# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

**FILED**
December 12, 2018

Lyle W. Cayce
Clerk

No. 17-50500

STEPHEN ANTHONY BERNAL,

Plaintiff–Appellant,

v.

BEXAR COUNTY; JAVIER SALAZAR, Sheriff of Bexar County, in his official capacity; GERALD TREVINO, JR., Correctional Officer for Bexar County Adult Detention Center, in his individual and official capacity,

Defendants–Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:17-CV-80

Before HIGGINBOTHAM, GRAVES, and WILLETT, Circuit Judges.

PER CURIAM:*

After Stephen Bernal finished his sentence in Bexar County Jail, he sued a jail officer under § 1983. But the district court dismissed his claim since Bernal hadn't exhausted his administrative remedies while in prison. On appeal, Bernal argues for the first time that the law didn't require him to exhaust his administrative remedies before suing.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Normally, parties waive issues that weren't argued below. But if there are extraordinary circumstances, we will consider the issue anyway. We decide whether there are extraordinary circumstances and, if so, whether the district court erred in dismissing the suit. Here, such circumstances exist, and the case should not have been dismissed. We REVERSE.

I

Stephen Bernal filed a pro se civil-rights complaint under § 1983. He alleges that one night while incarcerated, he asked the jail officer, Trevino, for an update on a property request. Supposedly, Bernal then asked Trevino if he or another officer had taken the property home. Trevino told Bernal to go back to his bunk, and Bernal made a comment that—according to him—started a fight. Bernal claims that Trevino bumped him with his chest and punched him in the face several times. Next, Bernal alleges that Trevino dragged him into the bathroom and continued to beat him up.

After this, Bernal went to the medical support unit, but he claims that the County Jail denied him medical treatment and put him in isolation. He alleges that he was later put in administrative segregation. Aside from the immediate injuries, deprivation of medical treatment, and placement in administrative segregation, Bernal also claims that he suffers lingering pain, has trouble sleeping, and cannot trust police officers anymore.

While incarcerated, Bernal sought an administrative remedy. He filed a Step 1 Grievance, which was denied. Bernal never filed an administrative appeal—Step 2. After release, Bernal sued Bexar County, the Bexar County Sheriff, and Officer Trevino. Trevino moved to dismiss the complaint because Bernal had failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act (PLRA). 42 U.S.C. § 1997e.

The magistrate judge recommended that the district judge dismiss the case. Bernal filed untimely objections to the magistrate judge's

recommendation. And the district court dismissed the complaint with prejudice. Bernal timely appealed.

Now on appeal, Bernal argues for the first time that he didn't need to exhaust his administrative remedies. The PLRA bars § 1983 suits filed "by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Since Bernal wasn't a prisoner when he sued, he argues that he wasn't required to exhaust his administrative remedies.

II

The district court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291. And we review the granting of a motion to dismiss de novo. *Boyd v. Driver*, 579 F.3d 513, 515 (5th Cir. 2009). We first decide whether we can consider Bernal's new argument.

III

Generally, parties waive any arguments not raised in the district court. *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir. 1996). So we will not consider a new issue on appeal unless there are "extraordinary circumstances." *Id.* And the party raising a new issue has the burden to show the extraordinary circumstances. *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009); *see also Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, 549 n.23 (5th Cir. 2016) (holding that plaintiffs waived their new argument by not identifying extraordinary circumstances).

"Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it." *N. Alamo Water Supply Corp.*, 90 F.3d at 916. For example, 30 years ago in *Verdin*, we declined to consider a new theory in an admiralty suit. *Verdin v. C & B Boat Co., Inc.*, 860 F.2d 150, 155 (5th Cir. 1988). We reasoned

that no extraordinary circumstances existed. *Id.* And because the new argument "involved some underlying facts," we also noted our concern that we would have to engage in appellate fact-finding. *Id.* On the other hand, in *Veigel*, we explained that "the district court's award of attorney's fees was patently erroneous in light of controlling precedent," which amounted to a miscarriage of justice. 564 F.3d at 701.

But we have never explicitly stated whether an appellant must expressly argue that "a miscarriage of justice would result" from waiver. In other words, must an appellant invoke the magic words? Or need the appellant merely articulate the harm from waiver and from the district court's ruling? Our caselaw conveys the latter.

Also in *Veigel*, we declined to consider the district court's finding that a property transfer was fraudulent under the Texas Uniform Transfer Act (TUFTA). *Id.* at 700–01. The appellants argued for the first time on appeal that transfer in question was exempt from TUFTA. *Id.* Yet we refused to consider the argument since the appellant "failed to identify any harm resulting from the district court's TUFTA ruling." *Id.*

Put differently, the appellant had to at least "make an argument or showing of extraordinary circumstances." *French v. Allstate Indem. Co.*, 637 F.3d 571, 582 (5th Cir. 2011). When the appellant identifies that a miscarriage of justice would result—whether invoking that precise language or not—we may consider the new argument if there are in fact extraordinary circumstances.

And here there are. If Bernal wasn't subject to the PLRA, then the dismissal of his § 1983 complaint based on the PLRA's exhaustion requirement would be obvious error. That error would have undoubtedly harmed him—the district court threw out his suit before he had the chance to prove his injuries. That is a miscarriage of justice. Plus, the sole issue is a legal one—whether

Bernal was subject to the PLRA and thus whether the court erred in dismissing his complaint.

Bernal also met his burden of showing that there are extraordinary circumstances. He is the one who pointed out the harm from the district court's ruling. The sole issue he argues on appeal is whether he needed to exhaust all his administrative remedies even though he was no longer a prisoner. And he argues that his asserted facts, if proven true, show a § 1983 violation.

Thus, Bernal has carried his burden. There are extraordinary circumstances. And we may weigh in on whether the district court erred in dismissing Bernal's suit.

## IV

The sole issue on appeal is whether Bernal had to exhaust all his administrative remedies before suing even though he was no longer a prisoner. The district court dismissed Bernal's complaint because it reasoned that he did have to exhaust his administrative remedies. But as already mentioned, the PLRA bars § 1983 suits filed "by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This restriction thus applies only to people who are currently incarcerated—not to former prisoners. Take our opinion 18 years ago in *Janes v. Hernandez*. 215 F.3d 541 (5th Cir. 2000). There, we concluded that because the appellant was no longer a prisoner at the time of the complaint, the PLRA's fee limits didn't apply.[1] *Id.* at 543.

At the time of his complaint, Bernal was not incarcerated. Rather, he had served his time. And he sued after his release. The district court was wrong

[1] Note that seven years later, in *Jackson v. Johnson*, we left open the question of whether a parolee is a prisoner under the PLRA in the sense that the parolee is still technically confined. 475 F.3d 261, 265 n.4 (5th Cir. 2007). We need not decide this question today.

that Bernal had to exhaust his administrative remedies. It thus erred in dismissing his complaint.

REVERSED.