No. _____

18-8182

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Monty Shelton — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the 8th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Monty Shelton, 10426-078
(Your Name)

FCC Forrest City (low), P.O. Box 9000
(Address)

Forrest City, AR 72336
(City, State, Zip Code)

None
(Phone Number)

IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment below

OPINIONS BELOW

The opinion of the United States court of appeals for the 8th circuit appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court in the Eastern District of Arkansas appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States court of appeals decided Petitioner's appeal was July 27, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment right to Due Process.

QUESTIONS PRESENTED

I. Should meritorious actual innocence claims in non-capital Habeas Corpus filings overcome all procedural hurdles and be afforded at least one full and fair hearing on the merits?

II. Does the failure of a minority of the Circuits to include the miscarriage of justice exception to the Savings Clause of 28 U.S.C. § 2255 violate the Due Process rights of petitioners with meritorious actual innocence claims?

III. Should the narrow interpretation of what constitutes an obstruction be broadened to include the miscarriage of justice exception as it applies to meritorious actual innocence claims?

IV. Should the word "Opportunity" be changed to "a Ruling on the Merits" when the Savings Clause is applied to meritorious actual innocence claims?

STATEMENT OF THE CASE

Petitioner was arraigned on May 21, 2003, in Sherman, Texas, in the U.S. District Court for the Eastern District of Texas on the initial indictment filed in this case. On June 12, 2003, the government filed a superseding indictment alleging three new charges to be added to the original two charges. A second superseding indictment was filed on August 14, 2003, dropping two of the new charges after it was determined that they were erroneous.

On September 16, 2003, Petitioner was convicted on three counts: Count One for possession with intent to distribute methamphetamine and Counts Two and Three were for receipt of a firearm while under felony indictment, 21 U.S.C. § 841 and 18 U.S.C. § 922(n). Petitioner was sentenced on March 6, 2004, to 405 months.

Petitioner's direct appeal was filed on August 26, 2004, and was denied on January 28, 2005. His writ of certiorari was denied on October 3, 2005.

Petitioner filed his 2255 motion on September 29, 2006, which was denied on January 13, 2010. In that denial, the district court instructed Petitioner to file a Rule 60(b) motion on his actual innocence claims. That motion was filed on January 3, 2011, and was denied as a second or successive 2255 on April 12, 2011.

Petitioner filed a 2241 motion in the Central District of California on November 25, 2013, and was denied without a ruling on the merits on January 8, 2014.

Petitioner filed the instant 2241 motion on December 3, 2016, and was denied without a ruling on the merits on July 6, 2017.

REASONS FOR GRANTING THE PETITION

1. Petitioner is factually innocent of Counts 2 and 3 of his indictment

The government and every court that has examined Petitioner's claims of actual innocence has never rebutted, refuted nor presented evidence contrary to Petitioner's claims. The Federal Rules of Civil Procedure 8(b)(6) states, "An allegation ... is admitted if a responsive pleading is required and the allegation is not denied." Petitioner's claims of actual innocence should be accepted as fact.

No evidence was ever presented by the government concerning when and where Petitioner received the two firearms in Counts Two and Three. The two fictitious dates listed on the charging instrument were never discussed, verified or corroborated. The record proves that Petitioner received the firearm in Count Two one month before he was indicted. The record demonstrates that Petitioner received both firearms before he was ever arraigned on the indictment used to justify the charge. The government knew that Petitioner received the firearms in the Northern District of Texas, not the Eastern district where he was charged. Petitioner's trial attorney told him that mere possession of the firearms violated the law and he failed to investigate or defend against the false charge. This misstatement of the law by Petitioner's attorney was just one of the many glaring examples of ineffective assistance of counsel – a violation of Petitioner's Sixth Amendment right. Petitioner is factually innocent of the false charges filed in Counts Two and Three of his indictment. Petitioner wishes to stress that he is factually innocent of all three counts filed in his indictment but the record only conclusively proves his innocence of the two 922(n) charges at this time.

2. Petitioner did not receive an unobstructed procedural shot at presenting his claims

The government and the Magistrate never responded to or refuted Petitioner's meritorious claims of legitimate obstructions and these obstructions should be accepted as fact:

1) The government's illegal introduction of the additional element of "Possession" at Petitioner's grand jury, trial, sentencing, appeal, and post-conviction proceedings (see Attachment A). The actual statute, 18 U.S.C. § 922(n) states,

> "It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Every Circuit that has addressed 922(n) has ruled that "Possession" is not an element of the charge. The 9th Circuit addressed 922(n) in ***United States v. Call*, 874 F.Supp.2d (Nevada D.C. 2012)**. "18 U.S.C. § 922(n) does not make it unlawful for a person under indictment to possess firearms or ammunition that he received prior to the indictment. The government is required to demonstrate that the defendant received the weapon after indictment." In ***United States v. Adams*, 2011 U.S. Dist. LEXIS 41879 (11th Cir.)**, the court ruled,

> "The statute [922(n)] criminalizes receipt of a firearm after indictment. Even assuming that one who possesses a firearm necessarily received it first, receipt is a discreet occurrence while possession implies a continuous act. A person who acquires a firearm and is later indicted continues to *possess* the firearm, but he does not *receive* the firearm again by virtue of that possession."

