

Case No. 19-5173

---

---

IN THE  
**Supreme Court of the United States**

---

---

JOHNNY KIRKLAND, *Petitioner*

versus

HUNTINGTON INGALLS INCORPORATED, *Respondent*

---

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

---

**BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

---

---

Richard P. Salloum, *Counsel of Record*  
Traci Castille  
Franke & Salloum, PLLC  
10071 Lorraine Road (39503)  
P. O. Drawer 460  
Gulfport, MS 39502  
Telephone: 228-868-7070  
Facsimile: 2280868-7090  
[rps@frslaw.com](mailto:rps@frslaw.com)  
[tmc@frslaw.com](mailto:tmc@frslaw.com)

## **QUESTION PRESENTED**

1. Whether the Court of Appeals correctly affirmed the District Court's finding that Petitioner's claims were barred by the exclusive remedy provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a).
2. Whether the Court of Appeals correctly determined that the dual capacity doctrine did not apply to Petitioner's claims.
3. Whether the Court of Appeals correctly affirmed the District Court's finding that Petitioner's claims were barred by the applicable statute of limitations.

## **PARTIES TO THE PROCEEDINGS**

1. Petitioner, the *pro se* Plaintiff/Appellant below, is Johnny Kirkland.
2. Respondent, Defendant/Appellee below, is Huntington Ingalls Incorporated.

## **CORPORATE DISCLOSURE STATEMENT**

In accordance with Supreme Court Rule 29.6, Respondent discloses that Huntington Ingalls Incorporated is a wholly owned subsidiary of Huntington Ingalls Industries, Inc., a publicly held corporation (NYSE: HII).

## TABLE OF CONTENTS

Questions Presented . . . . .	I
Parties to the Proceeding . . . . .	ii
Corporate Disclosure Statement. . . . .	iii
Table of Contents. . . . .	iv
Table of Authorities.. . . .	vi
Opinions Below. . . . .	1
Jurisdictional Statement. . . . .	2
Statement of the Case. . . . .	3
Summary of the Argument. . . . .	5
Argument. . . . .	6
I. Misstatements in Petitioner’s Petition for Writ of Certiorari. . . . .	6
II. Petitioner Has Failed to Present Any Compelling Reason for Granting His Petition for Writ of Certiorari. . . . .	9
III. Petitioner’s Claims are Barred by the Exclusive Remedy Provisions of the Longshore and Harbor Workers’ Compensation Act. . . . .	10
IV. The Dual Capacity Doctrine Does Not Apply. . . . .	11
V. Petitioner’s Claims Are Barred by Mississippi’s Catchall Three-Year Statute of Limitations. . . . .	12
Conclusion. . . . .	14
Index to Appendices:	
Appendix A: <i>Per Curium</i> Opinion of United States Court of Appeals for the Fifth Circuit dated March 18, 2019	

Appendix B: District Court’s Memorandum Opinion and Order Granting Defendant Huntington Ingalls Incorporated’s Motion for Summary Judgment with Final Judgment of Dismissal dated September 11, 2019

Appendix C: United States Court of Appeals for the Fifth Circuit’s Order Denying Petition for Rehearing dated April 23, 2019

Appendix D: United States Court of Appeals for the Fifth Circuit’s Mandate dated May 1, 2019

Appendix E: District Court’s Order Denying Plaintiff Johnny Kirkland’s Motion to Reinstate Dismissed Case dated October 1, 2018

