

No. 20-6643

**In the
Supreme Court of the United States**

ADRIAN MCCRAY,

Petitioner,

v.

SCOTT LEWIS, WILLIAM BUTLER, LEROY
CARTLEDGE, and BRIAN STERLING,

Respondents,

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

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
OPINIONS BELOW.....	1
JURISDICTIONAL STATEMENT.....	1
QUESTIONS PRESENTED.....	3
INTRODUCTION.....	5
REASONS TO DENY THE PETITION.....	11
I. PETITIONER FAILED TO TIMELY FILE HIS PETITION PURSUANT TO SUPREME COURT RULE 13.....	11
II. PETITIONER FAILS TO PRESENT ANY COMPELLING REASON TO GRANT HIS PETITION FOR WRIT OF CERTIORARI.....	14
III. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER’S CASE BASED ON HIS OWN INACTION.....	17
IV. PETITIONER IS NOT ENTITLED TO HAVE HIS CASE HEARD BEFORE THIS COURT, REINSTATED, OR REMANDED FOR RECONSIDERATION.....	20

CONCLUSION.....22

TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
<i>Martin v. Duffy</i> , 858 F.3d 239 (4th Cir. 2017).....	18
<i>McCray v. Lewis, et al.</i> , No. 20-6732 (4th Cir. Aug. 28, 2020).....	<i>passim</i>
<i>McCray v. Lewis, et al.</i> , C/A No. 4:19-CV-00151 (D.S.C. May 8, 2020).....	<i>passim</i>
<i>Roseboro v. Garrison</i> , 528 F.3d 309 (4th Cir. 1975).....	7
<i>Thomas v. Arn</i> , 473 U.S. 140 (1985).....	18
<i>Wright v. Collins</i> , 766 F.2d 841 (4th Cir. 1985).....	18
<u>Statutes</u>	
28 U.S.C. § 636.....	7
42 U.S.C. § 1254.....	2
42 U.S.C. § 1983	4, 5, 9

42 U.S.C. § 1997e.....	5
------------------------	---

S.C. Code Ann. § 15-78-30.....	8
--------------------------------	---

Rules

Dist. of S.C. Local Rule 73.02.....	8
-------------------------------------	---

Fed. R. Civ. P. 41.....	8
-------------------------	---

Sup. Ct. R. 10.....	2, 15, 16, 17
---------------------	---------------

Sup. Ct. R. 13.....	1, 11
---------------------	-------

Sup. Ct. R. 29.....	11, 14
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**BRIEF IN OPPOSITION
OPINIONS BELOW**

The Fourth Circuit Court of Appeals' Unpublished Opinion affirming summary judgment for Respondents can be found at *McCray v. Lewis, et al.*, No. 20-6732 (4th Cir. Aug. 28, 2020). Also, see the United States District Court for the District of South Carolina's Order granting Respondents summary judgment which may be found at *McCray v. Lewis, et al.*, C/A No. 4:19-CV-00151 (D.S.C. May 8, 2020).

JURISDICTIONAL STATEMENT

Respondents contend that Petitioner did not timely file his Petition for Writ of Certiorari with this Court pursuant to Supreme Court Rule 13. Therefore, jurisdiction is deficient. If this Court considers Petition's Petition as timely, Respondents do not dispute this Court's

jurisdiction over this case pursuant to 28 U.S.C. § 1254(1) but deny that the case satisfies the standard set forth in Supreme Court Rule 10. Judgement from the Fourth Circuit Court of Appeals was entered on August 28, 2020. Petitioner filed his Petition for Writ of Certiorari on December 8, 2020. Respondents' full argument against jurisdiction is contained in Respondents' section entitled Reasons to Deny the Petition, argument I., contained herein.

QUESTIONS PRESENTED

Though the Petitioner presented questions that reflect his dissatisfaction with the sound and correct rulings of the United States District Court for the District of South Carolina and Court of Appeals for the Fourth Circuit, Respondents assert that the only questions before this Court are whether Petitioner timely filed his Petition for Writ of Certiorari and whether Petitioner presented any question or argument that sets forth a compelling reason to grant his Petition for Writ of Certiorari.

The Petitioner's questions are restated and recited for issues of clarity. Respondents do not concede the creditability of the stated questions by this restatement.

1. Whether the Court of Appeals properly affirmed the dismissal of the Petitioner's case for his failure to prosecute when the initial claim provided adequate

information relevant to the prosecution of the named Defendants?

2. Whether Petitioner is entitled, as a matter of law, to have his section 42 U.S.C. § 1983 civil lawsuit reinstated as a necessity to comport with the mandates of due process?

