No. 21-7535

Application No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

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Antonio Alejandro Gutierrez,
*Plaintiff-Appellant*

v.

Steve Shelton; et al,
*Defendant-Appellee*

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

# PETITION FOR WRIT OF CERTIORARI

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Prepared by,
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#5448026
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777 Stanton Blvd.
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**Questions Presented.**

Question One

Should the Oregon Department of Corrections, the U.S. District Court of Oregon, and the Ninth Circuit Court of Appeals, be allowed to collect 28 U.S.C. § 1915(b) in forma pauperis (IFP) filing fees debts from Plaintiff on a "per case" basis, following a new interpretation of the United States Supreme Court's holding in *Bruce v. Samuels*, 136 S.Ct. 627, 577 U.S. 82, 193 L.Ed.2d 496 (2016) clarifying the statutory intent of that statute, when at the time these contractual debts were agreed to by Plaintiff and those parties it was the applicable method and expectations of all parties for those collections to occur in a "sequential" manner?

Question two

Is it the United States Supreme Court's intention of the clarifying holding in *Bruce v. Samuels*, 136 S.Ct. 627, 577 U.S. 82, 193 L.Ed.2d 496 (2016), that in forma pauperis fees collections pursuant to 28 U.S.C. § 1915(b) be collected on a "per case" basis be applied retroactively in all cases, or that such new interpretation must be applied "prospectively" from the time concerned parties receive fair notice of the new interpretation to the statute?

**List of Parties.**

Antonio Alejandro Gutierrez, Pro Se Plaintiff, #5448026, Snake River Correctional Institution, 777 Stanton Boulevard, Ontario, OR 97914.

Denise G. Fjordbeck, OSB #822578, Assistant Attorney General (Attorney for all the below defendants), Department of Justice, 1162 Court Street, N.E., Salem, OR 97301-4096, Telephone: (503) 378-4402.

Dr. Steve Shelton, Medical Director of Health Services for the Oregon Department of Corrections (ODOC), Defendant, 2575 Center Street, NE, Salem, Or 97301.

Dr. Garth Gulick, Practicing Physician at Snake River Correctional Institution (SRCI), Defendant, 777 Stanton Blvd., Ontario, OR 97914.

J. Taylor, Grievance Coordinator SRCI, Defendant, 777 Stanton Blvd., Ontario, OR 97914. Any other Defendants that through the course of this action may be found culpable.

**List of Proceedings in State, Federal, and Appellate Courts.**

United States District Court District of Oregon; 1000 S.W. Third Avenue, Portland, OR 97204-2902. Docket No. 2:14-cv-02071-AA. Antonio Alejandro Gutierrez, Plaintiff v. Steve Shelton, Medical Director; Garth Gulick; J. Taylor, Defendants. Date of Judgment: February 12, 2021.

United States Court of Appeals for the Ninth Circuit; Post Office Box #193939, San Francisco, CA 94119-3939. Docket No. 21-35158. Antonio Alejandro Gutierrez, Plaintiff-Appellant v. Steve Shelton, Medical Director, Health Services Oregon Department of Corrections; et al., Defendants. Date of Judgment: February 1, 2021.

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Antonio A. Gutierrez, Plaintiff v. Steve Shelton, Medical Director; Garth Gulick; J. Taylor, Defendants. Case No. 2:14-cv-02071-AA.

Antonio Alejandro Gutierrez, Plaintiff-Appellant v. Steve Shelton, Medical Director, Health Services Oregon Department of Corrections; et al., Defendants. Case No. 21-35158.

**Statement of the basis for jurisdiction in this Court.**

The order sought to be reviewed was entered on December 16, 2021, by the United States Court of Appeals for the Ninth Circuit (App. A and B); upon consideration from an order from the United States District Court for the District of Oregon of February 12, 2021.

United States Supreme Court rule 10 states that: A petition for a writ of certiorari will be granted only for compelling reasons. The following reasons are implicated in this case and are consistent with the reasons the Court considers:

(a) A United States court of appeals has departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

(b) A state court and a United States court of appeals have decided an important question of federal law that has not been, but should be, settled by this Court, because such decision of an important federal question is in a way that conflicts with relevant decisions of this Court.

