No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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MARIA MERCEDES CANCINO, Individually and as Representatives of the Estate of Mario Martinez; JULIAN PUGA,
– PETITIONERS

v.

CAMERON COUNTY, TEXAS; OMAR LUCIO, Individually and in his Official Capacity as Sheriff of Cameron County, Texas; ANTONIO TELLA, in his Individual and Official Capacity,
-RESPONDENT.

_____

PETITION FOR WRIT OF CERTIORARI

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FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. The District Court and the 5th Circuit erred, as a matter of law, in failing to find that Appellants have a constitutional right to be free from state created danger.

LIST OF PARTIES

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:

1. The Honorable Fernando Rodriguez Jr., United States District Judge.

2. Maria Mercedes Cancino, Individually and as Representatives of the Estate of Mario Martinez, Plaintiff-Appellant.

3. Julian Puga, Plaintiff-Appellant.

4. Cameron County, Texas, Defendant-Appellee.

5. Omar Lucio, Individually and in his Official Capacity as Sheriff of Cameron County, Defendant-Appellee.

6. Antonio Tella, in his Individual and Official Capacity, Defendant-Appellee.

Related Cases

- *Maria Mercedes Cancino, et. al., v. Cameron County Texas, et. al.;* No. 1:18-cv-135, U.S. District Court for the Southern District of Texas. Judgment entered Dec. 13, 2018.

- *Maria Mercedes Cancino, et. al., v. Cameron County Texas, et. al.;* No. 18-41182, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Dec. 17, 2019.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari be issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix 1 to this petition and is unpublished.

The opinion of the United States District Court appears at Appendix 2 to this petition and is unpublished.

JUISDICTION

The date on which the United States Court of Appeals decided Petitioners' case was December 17, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves issues pursuant to 14th Amendment and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Procedural History

On August 22, 2018, Mrs. Cancino and Mr. Puga, herein after "Appellants" filed a complaint against Cameron County, Texas; Omar Lucio, Individually and in his Official Capacity as Sheriff of Cameron County, Texas; and, Antonio Tella, in his Individual and Official Capacity. Appellants made one claim pertinent to this appeal: (1) State created danger, because Cameron County's deliberate indifference and

actual knowledge to a known risk of danger violated Appellants' liberty interests secured by the due process clause of the Fourteenth Amendment to the United States Constitution. *Id*.

On September 19, 2018, Cameron County, Texas, Omar Lucio and Antonio Tella filed a motion to dismiss.

On October 10, 2018, Appellants filed a motion for leave to file an amended complaint.

On October 11, 2018, the Court granted the motion for leave to file the amended complaint.

The first amended complaint is the operative complaint in this case. In that complaint, Appellants re-urged their prior claims from the first complaint, but also added claims under the Texas Tort Claims Act —Section 101.021(2): use of personal property. *Id*.,

On November 1, 2018, Cameron County, Texas, Omar Lucio and Antonio Tella filed a renewed motion to dismiss under Fed. R. Civ. P. 12(b)(6) and in the alternative motion for a more definite statement pursuant to Fed. R. Civ. P. 12(e). Cameron County, Texas, Omar Lucio and Antonio Tella asserted that the Fifth Circuit has not adopted the state-created danger theory of liability under the Fourteenth Amendment to the United States Constitution. *Id*. Cameron County, Texas, Omar Lucio and Antonio Tella further asserted in their individual capacity, that qualified immunity relying solely on the assertion that the state-created danger theory of liability is not clearly established. *Id*. On December 13, 2018 the District Court

granted Cameron County, Texas, Omar Lucio and Antonio Tella's Motion to Dismiss as to Appellants' Federal claims and dismissed without prejudice Appellants' claims under the Texas Tort Claims Act.

B. Statement of Facts

On June 8, 2017, Michael Diaz Garcia, an inmate at the Cameron County, Texas Detention Center, was scheduled for a dentist appointment in Brownsville, Texas. Appellee, Antonio Tella, acting in his official capacity, used a vehicle owned and operated by Cameron County, Texas to transport Mr. Garcia from the detention facility to a dental clinic located on or about the 3700 block of Boca Chica Boulevard in Brownsville, Texas. While on the parking lot at the dental clinic, at approximately 1:09 P.M., Mr. Garcia overpowered Antonio Tella and escaped from custody with Antonio Tella's handgun and service belt. Mr. Tella used his handgun or allowed Mr. Garcia the use of his handgun. At all times the handgun, the service belt, and equipment used to shackle Mr. Garcia were tangible personal property of Cameron County, Texas.

Antonio Tella was the sole officer assigned to transport Mr. Garcia to his dental appointment, which is in direct violation of the Cameron County Sheriff Department's transportation policy requiring at least two officers to supervise any transportation of local inmates to and from the detention facility.

