No: 03-5696

In The
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
AUG 05 2003
OFFICE OF THE CLERK

IN RE: DALE BROWN

Petitioner,

ORIGINAL PETITION FOR AN EXTRAORDINARY WRIT
OF HABEAS CORPUS

Respectfully Submitted,

Dale Brown
Reg. No: 29087-004/Unit A3
Federal Correctional Complex-Low
P.O. Box 1031
Coleman, Florida 33521-1031

PETITIONER, PRO-SE

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QUESTIONS PRESENTED

I. WHETHER MR BROWN, (PETITIONER), WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL, MR FEIGENBAUM, INCULCATED HIM WITH ERRONEOUS ADVICE AND MIS-INFORMATION, WHICH LED MR BROWN TO BELIEVE, AMONG OTHER ERRONEOUS THINGS, THAT GOING TO TRIAL WITH AN ENTRAPMENT DEFENSE WOULD HAVE BROUGHT FORTH A MORE ADVANTAGEOUS OUTCOME AS OPPOSED TO MR BROWN'S ORIGINAL INTENT TO PLEAD STRAIGHT UP TO THE CHARGES?

ORIGINAL PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS

DALE BROWN, (hereinafter, "Mr Brown," or "Petitioner"), respectfully prays for a WRIT OF HABEAS CORPUS on the grounds that he was denied effective assistance of counsel where his trial counsel, (Mr Feigenbaum), inculcated in him erroneous advice and misinformation which led Mr Brown to believe, among other erroneous things, that going to trial with an entrapment defense, (notwithstanding the mountain of evidence showing Mr Brown's predisposition), would have brought forth a more advantageous outcome than pleading straight up to the charges as Mr Brown had originally intended to do from the night of his arrest. Mr Brown asserts that his trial counsel should have informed him that entrapment was no defense and instead impress upon him that pleading straight up to the charges as he originally intended to do was the best alternative to reduce his sentence exposure under the Sentencing Guidelines.

Mr Brown has no other means or avenue to obtain judicial relief and vacatur of his sentence in the district where he was convicted or is currently imprisoned. Mr Brown, now appearing before this court pro-se, prays that this court will grant him the opportunity to have his petition heard. Mr Brown was unable to raise the instant issue in his original 28 U.S.C. § 2255 motion because as a pro-se litigant he did not have the proper legal training, knowledge or complete facts necessary to frame this issue with merit. Mr Brown obtained most of the facts pertaining to this issue at the November 21, 2001 evidentiary hearing, and

at that time it was too late to address the issue because the mandate from the appellate court instructed the district court to confine the hearing to addressing "only" the issue Mr Brown originally framed in his 2255 motion.

Mr Brown's habeas counsel, Mr Ross, made an attempt to present the instant claim at the hearing because he determined that Mr Brown had erroneously framed the issue in his original 2255 motion. The district court acknowledged that the instant claim was a separate issue but declined to address it because it said it was bound by the mandate of the Eleventh Circuit Court of Appeals to "only" address the issue petitioner originally raised, and that is, to find whether a plea offer was made by the government and not communicated to petitioner by his counsel. (See Transcripts at 114 - 115)

Now with no apparent avenue to obtain relief, Mr Brown is left in a tragic position where he may have to suffer the conditions of completing over 3000 more days of imprisonment which resulted from his trial counsel's ineffective assistance. Had Mr Brown pleaded guilty as he originally intended to do prior to being appointed trial counsel, he would have already been released from prison.

Mr Brown hereby asserts that the instant issue is "original" and believes that this court has the authority and the power to grant this writ on the facts and law as set forth in this petition. As a pro-se petitioner, Mr Brown requests this court to construe his petition liberally in accordance with Haines vs Kerner, 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972).

OPINIONS BELOW

The unpublished order of the district court for the middle district of florida, Ocala Division, dismissing Mr Brown's 28 U.S.C. § 2241 petition is attached herewith and marked **Appendix - "A";** Also appended is the published decision of the Eleventh Circuit court of Appeals affirming Mr Brown's conviction and sentence on direct appeal and cited as United States vs Brown, 43 F.3d 618 (11th Cir. 1995), marked **Appendix - "B."**

JURISDICTION

Mr Brown's petition seeks to vacate his illegal and unlawful sentence in light of the fact that he was rendered ineffective assistance of counsel, and asserts that this court has jurisdiction to hear his petition pursuant to Supreme Court Rule 20, as authorized by 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title 28 U.S.C. §§1651(a), 2241 and 2255, as well as the Sixth Amendment to the United States Constitution are set forth in **Appendices C, D, E,** and **F.**

STATEMENT OF THE CASE

A. Procedural History:

Mr Brown, a Federal Prisoner, was convicted in 1992 of conspiracy to import and possession with intent to distribute cocaine, in violation of 21 U.S.C. §§846 and 963, and possession with the intent to distribute hashish oil, in violation of 21 U.S.C. §§841(a)(1) and 18 U.S.C. §2. Mr Brown was sentenced to a total of 300 months imprisonment, and his conviction and sentence were affirmed by the Eleventh Circuit Court of Appeals. Brown, Supra., (see **Appendix - "B").**

On May 26, 1997, Mr Brown filed a 28 U.S.C. §2255 motion to vacate, Set Aside, or Correct Sentence. Subsequently thereafter, the district court adopted the magistrate judge's report and recommendation and denied Mr Brown's motion by finding that the records clearly showed that the government did not offer a plea to Mr Brown.

