No._____

In The
Supreme Court Of The United States

SHANGIA WASHINGTON, Petitioner,

vs.

WARDEN CEDRIC TAYLOR et al., Respondents,

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Eleventh Circuit is following its precedent prior to *Hope v. Pelzer* to require a prior case on all fours to demonstrate subjective knowledge?

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The Decision of the United States Court of Appeals for the Eleventh Circuit in *Washington v. Taylor*, et al., April 19, 2021, denying the Petition for Rehearing En Banc, Appeal No. 20-13263 is set forth in A-1. The Decision of the United States Court of Appeals for the Eleventh Circuit, Affirming the decision of the District Court in *Washington v. Taylor*, et al, Appeal No. 20-13263 is set forth in A-2. The Order of the District Court in *Washington v. Taylor,* et al, granting Defendants' Motion for Summary Judgement, Civil Action No. 5:19-cv-00178-TES is set forth in A-3.

JURISDICTION

The final judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on April 29, 2021. The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a writ of certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VII…nor cruel or unusual punishments inflicted.

42 U.S.C. § 1983. *Civil action for deprivation of rights*.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

STATEMENT OF THE CASE

Plaintiff filed the Complaint on May 9, 2019, under 42 U.S.C. § 1983. (Docket # 1). The Defendants filed a Motion for Summary Judgment and Brief in Support on April 27, 2020. (Docket # 14). for failure to exhaust grievance remedies. (Docket # 14 & 14-1). The Plaintiff filed a Response to Defendant's Motion for Summary Judgment on June 11, 2020. (Docket # 19). Defendants filed a Reply on June 24, 2020 (Docket # 20). On August 26, 2020, United States District Judge Tilman E. Self, III granted the Defendants' Motion for Summary Judgment. (Docket #21). Notice of Appeal was filed on August 26, 2020. (Docket # 23).

The panel decision of the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's granting the Defendants' Motion for Summary Judgement on March 8, 2021 on the grounds that all defendants were entitled to qualified immunity. On March 16, 2021, Plaintiff filed a Motion for Rehearing En Banc which was denied on April 29, 2021.

STATEMENT OF THE FACTS

On December 22, 2017, at around 6 p.m., Plaintiff was watching television in the day room at Baldwin State Prison in Georgia. The program he was watching ended and he handed the television remote to Inmate Dugger, who began watching a cartoon with his roommate Inmate Gladdney. (SMF ¶20-21). Plaintiff went back to his dorm to drop off his headphones, and then reentered the breakroom to watch sports on a different television. (Washington Tr. 17: 9-13). While Plaintiff was watching sports, Inmate Dugger started taunting and threatening him and instigating a fight. (Washington Tr. 18:4-17). When Plaintiff spoke to defend himself inmate Dugger stated he would stab Plaintiff as he grabbed a knife in his pocket. (Washington Tr. 18: 17). Plaintiff then ran to his room as inmate Dugger continued to be belligerent taunting Plaintiff Washington threatening to kill Plaintiff Washington and returned with a broomstick to defend himself. (SMF ¶23). Plaintiff, Inmate Dugger and Inmate Gladdney subsequently got into a fight during which Plaintiff was stabbed thirty-eight times. (SMF ¶24, Doc. 1 ¶15).

During the fight Defendant Milner was in the hallway outside of the dayroom where the fight took place, and her partner Officer Johnson was stationed in the control booth. (SMF ¶42-43). There was no officer inside the dayroom, which was the responsibility of Defendant Warden Taylor to ensure the presence of an officer at all times for the protection of inmates. (Doc. 1 ¶12). Defendant Milner radioed for backup prior to any physical altercation occurring and was told ““Do not call me until they start fighting.” (Washington Tr. 26:16-24). Defendants allege that

Defendant Milner ordered Plaintiff to drop the broomstick, to leave the day room, and to stop fighting. Defendant Milner never entered the room despite Plaintiff's cries for help and did not open the door, disallowing Plaintiff from escaping his attackers, until after he had already been severely injured. (Washington Tr. 25:20-25, 26:1-6, 27:9-10 Doc. 1 ¶16). After Plaintiff had already been severely injured, backup finally arrived, and pepper spray was deployed to stop the fight. (SMF ¶51).

