

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Kelly H. Wilson, et al. — PETITIONER
(Your Name)

vs.

Cynthia Zubiate, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KELLY H. WILSON

(Your Name)

P.O. Box 705

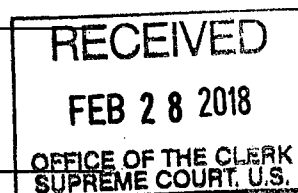
(Address)

Soledad, CA 93960

(City, State, Zip Code)

None Available

(Phone Number)



QUESTION(S) PRESENTED

Under 42 U.S.C. §1997e(a) of the Prison Litigation Reform Act (PLRA) when an agency determines it has no jurisdiction over the issue on appeal at the final level of review and then cancels the appeal:

- (1) is the permissive procedure to separately appeal the cancellation an "available" remedy when there is no possibility of regaining jurisdiction?
- (2) in such a case are administrative remedies "exhausted" if the cancellation is not appealed because although the procedure is on the books it is "not capable of use for the accomplishment of a purpose"?
- (3) is it a violation of federal law to apply conflicting exhaustion and cancellation regulations in such a way as to defeat the PLRA exhaustion requirement and impede the right to petition the government for a redress of grievances?
- (4) does California's regulation 15 CCR §3140(b) for processing Veterans' Benefits checks for incarcerated veterans violate controlling federal law?

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:

Plaintiff-Petitioner

Kelly H. Wilson, on behalf of himself and all others similarly situated

Defendants-Respondents

Cynthia Zubiarte

William Jordan

C. Martinez

Marion E. Spearman

Jeffrey Beard

California Department of Corrections and Rehabilitation

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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 G 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 F 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 November 30, 2017.

☒ 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

The following provisions, in relevant part, were in effect during the 2013-2014 time period of Wilson's appeal:

United States Constitution, First Amendment

...the right of the people...to petition the government for a redress of grievances.

42 U.S.C. §1997e(a) Prison Litigation Reform Act

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

38 U.S.C. §5701 Confidential nature of claims (Veterans' Benefits)

- (a) All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Secretary...shall be confidential and privileged, and no disclosure thereof shall be made except as provided in this section.
- (b) The Secretary shall make disclosure of such files, records, reports, and other papers and documents as are described in subsection (a) of this section as follows:
 - (1) To a claimant or duly authorized agent or representative of a claimant as to matters concerning the claimant alone....

California Code of Regulations, Title 15

§3140 Funds Enclosed in Correspondence

- (b) Generally, inmates are not eligible to receive...Veteran Affairs Benefits....
 - (1) A facility representative shall be appointed by the Associate Warden, Business Services, to assist outside agencies in determining an inmate's eligibility.
 - (2) Mailroom staff shall deliver all received...Veterans Affairs Benefits...to the Inmate Trust Office. The Accounting Officer shall notify the facility representative that checks are being held pending determination of eligibility of the inmates to receive the checks. The facility representative shall notify the appropriate agency.
 - (3) Unauthorized checks shall be returned to the appropriate agency.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (cont'd)

§3084.1 Right to Appeal

- (b) Unless otherwise stated in these regulations, all appeals are subject to a third level of review, as described in section 3084.7, before administrative remedies are deemed exhausted. [] In addition, a cancellation or rejection decision does not exhaust administrative remedies.

§3084.6 Rejection, Cancellation, and Withdrawal Criteria

- (a) Appeals may be rejected pursuant to subsection 3084.6(b), or cancelled pursuant to subsection 3084.6(c), as determined by the appeals coordinator.
- (3) At the discretion of the appeals coordinator or third level Appeals Chief, a cancelled appeal may later be accepted if a determination is made that cancellation was made in error or new information is received which makes the appeal eligible for further review.
- (c) An appeal may be cancelled for any of the following reasons....:
 - (1) The action or decision being appealed is not within the jurisdiction of the department.
- (e) Once cancelled, an appeal shall not be accepted except pursuant to subsection 3084.6(a)(3); however, the application of the rules provided in subsection 3084.6(c) to the cancelled appeal may be separately appealed. If an appeal is cancelled at the third level of review, any appeal of the third level cancellation decision shall be made directly to the third level Appeals Chief.