**Statutory provisions confering this Court jurisdiction to review on a writ of certiorari the judgment or order in question.**

**28 U.S.C. § 1254.** Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

**28 U.S.C. § 1651**. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

**28 U.S.C. § 2106**. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

**Constitutional provisions, statutes, ordinances, and regulations involved in the case**.

**28 U.S.C. § 1915**. Proceedings in forma pauperis.
(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor...
(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of-

(A) the average monthly deposits to the prisoner's account...

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(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.

**OAR 291-158-0015** (Oregon Administrative Rule). Trust Accounts.

(1) The Central Trust Unit will establish one trust account for each inmate which corresponds to the SID number issued... All moneys received for an inmate that are authorized for receipt in accordance with the provisions of these rules shall be credited to the inmate's trust account.

(2) The Department may assess an inmate's trust account for the following non-exclusive reasons:

(b) Garnishment actions determined by the courts;

(c) Court-ordered costs and fees in judicial review proceedings, in habeas corpus and post-conviction cases, in tort actions against a public body, or in other proceedings as authorized by law...

(e) Copies;

(f) Postage...

(3) Inmates who are indebted to the Department shall have their trust account debited and funds disbursed in accordance with the provisions of OAR 291-158-0065...

(6) Each month, Central Trust will provide each inmate with an active trust account, a statement that shows a list of transactions by type, dollar amount, and running balance. This statement may be provided by paper or electronic means.

(a) An inmate may submit questions or disputes regarding the statement to Central Trust, in writing, within 60 days of the statement issue date. Questions regarding account balances or whether transactions have been posted must be submitted to the institution business office, or, if an institution business office is not available, to Central Trust...

**OAR 291-158-0065** (Oregon Administrative Rule). Indebted Funds.

(1) Collection of DOC Debt;

(a) An inmate who has DOC debt may be permitted to spend one half of the first $80 (up to $40) of funds deposited into the inmate's general spending trust account for authorized expenditures during that calendar month.

(b) Any additional deposits received by the inmate into their general spending account during the calendar month shall be applied to the inmate's debt until such indebtedness is satisfied.

(c) Any unused funds remaining in an inmate's general spending trust account that were not transferred from the protected reserve account at the end of the last business day of the calendar month shall be applied to the inmate's indebtedness...

(2) Collection of Non-DOC Debt: DOC will comply with applicable state and federal law in regards to collection of non-DOC debt that has been established or that DOC has been charged with collecting.

**OAR 291-001-0020** Notice of Proposed Rule. Guides the notice process ODOC must follow when creating or amending a rule.

(1) Prior to the adoption, amendment, or repeal of any permanent rule, the Department of Corrections shall give notice of the proposed adoption, amendment , or repeal:
(d) By electronic mail or mail to the following at least 28 days before the effective date of the rule:
(I) Department of Corrections – Instituition Functional Managers or designee; and
(J) Department of Corrections – Institution Library Coordinators or designee.

**Statement of the Case**.

Plaintiff certifies that during the period involving the issues within this complaint he was, and continues to be, a prisoner under the custody of the Oregon Department of Corrections (ODOC). He asks leniency reminding the Court has reafirmed that Pro se litigant's pleadings are to be construed liberally and held to less stringent standards. *Haines v. Kerner*, 92 SCt 519, at 520 (1972) (under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers); and *Bounds v. Smith*, 430 US 817, at 826 (1977) ( Indeed, despite the "less stringent standards" by which a pro se pleading is judged). This case involves matters that are of great national importance involving tens of thousands of prisoners in the United States. It demands urgent clarification from a previous decision of this Court in *Bruce v. Samuels*, 577 U.S. 82, 136 S.Ct. 627, 193 L.Ed.2d 496 (2016).

This case originated as a 42 U.S.C. § 1983 civil rights case where Plaintiff being a prisoner complained about conditions of confinement because of denial to life saving medical treatment. It is one of five cases for which Plaintiff beginning in 2011 received in forma pauperis (IFP) status pursuant to 28 U.S.C. § 1915(b) and his fees waived while agreeing to make future payments[1]. The only issue remaining under this case, and issue Plaintiff is asking the Court to clarify, is a change in the form of payments of those IFP fees. Plaintiff attempted to solve this matter through the District Court's financial department, instead, the court addressed the matter by reopening under the last case for which he had received IFP status (2:14-cv-02071-AA) (App. K), hence, this case is currently being addressed under the caption of the last filed of those cases involved.

