

In The
Supreme Court of the United States

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TAYLOR CARLISLE, Individually and as
Representative Member of a Class, et al.,

Petitioners,

v.

JOSEPH P. LOPINTO, III, Sheriff and Administrator
of the Jefferson Parish Correctional Center, et al.,

Respondents.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION
JURISDICTIONAL STATEMENT

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. Petitioners filed their Petition for Writ of Certiorari on September 20, 2023.



COUNTERSTATEMENT OF THE CASE

Petitioners’ lawsuit “challenge[d] the manner in which the Jefferson Parish Drug Court (“Drug Court”) [was] conducted during Petitioners’ involvement with Drug Court.” (Record on Appeal 1578).¹ The “primary claim” of Taylor Carlisle (“Carlisle”) “involves allegations that he received excessive sentences from Drug Court for failure to comply with the terms of the program.” (ROA. 1579). Emile Heron (“Heron”) was added as a plaintiff with the filing of the First Supplemental Complaint (ROA. 249), and made similar allegations regarding sanctions issued by Drug Court (ROA. 1580, 1581). Apparently recognizing that a suit directly against Drug Court was a non-starter, Petitioners chose to sue, among others, Joe McNair (a Drug Court therapist), McNair’s business (McNair & McNair,

¹ In connection with briefs submitted to the Fifth Circuit, the parties were instructed to refer to the trial court record with the shorter citation form “ROA” followed by a period, followed by the page number or numbers. For consistency, references to the trial court record in this brief will use the same “ROA” format.

LLC), and his insurer (Philadelphia Insurance Company) (collectively the “McNair Defendants”), alleging McNair was responsible under 42 U.S.C. § 1983 for sanctions imposed against Petitioners by Judge Lee Faulkner of the Drug Court. In addition, Petitioners also asserted a pendant state law therapist malpractice claim against McNair.

McNair is a Licensed Professional Counsellor and a Licensed Marriage and Family Therapist. (ROA. 6609, 6620). During the pertinent time period, McNair provided limited treatment services under contract with Drug Court. These limited treatment services included outpatient group therapy for Drug Court participants and clinical screenings using the Addiction Severity Index for individuals who applied for admission to Drug Court. (ROA. 6609, 6621).

Petitioners have repeatedly attempted to mischaracterize McNair’s role with Drug Court. In the caption to their Fifth Circuit brief, Petitioners identified McNair as “Director of Counselling of the 24th JDC Drug Court Intensive Probation Program.” (Fifth Circuit Record Document 43, p. 1). In their Petition to this Court, Petitioners claim McNair was the Clinical Supervisor of the Drug Court. (Petition, p. 31). McNair never had either of these titles or the role alleged by Petitioners. No Drug Court employees were supervised by McNair. McNair’s sole supervisory responsibility related to staff members employed by McNair & McNair and paid to perform group therapy sessions. (ROA. 6609, 6624, 6625). While McNair’s contract with Drug Court does reference supervision, the contemplated

supervision related to individuals applying for licensure with the state. In any event, McNair never performed supervisory services of this type under the contract. (ROA. 6610, 6619, 6622).

Carlisle's involvement with Drug Court was precipitated by his November 9, 2012 arrest in Jefferson Parish on charges of possession of marijuana (second offense), possession of oxycodone and possession of drug paraphernalia. (ROA. 6610). At the time of his arrest, Carlisle was on parole for prior drug and theft charges. (ROA. 6611, 6631). As a result of the prior charges and his November 2012 arrest, Carlisle was facing a multi-bill indictment and prison time of 6 to 24 years. (ROA. 6631).

On January 17, 2013, acting on the advice of his attorney, Carlisle sought to become a Drug Court participant. (ROA. 1629). On January 30, 2013, Carlisle executed a Plea of Guilty and Waiver of Rights with respect to the charge of possession of oxycodone. (ROA. 6612, 6643). In connection with his admission to Drug Court, Carlisle also executed a Plea of Guilty Under 13:5304. (ROA. 6612, 6644). One of the mandatory conditions for Carlisle's participation in Drug Court following his Plea of Guilty Under 13:5304 was to "[u]ndergo a substance abuse evaluation by the court approved treatment provider and successfully comply with and complete all recommendations of the treatment provider and the court for treatment" (ROA. 6644). Carlisle also agreed "to abide by all sanctions imposed by the Drug Court Judge including jail service, community service, frequent court visits and

appearances, increased drug testing, AA and NA meetings, individual and group counselling sessions and any conditions of supervision, which in the judgment of the court will be beneficial.” (ROA. 6645). The Plea of Guilty Under 13:5304 allowed Carlisle 14 days to rescind his guilty plea, withdraw from Drug Court and return to the regular criminal docket. (ROA. 6645).