§3084.7 Levels of Appeal review and Disposition

- (a) All appeals shall be initially submitted and screened at the first level unless the first level is exempted. []
- (b) The second level is for review of appeals denied or not otherwise resolved to the appellant's satisfaction at the first level....[]
- (c) The third level is for review of appeals not resolved at the second level....
- (d) Level of staff member conducting review.
 - (3) The third level review constitutes the decision of the Secretary of the California Department of Corrections and Rehabilitation on an appeal.... The third level of review exhausts administrative remedies; however, this does not preclude amending a finding previously made at the third level.

STATEMENT OF THE CASE

In June 2013 petitioner Kelly Wilson, a Viet Nam veteran incarcerated at Correctional Training Facility (CTF) within the California Department of Corrections and Rehabilitation (CDCR), received notice from the Oakland Regional Office of the United States Department of Veteran Affairs (VA) granting benefits for claims filed in June 2011. The notice informed that under federal law the VA was "withholding part of your service connected compensation based on your incarceration." Accordingly, Wilson was awarded a monthly payment of \$129 and a backpayment of \$2,913. (Appendix A, VA Benefits Notice.)

In July 2013 VA checks in the above amount were mailed to Wilson. Pursuant to Title 15 of the California Code of Regulations (15 CCR) the CTF mailroom delivered those checks to the Inmate Trust Office for processing. Once there, the Accounting Officer was to notify the appointed facility representative that checks were being held pending determination of Wilson's eligibility to receive them. The facility representative in turn was to notify the VA. 15 CCR §3140(b). (The claim that this procedure violates the Supremacy Clause and benefit protections under 38 USC §§5301, 5905, et al. in Wilson's Second Amended Class Action Complaint was not reached in subsequent decisions.)

Instead, in August 2013 the Accounting Officer returned Wilson's checks to the Oakland VA office stating "this inmate is not eligible for full VA benefits." However, neither the Accounting Officer nor the facility representative first verified whether the amounts sent to Wilson were adjusted and authorized for incarcerated veterans. (Appendix B, Trust Accounting letter of August 12, 2013.)

Meanwhile, Wilson inquired into why he was not receiving his awarded benefit checks (see, e.g., Appendix C, Soledad Veterans Service Office letter) and in December 2013 he timely began the CDCR inmate appeal process per 15 CCR §3084 et seq. The CTF First and Second Level appeal responses confirmed that the Trust Office returned Wilson's checks to the Oakland VA office. Both levels also responded to the merits of Wilson's

STATEMENT OF THE CASE (cont'd)

requested action to deposit benefit checks to his trust account by instructing Wilson to contact the Oakland VA office. (Appendix D, CTF Appeal No. CTF-S-13-02207 First Level and Second Level Responses.)

In March 2014 Wilson timely submitted his appeal to the third and final level for review on behalf of the CDCR Director. The Third Level Review (TLR) summarized the issues and reached the merits of Wilson's requested action by again repeating that the CTF Inmate Trust Office returned his checks to the Oakland VA office and found that Wilson "was appropriately instructed to contact the Oakland VA Office for additional questions or concerns regarding his eligibility." (Appendix E, TLR dated May 12, 2014.)

Of course, Wilson was not questioning his eligibility for benefits or the reduced amount paid to inmates given his earlier notice from the Oakland VA office. Yet after admitting to the return of the otherwise authorized checks the Third Level Review **cancelled** Wilson's appeal by stating "The action or decision being appealed is **not within the jurisdiction** of the Department." (Id., Appendix E.)

