

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

Matthew Winters – Petitioner

vs.

The Cincinnati Insurance Company – Respondent

On Petition for a Writ of Certiorari to
the Utah Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Pro Se

QUESTION PRESENTED

1. Does it violate 14th Amendment Due Process when a case is dismissed with prejudice without findings or further opportunity to a party (*including full opportunity of appeal as a matter of right*) who effectively entered special appearance to challenge jurisdiction?
2. In light of this Court's guidance on the non-jurisdictional nature of flexible claims-processing rules, should a rule of procedure not based on statute but with explicit language about divestiture of jurisdiction be treated as jurisdictional, and can it be overridden by another part of the same rule?

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OPINIONS BELOW

The Court of Appeals issued an unpublished Order of Summary Affirmance. That order, the unpublished trial court order, and the denial of certiorari review by the Utah Supreme Court are included in the Appendix.

JURISDICTION

The Utah Court of Appeals filed its opinion on December 11, 2017. The Utah Supreme Court denied certiorari on March 22, 2018. This Court has jurisdiction per 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

The Due Process Clause of the 14th Amendment, in relevant part:

“... nor shall any State deprive any person of life, liberty, or property, without due process of law...”

The Utah Rules of Civil Procedure, Rule 3, Commence of action, in relevant parts:

(a) How commenced. A civil action is commenced (1) by filing a complaint with the court, or (2) by service of summons together with a copy of the complaint...If the action is commenced by the service of a summons and a copy of the complaint, then the complaint, the summons and proof of service, must be filed within ten days of such service. If, in a case commenced under paragraph (a)(2) of this rule, the complaint, summons and proof of service are not filed within ten days of service, the action commenced shall be deemed dismissed and the court shall have no further jurisdiction thereof...(b) Time of jurisdiction. The court shall have jurisdiction from the filing of the complaint or service of the summons and a copy of the complaint.

Utah Rule of Appellate Procedure 9, Docketing statement, in relevant parts:

(a) Purpose...(2) to identify at least one substantial issue for review. The docketing statement is a document used for jurisdictional and screening purposes. It should not include argument.....(c)(4) A statement of at least one substantial issue appellant intends to assert on appeal. An issue not raised in the docketing statement may nevertheless be raised in the brief of the appellant; conversely, an issue raised in the docketing statement does not have to be included in the brief of the appellant.

Utah Rule of Appellate Procedure 10, Motion for summary disposition, in relevant parts:

(a)(2) Within 10 days after the docketing statement...a party may move: (a)(2)(A) To affirm the order or judgment...on the basis that the grounds for review are so insubstantial as not to merit further proceedings and consideration by the appellate court....(c) Filing of response. The party moved against shall have 10 days from the service of such a motion in which to file a response.

STATEMENT OF THE CASE

This particular case concerns a party who ended up with claim preclusion without relief as a result of denial of Constitutional due process while he followed the plain language of procedural rules and tried to support judicial economy. The Petitioner's currently precluded claims are far less important to him than the due process issues he encountered which he believes should never be the case for anyone in the future.¹ The Petitioner believes such remedy in the future through authoritative answers to certain pertinent questions is more valuable for people generally than what he might achieve for himself individually.

In the end, due process is too important a component of the rule of law and our judicial system for the Petitioner to simply "look away". Substantial justice requires due process. What the Petitioner experienced and the questions he presents involve fundamental aspects of the rule of law that ought to lead to benefit for the many. Towards such end, the Petitioner, unaided by counsel because of circumstance, presents his petition with an understanding that argument about position should be limited at this stage.

In August of 2017, the Petitioner initiated a lawsuit against the Respondent under Rule 3(a)(2) of the Utah Rules of Civil Procedure but did not file all of the items required by the

¹ The claims relate to damage from a vehicle which crashed in his front yard and matters related to it. These claims are not appealed because they were not properly before trial court to consider.

deadline.² Pursuant to Utah rules and clear, definitive Utah case law, the Petitioner treated the case according to plain language, that the case was automatically dismissed and trial court's jurisdiction irrevocably divested.³

Trial court had neither personal nor subject-matter jurisdiction since it was automatically divested of jurisdiction over both the persons and the issues. "[T]o entertain a dispute, a court must have jurisdiction over both the subject matter of the dispute and the individuals involved. If the court lacks either type of jurisdiction, it has no power to entertain the suit" (*Curtis v Curtis*, 1990 UT App, 789 P.2d 717). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause" (*ex parte McCardle*, 74 US 506 (1868)).

