ORIGINAL

No. 23-223

In the Supreme Court of the United States

CHARLES J. JENKINS,

Petitioner,

v.

TRIWEST HEALTHCARE ALLIANCE ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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SEPTEMBER 5, 2023
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QUESTIONS PRESENTED

1. Whether the triumvirate overstepped their authority when they decided (*sua sponte*) to invoke, incite, insurrect, or for the lack of a better description "*A Coup, or a Coup' etat*" which appears as a overthrow of the lower court's regime by essentially usurping their authority and violating the Doctrine of *Stare Decisis*?

2. Whether the lower court's Rule 56 decision can be 'Invalidated by the (Federal Circuit(s)) as akin to the *Wakefield* petition and *Virentem* case whereby those claims were invalidated and in its stead replaced them with a negative decisions or stamp the single word ("AFFIRM")?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Charles Jenkins

Respondents and Defendants-Appellees below

- TriWest Health Care
- VA Medical Center
- Tulane Medical Center

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit
No. 22-30429
Charles Jenkins, *Plaintiff-Appellant* v.
TriWest Healthcare Alliance, *Defendant-Appellee*
Date of Final Judgment: February 8, 2023
Date of Rehearing Denial: March 31, 2023

U.S. District Court, Eastern District of Louisiana
Civil Action No. 22-37
Charles Jenkins, *Plaintiff* v.
VA Medical Center, et al., *Defendants*
Date of Final Order: June 21, 2022

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JUDICIAL RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner's, Charles J. Jenkins proceedings pro se respectfully petition this Court for a writ of certiorari to review the one word "affirmance" by the rehearing en banc by the Fifth Circuit without an explanation.

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Fifth Circuit was issued of February 8, 2023. (App.1a, 2a). The opinion of the U.S. District Court, Eastern District of Louisiana was issued on May 12, 2022. (App.7a, 10a).

JURISDICTION

Petitioner, Charles J. Jenkins requested an en banc hearing which was denied on March 31, 2023. (App.19a). By letter of the clerk, Petitioner was given and additional 60 days through September 5, 2023, to file this petition. Petitioner invokes this Court's Jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const., amend. XIV, § 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 deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

While the odds of the Supreme Court granting a pro se petition aren't great, it does happen every two or three years. For instance, in 2016, the Court agreed to review *Welch v. United States*, No. 15-6418. In 2013, the Court granted *Law v. Siegel*, No. 12-5196. Both of those pro se petitioners had their cases remanded to their respective courts of appeals. With that being said again, it would appear that the Fifth & Federal circuit have been given *carte blanche* authority to give a one statement response (e.g., Affirmance) to a negative or favorable lower court's decision or a reversal of a favorable decision by way of Rule 36 Decision. An important function of the Supreme Court is to resolve disagreements among lower courts about specific legal questions. Another consideration is the importance to the public of the issues.

B. Background on Rule 36

What is App 9th Cir. Rule 36-3?

Circuit Rule 36-3 essentially states that neither parties nor courts in the Ninth Circuit may cite to an unpublished disposition as precedent, though they may cite to unpublished dispositions purpose of establishing, *e.g.*, the applicability of collateral estoppel, *Res Judicata* or law of the case.

What is the Rule 36 affirmation?

A Rule 36 affirmance offers no explanation of the court's decision, other than recording that the court agrees with the judgment of the lower tribunal.

Indeed, "a Rule 36 judgment simply confirms that the trial court entered the correct judgment

- **Rule 36. Decisions at the Federal Circuit: Statutory**

  (a) Entry. A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

  (1) after receiving the court's opinion—but if settlement of the judgment's form is required, after final settlement; or

  (2) if a judgment is rendered without an opinion, as the court instructs.

  (b) Notice. On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion—or the judgment, if no opinion was written—and a notice of the date when the judgment was entered.

  (As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

- **11th Cir. R. 36-2. Unpublished Opinions.**

  An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority. If the text of an unpublished opinion is not available on the internet, a copy of the

unpublished opinion must be attached to or incorporated within the brief, petition, motion or response in which such citation is made. *But see* I.O.P. 7, Citation to Unpublished Opinions by the Court, following this rule.

- **11th Cir. R. 36-3.**
  Publishing Unpublished Opinions.

