

CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER EVERSON-PETITIONER

VS

SCOTT SEMPLE,
CONNECTICUT COMMISSIONER OF CORRECTIONS, ET AL-RESPONDENTS

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

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER EVERSON

12112 TOWNWALK DRIVE

HAMDEN CONNECTICUT 06518

PHONE NUMBER; 203-848-4777

EMAIL; DANNYEVERTON@YMAIL.COM

PRO SE PETITIONER

QUESTION(S) PRESENTED

The Petitioner presents two questions:

In *Semtek International Inc. v. Lockheed Martin Corp.*, The Court stated “The Primary Meaning of “dismissal without prejudice” we think, is a dismissal without barring the defendant from returning later, to the same court , with the same underlying claim, thus, Black law dictionary (7th ed. 1999) defines. “dismissal without prejudice” as removal from the courts docket in such a way that the plaintiff may refile the same suit on the same claim” an adjudication upon the merits is the opposite of a dismissal without prejudice”

Question one is: To define final judgment on the merits for purposes of “res judicata” as final decision of the district court or is final judgment when all appeals have been exhausted, ie, does “res judicata” bar unappealed judgments.

In *Burnett v. New York Central R. Co.* The Court stated “ The commencement of the state suit fulfilled the policies of repose and certainty inherent in the limitation provisions and tolled the running of the period”

Question two is: Does commencement of an action in the District Court permanently toll the statute of limitations or is the statute of limitations merely suspended or paused for a period of time?

LIST OF PARTIES

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:

Christopher Everson- Petitioner

Scott Semple, Connecticut Commissioner of Corrections-Respondent

John Armstrong, former Connecticut Commissioner of Corrections -Respondent

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1. The Lower Courts are Split on the application of “Res judicata/claim preclusion” and Tolling by commencement of an action.

The 2nd Circuit along with 3rd, 5th and 6th circuits have held for purposes of “Res judicata” the final decision of the district serves to bar any subsequent actions filed by preclusive effect if: 1. Previous action involved an adjudication on the merits, 2. Previous action involved same parties or those in privity, 3. Claims asserted in subsequent action were or could have been raised in the prior action.

- A. The 5th Circuit has “noted tension in our precedent” over two approaches to finality being held. The 1st and the 7th circuits along with several other circuits have adopted a judgment is not final for purposes of “Res Judicata” until appeals have been exhausted and preclusive effect is not given to unappealed judgments, citing exceptions to the grounds for claim preclusion.
- B. The 2nd Circuit and 4th Circuit and other circuit have held commencement of an action does not toll the statute of limitations. The 1st 8th and 10th Circuits along with other circuits have adopted the commencement of an action tolls any statute of limitations approach.

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42 U.S.C. section 1983: Civil rights actions

28 U.S.C. section 1331: Federal question

OTHER AUTHORITIES

American Law Institute's Restatement (second) of Judgments

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OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals appears at Appendix A the opinion is unpublished. The opinion of the United States District Court for Connecticut Appears at Appendix B the opinion is unpublished

JURISDICTION

The Second Circuit Court of Appeals issued its opinion on September 7, 2016 and a copy of decision appears at Appendix A. Petitioners timely Petition for panel and *en banc* rehearing was denied on October 25, 2017 and a copy of the order denying rehearing appears at Appendix C. The jurisdiction of this court is properly invoked pursuant to 28 U.S.C. section 1254(1)

STATUTORY PROVISIONS INVOLVED

28 U.S.C. section 1331 provides

Federal Question: The District Courts shall have original jurisdiction of all civil actions arising under the Constitution, Laws or Treaties of the United States.

