

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Jesus Valle — PETITIONER
(Your Name)

vs.

Rusty Rogers et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Circuit Court of Appeals in New Orleans
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jesus Valle
(Your Name)

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(Address)

Abilene Tx. 79601
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QUESTION(S) PRESENTED

- 1) Whether the Fifth Circuit Court of Appeals decision denying relief represents a split in the Circuit Courts. Valle, a pro se litigant and prisoner in state prison filed a civil rights claim after being assaulted by a fellow prisoner who was held in administrative segregation due to his history of 41 staff assaults and 18 "possession of a weapon" cases, Yet the court did not believe his violent history represented a foreseeable threat sufficient to constitute a "substantial risk of serious harm".
- 2) Whether the U.S.D.C.'s refusal to hear a claim under the theory of a "State Created Danger" is a split in the Circuits that this court will resolve.

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LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Correctional Officers Rusty Rogers, Tommy Ramos, Denise Upfold,
Lt. Johnson and Who have been represented by the Texas
Attorney Generals Office of "Law Enforcement Defense" at P.O. Box
12548 Austin Tx. 78711

Xavier Cutright who Valle sued under supplemental jurisdiction
28 U.S.C. §1337. And, is not represented by counsel.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Cornelius v. Town of Highland Lake 880 F.2d 348 (11th cir. 1989)	10
Eratt v. Gov't of V.I. 837 F.2d 968 (3rd Cir. 1988)	7
Farmer v. Brennan 114 S.Ct. 1970 (1984)	8
Johnson v. Dallas I.S.D. 38 F.3d 198 (5th Cir. 1994)	8
K.H. ex rel Murphy v. Morgan 914 F.2d 846 (7th Cir. 1990)	10
Longoria v. Texas 473 F.3d 586 (5th Cir. 2006)	10
Morgan v. District of Columbia 824 F.2d 1049 (D.C. Cir. 2987)	7
Scanlan v. Texas A & M 343 F.3d 533 (5th Cir. 2003)	10
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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 12th 2018.

[] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The U.S. Constitutional provision of the Eighth Amendment's prohibition of Cruel and Unusual Punishment.

STATEMENT OF THE CASE

This case was brought under 42 U.S.C. §1983 asserting a violation of the Eighth Amendment under failure to protect as Valle suffered physical injury and emotional injury he is asking for damages.

On 10-06-2013, around 0200 Valle was following his orders by picking up dirty meal trays and necessity items (clothing), even though this was technically a duty assigned to officers. Valle was doing this job as ordered. As Valle passed through the gate and in the process of cleaning offender Xavier Cutright, an offender whose reputation was well known to staff and administration as he had assaulted correctional officers over 41 times and been caught with a weapon over 18 times. Cutright was considered by the TDCJ agency to be an obvious and direct threat to officers and under policy was to be housed in a situation where he never had access to staff or other offenders. His cell was 1)red-tagged with a warning to officers to avoid contact with Cutright unless a five-man team was available to subdue him. 2)double locked; the first is a pressure lock on the meal tray slot referred to as the "bean chute" (meal tray slot) second is a pad lock. 3) the normal air-exchange vents which also allows easier communication in this case was covered with plexi-glass bolted into place which would prevent even a slip of paper from being moved out of the cell. 4) The bottom of the cell is welded in place a steel air barrier which prevents only the tiniest sheet of paper from being moved out of the cell. 5) The cell door itself is double locked with a center lock and another exterior keyed padlock.

According to the rules of administrative segregation (ad-seg herein) opening the bean chute door to allow Cutright to traffic and trade or even to be handed a meal tray was strictly forbidden without a plexiglass box covering the door panel and door. This plexi-glass box was the normal means by which an inmate housed in ad-seg at Cutright's level was handed a tray.

However, on this day Correctional Officer (C.O. herein) Rogers had opened the door to allow Cutright to traffic and trade items. On this date, Cutright asked Valle to move some contraband items, he refused and Cutright lashed out and sliced Valle's head from the forehead to the back of his head, requiring 16 stitches. It was revealed in the limited discovery that Valle obtained that agency policy requires that C.O.s be between these offenders (Cutright) and Valle or at least no further than normal conversational levels would allow. But, it had become a regular practice to let some of the hard to handle offenders have the bean chute door open to traffic and trade small items if they had recently been well behaved. Even though this was not allowed by policy and their history dictated against it.

Moreso on previous occasions injuries had occurred to other inmate janitors and even some officers through bean chute doors.

It is important to this case to realize that some C.O. most likely Rogers removed the keyed padlock from the exterior door of the bean chute. This was impossible for Cutright to get to the padlock from inside the cell. As our limited discovery indicated Rogers held the keys on that day, Valle named him as lead defendant.

Valle maintains that this "practice" was allowed at risk to inmate janitors and even fellow correctional officers and as such constituted deliberate indifference to a known risk that they failed to protect him from, in light of two policies that should have protected him.