Appendix F: Affidavit of Steven Pierce dated November 1, 2017

Certificate/Proof of Service..... 15

## TABLE OF CITED AUTHORITIES

### Cases

<i>Alfred v. M/V MARGARET LYKES</i> , 398 F.2d 684 (5 <sup>th</sup> Cir. 1968). . . . .	8
<i>Bollinger Shipyards v. Director, OWCP</i> , 604 F.3d 864 (5 <sup>th</sup> Cir. 2010). . . . .	11
<i>Cain v. Transocean Offshore USA</i> , 518 F.3d 295 (5 <sup>th</sup> Cir 2008). . . . .	9
<i>Frankel v. Bethlehem-Fairfield Shipyard, Inc.</i> , 132 F.2d 634 (4 <sup>th</sup> Cir. 1942), <i>cert. denied</i> , 319 U.S. 746 (1943). . . . .	8
<i>Fredieu v. Rowan Companies, Inc.</i> , 738 F.2d 651 (5 <sup>th</sup> Cir. 1984). . . . .	8
<i>Haynes v. Rederi A/S Aladdin</i> , 362 F.2d 345 (5 <sup>th</sup> Cir. 1966). . . . .	10
<i>Hollister v. Luke Construction Co.</i> , 517 F.2d 920 (5 <sup>th</sup> Cir. 1975). . . . .	8
<i>Jowers v. Lincoln Elec. Co.</i> , 617 F.3d 346 (5 <sup>th</sup> Cir. 2010). . . . .	11
<i>Mellen v. H. B. Hirsch &amp; Sons</i> , 159 F.2d 461 (D.C. Cir. 1947). . . . .	11
<i>Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.</i> , 788 F.2d 264 (5 <sup>th</sup> Cir. 1986), <i>cert. denied</i> , 479 U.S. 885 (1986), <i>overruled on other grounds by Stewart v. Dutra Construction Co.</i> , 543 U.S. 481, 496 (2005). . . . .	8

## TABLE OF CITED AUTHORITIES CONTINUED

### Cases Continued

*Scordino vs Hopeman Brothers, Inc.*  
662 So. 2d 640 (Miss. 1995)..... 7

*Williams v. Avondale Shipyards, Inc.,*  
452 F.2d 955, 958 (5<sup>th</sup> Cir. 1971). .... 9

### Statutes and Rules

28 U.S.C §1254..... 2

33 U.S.C. § 901..... 4, 10

33 U.S.C. § 905..... 6, 10, 11

MISS. CODE ANN. § 15-1-49..... 4, 6, 12

MISS. CODE ANN. § 15-1-59..... 12

MISS. CODE ANN. § 71-1-17..... 4

Supreme Court Rule 10..... 5, 10

Supreme Court Rule 15.2. .... 5, 6

Supreme Court Rule 29.6. .... iii



## OPINIONS BELOW

The *per curium* opinion of the United States Court of Appeals for the Fifth Circuit was filed on March 28, 2019 [Resp. Appendix A]<sup>1</sup> and designated as a non-published opinion which can be found at 758 Fed.Appx. 345 (Mem) (5<sup>th</sup> Cir. 2019). The Court of Appeals denied the Appellant's Petition for Rehearing by unpublished Order dated April 23, 2019 [Resp. Appendix C], with the Court's mandate issued on May 1, 2019 [Resp. Appendix D].

The District Court's non-published Memorandum Opinion and Order was issued on September 11, 2018, and can be found at 2018 WL4343410, with a Final Judgment of Dismissal issued on the same date [Resp. Appendix B]. Plaintiff filed a Motion to Reinstate Dismissed Case which was denied by the District Court by unpublished Order of October 1, 2018 [Resp. Appendix E].

---

<sup>1</sup>Petitioner's Appendix did not include all orders issued below. Accordingly, Respondent's Appendix is submitted which includes all orders issued in both the United States District Court and the Court of Appeals as well as the summary judgment affidavit of Steven Pierce which was submitted in the District Court proceedings.

## **JURISDICTIONAL STATEMENT**

The judgment of the Court of Appeals was entered on March 18, 2019.

Appellant filed a petition for rehearing which was denied on April 23, 2019.

