

IN THE
Supreme Court of the United States

KENNETH ALLEN WASHINGTON,

Petitioner,

v.

DEPUTY RAYL, *et al.*,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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

PETER J. AGOSTINO
Counsel of Record
ANDERSON, AGOSTINO & KELLER, P.C.
131 S. Taylor Street
South Bend, IN 46601
agostino@aaklaw.com
(574) 288-1510

Attorney for Respondents

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals and District Court followed well established law in denying Petitioner's Motions for Extension to File his Notice of Appeal in the absence of excusable neglect or good cause for the motions; and

Whether Petitioner's request to proceed *in forma pauperis* was properly denied, based on the District Court's written certification that the appeal was not taken in good faith; and

Whether the Supreme Court should consider Petitioner's additional requests for this Court to review the underlying opinions when Petitioner's appeal was never reviewed by the Court of Appeals due to Petitioner's failure to file a timely notice of appeal.

RELATED CASES

United States Court of Appeals for the Seventh Circuit, Case No. 23-2461,

Kenneth Allen Washington v. Rayl, et al., December 15, 2023.

United States District Court, Case No. 3:20-cv-00461-DRL-MGG, *Kenneth Allen Washington v. Rayl, et al.*, April 20, 2023.

TABLE OF CONTENTS

	Page
Counterstatement of Question Presented	i
Related Cases	ii
Table of Authorities	iii
Introduction.....	1
Statement of the Case.....	2
Reasons for Denying Certiorari.....	4
I. Plaintiff's Motions for Extension to file his Notice of Appeal Were Properly Denied by the District Court.....	4
II. Plaintiff's Motion to Proceed In Forma Pauperis Was Properly Denied by the District Court and Court of Appeals	8
III. Plaintiff's Request to Review the Underlying Opinions Should Be Denied as Plaintiff's Appeal was Untimely.....	10
Conclusion	11

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Denton v. Hernandez</i> , 504 U.S. 25 (1992)	8
<i>Garwood Packaging, Inc. v. Allen & Co., Inc.</i> , 378 F.3d 698 (7th Cir. 2004)	6
<i>James v. Eli</i> , 889 F.3d 320 (7th Cir. 2018)	6
<i>Lee v. Clinton</i> , 209 F.3d 1025 (7th Cir. 2000).....	8
<i>Lee v. Nager</i> , 983 F.2d 1072 (7th Cir. 1993)	8
<i>McCarty v. Astrue</i> , 528 F.3d 541 (7th Cir. 2008).....	4, 6
<i>Nestorovic v. Metropolitan Water Reclamation District of Greater Chicago</i> , 926 F.3d 427 (7th Cir. 2019)	6
<i>Nietzke v. Williams</i> , 490 U.S. 319 (1989).....	8
<i>Parke-Chapley Const. Co. v. Cherrington</i> , 865 F.2d 907 (7th Cir. 1989).....	5
<i>Prizevoits v. Ind. Bell Tel. Co.</i> , 76 F.3d 132 (7th Cir. 1996).....	5, 6
<i>Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat (Admin. of State Ins.)</i> , 808 F.2d 1249 (7th Cir. 1987)	5
<i>Satkar Hospitality, Inc. v. Fox Television Holdings</i> , 767 F.3d 701 (7th Cir. 2014)	5, 6
<i>Sherman v. Quinn</i> , 668 F.3d 421 (7th Cir. 2012)	4, 5, 6
<i>Thomas v. Zatecky</i> , 712 F.3d 1004 (7th Cir. 2013)	8
<i>United States v. Smith</i> , 860 F.3d 508 (7th Cir. 2017)	6
Rules	
28 U.S.C. § 1915.....	8

28 U.S.C. § 2107.....	4
U.S. Supreme Court Rule 10.....	10, 11
Fed. R. App. P. 4	4, 5

INTRODUCTION

A Writ of Certiorari is a matter of judicial discretion which should only be granted if there exist compelling reasons to expend this Court's time on matters of great importance. A petition filed by a pro se litigant after his failure to abide by multiple deadlines is not one of those matters.

