

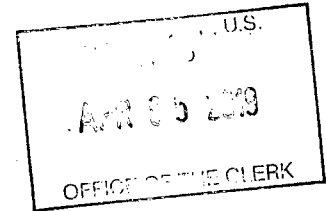
18-0152

ORIGINAL

In The

Supreme Court of The United States

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IN re:

Kirk Wayne ME Brice, Sr.,

Relator.

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Petition for Writ of Mandamus Before The United States Court of Appeals for The Fifth Circuit in No. # 18-56978, and the United States District Court for the Western District of Texas, San Antonio Division in No. # SA-18-CA-873-XR, Styled: Kirk Wayne ME Brice, Sr. v. Texas Board of Pardons and Paroles, et al.

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Petition for Writ of Mandamus

Kirk Wayne ME Brice, Sr.
No. # 733087
John M. Wynne Plantation
810 F.M. 2821
Huntsville, Texas. 77349

Relator, In propria persona.

Identity of Parties

Relator;

Kirk Wayne Mc Bride, Sr.
No. # 733097
John M. Wynne Plantation
810 F.M. 2921
Huntsville, Texas. 77349

Respondent;

Lyle W. Cayce
Clerk
U.S. Court of Appeals
Fifth Circuit
600 S. Maestri Place
New Orleans, LA. 70130

Respondent;

Xavier Rodriguez
District Judge
U.S. District Court
Western District of Texas
San Antonio Division
655 E. Cesar E. Chavez Blvd.
San Antonio, Texas. 78206

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Issue No. 1

Does a United States District Court have the authority to treat and screen a Complaint under Title 42 U.S.C., Section 1983 pursuant to Title 28 U.S.C., Section 1915 without first determining whether the party is a person subject to the provisions of Title 28 U.S.C., Section 1915?

Issue No. 2

Does the Clerk of a United States Court of Appeals have the authority to consider the appeal of a party under the three (3) Strikes provisions of Title 28 U.S.C., Section 1915 without any proof that the party is a person subject to the requirements of Title 28 U.S.C., 1915?

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I. Circumstances Warranting Writ.

Pursuant to Rule 20.1 of the Supreme Court Rules, the Relator provides that exceptional circumstances warrant this Court to exercise its discretionary

powers, as it is the duty of this Court to guard, assure, and protect every right granted or secured by the Constitution of the United States. Whereas this Court sit, human rights, under the Constitution are always a proper subject for adjudication, and it is believed by the Relator that this Court does not have the right to decline the exercise of its jurisdiction simply because a pro-se litigant pleading

was not construed liberally, and if construed liberally by the Clerk of the Court, the pleading provides why exceptional circumstances exist for this Court to exercise its discretionary powers. The job of a "judge" is to follow the law. If "judges" are to a government of laws and not of men, the lower courts must carefully apply the precedents of this Court. Unfortunately the lower federal courts are not following this fundamental

Constitutional principle is the matter of the rediments of Due Process under the 14TH Amendment to the United States Constitution. For the system to work, this Court should make sure that the law and rulings of this Court are respected

and faithfully applied, which the Clerk of the United States Court of Appeals has failed to do under the law. The Relator has been deprived of his rights to appeal by the Clerk of the United States Court of Appeals, and without an appeal, this Court's jurisdiction is lost from an adverse decision of the

appeal by the United States Court of Appeals for the Fifth Circuit. The Clerk of the United States Court of Appeals for the Fifth Circuit delivered a judicial decision contrary to Title 28 U.S.C., Section 1915(c), as the Clerk is not authorized to render a judicial decision upon matters that require proof or evidence to support the decision. The United States District Court does not have mandamus jurisdiction over a United States Court of Appeals, thus the Relator cannot seek relief

is that Court. This Court has mandamus jurisdiction over the United States Court of Appeals as it is an inferior Court to this Court. The Relator has no other adequate relief, and cannot acquire such relief from any other Court by this Court.

