ORIGINAL

03-10311

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
MAY 07 2004
OFFICE OF THE CLERK

OCTOBER TERM 2004,

IN RE

JERRY L. WILSON,
Petitioner

V

CRAIG HANKS,
Respondent

PETITION FOR A WRIT OF HABEAS CORPUS
TO THE UNITED STATES SUPREME COURT

# Questions Presented

1. Whether a Conviction and Subsequent Detention is Lawful when the State fails to prove every essential element?

2. Whether Detention is Lawful when Conceived in Violation of the Double Jeopardy Clause?

3. Whether Due process is violated when improper considersations are used to determine sentence?

4. Whether a Burglary Conviction is Valid when the State Does Not prove the essential elements?

5. Whether Ineffective Assistance of Counsel Violates the Constitution?

# Parties

The Petitioner is Jerry L Wilson is an Indiana State prisoner currently housed at The Wabash Valley prison located in Carlisle

The Respondent is Craig Hanks The Superintendant of The Wabash Valley prisoner, and legally has Custody of The petitioner

## Why application IS IN AID of Appellate Jurisdiction

This application IS IN AID of This Courts Jurisdiction IN That pursuant To Rule 10 (c). Rules of Supreme Court. To Wit:

" When A State Court OR A United States Court of Appeals has Decided AN important Question of federal law which has Not Been. But Should Be. Settled By This Court OR, has Decided A federal Question IN A WAY That Conflicts With applicable ondsions of This Court"

## EXCEPTIONAL CIRCUMSTANCES WARRANTING This Courts Discretionary powers

This application for federal habeas Remedy IS Submitted Because The federal District AND Appellate Courts have Determined That The Claims INCORPORATED HEREIN ARE BARRED By TIME CONSTRAINTS IMPOSED UNDER 28 U.S.C. § 2244. yet pursuant To 28 U.S.C. § 2254 (d) The Decisions Challenged here DEMONSTRATE A CLEAR AND EGREGIONS MISAPPLICATION of federal LAW AS promulgated By This Courts Edicts, Resulting IN A flagrant MISCARRIAGE of Justice AND The SUBSEQUENT SUBSTANTIAL PROBABILITY of AN INNOCENT PERSON Being UNLAWFULLY put upon IN his liberty AND Those Rights INHERENT THEREIN . . .

## of The LAWS

AND This PRECEPT of LAW IS ENFORCED BY Title 28, SECTIONS 2241 AND 2254, UNITED STATES. Code:

(A) The SUPREME COURT, A JUSTICE THEREOF, A CIRCUIT JUDGE, OR A DISTRICT COURT SHALL ENTERTAIN ON APPLICATION FOR A WRIT of HABEAS CORPUS, IN BEHALF of A PERSON IN CUSTODY PURSUANT TO The JUDGEMENT of A STATE COURT ONLY ON The GROUND That he is IN CUSTODY IN VIOLATION of The CONSTITUTION OR LAWS OR TREATIES of The UNITED STATES.

## STATEMENT of The CASE

1. This is A HABEAS ACTION filed BY AN INDIANA STATE PRISONER UNDER 28 U.S.C. § 2254. He hereby CHALLENGES The CONSTITUTIONALITY of His DETENTION. He CONTENDS That The LEGAL BASIS of His DETENTION IS AGAINST The

Constitution.

2. Petitioner herein, one Jerry L. Wilson ("Wilson") was charged by information in the Delaware County Court with Burglary, Battery. Wilson entered a plea of not guilty, gained counsel, and trial was set. Wilson was convicted by a jury on all counts and sentenced to prison. He later appealed and ultimately had his felony Battery charge reduced to misdemeanor Battery. Wilson initiated collateral attack which was denied. He then sought federal habeas relief however, his petition was dismissed with orders from the federal district court directing him to exhaust claims. When he returned to that court this attempt to do so was determined to be untimely. He appealed that decision without success. Wilson contends his habeas claims adjudged to be time-barred if put to scrutiny reveal his actual innocence hence he rejoins:

(p4)

# United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted August 15, 2003
Decided September 11, 2003

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

No. 03-2635

JERRY L. WILSON,
*Petitioner-Appellant,*

*v.*

CRAIG A. HANKS,
*Respondent-Appellee.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 1:03-cv-152-JDT-TAB

John D. Tinder,
*Judge.*

ORDER

Jerry Wilson has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an appellate brief, which we construe as an application for a certificate of appealability. The state maintains that Wilson's petition is an unauthorized second § 2254 petition, which the district court should have dismissed for lack of jurisdiction. *See Nuñez v. United States*, 96 F.3d 990 (7th Cir. 1996). The district court concluded that Wilson's petition is not successive because the court had dismissed his earlier petition without prejudice. The district court concluded, however, that Wilson's petition is untimely: AEDPA's one-year statute of limitations expired between the time the court dismissed Wilson's prior petition and the time that he filed the current petition.

We agree that Wilson's current petition is not successive within the meaning of § 2244(b) and that it is untimely. Wilson suggests that because he was pursuing state-court remedies in the interim, his current petition should be considered "filed" on the day that his earlier petition was timely filed. *See Newell v. Hanks*, 283 F.3d 827, 834 (7th Cir. 2002) (district courts should stay, rather than dismiss, mixed petitions). But Wilson's earlier petition was not a mixed petition. When he filed it, he had already exhausted his state remedies: he asked the district court to dismiss

357

it so that he could seek leave from the Indiana Appellate Court to file a *successive* post-conviction petition (a request the state court denied). In other words, the problem with his earlier petition was procedural default, not exhaustion, and *Newell* therefore does not apply. Moreover, Wilson's unsuccessful request in Indiana to file a successive collateral attack does not toll the time for filing a federal petition. *See Tinker v. Hanks*, 255 F.3d 444, 445-46 (7th Cir. 2001). Finally, timeliness itself is not an issue on which a certificate of appealability may issue, and Wilson has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000).

Accordingly, the request for a certificate of appealability is DENIED. Wilson's motion to proceed in forma pauperis is likewise DENIED.