No. 13-693

# In The
# Supreme Court of the United States

NATASHA WHITLEY,

*Petitioner,*

*v.*

JOHN NICK HANNA; ROBERT BULLOCK; MICHAEL MURRAY; AND ROBERT GRUBBS,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF MICHAEL MURRAY AND ROBERT GRUBBS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## MURRAY AND GRUBBS' ALTERNATIVE QUESTIONS PRESENTED

1. During the investigation of a police officer for suspected sexual misconduct, do law enforcement officials in a separate law enforcement entity have a constitutional duty to protect the suspected victim from the perpetrator regardless of any legitimate governmental interest in investigating and prosecuting the crime?

2. Can law enforcement officials be deliberately indifferent to the substantive due process rights of a suspected sexual misconduct victim during an investigation by lawfully performing their duties, investigating, and gathering evidence?

3. Does the right of a suspected victim in a sexual misconduct investigation override the legitimate governmental interest of the state in investigating crime and obtaining additional evidence?

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## BRIEF OF MICHAEL MURRAY AND ROBERT GRUBBS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Vincent Ariaz, a Brownwood, Texas police officer and an Explorer Post leader, was investigated and arrested by Texas Ranger John Nick Hanna for sexually molesting Whitley a minor. Ariaz ultimately pleaded guilty to sexual assault of a child and received 20 years in prison. On her behalf, Whitley's parents sued and later settled out of court with Ariaz's employer, the City of Brownwood, the City's Police Chief, and the Boy Scouts of America over the events.

After Whitley turned 18, and shortly before the statute of limitations ran, Whitley filed this second lawsuit against the persons who put an end to Ariaz's abuse, Hanna, his supervisor (Bullock), the District Attorney (Murray), and the Brown County Sheriff (Grubbs), claiming they should have intervened and protected her from Ariaz sooner. In essence, Whitley wants the Court to hold that officials investigating an officer in a separate law enforcement entity for suspected sexual abuse violate the alleged victim's constitutional rights if they do not immediately intervene and separate the victim from the alleged abuser regardless of the circumstances. The Court should decline this invitation.

## COUNTERSTATEMENT OF THE CASE

### I. Facts Pleaded

There is no denying that Ariaz sexually assaulted Whitley. Respondents are the ones who stopped him, and they put him away for 20 years. But the facts Whitley pleaded in the trial court bear little resemblance to the picture Whitley carefully tries to portray in her Petition for Writ of Certiorari – that of callous and indifferent law enforcement officers who had actual knowledge of the repeated and prolonged rape of a teenager and who willingly and intentionally allowed it to continue for months so that it would be easier to convict the perpetrator. That is not the case, and is not what Whitley pleaded.

Because this case was dismissed for failure to state a claim, the facts Whitley actually pleaded are crucial to understanding why the Petition should be denied. Whitley's Statement of the Case is actually a conglomeration of her Original and First Amended Complaint Pet. 3 n.1. But the live pleading was the Original Complaint. Record 7-23. Whitley's Motion for Leave to File First Amended Complaint (Record 131-154) was denied as futile, a ruling affirmed by the Court of Appeals. *Whitley v. Hanna*, 726 F.3d 631, 648 (5th Cir. 2013), Pet. App. 33a-35a.

The Original Complaint is replete with editorial comments and conclusory statements, but one can glean from it the following factual allegations:

- Ariaz was a sergeant in the Brownwood, Texas Police Department. As part of his job,

he was the adult advisor for the police department's Explorer Post.

- On January 31, 2007, a Brownwood P.D. detective and Texas Ranger Hanna began investigating a potential allegation of abuse against Ariaz by A.M.
- A.M. told Hanna that Ariaz would often use her as an example for activities like handcuffing and would have her stay late when no one else was around.
- A.M. reported that Ariaz would rub his body against hers to arouse himself and would ask her about her sexual experience.
- A.M. told Hanna that Ariaz sent her inappropriate text messages boasting about the size of his member and asked her out, wanting her to go out of town with him to a motel to spend the night and have sex.
- A.M. also reported that Ariaz had once gotten her alone in a storeroom, turned off the lights, kissed her and reached under her shirt, to fondle her breasts.

Record 8-9.

