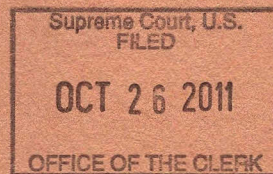


No. 10-1547



IN THE
SUPREME COURT OF THE UNITED STATES

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TYRONE DUFF, LINDA DUFF,
Petitioners,

v.

RICHARD W. LEWIS, PhD.,
Respondent.

—————◆—————
On Petition For Writ of Certiorari To The
United States Court Of Appeals For the Ninth Circuit

—————◆—————
PETITION FOR REHEARING

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STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

	Page(s)
STATEMENT PURSUANT TO RULE 29.6	i
TABLE OF AUTHORITIES	iii
PETITION FOR REHEARING	1
ARGUMENT	1
CONCLUSION	6
CERTIFICATE OF COUNSEL	7

TABLE OF AUTHORITIES

<u>Cases:</u>	Page(s)
<i>Adickes v. S.H. Kress & Co.</i> , 398 U.S. 144, 26 L.Ed. 2d 142, 90 S.Ct. 1598 (1970)	passim
<i>Briley v. State of California</i> , 564 F.2d 849 (9 th Cir. 1977)	2, 4
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833, 841, n. 5, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998)	4
<i>Frow v. Del Vega</i> , 82 U.S. 522 (1872)	5
<i>Harlow v. Voyager Communications V, Inc.</i> , 127 N.C. App. 623, 492 S.E. 2d 45 (1997)	5
<i>In re First T.D. & Inv., Inc.</i> , 253 F.3d 520, 532 (9 th Cir. 2001)	3, 5
<i>Lasar v. Ford Motor Co.</i> , 399 F.3d 1101 (9 th Cir. 2005)	3
<i>Lugar v. Edmondson Oil Co.</i> , 457 U.S. 922, 929 (1982)	4
<i>Monroe v. Pape</i> , 365 U.S. 167, 5 L. Ed. 2d 492, 81 S.Ct. 473 (1961)	2
<i>Parratt v. Taylor</i> , 451 U.S. 144, 152 (1970)	4
<i>Powell v. McCormack</i> , 395 U.S. 486, 497 (1969)	passim

TABLE OF AUTHORITIES - Continues

<u>Cases:</u>	Page(s)
<i>Siegert v. Gilley</i> , 500 U.S. 226, 232, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991)	4
<i>United States v. Classic</i> , 313 U.S. 299, 326 (1941)	4
<i>West v. Atkins</i> , 487 U.S. 42, 49 (1988)	4

STATUTE

42 USC §1983	passim
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CONSTITUTIONAL PROVISION

Fourteenth Amendment	1, 3
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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, petitioners Tyrone Duff and Linda Duff respectfully petition the Court for rehearing of its order issued October 3, 2011 denying their petition for writ of certiorari.

ARGUMENT

The Constitution and laws of the United States require this Court grant the Duff Defendant's petition for rehearing to determine whether federal subject matter jurisdiction continued to exist before the district court in the Plaintiff's §1983 action against the Duff Defendants after the State Defendants were dismissed with prejudice at summary judgment July 5, 2002. Specifically, where the district court on September 5, 2008 entered judgment in favor of the Plaintiff against the Duff Defendants that now held both the State Defendants and the Plaintiff are the prevailing parties in this §1983 action, which was legally impossible, given the fact, there is only one way both the State Defendants and the Plaintiff could be the prevailing parties in this action for redress under 42 USC §1983, is the case was fixed, the hearings rigged and the outcome predetermined in favor of the State Defendants and the Plaintiff against the Duff Defendants that deprived them of their due process and equal protection rights guaranteed by the Fourteenth Amendment to the Constitution of the United States, which the Ninth Circuit and this Court knowingly affirmed, in violation of the Constitution and rule of law.

There are absolutely no basis in law or fact that would give legal justification for the lower courts and this Court to continue to force the Duff Defendants to remain in the Plaintiff's §1983 action, now over nine (9) years, after his cause of action under color of state law was dismissed with prejudice with the State Defendants at summary judgment July 5, 2002 in contravention with the law passed by Congress and approved by the Senate governing an action for redress under 42 USC §1983 and this Court's opinion in *Adickes v. S. H. Kress & Co.*, 398 U.S. 44, 26 L.Ed. 2d 142, 90 S.Ct. 1598 (1970) that held "under 42 USC §1983, provides civil action for deprivation of civil rights, two elements are necessary for recovery; plaintiff must prove that defendant has deprived him of a right secured by; 'Constitution and laws' of the United States, and that defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom or usage, of any State or Territory; this second element requires that plaintiff show that defendant acted 'under color of law'". See *Monroe v. Pape*, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961). Yet, the district court, in contravention with this Court's holding in *Adickes v. S.H. Kress & Co.* supra, on September 4, 2008 held "the fact the Plaintiff cannot prevail in this action does not affect the court's subject matter jurisdiction" after the State Defendants were dismissed with prejudice at summary judgment on July 5, 2002, where "42 USC §1983 cannot be invoked by purely private conduct". *Briley v. State of California*, 564 F. 2d 849 (9th Cir. 1977).

