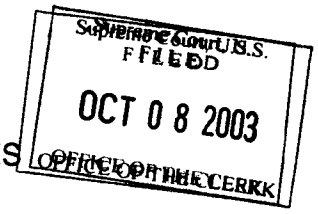
No. 03-7843 **ORIGINAL**

IN THE

SUPREME COURT OF THE UNITED STATES



#255292
In Re: HARRY BROCKWELL — PETITIONER
(Your Name)

vs.

WARDEN POWHATAN
CORRECTIONAL CENTER — RESPONDENT(S)

ON PETITION FOR A WRIT OF HABEAS CORPUS

4TH Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF HABEAS CORPUS

HARRY BROCKWELL, #255292
(Your Name)

POWHATAN CORRECTIONAL CENTER
(Address)

STATE FARM, VIRGINIA 23160
(City, State, Zip Code)

(Phone Number)

CLAIMS

All of the following claims are based on ineffective assistance of counsel and are governed by the United States Supreme Court's interpretation, in Strickland v. Washington, 466 U.S. 668.

This Honorable Court will find that the following claims; although under ineffective assistance of counsel, involve failure to follow state law and procedure, willfully and intentionally concealing exculpatory evidence and lieing about the evidence in order to obtain a conviction by fraud and deception.

CLAIM (1) DENIAL OF EXCULPATORY EVIDENCE THRU THE INEFFECTIVE ASSISTANCE OF COUNSEL.

This petitioner states he was denied due process of law by the Commonwealth, deliberately withholding exculpatory evidence. This concerns the gun powder residue sample for the petitioner's face, which the Commonwealth failed to test. See TR. 2/line 173. If this sample had been tested, it would have shown that, the petitioner

had no gun powder residue on his face, and could not have committed the alleged crime of murder. This prevented the petitioner from proving his actual innocence before the jury and made the results of the proceeding unreliable. This was allowed through the ineffectiveness of his trial counsel, John Venner who on January 7, 1997, met with the Commonwealth Attorney and Detective Buffington and all of the Commonwealth's files were opened to the defense. See TR. 170-25 and TR. 171/lines 1-9. Petitioner's attorney had ample time and opportunity to discover this fact and demand this powder residue vial be tested. Any reasonable attorney would have done this. This problem was further accented, by petitioner's attorney failing to state any legal authority, therefore allowing the gun powder residue samples to be admitted as evidence, after the Commonwealth failed to prove the chain of custody. TR. 2-137-147. To make matters worse, the Commonwealth was then allowed to recall Detective Buffington to establish the chain of custody. See TR. 2, 158-160 and TR. 2, 252-253. Even then no chain of custody was established, due to the fact, no one could say, who removed this vial for the face, or what happened to it.

Next; the alleged murder weapon, a ten round semi-automatic .22 caliber pistol was never fingerprinted. TR. 52, 13-16. Which would have proven beyond all doubt, that this petitioner never committed the alleged crime and that the petitioner's wife committed suicide. Then the Commonwealth's own witness could not say the bullets that were recovered, came from the alleged murder weapon. See TR. 62, 7-10. Further; this petitioner had told this detective that he picked up this weapon, in order to see if his wife was alive, as instructed by the 911 operator, but as luck would have it, this 911 tape, turned up missing under the control of Detective

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

COURT OF LAST JUDGEMENT
4TH CIRCUIT COURT OF APPEALS
denied July 22/03

ORDER SOUGHT FOR REVIEW
U.S DISTRICT COURT, AT ALEXANDRIA
VIRGINIA, Record No 1:02-CV-230-AM

JURISDICTIONAL STATEMENT

28 USC 1651 WRITS.

(A) The Supreme Court and all courts established by Act of Congress issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 USC 2241 POWER TO GRANT THE WRIT.

(A) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(C-3) The writ of habeas corpus shall not extend to a prisoner unless he is in custody in violation of the constitution or laws or treaties of the United States.

This petitioner firmly states that he is in fact, incarcerated contrary to the Bill Of Rights and the United States Supreme Court determination thereof.

