

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

---

ZACHARY JAMES MCALEXANDER,

*Petitioner,*

v.

D.G. YUENGLING & SON INCORPORATED, RED BULL DISTRIBUTION  
COMPANY, INC., and LIVING ESSENTIALS, LLC,

*Respondents.*

---

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

---

**RESPONDENT D.G. YUENGLING & SON INCORPORATED'S  
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

---

Chad A. Shultz, Esq.  
GORDON REES SCULLY MANSUKHANI LLP  
55 Ivan Allen Jr. Blvd., NW, Suite 750  
Atlanta, Georgia 30308  
Tel: (404) 869-9054  
Fax: (678) 389-8475  
cshultz@grsm.com

*Attorney for Respondent D.G. Yuengling & Son Incorporated*

---

---

## **COUNTERSTATEMENT OF QUESTIONS PRESENTED**

1. Does the Court of Appeals lack jurisdiction over an appeal which is not prosecuted in the manner directed, within the time limited by Congress under 28 U.S.C. § 2107?
2. Does dismissal of an action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) violate a plaintiff's constitutional right to trial by jury?

## TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING CERTIORARI.....	4
1. PETITIONER’S APPEAL WAS PROPERLY DISMISSED FOR LACK OF JURISDICTION.....	4
2. PETITIONER’S CLAIMS ARE TIME-BARRED AND THE COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO STATE A CLAIM.....	5
CONCLUSION.....	8
CORPORATE DISCLOSURE STATEMENT.....	9

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 678 (2009).....	6
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	6
<i>Bond v. United States</i> , 564 U.S. 211 (2011).....	5
<i>Bowles v. Russell</i> , 551 U.S. 205 (2007).....	4, 5
<i>Browder v. Director, Illinois Dept. of Corrections</i> , 434 U.S. 257 (1978).....	4
<i>Griggs v. Provident Consumer Discount Co.</i> , 459 U.S. 56 (1982).....	4
<i>McAuley v. Wills</i> , 164 Ga. App. 812 (1982).....	7
<i>National Collegiate Athletic Assn. v. Smith</i> , 525 U.S. 459 (1999).....	5
<i>Rosemound Sand &amp; Gravel Co. v. Lambert Sand &amp; Gravel Co.</i> , 469 F.2d 416 (5th Cir. 1972).....	6
<i>Ward v. Griffith</i> , 162 Ga. App. 194 (1982).....	7
<i>Zivotofsky ex rel. Zivotofsky v. Clinton</i> , 566 U.S. 189 (2012).....	7
<b>Statutes</b>	
O.C.G.A. § 9-3-33.....	7
28 U.S.C. § 2107(a).....	4
28 U.S.C. § 2107(c).....	4, 5
<b>Rules</b>	
Fed. R. App. P. 4(a)(1)(A).....	4
Fed. R. App. P. 4(a)(5).....	4
Fed. R. App. P. 4(a)(6).....	4

Fed. R. Civ. P. 8(a).....	6
Fed. R. Civ. P. 12(b)(6).....	6

## INTRODUCTION

Petitioner's characterization of the questions presented does not capture the issues posed in the proceedings below. In short, Petitioner's unreasonable delay in pursuing his original claims for personal injury *and* in pursuing his subsequent appeal, have resulted in both being time-barred. Despite the glaring procedural deficiencies in the prosecution of Petitioner's case, he now improperly attempts to argue the merits of his underlying claims before this Court, presenting issues which were neither addressed nor considered in the first instance by the lower courts. Therefore, this Court should reject Petitioner's arguments and find that the Court of Appeals properly dismissed Petitioner's appeal for lack of jurisdiction. Alternatively, this Court should find that Petitioner's Complaint was properly dismissed by the District Court for failure to state a claim as all of Petitioner's claims as described in the Complaint are time-barred.

