

---

**No. 21-7512**

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

KEVIN HERRIOTT,

Petitioner,

v.

PARRISH, Major in Individual and Official Capacity; DUNN, Officer in Individual and Official Capacity; MALNADO, Officer in Individual and Official Capacity; NFN MATA, Officer in Individual and Official Capacity; NFN LEVELS, Sergeant in Individual and Official Capacity; NFN VELA, Lieutenant in Individual and Official Capacity; NFN COXUM, Individual and Official Capacity,

Defendants-Respondents.

---

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

---

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

---

Andrew F. Lindemann  
*Counsel of Record*  
LINDEMANN & DAVIS, P.A.  
5 Calendar Court, Suite 202  
Post Office Box 6923  
Columbia, South Carolina 29260  
(803) 881-8920  
Email: [andrew@ldlawsc.com](mailto:andrew@ldlawsc.com)

*Counsel for Respondents*

## **TABLE OF CONTENTS**

Table of Authorities .....	ii
Statement of the Case .....	1
Reasons for Denying The Petition.....	3
Conclusion .....	6

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009) .....	3
<i>Christopher v. Harbury</i> , 536 U.S. 403 (2002) .....	3
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986) .....	4
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996) .....	3
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981) .....	4

### **Statutes and Rules**

28 U.S.C. § 1915A(b) .....	1, 3
42 U.S.C. § 1983 .....	1, 4

## **STATEMENT OF THE CASE**

The Petitioner Kevin Herriott is a former inmate within the South Carolina Department of Corrections (“SCDC”). In this action brought pursuant to 42 U.S.C. § 1983, the Petitioner alleged Eighth Amendment excessive force claims with respect to different incidents occurring in September 2018, when he was an inmate at Broad River Correctional Institution.

Initially, upon filing this action, the Petitioner included several other conditions claims. On May 1, 2019, the magistrate judge issued an Order finding that the Petitioner had not properly pled the conditions claims and indicated that only the excessive force claims would proceed. The Petitioner was given an opportunity to file an amended complaint to provide factual allegations to correct the pleading deficiencies identified by the magistrate judge. The Petitioner filed an amended complaint on May 17, 2019. However, the magistrate concluded that the amended complaint did not correct the deficiencies that were earlier identified or the legal defenses that precluded those claims from proceeding. The magistrate judge issued a Report dismissing the Petitioner's claims for mail tampering, denial of access to the courts, confiscation of personal property, and denial of recreation under 28 U.S.C. § 1915A(b). The magistrate judge authorized the issuance of process on the remaining claims described as the “excessive force/medical indifference claims” against the Respondents Parrish, Maldonado, Mata, Dunn, Level, Vela, and Coaxum. The district judge overruled the Petitioner's objections and issued an order adopting the magistrate judge's Report and dismissing the conditions claims. The Fourth Circuit

Court of Appeals affirmed that decision in its unpublished decision issued on August 30, 2021.

Later, after issuance of process and the completion of discovery on the excessive force/medical indifference claims, the Respondents moved for summary judgment. On May 26, 2020, the magistrate judge issued a Report recommending that the Respondents' motion for summary judgment be granted. He determined that the Petitioner failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act (PLRA). As to the merits, he also found that the Petitioner failed to prove an Eighth Amendment deprivation with respect to each of the incidents alleged. He also recommended that the Respondents be granted summary judgment based on qualified immunity.

After the Petitioner filed objections, the district judge overruled those objections and granted the Respondents motion for summary judgment on the merits. The district judge did not find it necessary to reach the PLRA exhaustion defense, but that defense provided an additional sustaining ground on appeal.

The Petitioner appealed to the Fourth Circuit Court of Appeals which unanimously affirmed the district court by an unpublished opinion entered August 30, 2021.

## **REASONS FOR DENYING THE PETITION**

In his Petition for Writ of Certiorari, the Petitioner challenges the dismissal under 28 U.S.C. § 1915A(b) of claims for mail tampering, denial of access to the courts, confiscation of personal property, and denial of recreation. The district court, as affirmed by the Fourth Circuit Court of Appeals, found that those claims were barred under the holding of this Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting that "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"). The district court found that the Petitioner's conclusory allegations failed to plausibly state a claim for relief. Specifically, the district court found that the denial of recreation allegations were pled only against supervisory employees without pleading facts showing any personal involvement in the alleged deprivation. Similarly, the district court found that the allegations of mail interference were "vague and conclusory."

The district court also found the allegations were insufficient to support a claim for denial of access to the courts. The district court, in fact, pointed out that the Petitioner had numerous ongoing lawsuits pending. Moreover, the Petitioner did not satisfy the very specific pleading requirements for an access to courts claim, including proof of "actual injury." *Lewis v. Casey*, 518 U.S. 343, 351 (1996). *See also, Christopher v. Harbury*, 536 U.S. 403, 416 (2002) (recognizing "[l]ike any other element of an access claim, the underlying cause of action and its lost remedy must

be addressed by allegations in the complaint sufficient to give fair notice to a defendant").

Finally, on the personal property claim, the district court correctly concluded that deprivations of personal property by corrections officials are not constitutional violations so long as there are post-deprivation remedies available. *See, Daniels v. Williams*, 474 U.S. 327 (1986); *Parratt v. Taylor*, 451 U.S. 527 (1981) (the *Parratt* doctrine provides that a state actor's random and unauthorized deprivation of a protected due process interest cannot be challenged under § 1983 if the State provides an adequate post-deprivation remedy).

In short, the Petitioner has not demonstrated any error in the district court's analysis nor has he presented any unsettled issue of law warranting the issuance of a writ of certiorari.

The final issue presented by the Petitioner pertains to his excessive force claim arising on September 6, 2018, when he alleges that the Respondents Dunn, Maldonado, and Mata "physically assaulted" him by "slamming his arms in the 'food flap'" of his cell door. The Petitioner did not dispute the material facts of the incident. In fact, in his grievance, the Petitioner writes: "It started because I would not get off the flap of the door after the wing officers feeding for dinner." He also writes: "I also bite one of the officers." Notably, in his Petition for Writ of Certiorari, the Petitioner reiterates that he caused the disturbance because "[t]he Petitioner refused to allow the officers to close the food flap temporarily at least until an administrator would address his serious need." *See*, Petition, p. 21. He concedes that his own arm "was hanging out

the food flap repeatedly." *See*, Petition, p. 23. He also concedes again that he bit one of the officers. *See*, Petition, p. 23.

Thus, the Petitioner bit one of the officers, which the Respondent Maldonado confirmed in his affidavit testimony. In reaction to the biting, Maldonado withdrew his arm and closed the food flap. There was no evidence of any intent to harm the Petitioner, and even the Petitioner concedes, his injuries (if any) were bruises. This was not a use of force repugnant to the conscience of mankind. It is abundantly clear that the Petitioner's conduct triggered the events that resulted in the food flap being closed. The evidence shows that the Petitioner assaulted Officer Maldonado, and at worst, he was bruised when the food flap was closed. Quite simply, that scenario does not present a case of constitutional dimension under the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Respondents Maldonado, Mata, and Dunn were correctly granted summary judgment. That decision was properly affirmed on appeal. 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,

  
Andrew F. Lindemann

*Counsel of Record*

LINDEMANN & DAVIS, P.A.

5 Calendar Court, Suite 202

Post Office Box 6923

Columbia, South Carolina 29260

(803) 881-8920

Email: andrew@ldlawsc.com

*Counsel for Respondents Parrish, Maldonado,  
Dunn, Level, Vela, Coaxum, and Mata*

May 2, 2022