This petitioner seeks review of the final order denying his Writ Of Habeas Corpus on 12/16/02 Record# 1:02-CV-230-AM, by the U.S. District Court at Alexandria Va. without an evidentiary hearing.

Notice Of Appeal was then filed and received by the clerk of the 4th Cir. Court Of Appeals on 12/30/02 and forwarded to the Federal District Court at Alexandria, Va. On 3/10/03 a Motion To Proceed In Forma Pauperis on appeal was granted, and the Certificate Of Appealability was denied.

Informal briefs were filed on 1/21/03 in the 4th Cir. Court Of Appeals

and was denied on May 29, 2003 Record# 03-6108, then a petition for Rehearing and Rehearing Enbanc was filed on June 9, 2003 and was denied in the 4th Cir, Court Of Appeals on July 22, 2003 Record # 03-6108. There was no adjudication on the merits.

All state remedies have been exhausted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

OCT 20

HARRY BROCKWELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACTION NO. 02-230-AM
	)	
	)	
DIRECTOR, DEPT. OF CORRECTIONS	)	
	)	
Respondent.	)	

O R D E R

This matter is before the Court on petitioner's motion for a certificate of appealability. On August 12, 2003, petitioner filed a motion to reconsider judgment pursuant to Fed. R. Civ. P. 60(b). By Order dated September 2, 2003, this Court denied petitioner's motion because it merely reiterated previous arguments. On September 30, 2003, petitioner filed a Notice of Appeal and the instant motion. For the reasons stated in the Order dated September 2, 2003, petitioner's request for a certificate of appealability must be denied.

Accordingly, it is hereby

ORDERED that petitioner's motion for a certificate of appealablity is **DENIED**.

The Clerk is DIRECTED to forward a copy of this Order to petitioner. In addition, pursuant to Rule 22 of the Federal Rules of Appellate Procedure, the Clerk is DIRECTED to send this Order, the

IN THE

Supreme Court of the United States

No._____

In re: Daryl Smith,

Petitioner,

V.

T.C. OUTLAW, Warden

Respondent.

On Petition for a Original Writ of Habeas Corpus to the Supreme Court of the Petitioner

---

PETITION FOR A ORIGINAL WRIT OF HABEAS CORPUS

Daryl Smith, pro se, on behalf of himself, respectfully petition for a Original Writ of Habeas Corpus to review the judgment of the Sixth Circuit Court of Appeal in this case.

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals is unpublished, Case No. 05-5670 (App.1A). The District Court decision in this case is attached, (App.4A). Reproduced in the appendix to this petition.

QUESTIONS PRESENTED

The Judicial power of the United States pursuant to federal statute 28 U.S.C. § 2255 under the Antiterrorism and Effective Death Penalty Act applies to persons in federal custody. In contrast, jurisdiction of federal circuit courts, on habeas corpus, could be invoked under habeas corpus act of September 15, 1863, by person, not prisoner of war, held in custody by authority of President. **Ex parte Milligan** (1866) 71 US 2, 18 L Ed 281.

It is undisputed Appellant is held by the authority of the President, within the Executive Branch of government, Department of Justice, Bureau of Prison, after the Judicial power of the United States was extended by applying its federal statutes. Equally undisputed, Appellant is not a prisoner of war, who's common law right to exercise the Great Writ ad-subjiciendum was derogated by federal statute to challenge the Custodian, execution of sentence. Statutes used by the District Court and Sixth Circuit Court of Appeal.

The questions presented here is whether the Executive Branch of Government Judicial statute's derogated Appellant's common law rights to exercise the Great Writ ad-subjiciendum. Whether the Court of Appeals denial of Appellant's Writ of ad-subjiciendum affectively impair common law rights to be free from unlawful restraint, and whether this Court has jurisdiction to grant the Great Writ of Habeas Corpus in the proceeding subjudice.

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JURISDICTION

The Court of Appeals judgment was entered on December 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1651, 28 U.S.C. 1253, Rule 20 Civil Judicial Procedure and Rules, Ex parte Bollman, 8 U.S. (4 Cranch.), In re Chapman, 156 U.S. 211, 218 (1895)(Court's habeas corpus jurisdiction is "appellate").