INTRODUCTION

The Petitioner, Adrian McCray, seeks review of the United States District Court for the District of South Carolina's dismissal and the Fourth Circuit Court of Appeals' affirmation of dismissal of his case for his failure to prosecute and failure to preserve issues for appellate review. In addition to dismissal for failure to prosecute, the underlying affirmed order found dismissal warranted due to Petitioner's failure to comply with the Prison Litigation Reform Act (PLRA). 42 U.S.C. § 1997e.

Petitioner, proceeding *Pro Se*, brought this action pursuant to 42 U.S.C. § 1983, alleging that Respondents, employees of the South Carolina Department of Corrections (SCDC), violated his Eighth Amendment rights in incidents that occurred in October 2016 at McCormick Correctional Institution and in January 2017 at Perry Correctional Institution. (Am. Compl., ECF No.

16). He alleges that Respondents are liable for failure to protect, deliberate indifference, and failure to timely respond in an emergency situation. *Id.* at p. 4. However, Petitioner provided few factual allegations in his Amended Complaint and has failed to provide additional facts or evidentiary support throughout the course of litigation.

Regarding the October 2016 incident, there is no record that the Petitioner was assaulted in October 2016 at McCormick Correctional Institution by other inmates, filed a report as the victim of an assault, nor that he received medical treatment from an assault. (Mot. Summ. J. Ex. B (Williams Aff.), ECF No. 48-3). Regarding the second incident, on January 14, 2017, Petitioner requested medical treatment for what appeared to be signs of an assault. (Mot. Summ. J. Ex. C (Byrd Aff.), ECF No. 48-4). All of Petitioner's medical needs were subsequently addressed by prison and local medical providers. (Mot.

Summ. J. Ex. D (Days Aff.), ECF No. 48-5). Prior to the January 2017 occurrence, Respondents had no notice or specific knowledge of other inmates' planned assault attempt, or a potential treat of harm to the Petitioner. (Mot. Summ. J. Ex. A, E, F, G (Lewis, Stirling, Butler, Cartledge Affs.), ECF Nos. 48-2, -6, -7, and -8).

Respondents filed their Motion to Dismiss, or in the alternative, Motion for Summary Judgment and supporting documents on September 4, 2019. (Mot. Summ. J., ECF No. 48). Because Petitioner proceeded *pro se*, he was advised pursuant to *Roseboro v. Garrison*, 528 F.3d 309 (4th Cir. 1975), that a failure to respond to the Respondents' Motion by October 7, 2019 could result in the dismissal of his case. (*Roseboro* Order, ECF No. 49). Petitioner did not file a response to the Respondents' motion or request an extension of time. The considering magistrate, pursuant to the provisions of 28 U.S.C. §

636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(e), District of South Carolina, issued a recommendation on March 3, 2020 for dismissal under Federal Rule of Civil Procedure 41(b) for Petitioner's failure to respond. (Report and Recommendation, ECF No. 57).

In the same Report and Recommendation, the magistrate recognized Petitioner filed a letter dated September 12, 2019, after Respondents' motion was filed, in which he sought to have his case transferred to a "Tort Claims under South Carolina Tort Claims Act, § 15-78-30." (Letter, ECF No. 51). To the extent Petitioner's Letter could be construed as a response to Respondents' motion, the magistrate addressed the arguments raised in the motion. When considering the merits of Respondents' motion, the magistrate recommended dismissal based on the Petitioner's failure to exhaust his administrative

remedies under the PLRA prior to filing his 42 U.S.C. § 1983 lawsuit. (Report and Recommendation, ECF No. 57).

The court advised Petitioner of his right to file objections and that failure to file timely, specific objections to the magistrate's recommendation could waive appellate review. (Notice, ECF No. 57-1). On March 13, 2020, Petitioner filed a Motion for Extension of Time to file a response to the recommendation. (Letter, ECF No. 59). The court granted his Motion and extended the time to respond until March 27, 2020. (Order, ECF No. 60). Petitioner failed to file any objections or further motions. On May 8, 2020, United States District Judge Timothy Cain issued an order affirming the magistrate's recommendation and incorporated it by reference. (Order, ECF No. 69). Petitioner then filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit on May 18, 2020. (Notice, ECF No. 72).