II. Statement of The Case.

The Relator, Kirk Wayne Mc Bride, Sr., and at all times mentioned herein is a State parolee, who filed a civil action pursuant to Title 28 U.S.C., Section 1983, on August 20, 2018, in No. #SA-18-CA-873-XR, before the United States District Court for The Western District of Texas, San Antonio Division, Styled: Kirk Wayne Mc Bride, Sr. v. Texas Board of Pardons and Paroles, and The Texas Department of Criminal Justice - Parole Division. See, (Appendix A)

The Respondent, Xavier Rodriguez, United States District Judge for the United States District Court for The Western District of Texas, San Antonio Division, abused his discretion when he screened the civil action pursuant to Title 28 U.S.C., Section 1915, and misconstrued the Relator's claims under the 13th Amendment as one for Federal habeas corpus relief, when the Relator pled that he was not a prisoner within the meaning of Title 28 U.S.C., Section 1915. See, (Appendix B)

The Respondent, Lyle W. Gayce, Clerk for The United States Court of Appeals, abused his discretion when he dismissed the Relator's appeal pursuant to Title 28 U.S.C., Section 1915, without any proof that the Relator was a prisoner subject to the provisions of Title 28 U.S.C., Section 1915, or person subject to the provisions of Title 28 U.S.C., Section 1915; and declined to process the Relator's Motion To Reinstate. See, (Appendix C, D, and E).

III. Jurisdictional Statement.

The Relator invokes this Court's jurisdiction pursuant to Title 28 U.S.C., Section 1651(a), that provides "The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate as aid of their respective jurisdictions and agreeable to the usages and principles of law.

IV Issues Presented.

Issue No. 1: Does a United States District Court have the authority to treat and screen a complaint under Title 42 U.S.C., Section 1983, pursuant to Title 28 U.S.C., Section 1915, without first determining whether the party is a person subject to the provisions of Title 28 U.S.C., Section 1915?

Issue No. 2: Does the Clerk of a United States Court of Appeals have the authority to consider the appeal of a party under the three (3) strikes provision of Title 28 U.S.C., Section 1915, without any proof that the party is a person subject to the requirements of Title 28 U.S.C., Section 1915?

V. Statement of Facts.

On August 29, 2018, the Rector filed a civil action pursuant to Title 42 U.S.C., Section 1983, in the United States District Court for the Western District of Texas, San Antonio Division, in No. #5A-18-CA-873-XR, styled: Kirk Wayne McRae, Sr. v. Texas Board of Pardons and Paroles, and the Texas Department of Criminal Justice Parole Division. See, (Appendix A). The Rector claimed that his constitutional rights under the 13th Amendment were violated because he was being held and forced into labor absent a valid process, and breach of contract.

On September 19, 2018, the Respondent, Xavier Rodriguez, entered a Dismissal Order dismissing the suit upon screening of the suit pursuant to Title 28 U.S.C., Section 1915, with the filing fee being imposed. See, (Appendix B). The Rector filed a Motion for reconsideration arguing that the Respondent acted by dismissing the suit, and screening pursuant to Title 28 U.S.C., Section 1915, because he was not a prisoner within the meaning of Title 28 U.S.C., 1915, and requested that the filing fee be reassessed. The Respondent denied the Motion on October 22, 2018. See, (Appendix F). Also (Appendix G).

On November 20, 2018, the Relator gave a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. See, (Appendix H). On November 27, 2018, at court, the Respondent, Lyle W. Cayce, Clerk for the United States Court of Appeals for the Fifth Circuit, the Relator was informed that the appeal had been docketed under No. # 18-50978, and that the Relator had three (3) or more cases dismissed as frivolous, thus, pursuant to the three (3) strikes provision of Title 28 U.S.C., Section 1915, the Relator had to pay the \$505.00 appellate docketing fee within fifteen (15) days from the date of the letter, and if the filing fee was not paid within that time provided, the appeal would be dismissed without further notice pursuant to Fifth Circuit Rule 42.3. See, (Appendix I).