CONSTITUTIONAL PROVISION INVOLVED

This case presents a question under the First, Fifth, Sixth, Eleventh, Thirteenth and Fourteenth Amendment of the Federal Constitution, Article I, § 9, cl. 2, Art. III, § 2, cl. 1 and Art. IV, § 2, cl. 1.

STATEMENT OF THE CASE

A. The Crime, Punishment and Direct Appeal

The material facts of the crime are not disputed. Smith was tried and found guilty in an Illinois federal district court for theft of government funds in violation of 18 U.S.C. § 641. Despite the unconstitutionality of the sentence imposed using acquitted conduct, whereas, the jury found Smith not guilty and rejected a special jury verdict form of possession of narcotics. The sentencing court using the preponderance standard held him accountable for the narcotics, replacing a sentence of 10 months to 120 months (10 years). On appeal, the conviction and sentence were affirmed as the district court's sentence of Smith did not exceed the statutory maximum of 18 U.S.C. § 641.

B. Administrative Remedies. Case#341346-F1

On 28 June 2004, Smith initiated administrative procedures

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 05-5670 APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

DEC 12 2005

LEONARD GREEN, Clerk

DARYL SMITH,

Petitioner-Appellant,

v.

T. C. OUTLAW, Warden,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

ORDER

Before: NELSON, DAUGHTREY, and SUTTON, Circuit Judges.

Daryl Smith, a federal prisoner proceeding pro se, appeals a district court order denying his habeas corpus petition construed to be filed under 28 U.S.C. § 2241. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Smith was convicted in an Illinois federal district court for theft of government funds in violation of 18 U.S.C. § 641. The district court sentenced him to 120 months of imprisonment. His conviction and sentence were affirmed on direct appeal. *United States v. Patterson*, 348 F.3d 218 (7th Cir. 2003).

In July 2004, Smith filed a petition in the United States District Court for the Western District of Tennessee asserting that his sentence is illegal in light of *Blakely v. Washington*, 542 U.S. 296 (2004). He filed an amended petition in January 2005 citing *United States v. Booker*, 125 S. Ct. 738 (2005). Upon review, the district court denied the petition.

Smith has filed a timely appeal. He has also filed a motion to proceed in forma pauperis on appeal.

We review de novo a district court's order dismissing a habeas corpus petition filed under 28 U.S.C. § 2241. See *Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999). Upon review, we conclude that the district court properly denied Smith's petition as without merit.

As a general rule, a petitioner challenging the legality of a sentence must bring his claim under § 2255 in the sentencing court, while a petitioner challenging the execution or manner in which the sentence is served may bring a claim under § 2241 in the court having jurisdiction over the prisoner's custodian. *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001); *Charles*, 180 F.3d at 755-56. However, a federal prisoner may challenge his conviction and the imposition of a sentence under § 2241, instead of § 2255, if he is able to establish that his remedy under § 2255 is inadequate or ineffective to test the legality of his detention. See 28 U.S.C. § 2255 (last clause in fifth paragraph); *Charles*, 180 F.3d at 756. The savings clause of § 2255 may only be applied when the petitioner makes a claim of actual innocence. *Martin v. Perez*, 319 F.3d 799, 804 (6th Cir. 2003). The prisoner has the burden of proving that his remedy under § 2255 is inadequate or ineffective. *Charles*, 180 F.3d at 756.

Smith failed to meet his burden. Smith has filed at least one § 2255 motion to vacate, which was denied on the merits. Smith is not entitled to § 2241 relief merely based on the denial of his prior § 2255 motion. The remedy under § 2255 is not rendered inadequate or ineffective simply because the petitioner has already been denied relief under that section. See *id.* at 756-58.

Smith does not assert a cognizable claim of actual innocence. He simply challenges the legality of his sentence. Moreover, the Supreme Court has not made its holding in *Booker* retroactive to cases on collateral review. See *Humphress v. United States*, 398 F.3d 855, 860-61 (6th Cir. 2005), *cert. denied*, 2005 WL 1671557 (U.S. Oct. 3, 2005).