18-9122

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DON NELL HAWKINS — PETITIONER
(Your Name)

vs.

PATRICIA A. GAUGHAN and DONALD D. MILLER — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DON NELL HAWKINS #53703-060
(Your Name)

FCI-ELKTON, P.O. BOX 10
(Address)

LISBON, OH 44432
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

This case involves a denial of access to the courts claim against a state police officer and a federal district court judge. This case presents the following questions?

1. Whether the doctrine of Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) applies to denial of access to court claims?

2. 28 U.S.C. § 2244(b)(3) allocates subject matter jurisdiction to the court of appeals, rather than the district court, in the first instance over a second or successive § 2255 motion. Does a district court judge act in the "clear absence of all jurisdiction" when she entertains an second or successive § 2255 motion without authorization having been granted by the court of appeals?

LIST OF PARTIES

[X] 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:

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was OCTOBER, 26, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: JANUARY 23, 2019, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I

Congress shall make mo law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Malitia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its juridiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 19, 2006, Canton, Ohio Police Officer, Donald D. Miller, submitted an Affidavit and Attachment for a Search Warrant of Appellant's residence to a state court judge. The Affidavit alleged that two controlled buys occurred wherein Detective Miller would have the CI observed enter and exit the residence by members of the Vice/Criminal Intelligence Unit. The search was executed on Petitioner's residence. During the search, officers found 199.95 grams of cocaine base.

On September 22, 2006, Petitioner was charged in a criminal complaint with knowing and intentionally possessing with intent to distribute 50 grams or more of cocaine base. On October 24, 2006, a federal grand-jury returned a three count indictment charging Petitioner with two counts of distributing cocaine base and one count of possession with intent to distribute cocaine base.

Petitioner filed a motion to suppress alleging that the warrant affidavit contained false statements that was necessary to the finding of probable cause. At this December 7, 2006, hearing, the affiant, Det. Miller, who was the sole officer to testify, explained that the controlled buys went down as follows:

> "He followed the CI from a pretermined location. he personally followed him until he parks in front of the house. He can't pull up and park behind the CI, but he already have people set in over watch, other officers from the Vice Unit. Once the CI parks, he drives away around the block. The other officers tell him by radio that the CI's going into and coming out the house."

Petitioner's counsel also asked Det. Miller, "Whether the conversation that he had with state court Judge Falvey was tape recorded or transcribed?" Det. Miller replied,

> "I think because it was a non consensual search warrant, I digitally recorded it, and then I don't know if I have it transcribed here, but we have th t on file in our office, in the computer system, so it can be transcribed, the proceedings."

The district court denied the motion to suppress. Thereafter, Petitioner entered a Conditional Guilty Plea, reserving the right to appeal the Court's ruling on his motion to suppress.

Petitioner's counsel argued to the Sixth Circuit Court of appeals that at the hearing Det. Miller testified that he had followed CI #403 to Petitioner's residence during the controlled buys, then drove around the block. Other officers were placed at the scene to observe the CI once he was parked in front of the residence. Thus, Petitioner's counsel contended, because Miller never actually saw CI #403 enter Petitioner's residence, his statement in the warrant affidavit that CI #403 was never out of visual contact during the transaction other than when he was inside the residence was, at best, made with reckless disregard for the truth and, at worst, constituted perjury.

The Sixth Circuit Court of Appeals ruled that Petitioner had failed to show that Miller made any deliberate false statements or reckless statements in the warrant affidavit because Petitioner mischaracterizes the affidavit. The warrant affidavit in paragraph 5 states that Det. Miller "followed CI #403 to the residence of 2319 3rd Street N.W. and had CI #403 observed enter and exit the residence by members of the Vice/Criminal Intelligence Unit. CI #403 was never out of visual contact during the transaction other than when the CI was inside the residence." Nowhere in the warrant affidavit does Det. Miller state that he personally observed CI #403 entering the residence; rather, he states that other officers in the Vice/Criminal Intelligence Unit observed CI #403 enter and exit the residence. Therefore, Petitioner's suggestions to the contrary are simply wrong and with out support. The Sixth Circuit Court of Appeals affirmed the district courts denial of the motion to suppress on May 23, 2008.

On March 16, 2009, Petioner filed a Motion to Vacate under 28 U.S.C. § 2255 alleging that counsel was ineffective at the suppression hearing for failing to obtain a transcript or recording of the conversation between Miller and Judge Falvey at the search warrant application hearing. In an order dated August 10, 2009, the district court rejected Petitioner's claim by asserting that, "Hawkins does not show that the search warrant application transcript would have changed the outcome of his case, inasmuch as the warrant was based on the two controlled buys at Hawkins' residence which the court of appeals found probable cause."