Appellant's petition for a writ of certiorari was filed on July 5, 2019, and docketed in the Supreme Court on July 15, 2019. According to the form petition for writ of certiorari submitted by Petitioner, the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT OF THE CASE

Petitioner filed a *pro se* Complaint in the District Court wherein he alleged that while he was employed by Huntington Ingalls Incorporated at its shipyard in Pascagoula, Mississippi, he was exposed to asbestos which resulted in “his illness” for which he sought damages of “2.8 MILLION.” Petitioner claimed that he began working at Huntington Ingalls Incorporated as a third class laborer in 1971 at the age of 13, although he represented on his employment application that he was 18 years old.

Without leave of court, Petitioner filed an Amended Complaint on October 4, 2017, naming as additional defendants the trusts of numerous asbestos manufacturers such as Fibreboard Asbestos Trust, Armstrong Asbestos Trust, Gypsum Asbestos Trust, Flintkote Asbestos Trust, etc.<sup>2</sup> The Amended Complaint alleged that Petitioner worked as a laborer in the “27<sup>th</sup> Department” painting, cleaning up, carrying out insulation in the trash, sand blasting, and rust grinding and sought damages of “5 or TEN BILLION DOLLARS.”

On December 4, 2017, Kirkland filed a Second Amended Complaint which was stricken for noncompliance with FRCP 15. He then filed a Motion to Amend Pleadings seeking to supplement his Amended Complaint with an allegation that

---

<sup>2</sup>The Magistrate Judge later entered Orders granting Petitioner’s subsequent motions to dismiss all Defendants other than Huntington Ingalls Incorporated.

Huntington Ingalls Incorporated failed to screen his employment application, or it would have been discovered that he was a minor and that he had used his cousin's Social Security number to obtain employment. The Motion was granted.

Huntington Ingalls Incorporated timely moved for summary judgment because Petitioner's claims fell within the exclusive jurisdiction of and were preempted by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA). In the alternative, Huntington Ingalls Incorporated argued that Petitioner's claims were time barred by § 15-1-49(1) of the Miss. Code.

In responding to the Motion for Summary Judgment, Petitioner admitted that Huntington Ingalls Incorporated was "covered under the LHWCA," but argued for the first time that he was also "suing Huntington Ingalls Incorporation (sic) under the Dual Capacity Doctrine for strict liability in tort, breach of duty, negligence, punitive damages, and illegal underage working," citing Mississippi Code § 71-1-17. He also argued for the first time that his claim was not time barred because his injury was latent.

Huntington Ingalls Incorporated replied and again pointed out that to the extent the claims were not preempted by the LHWCA, they were time barred by the three-year statute of limitations found at Mississippi Code § 15-1-49(1) and that Petitioner failed to present any evidence to support his claim of a latent injury.

On September 11, 2018, the District Court granted Ingalls' Motion for Summary Judgment and entered a corresponding final Judgment of Dismissal. An appeal was taken to the Court of Appeals for the Fifth Circuit which, by *Per Curium* Order of March 18, 2019, affirmed the District Court's grant of summary judgment.

### **SUMMARY OF THE ARGUMENT**

Pursuant to its obligations under Supreme Court Rule 15.2, Huntington Ingalls Incorporated files this opposition in order to address misstatements of fact and law in Kirkland's petition for writ of certiorari.

Additionally, Huntington Ingalls Incorporated opposes the granting of the petition for writ of certiorari in this case because Petitioner has failed to present any justifiable reason, much less a compelling reason as required by Supreme Court Rule 10, for the granting of certiorari. Instead, Petitioner's asserted errors are claims of erroneous factual findings and/or misapplication of properly stated rules of law which do not support the granting of certiorari.

Finally, Huntington Ingalls Incorporated asserts that the District Court and Court of Appeals for the Fifth Circuit were eminently correct in finding that Petitioner's claims were preempted by the exclusive remedy provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §

905(a); that the dual capacity doctrine did not apply to those claims; and that, to the extent such claims may fall outside the LHWCA, they were time barred by § 15-1-49 of the Mississippi Code.