At any time before the mandate has issued, the panel, on its own motion or upon the motion of a party, may by unanimous vote order a previously unpublished opinion to be published. The timely filing of a motion to publish shall stay issuance of the mandate until disposition thereof unless otherwise ordered by the court. The time for issuance of the mandate and for filing a petition for rehearing or petition for rehearing en banc shall begin running anew from the date of any order directing publication.

[. . .]

I.O.P.-

1. *Motion to Amend, Correct, or Settle the Judgment.* These motions are referred to the panel

[. . .]

Noteworthy Petitions for a Writ of Certiorari

This month, there is a new potentially impactful petition pending before the Supreme Court: *NST Global, LLC v. Sig Sauer Inc.*, Supreme Court No. 22-1001. Virentem argued the practice violates a Patent Act clause that says the Federal Circuit "shall issue

to the Director [of the Patent Office] its mandate and opinion."

The company had sued YouTube LLC and Google LLC in federal district court, alleging infringement of seven audio-processing patents. The Patent Trial and Appeal Board invalidated all of the patents, and the Federal Circuit summarily upheld the decisions.

Virentem called the process a poor substitute for the opinion mandated by the statute.

> "The lack of an opinion here, and in hundreds of other cases . . . conceals a disparate application of claim construction law at the Federal Circuit," Virentem said in its petition. "The disparity runs afoul of the very reason for the creation of that Court: to promote uniformity in the application of patent laws." preambles as limiting violates certain statutory and constitutional rights of the patentee, and whether the Federal Circuit's practice of Federal Circuit without opinion, violates "constitutional guarantees, statutory protections under 35 U.S.C. § 144, and undermines public trust in the judicial system." The response is due on May 15, 2023.

Virentem Ventures v. Google LLC, Supreme Court No. 22-803, Petition for Writ of Certiorari.

As we summarized in our March 2023 update, there are several petitions pending before the Supreme Court. We provide an update below:

According to the Act's creation of the Patent Trial and Appeal Board. The Federal circuits especially the (5th and 11th Circuits) reveal that tribunal's decisions

in patent validity challenges can be appealed to the Federal Circuit.

C. Background on Collateral Estoppel, *Res Judicata* and Issue Preclustion

What is the doctrine of collateral estoppel?

Collateral estoppel is an important doctrine in the fields of criminal law and civil procedure. In criminal law, collateral estoppel protects criminal defendants from being tried for the same issue in more than one criminal trial through the double jeopardy clause of the Fifth Amendment.

What are the four elements of Res Judicata?

The doctrine of *Res Judicata* bars subsequent litigation where four elements are met: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same Supreme Court's decision in *Kessler v. Eldred,* 206 U.S. 285 (1907), the *Kessler* doctrine bars a patent infringement action .

What is the 9-0 Supreme Court decision 2023?

Supreme Court's 9-0 Ruling Paves Way for Constitutional Challenges to Administrative Proceedings. The U.S. Supreme Court on April 14, 2023, issued a unanimous opinion holding that federal district courts can consider constitutional challenges to administrative proceedings before such agencies issue final rulings

Is collateral estoppel the same as Res Judicata?

Collateral Estoppel is closely related to the doctrine of *Res Judicata* also known as "claim preclusion,"

which prevents a party from asserting a claim or cause of action after it is subject to a final judgment. While *Res Judicata* deals with questions of law, collateral estoppel can apply to issues of law or fact.

What is the difference between claim preclusion and issue preclusion?

The crucial difference between claim preclusion and issue preclusion is that while claim preclusion can bar a party from raising a claim he or she failed to raise in a prior action, issue preclusion can bar only matters argued and decided in a prior lawsuit.

What is the difference between Res Judicata and Stare Decisis?

In simple terms, one serves as a guide (precedent), while the other is the principle compelling a court to follow the guide (*Stare Decisis*). *Res Judicata* is a Latin term that means "a matter decided." It is a legal doctrine that ensures that the same case cannot be litigated multiple times.

The Rule 36 decision by the 5th Circuit was entered on November 17, 2023. And then the old (switcharoo) occurred, whereby the Fifth Circuit overturned/discarded the lower court Rule 36 decision and surrogated it with a replacement decision.

Why would someone get a writ of certiorari?

- Decision Type.
- Declaration of Unconstitutionality.
- Disposition of Case.
- Unusual Disposition.
- Winning Party
- Formal Alteration of Precedent

Patent invalidation

In the other petition, *Wakefield* asked the high court to consider questions including "whether The Federal Circuit can affirm, by Rule 36, invalidation of a software patent" when the patent's prosecution history "discloses clear and convincing evidence to the contrary.