On October 8, 2010, Petitioner filed an unauthorized second or successive § 2255 motion which he titled "Memorandum of Law in Support of Motion for Writ of Audita Querela or Other Relief." Rather than issue an order of transfer to the court of appeals for a want of jurisdiction, the district court denied the motion on October 14, 2010, and further stated that "the Court will not accept any further motions or other requests for relief filed by Hawkins in this case."

On April 8, 2016, Petitioner was able to obtain a copy of the recorded conversation between Det. Miller and State Court Judge Falvey which was concealed through out Petitioner's case. Petitioner had the recording transcribed on June 23, 2016. On page 3 of the transcript, Det. Miller swore that:

> "He took photos and that he observed the transactions taking place from the residence."

Based upon the concealed information stated above, Petitioner attempted to file a Fed. R. Civ. P. 60(b)(6) motion requesting to reopen his § 2255 proceedings. Petitioner intended to show that he was entitled to relief from the § 2255 judgment which denied him an evidentiary hearing, given that he now has 'previously undisclosed facts ... central to the litigation' that show

initial judgment to deny him an evidentiary hearing on his ineffective assistance of counsel claim to have been manifestly unjust. However, Petitioner's motion was returned back unfiled, as a result of the district court's 10/14/10 order barring Petitioner from filing.

Likewise, Petitioner attempted to file a Rule 60(b)(4) motion wherein he claimed that the district court's 10/14/10 order was void because his writ of audita querela constituted an unauthorized second or successive § 2255 motion which the district court lacked subject-matter jurisdiction to adjudicate. This motion was also returned back un filed.

On September 20, 2017, Petitioner filed a Civil Rights Complaint against Judge Gaughan contending that she is unlawfully denying him access to the courts. On October 2, 2017, Petitioner filed an amended complaint adding Det. Miller as a second defendant and alleging that "by not providing the recorded or transcribed copy of his conversation with the state court judge at the search warrant application hearing, or making it available as he said he would at the December 7, 2006 suppression Hearing, Det. Miller violated Petitioner's First Amendment right of access to the court by preventing him from showing how the outcome of his case would have been different during the § 2255 proceedings.

In an opinion dated November 3, 2017, the district court denyied Petitioner's complaint. Thereafter, on October 26, 2018, the Sixth Circuit Court of Appeals affirmed the district court's order.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

Applying Heck v. Humphrey, 512 U.S. 477 (1994) to denial of access to court cases puts Petitioner in an untenable "Catch-22" situation. Petitioner would be precluded from suing Defendant Police Officer Miller for violating his right of access to the courts on direct appeal and in his § 2255 collateral attack until he successfully overturns his conviction, but cannot effectively challenge that conviction because Defendant Miller kept his recorded conversation with the state court judge at the search warrant application hearing away from Petitioner during his direct appeal and § 2255 collateral attack. This concealed evidence was absolutely imparative to Petitioner obtaining a remand and/or post-conviction relief. The result would be to deprive Petitioner of a remedy for the violation of a recognized and valued constitutional right.

1. **Whether the doctrine of Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) applies to denial of access to court claims?**

This Court has held in Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) that, "In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus[.]".

A prisoner has a fundamental right of access to the courts. See Lewis v. Casey, 318 U.S. 343, 354 (1996); Bounds v. Smith, 430 U.S. 817, 821 (1977). The right springs from the Due process Clause of the Fifth Amendment and Fourteenth Amendment and the right of petition found in the First amendment,

as well as from the Privileges and Immunities clause of Article IV. See Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002). Furthermore, "the right not only protects the ability to get into court, but also insures that such access be adequate, effective, and meaningful." Swekel v. City of River Rouge, 119 F.3d 1259, 1262 (6th Cir. 1996); see also, Thaddeus-X v. Blatter, 175 F.3d 378, 391 (6th Cir. 1999) ("A prisoner's right of access to the courts extends to direct appeals, habeas corpus applications, and civil rights claims only"). "A denial of access claim is available where the state officials 'wrongfully and intentionally conceal information crucial to a person's ability to obtain redress through the courts and do so for the purpose of frustrating that right, and the concealment and the delay engendered by it substantially reduces the likelihood of one's obtaining the relief to which one is otherwise entitled.'" Swekel, 119 F.3d at 1262-63. To make out a claim of denial of access to the courts, Petitioner must show: (1) the loss of a non-frivolous underlying claim (otherwise known as "actual injury"); (2) official conduct frustrating the litigation of that claim; and (3) a remedy that may be awarded as recompense but that is not otherwise available in a future suit. See Harbury, 536 U.S. at 413-14. Because Petitioner need only show that the underlying case was non-frivolous, proof of actual injury does not necessarily imply that Petitioner would have won the underlying case. See Heck, 512 U.S. at 487; Lueck v. Wathen, 262 F. supp. 2d 670, 696-99 (N.D. Texas 2003) (noting that, "[u]nlike the civil rights claims at issue in Heck, plaintiff's access claim does not necessarily imply the invalidity of his conviction or sentence.") (internal citation and quotation marks omitted).

