

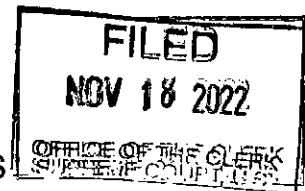
22-6122

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



Danny Wayne Alcoser — PETITIONER
(Your Name)

vs.

Judge Jones, 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

Danny Wayne Alcoser
(Your Name)

12071 F.M. 3522; Abilene, TX 79602
(Address)

Abilene, Texas 79601
(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

For this court to determine if the United States Fifth Circuit Court of Appeals has entered a decision in conflict with the decision of the United States Ninth Circuit Court of Appeals on the same important matter; when the Fifth Circuit deliberately sua sponte entered its opinion and judgment simultaneously with prejudice, case closure, and without notifying petitioner of its intent to dismiss; to prevent him from amending his claim, pursuant Rule 15 (a)(1), "matter of course" of the Federal Rule of Civil Procedure, which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

LIST OF PARTIES

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

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:

Circuit Judges: Jones, Haynes, and Oldham of the Fifth Circuit Court of Appeals sitting in New Orleans, Louisiana 70130

RELATED CASES

- Trial Court - Western District-Waco Division, case 6:19-CV-00354;
- Fifth Circuit Court of Appeals, case no. 19-50759 (830 Fed.App'x 743 (5th Cir.2020)); and
- Fifth Circuit Court of Appeals, case no. 21-50626.(Appendix Tab A).

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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 _____ 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 _____ 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 _____ court appears at Appendix _____ 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 September 6, 2022.

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

UNITED STATES CONSTITUTION

Amendment Fourteen

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES

Federal Rule of Civil Procedure 15(a):

(1) Amending as a matter of course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under rule 12 (b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with opposing party's written consent or the court's leave. The court should freely give leave when justice so requires. Fed.R.Civ.P. 15(a).

STATEMENT OF THE CASE

Petitioner sought to bring a 42 U.S.C. § 1983 action against numerous employees of the Texas Child Protective Services (CPS), judges, court officials, retained and appointed counsels, and others, including his alleged ex-wife. The Western District Court-Waco Division, case no. 6:19-CV-00354, wrote that the petitioner submitted a well written complaint but failed to state a claim to which relief may be granted. See Alcoser v. Ford, 830 Fed.App'x 743, 744 (5th Cir. 2020). The court dismissed his entire case with prejudice.

Petitioner filed for appeal, case no. 19-50759, where he claimed violation of due process, namely: the district court's failure to give notice of its intent to dismiss and opportunity to amend his complaint. Id. at Alcoser v. Ford, The Fifth Circuit Court of Appeals vacated the district court's judgment and remanded for further proceedings. Id. at 744. The court found Constitutional injury of petitioner's rights by the district court's actions.

Petitioner, upon the return of jurisdiction to the district court, pursuant to rule 15(a)(2) of the Federal Rules of Civil Procedure filed leave to amend his complaint which the court granted. When he amended his complaint he added additional parties to the suit by filing a notice of removal of his State case 2016-776-3 in to his Federal case 6:19-CV-00354 as those subject matters are equal to and involve some of those same parties from the initial filing of the original suit. Subsequently, again the court dismissed his entire claim but this time with prejudice and case closure.

Petitioner appealed, case no. 21-50626, again claiming that the court took the same action against his amended claim as it did his original, i.e. dismissed without notice of its intent to dismiss so petitioner may amend as a matter of course under Fed.R.Civ.P. 15 (a) (1), or to allow him an opportunity, if he chose, to file for dismissal for the want of prosecution.

REASONS FOR GRANTING THE PETITION

The requirement that a litigant be afforded notice and an opportunity to respond prior to dismissal is rooted in constitutional due process. *Alcoser v. Ford*, 830 Fed. App'x 743 (5th Cir.2020); *Lugo v. Keane*, 15 F.3d 29, 30 (2nd Cir.1994)(citing *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707, 108 S. Ct. 2104, 100 L. Ed. 2d 722 (1988)). However, before entering a *sua sponte* dismissal due process requires that the "court...accord the parties fair notice and an opportunity to present their position." *Alcoser v. Ford*, 830 Fed. App'x 743, 744 (5th Cir.2020)(quoting *Day v. McDonough*, 547 U.S. 198, 210, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006)).

In this instant case, the Fifth Circuit Court of Appeals had previously vacated the district court's judgement, under case no. 19-50759, to dismiss petitioner's case based on their finding of due process violation. The district court did not give petitioner notice of its intent to dismiss his suit or allow him an opportunity to amend his complaint, if he chose to do so. Thus, the case was remanded back to the district court. See *Alcoser v. Ford*, 830 Fed. App'x 743 (5th Cir.2020).