In this case, Plaintiff, Kenneth Washington, was granted leave to proceed against Defendants on his claims for violations of the Fourteenth Amendment. However, after reviewing the videotaped evidence in support of Defendants' motion for summary judgment, the District Court properly granted summary judgment. Plaintiff then failed to file his notice of appeal in a timely fashion, and, instead, attempted to request an extension to do so without meeting the excusable neglect standard. After Plaintiff's motion to extend was denied, Plaintiff nevertheless continued forward with filing a notice of appeal regarding the motion for extension, adding to that notice a request to be able to file the notice of appeal in forma pauperis. The Seventh Circuit denied Plaintiff's request due to his failure to demonstrate that his appeal was filed in good faith. Plaintiff has now requested this Court to allow him to file his appeal on the underlying opinion dismissing his case without paying his filing fee to the Court of Appeals, without a showing of excusable neglect on his original notice of appeal, and without any good faith basis for the filing of his second notice of appeal. This Court should deny his petition for writ of certiorari.

STATEMENT OF THE CASE

The following facts are relevant to this appeal:

On August 19, 2021, the District Court executed an Opinion and Order granting Plaintiff's motion to amend his complaint, and granting Plaintiff leave under the Prison Litigation Reform Act (PLRA) to proceed against Defendants, in their individual capacity, for placing him in a restraint chair, assaulting him, and dropping him on his head on September 9, 2019, in violation of the Fourteenth Amendment, as well as against Defendant Zawistowski, in her individual capacity, for failing to intervene. D.E. #74. On September 27, 2022, Defendants filed their Motion for Summary Judgment, and, on November 10, 2022, Plaintiff filed his Response to the Motion for Summary Judgment. D.E. #s 210-214 and 236. A Reply to the Response was filed on November 15, 2022, and a Surreply by Plaintiff was filed on December 14, 2022. D.E. #s 240 and 245. On April 19, 2023, the Court entered its Opinion and Order granting Defendants' Motion for Summary Judgment, and on April 20, 2023, the clerk entered the judgment. Appx., pp. 2-7.

A Notice of Appeal to the Court of Appeals for the Seventh Circuit must be filed 30 days after the entry of the judgment, but because the 30-day period ended on a Saturday in this case, the notice of appeal was due on Monday, May 22, 2023. Appx., p. 9. The deadline for filing a motion for extension of time was June 21, 2023. Appx., p. 9. On May 30, 2023, Plaintiff filed his Motion for Extension of Time to file a Notice of Appeal. Appx., p. 10. On June 22, 2023, Plaintiff filed a second motion for extension of time. Appx., p 11. On June 30, 2023, the District Court denied Plaintiff's

motions for an extension to file an appeal explaining that the first motion was denied because Plaintiff failed to demonstrate a compelling reason or excusable neglect to submit a tardy notice of appeal, and the second motion was untimely. Appx., pp. 8-12.

On July 19, 2023, Plaintiff filed a Notice of Appeal regarding the District Court's Order denying the motion for extension to file an appeal of the underlying matter. D.E. #260. On August 4, 2023, the Court of Appeals entered an Order noting that the appeal was subject to the PLRA, and Plaintiff's fee status had yet to be determined. D.E. #263. As such, the Court of Appeals gave Plaintiff until August 28, 2023, to either pay the \$505.00 appellate filing fees or file a motion for leave to proceed on appeal in forma pauperis in the district court. *Id.* On August 17, 2023, Plaintiff filed his Motion for Permission to Appeal In Forma Pauperis with the District Court. D.E. #264. On September 7, 2023, the District Court denied Plaintiff's Motion for Permission to Appeal In Forma Pauperis. D.E. #266.