## **ARGUMENT**

### **I. Misstatements in Petitioner's Petition for Writ of Certiorari**

Pursuant to its obligations under Supreme Court Rule 15.2, Huntington Ingalls Incorporated calls attention to the following misstatements in Petitioner's petition for writ of certiorari:

At page 4, Petitioner states that Huntington Ingalls Incorporated manufactured asbestos. This is untrue. In support of its summary judgment motion, Huntington Ingalls Incorporated submitted the affidavit of Steven Pierce, Risk Manager, which stated, in pertinent part:

3. At all material times, Ingalls was, and is today, a contractor engaged in the business of ship construction and repair at Ingalls Shipyard in Pascagoula, Mississippi.

[Resp. Appendix F]. There is no proof in this case that Huntington Ingalls Incorporated manufactured or sold asbestos. The parts and materials purchased and installed by Huntington Ingalls Incorporated as a contractor in shipbuilding or repair were required by the vessel owners who hired Huntington Ingalls Incorporated to build or repair their ships. Accordingly, under Mississippi law,

Huntington Ingalls Incorporated was neither a manufacturer or seller of asbestos and is not liable to Petitioner under any theory of liability he has alleged against it as an asbestos manufacturer or seller. See *Scordino vs Hopeman Brothers, Inc.* 662 So. 2d 640 (Miss. 1995).

At page 6, Petitioner states that “he has mesothelioma as being expose to asbestos.” There is nothing in the record to support a diagnosis of mesothelioma or any other lung illness. In fact, in his disclosures in the District Court as required by Rule 26 of the Federal Rules of Civil Procedure, Petitioner produced no record of any asbestos-related disease, nor did he produce any evidence of an asbestos disease at any time before the District Court granted Summary Judgment to Ingalls on September 11, 2018. On December 18, 2018, *after* he appealed to the Fifth Circuit, Petitioner submitted medical records from Pulmonary Associates and a magazine article on mesothelioma as part of his Record Excerpts in the Court of Appeals. The Pulmonary Associates records confirm that no pleural plaques were seen on Petitioner’s chest x-ray and his lung fields were clear. There was no diagnosis of mesothelioma or any other asbestos-related disease. To the contrary, the records confirmed that Petitioner’s breathing was regular, his breath sounds were normal, and he had no rales or wheezing from his lungs.

Petitioner makes allegations of a latent injury in an attempt to overcome the

barring of his claim by the applicable statute of limitations. However, there was no proof presented of any latent injury. In fact, as pointed out by the District Court, a latent injury was never pled. The District Court stated:

Although Kirkland raises the issue of a latent injury in his Response [62], he did not plead that he suffered a latent injury. To the contrary, Kirkland stated in his Response that he left work because of breathing problems. Resp. [6] at 2. In his Amended Complaint, Kirkland alleges that while at work he suffered chemical burns on his skin and hearing loss due to loud noise and metal flying into his ear. Am. Compl. [22] at 6-7. The record thus supports the conclusion that Kirkland was sufficiently aware of his alleged injuries at the time he left his employment with Ingalls. . .

[Resp. Appendix B, p. 12]. Therefore, Kirkland's untimely allegations that he had a latent injury are also misstatements unsupported by the record.

Throughout his petition, Petitioner refers to Huntington Ingalls Incorporated as a "vessel" owner. The only allegations made in the District Court were that Petitioner worked in the shipyard on ships under construction, not on completed vessels. It is well-settled that a ship under construction is not a vessel. *Alfred v. M/V MARGARET LYKES*, 398 F.2d 684 (5<sup>th</sup> Cir. 1968); *Frankel v. Bethlehem-Fairfield Shipyard, Inc.*, 132 F.2d 634 (4<sup>th</sup> Cir. 1942), *cert. denied*, 319 U.S. 746 (1943); *Hollister v. Luke Construction Co.*, 517 F.2d 920 (5<sup>th</sup> Cir. 1975); *Fredieu v. Rowan Companies, Inc.*, 738 F.2d 651 (5<sup>th</sup> Cir. 1984); *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 788 F.2d 264 (5<sup>th</sup> Cir. 1986),



*cert. denied*, 479 U.S. 885 (1986), *overruled on other grounds by Stewart v. Dutra Construction Co.*, 543 U.S. 481, 496 (2005); and *Cain v. Transocean Offshore USA*, 518 F.3d 295 (5<sup>th</sup> Cir 2008), *citing Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958 (5<sup>th</sup> Cir. 1971).