Hanna also spoke to A.M.'s mother and boyfriend who informed Hanna that he had previously complained to the Brownwood Police Chief about Ariaz. Record 10. The Complaint never specified when before January 31, 2007 these events were alleged to have occurred. Nothing further transpired on the investigation until July 3 when officers of the Brownwood

Police Department reported to Hanna that Ariaz was driving around every night with Whitley, another young female member of the Explorer Post. Record 12-13. Hanna began investigating Ariaz again on July 5, and, according to the Complaint, "quickly" confirmed the following in relation to Whitley:

- Ariaz let Whitley drive his vehicle even though she was only fifteen.
- Whitley rode with Ariaz almost every night.
- Ariaz would spend hours parked in remote areas with Whitley.
- Dispatchers noticed a consistent pattern with Ariaz and his vehicle in which he parked for periods of two to three hours in remote locations such as the Brownwood Airport, a wooded area by Brownwood Hospital, or by the old Police Department on Greenleaf with Whitley.
- The areas where Ariaz would park with Whitley were secluded or known as "make out" areas.

Record 13.

Murray and Grubbs attended a meeting with Hanna and other law enforcement officials on July 9 to discuss Ariaz. Whitley did not allege specific facts related to this meeting other than to state that as a result "Hanna determined that they would continue monitoring Ariaz." Whitley also made several conclusory allegations about the meeting, including that

Hanna made this determination "so that they could catch [Ariaz] in the act of abuse," and that this was done, "to make conviction easier." Record 14 ¶¶ 61-64.

After the July 9 meeting, video surveillance equipment was installed in the hallway of the Brownwood Annex Building (one of the locations where Ariaz took Whitley) and a GPS tracker was placed on Ariaz's car. This equipment revealed the following:

- On July 10, Ariaz spent significant time with Whitley after 3:20 a.m.
- On July 11, Ariaz spent 24 minutes inside the Annex with Whitley; the video showed him hugging and kissing her, and "other suspicious behavior" at the courtroom door.
- Ariaz was seen entering the courtroom with his duty belt on and exited 13 minutes later without his duty belt on.
- When Whitley exited the courtroom, she was adjusting her shirt.
- On July 13 Ariaz spent an hour and 23 minutes with Whitley; the video showed him exiting the courtroom without his duty belt on and putting it on in front of Whitley.
- On July 15, and the early hours of July 16, Ariaz and Whitley spent 39 minutes in the Annex courtroom.

Record 14-17.

On the night of July 16, Hanna moved the video surveillance equipment to the courtroom in the Annex and hid with another investigator and the monitoring equipment in the closet of the courtroom. That night Hanna observed the following:

- Whitley lying on a table in the courtroom with Ariaz positioned over her.
- Ariaz and Whitley left and returned around 6:13 a.m. at which time Ariaz began kissing Whitley for several minutes while Whitley was lying down.
- Hanna observed Ariaz place his head in Whitley's "crotch area."

Record 17.

When he saw this, Hanna immediately came out and arrested Ariaz. The only other allegation made as to Murray and Grubbs is that, "Upon information and belief" Murray and Grubbs were made aware of what was transpiring [regarding the surveillance] and if not actually aware, they should have been aware. Record 15-16.

Ariaz ultimately pleaded guilty to two counts of sexual assault of a child and no contest to indecency with a child,[1] and he was sentenced to 20 years in prison.

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[1] The indecency charge was related to the incident with A.M.

## II. Procedural History

Murray and Grubbs filed a Motion to Dismiss Whitley's claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim asserting that Whitley had not alleged a constitutional violation. Hanna and Bullock filed a separate Motion to Dismiss asserting qualified immunity. Murray and Grubbs later filed an Original Answer, subject to their Motion to Dismiss, which included the defense of qualified immunity. Whitley filed a Motion for Leave to File Amended Complaint, which was denied, and the District Court granted both Motions to Dismiss. Pet. App. 59a, 65a.

The trial court denied Whitley leave to amend because the amendment did not add anything new and would be futile. Pet. App. 58a-59a. As to the Original Complaint, the trial court held that Whitley failed to state a claim because her claims "relating to arresting Ariaz or concluding the investigation sooner do not amount to a constitutional violation." The trial court held that Whitley had failed to state a claim under 42 U.S.C. § 1983, and "certainly not such that would overcome [the] assertion of qualified immunity" for three reasons: (1) because there was no constitutional right to have charges filed or any investigation conducted; (2) because the Defendants were acting on facts and investigating rather than ignoring the situation; and (3) because Ariaz was employed by a separate law enforcement agency and the Defendants had no supervisory capacity over him. Pet. App. 59a-64a.