## STATEMENT OF THE CASE

This lawsuit was originally filed on July 12, 2021, in the Superior Court of Fulton County, Georgia, by *pro se* Petitioner Zachary James McAlexander, in which he sought to recover damages for injuries allegedly sustained in an incident that occurred *over eight (8) years prior to filing suit*. See App. A<sup>1</sup>, *infra*, 2. In particular, Petitioner claimed that he consumed Five Hour Energy products in the weeks leading up to April 19, 2013, consumed one Red Bull energy drink on the morning of April 19, 2013, and consumed two Yuengling beers later that evening. *Id.* He awakened early the next morning and fainted in his home. *Id.* Upon waking from the fainting episode, he was driven to the hospital by his father and was subsequently diagnosed with and hospitalized for atrial fibrillation. *Id.*

On August 16, 2021, Respondents removed this matter to the U.S. District Court for the Northern District of Georgia. *Id.* at 2-3. Thereafter, in light of Petitioner's substantial delay in pursuing his claims, each of the Respondents filed motions to dismiss the Petitioner's Complaint for failure state a claim as all of the asserted claims in the Complaint were filed well outside of applicable statutes of limitations. *Id.* at 3. On November 5, 2021, the District Court granted Respondents' motions and dismissed Petitioner's Complaint without prejudice. The District Court noted that:

[C]ounting from the date [Petitioner] claims to have been injured and diagnosed, he would have reached the end of the limitations period on all of his

---

<sup>1</sup> Petitioner's appendix submitted with his petition for writ of certiorari does not include the original order from the district court dismissing his case. The factual findings and legal reasoning contained therein is necessary for an appellate review of the underlying courts' decisions. Accordingly, Respondent has attached a copy of the district court's original order at Appendix A.

claims no later than April 20, 2017 . . . Based on the allegations as stated in the complaint, [Petitioner]’s claims are barred by the statute of limitations.

*Id.* at 4.

On or about July 12, 2022, Petitioner filed a motion to vacate the District Court’s Order dismissing his case pursuant to Federal Rule of Civil Procedure 60, essentially arguing that the statute of limitations should not have barred his claims because he is suffering from a “continuous injury.” Pet. App. at 3. The District Court denied Petitioner’s motion to vacate on September 13, 2022, and reiterated that “the statute of limitations begins running from the date [Petitioner] claims that he was initially injured and diagnosed. As such, the statute of limitation expired before [Petitioner] filed his complaint.” *Id.*

Over two months after the District Court’s ruling on Petitioner’s motion to vacate, on or about November 23, 2022, Petitioner filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit. *Id.* at 1. A three judge panel of the Eleventh Circuit dismissed Petitioner’s appeal, *sua sponte*, for lack of jurisdiction stating that Petitioner’s notice of appeal was untimely and could not invoke its appellate jurisdiction. *Id.*



## REASONS FOR DENYING CERTIORARI

### 1. PETITIONER'S APPEAL WAS PROPERLY DISMISSED FOR LACK OF JURISDICTION.

According to 28 U.S.C. § 2107(a), parties must file notices of appeal within 30 days of the entry of the order or judgment being appealed. It is well settled that the taking of an appeal in a civil case within the time prescribed by statute is both “mandatory and jurisdictional.” *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (quoting *Browder v. Director, Illinois Dept. of Corrections*, 434 U.S. 257, 264 (1978)). Therefore, Petitioner was required to file a notice of appeal on or before October 14, 2022, which was 30 days after the entry of the appealed-from order of the District Court. However, Petitioner filed his notice of appeal on November 23, 2022 – 40 days after the statutory deadline. Thus, the notice of appeal was untimely and could not invoke the jurisdiction of the Court of Appeals. *See* 28 U.S.C. 2107(a); Fed. R. App. P. 4(a)(1)(A); *Bowles v. Russell*, 551 U.S. 205, 210 (2007) (“Reflecting the consistency of this Court’s holdings, the court of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction.”).

Additionally, the Court of Appeals has already noted that Petitioner has no basis for relief under Federal Rules of Appellate Procedure 4(a)(5) or 4(a)(6) because he failed to make a timely Rule 4(a)(5) motion and there is no indication that he failed to receive notice of the entry of the appealed-from order of the District Court within 21 days of its entry. *See* 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(5-6). Furthermore, Petitioner has provided no other “unique circumstances” or reasonable justification for his delay in filing a notice of appeal. *See Bowles*, 551 U.S. at 219 (Souter J.

dissenting opinion) (“[A]n exception to the time limit in 28 U.S.C. § 2107(c) should be available when there is a good justification for one . . . we [previously] found that “unique circumstances” excused failures to comply with the time limit.”). Accordingly, this Court should affirm the dismissal of Petitioner’s appeal for lack of jurisdiction.

