No. 19-8145

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

SANTIAGO CRUZ — PETITIONER
(Your Name)

vs.

C. BETANCOURT CDCR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEAL NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SANTIAGO CRUZ #K75616
(Your Name)

P.O.BOX 705 SHA-A-120-L
(Address)

SOLEDAD CALIFORNIA 93960
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

The district court erred in finding Cruz failed to exhaust administrative remedies for his Eighth Amendment claim. The district court failed to recognize that prison officials had waived any procedural errors in the grievance by deciding the issue on the merits at all Levels of review. For this reason, this Court should reverse the district court's decision and decide as a matter of law that Cruz did exhaust all available administrative remedies regarding his Eighth Amendment claim.

LIST OF PARTIES

[X] 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:

RELATED CASES

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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

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

The opinion of the United States court of appeals appears at Appendix E 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[ ] is unpublished.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 D 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[ ] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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 JUNE 13, 2019.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: AUGUST 21, 2019, and a copy of the order denying rehearing appears at Appendix F.

[ ] 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

This is a claim for retaliation under 42 USC 1983 and for a violation of the Eighth Amendment. that the petitioner failed to exhaust Administrative remedies for his Eight Amendment.

STATEMENT OF THE CASE

Santiago Cruz ("Cruz or "Plaintiff") is at all times in this petition for a writ of Certioraria a California state prisoner who correctional officers retaliated against for filing prison grievances. Correction-officer C. Betancourt ("Bentancourt" or "Defendant") subjected Cruz to differential treatment in cell searches and property confiscations because he filed grievances complaining of staff misconduct. Defendant Betancourt also orchestrated a fight between Cruz and another prisoner through which Cruz suffered four fractured ribs and other injuries.

The district court erred in granting summary judgment in favor of Betancourt. First, Cruz exhausted available Administrative remedies for the Eight Amendment claim, regardless of any procedural errors. Prison officials waived any procedural errors when they decided all of Cruz's retaliation claim, viewed in the light most favorable to him, raised genuine issues of material fact as to whether the "because of" prong and "no legitimate penological purpose" prong of a retaliation claim were met. The "because of" prong was adequately set forth because Cruz proffered evidence showing that both the timing of the events and circumstantial evidence supported an inference of retaliatory motive on Betancourt's part. Finally, the "no legitimate penological purpose" prong was adequately set forth because Cruz brought evidence showing Betancourt was motivated by reasons other than neutral penological objectives.

REASONS FOR GRANTING THE PETITION

The courts Decision conflicts with a decision of the United States Supreme Court and at least two decisions of the Ninth Circuit Jones v. Bock 549 U.S. 199, (2007), Reyes v. Smith, 810 F.3d 653 (9th. Cir. 2016), and Albino v. Baca 747 F.3d 1162 (9th. Cir. 2014).

Jones and Albino hold that failure to Exhaust administrative remedies as required by the Prison litigation Reform Act (PLRA) is "an affirmative defense the defendant must plead and prove." Albino v. Baca, 747 F.3d at 1166 (quoting and citing Jones v. Bock, 549 U.S. at 204, 216), Reyes v. Smith adopted the rule that "the PLRA exhaustion requirement is satisfied if prison officials decide a potentially procedurally flawed grievance on the merits" 810 F.3d at 657 (citing cases from seven other circuits courts). Cruz presented evidence in the district court that prison officials decided his untimely grievance through all three levels of administrative review. The panel's determination that Cruz nevertheless failed to show that prison officials "addressed on the merits his allegation that Betancourt orchestrated a fight between cruz and another inmate" improperly shifted the burden of proof for the Affirmative defense to Cruz.