On December 4, 2018, the Respondent, Xavier Rodriguez, denied the Relator's Application to Proceed In Forma Pauperis, and that it could not make the initial partial filing fee assessment, and if the Relator wished to proceed on appeal, to file a current Trust Fund Account Statement. See, (Appendix G). The Respondent furthered that the Relator's assertion that Title 28 U.S.C., Section 1915 did not apply because he was not a prisoner was denied as being incomprehensible. The Relator complied and tendered a certified copy of an Institution Trust Fund Account Statement. While this matter was pending, the Respondent, Lyle W. Cayce, under Fifth Circuit Rule 42.3 dismissed the appeal on December 27, 2018, for want of prosecution, on the ground that the Relator failed to timely pay the docketing fee. See, (Appendix C).

The Relator filed a Motion To Reinstate, and was informed that no action would be taken. See, (Appendix D). The Relator was further informed that since his address is a men's prison of TDCJ, the Prison Litigation Reform Act applied. See, (Appendix E).

VI. Reasons for Granting Writ of Mandamus.

The Relator moves, that he has no adequate legal remedy at law, and the actions he seeks to compel are

purely ministerial in nature regarding the application of Title 28 U.S.C., Section 1915.

Mandamus is an extraordinary remedy as it lies only to confine a lower court within its jurisdiction or to compel it to perform ministerial not discretionary functions. To obtain a mandamus order, a relator must establish (1) a clear right to relief, (2) a clear duty by the respondent to do the act requested, and (3) the lack of any other adequate remedy. See, *Gulfstream Aerospace Corp. v. Mayacomes Corp.*, 108 S.Ct. 1133 (1988), *Kerr v. United States District Court*, 96 S.Ct. 2119 (1976), *Weber v. Conway*, 642 F.2d 91 (5th Cir. 1981), and *Davis v. Fectel*, 150 F.3d 486 (5th Cir. 1998).

The United States Court of Appeals for the Fifth Circuit has held and established that a "parole violator" is considered to be "in custody" for a parole violation only when the "parole board" executes a violator warrant to incarcerate the parolee. See, *Tijerina v. Thornburgh*, 884 F.2d 861 (5th Cir. 1989). Thus, a "parolee" is not a "prisoner" until the violator warrant is executed to incarcerate the parolee to serve the remainder of the sentence.

It is agreeable among the Circuits, that a prisoner ceases to be a prisoner for the purpose of the Prison Litigation Reform Act (PLRA), also codified as Title 28 U.S.C., 1915, when they are released from prison, whether on parole or otherwise. See, *Jackson v. Johnson*, 475 F.3d 261 (5th Cir. 2007). Cf., *Talamantes v. Leyva*, 575 F.3d 1021 (9th Cir. 2009); parolees released into the general public are not prisoners.

In *Kerr v. Puckett*, 138 F.3d 321 (7th Cir. 1988); the court held that a parolee is not a PLRA "prisoner." Also, in *Abdul-Wadood v. Nathan*, 91 F.3d 1023 (7th Cir. 1996); the court held that the PLRA requires the court to determine the party's status on the date the suit or appeal is "brought" rather than at some other time. Cf., *Duvall v. Dallas County, Texas*, 2006 WL 3487024 (N.D. Tex. Dec. 1, 2006); the court directed the defendant(s) to submit proof of their claim that the plaintiff was a prisoner at the time of filing and subject to the PLRA.

Persons who are not lawfully subject to detention are not prisoners. Someone who has been sentenced to prison but has not yet surrendered is not "confined" in a correctional facility even though he may be within

the prison system's legal custody. See, *Tasperson v. Federal Bureau of Prisons*, 460 F.Supp. 2d 76 (D.D.C. 2006). A prospective prisoner is not a prisoner; an arrestee is not a prisoner even if he is subsequently jailed.

