

In the
Supreme Court of the United States

CLARENCE M. OTWORTH,

Petitioner,

v.

PNC BANK, N.A.,

Respondent.

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

**BRIEF IN OPPOSITION OF RESPONDENT
PNC BANK, N.A.**

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QUESTION PRESENTED

Whether the Sixth Circuit correctly determined that the trial court appropriately used the sanction power provided under Federal Rule of Civil Procedure 16(f) to dismiss Petitioner's action for the repeated failure to obey the trial court's Orders.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29(6), Respondent, PNC Bank, National Association, makes the following disclosure:

PNC Bank, National Association, is wholly owned by PNC Bancorp, Inc., which in turn is a wholly owned subsidiary of the PNC Financial Services, Group, Inc. No single shareholder currently owns more than 10% of The PNC Financial Services Group, Inc.

DIRECTLY RELATED CASES

Pursuant to Supreme Court Rule 15.2, Respondent identifies the following directly related cases not identified in Petitioner's Petition for Writ of Certiorari as otherwise required in Supreme Court Rule 14.1(b) (iii):

Clarence Otworth v. PNC Bank, No. 18-cv-00625, U.S. District Court for the Western District of Michigan. Judgment entered September 26, 2019.

Clarence Otworth v. PNC Bank, No. 19-2188, U.S. Court of Appeals for the Sixth Circuit. Order/Opinion entered July 27, 2020.

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The opinion of the Sixth Circuit Court of Appeals is unreported and unpublished, and reproduced in full in the Appendix attached by Respondent PNC Bank, N.A. at Res.App.1a.



COUNTERSTATEMENT OF THE CASE

Respondent PNC Bank, N.A. (“PNC”) objects to the classification by Petitioner Clarence Otworth (“PETITIONER”) of this matter as one which involves consideration of the impact of the Americans with Disabilities Act on banking institutions through the Fourteenth Amendment, and instead posits that the matter before the Court is instead the Petitioner seeking a Writ of Certiorari to correct a perceived error by the trial court in exercising its powers of sanction pursuant to Federal Rule of Civil Procedure 16(f). Petitioner improperly attempts to convince this Court that the merits of his underlying claim from which this appeal stems serve as ample basis to grant certiorari. However, the procedural history of the trial court action, as well as the contents of the Order from the Sixth Circuit, show that Petitioner is appealing a procedural sanction determination rather than a judgment on the merits of his claim.

Petitioner Clarence Otworth initiated this action in the Western District of Michigan against PNC, complaining of alleged violations of the Americans with Disabilities Act. Res.App.1a-2a. Petitioner pro-

ceeded *pro se* throughout the case, and engaged in several questionable acts which demonstrated a lack of respect—rising to the level of outright contempt—for the trial court’s Orders and procedural guidelines.¹ Petitioner attempted to obtain default judgment following PNC’s Answer, attempted to file several sur-replies without court approval, requested that the trial court appoint him counsel for the purposes of appearance only (*i.e.*, he would continue to draft and file all written filings but did not want to be bothered to have to appear in front of the trial court), attempted to obtain discovery prior to a Rule 16 conference, and once a conference had been set attempted to obtain summary judgment before the conference date. Res.App.2a-4a. Petitioner also attempted to join Congress to the action without citing authority for the same. Res.App.3a. Petitioner next attempted to compel the trial judge to recuse himself on the basis of an unspecified and undemonstrated “bias” towards *pro se* litigants, and further sought to terminate PNC’s representation and initiate criminal proceedings against its counsel. Res.App.4a.

Petitioner escalated his behavior when he composed numerous letters to the Chief Judge of the

¹ Petitioner’s behavior before the trial court and general disregard for the trial court’s rules is particularly inexcusable in this circumstance because he has filed and litigated numerous actions, including: *Otworth v. Trump*, 728 Fed. App’x 6 (D.C. Cir. May 29, 2018); *Otworth v. Budnik*, 594 Fed. App’x 859 (6th Cir. Nov. 21, 2014); *Otworth v. Vanderploeg*, 61 Fed. App’x 163 (6th Cir. Mar. 19, 2003); *Otworth v. Village of Lakewood Club*, 59 Fed. App’x 785 (6th Cir. Mar. 11, 2003). *Otworth v. Williams, Hughes & Cook, PLLC*, 2011 U.S. Dist. LEXIS 43343 (W.D. Mich. Apr. 21, 2011). It is evident that Petitioner is a well experienced litigant who should know the Rules and be able to abide by them.

Western District of Michigan accusing the trial court judge of intentionally acting to prevent discovery in his cases and even referred to the trial court judge as a “bias [sic] corrupt piece of shit.” Res.App.27a. Despite the Western District’s attempts to rein in Petitioner’s behavior, the Chief Judge of the Western District noted that as Petitioner’s correspondence continued, his tone became “more strident and vulgar.” Res.App.26a. The Chief Judge of the Western District determined that, in order “to avoid further burdening the public record with irrelevant and increasingly profane assertions from [Petitioner],” Petitioner’s continued correspondence would be on a restricted access basis. *Id.* Through it all, Petitioner complained that the trial court and PNC were conspiring to deny him access and opportunity for discovery.