**2. PETITIONER’S CLAIMS AGAINST RESPONDENTS ARE TIME-BARRED AND THE COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO STATE A CLAIM.**

This Court does not ordinarily decide issues in the first instance which were not previously decided by the courts below. *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999). In the event the Court reverses on a threshold question (such as the issue presented above regarding the Court of Appeal’s jurisdiction over Petitioner’s appeal), the Court has typically remanded such cases back to the lower courts for resolution of outstanding claims which were not previously addressed. *See, e.g., Bond v. United States*, 564 U.S. 211, 214, (2011) (reversing the court of appeals’ determination on standing and remanding because the “merits of petitioner’s challenge to the statute’s validity are to be considered, in the first instance, by the Court of Appeals.”); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

Accordingly, in the event the Court finds that Petitioner’s appeal was improperly dismissed for lack of jurisdiction – a result that Respondent maintains would be erroneous – the Court should remand the case back to the Eleventh Circuit for further consideration of the merits of Petitioner’s appeal. However, out of an

abundance of caution, Respondent addresses the merits of Petitioner's appeal and the arguments presented in his Petition for Writ of Certiorari in turn.

That said, the basis of Petitioner's appeal appears to be centered on the belief that the District Court somehow violated his constitutional right to trial by jury under the Seventh Amendment when it dismissed his complaint for failure to state a claim. *See* Pet. at 5 ("Petitioner's Seventh Amendment constitution right to a jury was violated by defendants and the lower courts . . . There was no jury in any of the previous rulings, so all of the lower court rulings were invalid."). Petitioner's contention, however, is completely misguided. It is well within the ambit of the court's authority to test the sufficiency of a plaintiff's statement of a claim for relief. *See* Fed. R. Civ. P. 8(a), 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972) (Dismissal of antitrust suit for lack of subject matter jurisdiction did not deny plaintiff its right to a trial by jury.).

Here, the district court properly dismissed Petitioner's complaint for failure to state a claim because, based on the allegations as stated in the complaint, Petitioner's claims were barred by applicable statutes of limitations. Petitioner provides no factual basis or legal authority for his bold contentions that the statute of limitations are not applicable in this case or that Respondent has waived the defense. *See* Pet. at 5 ("Statute of limitations does not apply to current claims and statute of limitations can be waived based on the discovery principle anyway. . ."). To the extent Petitioner

attempts to suggest the statute of limitations is inapplicable to his case because he is suffering a “continuous injury,” he is sorely mistaken. To the extent the allegedly tortious conduct by Respondents against Petitioner was inflicted and completed by April 20, 2013, that is the date Petitioner’s limitation period begins to run. *See* O.C.G.A. § 9-3-33; *see also McAuley v. Wills*, 164 Ga. App. 812, 813 (1982); *Ward v. Griffith*, 162 Ga. App. 194, 194 (1982) (Two-year limitation period governing personal injury actions begins to run on date that suit on the claim can first be brought).

## CONCLUSION

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

Respectfully submitted, this 21st day of April, 2023.

**GORDON REES SCULLY  
MANSUKHANI, LLP**

/s/ Chad A. Shultz

Chad A. Shultz

Georgia Bar No. 644440

55 Ivan Allen Jr. Blvd. NW, Suite 750

Atlanta, Georgia 30308

Telephone: (404) 869-9054

Facsimile: (678) 389-8475

cshultz@grsm.com

*Attorney for Respondent D.G. Yuengling &  
Son Incorporated*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent D.G. Yuengling & Son Incorporated, discloses the following. There is no parent or publicly held company owning 10% or more of Respondent's stock.

This 21st day of April, 2023.

**GORDON REES SCULLY  
MANSUKHANI, LLP**

/s/ Chad A. Shultz

Chad A. Shultz

Georgia Bar No. 644440

55 Ivan Allen Jr. Blvd. NW, Suite 750

Atlanta, Georgia 30308

Telephone: (404) 869-9054

Facsimile: (678) 389-8475

cshultz@grsm.com

*Attorney for Respondent D.G. Yuengling &  
Son Incorporated*