

No. 17-815

IN THE
Supreme Court of the United States

FLORENCIO VAZQUEZ,

Petitioner,

v.

CITY OF ALLENTOWN, ET AL.

Respondent

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

**RESPONSE IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI ON BEHALF OF ALL
RESPONDENTS**

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Introduction

Petitioner, Florencio Vazquez, filed this action, alleging that Respondents used excessive force when they arrested him on July 26, 2014. On that date, Petitioner was under the influence of PCP and testified at his deposition that he had no recollection of any events that afternoon. After Petitioner walked out of a deposition, his counsel stipulated that he would not testify at trial. Petitioner's counsel then failed to subpoena a single other witness for trial. After Respondents opted not to appear at trial, Petitioner could not authenticate any exhibits at trial. After allowing Petitioner to read some deposition testimony into the record, the District Court granted Respondents FED. R. CIV. P. 50 motion for judgment as a matter of law. Petitioner appealed, and the Third Circuit Court of Appeals affirmed, holding that the District Court exercised its discretion in declining to allow Petitioner to rely on a video at trial when he could not offer any witness to authenticate that exhibit. The Third Circuit also affirmed the District Court's decision not to continue the trial in light of Petitioner's failure to subpoena any witnesses.

Questions Presented for Review

Question: Whether Petitioner has failed to establish good cause for this Court to hear his appeal under the criteria set forth in S. Ct. Rule 10.

Suggested Answer: Yes.

Question: Whether the Third Circuit Court of Appeals correctly affirmed the Trial Court's ruling not to continue the trial after Petitioner failed to subpoena any witnesses.

Suggested Answer: Yes.

Question: Whether the Third Circuit Court of Appeals correctly affirmed the Trial Court's evidentiary decisions at trial.

Suggested Answer: Yes.

Question: Whether the Third Circuit Court of Appeals held Petitioner to the same standard as every other civil litigant.

Suggested Answer: Yes.

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

Respondents, City of Allentown, Andrew Holveck, Maurice Flowers-Williams, and Matthew Diehl, respectfully respond to Petitioner's Petition for Writ of Certiorari to review the decision of the Court of Appeals for the Third Circuit affirming the entry of judgment pursuant to FED. R. CIV. P. 50 by the District Court for the Eastern District of Pennsylvania.

OPINIONS BELOW

The opinion of the court of appeals is reported at 689 Fed. Appx. 695, 2017 U.S. App. LEXIS 8235, 2017 WL 1906742 (3rd Cir. April 4, 2017). The decision of the district court was not reported.

BASIS FOR JURISDICTION

Petitioner seeks review of the May 9, 2017, Judgment of the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1253.

The Third Circuit Court of Appeals had jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

Petitioner's claims arise from the Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Petitioner's claims also implicate Eastern District of Pennsylvania Local Civil Rule 45.1:

No trial shall be continued on account of the absence of any witness unless a subpoena for the attendance of such witness has been served at least seven (7) days prior to the date set for trial. This rule shall not dispense with the obligation to take the deposition of any witness where the party requiring his/her attendance, or counsel, knows that such witness intends to be absent from the district at the time of the trial, or where such witness is not subject to subpoena within this jurisdiction.

CONCISE STATEMENT OF THE CASE

On July 26, 2014, Petitioner was arrested by Respondents following a struggle. According to Petitioner's medical records, he was under the influence of phencyclidine (PCP) at the time of his arrest and testified at his deposition that he had no recollection of the arrest or the period of time prior to the arrest. Due to Petitioner's resistance, at least seven (7) police officers were required to restrain him. Plaintiff suffered facial abrasions from the sidewalk, but no serious injuries during the arrest.

During a Final Pretrial Conference on July 29, 2015, the District Court ordered that Petitioner appear for a second deposition with regard to his medical history and prior drug treatment. At that deposition on July 31, 2015, before any substantive testimony was taken, Petitioner requested to use the restroom, walked out of the building, and did not return. In light of this conduct, as well as his prior testimony that he lacked any memory of events, on August 3, 2015, Petitioner's counsel stipulated that Petitioner would not be called as a witness at his own trial.

At the Final Pretrial Conference, Petitioner's counsel represented that he intended to present his case solely through the cross-examination of Respondents and the presentation of a video of the arrest. However, Petitioner's counsel made no effort, formal or informal, to secure the attendance of Respondents at trial. As Respondents had no interest in volunteering to assist Petitioner in presenting his case, and because there was no

subpoena to compel their attendance, they opted not to appear at trial.

On August 4, 2015, trial commenced without Respondents present. Petitioner's counsel requested a continuance in order to issue subpoenas. However, relying on Eastern District of Pennsylvania Local Civil Rule 45.1, the District Court denied this request.

