

No. 11-10362

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IN THE SUPREME COURT OF THE UNITED STATES

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KIM MILLBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner's allegation of his sexual assault by prison officials did not state a claim premised on negligence by those officials.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not reported. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2012. The petition for a writ of certiorari was filed on May 10, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is a federal inmate who alleges that he was sexually assaulted by a federal correctional officer at the United States Penitentiary in Lewisburg, Pennsylvania. Petitioner alleges that three correctional officers participated in the assault: one allegedly directed petitioner to perform a sexual act on the officer; another allegedly restrained petitioner; and a third allegedly stood watch by the door. After petitioner reported to prison authorities that he had been assaulted, officials conducted an internal investigation which included a medical assessment. The investigation found petitioner's claims to be unsubstantiated. Pet. App. A2, B1-B2.

2. Petitioner filed this suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et seq., asserting both negligence and the intentional torts of assault and battery. The FTCA generally "waive[s] the sovereign immunity of the United States for certain torts committed by federal employees" within the scope of their employment. FDIC v. Meyer, 510 U.S. 471, 475 (1994). As a general matter, that waiver of immunity does not extend to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h). That intentional-tort exception, however, is itself subject to an exception for certain

"acts or omissions of [federal] investigative or law enforcement officers," i.e., federal officers "who [are] empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." Ibid. The acts or omissions of such officers are cognizable under the FTCA if they give rise to a claim of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." Ibid.

3. The district court granted summary judgment to the government. Pet. App. B. First, the court concluded that petitioner did not "state[] a negligence claim upon which relief can be granted," because "it is clear that the alleged assault and battery was intentional." Id. at B7-B8. Second, the district court held that petitioner's intentional-tort claim was not actionable, because it fell within the FTCA's intentional-tort exception. Id. at B5-B7. The court explained that Pooler v. United States, 787 F.2d 868 (3d Cir.), cert. denied, 479 U.S. 849 (1986), had construed the FTCA to permit suits based on intentional torts by federal law-enforcement officers only when such officers "execut[e] a search, seiz[e] evidence, or mak[e] an arrest." Pet. App. B6 (quoting Pooler, 787 F.2d at 872). And because a "seizure" is actionable under 28 U.S.C. 2680(h) only when it involves "the seizure of evidence," the court rejected petitioner's contention that his claim was actionable because he purportedly was "seized"

when he was "placed in restraints and taken to the basement" of the facility before the alleged assault. Pet. App. B6-B7.

4. The court of appeals summarily affirmed in a non-precedential decision. Pet. App. A. The court of appeals agreed with the district court that petitioner had failed "to state a negligence claim on which relief could be granted," because "it is clear that the alleged actions were intentional," not negligent. Id. at A5 n.1. The court emphasized that petitioner himself had asserted that he "was 'sexually assaulted and battered maliciously with evil intent by [three specific correctional] officers.'" Ibid. (quoting complaint). The court of appeals also agreed with the district court that petitioner had failed to show that his intentional-tort claim was actionable under Pooler. Id. at A4-A5.

#### ARGUMENT

Petitioner contends (Pet. i, 9-10, 12) that the court of appeals erred in dismissing his "negligence claim." The decision of the court of appeals is correct, and its fact-bound rejection of petitioner's negligence claim does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. The questions that petitioner presents (Pet. i) turn exclusively on petitioner's contention that the court of appeals erred in dismissing his "negligence claim." Petitioner argues (Pet. 9-10) that federal correctional officers have a duty to

protect prisoners from assaults, and that FTCA liability can be premised on negligent failures to protect prisoners from intentional torts. Petitioner thus contends (Pet. 12) that the court of appeals mistakenly focused only on his "intentional tort" claim and "overlook[ed] and disregard[ed] the negligence claim." See also Pet. i (suggesting that the court of appeals should have "affirmed in part in favor of the [government] as to the intentional [tort] claim" but "reversed in part \* \* \* as to the negligence claim"). Petitioner is incorrect.

The court of appeals correctly concluded that petitioner did not state a negligence claim on which relief could be granted, because petitioner specifically alleged that officers sexually assaulted and battered him "maliciously with evil intent." Pet. App. A5 n.1 (quoting complaint). Petitioner's allegations are thus entirely inconsistent with negligence. The court of appeals' fact-bound ruling warrants no further review.

2. Although petitioner does not present a question challenging the disposition of his intentional tort claim (Pet. i), petitioner appears to contend (Pet. 10-11) that he sufficiently alleged that his purported assault was a "seizure" actionable under the FTCA as construed by the court of appeals in Pooler v. United States, 787 F.2d 868 (3d Cir.), cert. denied, 479 U.S. 849 (1986). Pooler, however, interpreted the FTCA's focus on law-enforcement officers authorized to "execute searches, to seize evidence, or to

make arrests," 28 U.S.C. 2680(h), to define the extent of the statute's application to intentionally tortious conduct. 787 F.2d at 872. Petitioner did not allege a "seiz[ure of] evidence" that would be actionable under Section 2680(h) as interpreted by Pooler. Pet. App. A4.

Although petitioner has not challenged Pooler's interpretation of the law-enforcement exception to the intentional-tort exception in Section 2680(h), a division of authority has arisen regarding the proper scope of that exception. Compare Pooler, 787 F.2d at 871-872, and Orsay v. United States Dep't of Justice, 289 F.3d 1125, 1134-1136 (9th Cir. 2002) (construing law-enforcement exception to apply to "only those claims asserting that the tort occurred in the course of investigative or law enforcement activities"), with Ignacio v. United States, 674 F.3d 252, 255-256 (4th Cir. 2012) (holding that exception applies if an "investigative or law enforcement officer commits one of the specified intentional torts, regardless of whether the officer is engaged in investigative or law enforcement activity"). That division of authority may eventually warrant this Court's review in a future case. The petition in this case, however, does not implicate the division of authority. Petitioner's contention that the alleged assault occurred during a seizure, Pet. 11 (citing Terry v. Ohio, 392 U.S. 1 (1968)), is premised upon the view that petitioner's claim must qualify as a "seizure" to fall within Section 2680(h)'s



law-enforcement exception. For that reason, this case is not an appropriate vehicle to resolve the division of authority about the scope of that exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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