After review and consideration of the parties' informal briefs, the Court of Appeals affirmed the judgment of the District Court and held that Petitioner waived appellate review by failing to file objections to the magistrate judge's recommendation after receiving proper notice. (Order, ECF No. 78). The judgment of the Court of Appeals, entered August 28, 2020, took effect by mandate dated September 21, 2020. (Mandate, ECF No. 79). Petitioner then filed a motion to recall mandate on October 8, 2020. (Mot., USCA4 20-6732 Doc: 15). The court considered and denied Petitioner's Motion on October 9, 2020. (Order, USCA4 20-6732 Doc: 16). On November 30, 2020, Petitioner filed his Petition for Writ of Certiorari with the Court of Appeals and was subsequently directed to the proper rules for filing. (Appeal, USCA4 20-6732 Doc: 17). Petitioner did not date his Petition but the

institutional mailing stamp notes November 16, 2020. *Id.* at p. 18.

On December 8, 2020, Petitioner filed his Petition for Writ of Certiorari with this Court, without changing the contents of his Petition or certificate of service from the mailing to the Court of Appeals, and his case was placed on the docket as of December 17, 2020. (Appeal, USCA4 20-6732 Doc: 19). Petitioner did not serve Respondents with either petition as required by Supreme Court Rule 29.

REASONS TO DENY THE PETITION

ARGUMENT

I. PETITIONER FAILED TO TIMELY FILE HIS PETITION PURSUANT TO SUPREME COURT RULE 13.

As an initial inquiry, Petitioner's Petition for Writ of Certiorari is jurisdictionally deficient as he failed to timely file with this Court. Supreme Court Rules 13.1 and 13.3 require that a petition must be filed within 90 days after

the entry of judgment from the lower court, not the issuance date of a mandate. The Court of Appeals entered judgment on August 28, 2020. (Order, ECF No. 78). Petitioner did not file any post-judgment motions with the court warranting an extension of time. Petitioner's next filing, captioned as a motion to recall mandate, was filed 41 days later on October 8, 2020. Petitioner's untimely motion does not obviate or extend his need to comply with this Court's deadlines for filing as the proper measure of time is from the date of judgment, not post-mandate. Petitioner filed his Petition with this Court on December 8, 2020, which is 102 days from the Court of Appeal's Entry of Judgment. To date, Petitioner has not filed an application to extend time. Therefore, Petitioner's Petition is jurisdictionally out of time and should be denied.

Petitioner's Petition should also be denied as untimely as Petitioner's November dates of service or filing

with this Court are inaccurate, incomplete, and misleading. Petitioner previously filed his Petition in the Fourth Circuit Court of Appeals with a certificate of service indicating “November 2020” and an incomplete mailing address to this Court but did not indicate a day of service. (Appeal, USCA4 20-6732 Doc: 17 at p. 16). In contrast, Petitioner’s filing envelope notes an institutional mailing date stamp of November 16, 2020 and is addressed to the Fourth Circuit Court of Appeals. *Id.* at p. 18. The Fourth Circuit Court of Appeals noted a filing date of November 30, 2020. The court returned the petition and advised Petitioner to adhere to the proper rules of service. (Appeal, USCA4 20-6732 Doc: 18). Petitioner did not serve Respondents with this filing.

Petitioner next filed the same Petition, still bearing clocked stamps from the Fourth Circuit Court of Appeals, with this Court on December 8, 2020. (*In Forma Pauperis*

Mot., No. 20-6643; Remark, USCA4 20-6732 Doc: 19).
Petitioner failed to draft an updated, complete certification of service and again failed to serve Respondents pursuant to Supreme Court Rule 29. (Cert. of Service, No. 20-6643).
Based on the totality of Petitioner's filings available through court dockets and the applicable time requirements, Petitioner is jurisdictionally out of time and his Petition should be denied.

II. PETITIONER FAILS TO PRESENT ANY COMPELLING REASON TO GRANT HIS PETITION FOR WRIT OF CERTIORARI.

If this Court deems Petitioner's Petition as timely filed, Petitioner nonetheless fails to present any compelling reason to grant his Petition. Petitioner has not argued that his case involves a conflicting decision in the United States Courts of Appeal, a conflicting decision of a state court of last resort on a federal question, or an important question of federal law conflicting with the decisions of the United

States Supreme Court or that should be settled by the United States Supreme Court. He cannot make such arguments because they simply do not exist. Petitioner has set forth baseless arguments that simply highlight his dissatisfaction with the rulings of the United States District Court for the District of South Carolina and the United States Court of Appeals for the Fourth Circuit.