In 2019, eight years after Plaintiff entered into the first of those contractual agreement with

1 Although the district court decided to proceed when addressing the issues involved in this petition under only 2:14-cv-02071-AA, Plaintiff made it explicitly clear in his filings ([76] and [77]) that these issues affected not just 2:14-cv-02071-AA but also involved cases No's. 3:11-cv-1095-KI, 2:12-cv-0542-KI, and Ninth Circuit Case No's. 12-35158, and 14-35939.

the U.S District Court to proceed under IFP status, and years after ODOC on behalf of the U.S. District Court of Oregon and the U.S. Ninth Circuit Court of Appeals would garnish every month 20% of his overall trust account deposits for the previous month, in what is referred to as the "sequential" method, that method of collection was unexpectedly changed. That method of collection had been the expectation of all parties since at least 2011 when Plaintiff first entering into these contracts, and possibly since Oregon's adoption of the Prison Litigation Reform Act (PLRA) of 1995.

In October of 2019 without any prior of proposed amendment as legally required, the state's Administrative Rule application allowing them to garnish those monies was changed. The Department of Corrections began garnishing owed fees on a "per case" basis, that is, 20% per each case owed from monies deposited into his trust account. In Plaintiff's case instead of being garnished 20% of monies in his account, he now was being garnished 100% (20% for each of the five cases for which he owed). Because of the current pandemic this occurred only twice, both times when the Economic Impact Payments (EIP) authorized by Congress were received and where a total of $1,518.33 were garnished from Plaintiff, while collections have been suspended for the remainder of the time. Nevertheless, ODOC and the court has now made it clear that it is their intentions to continue garnishing funds on a "per case" basis based on *Bruce v. Samuels*, 577 U.S. 82, 90, 136 S.Ct. 627, 193 L.Ed.2d 496 (2016). These changes occurring years after the original and much different contractual agreements reached upon by the U.S. Courts and Plaintiff for these debts. If Plaintiff had been made aware that the method of collection for those IFP debts was to occur on a "per case" manner, in contrast to "the sequential" method that was being applied and was expected by him and all others Oregon prisoners, he would not have taken part in any other IFP complaint other than his first one.

Soon after the first "per case" garnishment occurred, Plaintiff wrote to the U.S. District Court of Oregon trying to solve this problem through its financial department, explaining that the "per case" method appeared was being illegally retroactively applied (App. K, L, and M). He submitted supporting case law showing that this type of retroactivity appeared to be in violation of clearly established federal law involving ex post facto guarantees. The district court instead issued an order [79] (App. E) under the last case Plaintiff had filed and received in forma pauperis status in 2014 (Case No. 2:14-cv-02071-AA), holding "that pursuant to *Bruce v. Samuels*, 577 U.S. 82, 90 (2016) Plaintiff had no grounds for relief". Upon further motion for reconsideration, the court issued another order [81] (App. J) stating it was not inclined to entertain a reconsideration. Plaintiff then filed a notice of appeal (App. H and N), after which the the U.S. Appeals Court for the Ninth Circuit issued a case number (21-35158) (App. C and D). Plaintiff then filed for in forma pauperis status[2](App. O), submitting a statement as to why the appeal should go forward (App. P) to address this matter as a matter of first impression as he could not find any other case addressing the issue. After eight months, and after Plaintiff had filed a series of motions for clarification and instructions (App. Q, R, S, and T), the Ninth Circuit denied Plaintiff's motions to proceed in forma pauperis and dismissed the appeal as frivolous pursuant tot 28 U.S.C § 1915(e)(2) (App. B).

Plaintiff further filed combined Panel and En Banc petitions for rehearing providing the Ninth Circuit an opportunity to address this matter. No response or decision was provided on those petitions.

Plaintiff now submits this petition for writ of certiorari hoping that the Court clarifies as a matter of first impression if any retroactivity is to be applied to the Court's interpretation in *Bruce v. Samuels*, or if its interpretation is to be applied *prospectively* in circumstances similar to those presented by Plaintiff's.