Despite the automatic dismissal of the case, the Respondent filed a motion to dismiss with prejudice. The Petitioner responded as he believed was necessary, entering special appearance to note the automatic dismissal and divestiture of court jurisdiction.⁴

On September 29, 2017, trial court dismissed the case with prejudice.⁵ No hearings were held. Trial court did not make specific findings or address the Petitioner's challenge of

² The reasons for not filing proof of service along with the complaint and summons were circumstantial involving multiple factors that are irrelevant as equitable exception does not apply.

³ Service of process having occurred on August 18, 2017 and proof of service was not filed by August 28, 2017. Rule 3(a)(2) clearly states that an action is automatically dismissed and the court's jurisdiction divested if a complaint, summons, and proof of service (all 3) are not filed within ten days when litigation is commenced by service of a summons.

⁴ The Petitioner filed response to advise the court that there was no longer an action. While he did not specifically use language of "special appearance" in his limited response, it is effectively indicated in the substance of the response. No response would not have supported judicial economy since court records did not show that commencement of litigation had occurred via service of a summons.

jurisdiction. The case simply moved from Petitioner's limited appearance to note divestiture of jurisdiction to an order effecting claim preclusion without any further opportunity for the Petitioner's voice to be heard.

The Petitioner timely appealed on October 18, 2017 as a matter of right under Utah Code §78A-3-102. Thereafter he filed his docketing statement, which under Utah Appellate Rule 9, was not required at that time to contain all issues being appealed. Having sufficiently demonstrated at least one legitimately appealable issue in the docketing statement, the Petitioner should have had further opportunity to present issues for appeal.

On November 27, 2017, the Respondent moved for summary disposition, incorrectly claiming there were insubstantial issues to merit full appeal. The Petitioner responded on December 1, 2017 in accordance with Utah Appellate Rule 10, sufficiently demonstrating grounds for the appeal to continue by providing numerous arguments that in the very least showed the appeal was not insubstantial. This included argument that Utah already had case law in *Harper v. Froerer*, 2009 UT App 337 that the Petitioner had referenced in trial court and demonstrated that trial court had been divested of jurisdiction. Again at this stage, the Petitioner did not present a full briefing of all appealable issues since it was not time to do so. The Petitioner responded to demonstrate the invalidity of the Respondent's Motion for Summary Disposition that by rule did not require articulation of all appealable issues.

Despite all this, on December 11, 2017, the Utah Court of Appeals issued a summary affirmance decision claiming that trial court had jurisdiction. While asserting that the filing

⁵ Trial court did not state dismissal with prejudice in the order but granted Respondent's motion for dismissal with prejudice. The case disposition was later found to indicate dismissal with prejudice.

of the complaint invoked jurisdiction under Utah Rules of Civil Procedure 3(a)(1), the appellate court did not enter findings that addressed the Petitioner's many arguments or sufficiently determine jurisdiction of trial court. Further, the appellate court also stated that the *Harper* case did not apply without articulating any basis for such ruling.

In *Harper*, the complaint had also been filed, but that panel of the Utah Court of Appeals held that “*the district court was later divested of jurisdiction once the [Petitioners] failed to file proof of service within ten days of service as required by rule 3(a)(2)*”; and earlier: “[i]f the complaint, summons, or proof of service are not filed within ten days of service, the district court is required to dismiss the complaint for lack of jurisdiction”. In *Harper*, it was ruled that trial court was divested of jurisdiction of a case without pertinent difference to the Petitioner's case. In both cases, a complaint was filed in an action commenced with the service of a 10-Day Summons where proof of service was not filed within the 10-day deadline.

The Utah Supreme Court has instructed the Utah Court of Appeals to apply stare decisis to decisions of panels of the latter court (*State of Utah v. Thurman*, 1993 UT, 846 P.2d 1256). Such horizontal stare decisis made it improper for the Utah Court of Appeals to summarily affirm the trial court decision when it effectively functions to overturn *Harper* even while the appellate court stated *Harper* didn't apply without providing findings.