42 U.S.C. section 1983 provides

Civil Action for Deprivation of rights: Every person who, under color of any statute, ordinance regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In 1984 the petitioner here an African America began employment with the Connecticut Department of Corrections (hereinafter referred to as DOC),. The petitioner was a stellar employee with an outstanding work record. In March of 2001 the petitioner was terminated from his employment with DOC, in 2004 the petitioner filed a timely lawsuit in Connecticut District Court under 42 U.S.C. section 1983 alleging numerous Constitutional Violates the case was filed within the prescribed statute of limitations period. The case was dismissed by the District Court after two separate summary judgments. The petitioner filed an appeal with the Second Circuit Appeals Court within the time prescribed by law, the petitioner's appeal cited that among other things that petitioner's admissible evidence ie "the names of similarly situated comparators" were discarded and replaced with names of comparators submitted by the defendant DOC at summary judgment. At the time the appeal was filed the petitioner was incarcerated in Connecticut for a matter unrelated to this case and prison official were screening the petitioners legal mail, some of the petitioners legal mail was not being delivered to the petitioner, specifically legal mail sent to the petitioner from the Appeals Court was not being delivered to the petitioner this resulted in the petitioner missing important filing and Court imposed deadlines as instructed by the Court of Appeals. The appeal was dismissed by the Court of Appeals by default judgment for failure to return a New York fee waiver, the petition had already filed an approved Connecticut fee waiver with the Appeals Court, but the Appeals Court wanted a New York fee waiver. The petitioner

requested the appeals court reopen the case, the petitioner argued *Wolf v.*

Mcdonnell, "An inmate in a state prison has a right to legal mail and a right to access to the federal courts" request to reopen case denied, the petitioner filed Writ of Certiorari with U.S. Supreme Court, denied "as filed untimely", the untimeliness was attributed to the mail delays, filed request for rehearing, denied, filed Extraordinary Writ, denied.

Upon his release from incarceration the petitioner by his attorney made numerous communications with DOC. Attempting to resolve the matter, the petitioner's attorney passed away during that time. In 2016 the Petitioner refiled the case in the same District Court as the 2004 claim, District Court dismissed claim citing "Res Judicata" and frivolous, Petitioner filed appeal to Second Circuit Appeals Court, Appeals Court upheld the District Court's ruling and also cited time barred stating 3 year statute of limitations had expired, petitioner filed request for panel rehearing and rehearing En Banc, Denied, This Petition followed.

REASONS TO GRANT THE PETITION

For both doctrines of “Res Judicata” and “Tolling of Statute of limitations by commencement of an action” there is a well recognized and entrenched conflict of authority on which approach reflects the correct interpretation of the governing law regarding both of these issues.

The Court should grant certiorari in this case to resolve both conflicts. The questions presented are important and recurs frequently; it determines when “res judicata” is applicable and when it is not applicable. This decision will clarify the appropriate circumstance as to when a party may be allowed to subsequently refile the same claim with the same court after the court has initially dismissed that same claim “without prejudice” in the event that the claim is dismissed by the District Court “without prejudice” under what circumstance the claim is barred by “res judicata”. Moreover, it will determine and clarify tolling by commencement of an action as to whether the commencement of an action permanently tolls the statute of limitations or merely pauses it and for how long. Congress intended for there to be a tolling of statute of limitations in civil actions.. That clarity has been frustrated by the split of authority regarding tolling by commencement of action, moreover, the basic issue of how long a Plaintiff has to refile a claim in the same court without the claim being time barred,

The correct interpretation of “res judicata” is divided among the lower courts as to when it is applicable by two opposing doctrines: one being a strict adherence to claim preclusion grounds:

1. The previous action involved an adjudication on the merits; 2. The previous action involved the same parties or those in privity with them; 3. Claims asserted in the subsequent action

were, or could have been, raised in the prior action. This approach indicates a final judgment on the merits is after the district court has rendered a final disposition on the case, as the 2nd Circuit has ruled in this case and 3rd, 5th and 6th circuits have held and several other circuits also adhere to this approach. The other contrasting interpretation being a more rigid approach on what constitutes a final judgment for purposes of “claim preclusion/collateral estoppel” being a judgment is not final until all appeals have been exhausted and that there are exceptions to claim preclusion grounds such as found in Restatement (second) section 27 (1980), or an exception being “res judicata” does not apply to an unappealed judgment, or where appeals have not been exhausted, under this approach finality of a judgment is emphasized and claim preclusion is not applicable to tentative judgments or judgments still open to review, the 1st circuit, the 7th circuit and several other circuits follow this approach.