2 The In Forma Pauperis application is not part of the Appendix as Plaintiff when filing it was unable to secure a copy for his records because of not having access to the legal facilities available to him.

**Argument in Support of Reasons For Allowance of the Writ.**

To Plaintiff's knowledge, since at least 2011 the earliest time when he entered into a contract for IFP fees owed, and apparently since the implementation in 1995 of the Prison Litigation Reform Act (PLRA) in Oregon, it had been the customary "applied and expected" method of collection from all parties, dealing with IFP fees debts, to garnish 20% monthly of the total of all new monies deposited to Petitioner's account during the previous month, in what is referred to by the courts as the "sequential" method of collection. In October of 2019, ODOC posted for the first time in the Snake River Correctional Institution's (SRCI) newsletter "The Currents", where Plaintiff is incarcerated, that these collections were to take place in a "per case" manner, that is ODOC would soon begin collecting 20% per each case each month; in what is referred to as the "per case" method[3]. These garnishments had been temporarily suspended because of the existing Covid-19 pandemic. This new method of collection considerably affected Plaintiff's economic condition, as it was a considerable alteration to the expected factors present when entering into contracts for those debts in the first place. This change would eventually result in garnishment of 100% of his deposits.

The payments or garnishments of IFP debts for all practical purposes have the same effect as any other contract. Prisoners are asked if they will like to proceed with their cases with the understanding that they will have to make payments until they pay the balance of their owed IFP filing fees, given forms to agree to such a contract, and orders issued by the courts approving such effect. Then these monies are garnished just like other contract payments would following an specific method. The amount and method of payment in this particular case was changed by ODOC, unexpectedly and without previous agreement from Plaintiff, years after having been applied as originally expected and

3 This information was being provided in relation to ODOC stopping all garnishments until further notice because of the Covid pandemic's lockdowns occurring everywhere. It was not notifying that a change was being made to the manner of collecting IFP fees, it just stated what the new method was to be.

agreed to, never expecting the method of collecting these fees was to be taking place in a different manner in the future.

The Bouvier Law Dictionary 2012 edition, under Contract (K) describes "a contract is an enforceable agreement, or the legal obligations stemming from an agreement... an arrangement between two or more competent parties who *intentionally and voluntarily* exchange *money, promise, or thing of value in return for money, promise, or thing of value*, none of which is for a purpose against the law or public policy... Contract means the total legal obligation which results from the parties' agreement. U.C.C. §1-201(11) (1978)". (Emphasis added). In this case Plaintiff signed promissory agreements accepted, approved, and enforced by the courts, for the obligation of garnishment/payment of his monies in exchange for the opportunity to proceed to trial. The "sequential" enforcement being the expectation of all parties as applied by ODOC and the courts for years.

Consensual contracts, are those which are formed by the mere consent of the parties, such as sale, hiring and *mandate*. A required mutuality of agreement as to the terms clearly present. The Bouvier Law Dictionary (2012 edition) again explains: "that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be " instinct with an obligation, " imperfectly expressed. *If that is so, there is a contract. Wood v. Duff-Gordon*, 222 N.Y. 88, 90-91 (1917) (Cardozo, J.)" (Emphasis Added). Such promises and obligations are, without doubt, consistent with Plaintiff's requests for IFP status and the courts orders approving them.

The Bouvier Law Dictionary (2012 edition) explains an Implied Contract as: "A contract arising from the *conduct of the parties*, and later recognized by law or equity. An implied contract arises between two parties whose *mutual conduct, particularly mutual reliance, suggests that the parties have each in fact silently agreed to a contract through actions by each that create an*

*expectation in the other of further performance*, which may be treated by either as if a contract had been expressly created. A court will examine the conduct of the parties, particularly communications between the parties, *the past relations between the parties*, *the conduct of each* and *the knowledge by the other of that conduct* and may imply a contract to perform further conduct in accord with reasonable expectations that arose from the situation" (Emphasis added). ODOC and the courts had applied the "sequential" method for decades, and such was the method expected to be applied when Plaintiff entered into these contracts. If the "per case" method had been in existence he would not have proceeded to trials as he did, as it would have created an unsustainable economic burden.