"It is axiomatic that a defendant may not be tried on charges that were not made in the indictment. A constructive amendment, which is reversible error per se, occurs when the essential elements of the offense set forth in the indictment are altered, either actually or in effect, by the prosecutor or the court after the grand jury has passed upon them," ***United States v. Novak*, 217 F.3d 566 (8th Cir. 2000)**. The inclusion of the word "Possession" by the prosecution and the courts is clearly a constructive amendment and created an obstruction that violated Petitioner's Due Process rights.

2) The failure of Petitioner's appellate attorney to communicate with Petitioner prior to filing his direct appeal and subsequently failing to raise his actual innocence claims. Petitioner has a constitutional right to effective assistance of appellate counsel dictated by ***Evitts v. Lucey*, 469 U.S. 387 (1985).**

3) The constant inclusion of the word "Possession" in the opinions of the Fifth Circuit Court of Appeals and the magistrate's R & R on Petitioner's initial 2255 motion (see Attachment B). The continued misstatements by the courts continued the obstruction created by the initial constructive amendment by the government.

4) The instruction of the trial court to Petitioner that he should file a Rule 60(b) and then ruling that Petitioner's filing was a second or successive 2255 motion (See Attachment C). The district court misled and misdirected Petitioner acting pro se in order to foreclose his right to attack his conviction.

Each of these claims warrant remand and considered in total represent an egregious miscarriage of justice. The multiple violations of Petitioner's constitutional rights and the failure of the courts in the 5th Circuit to address these violations demonstrate that Petitioner was obstructed throughout the process.

3. <u>The inclusion of the two false 922(n) charges caused irreparable prejudice to Petitioner</u>

Petitioner raises this issue for two reasons. First, this is just one of the myriad claims that were addressed by Petitioner in his 2255 motion that were ignored along with his colorable claims of actual innocence. The trial court's failure to address these claims leaves them unresolved and violates Petitioner's Due Process rights.

Second, and most important, is that the district court in Arkansas tried to downplay Petitioner's actual innocence claims by stating that, even if Petitioner was victorious, it would not affect his overall sentence since the two gun charges were run concurrent to the drug charge. Every Circuit that has addressed the misjoinder of a drug charge with a gun charge has come to the same conclusion – that the inclusion of a gun charge with a drug charge where there is no nexus creates an unconstitutional level of prejudice. This can lead any jury to unjustifiably convict a defendant because he is a "Bad Person" rather than on the evidence, see ***United States v. Holloway*, 1 F.3d 307 (5th Cir. 1993)**. The misjoinder of disparate charges can "weigh too much with the jury and overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge," ***United States***

***v. Aldrich*, 169 F.3d 526 (8th Cir. 1998).** There were no guns found or alleged in connection with the January, 2002, drug charge in Count One and there were no drugs found or alleged in connection with the two gun charges. The two gun charges were 13 and 16 months after Count One. There was absolutely no factual, constructive, implied or temporal nexus between these charges. The prejudice associated with this misjoinder was not minimized by a limiting instruction.

The Supreme Court ruled in ***Ball v. United States*, 84 L.Ed.2d 740,750 (1986)**, "When multiple charges are brought, the defendant is 'put in jeopardy' as to each charge. To retain his freedom, the defendant must obtain acquittal on all charges; to put the defendant in prison, the prosecution need only obtain a single verdict. The prosecution's ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of these charges. The very fact that the defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of these crimes. Moreover, where the prosecution's evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict." The improper joinder of a gun charge with an unrelated drug charge in ***United States v. McCarter*, 316 F.3d 536 (5th Cir. 2002)**, led the court to state that "it is the ineluctable conclusion that the government added counts solely to buttress its case on the other counts."

4. <u>There is a substantial split among the Circuits concerning 2241 petitions</u>

The standard used to determine jurisdiction over 2241 petitions in the 8th Circuit is the ruling from ***In Re Davenport*, 147 F.3d 605 (7th Cir. 1998).** There are two prongs that must be satisfied under <u>*Davenport.*</u> First, a petitioner must demonstrate actual innocence of the charge. Second, the petitioner must show that he did not receive an unobstructed procedural shot at presenting his actual innocence claim. The Circuits that follow <u>*Davenport*</u> have limited what constitutes an unobstructed procedural shot and completely disregard the miscarriage of justice exception. This narrow interpretation of the

2255 savings clause runs afoul of the law governing actual innocence claims established in ***McQuiggin v. Perkins,* 185 L.Ed.2d 1019 (2013)** and has turned habeas filings of actual innocence into a sham. Davenport completely disregards a multitude of injustices with the most glaring exclusion being the miscarriage of justice created by imprisoning an innocent person.