Title 28 U.S.C., Section 1915(g) provides, that "In no event 'shall' a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

The Relator has continuously argued before the Respondents' that he is not a prisoner within the meaning of the PLRA, because although confined or housed at a facility of the Texas Department of Criminal Justice, he is a parolee being held in the absent of a violator warrant under Texas law termed a Proclamation of Revocation and Warrant of Arrest" that is the legal process executed by the Texas Board of Pardons and Paroles that authorizes the Texas Department of Criminal Justice to accept a parolee as a parole violator, and which declares a parolee's parole to be revoked. Absent such process the Relator retains a status as a "parolee."

The Respondent, Xavier Rodriguez, in failing to analyze or apply the law correctly acted in an unreasonable arbitrary manner, or acted without reference to any guiding rules and principles, and simply undermined the Relator's argument as being incomprehensible, and applied the provisions of Title 28 U.S.C., Section 1915 and assessed the filing fee. The Respondent abused his discretion in the application of Title 28 U.S.C., Section 1915, without first determining the status of the Relator.

The Relator attempted to appeal the actions taken by Respondent, Xavier Rodriguez, but was "cut short" by Respondent, Lyle W. Cayce, whom failed to analyze or apply the law correctly acted in an unreasonable arbitrary manner, or acted without reference to any guiding rules and principles, sua sponte assumed that

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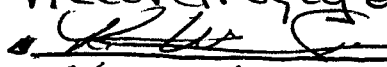
the Relator was a "prisoner" because he is housed at a facility of the Texas Department ~~of~~ Criminal Justice, therefore, Title 28 U.S.C, Section 1915 applied. There was no evidence set out or shown by the Respondent, that the Relator had three (3) or more cases dismissed as frivolous, or that the Relator was one and same person as alleged. Other than the Respondent's conclusory allegation, there is no evidence to support the same. Further, even if it can be concluded that the Respondent is correct and applied the law correctly by holding that the Relator is a "prisoner," this falls short of Title 28 U.S.C, Section 1915(g), because there is no finding that the Relator was not under the imminent danger of serious physical injury as to prohibited the appeal by the Relator. The Respondent had no authority to refuse or deprive the Relator of the right to appeal or to dismiss the appeal absent the status of the Relator, and/or findings under Title 28 U.S.C, Section 1915(g).

VII. Prayer.

Wherefore, Premises Considered, and in the interest of justice, the Relator respectfully moves and prays that for the reasons set out above, the Court issue a Mandamus Order directing Respondent, Xavier Rodriguez, to rescind its Order directing the filing fee and collection pursuant to Title 28 U.S.C, Section 1915, and issue a Mandamus Order directing Respondent, Lyle W. Cayce, to reinstate the appeal in this case, with removal to the United States District Court to determine the status of the Relator, and whether the Relator is subject to the three (3) strikes provisions of Title 28 U.S.C, Section 1915.

The Relator requests any other relief to which he may be justly entitled to in equity or at law.

Accordingly Written,


Kirk Wayne McBridge, Sr.
No. #733097 - Wynne Facility
810 F.M. 2021
Huntsville, Texas. 77349

Verification

I, Kirk Wayne Mc Bride, Sr., pursuant to Federal Law Title 28 U.S.C., Section 1746, state that I have read the foregoing Petition for Writ of Habeas Corpus and understood the contents thereof, and declare under penalty of perjury that the foregoing is all true and correct.

Executed on this the 01 day of May, 2019.

Kirk Wayne Mc Bride, Sr.
Kirk Wayne Mc Bride, Sr.
Declarant/Relator.

Certificate of Service

I, Kirk Wayne Mc Bride, Sr., do hereby certify, that a true and correct copy of the foregoing Instrument was served, via United States Postal Service, prepaid first class postage on this the 01 day of May, 2019, and properly addressed to:

Lyle W. Cayce
Clerk
U.S. Court of Appeals
Fifth Circuit
600 S. Maestri Place
New Orleans, LA. 70130

Xavier Rodriguez
U.S. District Judge
U.S. District Court
Western District of Texas
San Antonio Division
655 E. Cesar E. Chavez Blvd.
San Antonio, Texas. 78206

Kirk Wayne Mc Bride, Sr.
Kirk Wayne Mc Bride, Sr.