Tolling of Statute of limitations by commencement of an action is also divided by two opposing interpretations of the governing law, one approach being commencement of an action tolls or pauses or suspends the statute of limitations for an indefinite amount of time and commencement is defined by state law as to whether commencement is defined by the filing of the claim with the court or whether commencement requires the parties be served, this approach is followed by the 8th Circuit *see Moore Co. of Sikeston v. Sid Richardson Carbon & Gasoline Co.* “the filing of the complaint in and of itself, was a commencement of the action sufficient to toll the statute of limitations”, 10th circuit, *see Vest v. Bossard*, “the federal court is obligated in civil rights actions under 42 U.S.C. section 1983, to apply the forum state’s statute of limitations and its tolling rules”, and several other circuits follow this approach to tolling.

The second conflicting interpretation of tolling by commencement of an action, being commencement of an action does not toll the Statute of Limitations as ruled by the second circuit in this claim and the 4th circuit, *see Shofer v. Hack Co.*, and *Woodson v. Allstate Insurance Co.* several other circuits follow this approach only allowing equitable tolling to be granted in certain rare circumstances or tolling is granted when statutory provisions expressly allow.

Washington State Legislature "9th Circuit" is one of the states that expressly decrees under RCWs title 4 Chapter 4.16 Section 4.16. 170 reads as follows: " For purposes of tolling any statute of limitation an action shall be deemed commenced when complaint is filed, or summons is served whichever occurs first"..." Most states legislature does not make that clear provision. Connecticut legislature does not, but Connecticut case law provides that commencement of an action does toll the statute of limitations *see Raynor v. Hickock Realty Corp.*, relying on *Consolidated Motor line v. M & M Transp. Co.*, "under Connecticut law statute of limitations are tolled by actual service on the defendant" "the Conn Supreme Court has long adhered to the rule that only actual service upon the defendant will satisfy the state statute of limitations", the language of Connecticut law does not resume the running of the statute of limitations once it's tolled by commencement of an action. Blacks Law Dictionary Tenth Edition p. 1716 Defines Toll ,vb, 1.To annul or take away 2. Of a time period: to stop the running of: to abate toll the limitations period", reasonably, if commencement of an action tolls the statute of limitation it should annul or take it away, or stop the running of or abate limitation period.

Tolling of the statute of limitation is a substantive right *see Jinks v. Richland County S.C.,*. The 4th Circuit does not allow tolling by commencement of action *Woodson v. Allstate Insurance Co. and Shafer v. Hack Co.* "commencement of an action does not toll the statute of limitation". The 2nd Circuit in this present case did not rule the statute of limitations was tolled.

The two different approaches in both of these legal doctrines yield two materially different outcomes; in one case a different operation of tolling depending on the opposing interpretations of tolling by commencement of an action and in the other case two different applications of preclusive effect depending upon the interpretation. Consider a plaintiff who is fired from her job on March 1, 2001. She files a timely lawsuit in federal court within the allowable statute of limitations period on February 1, 2004 alleging violations of Title 42 as well other state and federal claims. She believes the statute of limitations is now permanently tolled by commencement of the action because state law in the state she filed her action provides tolling by commencement of an action and does not resume the limitations period, *see American Pipe and Construction v. Utah*, and *Burrett v. New York Central R. Co.*, "Congress thereby recognized that the filing of a lawsuit "ITSELF SHOWS THE PROPER DILIGENCE" on the part of the plaintiff which statute of limitations were intended to insure" and *Chardon v. Fumero Soto*, "Congress in 42 U.S.C. section 1983 has specifically directed the courts, in the absence of controlling federal law, to apply state statute limitations and state tolling rules..." The district court dismisses the plaintiff's title 42 claim by summary judgment on February 9 2009, She then files a timely appeal with the appellate court alleging numerous errors in the

summary judgment, but the appeal is dismissed by the Court Clerk because a fee waiver was not delivered; citing default based on “*Civil Appeals Management Plan*” deflects.