On January 29, 2013, McNair interviewed Carlisle at the Jefferson Parish Correctional Center in connection with Carlisle’s application to be admitted to Drug Court. Carlisle knew this interview was conducted by McNair in McNair’s official capacity with Drug Court. (ROA. 6611, 6632). Carlisle did not consider himself to be McNair’s patient when the January 24, 2013 interview was conducted. (ROA. 6611, 6632, 6633). The day following the interview, McNair prepared a letter to the Administrator of Drug Court advising that Carlisle was capable of fulfilling the requirements of group treatment for Drug Court. Carlisle agreed with McNair’s conclusion and is aware of no negligence by McNair relating to the January 29, 2013 interview. (ROA. 6611, 6635, 6636).

Carlisle’s Second Amending and Supplemental Complaint admits: “The only time Carlisle ever even met with McNair after the initial interview at the Jefferson Parish Jail prior to the acceptance into Drug Court was on July 17, 2015 after [Carlisle alleges he served] an illegal 90 day sanction for ‘associating with a felon.’” (ROA. 990). In reality, the gravamen of Carlisle’s lawsuit entirely relates to sanctions issued to

Carlisle by Drug Court Judge Lee Faulkner and nothing to do with McNair.

After his admission to Drug Court, Carlisle was sanctioned with community service on May 20, 2013, June 17, 2013, November 7, 2013, November 15, 2013, January 27, 2014, and February 19, 2014. (ROA. 3406). Carlisle was also sanctioned with jail time by Judge Faulkner on August 20, 2013 (24 hours) and July 22, 2014 (48 hours). (ROA. 3406).

The sanctions became more serious in 2015. On April 28, 2015, Judge Faulkner issued an Order sanctioning Carlisle to 90 days flat time at the Jefferson Parish Correctional Center for contempt and demoted Carlisle to Phase II of the Drug Court program. (ROA. 6613). According to the October 9, 2015 Per Curiam Opinion from Judge Faulkner, the sanction was issued because Carlisle “lied about associating with a convicted felon, despite being shown a picture of himself with the convicted felon.” (ROA. 6711, 6712). Carlisle concedes he has no basis to say that McNair was at fault or responsible for Judge Faulkner’s finding Carlisle lied to Drug Court about associating with a convicted felon. (ROA. 6613, 6641, 6642).

While serving the 90 day jail sanction, Carlisle was brought to Drug Court and ordered by Judge Faulkner to attend Oxford House, a sober living facility. (ROA. 6613, 6638, 6639). McNair testified that he had nothing to do with Judge Faulkner’s directive sending Carlisle to Oxford House. (ROA. 6613, 6626). Carlisle has no evidence to the contrary.

On July 27, 2015, Carlisle had his first direct contact with McNair subsequent to Carlisle's admission to Drug Court. Carlisle sought to have McNair persuade Judge Faulkner to reverse the Oxford House Order. In his deposition, Carlisle absurdly testified the July 27, 2015 conversation with McNair created a patient-therapist relationship. (ROA. 6614, 6637, 6638). But the brief encounter with McNair regarding Oxford House was unrelated to any treatment or therapy provided by McNair. (ROA. 6614). Nevertheless, Carlisle claims that McNair committed therapist malpractice because McNair was not "standing up and being an advocate for me." (ROA. 1614, 1628).

