness" standard that significantly erodes qualified immunity. The remainder of the country, the 5th, 8th, 10th and 11th circuits still utilize the subjective intent standard. (See most recent decision in Cope v Cogdill, 3 F4th 198 (5th Cir 2021)(casetext.com/case/cope-v-cogdill)

Brawner was a 2-1 decision with a dissenting opinion that was very much in favor of protecting qualified immunity. Both the majority and dissent are in the attached link: https://law.justia.com/cases/federal/appellate-courts/ca6/19-5623/19-5623-2021-09-22.html The dissent from the *en banc* request (request for full hearing of 6th Circuit judges) is in the following link: https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0274p-06.pdf

Prior to *Brawner*, the law on this issue in the 6th Circuit was very clear:

A deliberate indifference claim under the Eighth Amendment has an objective and a subjective component. Id. at 937-38. To meet the objective component, the plaintiff must show that the medical need is "sufficiently serious." Farmer v. Brennan, 511 U.S. 825, 834 (1994). **To meet the subjective component, the plaintiff must show that "an official kn[ew] of and disregard[ed] an excessive risk to inmate health or safety."**

Unless an officer was subjectively aware of the pre-trial detainees condition (specifically knew they were in serious danger), the officer was entitled to qualified immunity. That is no longer the standard.

Under *Brawner*, the officers no longer need to be subjectively aware of the serious danger or risk. Instead: A pretrial detainee must prove "more than negligence but less than subjective intent-something akin to reckless disregard." ("[T]he pretrial detainee must prove that the defendant-official acted [or failed to act] intentionally to impose the alleged condition, or **recklessly failed to act with reasonable care** to mitigate the risk that the condition posed to th e pretrial detainee even though the defendant-official knew, **or should have known**, that the condition posed an excessive risk to health or safety.")

It no longer matters what the officer knew, but what the officer "should have known." The argument will now be that the officer should have known of the potential heart attack, ulcer, diabetic response, allergy, drug or alcohol withdrawal, etc. The officers are now rendered de facto doctors, nurses, mental health professionals, who will be required to distinguish between what is or is not a serious mental or medical danger. In fact, in an even more recent case that we are handling, the officers were not entitled to qualified immunity even though they contacted the agency that trained the department on mental and medical issues, and followed the advice of the mental health professional provided by that agency. (See *Greene v Crawford County*, No. 20-1741 (6th Circuit 2022). Decided January 4, 2022) https://law.justia.com/cases/federal/appellate-courts/ca6/20-1741/20-1741-2022-01-04.html

The *Brawner* decision has been followed by a number of decisions that are essentially required to follow the precedent in *Brawner*. The case on which this current brief is being filed, *Helphenstine v Lewis County*, is also a 6th Circuit case. There was an even more recent decision in *Mercer v Ashton County* (McGraw Morris is filing the actual Petition on *Mercer*, so we cannot participate in an amicus in that matter). *Brawner, Helphenstine and Mercer* currently all follow the *Brawner* logic and establish the precedent in the 6^{th}Circuit. To highlight the confusion in this area, the 2022 case of *Trozzi v Lake County*, disagreed with *Brawner*. *Helphenstine*, however, rejected *Trozzi*, finding that it was required to follow *Brawner*. The US Supreme Court petition in Helphenstine highlights this confusion:

…the panel took the unusual step of overruling Trozzi because it was "irreconcilable with

Brawner." Id. "We appreciate that our sister circuits are all over the map on this issue," id., but "Brawner held that Kingsley required us to lower the subjective component from actual knowledge to recklessness." Pet.App.14a. Brawner therefore controlled over Trozzi. Id.