On an appeal as a matter of right, the Petitioner asserts that procedural due process at least required that he be allowed full opportunity of appeal and briefing, where the Utah Court of Appeals did not enter rulings that sufficiently addressed arguments already on file or how the *Harper* case did not apply. As with trial court, the appellate court's rulings were absent sufficient findings to justify the decision; due process was compromised.

The Petitioner timely petitioned the Utah Supreme Court for certiorari review and presented two questions.⁶ The petitioner was denied on March 22, 2018. This petition timely follows on Constitutional grounds.

This Court's rules instruct statement on preservation of federal questions. The Petitioner believes he has done so to the extent there was opportunity. In trial court, the Petitioner noted lack of jurisdiction (*which was both personal and subject-matter*); trial court did not enter findings. At the appellate stage, the Petitioner began the appeal noting the issue of jurisdiction, but he was denied the full opportunity of appeal which the Petitioner believes was further violation of Constitutional due process. The Utah Court of Appeals issued limited findings. In his certiorari petition to the Utah Supreme Court, the Petitioner included concerns about due process. It is the Petitioner's understanding that actual questions presented for review must be limited in number. Both questions pertained to jurisdiction. The petition was denied. The Petitioner has included further statement on preservation of federal questions in the third part of the section on "Reasons for Granting the Writ".

In summary, the trial court failed to enter findings on jurisdiction and the appellate court improperly denied full opportunity of appeal as a matter of right, thereby violating due process. And since trial court never had jurisdiction, due process was violated.

⁶ The questions presented were these: 1) Does Utah R. Civ. P. 3 ("Rule 3") allow the filing of a complaint and service of a summons to both commence a lawsuit within the same ten day period, while also allowing the court to ignore divestiture of jurisdiction when the requirements under Utah R. Civ. P. 3(a)(2) are not met? And 2) Can a court convert the special appearance of a party to note divestiture of court jurisdiction into general appearance and effect res judicata without giving that party further opportunity to defend?

REASONS FOR GRANTING THE WRIT

A. Because the Questions Exists Unaddressed and Are Timely: Procedural Due Process Between Jurisdiction Challenge and Claim Preclusion Needs Guidance

To-date, after substantial search, the Petitioner has neither found the questions addressed nor splits in appellate opinions. Various searches reveal components or related aspects of the Petitioner's questions have been considered. Cases regarding a state's personal jurisdiction over a non-resident as well as ones addressing jurisdiction, appeals, and timing of filings seem to be many. But the Petitioner has not found authoritatively addressed the intersection of a challenge to jurisdiction and minimums necessary to ensure due process after such a challenge, whether or not such challenge is labeled as "special appearance".⁷ And the second question seeks for additional clarification on recent guidance from this Court.

The Petitioner has found cases addressed by this Court that confirm the importance of questions on jurisdiction and due process. But there may be a gap in guidance on how trial courts should handle challenges to jurisdiction to ensure that due process and judicial economy are not compromised. Therefore, the Petitioner presents the question as one needing authoritative opinion and guidance to ensure Constitutional procedural due process occurs between any challenge to the jurisdiction of a court and a decision effecting claim preclusion before remedy.

⁷ If what the Petitioner has reviewed thus far is indicative, the term "special appearance" may be "going out of style" with some states ceasing to use the designation within their rules and procedures. Some employ specific rules and procedures for special appearance, such as Texas, but the Petitioner has not found case law addressing the question he presents for consideration.

Some of the fundamental components underlying the Petitioner's due process question have been important enough for this Court to address as recently as a few months ago. In *Hamer v. Neighborhood Housing Services of Chicago*, US, No. 16-658, Nov. 8, 2017, this Court addressed and summarized some issues including: deadlines per statute as jurisdictional vs. court-made rules as non-jurisdictional (*Bowles v. Russell*, 551 U. S. 205, 210-213 (2007) and *Reed Elsevier, Inc. v. Muchnick*, 559 U. S. 154, 161 (2010)); mandatory claim-processing rules vs. jurisdictional limitations (*Henderson v. Shinseki*, 562 U. S. 428, 435 (2011) and *Sibbach v. Wilson & Co.*, 312 U. S. 1, 10 (1941) ; and historical "less than meticulous" usage of jurisdiction terms (*Kontrick v. Ryan*, 540 U. S. 443, 454 (2004)). The Petitioner's due process question now seeks to extend the Court's clarifications into an unaddressed arena of due process requirements after a party has sought to challenge jurisdiction with a limited appearance to support judicial economy without compromising lack of submission to jurisdiction that has been challenged.