This proceeding involves a question of exceptional importance, that the PLRA exhaustion requirement is satisfied. where prison officials decide a procedurally flawed grievance on the merits because the panel decision conflicts with all of the other authoritive decisions of other Courts of Appeals that have addressed this issue. As noted by the Ninth Circuit Court in Reyes v. Smith, all seven circuits that had addressed the issue were in accord with The Ninth Circuit decision in that case. 810 F.3d at 657. Last year, the Third Circuit reaffirmed this rule, Rinaldi v. United States, 904 F.3d 257, 272 (3rd. Cir. 2018) (merits review

satisfies exhaustion under the PLRA")

The panel's decision is also at odds with binding precedent of the Ninth Circuit Court allowing circumstantial evidence of motive in prisoner retaliation claims. McCollum v. California Dept. of Corrections and Rehabilitation, 647 F.3d 870, (9th. Cir. 2011); Allen v. Iranon 283 F.3d 1070, 1077 (9th. Cir. 2002) The panel disregarded Cruz's circumstantial evidence that Bentan court's close relationship to Carrillo, the proximity in time of the complained-of-conduct with the retaliation, and Carrillo's actions suggesting she was aware of Bentan courts behavior, all pointed to a substantial motive for Bentan court to retaliate against Cruz. The asymmetrical access to information of plaintiffs in prisoner cases demonstrates that this is also a question of exceptional importance.

The panel's decision regarding the First Amendment retaliation claim is also at odds with Shephard v. Quillen, 840 F.3d 686, 692 (9th. Cir. 2016) and the decision of this and other circuits cited therein holding that prison officials may not defeat a retaliation claim . . . simply by articulating a general justification for a neutral process, when there is a genuine issue of material fact as to whether the action was taken in retaliation for the exercise of a constitutional right" (quoting Bruce v. Ylst, 351 F.3d 1283, 1289 (9th. Cir. 2003).

The courts resolution of the PLRA exhaustion issue is at odds with controlling precedent of the Supreme Court and the Ninth Circuit Court. Placing the burden on Cruz to "show that [prison officials] addressed on the merits his allegations" improperly shifted the burden of proof in a PLRA affirmative defense to the prisoner plaintiff, in contravention of the well-established

rule from Jones and Albino. The prison's memorandum of the second level response to Cruz's grievance noted that Cruz complained, at least in the interview conducted in connection with his grievance, that after he complained about Officer Carillo, another inmate slammed him to the ground and broke his ribs and that he was told that officers Carrillo and Bentancourt were setting up inmates to fight with him. ER077. The prison conducted a confidential inquiry into the allegations. ER078. At the third and final level of review, this same confidential inquiry was considered. ER081. Personnel inquiries of this nature are confidential and "will not be disclosed to . . . the inmate population, or to the appellant [Cruz]." Id.

The panel decision violates precedent that places the burden of establishing a prisoner's failure to exhaust administrative remedies on the defendant. As the Court is aware, the vast majority of prisoners are forced to litigate their civil rights cases without counsel, as was the case with Mr. Cruz in the court below. See Margo Schlanger, Trends in Prisoner Litigation as the PLRA Enters Adulthood, 5 U.C. Irvine L. Rev. 153, 167 (2015) (as of 2012, prisoner in civil Rights cases represented themselves nearly 95% of the time, exceeding the 26% pro se rate generally for civil Litigants in Federal Court by an enormous margin).

Moreover, pro se prisoner litigants

> cannot conduct effective discovery either, in part because of lack of legal skills and in part because prisoners and judges are extremly nevous about sharing information with prisoners.

Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1611 (2003). Even if Cruz had sought in discovery the confidential inquiry conducted

in connection with his inmate grievance, it is doubtful if the defendant would have produced it or that the district court would have ordered that it be provided to Cruz. Realistically, the cases in which this information is provided is when a plaintiff is represented by counsel, and then only under a protective order allowing the information be provided to counsel, only, not to the prisoner plaintiff. See, eg., Kerr v. U.S. Dist. Court for the Northern Dist of California, 426 U.S. 394, 398 (1976) (describing lower court's protective order allowing disclosure of prison files to attorneys and investigators only). The dilemma of a plaintiff in this asymmetrical relationship illustrates the exceptional importance of this issue in future cases – it is patently unfair to place the burden on a pro se prisoner to produce confidential information regarding exhaustion of administrative remedies, and the Court should grant rehearing to correct this error.