On September 1, 2015, Judge Faulkner sanctioned Carlisle to six (6) months in the JPCC for contempt. Magistrate Judge Wilkinson's June 3, 2016 Report and Recommendations on Carlisle's Habeas Petition describes the events that led to the 6 months sentence as follows:

"On August 27, 2015, Carlisle "did not appear before the bar of the court his day for Drug Court," which led to the issuance of an attachment for his appearance. The attachment required Carlisle "to answer for a contempt in neglecting or refusing to attend before said Court as a defendant." Later that day, Carlisle met with this probation officer and appeared before the drug court. At the meeting with his probation officer, Carlisle failed to present required documentation, provided inaccurate information to the probation officer, and admittedly lied to the probation officer, all of

which was reported to the drug court when Carlisle appeared. Carlisle admitted to the drug court that he lied about losing the documentation he was supposed to deliver and lied about attending certain AA meetings. At the request of the probation officer, the drug court concluded that Carlisle misrepresented this information and imposed a sanction of six months in jail “flat-time” for contempt after which a probation revocation proceeding would be scheduled. Carlisle was taken into custody at 1:00 p.m. that day and ordered to return to drug court on September 1, 2015. The previously issued attachment was deemed satisfied on August 27, 2015.

Upon Carlisle’s return to court on September 1, 2015, he was accompanied by retained counsel and both his retained counsel and Carlisle’s current federal habeas counsel were allowed to attend the meeting with probation staff. Attending that meeting were the drug court judge, Carlisle, his retained and current counsel, the prosecutor, the probation officer and treatment staff. During the meeting, Carlisle’s counsel was informed of the program’s sanction procedures, Carlisle’s sanction history, and the allegations against Carlisle underlying the contempt. At the meeting the drug court allowed Carlisle’s counsel to present mitigating evidence and argument regarding Carlisle’s remorse, record of negative drug tests, employment and child support.

After the meeting, the drug court judge, prosecutor, defense counsel and program officials

appeared in open court, where Carlisle's counsel sought leave to put his mitigation evidence on the record. The judge advised counsel that there was no recording being made. The court noted counsel's objections and replied to his request for a transcript by repeating that no recording was being made. After considering the mitigating information provided by counsel at the meeting, the drug court determined that the contempt and jail sanction were warranted. The drug court then reiterated that Carlisle was to serve six months in jail for contempt for admittedly lying to his probation officer and ordered Carlisle held after completion of that term for a probation revocation proceeding at a later date." (ROA. 2328, 2329, 2330).

In his Petition for Writ of Habeas Corpus filed on February 1, 2016 in federal court, Carlisle described the August 25, 2015 hearing that led to the six (6) month sanction as follows:

"There is no record of the court appearance on August 25. What is understood now is that Carlisle was asked about his curfew understandings and AA meetings. He answered and he was dismissed. While walking from Court to the Drug Court Office, he was stopped and questioned outside again regarding his paperwork. Carlisle was merely stopped outside the building by Gretna Officer Klees, in the presence of his probation officer, and Administrator. The officer said "I will give you six months." His truck was searched, to which the Officer responded to Carlisle "you lied to the

judge.” Carlisle proceeded into the building to meet with his Probation Officer, completed his curfew paperwork and returned outside. After which his Probation Officer approached and had the Gretna Duty Officers arrest Carlisle. Judge Faulkner issued an arrest warrant minute entry for direct contempt at approximately 1:00 p.m., two and half hours after Carlisle had been taken into custody and booked in JPCC.” (ROA. 6615).

Carlisle admits that McNair is not responsible for Judge Faulkner’s finding that Carlisle lied about losing his paperwork. Furthermore, Carlisle admits that McNair had nothing to do with his car being searched and the AA paperwork being found. (ROA. 6616, 6642).

On April 27, 2016, Carlisle filed suit against Newell Normand (then Sheriff of Jefferson Parish and allegedly the administrator of the Jefferson Parish Correctional Center), Kristen Becnal (Drug Court Administrator), Tracy Mussal (Drug Court Program Supervisor), Kevin Theriot (Drug Court Probation Coordinator), Joe McNair (Drug Court Therapist), administrators of the 24th JDC Drug Court Intensive Probation Program, Richard M. Thompson (Jefferson Parish Public Defender Administrator) and Joe Marino (Public Defender). (ROA. 73). Emile Heron was added as a plaintiff on August 25, 2016. (ROA. 249).

On May 23, 2017, the District Court dismissed all claims by Heron against McNair. In doing so, the District Court stated “[t]he Court has reviewed both the Complaint and the Amended Complaint and finds that

Plaintiffs have pled no facts to support a cause of action against McNair as asserted by Plaintiff Heron.” (App. 1679).