On the same day, September 4, 2008, the district court entered a second order holding "therefore, since the court dismissed the answering defendants at summary judgment (July 5, 2002, Order (#232)),

the court dismisses Lewis's action against the Duffs with prejudice", citing *In re First T.D. & Inv., Inc.*, 253 F. 3d 520, 532 (9th Cir. 2001), which terminated its subject matter jurisdiction in the Plaintiff's §1983 action against both the State Defendants and the Duff Defendants with prejudice with the entry of summary judgment July 5, 2002, where "[A] case is moot when the issues presented are no longer "live" or the parties lacked a legally cognizable interest in the outcome". *Powell v. McCormack*, 395 U.S. 486, 497 (1969).

The district court then, on September 5, 2008 entered judgment in favor of the Plaintiff against the Duff Defendants now holding both the State Defendants and the Plaintiff are the prevailing parties in this §1983 action, which is legally impossible, given the fact, there is only one way both the State Defendants and the Plaintiff could be the prevailing parties in this action for redress under 42 USC §1983, is the case was fixed, the hearings rigged and the outcome predetermined in favor of both the State Defendants and the Plaintiff against the Duff Defendants that deprived them of their due process and equal protection rights guaranteed by the Fourteenth Amendment.

The district court "created a controversy" against the Duff Defendants "where none existed" (*Lasar v. Ford Motor Co.*, 399 F.3d 1101 (9th Cir. 2005)), when it continued to act in the Plaintiff's §1983 action against them, over nine (9) years, without a cognizable cause of action under color of state law remaining before it after entry of summary judgment July 5, 2002, now holding both the State Defendants and

the Plaintiff are the prevailing parties in this §1983 action, in violation of due process.

The law passed by Congress governing an action for redress under 42 USC §1983 and this Court's opinions in *Adickes v. S.H. Kress & Co. supra* and *Powell v. McCormack supra* held 42 USC §1983 does not allow the district court to continue to act in the Plaintiff's §1983 action without a cognizable cause of action under color of state law remaining before it after the State Defendants were dismissed at summary judgment on July 5, 2002, where 42 USC §1983 cannot be invoked by purely private conduct. See *Briley v. State of California supra*.

The traditional definition of acting under color of law requires that "the defendant have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state law". *West v. Atkins*, 487 U.S. 42, 49 (1988)(quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982); *Parratt v. Taylor*, 451 U.S. 144, 152 (1970). When this is dismissed, as it was at summary judgment July 5, 2002, the district court no longer had subject matter jurisdiction to continue to act in the Plaintiff's §1983 action after his cause of action under color of state law was dismissed with prejudice with the State Defendants a summary judgment. *See, e.g. Siegert v. Gilley*, 500 U.S. 226, 232-233, 114 L.Ed. 2d 277, 111 S. Ct. 1789 (1991); see *County of Sacramento v. Lewis*, 523U.S. 833, 841 n.5, 140 L. Ed. 2d 1043, 118 S.Ct. 1708 (1998). Every action taken by the district court against the Duff Defendants after the entry of summary judgment July 5, 2002 had to be taken against the State De-

defendant as well, who represented the color of state law and are “inseparable” with the Duff Defendants in the Plaintiff’s §1983 action where they were alleged jointly. *See, e.g., In re First T.D. supra; Harlow v. Voyager Communications V, Inc.*, 127 N.C. App. 623, 492 S.E.2d 45 (1997); *Frow v. Del Vega*, 82 U.S. 522 (1872) the principle be applied where the defendants have been alleged only as jointly liable. Where two or more obligors are alleged jointly, it means that they are “undivided” and “must therefore be prosecuted in a joint action against them all”).

After three (3) appeals before the Ninth Circuit and two (2) petitions for writ of certiorari before this Court, the Duff Defendants are still denied the same relief as that of the State Defendants, who were alleged jointly. It violated due process for the Ninth Circuit to remand the Duff Defendants to the district court for further proceedings in the Plaintiff’s §1983 action, after the district court, on September 4, 2008, held “therefore, since the court dismissed the answering defendants at summary judgment (July 5, 2002, Order (#232)), the court dismisses Lewis’s action against the Duffs with prejudice” that rendered the Plaintiff’s §1983 action moot after the State Defendants and the Duff Defendants were dismissed with prejudice at summary judgment July 5, 2002. See *Powell v. McCormack supra*. Specifically, where the district court continue to act in violation of due process, when on September 5, 2008, entered judgment in favor of the Plaintiff against the Duff Defendants that now held both the State Defendants and the Plaintiff are the prevailing parties in this §1983 action, making it legally impossible for the Duff Defendants to obtain relief before the lower

courts, where due process fails to exist, which this Court knowingly affirmed, in contravention with its holdings in *Adickes v. S. H. Kress & Co. supra* and *Powell v. McCormack supra* and the law passed by Congress governing an action for redress under 42 USC §1983 that can only be changed by an act of Congress, rendering this Court's order of October 3, 2011 unconstitutional, which will be address before the House Judiciary Committee.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted and the order of October 3, 2011 vacated.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for petitioners, we hereby certify that this petition for rehearing is presented in good faith and not for purpose of delay.

/s/ _____

Tyrone Duff

/s/ _____

Linda Duff