Once jurisdiction was vested back to the district court petitioner file his Motion For Leave To Amend. The court granted leave. In the amended complaint was added additional parties and the subject matter of the State court, counsel, and laboratory owner colluding to deprive him of a procedural due process; the right to additional genetic testing under Texas Family Code § 160.507. After review of

his amended complaint, while pending recusal motion, the district court judge sua sponte entered its order of dismissal with prejudice, case closure, and without adequate notice of its intent to dismiss. Moreover, depriving him a right to amend his claim against the added parties, as a matter of course or otherwise.

Petitioner appealed to the Fifth Circuit, case no. 21-50626, describing the court's conduct as repetitive in nature. How the court failed to address the additional parties or the matters of his claim of violation of due process; the right to enjoy procedural due process under Texas Family Code § 160.507 even though he fulfilled the requisites of prepaying for additional genetic testing to combat the initial testing which he contested because the testing facility used the wrong ethnicity or racial grouping while performing its test. The Fifth Circuit favored the district court's judgment; case dismissed with prejudice, case closure, and without adequate notice of its intent to dismiss his claim. See appendix Tab A. Alcoser could have simply modified his claim, especially those parties added,¹ or submitted his dismissal for want of prosecution. Instead, the court entered judgment against him and ordered a strike notice be sent to the strike keeper, strike number two regardless the fact he was victorious in his first appeal under case no. 19-50759.

1. Fifth Circuit Court of Appeals asserted Alcoser had no right to amend since his case was dismissed, see appendix tab A, which is contrary to its decision under case no. 19-50759 based on those same matters here; sua sponte dismissal. See Alcoser v. Ford, 830 Fed. App'x 743 (5th Cir.2020).

Federal Rule of Civil Procedure 15(a) provides:

- (1) **Amending as a Matter of Course.** A party may amend its pleading once as a matter of course within:
 - (A) 21 days after serving it, or
 - (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
- (2) **Other Amendments.** In all other cases, a party may amend its pleading only with opposing party's written consent or the court's leave. The court should freely give leave when justice so requires. Fed. R. Civ. P. 15(a).

The Ninth Circuit holds that Rule 15 provides different ways to amend a complaint, and these ways are not mutually exclusive. Rule 15 is organized substantively, not chronologically. It does not prescribe any particular sequence for the exercise of its provisions. That is, it does not mandate that the matter of course amendment under 15 (a)(1) be exhausted before an amendment may be made under 15 (a)(2), nor does it state that the ability to amend under 15 (a)(1) is exhausted or waived once 15 (a)(2) amendment is made. See *Alcoser v. County of San Bernardino*, 806 F.3d 1002, 1007 (9th Cir. 2015). A plaintiff may amend in whatever order he sees fit, provided he complies with respective requirements found within 15(a)(1) and 15(a)(2). *Id.*

In plaintiff's case the Fifth Circuit held, "At the outset, we reject Alcoser's assertion that the district court erred in dismissing the action before he had opportunity to amend² as a matter of course under rule 15 (a)(1). 'After dismissal, the plaintiff does

². "district court erred by not affording Alcoser notice of its intent to dismiss his claim and an opportunity to respond." *Alcoser v. Ford*, 830 Fed. App'x 743 (5th Cir.2020).

not have the right to amend as a matter of course.' Whitaker v. City of Houston, 963 F.3d 831, 835 (5th Cir.1992)." However, Rule 15(a) "gives a plaintiff one opportunity to amend as of right." Ramirez, 806 F.3d at 1007 (quoting Sanford v. Motts, 258 F.3d 1117, 1120 (9th Cir.2001); cf. Appendix Tab A and Alcoser v. Ford, 830 Fed. App'x 743, 744 (5th Cir.2020);³

Petitioner contends that he was granted leave to amend by the district court.⁴ He had the right to amend under 15(a)(1) as a matter of course. However, the Fifth Circuit Court of Appeals, contrary to its previous opinion in plaintiff's case - 19-50759,⁵ conceded to the actions of the district court as just; to sua sponte enter an order and final judgment over plaintiff's case without given notice or opportunity to respond or present his position.⁶ It is apparent through these showings that the Fifth Circuit Court of Appeals opinion is unjust, and against the plaintiff's rights of due process. Thus, this Court needs to intervene and give directive to the Fifth Circuit Court of Appeals over how Rule 15(a) is applicable to a person's rights when it involves due process.

3. "District court erred by not affording Alcoser notice of its intent to dismiss his claim and an opportunity to respond." Alcoser v. Ford, 830 Fed. App'x 743 (5th Cir.2020).

4. Fed.R.Civ.P. 15(a)(2); Appendix Tab A, p.4.

5. Footnote two(2) above.

6. Day, 547 U.S. at 210; Alcoser 830 Fed. App'x at 744.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Danny Wayne Alcorn

Date: November 07, 2022