REASONS FOR GRANTING THE PETITION

The panel decision reverts to the precedent law in the United States Court of Appeals for the Eleventh Circuit requiring a previously decided case on all fours in order to find liability under 42 U.S.C. 1983 which was reversed by the United States Supreme Court in *Hope v. Pelzer*, 536 U.S. 730 (2002).

The United States Supreme Court in *Hope v. Pelzer*, supra rejected the Eleventh Circuit decision requiring a prior materially similar prior case and established that Defendants can be liable for damages under 42 U.S.C. §1983 when under color of law they "violate clearly established statutory or constitutional rights of which a reasonable person would have known", and that "for a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,…but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Id*.

The panel decision applied the law in the Eleventh Circuit prior to *Hope v. Peltzer*, supra, in which the United States Supreme Court reversed the Eleventh

Circuit prior precedent requiring a "materially similar" case. The opinion of Mr. Justice Stevens disposed of this argument as "rigid gloss on the qualified immunity standard… is not consistent with our cases". The opinion pointed out that the standard only required that prior law give officials a general 'fair warning' that his conduct deprived his victim of a constitutional right, and that the standard for determining the adequacy of that warning was the same as the standard for determining whether a constitutional right was 'clearly established' in civil litigation under § 1983." *Id.* at 740. Certainly, the Defendants were on notice of the prior existing law requiring adequate protection for inmates against violence from others as clearly laid out in *Farmer v. Brennan*, 511 U.S. 825 (1994) and *Rodriguez v. Sec'y for the Dep't of Corr.*, 508 F.3d 611 (11th Cir. 2007).

The material facts relied upon by the Plaintiff are that he was seriously injured in an altercation where an inmate stabbed him; that he had issues with this inmate before and had requested to be moved to a different dorm away from the aggressor; that Defendants Warren and Farley denied his request to move away from his aggressors; that Defendant Milner saw the altercation take place; that Defendant Milner recklessly and deliberately did not help him, causing serious injury to occur to Plaintiff; and that Defendant Taylor inadequately staffed the prison below minimum security measures to the detriment of Plaintiff.

Prior to *Hope v Pelzer*, the Eleventh Circuit limited § 1983 cases by requiring a prior materially similar case in order to put the Defendants on notice. The prior law stated that when analyzing a qualified immunity defense, "we look to whether a reasonable official could have believed his or her conduct to be lawful in light of

clearly established law and the information possessed by the official at the time the conduct occurred". The Eleventh Circuit in *Hope v. Pelzer,* 240 F.3d 975 (11th Cir. 2001) found no case law in this Circuit with facts and legal analysis clear enough to serve as a bright-line rule. However, in the current case, without a case directly on point, and at least one case that cuts against him, Washington has not shown that Farley or Warren acted contrary to clearly established law. For a similar reason, the Eleventh Circuit found Warden Taylor was also entitled to qualified immunity. *Id*.

In *Hope v Pelzer*, the Supreme Court of the United States reversed the prior rule and concluded that the guards' conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known, regardless of the fact that no case law served as a bright-line rule.

Here, the same decision requiring "substantially similar" prior case law was reverted to when it was outrageous that the guards would not intervene until the inmates started fighting and in 62 seconds the Plaintiff was stabbed 38 times because the guards waited and refused to intervene before the fight.

Contrary to the Eleventh Circuits, which continues to enforce its precedent prior to *Hope v. Pelzer*, other circuits are following the instructions of the United States Supreme Court in *Hope v. Pelzer*, thus demonstrating a split in the circuits.

The First Circuit in *Lopera v. Town of Coventry*, 640 F.3d 388 (1st Cir. 2011) follows the Supreme Court of the United States decision precedent set in *Hope v. Pelzer*, agreeing that officials can be put on notice that their conduct violates clearly established law if unlawfulness is apparent in light of preexisting law at time of violation and is therefore reasonable. Similarly, the Third Circuit in *Washington v.*

Ondrejka, 822 F. App'x 104 (3d Cir. 2020) adopted the precedent set forth by the Supreme Court of the United States in Hope v. Pelzer, which instructs us to analyze an Eighth Amendment claim under the excessive use of force test and found that the Court was unable to conclude there was a lack of an emergency situation, as the Defendant's conduct was continuous and uncooperative.