The first question presented ultimately does not rest upon any particular interpretation of the Utah rule in light of the Court's conclusions and counsel in the foregoing cases. But there is a timeliness to the Petitioner's concerns about procedural due process after challenge of jurisdiction pursuant to a rule of procedure which may include confusing usage of the word "jurisdiction"; may be truly jurisdictional or more of a "claim processing" rule; and which may be more akin to a statute-based limit than a flexible procedural rule that could simply be ignored or subject to equitable exceptions.

That the Court has as recently as 2017 addressed some of the fundamental components forming a basis for Petitioner's concerns of due process violations leads him

to conclude the question he presents is timely and important. Further, what the Petitioner has encountered in a rule may pose an exception to this Court's clarifications for determining whether a rule is jurisdiction-limiting. In the case of the Utah rule, it does not merely set a deadline for filing. It explicitly references jurisdiction. As this Court analyzed this year about a statute in *Patchak v. Zinke*, 138 S.Ct. 897 (2018), the Petitioner asserts the Utah rule “uses jurisdictional language, [therefore, it] imposes jurisdictional consequences”.

Therefore, to the extent that existing opinions and authority touches on aspects or specific components of the Petitioner's questions, they appear to not address the Petitioner's actual questions and concerns. As far as he can tell, that leaves unaddressed the core of the Petitioner's question on whether Constitutional due process is achieved if insufficient procedural or actual opportunity exists between a challenge of jurisdiction and dismissal of claims for relief with prejudice that effect claim preclusion, denying real opportunity for adjudication. And on the substance and importance of that question ...

B. Because the Questions are Substantive and Important: Substantial Justice Cannot Be Done Without Procedural Due Process and Further Guidance

If the end goal is that substantial justice be done, it is best or most likely achieved when all parties have full opportunity to have their voices heard. While procedural rules may facilitate docket management and overall adjudication of claims, to the extent procedural rules deny full and real opportunity for voices to be heard, it is difficult to reconcile such with the end goal of substantial justice. The point of *res judicata* or claim preclusion is “that matters once tried shall be considered forever settled as between the

parties' *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 75 L.Ed. 1244 (1931)" (*Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292). But claim preclusion reached prematurely defeats the purpose; a party who is never heard is very unlikely to consider claims to be settled.

From the Petitioner's perspective, when a challenge to jurisdiction is made, it must be addressed first before any case continues. Jurisdiction is too fundamental. If jurisdiction does not exist, all work on any case by parties and the court becomes an incredible waste of resources since no adjudication is actually possible absent jurisdiction. As this Court noted, our courts have recognized the invalidity of judgments of courts lacking jurisdiction "long before the Fourteenth Amendment was adopted", (*Burnham v. Superior Court of CA*, 495 U.S. 604 (1990)). And quite significantly in *Burnham*, this Court went on to state: "[i]n *Pennoyer v. Neff*, 95 U. S. 714, 732 (1878), we announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment as well".

Further from the Petitioner's perspective, lack of specific findings by a court on a challenge to jurisdiction is synonymous with failing to address the challenge to jurisdiction entirely. It is difficult to see how such would not be an abuse of discretion each and every time, severe enough to compromise due process.⁸ Only after the challenge to jurisdiction should litigants and courts proceed.

⁸ As a parallel: *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) on lack of findings with denying leave to amend. ("...outright refusal...without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the... [r]ules..".)

In the Petitioner's case in trial court, his challenge to jurisdiction was not addressed because trial court did not rule or provide any findings. If trial court had a basis for establishing its jurisdiction, then on such specific finding and ruling, the Petitioner should have had opportunity to enter general appearance and further dispute the Respondent's motion to dismiss with prejudice.

But only at such a time. Absent specific finding of jurisdiction, there was no basis for the Petitioner to respond fully to the Respondent's dismissal motion since that motion was predicated upon the existence of jurisdiction, which neither the Respondent nor trial court had established. When a party specifically enters special or limited appearance, effectively or literally-labeled, that party should not have to respond to any motion in a manner that would be expected of a party who has generally appeared. Whether or not any state has particular procedures for special appearance does not seem wholly relevant.