The Fifth Circuit affirmed, limiting its analysis to whether the facts pleaded stated a claim of deliberate indifference. *Whitley v. Hanna*, 726 F.3d 631, 640-641 (5th Cir. 2013), Pet. App. 15a-16a. Judge Elrod concurred in the decision but wrote separately to say that she would find that Whitley had stated a claim of deliberate indifference as to Hanna but that he was still entitled to qualified immunity because the law was not clearly established. The Fifth Circuit denied Rehearing En Banc. Whitley then filed this Petition for Writ of Certiorari.

## REASONS FOR DENYING THE PETITION

### I. Whitley Really Seeks Review of Factual Determinations of the Court of Appeals

There are two main issues in this case: (1) deliberate indifference; and (2) vicarious liability. Neither is novel nor new. They merely plow the same old ground that has been plowed many times before by this Court. Whitley wants the Court to accept this case so it can hold that deliberate indifference should be met when an official acts or fails to act despite knowing of a "substantial risk of constitutional harm." Pet. 10-14. At first glance, that sounds impressive and important. But once one examines her Petition closely, one sees that Whitley is really asking the Court to rule on whether the Fifth Circuit misapplied the well-established deliberate indifference standard to the facts she pleaded. She is not actually

asking the Court to address the applicable standard of deliberate indifference.

Whitley first claims the Fifth Circuit confused and improperly separated the "shocks the conscience" and deliberate indifference standards but then, in the same paragraph, refers to them as separate tests. Pet. 11. Why she brings this up is unclear. As the Court of Appeals noted during oral argument, Whitley limited the grounds on which she sought relief and it was not clear whether she was still asserting a claim under the "shocks the conscience" standard. *Whitley*, 726 F.3d at 638 n.2, Pet. App. 11a n.2. Whitley also seems to acknowledge and argue in her Petition that the proper standard is deliberate indifference. Deliberate indifference is the correct standard, and the Fifth Circuit properly applied it in this case.

In seeking to hold the Respondents liable for Ariaz's conduct, Whitley relied on the Fifth Circuit's previous decisions in *Doe v. Taylor*, 15 F.3d 443 (5th Cir. 1994), *cert. denied*, 513 U.S. 815 (1994) and *Doe v. Rains County I.S.D.*, 66 F.3d 1402 (5th Cir. 1995). Under those cases, to state a claim Whitley was required to show that the Respondents (1) knew of a pattern of constitutional deprivations; (2) the abuse was caused by a state actor over whom they had supervisory authority or a state law created right of legal control; (3) they acted with deliberate indifference to the victim's constitutional rights; and (4) their failure to act resulted in a constitutional injury. *Whitley*, 726 F.3d at 640, Pet. App. 15a. The Fifth

Circuit decided the case only on the deliberate indifference issue.

Deliberate indifference is a high standard. *Whitley*, 726 F.3d at 641, Pet. App. 16a. The Court has defined deliberate indifference as meaning that "the official knows of and disregards an excessive risk to . . . health or safety; the official must both be aware of facts from which the inference could be drawn that substantial risk of serious harm exists and he must also draw that inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). It is a subjective test. *Id.* A failure to alleviate a significant risk that an officer should have perceived, but did not, does not rise to the level of deliberate indifference. *Id*. at 838. Deliberate indifference is a stringent standard of fault and requires proof that the official disregarded a known or obvious consequence of his action. *Board of County Comm'rs v. Brown*, 520 U.S. 397, 410 (1997). It cannot be a generalized showing of risk or merely that events become more likely. *Id*. at 410-411. It must be a plainly obvious consequence of the action. *Id.* at 411-412. It cannot be a mere probability. *Id*.

Whitley asks the Court to take this case in order to hold that deliberate indifference is met when an "official acts or fails to act despite knowing of substantial risk of constitutional harm." Yet it is not clear exactly how this test would be substantively different than the standard previously adopted by the Court. She never explains how "despite knowing of a substantial risk of constitutional harm" is materially different from the current definition of "acted or

waited to act despite his knowledge of a substantial risk of serious harm." Pet. 12, citing *Farmer v. Brennan*, 511 U.S. at 842. Whitley neither cites any precedent from this Court nor any Courts of Appeals' decisions that recognize any such distinction, nor does she reference any decisions of any other Courts of Appeals that actually conflict with the Fifth Circuit's decision.