Without citing any authority other than Heck, the Sixth Circuit Court of Appeals held petitioner's complaint was barred by the doctrine of Heck v.

Humphrey, 512 U.S. 477, 486-87 (1994), because it implies that the underlying conviction is invalid. The Sixth Circuit Court of Appeals made the above statements in a conclusory fashion. Of course, Heck did not involve an access of court claim. Rather, the prisoner sued state prosecutors and police officials for false arrest and destroying evidence that resulted in his conviction. Heck, 114 S. Ct. 2368. Such claims go to the very heart of the conviction itself. By contrast, the Petitioner in this case seeks redress for being deprived of an "adequate, effective and meaningful opportunity" to even challenge his conviction on direct appeal and in a § 2255 collateral review in an attempt to have his case reversed or set-aside. The Ninth Circuit was confronted with this precise issue under Fuller v. Nelson, 128 fed. Appx. 584, 586 (9th Cir. 2005). In that case, the plaintiff Fuller contended that the "district court erred in holding that his First Amendment claims of denial of access to the courts on direct appeal and in an post-conviction proceeding were barred under Heck." The Ninth Circuit Court of Appeals reversed the district court's dismissal of Fuller's claims as barred under Heck and remanded for further proceedings because those claims were not challenging the facts of the prisoner's confinement, as the remedy for the unconstitutional deprivation of an appeal was not an immediate release. Id. at 586.

Likewise, in Lueck v. Wathen, 262 F. Supp. 2d 670, 696-99 (N.D. Texas 2003), the plaintiff Lueck sought injunctive relief or money damages for being deprived of the opportunity to present non-frivolous claims on collateral review in an attempt to have his convivtion set-aside. Id. That Court in turn stated, "under these circumstances, Heck does not bar plaintiff's ability to bring a civil rights action." Id. at 699.

At least five justices of the Supreme Court have suggested that Heck may not apply to persons without recourse to the habeas statute, See Spencer v. Kemna, 523 U.S. 1, 20-21 (1998) (Souter, J., joined by O'Connor, Ginsburg, and

Breyer, JJ., concurring) and id., 118 S. Ct. 991-92 & n.8 (Stevens, J., dissenting). Petitioner may well fall into this category. Applying Heck to the instant case puts Petitioner in an untenable "Catch-22" situation. He would be precluded from suing defendant Miller for violating his right of access to the courts on direct appeal and on his § 2255 collateral attack until he successfully overturns his conviction, but cannot effectively challenge that conviction because Miller kept his recorded conversation with the state court judge at the search warrant application hearing away from Petitioner during both proceedings. This recording and/or transcript was absolutely imperative to obtaining a remand or post-conviction relief, as Petitioner would have easily shown that Miller included reckless disregard for the truth statements in his search warrant affidavit and gave perjured testimony. Applying Heck would equate to be depriving Petitioner of a remedy for the violation of a recognized and valued constitutional right.

Finally, the Sixth Circuit Court of Appeals held that, "Petitioner has no claim of denial of access to the courts against either the district court judge or the police officer because he has not shown actual prejudice or injury to a non-frivolous claim." Id. That Court further held, "Petitioner alleges only that he cannot continue to raise the claim that he believes the two statements by the police officer are contradictory, even though they clearly are not, and he raised this argument before both courts repeatedly." Id. Both allegations will be addressed in turn.

With respect to the police officer's statements, Petitioner submits that Miller did give contradictory testimony and that he has never raised this argument before both Courts repeatedly.

Indeed, the search warrant affidavit which appears at Appendix D contains

judge that "he personally oberved the transactions taking place from the residence,"but yet, on the other hand he is stating to the federal court judge that "other officers told him by radio that the CI was going into and coming out the house while he was around the block." If Det. Miller did in fact observe these alleged transactions taking place from the residence as he stated in the concealed search warrant application transcript, then his statements in the search warrant affidavit that he had the CI observed enter and exit the residence by members of the Vice/Criminal Intelligence Unit is stated in a reckless disregard for the truth, and his testimony in federal court was perjured testimony.