With respect to the claims by Carlisle against McNair, on May 23, 2017, the District Court also ruled that McNair was entitled to qualified immunity from suit in his personal capacity as to all claims for damages arising under Section 1983. Accordingly, all Section 1983 claims for damages against McNair in his personal capacity were dismissed with prejudice. (App. 1649-1659). This decision was followed by an August 1, 2017 Order in which the District Court dismissed Carlisle’s suit against McNair in his official capacity with Drug Court. The District Court explained its dismissal of the official capacity claim against McNair as follows:

“Suits are directed at these individuals [including McNair] based on their role with the Drug Court system. Official capacity claim merely represent an alternative means of pleading a cause of action against an entity of which the individual is a member – here, the Jefferson Parish Drug Court. Despite Plaintiffs’ arguments to the contrary, it is apparent from the statute authorizing the Drug Court that it exists under the auspices of the 24th Judicial District Court for the Parish of Jefferson. These official capacity claims, therefore, are actually suits against the 24th Judicial District Court itself. Any such suit is precluded by the immunity provisions of the 11th Amendment.” (App. 1529-1530).

With the dismissal of all claims brought by Heron against McNair and Carlisle's 1983 claims against McNair in his individual and official capacities, the only remaining claim against McNair was Carlisle's pendant state law therapist malpractice cause of action. On August 30, 2018, the District Court granted the motion for partial summary judgment filed by the McNair Defendants based on prescription.² (ROA. 3405). The District Court explained this ruling as follows:

“Based on the undisputed evidence submitted, there is no question of fact that the involvement of the McNair Defendants and the sanctions plaintiff [Carlisle] received from Drug Court was apparent enough that a reasonable person's attention would have been excited to the point of further inquiry. Moreover, Plaintiff has produced no evidence that the alleged negligence of the McNair Defendants in evaluating plaintiff for the Drug Court program or in providing or failing to provide treatment during that period was not discoverable until after April 27, 2015. Plaintiff alleges that the sanctions imposed by Drug Court before April 27, 2015 are part of the damage that resulted from Plaintiff's initial evaluation and subsequent treatment. Therefore the constructed notice of a potential negligence claim based on the sanctions applies to plaintiff's claims based on the initial evaluation and therapy sessions before April 27, 2015 as well. The

² Prescription under Louisiana law is a mode of the barring of actions that are time-barred.

prescriptive period for any negligence claims involving a sanction therefore commenced when plaintiff received that sanction.

Accordingly, Plaintiff's claims for any sanctions imposed before April 27, 2015, for plaintiff's initial evaluation, and for any treatment or lack thereof by the McNair Defendants before April 27, 2015 have prescribed. Such claims are dismissed with prejudice." (ROA. 3411, 3412) (citations omitted).

On October 16, 2019, the McNair Defendants moved for summary judgment on Carlisle's sole remaining claim for therapist malpractice under Louisiana law relating to alleged negligence by McNair occurring on or after April 27, 2015. (ROA. 6598). The McNair Defendants argued Carlisle's remaining state law malpractice claim was legally deficient for three reasons. First, there was no relationship between Carlisle's alleged damages and the allegations of negligence made against the McNair Defendants. Second, there was no patient-therapist relationship between McNair and Carlisle during the prescriptive period. Third, the only interaction McNair had with Carlisle was in McNair's official capacity with the Drug Court. (ROA. 7455). Because the District Court agreed with the McNair Defendants as to the first point on causation, the District Court granted summary judgment without addressing whether a patient-therapist relationship existed or whether all allegations against McNair related to work in his official capacity with Drug Court. (App. 529).

The District Court described Carlisle's alleged damages flowing from McNair's therapist malpractice as follows:

"Plaintiffs' Opposition Memorandum ("brief") is replete with arguments sounding in Section 1983 claims. In fact, there are striking similarities between the arguments made by Plaintiffs' brief and Plaintiffs' allegations of Section 1983 violations in the Second Amended Complaint. In that sense, Plaintiffs' brief is vexing. Additionally, much of Plaintiffs' brief makes allegations against the McNair Defendants without tying those allegations to any purported harm suffered by Carlisle. The Court has managed, however, to decide for the following allegations of harm from Plaintiffs' brief: (1) McNair's failures as Carlisle's counsellor caused Carlisle to be demoted to Phase 2 in the Drug Court Program; (2) the McNair Defendants caused Carlisle money by requiring him 'to pay, accrue and fees [sic];' (3) McNair caused Carlisle to be incarcerated in jail without medication; and (4) McNair caused Carlisle to be sent to Oxford House." (App. 499) (citations omitted).