At this point, the CDCR appeal regulations revealed a flaw as written and applied which defeated Wilson's exhaustion of "such administrative remedies as are available" under 42 USC §1997e(a) and impeded his petition for a redress of grievances.

First, 15 CCR §3084.1(b) provides "Unless otherwise stated in these regulations, all appeals are **subject to a third level of review**, as described in section 3084.7, **before administrative remedies are deemed exhausted.**" In turn, section 3084.7(d)(3) provides that after a first and second level review "The third level of review **exhausts administrative remedies;....**"

But §3084.1(b) goes on to state "a cancellation or rejection decision does not exhaust administrative remedies." Elsewhere, 15 CCR §3084.6(e)

STATEMENT OF THE CASE (cont'd)

provides "Once cancelled, an appeal shall not be accepted...; however, the application of the rules provided in section 3084.6(c) to the cancelled appeal may be separately appealed." A lack of jurisdiction is one of the "rules" provided in subsection 3084.6(c) but Wilson knew the VA process and chose not to separately appeal the cancellation.

The argument is that Wilson's appeal was accepted by the Third Level and "subject to" its review which was consistent with the First and Second Level responses. Only then did CDCR determine it had no jurisdiction over the returned checks and cancel the appeal. Crucially, once Wilson's checks were improperly returned CDCR could not regain jurisdiction given the benefit protections under 38 USC §5701 and §5901 et seq. which prohibit the VA from disclosing or acting upon a veteran's claim with anyone not an agent or representative authorized by the veteran. Loss of jurisdiction was a fait accompli and no further appeal process could change that fact. Thus CDCR put Wilson at "a simple dead end -- with officers unable or consistently unwilling to provide any relief." *Ross v. Blake*, 136 S.Ct. 1850, 1859 (2016) citing *Booth v. Churner*, 532 U.S. 731, 736, 738 (2001).

In sum, Wilson complied with the required process of a Third Level review which rendered administrative remedies "exhausted" pursuant to CDCR appeal regulations and 42 USC §1997e(a). There was no other appeal process capable of use or "available" to obtain relief. Thus, to not separately appeal the lack of jurisdiction cancellation under the permissive regulation was not and could not be a failure to exhaust administrative remedies. *Booth v. Churner*, supra, 532 U.S. at 736 and n.4, 738-739.

Because the lower courts failed to recognize the significance of improperly returning VA checks which relinquished CDCR's jurisdiction and the abusive application of conflicting regulations to cancel Wilson's appeal, CDCR was effectively able to defeat Wilson's federal exhaustion of available administrative remedies and the First Amendment right for which he honorably served. (See Appendix F, U.S. District Court Order Denying

STATEMENT OF THE CASE (cont'd)

Motion to Vacate Judgment filed August 19, 2016; Appendix G, U.S. Court of Appeals for the Ninth Circuit Memorandum filed November 30, 2017.)

This matter should be remanded for determination in light of the above issues or heard by this Court to further develop case law regarding the Prison Litigation Reform Act.

REASONS FOR GRANTING THE PETITION

This petition should be granted to further develop Prison Litigation Reform Act (PLRA) case law to ensure that appeal/grievance regulations and processes cannot conflict with one another or be applied to circumvent or defeat PLRA remedy exhaustion requirements or the First Amendment right to petition and obtain redress for government wrongdoing.

Given that the PLRA already adds a layer of burden, inmates--especially our military veteran inmates--must have appeal regulations and procedures that are unambiguous, fairly applied, and readily capable of protecting rights. The courts must be able to adjudicate a proper outcome.

Lastly, appeal regulations and administrative practices should not be able to reduce a legitimate grievance to an insubstantial process, yield unintelligible or meaningless response, or give advantage to governmental wrongs at the expense of legal or constitutional injury to the appellant. A firm rebuke and solution is therefore needed to quell these recurring and prevalent problems.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kelly Wilson

Date: February 21, 2018