What Whitley really wants is for the Court to take this case so she can have the sufficiency of her factual allegations reviewed a *third* time. Even if the Court were inclined to accept review for that reason, the Court should deny this Petition because the Fifth Circuit's decision was correct. The only evidence alleged to have been known at the time of the July 9 meeting was that Ariaz had allegedly harassed and put his hand under A.M.'s shirt to fondle her breasts more than six months before. Hanna next learned in early July that Ariaz was spending time with Whitley, let Whitley drive his vehicle, rode with her every night, and would spend hours parked in remote areas with Whitley. This is the most information that could have been provided to Murray and Grubbs by Hanna at the July 9 meeting. Nothing beyond this was uncovered until video surveillance began.

Even after the surveillance began, the most that it revealed until July 17 was suspicious conduct – hugging and kissing, Ariaz giving Whitley a necklace, having his duty belt off, putting it on and Whitley adjusting her shirt. Whitley's Complaint did not state facts which, taken in the light most favorable to

Whitley, alleged that Respondents knew Whitley was being subjected to sexual abuse or assault sufficient to establish deliberate indifference. This is what the Fifth Circuit recognized. *Whitley*, 726 F.3d at 644, Pet. App. 26a. Whitley's real complaint, throughout this lawsuit, has been nothing more than that the investigation was conducted negligently and it should have been brought to a conclusion much sooner. As the Fifth Circuit observed, Whitley may have alleged facts sufficient to show there was an error in judgment. But being negligent or making mistakes does not constitute deliberate indifference.

In both the trial and appellate courts below, Whitley used a great deal of poetic license in describing her pleadings. In her Petition in this Court, Whitley has toned it down a bit but still refers several times to being "repeatedly raped" during the course of the investigation. It should be noted that nowhere in her Original Complaint or the proposed First Amended Complaint was there an allegation of her being repeatedly raped. The closest she came was the allegation that "the relationship between Ariaz and Plaintiff became sexual around June 2007. From that time until Ariaz's arrest on July 17, 2007, Ariaz would engage in sexual misconduct with Plaintiff while they were together at night." Record 12. The specific nature of this "sexual" relationship or the sexual misconduct was never alleged. She never pleaded that she was subjected to "statutory rape." There was also no indication that there was any specific information of inappropriate conduct until the video

surveillance revealed Ariaz and Whitley hugging and kissing. But hugging and kissing are not crimes.

Whitley also argues that the "officers chose to allow her to continue being raped by Ariaz as part of an investigation that spanned six months and included the July 9 meeting in which they actively deliberated how to proceed." This sharply mischaracterizes the investigation of Ariaz and the facts pleaded in the trial court. The investigation of Ariaz and his relationship with Whitley did not begin until around July 5, the meeting was held on July 9, and Ariaz was arrested in the early morning of July 17 a span of less than two weeks.

In reality, Whitley is quibbling over the factual determinations the Fifth Circuit made based on her pleadings. She wants the Court to declare the investigation conducted by Hanna deficient and that a deficient or negligent investigation of a police officer on its face constitutes deliberate indifference. There is nothing new about deliberate indifference in this case that warrants this Court's consideration. The Court should deny the Petition for that reason.

## II. The Fifth Circuit Did Not Create an Exception to Deliberate Indifference

Whitley also claims the Fifth Circuit's opinion provides an "escape valve" for deliberate indifference to knowingly place constitutional rights at risk for a "presumed greater good." Her claim is based on Judge Elrod's concurrence, which stated: "The implicit

message in the majority opinion's deliberate indifference analysis is that an officer can escape § 1983 liability for a conscious endangerment of a victim's constitutional rights, provided that he acted with good intentions." Whitley misreads the majority's opinion, however, as the majority recognized in its criticism of the concurrence. As the majority noted, "Instead of looking to whether Hanna's conduct was appropriate in light of the available evidence, . . . the concurrence instead would look to whether 'the purpose of [the defendant's] actions was to *interfere* with the alleged abuse.'" [italics in original]. *Whitley*, 726 F.3d at 643, Pet. App. 21a n.9.

The majority below did not create an exception to deliberate indifference. It never held that there was any exception to the deliberate indifference standard, or some sort of "escape valve" or that deliberate indifference is excused if an officer acts with good intentions. As discussed in detail above, it simply applied the standards of deliberate indifference to the facts pleaded in this case. The crux of the majority's deliberate indifference analysis was that the decision to gather additional evidence in this case did not rise to the level of deliberate indifference. *Id*., Pet. App. 27a.