On September 28, 2023, Plaintiff filed a Motion for Permission to Appeal in Forma Pauperis with the Court of Appeals, and on November 13, 2023, the Court of Appeals denied Plaintiff's Motion, noting that Plaintiff had not identified a good faith argument that the District Court erred in denying his motion for extension of time to appeal, and ordering Plaintiff to pay the required docketing fee within 14 days or the appeal would be dismissed for failure to prosecute pursuant to Circuit Rule 3(b). Appx., p. 1. On December 15, 2023, the Court of Appeals issued an order finding that the Plaintiff had not paid the appellate fee, and, therefore, the appeal was dismissed

for failure to pay the required docketing fee pursuant to Circuit Rule 3(b). *Id.* On December 21, 2023, Plaintiff filed a motion, which the Court of Appeals construed as a motion to recall the mandate. The Court ordered that Plaintiff's motion was denied without prejudice to renewal in a motion that includes confirmation that appellant has paid the \$505.00 appellate filing fees in the district court, and any such motion is due by January 22, 2024. Case No. 23-2461 D.E. #27. The Court of Appeals also reminded Plaintiff that any motion for an extension to file a petition for writ of certiorari should be filed in the United States Supreme Court. *Id.*

On January 10, 2024, Plaintiff filed his application to extend time to file a petition for a writ of certiorari with this honorable Court, and was granted until May 13, 2024, to file his petition. On April 27, 2024, Plaintiff filed his petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

I. PLAINTIFF'S MOTIONS FOR EXTENSION TO APPEAL WERE PROPERLY DENIED BY THE DISTRICT COURT

“A timely notice of appeal is a prerequisite to appellate review.” *Sherman v. Quinn*, 668 F.3d 421, 424 (7th Cir. 2012) (quoting *McCarty v. Astrue*, 528 F.3d 541, 544 (7th Cir. 2008)). In this case, Plaintiff was required to file a notice of appeal within 30 days from the entry of judgment. 28 U.S.C. § 2107; Fed. R. App. P. 4(a)(1)(A). Under Federal Rule of Appellate Procedure, the district court may extend the time to file notice of appeal if a party so moves no later than 30 days after the

original deadline for the filing of notice of appeal, and that party shows “excusable neglect or good cause.” Fed. R. App. P. 4(a)(5).

“While Rule 4(a)(5) ‘does not define what constitute excusable neglect,’ the term ‘was intended to be narrowly construed.’” *Satkar Hospitality, Inc. v. Fox Television Holdings*, 767 F.3d 701, 706 (7th Cir. 2014) (quoting *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat (Admin. of State Ins.)*, 808 F.2d 1249, 1251 (7th Cir. 1987)). “The excusable neglect standard applies in situation in which there is fault; in such situations, the need for extension is usually occasioned by something within the control of the movant.” *Sherman*, 668 F.3d at 425 (quoting *Parke-Chapley Const. Co. v. Cherrington*, 865 F.2d 907, 910 (7th Cir. 1989)). “On the other hand, the good cause standard ‘applies in situations in which there is no fault—excusable or otherwise.’” *Sherman*, 668 F.3d at 425 (quoting *Parke-Chapley*, 865 F.2d at 910).

In the present case, Plaintiff’s motion demonstrates that his request for an extension is based upon his own failure to file the notice of appeal within the time required, and not, based on a claim that the failing of the filing was through no fault of his own. As such, the Court should have considered Plaintiff’s motion through an excusable neglect standard. “The excusable neglect standard ‘refers to the missing of a deadline as a result of such things as misrepresentations by judicial officers, lost mail, and plausible misinterpretations of ambiguous rules.’” *Satkar*, 767 F.3d at 706 (quoting *Prizevoits v. Ind. Bell Tel. Co.*, 76 F.3d 132, 133-34 (7th Cir. 1996)). “The standard for reviewing whether neglect is ‘excusable’ is an equitable one, taking into consideration relevant circumstances, including (1) the danger of prejudice to the