In reviewing the evidence submitted by the parties, the District Court concluded Carlisle had failed to demonstrate a disputed issue of material fact as to McNair's role in causing any of the harm alleged by Carlisle. (App. 509-529). Accordingly, the District Court dismissed the remaining claims by Carlisle

against the McNair Defendants, with prejudice. (App. 529).



REASONS FOR DENYING THE PETITION

1. THE APPEAL OF THE DISMISSAL OF HERON'S CLAIMS AGAINST THE MCNAIR DEFENDANTS HAS BEEN ABANDONED

On October 20, 2016, McNair filed a Motion to Dismiss. (ROA. 350-362). One of the arguments advanced by McNair was that the allegations made by Heron in the First Supplemental and Amending Complaint did not relate to or even mention McNair. (ROA. 361). As a result, McNair argued Heron had failed to state a claim against McNair upon which relief could be granted. (ROA. 361). In opposition to the Motion to Dismiss, Heron argued that he had “adopted all of the allegations of the Complaint as set forth with respect to McNair’s role as the Director of Counseling and the Counselor for the Drug Court.” (ROA. 650). The District Court rejected Heron’s argument, finding Heron had “pled no facts to support a cause of action against McNair.” Heron’s claims against McNair were dismissed without prejudice. (App. 166a-167a).

On June 13, 2017, Petitioners filed a Second Amending And Supplemental Complaint. (ROA. 958-1020). This pleading added McNair & McNair, LLC as a defendant. (ROA. 959). The Second Amending And Supplemental Complaint did not contain any

allegations of fact by Heron against McNair or McNair & McNair, LLC. (ROA. 982-997).

On October 16, 2019, the McNair Defendants moved for summary judgment with respect to the sole remaining claim against them: Carlisle's alleged therapist malpractice claim arising on or after April 27, 2015. (ROA. 6596-6617). The Motion for Summary Judgment was directed solely at Carlisle's therapist malpractice claim because Heron had made no such allegations against the McNair Defendants. In addressing this motion, the Court noted that the only remaining claim against the McNair Defendants was Carlisle's state negligence claim for actions taken after April 27, 2015. (App. 44a). On January 23, 2020, the District Court granted summary judgment in favor of the McNair Defendants, dismissing all claims made by Carlisle, with prejudice. (App. 52a).

Petitioners' Original Brief filed with the Fifth Circuit devoted itself entirely to arguing only that summary judgment was unwarranted as to Carlisle's claims against the McNair Defendants. (See Fifth Circuit record document 43, pp. 7-8 and 41). Nowhere in the Fifth Circuit Brief did Heron contest the District Court's dismissal of his claims against McNair or identify any facts specific to Heron's to state a claim against McNair of the McNair Defendants. In the Fifth Circuit, "It is well settled that an Appellant 'abandons all issues not raised and properly presented in [his] initial brief on appeal.'" *Hughes v. Morgan*, 647 Fed.Appx. 292 (5th Cir. 2016), quoting *Banks v. Thaler*, 583 F.3d 295, 329 (5th Cir. 2009). Having abandoned

any challenge to the District Court's dismissal of his claims against the McNair Defendants in connection with his appeal to the Fifth Circuit, Heron has no basis to seek a Writ of Certiorari from this Court.

2. THE COURT SHOULD NOT CONSIDER PETITIONERS' NEW ARGUMENT CHALLENGING THE GRANT OF QUALIFIED IMMUNITY TO MCNAIR BASED ON THE ALLEGED INVALIDITY OF THEIR DUE PROCESS WAIVER

In *Ohio Forestry Ass'n Inc. v. Sierra Club*, 523 U.S. 726 (1998), this Court did not consider new arguments raised on the rightness of a challenge to the forest services' land resource management plan for national forests where the argument was raised for the first time in briefs on merits before the Court. For the same reason, the Court should reject the Petitioners' challenge to the District Court's ruling granting qualified immunity to McNair because it is premised on an entirely new argument.