Deliberate indifference is, after all, a subjective standard. The majority merely recognized that Respondents' ultimate aim and what they were trying to accomplish is part of the deliberate indifference analysis. This is because the purpose of the due process clause is to protect the individual against

arbitrary action of government. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). The Constitution does not guarantee "due care" on the part of state officials. *Id.* at 848. It is intended to prevent government officials from abusing their power or using it as an instrument of oppression. *Id.* at 846. The due process guarantee does not create a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. *Id*. at 848. It only protects against conduct intended to injure in some way unjustifiable by any government interest. *Id*. at 849.

Therefore, in analyzing deliberate indifference it is appropriate to ask, what were the officers doing? Was it an arbitrary act? Was it simply an abuse of power? Was it unjustifiable by any governmental interest? Or, were they legitimately trying to investigate a suspected crime being committed by a police officer in order to put an end to suspected abuse and harm? This is not an exception to deliberate indifference. It is part of the required analysis.

It is in fact Petitioner who wants the Court to create an exception, and require an objective standard in sexual assault investigations of state actors. She wants deliberate indifference to mean that, regardless of the actions or motives of the officers, or the circumstances of the case, that criminal investigators and prosecutors should be liable for the actions of another police officer in a different governmental entity if they have a suspicion that the officer either has committed or might commit constitutional harm

in the future. This would amount to creating a system of tort law under the due process clause that this Court has repeatedly said the Constitution does not provide. There is no need to grant certiorari to address this issue again.

## III. Whitley Is Asking the Court to Create a Strict-Liability Rule

Whitley also argues that the Court should take this case to hold that allowing sexual assault by a state actor is unjustifiable by any government interest. In fact, she goes so far in her Petition as to declare, "The Court should grant review to say that, no matter what the intentions or the standard involved, allowing rape by a state actor is unjustifiable by any governmental interest." What Whitley appears to want is a new rule of law placing an individual's right to bodily integrity above any legitimate governmental interest in investigating and prosecuting crime and enforcing the law regardless of the facts or circumstances of the case. In effect, this would amount to a rule of strict liability for police officers conducting sexual assault, domestic violence, or other types of assault investigations, unless they separate alleged victims from the suspected abuser at the first whiff of suspicion. Whitley wants a rule that requires law enforcement officers to police "inappropriate" rather than illegal behavior. How that is to be done in a free society without gathering evidence is unaddressed by Petitioner.

The Court should not grant the Petition to review this issue. The law already provides protection and relief for sexual assault victims. State actors other than the abuser can already be held liable for sexual assault. *See, e.g., Doe v. Rains County I.S.D.*, 66 F.3d 1402 (5th Cir. 1995). In fact, Whitley has already had one recovery in a lawsuit against the City of Brownwood and the Boy Scouts of America. Just because Respondents are not liable in this case is no reason for the Court to revisit and alter a standard that the Court has consistently applied since *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). *See*, *Farmer v. Brennan*, 511 U.S. at 834.

## IV. No Conflict Among Circuit Courts of Appeals

Whitley also claims this case conflicts with decisions of other Courts of Appeals. That is incorrect. Whitley cites *Rogers v. City of Little Rock*, 152 F.3d 790 (8th Cir. 1998) and *Fontana v. Haskin*, 262 F.3d 871 (9th Cir. 2001) for the proposition that sexual assault by a state actor falls at the extreme end of egregious conduct and is unjustifiable by any governmental interest. Murray and Grubbs agree. That is why it was proper that Ariaz be stopped, permanently. But the cases cited address the liability of the perpetrator in the assault, not the officers and prosecutor who put an end to the abuse. This Court does not need to address the substantive due process right to be free from sexual assault by a state actor. The Circuit Courts have already done so, as acknowledged both by Whitley and the Amici, and have not reached

conflicting results. *See, e.g.*, *Doe v. Rains County I.S.D.*, 66 F.3d 1402 (5th Cir. 1995); *Rogers v. City of Little Rock*, 152 F.3d 790 (8th Cir. 1998); *Fontana v. Haskin*, 262 F.3d 871 (9th Cir. 2001); *Jones v. Wellham*, 104 F.3d 1620 (4th Cir. 1997).

Counsel could not find, and Petitioner does not cite to, any other case with facts similar to this one. While that does not mean it is not possible that these facts could never arise again, it certainly is reasonable to conclude that there is no conflict among the various Courts of Appeals because the circumstances of this case are so rare. There is no indication that this situation has arisen previously, is likely to arise again, or that it is such a frequent problem or issue that the Court must address it at this time to answer a burning, unanswered question of federal law.