The idea that any party should have to choose between submission to jurisdiction the party doesn't believe exists in order to challenge that jurisdiction or simply ignore judicial proceedings with the hope it can be successfully challenged later is very difficult to reconcile with the rule of law. Our judicial system is predicated upon a party responding to an action whether or not the party believes the action has merit. Non-response is not a viable option. Determinations are made against a party without that party present. It necessitates appeal of a matter that might be addressed in trial court. Both options, to submit to potential non-existent jurisdiction or ignore proceedings, compromise due process and judicial economy.

Further, it is not only a matter of the Petitioner considering judicial economy to have responded as he did. Any further response might have been deemed to constitute general appearance and the Petitioner's subjection of himself to personal jurisdiction when the Utah rule explicitly indicated trial court had been divested of any jurisdiction and was prohibited from any further consideration of the original claims or motions to preclude them (*dismissal with prejudice*). As this Court noted not too long ago in *Wellness International Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015), there are situations where consent may lead to adjudication. ("Adjudication by consent is nothing new.").

If trial court never had jurisdiction and that lack of jurisdiction was completely inflexible as a matter of law, adjudication even by consent would have been void. If, as the Petitioner has asked this Court, the Utah rule should be treated as jurisdictional even if it not based on statute, then trial court never had jurisdiction. "Failure to comply with a jurisdictional time prescription, we have maintained, deprives a court of adjudicatory authority over the case, necessitating dismissal.." (*Wellness v. Sharif*, at (I)(A)). The Petitioner's response in trial court was the best possible action to support judicial economy and seek to avoid confusion about trial court's lack of jurisdiction.⁹

All of the foregoing is intended to convey grounds for issuing a writ to help ensure that some hurdles to the rule of law and due process might be avoided for others in the future. These matters are not unique to one type of case. They have implications for people coming to courts throughout the country. Without due process, our entire legal

⁹ Even filing a notice of dismissal would be problematic since it could be seen as general appearance in a case without court jurisdiction and implies an open case when in reality the disposition of the case should have already reflected automatic dismissal.

system and the rule of law fails. Without due process, there is no rule of law. Jurisdiction is the most fundamental aspect of due process. Any order absent jurisdiction is not due process. Jurisdiction, when challenged, must be addressed. A party claiming jurisdiction exists must demonstrate it. When challenged and unaddressed by a court, jurisdiction is not established and orders effecting judgment are void.

When a party is put "out of court" for acting in consideration of judicial economy and following rules of procedure, due process has been compromised. When a party is expected to follow procedure differently than is stated in rules of procedure, due process has been violated. There is no due process if a party is penalized for following any particular process as stated in rules of procedure or is expected to follow them differently.

C. Because the Question Has Been Preserved: the Petitioner's Case is an Opportunity for Important Guidance for the Benefit of Many

A violation of a Constitutional right occurs whether or not the violated person is simultaneously aware of the violation and right. And a Constitutional right exists whether or not the protected individual names the Constitutional right.

That the Petitioner did not specifically name a Constitutional violation at every stage is not necessarily a hurdle that cannot be overcome. At early stages, the Petitioner was not thinking that an appeal to the United States Supreme Court would become necessary. When the Petitioner notified the court of the automatic dismissal of the case pursuant to Utah rules, he expected the disposition of the case would be corrected. Later, given clear Utah case law, he expected the issue would be fixed with the Utah Court of Appeals rather than be denied full opportunity of appeal as a matter of right under Utah

law. The Petitioner could not cite a Constitutional issue in trial court. At the appellate stage, he was never allowed to reach the stage of presenting all issues on appeal. The Petitioner took the cases, one step at a time.

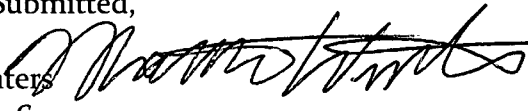
But now, due process has been violated in a myriad ways. And the specifics of the Petitioner's original claims for relief pale in comparison to the implications of due process for many people across many types of cases. Therefore, the Petitioner believes issuance of a writ would yield widespread benefit on fundamental Constitutional issues allowing his case to be a vehicle to advance future clarity and justice for the many.

CONCLUSION

For the foregoing reasons on the questions presented that he believes are timely and beneficial for many, the Petitioner humbly requests an issuance of the writ.

Respectfully Submitted,

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 , June 20, 2018

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