The Seventh Circuit follows the clearly established precedent as well, as *Lovett v. Herbert*, 907 F.3d 986 (7th Cir. 2018) requiring a much higher level of obvious risk to determine whether the conduct was reasonable. The Ninth Circuit in *Cooley v. Meads*, 728 F.App'x 773 (9th Cir. 2018) follows *Hope*'s precedent, adopting the reasonable standard that no reasonable officer could have believed the Plaintiff's confinement was appropriate or lawful.

The Supreme Court of the United States should grant this Petition for Writ of Certiorari to resolve the conflict in the Circuit Courts.

THE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE PETITIONER DEMONSTRATED THERE WAS A RISK OF SUBSTANTIAL HARM NOT ONLY TO HIM BUT TO THE PRISON POPULATION AT LARGE AND THAT DEFENDANTS KNEW OF THAT SUBSTANTIAL RISK

The Order acknowledges that the assailant inmate threatened the Appellant for over a month during which he requested that he be moved for his safety. (Order, Docket # 21, p.13-16). But then concedes that, "for argument's sake assume that even if the facts of this case could demonstrate a substantial risk of serious harm, there is nothing in the record to show that Defendants were aware of – or were deliberately indifferent to- that risk." (Id. p. 16).

In *Rodriguez v. Sec'y for the Dep't of Corr.*, 508 F.3d 611(2007), the Court of Appeals for the Eleventh Circuit held that summary judgment for a prison official wasn't proper when an inmate informed prison officials that he feared for his safety and requested to be moved, and when following the request that was denied by the prison officials, the Plaintiff was stabbed twice by one of the inmates he feared. Defendants allege that the immediate case is "completely different than the specific threats in *Rodriguez*. However, that is simply not the case, the only difference is that Plaintiff did not have the administrative background of seeking a housing reassignment through the Classification Committee. Plaintiff testified in his deposition regarding Inmate Dugger's and Inmate Gladdney's violent disposition. He testified that Inmate Dugger had been "jugging" Plaintiff and other inmates for over a month. (SMF ¶55, Washington Tr. 33:3-4, Doc. 1 ¶9).

Defendants claim that because inmates Dugger and Gladdney boasted of their violent behavior and made threats to multiple inmates and not just Plaintiff, that Plaintiff's claims must be viewed under an "individualized risk" theory under *Bugge v. Roberts*, 430 Fed Appx. 753, 758 (11th Cir. 2011). *Bugge* does not stand for this proposition however; instead, the *Bugge* court quoted *Farmer v. Brennan supra*, stating "it does not matter "whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk". In other words, it does not matter whether Dugger and Gladdney posed a targeted threat to Washington alone, or to the whole prison. If Dugger and Gladdney posed a substantial risk of harm to the average inmate (which their reputation would suggest they do), then the pair's unchecked behavior should satisfy the "substantial

risk of harm" prong. Dugger and Gladdney did in fact meet this risk of harm, as they had made numerous threats to Plaintiff and other inmates in the time leading up to the attack on Plaintiff (SMF ¶55, Washington Tr. 33:3-4, Doc. 1 ¶9, Washington Tr. 51-54). Additionally, Plaintiff further testified that Inmate Dugger had threatened a different inmate earlier with a knife and that an officer witnessed the incident and broke it up. (Washington Tr. 49:10-14). More fundamentally, Defendants Warren and Farley admitted to knowing the pair were making threats before Plaintiff even mentioned Duggar and Gladdney by name, suggest their reputations and the complaints of other inmates preceded Plaintiff's requests to be moved (Order, Docket # 21, p18). The fight between Inmate Dugger, Inmate Gladdney, and Plaintiff had over a month's worth of incidents leading up to it, of which the Defendants prison officials were aware of and to which their deliberate indifference was a proximate cause that led to the Plaintiff being stabbed thirty-eight times.