Upon escape, Mr. Garcia, who was still in possession of Antonio Tella's handgun, swam across a nearby waterbed and, without consent, entered a home located on the 300 block of Fruitdale Road that was being leased by Blanca Puga

and her family. At the time of the entry, Appellants, Julian Puga, Maria Mercedes Cancino, and Mario Martinez occupied the home. Upon gaining entry into the home, Mr. Garcia demanded a vehicle and keys from Mario Martinez who attempted to calm Mr. Garcia down. Mr. Garcia used the handgun—tangible personal property of Cameron County, Texas— against Mr. Martinez, wounding him, and leading to Mario Martinez's eventual death. Maria Mercedes Cancino, who witnessed the shooting of her husband, was then held at gunpoint by Mr. Garcia and forced into the room occupied by Julian Puga. Mr. Garcia forced Maria Mercedes Cancino, at gunpoint, to obtain the keys from Julian Puga to a 2017 blue Hyundai Elantra owned by Blanca Puga, Julian Puga's mother. Mr. Garcia continued his escape in the 2017 blue Hyundai Elantra. Shortly thereafter, Julian Puga called for emergency assistance and witnessed the deceased on the floor. As a result, Maria Mercedes Cancino and Julian Puga suffered severe emotional distress and mental anguish damage requiring extensive therapy and medical assistance that continue to occur and harm Appellant Puga and Appellant Cancino, which is expected to continue into the future indefinitely.

Upon identifying the 2017 blue Hyundai Elantra, officers began a high-speed pursuit of Mr. Garcia from Brownsville, Texas at or around Paredes Line Road and Farm-to-Market Road 511. The high-speed chase ended near San Benito, Texas where officers seriously injured Mr. Garcia after gunfire ensued. Mr. Garcia was later pronounced dead at a local hospital.

Appellees were aware of Mr. Garcia's violent tendencies at the time of transport to the dental appointment. On 05/19/2017, a jury found Mr. Garcia guilty of all 4 counts of the indictment in cause number 2016-DCR-01051 stemming from a violent criminal episode on 02/14/2016. The four counts of the indictment under 2016-DCR-01051 were as follows; (1) Burglary of a habitation; (2) Aggravated Assault with a Deadly Weapon; (3) Aggravated Assault with a Deadly Weapon; and (4) Aggravated Assault with a Deadly Weapon. Mr. Garcia was still in the custody of the Cameron County Sheriff's Department since his sentencing hearing was scheduled to occur on 06/19/2017—11 days later. Due to Mr. Garcia's death occurring prior to his sentencing hearing, the Cameron County District Attorney's Office dismissed the charges against Mr. Garcia under 2016-DCR-01051. However, at the time of the incident that gives rise to this cause of action, Cameron County, Texas was on actual notice of inmate Garcia's violent tendencies.

In addition to his violent tendencies, Cameron County Sherriff's Department was also aware that Mr. Garcia was suicidal. On or about the day Mr. Garcia was found guilty by a jury under cause number 2016-DCR-01051, Mr. Garcia told his criminal defense attorney, Michael Benton, that he was going to commit suicide. Michael Benton immediately called the detention facility that Mr. Garcia was incarcerated in to notify jail staff of Mr. Garcia's threat to kill himself. Michael Benton communicated the suicide threat to Lieutenant Janie Trevino, a Cameron County, Texas employee. Approximately two weeks after

Mr. Benton informed the jail of Mr. Garcia's suicide threat, the incident described above, that gives rise to this cause of action, occurred.

C. Appeal

Petitioners timely filed their appeal to the United States Court of Appeals for the Fifth Circuit and the Fifth Circuit affirmed the District Court's judgment.

REASONS FOR GRANTING THE PETITION

Question 1: The District Court and 5th Circuit erred, as a matter of law, in failing to find that Appellants have a constitutional right to be free from state created danger.

The Fifth Circuit has not adopted the state-created danger theory of liability under the Fourteenth Amendment to the United States Constitution. However, the Fifth Circuit has never rejected the state-created danger theory, either. See *Kemp v. City of Hous.*, No. H-10-3111, 2013 U.S. Dist. LEXIS 116104, at *13-14 (S.D. Tex. 2013) (noting, "[E]ven though the Fifth Circuit has not found a circumstance in which it believed the evidence (as opposed to the pleadings) supported the theory and consequently adopted the theory, the Fifth Circuit also has not indicated that it would be unwilling to adopt the theory in the appropriate case"). Judge Higginson once summarized the status of the state-created danger theory in the Fifth Circuit as follows:

> Dicta in *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), has contributed to twenty-[nine] years of circuit (and intra-circuit) disharmony, and excited legions of law review articles, about whether the Constitution asserts positive or negative liberties, or regulates government action or inaction—all giving uncertain guidance to litigants and courts, as well as public

> officials, hence necessarily also giving uncertain relief to citizens whom government persons cause to be subjected to injury.