Following Petitioner’s filing of an Amended Complaint and PNC’s Answer, the trial court set a scheduling conference for March 26, 2019. At the scheduling conference, PNC’s counsel appeared in person, but Petitioner failed to appear. Res.App.35a. The Magistrate Judge presiding over the scheduled conference attempted to call Petitioner at his home but received no answer. Res.App.10a. The trial court then rescheduled the scheduling conference for April 9, 2019, and included an admonishment that the physical attendance of Petitioner was necessary, or Petitioner risked possible dismissal of his case as a sanction. Res.App. 32a-33a. Petitioner filed a response to the trial court’s rescheduling Order alleging that the magistrate judge “knew” that Petitioner was in a wheelchair, that it was impossible for him to appear in person, and that the magistrate judge was using this as a pretext for dismissing his case. Petitioner stated that his phone

had been defective on the day on which the scheduling conference had been originally scheduled, and that he had since fixed the issue. Petitioner informed the trial court that he “expected” the trial court to call him on the rescheduled conference date.

Petitioner failed to appear on the April 9, 2019 rescheduled scheduling conference date and made no attempt to call into the conference. Res.App.11a. Instead, following the second missed scheduling conference, Petitioner filed motions to terminate PNC’s counsel, impose sanctions against the same counsel, schedule a telephonic conference, and filed a second motion for the recusal of the magistrate judge. Res. App.11a-12a. Petitioner also wrote letters to the United States Attorney General seeking prosecution of the district and magistrate judges of the Western District of Michigan.

The trial court denied all of Petitioner’s pending motions and, relying on the authority provided under Federal Rule of Civil Procedure 16(f)(1) and Rule 37 (b)(2)(A)(ii)-(vii), dismissed Petitioner’s action for his failure to appear at the scheduling conferences. Res. App.5a. Petitioner filed a notice of appeal with the Sixth Circuit in which he failed to specify perceived errors other than the fact that his action was dismissed. In evaluating Petitioner’s appeal, a panel of the Sixth Circuit concluded that the trial court did not abuse its discretion in dismissing Petitioner’s complaint as a sanction for his noncompliance with the trial court’s order. Res.App.6a. The Sixth Circuit’s Order found that Petitioner:

willfully violated the magistrate judge’s order requiring him to appear at the April 9th scheduling conference. As Otworth had pre-

viously and repeatedly indicated that he would participate only by telephone, his conduct may be deemed contumacious, *i.e.*, “behavior that is perverse in resisting authority and stubbornly disobedient.” (citation omitted). Contumacious behavior by itself may warrant dismissal. (citation omitted).

Id. The Sixth Circuit further found that PNC suffered prejudice from Petitioner’s refusal and failure to appear, that Petitioner had been provided with explicit and written notice that his failure could lead to dismissal, and that no lesser sanction was available since Petitioner failed to prosecute his case by refusing to appear in court or follow its orders. Res.App.6a-7a. The Sixth Circuit did not address the merits of Petitioner’s claim, as the trial court did not reach the merits of his complaint when it dismissed the underlying action. Res.App.7a.

Petitioner’s Writ to this Court follows, in which he addresses the merits of his suit and not the conditions that led to his dismissal.



REASONS FOR GRANTING THE PETITION

I. PETITIONER HAS NOT PRESENTED THE CORRECT ISSUE ON APPEAL BEFORE THIS COURT.

Petitioner has failed to adequately present the actual issues on appeal to this Court for consideration on whether to grant a writ. The Petition lists the Questions Presented as though Petitioner had been able to address the merits of the claims underlying his action before the trial court, which then found for PNC. In reality, the trial court never reached the merits of Petitioner's claim—the court dismissed his action under the authority provided by Rule 16(f)(1) for failure to obey court orders and attend scheduling conferences. Petitioner's Notice of Appeal failed to address the specifics of what he was appealing to the Sixth Circuit beyond the dismissal of his action. The Sixth Circuit, in turn, evaluated the trial court's discretion in dismissing Petitioner's action and specified that it did not reach the merits of his claims. Res.App.7a. Petitioner's Questions Presented err in presenting the Court with questions on the merits underlying his subsequently dismissed claim—rather, PNC's Questions Presented are an accurate representation of the question before the Court should certiorari be granted. "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Supreme Court Rule 14.1(a).

Petitioner's Writ asserts that the Americans with Disabilities Act was violated, and that the trial court and Sixth Circuit erred in determining otherwise. However, neither the trial court nor the Sixth Circuit

found that the ADA did not apply to Petitioner's circumstance, having never reached the Petitioner's merits before dismissal. The Petitioner fails to indicate how his Questions Presented have survived the appellate process following dismissal to reach this Court's determination.

This Court should deny certiorari on the basis that Petitioner has failed to present issues preserved on appeal before the Court. Petitioner's questions are not those properly before the Court, and pursuant to Rule 14.1(a) the Court will only review those questions that are presented in the Petition. PNC's Question Presented presents the appropriate question before the Court, and Petitioner's request should be denied for his misrepresentation alone.