If filed in Washington State “9th Circuit” or the 8th Circuit see *Moore Co. of Sikeston v. Sid Richard son Carbon & Gasoline* “the filing of the complaint in and of itself is sufficient to toll the statute of limitations” or the 10th Circuit under tolling by commencement of action approach the statute of limitation has already been tolled and the plaintiff can file a motion with the Appeals Court to reopen the case, but if that motion is denied she should have an option of refiling the action with the district court without being time barred. If filed in Ohio 1st Circuit see *Byers v. Dobies*, “Held “the statute of limitations stops running when plaintiff filed his Petition”. The 5th Circuit see *Taylor v. United Parcel Serv. Inc.*, and 7th Circuit see *Collins v. Village of Palatine, Illinois* both toll by commencement of an action. By contrast if filed in the 2nd, 4th or 11th Circuits under the equitable tolling only or tolling only if statutory provisions expressly allow approach her claim is now forever time barred and referring to class actions the 6th Circuit quoted in a class action see *Stein v. Regions Morgan Keegan*, “this court declined to extend American Pipe tolling to plaintiffs who file individual actions before the district court rules on class certifications...”.

Moreover, under “res judicata” strict adherence to preclusive grounds approach as followed by the 2nd Cir *Monahan v. N.Y.C. Dept. of Corr.*, and several other circuits if: 1. The previous action involved an adjudication on the merits; 2. The previous action involved the plaintiff or those in privity with them, and 3. The claims asserted in the subsequent action were, or could have

been, raised in the prior action, her claim is forever barred by “res judicata” This approach is followed by the 6th Circuit, *see Ausable River Trading Post v. Dovetail Solutions* “under Michigan law, a second, subsequent action is barred by “res judicata” when; 1. The prior action was decided on the merits, 2. Both actions involve the same parties or their privities 3. The matter in the second case was, or could have been, resolved in the first” the 3rd Circuit follows this approach also *see Fields v. City of Salem Housing Authority*,. the 5th Circuit also follows this approach but has noted “tension in our precedents” *see Hacienda Records v. Ruben Ramos*, noting “Two different approaches” one being” a strict approach more flexible on finality” ie “the three elements of Collateral estoppel are: 1. Issue at stake must be identical to the one involved in the prior action 2. The issue must have been actually litigated in the prior action 3. The determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action”, second “the rigid approach stopping short of requiring a judgment be appealed to be final” “a more rigid approach equates finality for collateral estoppel purposes with the final-decision requirement for purposes of appeal pursuant to 28 U.S.C. section 1291””under that approach “if a decision is not appealable under 28 U.S.C. section 1291, it is probably not final for collateral estoppel purposes” , By contrast other Circuits follow the approach the judgment is not final until all appeals have been exhausted or exceptions to preclusive effect approach the plaintiff’s claim may be allowed to be refiled in the District Court where she first filed the original action if the case passes the appropriate criteria “unappealed judgment” was the case reviewed on appeal or possible other allowable exceptions to preclusive effect. If her action was filed in Indiana federal court “ the 7th

Circuit” following Indiana law judgment must be final, see *Mains v. Citibank*, citing *Indianapolis Downs, LLC v. Herr*, “1. Whether the party in the prior action had full and fair opportunity to litigate the issue and 2. Whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case” *Mains* “ in order for issue preclusion to apply under Indiana law, the rendering court’s decision must be final Indiana courts rely on “American Law Institute’s” Restatement (second) of judgments section 13, in making that determination As we put in *Haber v. Biomet Inc*, 578 F.3d 553, 556 (7th Cir. 2009) The Indiana courts use a holistic analysis of finality; they focus on the nature of the judgment itself and specifically whether it is sufficiently firm and non-tentative”