Inquiring Minds Would Like To Know?

Whether the 5th & 11th circuits differs from the other circuits when the instant claim was resolved by an *Unusually Disposition?* And if the answer is a resounding yes, then it beg the question, Whether the Federal Circuit can invalidate a ruling (e.g., Rule 36 Decision), of the lower court by displacing that ruling with one of its own (e.g., negative ruling in the same case) which said negative decision was appealed and non-dispositive.

And in its stead, inject that previous negative decision of the lower court and dismiss petitioner's Rule 36 decision and provided its own negative judgment and summarily dismissed it, by a one word conundrum pursuant to Rule 36 (e.g., affirm).

Again, Question(s) Presented

Virentem argued the practice violates a Patent Act clause that says the Federal Circuit "shall issue to the Director [of the Patent Office] its mandate and opinion." The company had sued YouTube LLC and Google LLC in federal district court, alleging infringement of seven audio-processing patents. The Patent Trial and Appeal Board invalidated all of the patents, and the Federal Circuit summarily upheld the decisions. Virentem called the process a poor substitute for

the opinion mandated by the statute. "The lack of an opinion here, and in hundreds of other cases ... conceals a disparate application of claim construction law at the Federal Circuit," Virentem said in its petition. "The disparity runs afoul of the very reason for the creation of that Court: to promote uniformity in the application of patent law. Again, it is petitioner contention that in the instant case that non-dispositive decision was made moot by way of the doctrine of *Res Judicata*/collateral estoppel.

And whether said invalidation/deselection of decisions by the Federal Circuit is tantamount to legislating from the bench," and literally violating the doctrine of *Stare Decisis*.

D. Fifth Circuit Improperly Granted Rule 56 Motion

Every since the ruling by SCOTUS in *Thryv, Inc., fka Dex Media, Inc. v. Click-To-Call Techs., LP*, No. 18-916, 140 S. Ct. 1367 (2020): As we summarized in our alert, on April 20, 2020, the Supreme Court held 7-2 that the Patent Trial and Appeal Board's decision whether a petition for inter parties review is time-barred is not judicially reviewable. And on April 27, 2020, in the case of June 2022 ruling in *West Virginia v. EPA*, 597 U.S. ___ (2022) the Supreme Court applied the major questions doctrine — which says Congress must clearly authorize federal agencies to regulate politically and economically significant matters — in a novel way to strike down the Clean Power Plan. Feb 15, 2023. It appears the fifth circuit has become emboldened and has bestowed upon themselves plenipotentiary powers from SCOTUS to actually ignore the Doctrine of *Stare Decisis* and legislate from the Bench.

That is to say, a claim for medical malpractice was presented to the proper government agency under the auspices of the Federal Tort Claim Act (FTCA). Said claim was denied as being time barred. Nonetheless, this petitioner appealed that negative decision to the 5th Circuit. That appeal was opposed by defendant Triwest Healthcare Alliance, herein (TriWest).

Prior to petitioner's ruling from the 5th Circuit, a Rule 56 motion for summary judgment was made by respondent (TriWest) to dismiss said claim, alleging that since there were no genuine issue(s) of material facts defendants are entitled to judgment as a matter of law. Contemporaneously to appealing said decision, the magistrate Judge B. Ashe, ruled that this petitioner did not meet his burden of proving that he had presented his complaint within the 2 years statute of limitations as required by the FTCA and had failed to present said claim to the proper government agency.

However, that decision was appealed and was non-dispositive. Nevertheless, an appeal was commenced to the lower court who made their Rule 56.

REASONS FOR GRANTING THE PETITION

It is suggested that SCOTUS may want to look into the matter at hand witch is to determine whether it's feasible to remand or grant a writ. Since we know our chances are 'slim to none' in regards to attaining a writ, so why not concentrate on petitioner's research which says sometimes a writ may be issued, because in the past SCOTUS have granted writs to pro se petitioner, (See cases cited below *infra*).

Petitioner understands the odds of receiving a writ but what about the dichotomy existing among the Federal circuit(s). Again, whereby the 5th & 11th circuits differs from the other circuit in regards to how those different circuit(s) apply Rule 56 (*e.g.*, invalidation), therefore, making null & void any decisions made by the agency and/ or the lower courts even when applicants has presented a meritorious claims on their face.