McNair filed a Motion to Dismiss based in part on qualified immunity on October 20, 2016. (ROA. 350-362). At no point did the opposition memorandum filed by Petitioners on December 13, 2016, claim the due process waiver signed by Petitioners in connection with their admission to the Drug Court program was invalid. (ROA. 627-650). In ruling in favor of McNair with respect to qualified immunity, the District Court stated:

“Plaintiff argues that the procedural due process rights violated by defendants are clearly established, however, it is undisputed that plaintiff signed a waiver of his due process rights prior to participating in the Drug Court program. To evade qualified immunity, plaintiffs would have to demonstrate that the invalidity of the due process waiver was clearly established. They have not done so.” (App. 164a).

In affirming the District Court ruling, the Fifth Circuit stated:

“The District Court concluded that McNair was entitled to qualified immunity, dismissing ‘all § 1983 claims for damages against McNair’ with prejudice. Appellates do not challenge the district court’s determination that McNair retained qualified immunity, which bars relief on the deliberant indifference claim. Appellates also point to no facts indicating that McNair knew of and disregarded an excessive risk to Appellants’ health or safety. Appellants demonstrate no error in the district court’s grant of qualified immunity to McNair.” (App. 5a).

In their Petition to this Court, Petitioners claim to have challenged the District Court’s grant of qualified immunity, pages 66-67 of their Original Brief in the Fifth Circuit. (Petition, p. 12). Contrary to Petitioners’ assertion, the 5th Circuit was correct. Petitioners’ Original Brief to the Fifth Circuit made no argument

challenging the validity of their due process waivers. (See Fifth Circuit Record Document 74, pp. 66-67).

In sum, the 5th Circuit opinion did not address the validity of the due process waiver precisely because Petitioners presented no argument on this issue to the appellate court. This Court denied a Petition for a Writ of Certiorari where a new argument was made for the first time to this Court in *Gann v. United States*, 142 S.Ct. 1 (2020). In a statement respecting the denial of Certiorari, Justice Sotomayor noted that “[Petitioner’s] argument has not been addressed by the Sixth Circuit, which leads this Court without a reasoned decision to review.” For the same reason, this Court should deny the Petition for Writ of Certiorari in this case. There is no decision of the Fifth Circuit relating to the waiver of due process rights for this Court to consider because the Fifth Circuit was not presented with and did not decide this issue.

3. THE ISSUES RAISED IN THE PETITION ARE MERITLESS BECAUSE THERE IS NO CAUSAL CONNECTION BETWEEN THE ALLEGED INJURIES AND THE MCNAIR DEFENDANTS

In the January 23, 2023 opinion granting summary judgment in favor of the McNair Defendants, the District Court was able to discern four alleged categories of injuries Carlisle attributed to the McNair Defendants:

- (1) Demotion to Phase II of the Drug Court program;
- (2) Approval of fees;
- (3) Incarceration without medication; and
- (4) Carlisle's claim he was forced to live at Oxford House at McNair's direction. (App. 50a-51a).

The District Court analyzed each of these claims and found zero evidence of causation. Petitioners presented the District Court with no evidence to support the claim had any connection to a demotion in the Drug Court program or the accrual of fees. With respect to the issue of medication, the District Court concluded "Carlisle fails to demonstrate that McNair had the power to prescribe Carlisle his medications while he was incarcerated or that McNair could require jail officials to provide them to him." (App. 51a). With respect to the argument that Carlisle was forced to live at Oxford House at McNair's direction, the District Court noted that even Carlisle conceded he was ordered to go to Oxford House by Judge Faultner. Zero evidence was presented to suggest McNair played any role in this decision. (App. 51a).

CONCLUSION

From the outset, Petitioners' lawsuit against the McNair Defendants has been an indirect attack on the Jefferson Parish Drug Court program. But the suit and

the Petition to this Court amount to a misdirected effort to somehow blame the McNair Defendants for the alleged Drug Court program deficiencies. The issues relating to the McNair Defendants in this suit simply do not warrant the attention of this Court.

Respectfully submitted,

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