non-moving party; (2) the length of the delay and its impact on judicial proceedings; (3) the reason for the delay (i.e. whether it was within the reasonable control of the movant); and (4) whether the movant acted in good faith.” *Sherman*, 668 F.3d at 425-426 (quoting *McCarty*, 528 F.3d at 544 (internal citations omitted)). “To establish excusable neglect, the moving party must demonstrate genuine ambiguity or confusion about the scope or application of the rules or some other good reason for missing the deadline, in addition to whatever lack of prejudice and absence of delay he can show.” *Satkar Hospitality*, 767 F.3d at 707 (citing *Prizevoits*, 76 F.3d at 134). “A party’s choice to wait, without more, is not a proper reason for extending the time to appeal.” *Nestorovic v. Metropolitan Water Reclamation District of Greater Chicago*, 926 F.3d 427, 432 (7th Cir. 2019) (citing *Sherman*, 668 F.3d at 427).

“A district court’s determination that excusable neglect is established is reviewed for an abuse of discretion.” *Sherman*, 668 F.3d at 425 (citing *McCarty*, 528 F.3d at 544 (which cited *Garwood Packaging, Inc. v. Allen & Co., Inc.*, 378 F.3d 698, 700 (7th Cir. 2004))). “A court abuses its discretion when the record contains no evidence on which it could have rationally based its decision or when the decision rests on an erroneous view of the law.” *Nestorovic*, 926 F.3d at 431-32 (7th Cir. 2019) (citing *James v. Eli*, 889 F.3d 320, 328 (7th Cir. 2018); *United States v. Smith*, 860 F.3d 508, 516 (7th Cir. 2017) (“Before we can conclude that a court did not abuse its discretion, we have to satisfy ourselves that the court exercised its discretion, that is, that the court considered the factors relevant to that exercise.”))

In the present case, the District Court issued a 5-page opinion explaining its reasoning for the denial of the motions for extension of time to file a notice of appeal. Plaintiff's second motion for an extension was simple to deny due to it being untimely. However, as for Plaintiff's first motion, the Court diligently laid out the time frame Plaintiff had to meet, and the timeline of events stated by Plaintiff. Of note, Plaintiff claimed he intended on filing his notice of appeal on May 23, 2023, but was rearrested on May 22, 2023, and was unable to file the notice. However, a notice filed on May 23, 2023, would have been a day late. Further, as of his motion filed on May 30, 2023, Plaintiff had not attached his notice of appeal, or otherwise filed it with the courts.

As stated above, a simple case of miscalculation of the deadline is not a sufficient reason to extend the time. The District Court explained:

Taking Mr. Washington at his word, his appeal documents were all but complete at the time of his arrest considering he intended to send them out the next day (which, as noted above, would have been late), so waiting eight additional days to request an extension – without providing a compelling reason why – isn't justified.

Ultimately, the District Court's opinion demonstrates the Court found the reason for the delay was within the reasonable control of Plaintiff, and did not find Plaintiff had provided any compelling reason to explain his failure to file the notice of appeal. As such, the District Court could not find Plaintiff was acting in good faith, and, therefore, found Plaintiff had not shown good cause or excusable neglect to submit a tardy notice of appeal. The District Court's opinion is sound and based upon well-reasoned and long-established law. Without a timely filed notice of appeal, the Court

of Appeals did not have jurisdiction over Plaintiff's appeal of the order granting summary judgment.

II. PLAINTIFF'S MOTION TO PROCEED *IN FORMA PAUPERIS* WAS PROPERLY DENIED BY THE DISTRICT COURT AND COURT OF APPEALS

In 28 U.S.C. § 1915(a)(3), it states: "an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." An appeal not taken in good faith "has been understood to mean objective frivolousness." *Thomas v. Zatecky*, 712 F.3d 1004, 1006 (7th Cir. 2013) (citing *Lee v. Clinton*, 209 F.3d 1025 (7th Cir. 2000)). "An action is frivolous if no rational argument in law or fact supports it." *Lee v. Nager*, 983 F.2d 1072 (7th Cir. 1993) (citing *Denton v. Hernandez*, 504 U.S. 25, 31 (1992) (which cited *Nietzke v. Williams*, 490 U.S. 319, 325 (1989))).