Finally, Petitioner alleges that Huntington Ingalls Incorporated should have known that he was a minor when first hired, though the record confirms that Petitioner applied for the job by intentionally deceiving Huntington Ingalls Incorporated about his age.

## **II. Petitioner Has Failed to Present any Compelling Reason for Granting His Petition for Writ of Certiorari**

The Petition for Writ of Certiorari does nothing more than recite the arguments made by Petitioner before the District Court and Court of Appeals for the Fifth Circuit. The decision of the Court of Appeals for the Fifth Circuit in this case does not conflict with that of another Court of Appeals on the same matter nor does it conflict with a decision by a state court of last resort. The Court of Appeals for the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory powers. To the contrary, the Court of Appeals for the Fifth Circuit and the District Court applied well-settled principles of law to the facts of this case. Simply stated, Petitioner has presented nothing to warrant the granting of his petition for writ of

certiorari, much less a “compelling” reason as required by Supreme Court Rule 10.

### **III. Petitioner’s Claims Are Barred by the Exclusive Remedy Provisions of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 905(a)**

In 1927, the United States Congress enacted the Longshore and Harbor Workers’ Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.* At the time of Petitioner’s employment at Huntington Ingalls Incorporated - whether it be 1971 or 1978 - and, indeed, since its enactment, the LHWCA contained an exclusive remedy provision. It provides that an employer’s liability under the LHWCA:

**shall be exclusive** and in place of all other liability of such employer to the employee, his legal representative, husband, or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .(emphasis added)

33 U.S.C. § 905(a). The statute is clear and unambiguous and leaves no room for interpretation.

The LHWCA was passed to provide compensation in lieu of tort damages for a class of workers involved in shipbuilding, ship repair or loading and unloading a vessel. The Fifth Circuit has stated that the whole theory of the LHWCA is to provide injured workmen with certain and absolute benefits in lieu of all common law damages. *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5<sup>th</sup> Cir. 1966). Succinctly stated,

[The] LHWCA guarantees workers’ compensation for qualified

beneficiaries. . . who are injured while assisting in the construction of large ships on or near federal navigable waters. Accordingly, a person who receives LHWCA benefits may not sue his employer under state law for any additional compensatory damages related to his on-the-job injury. See 33 U.S.C. §§ 905(a), 933(I); *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818, 121 S.Ct. 1927, 150 L.Ed.2d 34 (2001)(LHWCA “provides nonseaman maritime workers . . . with no-fault workers’ compensation claims” and “expressly pre-empts all other claims.”)

*Jowers v. Lincoln Elec. Co.*, 617 F.3d 346, 357 (5<sup>th</sup> Cir. 2010).

Because Petitioner’s claims arise out of his employment with Huntington Ingalls Incorporated in ship construction or repair, his claims are preempted by the LHWCA, which affords Huntington Ingalls Incorporated immunity from the allegations raised by him in this case. Accordingly the Fifth Circuit was eminently correct in affirming the dismissal of Petitioner’s claims pursuant to the LHWCA.<sup>3</sup>

#### **IV. The Dual Capacity Doctrine Does Not Apply**

Petitioner alleges nothing to bring this case within the dual capacity doctrine because Huntington Ingalls Incorporated did not act in any capacity other than that of his employer for the short time he worked at its shipyard. In discussing his dual capacity claims, the Fifth Circuit noted,