The Bouvier Law Dictionary continues. ""A contract implied in fact is actually a contract... Court in Mogavero v. Silverstein, 142 Md. App. 259, 275, 790 A.2d 43 (2002): An implied-in-fact contract is a " true contract " and " means that the parties had a contract that can be seen in their conduct rather than in an explicit set of words. " Implied-in-fact contract are " dependent on mutual agreement or consent, and on the intention of the parties; and a meeting of the minds is required".

"[I]n the absence of an express contract, the courts should look to the conduct of the parties to determine whether or not *that conduct demonstrates an implied contract... or some other tacit understanding between the parties*. Velez v. Smith, 48 Cal. Rptr. 3D 642, 659 (Cal. Ct. App. 2006) (Swager, J.)". (Emphasis added)

"[A]n implied-in-fact contract is a true contract, containing all necessary elements of a binding agreement; it differs from other contracts only in that it has not been committed to writing or stated orally in express terms, but rather is inferred from the conduct of the parties in the milieu in which they dealt." Lirtzman v. Fuqua Industries, Inc., 677 F.2d 548, 551 (7th Cir. 1982) (Illinois law); E. Allan Farnsworth, *Contracts* § 3.10, pp. 129-30 (4th ed. 2004).

Therefore, there can be no disagreement then that these IFP agreements between Plaintiff and the courts are in fact a "legal contractual agreement" between the involved parties, there can be no

dispute to such effect. While there is no written agreement as to how those garnishments were to occur, it had been the customary applied and expected method by all parties that it would be "sequentially". In such case, any unexpected change to such expected "implied" agreement without the knowledge and "approval" of all parties then becoming a breach of contract, the existing method of payment at the time Plaintiff agreed to all those 28 U.S.C. § 1915 obligations having the same weight in law as any other contractual agreement. More so, when implemented in such way for such a long time and being the expectations of all parties that it would remain so.

Plaintiff has consistently requested that the method of collection "applied to him" continues to be "sequentially" because "all" his cases were contracted to prior to any notice being given through *Bruce v. Samuels's* clarifying interpretation, or notice of administrative changes by ODOC or the courts. The last case for which he received and owes fees for IFP status was filed in 2014, two years before the Court's decision in *Bruce v. Samuels*. At the same time, established federal law clearly prohibits retroactivety in the "*application*" of statutes and rules in as much as it may constitute Ex Post Facto violations. This includes new interpretations by Congress or the United States Supreme Court. In this case, when newly re addressed, retroactivity must be specifically authorized by Congress or the Court to such effect. Otherwise, when newly addressed by those entities, a "prospectivity" application to new "interpretations" of statutes and agencies rules is then encouraged.

The Oregon's administrative rules historical data show that without any public notice, as otherwise demanded by law, on June 19, 2019, OAR 291-158-0065 (Oregon Administrative Rules), the rule authorizing collection of these debts was temporarily "amended filed" by ODOC becoming effective on that same date. Not until October 3, 2019 four months later, did a notice was given to Oregon's prisoners appearing for the first time in SRCI's "Currents" (Plaintiff's institutional weekly news source) that U.S. courts garnishments were to take place on a 20% "per case" basis. It made no mention that the way these payments were to take place was being changed, it just simply changed

them. That is, he would now have to begin paying 20% per each case for which he owed, not 20% of his overall deposits as it had been applied to him for years. Because he owed for five cases he would now have 100% of his deposits garnished[4].

This new method of collection considerably retroactively affects Plaintiff's economic condition, as he sure it affects thousands of other prisoners. If he would have been aware from the very beginning that IFP payments would have to be satisfied on a "per case" basis, he would never have filed those cases in the first place. More so, and in his opinion, in an abusive judicial system where prisoner's complaints are routinely just cast aside without proper relief given, while justifying dismissals as being frivolous when in fact they are not. This case being a good example, when the district court and the Ninth Circuit categorizing it as not taken in good faith and frivolous (App. B, and E), while in fact the case presents very legitimate questions of law.

The collection of fees described in 28 U.S.C. § 1915(b)(2) had been the subject of great controversy for years until *Bruce v. Samuels*, different circuits giving different interpretations to the statute. The Ninth Circuit, and as applied in Oregon possibly since the implementation of the PLRA, having favored the "sequential" method in the past[5].