Review on a petition of writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. It will only be granted for compelling reasons. *Id.* Supreme Court Rule 10 lists guideposts indicating the character and nature of reasons the Court may consider before accepting a case for review. *Id.* Examples include: conflicting decisions of United States Courts of Appeal, conflicting decisions of state courts of last resort on a federal question, and an important question of federal law conflicting with the decisions of the United States Supreme Court or that

should be settled by the United States Supreme Court. Sup. Ct. R. 10(a)-(c). A petition for a writ of certiorari is rarely granted when there is an allegedly erroneous application of the facts to a properly stated rule of law. *Id.*

Petitioner's Petition for Writ of Certiorari does not set forth any compelling reason for this Court to grant review. Petitioner's arguments center around Petitioner's dissatisfaction with the correct legal decisions of the United States District Court for the District of South Carolina and the United States Court of Appeals. At best, Petitioner argues that alleged erroneous factual findings or misapplication of a properly stated rule of law should grant him review. However, the District Court did not make any erroneous factual findings and applied the law correctly. The Court of Appeals properly considered and affirm the District Court's decision on appeal. Additionally, Rule 10 clearly states that "[a] petition for writ of certiorari is

rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10. Petitioner's Petition is devoid of substantive challenges in conformity with this Court's stated rules and should therefore be denied.

Though the Respondents believe the Petitioner set forth invalid questions for a Petition for Writ of Certiorari, Petitioner's arguments will be addressed.

**III. THE COURT OF APPEALS PROPERLY
AFFIRMED THE DISMISSAL OF
PETITIONER'S CASE BASED ON HIS OWN
INACTION.**

Petitioner's failure to timely respond to Respondents' Motion for Summary Judgment and failure to timely file specific objections to the magistrate judge's recommendation resulted in the dismissal of his case for a failure to prosecute. Petitioner provides precious few facts

or legal grounds in support of his petition but appears to incorrectly cite his burden of proof and impute the dismissal on Respondents' Motion. (Petr's Writ of Cert. p. 14). However, it is solely through Petitioner's own neglect that his case was dismissed. (Report and Recommendation, ECF No. 57 at p. 2).

The timely filing of specific objections to a magistrate judge's recommendation is necessary to preserve appellate review of the substance of that recommendation when the parties have been warned of the consequences of noncompliance. *Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017); *Wright v. Collins*, 766 F.2d 841, 846-47 (4th Cir. 1985); *see also Thomas v. Arn*, 473 U.S. 140, 154-55 (1985). Petitioner received proper notice and throughout the course of this litigation, has shown competency to file documents, pleadings, and present arguments before the court. Rather than filing a response

to Respondents' Motion directly addressing the merits of his case or filing objections to the magistrate's recommendation, Petitioner failed to substantively address either for over eight months resulting in an order adopting the recommendation. (Mot., ECF No. 48, filed Sep. 4, 2019; Order, ECF No. 69, filed May 8, 2020). Further, as the District Court and Court of Appeals affirmed the underlying magistrate's recommendation, incorporated into the affirmation is an alternative sustaining ground that Petitioner's case also warrants dismissal based on his failure to comply with the PLRA.

Most importantly, Petitioner has failed to show a compelling reason for this Court to grant review. Accordingly, this Court should deny Petitioner's Petition for Writ of Certiorari.

**IV. PETITIONER IS NOT ENTITLED TO HAVE HIS
CASE HEARD BEFORE THIS COURT,
REINSTATED, OR REMANDED FOR
RECONSIDERATION.**

Petitioner presents the question of reinstating his case. (Petr's Writ of Cert. p. 8). He also asserts entitlement to have his claims heard by this Court. *Id.* at p. 15. Respondents are unclear on the procedural mechanism Petitioner seeks as a remedy but recognize his desire for his case to continue as though his months of failing to respond to filings and notices did not occur. Rather than cite legal authority, Petitioner uses his Petition to present generalized invocations of misapplied constitutional concepts. Respondents glean that Petitioner asserts due process would be thwarted if his requested relief is not granted. However, Petitioner has been afforded due process through multiple judicial reviews, notices to object, and appeals. Even at the precipice of this Court, Petitioner

has failed to allege, forecast, or otherwise plead factual and legal support for his underlying allegations of wrongdoing.

It is axiomatic that Parties to lawsuits must comply with the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, and court scheduling deadlines during litigation. Petitioner is not entitled to extend his case indefinitely due to his failure to comply with filing deadlines and appeals after receiving repeated notices. Respondents are afforded the protection of due process as well.

In sum, Petitioner's case was dismissed due to his own neglect. The lower courts correctly determined that Respondents are entitled to Summary Judgment. Accordingly, Petitioner's Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petitioner failed to timely file his Petition for Writ of Certiorari with this Court and failed to assert any compelling reason for this Court to grant his Petition. Respondents therefore humbly request that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

s/ Charles F. Turner, Jr.

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