

No. 18-7476

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

Supreme Court, U.S.
FILED

JAN 08 2019

OFFICE OF THE CLERK

SCOTT ZIRUS — PETITIONER
(Your Name)

vs.

SHARON KELLER et. al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FIFTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Scott Zirus #1640002

(Your Name)

12071 F.M. 3522

(Address)

Abilene, Texas 79601

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- Q. When a prisoner's 42 U.S.C. §1983 action is construed as a Petition for Writ of Mandamus, is it a "civil action" within the scope of the Prison Litigation Reform Act requiring the subsequent fee payment requirement?
- Q. Is a prisoner barred by the doctrine of invited error from complaining of any error by the district court in applying the Prison Litigation Reform Act filing fee if he sought leave to proceed In Forma Pauperis PRIOR to the district courts decision to construe his 42 U.S.C §1983 action as a Petition for Writ of Mandamus?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[X] 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. SHARON FAYE KELLER, in her official capacity;
 2. LAWRENCE E. MEYERS, in his official capacity;
 3. BERT RICHARDSON, in his official capacity;
 4. KEVIN P. YEARY, in his official capacity;
 5. CHERYL A. JOHNSON, in her official capacity;
 6. MICHAEL E. KEASLER, in his official capacity;
 7. BARBARA P. HERVEY, in her official capacity;
 8. ELSA ALCALA, in her official capacity;
 9. DAVID NEWELL, in his official capacity;
 10. M. REX EMERSON, in his official capacity;
 11. SCOTT MONROE, in his official capacity.
- Defendants/Appellees

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION.....	7

INDEX TO APPENDICES

- APPENDIX A - DENIAL OF IFP ON APPEAL, AND DISMISSAL OF APPEAL
AS FRIVOLOUS
FIFTH CIRCUIT COURT OF APPEALS (15th November 2018)
- APPENDIX B - ORDER REGARDING MOTION TO PROCEED IN FORMA PAUPERIS
US DISTRICT COURT (18th April 2018)
- APPENDIX C - ORDER DENYING RULE 60(b) MOTION
US DISTRICT COURT (14th March 2018)
- APPENDIX D - RULE 60(b) MOTION
(28th February 2018)
- APPENDIX E
- APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

STATUTES AND RULES

28 U.S.C. §1915	5, 6
42 U.S.C §1983	5, 6
Fed. R. Civ. P., Rule 60(b)	5, 6

OTHER

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

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A 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 B+C 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 A 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 U.S. District Court court appears at Appendix B+C 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 15th November 2018.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals 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. § 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

28 U.S.C. §1915(a)(2):

A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security thereof, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

28 U.S.C. §1915(b)(3):

In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

STATEMENT OF THE CASE

Petitioner Zirus filed a civil action pursuant to 42 U.S.C §1983 attempting to vindicate the Right to Habeas Counsel in Texas.

On the 4th May 2016, the U.S. District Court construed Petitioner's §1983 action as a Petition for Writ of Mandamus, and dismissed this action on the premise that federal courts lack power to mandamus state courts in performance of their duties. The District Court also ordered that Petitioner must comply with the PLRA fee payment requirements.

On 28th February 2018, Petitioner filed a Rule 60(b) Motion (APPENDIX D) arguing that since his §1983 action was construed as a Petition for Writ of mandamus it was not a civil action within the scope of the PLRA and the subsequent fee payment requirements did NOT apply to this action.

On 14th March 2018, the District Court addressed Petitioners Rule 60(b) Motion and held that under the Doctrine of Invited Error, Petitioner may not complain of any error by the District Court in applying the PLRA filing fee requirement because Petitioner allegedly induced any such error by seeking leave to proceed IFP (APPENDIX C).

Petitioner appealed to the Fifth Circuit Court of Appeals and moved for leave to proceed IFP on appeal from the District Court's denial of his Rule 60(b) Motion. The District Court certified that an appeal would not be taken in good faith (APPENDIX B). Petitioner challenged this certification and argued that he could not possibly invite the error because his actions occurred PRIOR to the District Courts decision to construe his §1983 as a Petition for Writ of Mandamus.

The Fifth Circuit Court of Appeals disagreed, and denied Petitioner's motion for leave to proceed IFP on appeal, and dismissed the appeal as frivolous (APPENDIX A).

Petitioner Zirus now respectfully seeks a Writ of Certiorari from this Honorable Court.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit Court of Appeals has decided an important question of Federal Law that has not been, but should be, settled by this Court [SUPREME COURT RULE 10(c)].

The questions presented are important beyond the particular facts and parties involved in this case because it interprets the way the Prison Litigation Reform Act filing fees are applied to 42 U.S.C. §1983 actions which are construed and dismissed as Petitions for Writ of Mandamus.

Without guidance on this issue, there is a serious risk that it may set a trend in the federal courts that it is permissible to apply the PLRA filing fees to actions that are technically not civil actions within the scope of the PLRA. Thus venturing outside the legislative intentions of 28 U.S.C. §1915 in regards to actions filed pursuant to 42 U.S.C. §1983.

This present case is ripe for this Honorable Court to address these questions:

On the 4th May 2016, the U.S. District Court construed Petitioner's §1983 action as a Petition for Writ of Mandamus, and dismissed this action on the premise that federal courts lack power to mandamus state courts in performance of their duties. The District Court also ordered that Petitioner must comply with the PLRA fee payment requirements.

On 28th February 2018, Petitioner filed a Rule 60(b) Motion arguing that since his §1983 action was construed as a Petition for Writ of Mandamus it was not a civil action within the PLRA and the subsequent fee payment requirements did NOT apply to this action.

On 14th March 2018, the District Court addressed Petitioners Rule 60(b) Motion and held that under the Doctrine of Invited Error, Petitioner may not complain of any error by the District Court in applying the PLRA filing fee requirement because Petitioner allegedly induced any such error by seeking leave to proceed IFP. Petitioner appealed to the Fifth Circuit Court of Appeals.

Petitioner moved for leave to proceed IFP on appeal from the District Court's denial of his Rule 60(b) Motion. The District Court certified that an appeal would not be taken in good faith. Petitioner challenged this certification and argued that he could not possibly invite the error because his actions occurred PRIOR to the District Courts decision to construe his §1983 as a Petition for Writ of Mandamus.

At the time of filing, Petitioner intended his civil action to be construed as a §1983 petition. Thus under 28 U.S.C. §1915 he was also required by law to file IFP. However, when the District Court construed his §1983 as a Mandamus, and dismissed it for lack of jurisdiction, it fundamentally changed the nature of the proceeding. Since Petitioner's §1983 was construed as a "Mandamus" it was not a civil action within the scope of the PLRA, and the Application To Proceed In Forma Pauperis should have also been dismissed as moot.

Ultimately, the Fifth Circuit Court of Appeals disagreed with Petitioner's argument, and denied his motion for leave to proceed IFP on appeal, and dismissed the appeal as frivolous.

Petitioner urges this Honorable Court that these questions are of great public importance, and that this Court should resolve this presently unsettled question of Federal Law. Thank you.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 30th December 2018