Over the objection of Respondents, the District Court initially permitted Petitioner's counsel to present the video that purported to show Petitioner's arrest. However, since Petitioner did not present any evidence to authenticate that video, the District Court subsequently reversed its ruling and held that the video was not admissible. Over a strong objection from Respondents, Petitioner was then permitted to read selected portions of the depositions of Respondents Andrew Holveck and Matthew Diehl. However, Petitioner was not permitted to introduce copies of exhibits that purported to be screenshots from the video, as Petitioner once again had no means to authenticate the records. After introducing a photograph showing his purported injuries, Petitioner rested without presenting a single witness.

Upon the close of Petitioner's case, Respondents moved for judgment pursuant to FED. R. CIV. P. 50. After lengthy argument, the District Court granted that motion, ruling that Petitioner had failed to present any evidence from which the jury could find liability on the part of Respondents. Petitioner appealed that decision, and the Third Circuit Court

of Appeals affirmed the District Court's decision. The Third Circuit held that the District Court properly exercised its discretion in declining to continue the trial and in excluding the video and screenshots. The Third Circuit also ruled that, in light of the absence of any admissible evidence, the District Court properly entered judgement pursuant to FED. R. CIV. P. 50.

LEGAL ARGUMENT

I. Petitioner Has Not Identified Any Basis for Certiorari

This Court has established guidelines for its scope of review. Pursuant to S. Ct. Rule 10:

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. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower

court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or 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, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

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.

In this matter, Petitioner has not set forth any argument to establish a basis for review by this Court. Petitioner affirmatively concedes that there is no conflict among the circuits;¹ there is no decision of a state court of last resort; and Petitioner has not identified any important question of law that should be settled by this Court. Instead, Petitioner argues only that the Court of Appeals erred in its decision finding that the District Court based its evidentiary decisions on a proper exercise of discretion. Such a

¹ Petition for *Certiorari*, at p. 16.

claim does not warrant a grant of certiorari. *See e.g. Baker v. Druesedow*, 263 U.S. 137, 142, 44 S. Ct. 40, 68 L. Ed. 212 (1923) (“Mere errors of judgment are not subject to review” via a petition for certiorari.)

II. The Court of Appeals Properly Affirmed the Denial of Petitioner’s Request for Continuance

As Petitioner made no attempt to secure the attendance of Respondents at trial, the Court of Appeals correctly held that the District Court properly exercised its discretion in denying the request for a continuance. As this Court has noted, granting and denying continuances usually is within the sound discretion of the District Court. *See e.g. Valdes v. Central Altagracia, Inc.*, 225 U.S. 58, 73, 32 S. Ct. 664, 56 L. Ed. 980 (1912). However, in this case, the issue was beyond even the discretion of the District Court. Pursuant to Eastern District Local Civil Rule 45.1, “No trial *shall* be continued on account of the absence of any witness unless a subpoena for the attendance of such witness has been served at least seven (7) days prior to the date set for trial.” (*emphasis added*). As Respondents had not been subpoenaed, the District Court lacked even the discretion to grant a continuance of the trial. *See e.g. Lopez v. Davis*, 531 U.S. 230, 241, 121 S. Ct. 714, 148 L. Ed. 2d 635 (2001) (holding that the use of the mandatory “shall” “imposes discretionless obligations.”); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998) (“the mandatory ‘shall’ ... normally creates an obligation impervious to judicial discretion.”) Under Local Rule 45.1, the Trial Court

was prohibited from continuing the trial, and the Court of Appeals properly affirmed this decision.

Petitioner's reliance on Eastern District of Pennsylvania Local Civil Rule 43.1.1 is misplaced. Pursuant to that Rule, "No action, when called for trial, shall be passed or delayed on account of an attachment for witnesses unless ... it is shown that the witness or witnesses were in attendance at the time and departed without leave." Initially, Petitioner failed to raise this Rule either before the District Court or on appeal to the Third Circuit Court of Appeals. As such, the argument was waived and should not be considered by this Court. See *e.g.* *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002) (holding that issues not raised in the lower courts are waived on appeal to the Supreme Court). Further, as trial had not yet commenced when Respondent's appeared for jury selection, the Rule is inapplicable. Pursuant to the District Court's February 2, 2015, Scheduling Order (Docket Item No. 16):

12. The selection of a jury shall take place on **August 3, 2015**, at **9:30 a.m.** Jury selection will take place at the James A. Byrne United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania, in a courtroom to be determined;

13. A jury trial shall commence before this court on **August 4, 2015**, at **9:30 a.m.** at the Holmes Building, 4th Floor, 101 Larry Holmes Drive, Easton,

Pennsylvania. This order shall serve as a formal attachment for trial[.]