Arguably, the evidence Cruz produced actually demonstrates that his grievance included the assault in question. If so, then the panel decision violates Reyes v. Smith and the similar decision of at least seven other circuits. As noted in Reyes, "the state's interests in administrative exhaustion have been served." 810 F.3d at 657. There is no reason for the Ninth Circuit Court, just as there was no reason for the district court, to enforce the prison's timeliness rule for prisoner grievances if the prison itself did not desire to do so. This Court should grant this writ of Certiorari and correct these errors in the panel decision.

The Court should correct the panel's decision on Cruz's Retaliation claim. Its decision that Cruz failed to supply evidence to support the "because of" element is rooted in its be-

lief, articulated by one member of the panel at oral argument but omitted from its written decision, that such evidence must be direct and cannot be circumstantial. But controlling precedent of this Court holds otherwise. McCollum v. California Dept of Corrections and Rehabilitation, 647 F.3d 870, 882 (9th. Cir. 2011)(noting three types of acceptable circumstantial evidence including proximity in time)(citing Allen v. Iranon, 283 F.3d 1070, 1077 (9th. Cir. 2002)).

The Court should also correct the panel's decision regarding the legitimate perological goal element of a retaliation claim. The panel completely ignored Cruz's evidence that Betancourt's other searches of his cell resulted in confiscation of many permitted items, not just contraband. ER062 (legal papers, family pictures). Cruz established a disputed issue of material fact with regard to this element, placing the case squarely under the holding of Shephard v. Quillen, 840 F.3d 686, 692 (9th. Cir. 2016) and other case of this and other circuits cited therein. Cruz's evidence supported an inference that the cell searches were designed to set up fights between other prisoners and Cruz, not for the neutral reason argued by Betancourt.

"Inmates must be able to complain about staff; doing so provides a crucial check against those who are in a position to abuse them." Shephard v. Quillen, 840 F.3d at 692-93. This Court should grant rehearing en banc and correct the panel's decision to make clear that circumstantial evidence is allowed in prisoner retaliation cases. The Court should also correct the panel's decision that ignores Cruz's circumstantial evidence that the cell searches conducted by Betancourt were not for a legitimate correctional goal.

The panel also decided, sub silentio, that the interview that prison

officials conduct in connection with a prison's grievance, dose not constitute part of the grievance and will not be considered in determining whether the grievance was exhausted. This is the only way to explain the panel's determination that Cruz's grievance did not allege that Betancourt had orchestrated a fight between Cruz and another inmate." This is a fair inference to be drawn from the summary judgment evidence. As noted above, the prisoner's second level response to Cruz's grievance noted that Cruz complained in the interview that after he complained about Officer Carrillo, another inmate slammed him to the ground and broke his ribs and that he was told that Officers Carrillo and Betancourt were setting up inmates to fight with him. ER077. The incident in which Cruz's ribs were broken is mentioned in the same sentence as the confiscation of Cruz's television set, both events that Cruz alleged occured on May 5. Id. Applying the the proper summary judgment standard and drawing all inferences in favor of the non-movant, Cruz did allege that Betancourt set up the fight in which another inmate broke Cruz's ribs.

At a minimun, the panel should correct its decision on administrative exhaustion and remand the case to the district court for fact-finding regarding the content of the confidential inquiry conducted by the prison in response to Cruz's grievance. It is unfair to place the burden on Cruz to produce this information, and this is the only Way it will ever truly be know whether prison officials " addressed on the merits [Cruz's] allegation, or if they only applied a bare minimum to show that they only did their part in defending that he cruz did not. The record will show that their was a genuine Material dispute.

FOR all the reasons so stated, the petitioner Santiago Cruz dose pray that the Honorable Court FOR the SUPREME COURT OF THE UNITED STATES take notice that their is an issue of Law that needs to be decided by this court, to reverse the decision of the United States Court of Appeal For the Ninth Ciruit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Santiago Cruz

SANTIAGO CRUZ

Date: OCTOBER / 22 / 2019