Petitioner asked the district court for a judicial ruling on what constitutes an obstruction for purposes of the Davenport standard and was never answered. The law has been misstated throughout Petitioner's judicial process and yet this constructive amendment has never been addressed. Petitioner has never been afforded a full and fair hearing on his actual innocence claims, and there has never been a ruling on the merits of his claims. All the trial court had to do was turn a blind eye to Petitioner's claims and refuse to answer them. Now, the district court says Petitioner had his shot at presenting his claims.

A majority of the Circuits have not adopted Davenport but instead follow the rule defined in ***Triestman v. United States,* 124 F.3d 361 (2nd Cir. 1997).** Triestman went into much greater detail concerning congressional intent and judicial authority of the 2255 savings clause and concluded that "inadequate or ineffective" does not refer solely to practical limitations on the Petitioner's ability to obtain relief under 2255 but includes the set of cases in which the Petitioner cannot, for whatever reason, utilize 2255, and in which the failure to allow for collateral review would raise serious constitutional questions. The Tenth Circuit has gone so far as to refer to Davenport as the "erroneous circuit foreclosure test," see ***Lewis v. English,* 2018 U.S. App. LEXIS 15044 (10th Cir. 2018).**

In ***U.S. v Hayman*, 342 US 205 (1952)**, this Court reasoned that "A failure to exercise habeas corpus jurisdiction would present constitutional questions that are obvious." The 8th Circuit has a better jurisdictional standard that has never been abrogated and does not create a miscarriage of justice as Davenport does. ***Rawls v. United States,* 236 F.Supp. 821 (D.C.Mo. 1964),** grants habeas jurisdiction to the district court if the Petitioner can demonstrate that he is actually innocent and that subsequent

filings in his district of origin would be futile. The obstruction by the trial court, when it instructed Petitioner to file a Rule 60(b) and then ruled that Petitioner's 60(b) was a second or successive filing, vests jurisdiction with the district court under *Rawls*.

CONCLUSION

Petitioner cannot locate another case where the district court refuses to rule on an actual innocence claim on procedural grounds, instructs the petitioner to file a Rule 60(b) miscarriage of justice exception, and then declares the Rule 60(b) a second or successive 2255 without giving any reason and without a ruling on the merits of a colorable claim of actual innocence. The lower courts cannot claim that Petitioner had an "Opportunity" to present his claims when they refuse to address them. Without an evidentiary hearing and a ruling on the merits, there can never be a claim that Petitioner has received Due Process.

Petitioner has clearly demonstrated he has satisfied both prongs of the *Davenport* standard necessary to grant jurisdiction to the district court. Habeas Petitioners rarely have colorable claims of actual innocence. That is why the Supreme Court established the "miscarriage of justice" exception for actual innocence claims. Actual innocence claims, when judged true, must overcome all procedural hurdles. This Court ruled in ***Murray v. Carrier*, 477 U.S. 478 (1986)** that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Had the district court followed *Rawls* and held an evidentiary hearing, it would have cured this ongoing wrongful conviction. The district court does have jurisdiction and has in its power the duty, obligation, and responsibility to correct this manifest injustice. Actual innocence should always trump finality.

For the foregoing reasons, Petitioner asks this Court to remand his 2241 motion to the district court for further proceedings, directing the district court to follow the applicable precedents and hold the requisite hearing to allow the Petitioner to demonstrate how and why the law dictates that Counts Two and Three should be vacated.

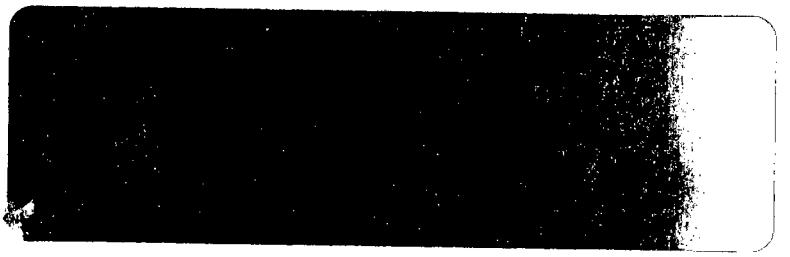
Respectfully Submitted,

Monty M. Shelton, 10426-078

Certificate of Service

This will certify that a true and correct copy of the foregoing was filed with the Court and the Respondent by presenting said documents to prison officials in an envelope with postage prepaid first class and addressed to:

Richard M. Pence, Jr.
Asst. U.S. Attorney
P.O. Box 1229
Little Rock, AR 72203



Delivered this 24TH day of October, 2018.

Respectfully Submitted,

Monty M. Shelton, 10426-078
FCC Forrest City (Low)
P.O. Box 9000
Forrest City, AR 72336