II. THE PETITION DOES NOT PRESENT ANY QUALIFYING CONCERNS WHICH MANDATE REVIEW ON CERTIORARI.

Petitioner has failed to demonstrate or even argue sufficient compelling reasons for this Court to grant certiorari. "A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. Petitioner argues that the issues before the Court are of fundamental national importance, and further argues that the Petition should be granted because the lower courts "did not want to answer the two questions presented. . . ." Pursuant to the Rules of this Court, when considering a petition for certiorari the Court will review for whether: 1) a U.S. Circuit Court of Appeals has issued an opinion on the present matter conflicting with that of a separate Circuit or state court of last resort, or the opinion so far departed from accepted judicial proceedings such that this

Court's supervisory power is warranted; 2) a state court of last resort has decided a federal question in such a way that conflicts with another state court of last resort or U.S. Circuit Court, or; 3) a state court of last resort decided a question of important federal law that should be settled by this Court, or decided an important federal question such that its decision conflicts with this Court. *See* Rule 10(a)-(c). Even in the most generous light, Petitioner has not satisfied any condition to encourage this Court to exercise its discretion to grant certiorari.

Petitioner has not identified that there is a circuit split, a state court of last resort's decision of a federal question that conflicts with another state or federal court, or a determination of a federal question that conflicts with decisions of this Court related to the issues raised in his Petition. First, the Petition fails to meet the threshold of Rule 10 subsections (a) and (c) because federal courts are in agreement that Federal Rule of Civil Procedure 16 grants express authority to sanction parties that fail to comply with relevant orders. This Court has long recognized the general ability of lower courts to impose sanctions—including dismissal of an action—for a party's failure to abide by Court Orders. *See Link v. Wabash R. Co.*, 370 U.S. 628, 633 (1962) ("Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint. . . ."). Courts may determine sanctions from within "a permissible range." *See id.* Federal Rule of Civil Procedure 16 specifically ties itself to the range of possible sanctions permitted under Rule 37(b)(2)(A)(ii)-(vii), which include the sanction of "dismissing the action or proceeding in whole or in part." Fed. R. Civ. P. 37(b)(2)(v). Petitioner

has failed to show—and cannot show—that the lower decisions in this action deviate from the commonly accepted practice and determinations made by courts across the country under powers both recognized by this Court’s jurisprudence and specifically granted through the Federal Rules of Civil Procedure.

Courts are in agreement on the issue that they have the power to sanction noncompliance with court orders or procedures up to and including dismissing the underlying action. *See, e.g., NHL v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976) (“[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases. . . .”); *Mulero-Abreu v. P.R. Police Dep’t*, 675 F.3d 88, 91 (1st Cir. 2012) (acknowledging that the civil rules such as Rule 16(f) grant trial judges with formidable case-management authority); *Huebner v. Midland Credit Mgmt.*, 897 F.3d 42, 53 (2nd Cir. 2018) (“[The] sanctioning power [enumerated in Rule 16(f)] accords with a district court’s broader ‘inherent power’ and responsibility to manage [its] docket[] ‘so as to achieve the orderly and expeditious disposition of cases’”) (citation omitted); *Mager v. Wis. Central, Ltd.*, 924 F.3d 831, 837 (6th Cir. 2019) (“[A] district court may sanction parties who fail to comply with its orders in a variety of ways, including dismissal of the lawsuit.”) (citing *Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995)). Even the Note of the Advisory Committee to the 1983 amendments to the Federal Rules of Civil Procedure—specifically those amendments to Rule 16(f)—noted that part of the purpose of adding permissive sanction language to Rule 16(f) was to “reinforce[] the rule’s intention to encourage forceful judicial management” through the express allowance of sanc-

tions. *See* Fed. R. Civ. P. 16(f) advisory committee's notes 1983 amendment. As such, no conflict exists to warrant certiorari herein pursuant to Rule 10(a) or (c), and Petitioner cannot point to the existence of the same.

The Petition similarly fails to meet the threshold of Rule 10 subsection (b) because, clearly, the decisions before the Court through this Petition were not made in a state court of last resort. Furthermore, as stated above, no state or federal court has held that a court cannot manage its own affairs to ensure judicial economy or otherwise manage its docket.

Even if Petitioner attempts to connect his argument to the conditions set forth in Rule 10, he fails to address how the trial court's or Sixth Circuit's decisions apply to the Questions Presented in his Petition. Petitioner merely asserts that certiorari is warranted by virtue of the merits of issues which are not on appeal.

Petitioner has not identified—and Respondent cannot locate—any indication that the circumstances of Petitioner's dismissal meet the requirements of Supreme Court Rule 10 or its related considerations. This Court has already addressed the scope of courts' powers to sanction parties for general noncompliance with court orders, and nationwide jurisprudence is in agreement. Without conflicting authority identified by Petitioner, now that the true issue before this Court has been identified by Respondent PNC, this Court should deny Otworth's Petition and not grant certiorari to this case.

This Court should deny certiorari as Petitioner has failed to provide a sufficiently compelling reason

for this Court to review the well-considered Order of the Sixth Circuit.



CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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