The District Court's Order specifically delineates the difference between jury selection and the commencement of trial. While Respondents were present during jury selection, they never appeared at trial, and there was no basis to allow for a continuance under Local Civil Rule 43.1.1. Under such circumstances, Petitioner has set forth no grounds for this Court to grant review of the decision not to continue the trial.

III. The Court of Appeals Properly Affirmed the District Court's Decision to Exclude the Video

Petitioner complains that the District Court excluded evidence in the form of a video that Petitioner sought to play to the jury. Initially, “any evidentiary decision must be reviewed for abuse of discretion.” *See e.g. GE v. Joiner*, 522 U.S. 136, 141, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) (“We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings.”) “Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous.” *Spring Company v. Edgar*, 99 U.S. 645, 658, 25 L. Ed. 487 (1879). As the District Court's decision was in accord with the applicable Federal Rules of Evidence, there are no grounds for review by this Court.

Pursuant to FED. R. EVID. 901(a), “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Rule 901(b) provides a non-exclusive list of means by which evidence can be authenticated, and Rule 902 provides means by which evidence can be deemed self-authenticating. Petitioner seeks that the Court add another wrinkle to these Rules and hold that any document produced in discovery be deemed authentic.

The cases cited by Petitioner do not support his position. Initially, Petitioner relies on *Snyder v. Whittaker Corp.*, 839 F.2d 1085 (5th Cir. 1988), a case in admiralty. In *Snyder*, the disputed evidence consisted of the notes of a senior manager of a subdivision of the defendant. The defendant objected to the introduction of the evidence on the grounds that the author had not appeared to authenticate it. The district court allowed the introduction of the notes on the grounds that several of the defendant’s witnesses testified that the author was one of its senior employees, and because the notes were produced in discovery. In this matter, Petitioner did not introduce **any** evidence regarding the video. Instead, he sought to play the video in a vacuum, without any explanation of what the video showed or how it was prepared. As such, *Snyder* does not support Petitioner’s position.

Next, Petitioner relies on *FTC v. Hughes*, 710 F. Supp. 1520 (N.D. Tx. 1989). In *Hughes*, the issue before the court was whether documents could be authenticated for purposes of a Rule 56 motion for

summary judgment in the absence of an accompanying affidavit. The issue of whether the documents were self-authenticating for purposes of trial was never addressed. The same can be said for *Law Co. v. Mohawk Construction & Supply Co.*, 577 F.3d 1164, 1170 (10th Cir. 2009), in which the Tenth Circuit held, “We do not require an affidavit to authenticate every document submitted for consideration ***at summary judgment.***” The Tenth Circuit never held that all documents produced during discovery could be self-authenticating at trial. Similarly, in *Anderson v. Cramlet*, 789 F.2d 840 (10th Cir. 1986), the issue was whether a document needed to be authenticated with an affidavit for purposes of a motion for summary judgment. None of these cases involved the burden of establishing authentication at trial.

In *Dennison v. Swaco Geograph Co.*, 941 F.2d 1416 (10th Cir. 1991), the Tenth Circuit held that, where a document was on company letterhead and was produced during discovery, there was sufficient circumstantial evidence to authenticate it. However, in that case, the plaintiff put witnesses on the stand and questioned them regarding the documentation. In this case, Petitioner sought to do nothing more than press play on a video and rest his case without any testimony about what the video purportedly showed. This strategy is untenable under the Rules of Evidence, which require that a party actually proffer evidence to authenticate its evidence.

For example, in *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 929 (3rd Cir. 1985), the Third Circuit Court of Appeals held, “[T]he fact that the

copies were produced by the plaintiff in answer to an explicit discovery request for his Sea Service Records, while not dispositive on the issue of authentication, is surely probative.” (*emphasis added*). Similarly, in *Lexington Insurance Co. v. West Pennsylvania Hospital*, 423 F.3d 318, 319 (3rd Cir. 2005), this Court of Appeals held that documents produced in discovery were properly authenticated only where there was testimony regarding the document from an employee of the defendant. The Third Circuit in this matter followed this precedent and held

It does not follow that everything produced in discovery is unconditionally authenticated. ... The District Court reasonably concluded that Vazquez’s inability to elicit testimony identifying Defendants in the video militated against authentication, notwithstanding the fact that the Defendants produced the video in discovery.

Vazquez v. City of Allentown, 689 Fed. Appx. 695, 700 (3rd Cir. May 9, 2017). Petitioner now argues that the District Court simply dispense with the requirements of FED. R. EVID. 901 and allow the video to be shown without any evidence to authenticate it. The District Court properly declined to do so, and the Court of Appeals correctly affirmed that decision. There was no manifest abuse of discretion, and there is no basis for the Court to review that decision.