Not until *Bruce v Samuels*, 577 U.S. 82, 90, 136 S.Ct. 627, 193 L.Ed.2d 496 (2016), two years after Appellant filed the last case for which he owes, did the United States Supreme Court hold

4 Appellant owed IFP fees for five cases: 2:14-cv-02071-AA, 3:11-cv-1095-KI, 2:12-cv-0542-KI, and Ninth Circuit Cases No's. 12-35158, and 14-35939.

5 In *Grenning v Miller-Stout*, 739 F3d 1235, at 1242 (9th Cir 2014) the court remands back to the district court to consider the issue in the first instance. Then in *Grenning v Stout*, 144 Supp.3d 1241, at 1249 (E.D. Wash 2015) upon remand the court holds that it "should apply the sequential approach or 20% regardless of the number of cases. The Ninth Circuit never again makes a determination on this issue in this or any other case. The Ninth Circuit in *Grenning v Miller-Stout* 739 F3d at 1242 directs attention to *Torres v O'Quinn*, 612F3d 237, 242-48 (4th Cir 2010) where it discusses the split between the circuits on how these collections should take place, some choosing the "sequential" or "per prisoner" system where only 20% is collected regardless of the number of cases, while other circuits choose the "per case" or "simultaneous" system where 20% is collected on each case and where 100% of the prisoner's monies could be garnished. Not until *Bruce v Samuels*, 136 S.Ct. 627 (2016) (see S'ummaries) did the Court agree to adopt the "per case" approach. No one in Oregon's Department of Corrections, the Justice Department, or any courts, gave any notice of intended change because of *Bruce v Samuels* until October 2019 three years after that decision, either to those filing new cases or those already being garnished for collection of those fees, while the 20% "sequential" system remained in place.

that: "The Circuits following the per-case approach, we conclude, better comprehend the statute". That is, the Court in *Bruce v Samuels* in order to create uniformity, now clarified the statute to allow collections of 20% on a "per case" basis. The Court though, never addressed as otherwise demanded, to make this new interpretation retroactive. Nor has it addressed the issue on the basis of breach of contracts, or any other argument. Something that seriously affects tens of thousands of prisoners, and where until *Bruce v Samuels* the courts had been "split" on the subject; example of disparities and expectations provided by the Ninth Circuit's and Oregon's application adhering to the "sequential" method for years. The U.S. Supreme Court when adopting the "per case" method in *Bruce v Samuels*, did not hold or even addressed, whether the statute's new interpretation pertaining to 28 U.S.C. § 1915 IFP fees collections on a "per case" basis should now be applied retroactively. While yet, it did acknowledge the split that had been present between the circuits for years.

Federal law discourages and prohibit retroactive changes in applications of administrative rules, statutes, federal court rulings, governing legislation, and rulings from the Court, more so once a rule has been implemented in a certain manner for a period of time and is the expected application by the parties. In *Cort v Crabtree*, 113 F3d 1081 (9th Cir 1997) the Ninth Circuit agreed with the plaintiffs that retroactive application of a "new interpretation" of a rule is disfavored, more so when failing to comply with the rule making process, as it also occurred in Plaintiff's case, "pursuant to a rule that had previously been struck down for failure to comply with proper rulemaking procedures, but that had since been properly readopted by the agency... Elaborating upon the time-honored principle that "[r]etroactivity is not favored in the law,"" *Id* at 1084. In this case, there was no rule making or amending process as demanded by law, a notice was simply put in the institution's newsletter without mention to any change even months after the amendment had been adopted, unexpectedly changing the method of payments that had been expected and applied for years.