Valle was initially placed into the court of magistrate Judge Frost who agreed that Valle had stated a claim see the Order dated April 24th 2015 page 6 where Judge Frost stated "While Plaintiff has stated sufficient allegations as to Rogers..." quoting Coleman v. Sweetin 745 F.3d 756, 763-64 (5th Cir. 2014). Yet later Judge Cummings on page 14 of the "Order Granting Motion for Summary Judgment and Order of Dismissal" entered on or about Sept. 14th 2016 held that "Valle has not and cannot, state facts to show that Rogers was anticipating such an attack...Valle has failed to state a claim of violation of a constitutional right." The honorable Fifth Circuit upheld this decision implying in it's order that Valle was required to prove under the failure to protect claim that Rogers knew an attack on Valle was anticipated.

REASONS FOR GRANTING THE PETITION

Valle argues that the Hon. Fifth Circuit Court of Appeals decision is in conflict with the other Courts of Appeals decisions on the issue of failure to protect. This Court of Appeals for the Fifth Circuit has taken an approach which does not allow for the Plaintiff to present the argument that the defendant should have known of the potential of injury. Rather, this standard of review requires that Plaintiff prove that the defendant was "anticipating" an attack upon an individual.

Each year dozens of individuals are assaulted in state and federal prisons despite the efforts made by the Prison Rape Elimination Act (P.R.E.A. herein) and other efforts by the U.S. Congress to eliminate violence from the prison systems. Clearly the level of violence in general has been considered on several fronts to be of national significance. By the utilization of this standard of review it has signaled a "heightened" level of proof for Plaintiffs.

In the case of Morgan v. District of Columbia 824 F.2d 1049 (D.C. Cir. 1987) we find "Record supported finding that, as matter of practice, District of Columbia was "deliberately indifferent" to inmates' security and that this practice caused inmate to suffer injury from assault at hands of fellow inmate; there was substantial evidence that inmate had been planning to kill another inmate unrelated to instant litigation..."

In Erett v. Government of Virgin Islands 839 F.2d 968 (3rd Cir. 1988) "Evidence supported conclusion that corrections officer with full knowledge of risk that first inmate, who had assaulted

ous, second inmate with rock, would return with weapon and attempt that to inflict further harm on second inmate, deliberately chose to occupi avoid confronting first inmate; therefore, second inmate was eren entitled to damages under §1983 from officer, who was sued in his individual capacity, for injuries sustained when first inmate havi returned and stabbed second inmate."

Even Supreme Court precedent is clear on this issue, "if the risk is obvious" then defendants may be liable, see Farmer v. Brennan 114 S.Ct. 1970 (1994); here Valle argues simply that if an inmate is willing to assault correctional officers 41 times, the risk should be obvious that he was willing to assault a fellow inmate with little or no provocation.

In contrast the Fifth Circuit held that Valle had merely argued that the Defendants were liable because of 'where' Cutright was housed! Valle in reply would point out that any correctional officer would tell you that people on death row are obviously more dangerous than those in general population.

Valle also points out there is a second circuit split in this case.

Valle argues that the Fifth Circuit has made a deliberate effort to not apply the "State Created Danger" theory of liability to criminal justice affairs in general and prison litigation specifically. While it is well defined in the case law of the Fifth Circuit, In Johnson v. Dallas Independent School Dist., 38 F.3d 198 (5th Cir. 1994) headnote 1 states "In order for §1983 liability to be imposed on a state created danger theory, environment created by state actors must be dangerous and they must know it is danger-

5) Defendant's Myers, Ramos and Rogers were aware of the danger and chose to ignore the risk to themselves and Valle in order to gain short term cooperation of Cutright.

Valle argues that the Fifth Circuit has chosen to not apply the ideas of a State Created Danger while other circuits have applied it to the criminal justice context. Other Circuits have readily applied the theory of liability to the criminal justice context consider; Wood v. Ostrander 879 F.2d 583 (9th Cir. 1989) where a police officer arrested a drunken driver and impounded his car leaving female passenger alone at night, without any means to go home, in a neighborhood known for criminal activity. She was raped by a stranger who offered her a lift. In Cornelius v. Town of Highland Lake 880 F.2d 348 (11th Cir. 1989) the state permitted a prisoner with a violent criminal history to participate in work release program at a municipal town hall under supervision of an untrained city employee. He gained access to a knife, abducted the Plaintiff who worked for the city, and held her hostage for three days. See also K.H. ex rel Murphy v. Morgan 914 F.2d 846 (7th Cir. 1990).

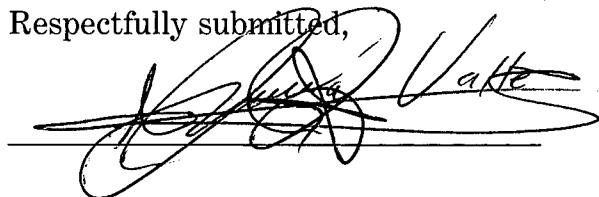
In Longoria v. Texas 473 F.3d 586 (5th Cir. 2006) the court noted "Since Scanlan we have explicitly rejected this theory of liability." See Scanlan v. Texas A & M Univ. 343 F.3d 533 (5th Cir. 2003) the court held that the "bonfire" was a state created danger.

Valle argues that this question of a theory of liability is the sort of question that the Supreme Court should hear as it is a question that directly applies to the numerous shootings

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "K. B. Walter". The signature is fluid and cursive, with "K. B." on the left and "Walter" on the right, all written in a single continuous line.

Date: 10/13/2018