IV. The Court of Appeals Properly Affirmed the District Court's Decision to Preclude Screenshots from the Video

As the video itself could not be authenticated, the Court of Appeals properly ruled that the District Court exercised its discretion in precluding the screenshots proffered by Petitioner. The Court of Appeals applied the proper abuse of discretion standard and ruled that “without testimony as to the method of creation, there is simply no proof that the shots came from the video footage.” *Vazquez*, at 701, n.4. In essence, Petitioner sought to authenticate one exhibit through documents that purported to be taken from that exhibit. What Petitioner failed to do was present a single witness who could testify as to what any of the exhibits actually were. As the Court of Appeals noted, Petitioner’s counsel claimed that the screenshots were created by his secretary. If true, Petitioner could have proffered his secretary as a witness to explain and testify as to how the screenshots were made. Instead, Petitioner simply sought to offer them, without supporting or explanatory testimony as to the origin or meaning of the documents. The Court of Appeals correctly ruled that the District Court exercised its discretion in excluding these screenshots, and there are no grounds for further review.

V. The Court of Appeals Did Not Apply a Different Standard to Petitioner's Claim

In his final argument, Petitioner argues that the Court of Appeals applied a higher standard to his claims because it involved allegations of excessive

force. There is no evidence to support this position. Petitioner makes several arguments, none of which support a finding that his claims were subjected to a higher standard than other civil claims. Respondents will address those issues *seriatim*.

First, Petitioner claims, “The Defendants were permitted to miss the second day of trial *without leave* of the Court, even though the Local Rules say otherwise.”² As noted above, trial was not scheduled to commence until August 4, 2015, and Respondents chose not to appear for that first day of trial. They were not “permitted to miss the second day” of trial. Rather, they did not attend because Petitioner did not take any steps to ensure that they did attend. Further, as the Court of Appeals noted:

[I]t is problematic for Vazquez to now demand this charge for at least two reasons: one, Vazquez failed to remain at a scheduled deposition and the Court did not apply the charge in that instance and two, the Court, in an apparent effort to provide a remedy to Vazquez given Defendants’ failure to appear, took the unorthodox approach of allowing admission of portions of Defendants’ depositions.

Vazquez, at 700, n.3. As the Court of Appeals recognized, the District Court didn’t apply a higher standard to Petitioner. Instead, it actually allowed for deposition testimony to be admitted in violation of

² Petition for *Certiorari*, at p. 25

FED. R. CIV. P. 32(a)(6), over the objection of Respondents that the testimony was taken out of context. Rather than show a bias against Petitioner, this demonstrates that the Court of Appeals recognized that the District Court did everything in its power to ameliorate the effects of Petitioner's counsel's failure to prepare for trial.

Next, Petitioner argues that, "The trial court refused a delay in trial under Local Rules 43.1.1 even though the Local Rules requires that." This argument fails for several reasons, not the least of which is that Petitioner never argued that Local Rule 43.1.1 should have been applied. As such, this argument was waived. Further, as the trial had not commenced when Respondents attended jury selection, Local Rule 43.1.1 was completely inapplicable.

Third, Petitioner complains that the videotape and screenshots were not admitted, despite the complete absence of any authenticating testimony. As set forth above, the Court of Appeals addressed the applicable Rules and precedents and held that Petitioner failed to present any evidence to authenticate this evidence. The Third Circuit Court of Appeals followed its own decision in *McQueeney*, negating any suggestion that Petitioner was held to a higher standard.

Petitioner has not set forth any basis to support his claim that the Court of Appeals held him to a higher standard. Rather, the Court of Appeals and District Court both held Petitioner to the same Rules to which every litigant is required to abide. Rather

than a showing of bias by the Court of Appeals or District Court, this matter is, unfortunately, the result of poor planning by Petitioner's counsel. As the Court of Appeals recognized:

We are troubled by what appears to be plaintiff's counsel's serious lack of preparation in this very important case – section 1983 is an invaluable device in aiding citizens who have suffered abuse from the state. Unfortunately, there is simply no basis for us to conclude that the District Court abused its discretion with regard to central pieces of evidence, and similarly no basis for us to reverse its grant of judgment as a matter of law.

Vazquez, at 802. Contrary to Petitioner's claims, the Court of Appeals recognized the importance of Section 1983 in protecting the Constitutional rights of citizens. It was Petitioner's counsel who failed in this matter, not the Courts. As such, there is no basis for the Court to grant *certiorari* in this case.

CONCLUSION

In light of the foregoing, this Court should deny the Petition for Writ of *Certiorari* to the Third Circuit Court of Appeals.

Respectfully submitted,

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