The District Court erred in finding Defendants were not deliberately indifferent to this harm. Plaintiff has successfully demonstrated that Defendants were not only subjectively aware of the substantial the risk he was exposed to, but that Defendants failed to respond in an objectively reasonable manner. *Q.F. v. Daniel*, 768 Fed. Appx. 935, 944-945 (11th Cir. 2019). As discussed above, Defendants Warren and Farley were given notice not just from Plaintiff, but several other inmates that Duggar and Gladdney were violent and threatening towards the Plaintiff and the prison populace at large. (Order, Docket # 21, p18). This notice inarguably put them on subjective notice that these two inmates presented a substantial risk. The Officers' refusal to move Plaintiff to a different cell placed him

in danger of attack from Duggar and Gladdney despite their reputation and numerous warnings and was unreasonable in the face of this evidence presenting them as a threat.

Further, Defendant Milner showed a subjective awareness of a substantial risk of imminent harm to the Plaintiff when she called for backup from the other officers. In determining whether Defendant Milner had a subjective knowledge of the danger to Plaintiff, the court may look to whether Defendant was "aware of facts from which the inference could be drawn that a substantial risk of serious harms exists, and [they] must also draw the inference". *Nam Dang v. Sheriff, Seminole Cty. Fla.,* 871 F.3d 1272, 1280 (11th Cir. 2017). Further, this knowledge of a substantial risk is a question of fact and can be proved via inference drawn from circumstantial evidence. *Farmer, supra* at 842. Reviewing Defendant Milner's actions under this lens, it is unlikely she would have made the initial call for backup if she had not subjectively believed Plaintiff was in danger.

Defendants' indifference caused Plaintiff's injuries. The Court of Appeals for the Eleventh Circuit held in *LaMarca v. Turner*, 995 F.2d 1526 (11th Cir. 1993), that causation is demonstrated when a plaintiff is able to show that a prison official: (1) "had the means substantially to improve" the inmate's health and safety; (2) "knew that the actions he undertook would be insufficient to provide [the inmate] with reasonable protection from violence;" and (3) had "other means available to him which he nevertheless disregarded." *Id.* at 1539.

The Defendants, as the Warden and officers within Baldwin State Prison, had the means to substantially improve Plaintiff's safety. Plaintiff voiced a serious safety

and life-threatening concern to Defendants, and they had it within their authority, even if to not immediately transfer him to a different dorm, but to place him in protective custody while he initiated the dorm transfer process. Second, a reasonable juror could conclude that Defendants knew that the actions taken were not enough to provide protection to Plaintiff. There were no actions taken to protect Plaintiff, to the point of one Defendant standing there watching the altercation, and any action taken by Defendants more than what they failed to do likely would have protected Plaintiff from his severe wounds. Defendants did have other means that they disregarded. Back-up could have been sent when it was originally called for, instead of waiting for "when they start fighting" (Washington Tr. at 28, 18-23). Defendant Taylor could provide more than two staff in two separate parts of the prison at any one time. There were any number of reasonable means available to Defendants to protect Plaintiff and their failure to caused Plaintiff's severe injuries.

Defendants claim that under *Farmer v. Brennan*, 511 U.S, 825 (1994), Defendant Milner was not required to place herself in harm's way to protect Plaintiff from danger. However, this was not Milner's only option, Milner had a plethora of options available to her which would not have placed her in harm's way. Milner could have repeated her calls for backup when the first was dismissed. Milner could have opened the doors as Plaintiff requested, allowing him the chance to disengage from the altercation. Milner could have deployed pepper spray or similar measures without placing herself in danger. Above all, Milner had numerous steps she could

have taken to better protect Plaintiff without risking her own life, and her failure to do so caused Plaintiff's injuries.

CONCLUSION

It is submitted that the Petition for Writ of Certiorari should be granted to consider that the panel decision applied the law of the Court of Appeals for the Eleventh Circuit prior to its reversal by the United States Supreme Court in *Hope v. Pelzer*.

Respectfully submitted,

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