Restatement (second) of judgments section 13 comment b. p. 133 “Thus when “res judicata” is in question a judgment will ordinarily be considered final in respect to a claim, if it is not tentative, provisional or contingent and represents the completion of all steps in the adjudication of the claim by the court,...” comment g. p. 135 “the requirement of finality of judgment is interpreted strictly”; p.136 “for finality determination ‘that the decision was subject to appeal or was in fact reviewed on appeal, are factors supporting the conclusion that the decision is final for the purpose of preclusion.” See *Catlin v. United states*, 324 U.S. 229, 233 (1945). Under the 1st Circuit approach her new action would not be barred by claim preclusion requiring a judgment be final for preclusive effect; *Universal Insurance Co. v. Office of Insurance Commissioner, Cruz-Colon, Commonwealth of Puerto Rico*, 1. Existence of a prior judgment on the merits that is “final and unappealable” 2. A perfect identity of thing or cause between both actions 3. Perfect identity of the parties and the capacities in which they acted” *Berrios-Romero*

v. Estado Libre Asociado De Puerto Rico, “Supreme Court of Puerto Rico recognizes a great flexibility on application of the doctrine of res judicata”. Under this approach to “res judicata” this plaintiff can most likely be allowed to refile her claim in the same district court where she first filed her claim without being barred by preclusive effect.

Finally, the decision here warrants review because it is wrong on both doctrines “res judicata” and tolling of statute of limitations by commencement of an action. The approach adopted by the 2nd Circuit Court of Appeals is contrary to the State law regarding Tolling in Connecticut see *Raynor v. Hickock Realty Corp* and *Consolidated Motor Lines, Inc. v. M & M Transp. Co.*

commencement of an action tolls the statute of limitation without any provisional language to resume the running of the limitations period, and at odds with the policy choices Congress made as cited by this Court’s decision in *Chardon v. Fumero Soto*; “Congress in 42 U.S.C. section 1983 has specifically directed the courts, in the absence of controlling federal law, to apply state statute of limitations and state tolling rules unless they are “inconsistent with the constitution and laws of the United State”” Although some circuits have opted to resume the running of the limitations period at various times Connecticut does not have that language for tolling statute of limitation by commencement of an action. Furthermore the 2nd Circuits decision is inconsistent with the manner in which this Court has long understood the application of “res judicata” and final judgments, see *B and B Hardware v. Hargis Industries*, “Restatement (second) section 27 P. 250 (1980) see also id. Section 28 at 273 (listing exceptions

such as whether appellate review was available or whether there were “differences in the quality or extensiveness of the procedures follows”

The Questions Presented are Important.

Review is also warranted because the questions presented are important these doctrines go to the basic issue of federal jurisdiction: when can a plaintiff refile a claim in the same District Court after the claim is dismissed without prejudice by the District Court and does the filing of the first claim toll the statute of limitation. These issues are not merely a hypothetical federal-court puzzles. They arise in every case in which a district court ultimately declines to accept cases that have been previously filed by a plaintiff exercising his or her constitutional rights, and it will continue to arise until it is resolved by this Court.

It is particularly important to have a definitive answer to when “res judicata” precludes a claim from moving forward and moreover a correct definition of “final judgment” for purposes of “claim preclusion/collateral estoppel” when the efficient straightforward operation of “res judicata” is thwarted when there are two conflicting legal definitions of “final judgment” creating two opposing rules regarding the preclusion effect.

Furthermore, “the commencement of the state suit fulfilled the policies of repose and certainty inherent in the limitation provisions and tolled the running of the period” “Congress thereby recognized that the filing of a lawsuit “ITSELF SHOWS THE PROPER DILIGENCE” on the part of the plaintiff which statutes of limitations were intended to insure” *Burnett v. New York Central*

R. Co. and Herb v. Pitcaim both quoted in *American pipe and Construction Co. v. Utah*. also “Congress in 42 U.S.C. section 1983 has specifically directed the courts, in the absence of controlling federal law, to apply state statute of limitations and state tolling rules” *Chardon v. Fumero Soto*, Additionally, “the tolling of limitations periods falls on the “substantive” side of the line” *Jinks v. Richland County, S.C.*,. That interest in an efficient straightforward tolling application is thwarted when there are two conflicting legal rules for tolling statute of limitations by commencement of an action specifically in 1983 cases.

The split on both of these legal rules also present a significant opportunity for plaintiffs to forum shop to get the benefits of application of the rule which best suits them which can in turn overload some district courts with filing far exceeding other districts.

CONCLUSION

The petition for writ of certiorari should be granted

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher Everson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Christopher Everson, Pro Se Petitioner

Date: Jan 19, 2018