In response to Plaintiff's Notice of Appeal filed on July 19, 2023, the Court of Appeals issued an Order requesting the District Court review and rule upon Plaintiff's motion for permission to appeal *in forma pauperis*. On September 7, 2023, the District Court issued its Order denying Plaintiff's motion. The District Court's Order explained that even if Plaintiff's appeal was construed as timely, Plaintiff's appeal would still not be taken in good faith. The Court explained: "Summary judgment was granted in defendants' favor because Mr. Washington's version of events was flatly contradicted by video evidence." Ultimately, the District Court concluded "Because no reasonable jury could conclude the defendants violated Mr.

Washington's Fourteenth Amendment rights after viewing the videotaped evidence, summary judgment was proper."

The District Court, in footnote 3, also addressed Plaintiff's new claim of an appeal on the issue of whether he should have been granted counsel. The District Court laid out in detail the numerous motions and orders filed in the case, which advised Plaintiff he was required to follow specific steps to show he had made a reasonable effort to obtain counsel on his own before the court would appoint counsel, but that Plaintiff never did so. Based upon the above, it is clear that the Plaintiff did not have a good faith basis to appeal the order on summary judgment, nor to appeal the decision regarding his untimely appeal.

When the Court of Appeals received Plaintiff's motion requesting the Court of Appeals to allow him to proceed in forma pauperis as well, the Court of Appeals reviewed the District Court's certified order of denial. However, the Court of Appeals, in its decision denying Plaintiff's motion noted the district court's order certifying the appeal was filed in bad faith, as well as Plaintiff's failure to identify a good faith argument that the district court erred in denying the motion for extension of time to appeal. Instead of denying Plaintiff outright, the Court of Appeals allowed Plaintiff time to pay the filing fee and save his appeal. Plaintiff failed to do so. Instead, Plaintiff filed his petition for writ of certiorari with this honorable Court.

Not only has Plaintiff failed to demonstrate what good faith or excusable neglect he has for failing to timely file his notice of appeal, but Plaintiff has also failed to present any good faith argument for how his underlying appeal would be anything

but brought in bad faith given the video emphatically contradicts his entire factual allegations. For these reasons, Plaintiff's writ should be denied.

III. PLAINTIFF'S REQUEST TO REVIEW THE UNDERLYING OPINIONS SHOULD BE DENIED AS PLAINTIFF'S APPEAL WAS UNTIMELY.

In Plaintiff's Petition for Writ of Certiorari, Plaintiff attempts to appeal not only the order granting summary judgment in favor of Defendants, but also the District Court's discovery orders and orders denying Plaintiff appointed counsel. Rule 10 of the U.S. Supreme Court Rules states "review on a writ of certiorari is not a matter of right, but of judicial discretion." "A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10. Some of the matters considered by the Court, partially relevant for consideration here, are:

- (1) "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals,"
- (2) a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power," or
- (3) "... a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court."

Rule 10. "A petition for a 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." Rule 10. Plaintiff's petition is nothing more than this; a request for this Court to review decisions of both the Court of Appeals and District Court for which

he believes they misapplied the rule of law. While Plaintiff claims that there is some conflict between the circuits on the issues he brings within his petition, Plaintiff does not identify one circuit which decides the issue of a motion for extension to file a notice of appeal or a motion to proceed in forma pauperis differently. Within Plaintiff's "Reasons for Granting Petition," the Plaintiff makes no attempt to identify any split amongst the circuits, any federal question important for this Court to review, or any action by the court of appeals which departed so far from accepted practices to require this Court's intervention.

Instead, Plaintiff merely claims that the District Court decided the summary judgment wrongly and made findings of fact incorrectly in making its decision on summary judgment. As such, in conformity with Rule 10, this Court should deny Plaintiff's petition.

CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PETER J. AGOSTINO
Counsel of Record
ANDERSON, AGOSTINO & KELLER, P.C.
131 S. Taylor Street
South Bend, IN 46601
agostino@aaklaw.com
(574) 288-1510

Attorney for Respondents