Jane Doe v. Covington County Sch. Dist., 675 F.3d 849, 871 (5th Cir., 2012)(J. Higginson, Concurring).

The Fifth Circuit has three times taken up the issue *en banc* to clarify the state-created danger theory in the schoolhouse context. See *Jane Doe v. Covington County Sch. Dist.*, 278 Ed. Law Rep. 761, 675 F.3d 849 (5th Cir., 2012) (en banc); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412 (5th Cir.1997) (en banc); *Walton v. Alexander*, 44 F.3d 1297 (5th Cir.1995) (en banc). The Fifth Circuit has also taken up the issue *en banc* in the law enforcement context. See *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir., 2002) (en banc). In each *en banc* decision, the Fifth Circuit listed proposed elements of the state-created danger theory while also finding that the facts in each case do not support adoption of the theory. In what appears to be a fact-specific inquiry set forth by the Fifth Circuit, the Appellants contend that they have pleaded sufficient facts under the Fifth Circuit's proposed elements of the state-created danger theory of liability to state a viable claim.

A state-created danger theory requires (1) "th[at] defendants used their authority to create a dangerous environment for the plaintiff" and (2) "that the defendants acted with deliberate indifference to the plight of the plaintiff." *Covington*, 675 F.3d at 865 (quoting *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 537-38 (5th Cir. 2003)). The second element is then subdivided into three prongs:

> specifically, a plaintiff would have to show that "(1) the environment created by the state actor is dangerous, (2) the state actor must know it is dangerous (deliberate indifference), and (3)

> the state actor must have used its authority to create an opportunity that would not otherwise have existed for the third party's crime to occur."

Dixon v. Alcom. Cnty. Sch. Dist., 499 F. App'x 364, 366-67 & n.3.; *Piotrowski v. City of Houston*, 237 F.3d 567, 585 (5th Cir. 2001).

Here, each Appellant asserts that the Appellees violated the following Constitutional rights:

(1) Maria Mercedes, as representative of the estate of Mario Martinez;

a. Fourteenth Amendment—right to life

b. Fourteenth Amendment—right to bodily integrity

c. Fourteenth Amendment—right to be free from a state-created danger

d. Fourteenth Amendment—conscience shocking state activity

(2) Julian Puga;

a. Fourteenth Amendment—right to be free from state-created danger

b. Fourteenth Amendment—conscience shocking state activity

The Plaintiffs' Amended Complaint adequately describes the unconstitutional state action as the "custom or practice of improper inmate transportation and suicide notice procedures." The custom or practice of improper inmate transportation and suicide notice procedures created a dangerous environment for the Appellants being that they were known to be in the zone of danger geographically from the jail to the dental clinic parking lot where Mr. Garcia initiated his escape[1]. The Appellees knew

[1] Not all cases decided by the Fifth Circuit list the proposed requirement that the victims be known. See *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1002 (5th Cir. 2014) (listing elements of state-created danger cause of action without explicitly including "known victim" requirement); *Rivera v. Hous. Indep. Sch. Dist.*, 349 F.3d 244, 249 (5th Cir. 2003) (same); *Scanlan*

that the custom or practice of inmate transportation and suicide notice procedures was dangerous as applied to Mr. Garcia's because Mr. Garcia's lawyer notified the Cameron County Sheriff's Department of Mr. Garcia's suicidal threat. Mr. Garcia's injury-causing actions would not have occurred but for the Appellees creation of the opportunity afforded by the custom or practice of improper inmate transportation and suicide notice procedures.

This case is unique and should be distinguished from earlier decisions, because there is a special relationship between Mr. Garcia, as an inmate, and the Cameron County Sheriff's Department. In such instances, "the Constitution imposes upon [the State] a corresponding duty to assume some responsibility for [an inmate's] safety and general well-being." *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1979). In fact, the escape occurred during the Constitutional obligation imposed upon the state actors to provide Mr. Garcia with reasonable medical care. "When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, *medical care*, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and

v. Texas A&M University, 343 F.3d 533, 537-38 (5th Cir. 2003) (same); *McKinney v. Irving Independent School Dist.*, 309 F.3d 308, 313-14 (5th Cir. 2002) (same). There is clearly an intra-circuit split that has not been fully explained by the Fifth Circuit sitting *en banc* regarding the bounds of the proposed known victim element. Appellants contend that if the proposed "known victim" element is adopted, it be considered a factual question for the jury. Appellants have pleaded that they were known victims within a zone of danger caused by the State actors unconstitutional custom or practice and therefore, this element has been sufficiently pleaded.

the Due Process Clause." *Covington*, 675 F.3d at 856 (Quoting *DeShaney*, 489 U.S. at 200) (emphasis added).