Under that doctrine, a plaintiff may sue an employer otherwise

---

<sup>3</sup>Petitioner’s allegations that he was hired at age 13 (despite his representation that he was 18) does not alter this LHWCA preemption. See 33 U.S.C. § 905(a); *Mellen v. H. B. Hirsch & Sons*, 159 F.2d 461 (D.C. Cir. 1947); and *Bollinger Shipyards v. Director, OWCP*, 604 F.3d 864 (5<sup>th</sup> Cir. 2010).

covered by the LHWCA for negligence in its capacity as a vessel owner as if it were a third party. *Levine v. Pintail Enters, Inc.*, 943 F.2d 528, 531 (5<sup>th</sup> Cir. 1991). But Kirkland does not allege that he was injured by the negligence of one of Ingalls' vessels. Accordingly, the dual capacity doctrine does not apply and these claims are preempted.

[Resp. Appendix A, p. 2].

### **V. Petitioner's Claims Are Barred By Mississippi's Catchall Three-Year Statute of Limitations**

None of Petitioner's allegations create an exception to Mississippi's catchall three year statute of limitations provided by § 15-1-49(1) of the Mississippi Code. Regardless of whether it was 1971 or 1978, the record establishes the latest Petitioner worked at Huntington Ingalls Incorporated was 1978. If he was 13 years old at that time, the Mississippi statute of limitations would have run in 1989, three years after he turned 21. See Miss. Code Ann. § 15-1-59. Petitioner pled nothing in his Complaint or Amended Complaint which would justify extending the statute of limitations beyond 1989. He filed his lawsuit in this case on May 1, 2017, twenty-eight years after the statute of limitations expired.

The District Court was correct in finding his claims are time barred to the extent they were not subject to the provisions of the LHWCA as follows:

In Mississippi, "[a]ll actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after." Mississippi Code § 15-1-49(1). Based upon the dates contained in the

Employee Separation Certificate [6-1] provided by Kirkland, and giving Kirkland every benefit of the doubt in terms of the dates of his employment, he worked at Ingalls in either 1971 or 1978 for a brief period of time. Resp. [6] at 4; Employee Separation Certificate [6-1] at 4. Taking as true Kirkland's allegation that he was only thirteen years of age when he worked at Ingalls in either 1971 or 1978, the three-year statute of limitations would have started running once he attained the age of twenty-one, either in 1979 or 1986. Mississippi Code § 15-1-59 provides that

[i]f any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed as provided by law.

However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

Mississippi Code § 15-1-59 ("Saving in favor of persons under disabilities."). Therefore, the statute of limitations on any state law tort claim expired three years after Kirkland attained the age of twenty-one in either 1979 or 1986, long before he filed his Complaint in 2017.

[Resp. Appendix B, pp. 11-12]. The Fifth Circuit affirmed, stating:

Whatever the precise date of accrual, the statutory period for Kirkland's claim expired long before 2017, when Kirkland filed this lawsuit. Kirkland's child-labor claim is therefore barred.

[Resp. Appendix A, pp. 2-3].

## CONCLUSION

The District Court's grant of Summary Judgment to Huntington Ingalls Incorporated was eminently correct, and the affirmation of the District Court's ruling by the Court of Appeals for the Fifth Circuit was proper in all respects. Petitioner has presented no compelling reason for the granting of certiorari in this case, and his Petition for Writ of Certiorari should be denied.

Respectfully submitted, this the 30<sup>th</sup> day of July, 2019.

HUNTINGTON INGALLS INCORPORATED

BY: FRANKE & SALLOUM, PLLC

BY: /s/ Richard P. Salloum

RICHARD P. SALLOUM

*Counsel of Record*

Ms. Bar No. 6417

[rps@frslaw.com](mailto:rps@frslaw.com)

TRACI CASTILLE, Ms. Bar No. 8348

[tmc@frslaw.com](mailto:tmc@frslaw.com)

FRANKE & SALLOUM, PLLC

10071 Lorraine Road (39503)

Post Office Drawer 460

Gulfport, Mississippi 39502

Telephone: 228.868.7070

Facsimile: 228.868.7090