## V. Other Meritorious Arguments and Issues

In addition, the Court should not take this case because there are other meritorious issues and defenses which would potentially affect the outcome of this case, so the Court might never reach Whitley's question. These issues are that the allegations pleaded against Murray and Grubbs were not sufficient under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); the denial of Whitley's Motion for Leave to Amend Complaint; and the lack of control of Respondents over Ariaz. *Rains*, 66 F.3d at 1414-15.

As part of their Motion to Dismiss, Murray and Grubbs argued that the allegations against them did not have to be viewed in the light most favorable to Whitley because they were mere conclusory allegations and were not sufficient under *Iqbal.* While the trial court did not directly hold that Whitley's Complaint failed under *Iqbal*, it did state, "as argued by the Defendants, the conclusory and editorial statements in either complaint [Original or proposed First Amended Complaint] cannot form the basis for supporting a plausible claim." Pet. App. 60a. The Court of Appeals did not address the *Iqbal* question, although it had been raised and briefed, and viewed the allegations in the light most favorable to Whitley. Nevertheless, to properly deal with this case the Court would first need to address the sufficiency of the conclusory nature of the allegations and editorial comments made against Murray and Grubbs, and whether they pass muster under *Iqbal* in order to be entitled to be viewed in the light most favorable to Whitley.

While Whitley sought leave to amend her complaint, the trial court denied leave because it would be futile. This decision was correct and was affirmed by the Fifth Circuit. The proposed First Amended Complaint did not add anything substantively new to what was already pleaded in the Original Complaint. The amendment also would not have resolved Murray and Grubbs' objections to the allegations against them as being insufficient under *Iqbal*. Whitley relies on allegations asserted in her proposed First Amended Complaint in her Petition despite the fact that it was

not the live pleading. If the Court grants review in this case, it would also need to consider whether denial of leave to amend was proper, whether the amendment should have been allowed, and then whether the allegations under that amended complaint were sufficient under *Iqbal* to state a claim.

But the primary issue which the Fifth Circuit did not address was the "linchpin" issue of the Respondents' lack of control over Ariaz. *Whitley,* 726 F.3d at 641, Pet. App. 16a n.7. Control over the persons or events giving rise to the injury has generally been required before § 1983 liability will attach. *Rains*, 66 F.3d at 1414-15. Typically, the Due Process clause only requires government protection or services in the limited circumstances where the government has control of the person, or there exists a special relationship. *DeShaney v. Winnebago County Soc. Serv. Dept.*, 484 U.S. 189, 191 (1989). Although *DeShaney* is not controlling in this case because it concerned liability of the state for private violence, it does point the way. It establishes the principle that there is no liability for failing to protect an individual from someone over whom the governmental entity in question has no control. This is because the duty of the state to protect an individual comes not from the knowledge of the circumstances but from the corresponding duty that arises from the state assuming the responsibility of taking the person into custody or some "special relationship." *Id.* at 199-200.

None of the Respondents had any supervisory authority or state law created right of control over

Ariaz or the Brownwood Police Department. Furthermore, there was no special relationship between Respondents and Whitley. Despite these uncontroverted facts, Whitley apparently wants a rule that makes law enforcement officials and prosecutors liable not only for their own actions and those over whom they have control, but also for the actions of any public employee in any government entity that commits sexual misconduct if they did not act fast enough in stopping him, through the benefit of hindsight. There is nothing in either this Court's jurisprudence or any Court of Appeals decision counsel could find that expands potential § 1983 liability beyond those over whom the official or entity sued has control. In fact, Whitley's request takes the concepts of respondeat superior and vicarious liability far beyond anything that exists in ordinary tort law. Therefore, the Court should deny the Petition.

## CONCLUSION

In short, there is nothing about this case sufficient to justify the Court granting Certiorari. It involves a specific application of factual allegations to a well-established standard of liability: deliberate indifference. The Fifth Circuit's decision is limited to the facts of this case and is not in conflict with the decision of any other Circuit Court of Appeals or State Court of final resort. It is not an important issue of law. There is no evidence or indication that this is a situation that arises frequently, or that the

standards of law governing these types of cases are such as to require the Court's guidance or resolution of an important issue. Even if the issue were important enough to merit review, the record and procedural posture of this case is not clean enough for the Court to address that issue. For these reasons, and those set out above, the Court should deny the Petition.

Respectfully submitted,

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