Given the unique facts in this case, Appellants urge that Judge Higginson's concurring opinion in *Covington* is particularly informative, because it advocates a different approach to "difficult cases aris[ing] often out of a grey zone where a government person's alleged recklessness or deliberate indifference or intentionality is inextricably intertwined with a non-remote injury allegedly inflicted by a third person, the first (government person) causing the citizen to be subjected to injury by the second (non-government) assailant." *Covington* 675 F.3d at 873 (J. Higginson, Concurring). First, Judge Higginson construed Section 1983 literally and notes the difference in the word "subjects" and the phrase "causes to be subject to." 42 U.S.C. Sec. 1983. Judge Higginson concludes that in order to give meaning to the difference, the Congress in 1871 must have intended Section 1983 to apply to injury resulting from Constitutional violations committed by non-governmental assailants so long as the government caused "any citizen" to be subject to the non-governmental assailants actions. *Id*. To illustrate the distinction, Judge Higginson provided an example in which a sheriff's liability should be on par with an angry mob if "a sheriff released a prisoner to a vengeful lynch mob." *Id* at 873. According to Judge Higginson's approach, when properly pleaded, a fact question arises for the jury as to whether the physically injurious actions of the non-governmental person, as opposed to the government's injury-causing unconstitutional custom or practice, is the moving force behind the Appellants injuries. As Judge Higginson explains:

It may well be that a jury would conclude that an assault on the same day as a government release is too remote for causal attribution, if not in time then in location or circumstance. And a jury might always conclude that no more than negligent conduct was present, however tragic. *See Davidson v. Cannon,* 474 U.S. 344, 347, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). But if a jury, not us, were to come to such conclusions, then we, as government persons, are not immunizing other government persons, here state public school officials, against accountability for their affirmative act of releasing Jane from school under whatever complicating, aggravating, or mitigating release circumstances might be developed through discovery and at trial. This assignment of decision-making responsibility to assess, check, or overlook government action as a cause-in-fact of an injury, and specifically a deprivation of a constitutionally protected right, is consistent with the choice made by electors who, through Congress in 1871, established that a cause of action exists when a government officer "causes to be subjected" a person to a "deprivation of any right[ ] ... secured by the Constitution ...."

To the extent that our court contemplates this "causes to be subjected" statutory language before turning to *DeShaney,* it is in a footnote reference to our decision in *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443 (5th Cir.1994) (en banc), which recognized a constitutional right to bodily integrity "vouchsafed by the Fourteenth Amendment" against state action. The court today infers from that important truism that " *Taylor* is inapplicable here because the *actual violation* of Jane's bodily integrity was caused by Keyes, a non-state actor" (emphasis added). But that conclusion substitutes this court for a jury in deciding one of three inter-related elements of Section 1983: (1) state action, as (2) the cause-in-fact of (3) a deprivation of right protected by the Constitution. The conclusion also either constricts the statute—and government accountability for wrongdoing—from cases where a government person causes a victim "to be subjected" to a violation, just to cases where the government person "subjects" the victim to the actual violation, or constricts even more by rewriting the statute to make liable only government persons who actually "depriv[e]" others of rights secured by the Constitution.

> Section 1983, as well as its historical moment and purpose, and as implied by the Supreme Court in *Martinez,* does not perceive only a divisible and binary world of government or non-government rights violations.

Id at 872-73 (footnote omitted).

Here, unlike in *Covington*, Appellants pleaded that the affirmative acts of the Cameron County parties are the cause in fact and moving force behind each Appellant's injuries. Additionally, unlike *Covington*, Appellants have pleaded that they were known victims due to their proximity to the zone of danger. Moreover, unlike in *Covington*, Appellants were victims of an injury resulting from a person with a *DeShaney* special relationship. As suggested by Judge Higginson, a jury can determine the sufficiency of the causal link to the state actors and whether facts suggest sufficient knowledge of the Appellants. For these reasons, the District Court erred in dismissing Appellants' Federal causes of action and, therefore, Appellants respectfully request this Honorable Court reverse the District Court's findings and remand their Federal causes of action.

CONCLUSION

Petitioners should be given the opportunity to try this matter to the jury. Because the Fifth Circuit has never rejected the state-created danger theory outright and this Court has not resolved its viability, we urge that this case be reversed and remanded to a jury trial.

Respectfully submitted,

/s/ Ed Stapleton

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