Mr Brown appealed the decision to the Eleventh Circuit Court of Appeals, and the court vacated the district court's order and remanded the case back for an evidentiary hearing because it found that the records did not conclusively show that no plea offer existed before trial.

On November 21, 2001 the evidentiary hearing was conducted. At the conclusion of the hearing, the district court once again denied Mr Brown's 28 U.S.C. §2255 motion. Thereafter, Mr Brown made requests for certificates of appealability in both the district and appellate courts and they were both denied. A motion for reconsideration filed in the appeals court was denied on June 11, 2002.

On May 5, 2003, Mr Brown filed a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2241 in the United States District Court for the Middle District of Florida, Ocala Division, and in the petition, Mr Brown "only" challenged his sentence which was imposed by the United States District Court for the Southern District of Florida.

On June 20, 2003, the Ocala District court issued an order dismissing Mr Brown's §2241 petition by stating that "petitioner is expressly precluded by 28 U S C. §2255 from pursuing any remedies under §2241 by citing the three (3) requirements as set out in

the case of Wofford vs Scott, 177 F3d 1236, 1244 (11th Cir. 1999). The court went on to state that "even when those narrow and stringent requirements are met so as to "open the portal" to a §2241 proceeding, the petitioner must demonstrate "actual innocence." The court then stated that this in this instance, petitioner merely presents arguments usually advanced in a §2255 proceeding, i.e. "trial counsel was ineffective [and] this comes nowhere close to the requirements of Wofford, and even if it did, [it] is far short of demonstrating "actual innocence" under Bousley vs United States, 523 U.S. 614, 118 S.Ct. 1604 (1998).

With that said, Mr Brown is now left in a dilema because according to the court there is no way he can seek relief from the sentence which was imposed upon him as a result of being denied his Sixth Amendment right under the United States Constitution to be rendered effective assistance of counsel. Because Mr Brown is "only" attacking his sentence and not his conviction, there is no way he will be able to prove "actual innocence." In fact the crux of Mr Brown's instant claim surrounds the fact that from the night of his arrest he never claimed innocence. Instead he confessed and accepted guilt as this court will see in the facts provided herein.

So the question before this court now is, "Where and how can Mr Brown find relief and should Mr Brown be barred from seeking relief from a deprivation of his Sixth Amendment right? Mr Brown believes that this court has the power to grant him relief and hence the instant petition now follows since;

1. It would be fruitless and a waste of judicial resources to appeal the Ocala District Court's order dismissing

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DALE BROWN,

Petitioner,

v. Case No. 5:03-cv-150-Oc-10GRJ

PAUL M. LAIRD, etc., et al.,

Respondents.

ORDER OF DISMISSAL

This cause is before the Court on Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1). The Petitioner is a federal prisoner at the Coleman Federal Correctional Complex within this district. Petitioner is challenging a conviction and sentence imposed in the United States District Court for the Southern District of Florida.

In his petition, the Petitioner attacks the validity of his sentence rather than the means of execution and acknowledges that he has applied for relief under 28 U.S.C. § 2255 in the Court that sentenced him. Petitioners' motion pursuant to § 2255 was denied. It is clear that Petitioner is now pursuing relief in this Court under § 2241because filing a motion under § 2255 in the sentencing court would be barred. *See* 28 U.S.C. § 2255. Under these circumstances Petitioner is expressly precluded by § 2255 from pursuing any remedies under § 2241. Section 2255 states that an

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application such as this one "shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court denied him relief . . . "

The Petitioner seeks to avoid the preclusive effect of that prohibition by invoking the "savings clause" in § 2255 which permits relief to be sought under § 2241 if it "appears that the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of [the applicant's] detention." The law is clearly developed, however, that merely because relief has become unavailable under § 2255 because of a limitation bar, the prohibition against successive petitions, or a procedural bar due to failure to raise the issue on direct appeal, does not demonstrate that the § 2255 remedy is inadequate or ineffective. [1] Further, in *Wofford*, the court held that:

> The savings clause of §2255 applies to a claim when: 1) that claim is based upon a retroactively applicable Supreme Court decision; 2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense; and, 3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal or first §2255 motion.

Id at 1244.

Even when those narrow and stringent requirements are met so as to "open the portal" to a § 2241 proceeding, the Petitioner must then demonstrate "actual

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[1] *Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999).

innocence." [2] In *Bousley* the court said "[i]t is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency."[3]

In this instance, the Petitioner merely presents arguments usually advanced in a § 2255 proceeding -- that trial counsel was ineffective. This comes nowhere close to the requirements of *Wofford* and even if it did, is far short of demonstrating "actual innocence" under *Bousley*.[4]

Accordingly, the Petition under 28 U.S.C.§ 2241 (Doc. 1) is **DISMISSED with prejudice**. The Clerk is directed to enter judgment dismissing this case with prejudice, terminate any pending motions, and close the file.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 19th day of June 2003.

WM. TERRELL HODGES
United States District Judge

la 6/18
c:
Dale Brown

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[2] *Wofford* at 1244, note 3 (citing *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604 (1998)).

[3] *Bousley* at 623.

[4] In fact, Petitioner merely argues that he was "unable" to raise this issue in his motion under § 2255 because he did not have the necessary legal training to frame the issue with merit. Further, Petitioner does not allege that he is actually innocent of the crime of conviction. Rather, he argues that had counsel not been ineffective, he would have accepted a plea bargain instead of proceeding to trial.