I. Fifth Circuit Failed to Conduct a Fair *De Novo* Review

That the 5th Circuit in the instant case reneged upon it promise to review a case denovo and assures the petitioner is getting a fair shake of his case. Also, the petitioner have presented salient facts that if proven accurate, his veracity would be unquestioned.

It also was proclaimed that this petitioner presented information that was after the final decision. But the 5th Circuit never said what information that presented was time barred and the time and date that information was tarty. The only information given

for the time laxity was a conclusory word (SIC). After all, these are the kind of questions that should be proven if it's going to be the culprit used for negating petitioner's review denovo.

II. Fifth Circuit Improperly Denied Subject Matter Jurisdiction

Moreover, the 5th Circuit denied this petitioner Subject Matter Jurisdiction, in that petitioner claimed jurisdiction through diversity of citizenship. It was that " petitioner, did not prove diversity of citizenship because it said diversity cannot be charge if all parties/ descendants are from the same state and this petitioner only (implied (SIC) that one tortfeasor(s) TriWest may have had an entity in the same State *e.g.*, Louisiana. The statement below from the

5th Circuit in its entirety;

> Jenkins provides no other tenable basis for federal jurisdiction. His claim that he has diversity jurisdiction is without merit—from the face of the pleadings, all parties are in Louisiana. Jenkins' only assertion to the contrary is that "although TriWest does business in Louisiana, it's [sic] corporate Headquarters is in Arizona." But even if that is true, diversity jurisdiction requires complete diversity—"no party on one side may be a citizen of the same State as any party on the other side"—and Jenkins has made no showing that the other plaintiffs are diverse. *Mas v. Perry*, 489 F.2d 1396, 1398–99 (5th Cir. 1974); *see also* 28 U.S.C. § 1332.

Do you need both diversity and federal question?

If a case has a legitimate and substantial federal question, it does not also need diversity and the required amount in controversy. A corporation is considered a person and a citizen of both its state where it is incorporated as well as the state where its principal place of business is located. Feb 3, 2022. **See** for example what SCOTUS had to say about Diversity Jurisdiction.

In an attempt to resolve this confusion, and to promote a uniform interpretation of federal law, the Supreme Court held in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), that the phrase "principal place of business" means the corporation's "nerve center," or "the place where the corporation's high level officers direct, control, and coordinate the corporation's activities," thereby taking the state-by-state analysis of a corporation's business activities out of the equation. The Court added that a corporation's "nerve center" typically will be the corporation's headquarters.

It's important to note that in cases invoking diversity of citizenship involving multiple plaintiffs or defendants, no single defendant can be a resident of the same state as any single plaintiff.

This petitioner submits when the triumvirate came to the issue of Subject Matter Jurisdiction on this case, the results were an apparent default into a (*Casus Omissus*). They completely ignored that issue.

Therefore, petitioner suggests any untangling of this convoluted, single appellant, multiple tortfeasor (s) and corporate headquarters, would have had to deduce Subject matter Diversity Jurisdiction.

However, research indicates that SCOTUS doesn't really look at what mistakes the lower court made but whether there's a controversy among the circuits and what's the public interest.

With that being said, it appears that all of my research was or is to know avail. For petitioner understands that SCOTUS has bestowed upon the federal circuits omnipotent discretions to lash Rule 36 decisions at their whim(s).

By the way, in regards to the ill faded decision of which was relied upon to discard petitioner's claim (*I.e.*, not presenting the SF-95 in a timely matter, not presenting the claim to the proper agency, no Subject Matter jurisdiction *inter alia* we're all subjected to Collateral Estoppel and/or *Res Judicata.* In addition, those issues we're appealed and resulted in a non-dispositional status.

Also, defendant(s) tweaked their response to the required SCOTUS Rule 29.6 by failing to divulge its full corporate disclosure statements. That is to say, while doing business in Louisiana (*e.g.*, and many other States) their corporate Headquarters is in the State of Arizona. And that makes for a diversity Jurisdiction.

CONCLUSION

For the foregoing reasons this petitioner respectfully requests this 'August Body's issue a writ to review how the Federal circuits are using Rule 56 decision as a whip. I mean the Public should be wary to know the feds courts have the muscle to give you a win and take it away. If that be the case, who need the District court they are invertebrates.

It is with great satisfaction that I was able to, once again, engage in a "tête-à-tête with the pundits.

Respectfully submitted,

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September 5, 2023

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