The court in *Cort* further addressing the retroactivity of a new ruling stated, "... the Court has reemphasized the importance of the presumption against retroactivity. It has reiterated that the presumption is "deeply rooted in our jurisprudence" and "embodies a legal doctrine centuries older than our Republic": "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."... Thus, even where the Ex Post Facto Clause is not formally applicable, "prospectivity remains the appropriate default rule."" *Cort*, 113 F3d at 1084. This type of prohibited retroactivity is what ODOC on behalf of the U.S. courts have now attached to Plaintiff and Oregon prisoners in connection with the collection of IFP court fees. If applying the *Cort* decision, *Id*, it can then be clearly reasoned that new filing fees should be "*prospectively*" collected on a "per case" basis, but that old cases where those fees were initially entered into agreement, expected to, and were being collected "*sequentially*", may not be retroactively collected in the newly adopted manner, instead continuing applying the "*sequential*" method applicable at the time of entering into those contracts. When considering the Ninth Circuit's approach in *Cort*, it is plainly clear that ODOC abusively fails to apply such approach to Plaintiff's debts, when in fact this conduct is almost identical to that claimed in *Cort* including the failure to provide a legal challengeable notice before the change. The district court and the Ninth Circuit supporting such conduct and the basis for this petition.

In Oregon, ODOC allows prisoners to participate in the proposed rule making process by posting notices of such proposed changes, and allowing prisoners to comment on the effect of this amendments.

OAR 291-001-0020. Notice of Proposed Rule. Guides the notice process ODOC must follow when creating or amending a rule.

> (1) Prior to the adoption, amendment, or repeal of any permanent rule, the Department of Corrections shall give notice of the proposed adoption, amendment , or repeal:

(d) By electronic mail or mail to the following at least 28 days before the effective date of the rule:
(I) Department of Corrections – Instituition Functional Managers or designee; and
(J) Department of Corrections – Institution Library Coordinators or designee.

A notice that regularly appears in the institution's "The Currents" newsletter at Plaintiff's place of confinement regularly states: "Rule making comments must be provided to the DOC Rules Coordinator in writing... DOC rules are available for review and copies in the inmate law library". Each rule being amended provides the caption: "Last day to provide comments (providing the date)". ODOC when changing the method of IFP collections, did not provide any notice that the method nor the rule itself was being amended. In fact, the rule that guides this garnishments never provided nor provides today any specification as to what method it is to follow, ODOC and the courts in the past just followed the "sequential" method for years now applying the "per case" method to every one.

Once a rule or statute is amended or a new interpretation adopted, an agency may not just retroactively default to the new interpretation in a "blanket" manner to affect every one. Such new interpretation would not retroactively apply to those following an old interpretation unless the change explicitly made it retroactive by a congressional source or higher court handling the matter. "The Court held in Landgraf... "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."" *Chenault v U.S. Postal Service*, 37 F3d 535, at 537 (9th Cir 1994). "The only way the Supreme Court can, by itself, "lay out and construct" a rule's retroactive effect, *or "cause" that effect "to exist, occur, or appear," is through a holding. The Supreme Court does not "ma[k]e" a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts...* We thus conclude that a new rule is not "made retroactive to cases on collateral review" *unless the Supreme Court holds it to be retroactive*" (Emphasis added) *Tyler v Cain*, 533 US 656, at II A, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001). Thus, while the Court in *Bruce v Samuels*, 136 S.Ct. 627, at 632 (2016) held that: "The

Circuits following the per-case approach, we conclude, better comprehend the statute", the Court when adopting the "per case" method, also correctly *did not hold* that the statute or any rules pertaining to 28 U.S.C. § 1915 IFP fees collections on a per case basis should now be applied retroactively. It left such issue of retroactivety unaddressed, possibly assuming that agencies and lower courts would be well informed that retroactivity to this new interpretation would be prohibited.

*Prospectivity*, the *implementation of a new interpretation* to take place only *after fair notice is given* is the favored action per established federal law of most circuits and the U.S. Supreme Court. *Cort v Crabtree*, 113 f3d at 1084 ("prospectivity" remains the appropriate default rule). "*Sequentially*", then seems the correct manner in which to proceed in cases such as Plaintiff's as it was being applied when he entered into those contracts, following the "old interpretation" and "application" of the statute and rules, at least in Oregon and some circuits, prior to the *Bruce v. Samuels* clarification of the statute. A change from "sequentially" to "per case" in cases as Plaintiff's represent an Ex Post Facto retroactive violation. Plaintiff had no hint or was given any warning prior to entering into his contracts, that the state and courts were even considering a change to these rules, it simply happened suddenly and unexpectedly years later in an illegally retroactive manner.

