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No. 20-8351

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

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KEVIN HERRIOTT,

Petitioner,

v.

AARON JOYNER, ASSOCIATE WARDEN TISDALE, MAJOR RAY,  
CAPTAIN COMMANDER, AND LIEUTENANT GREENE,

Respondents.

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

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

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## **TABLE OF CONTENTS**

Table of Authorities .....	ii
Statement of the Case.....	1
Reasons for Denying The Petition .....	3
Conclusion .....	5

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Herriott v. Joyner</i> , 830 Fed. Appx. 123 (4th Cir. 2020).....	2
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### **Statutes and Rules**

42 U.S.C. § 1983.....	1
Fed. R. App. P. 41(d)(1) .....	3
S.Ct. Rule 23.....	3

## **STATEMENT OF THE CASE**

The Petitioner Kevin Herriott is an inmate within the South Carolina Department of Corrections (SCDC). In this action brought pursuant to 42 U.S.C. § 1983, the Petitioner alleged an Eighth Amendment cruel and unusual punishment conditions claim for the alleged denial of outdoor recreation or exercise for the period of time from April 19, 2018 through July 2018, while he was housed at Lee Correctional Institution.

The Petitioner, however, never filed a grievance while he was at Lee Correctional Institution about being denied outdoor exercise or recreation, and a grievance filed on March 28, 2019, while he was an inmate at Kershaw Correctional Institution, that raised recreation issues at Kershaw, was submitted only after this lawsuit was already filed. Accordingly, the Petitioner failed to exhaust his administrative remedies prior to commencing this action, which was filed on March 4, 2019. That was not disputed by the Petitioner.

On May 28, 2020, Magistrate Judge Kevin F. McDonald issued a Report of Magistrate Judge in which he recommended that the Respondents' motion for summary judgment be granted on their Prison Litigation Reform Act ("PLRA") exhaustion defense. On June 8, 2020, the Petitioner filed objections to the Report and Recommendation. In those objections, the Petitioner did not address the merits of the motion for summary judgment under review. He offered no argument as to any perceived errors in the Magistrate Judge's reasoning with respect to the PLRA exhaustion defense. Instead, he argued only that he had earlier filed an appeal to the United States Supreme Court which should have stayed this action.

By Order filed July 13, 2020, District Judge David C. Norton rejected the Petitioner's objections, adopted the Report and Recommendation, and granted the Respondents' motion for summary judgment.

The Petitioner appealed to the Fourth Circuit Court of Appeals which affirmed the District Court by an unpublished opinion entered November 24, 2020. The Fourth Circuit explained that "we confine our review to the issues raised in the informal brief" and "[b]ecause Herriott's informal brief does not challenge the basis of the district court's disposition, Herriott has forfeited appellate review of the court's order." *Herriott v. Joyner*, 830 Fed. Appx. 123, 124 (4th Cir. 2020). The Fourth Circuit further "reject[ed] Herriott's contention that the district court lacked subject matter jurisdiction." *Id.* at 124-125.

## **REASONS FOR DENYING THE PETITION**

On appeal from the District Court and again in his petition for writ of certiorari, the Petitioner does not challenge the decision of the District Court on the merits of the summary judgment ruling. He does not contend that there is any error in the District Court's analysis and decision on the PLRA exhaustion defense. As a result, the Fourth Circuit correctly affirmed that decision.

Instead, the Petitioner claims that a stay was in place in the District Court because he had purportedly appealed an interlocutory order early in the litigation to the United States Supreme Court. The Petitioner's position fails for numerous reasons.

First, there is no record that the Petitioner filed a petition for writ of certiorari with the United States Supreme Court. A review of the Supreme Court's on-line docket shows no indication that the Petitioner filed such a petition. Additionally, the Respondents' counsel was never served with a petition by the Petitioner nor did he receive any notice of a pending petition from the Clerk of the United States Supreme Court.

Second, the mandate for that interlocutory appeal was issued by the Fourth Circuit on August 12, 2019, and the Petitioner filed no motion to stay the issuance of the mandate to allow for him to petition the Supreme Court. A party may move to stay the mandate pending the filing of a petition for writ of certiorari in the Supreme Court. Fed. R. App. P. 41(d)(1). Likewise, if the court of appeals denies a stay of the mandate, the party may seek a stay from the Supreme Court. S.Ct. Rule 23. That was not done.

Third, after the issuance of the mandate and the remand to the District Court, the Petitioner filed no motion with the District Court seeking a stay pending a decision on any petition for writ

of certiorari. Importantly, there is no automatic stay that results from the filing of a petition for writ of certiorari.

Finally, the subject matter of the Petitioner's interlocutory appeal to the Fourth Circuit and the dismissal of that appeal as moot have no bearing on the merits of the issues that were adjudicated by way of the Respondents' motion for summary judgment.

To reiterate, the Petitioner does not challenge on appeal the decision of the District Court on the merits of the summary judgment ruling. That decision was properly affirmed. In short, there is no basis for the issuance of a writ of certiorari.

## **CONCLUSION**

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

Respectfully submitted,

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