> "The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application... the *Ex Post Facto* Clause not only ensures that individuals have "fair warning" about the effect of criminal statutes, but also "restricts governmental power by restraining arbitrary and potentially vindictive legislation."" *Landgraf v. United Statesi Film Prods.*, 511 US 244, at 266-267, 114 S.Ct. 1483, 128 L.Ed. 2D 229 (1994).

> "A court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties... This Court, for example, recently refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed... Here too the lack of "fair warning" outweighed the reasons to apply..." *Kisor v Wilkie*, 139 S.Ct. 2400, 2417-2418 (2019).

> "The inquiry into whether a statute operates retroactively demands a commonsense, *functional judgment* about 'whether the new provision attaches new legal consequences to events completed before its enactment... *A statute has retroactive effect when it "'takes away or impairs vested*

constitutional provisions. For ten years, after filing his civil complaints, up to the time that the Economic Impact Payments were issued he lived on $12.00 to $14.00 per month being able to purchase only the very basic of items including additional legal expenses. The assumption that prisoners are taken care of by their guardians receiving the "basics of needs", is something that is barbaric to accept in a society as that of the United States as it exists today. Decades of price increases, and "justified" denials to an incarcerated person for years of some human satisfaction such a candy bar or a cup of coffee violates any basic deserving human decency. In fact, those so called "basic needs" the courts so often claim are met regarding prisoners, are regularly nonexistent, greatly substandard, or just simply and maliciously withheld, and often life threatening. Then when we prisoners challenge those conditions, the courts just choose to follow the status quo imposed through decades of abuse and find them "frivolous. Alexis de Tocqueville would be in agreement that the Penal System in the United States today, is not the exemplary system he once bequested it to be, in comparison to other industrialized countries today. Perhaps the Court, progressive as it alleges to be, should consider revisiting some of these issues in the near future.

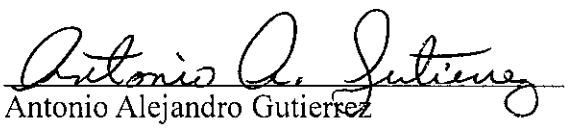
After receiving the Economic Impact Payments (EIP) from the federal government because of the pandemic, it allowed Plaintiff to purchase a t.v. which he had not had for ten years because having to leave behind the previously one owned upon a transfer. It also allowed him to purchase shoes, he had worn state issued for a decade, that eventually caused him permanent severe back and leg pains. It also allowed him to purchase real soap, and toothpaste, not the baking soda issued in its place which tears a person's gums and teeth, and other cosmetics necessary for a human sub existence. It also allowed him to purchase cookies and other food items to which he had been deprived of for years. While he has more than twenty five years worked in prison industries and has always maintained other institutional jobs, parole and civil rights litigations, courts fees, and other costs imposed by ODOC, have prevented him from maintaining even a mediocre standard of living in later years. Regardless of this "nagging",

he hopes it doesn't prevent the Court from addressing the very legitimate claims within this case while it continues to have an adverse effect on him and thousands of other prisoners.

The "per-case" method should never have been retroactively applied to Plaintiff's cases that were filed before ODOC gave notice of changes in October of 2019. Such retroactive application of *Bruce v. Samuels* is illegal for all those reasons explained herein. Plaintiff gave ODOC and the courts plenty of notice of the illegality of such retroactive application, yet, they continued to adhere to such "per case" doctrine even if so far they have only taken monies from the EIP payments Plaintiff received. Monies that Plaintiff received and had a legitimate intent to use in a number of ways, including upon a subsequent parole. Another abuse they had no statutory right to have done. He is presently trying to get reimbursed from those EIP funds ODOC garnished on behalf of the courts for IFP debts. As previously described, United States Federal Code pertaining to those payments include provisions against court fees garnishment orders.

Plaintiff asks the United States Supreme Court to based on its new interpretation in *Bruce v. Samuels*, that it makes a legal determination that such interpretation should not be applied retroactively against the contractual expectations of parties whom the "sequential" method was attached to at the time their IFP contractual agreements were entered into, and whether the "per case" method should be applied "prospectively" only for new cases after fair notice has been given of the clarifying interpretation of *Bruce v. Samuels*.

Respectfully submitted by,



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