With regard to the district court judge, this Court has held in Mireles v. Waco, 502 U.S. 9, 11 (1991) that, "a judge is not immune from suit for actions taken 'in the clear absence of all jurisdiction'". "A clear absence of all jurisdiction means a clear lack of all subject-matter jurisdiction." Miller v. Davis, 521 F.3d 1142, 1147 (9th Cir. 2007) "A judicial officer acts in the clear absence of jurisdiction only if he knows that he lacks jurisdiction, or acts despite a clearly valid statute or case law expressly depriving him of jurisdiction." Mills v. Killebrew, 765 F.2d 69, 71 (6th Cir. 1985). Furthermore, this Court has commented:

> "A distinction must be observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."

Bradley v. Fisher, 80 U.S. 335, 351-52 (1872); Stump v. Sparkman, 435 U.S. 349, 356-57 (1978).

Petitioner points out that on March 16, 2009, he filed his first § 2255 motion to vacate. Thereafter, he filed a second motion challenging his

two (2) relevant statements:

> (1) "[Det. Miller] had the CI observed enter and exit the residence by members of the Vice/Criminal Intelligence Unit."
>
> (2) "The CI was never out of visual contact during the transaction other than when the CI was inside the residence." Id. at ¶ 5.

Petitioner submits that on his direct appeal and on his § 2255 collateral attack, they both readily shows that re raised the argument that Miller's second statement was stated in a reckless disregard for the truth which both Courts rejected because Petitioner mischaracterized the affidavit. See U.S. v. Hawkins, 278 Fed. Appx. 629, 633-34 (6th Cir. 2008) and U.S. v. Hawkins, 5:09 CV 0567 (N.D. Ohio Aug. 10, 2009).

In contrast, Petitioner now is arguing that Miller's first statement is contadicted by his statements in the concealed search warrant transcript of Miller's conversation with the state court judge. Fore demonstrations: In the search warrant application hearing transcript which as attached herein at Appendix-E, Det. Miller swore to the state court judge that,

> "He took photos and that **he observed the transactions taking place from the residence.**" Id. at page 3 (emphasis added).

However, Miller's first statement in his search warrant affidavit states that,

> "He had the CI observed enter and exit the residence by members of the Vice.Criminal Intelligence Unit." Id. at ¶ 5.

Further still, Det. Miller's testimony in federal court was that,

> "He followed the CI from a predetermined location. He personally followed him until he parks in front of the house. He can't pull up and park behind him, but he already have people set in over watch, other officers from the Vice unit. Once the CI parks, he drives awat around the block. **The other officers let him know by radio that the CI's going into and coming out the house.**" Id. See Appendix-F: Suppression Hearing Transcript.

As this court can clearly see, Det. Miller is stating to the state court

criminal conviction on October 8, 2010, which he plastered on the cover, "Memorandum of Law in Support of M otion for Writ of Audita Querela or Other Relief." In an order dated October, 2010, district court judge, Gaughan, denied the motion and further stated, "additionally, the Court will not accept any further motions or other requests for relief filed by Defendant in this case." It is Petitioner's position that Judge Gaughan did not have subject-matter jurisdiction to consider the merits of his October 8, 2010, motion because it constituted an unauthorized second or successive § 2255 motion.

Indeed, "§ 2244(b)(3) allocates subject matter jurisdiction to the court of appeals, rather than the district court, in the first instance, over a second or successive habeas petition." Smith v. Anderson, 402 F.3d 718, 723 (6th Cir. 2005). See also, Alley v. Bell, 392 F.3d 822, 828 (6th Cir. 2004) (holding that, "since Alley didn't request permission from this Court to file his motion, it follows that the motion is properly viewed as a successive habeas, than the district court lacked jurisdiction to consider it and the stay of execution is invalid."); U.S. v. McDonald, 326 Fed. Appx. 880, 882 (6th Cir. 2009) ("While the lower court could liberally construe McDonald's motion, the court could not consider the merits unless the court had jurisdiction over the subject-matter."); Neuhausser v. U.S., 2009 U.S. Dist. LEXIS 29998 (S.D. Ohio April 8, 2009) (construing petition for writ of audita querela as a § 2255 motion and issuing an order of transfer to the court of appeals); U.S. v. Holt, 417 F.3d 1172, 1175 (11th Cir. 2005) (holding that "a pro-se motion for a writ of audita querela was actually a § 2255 motion."); Melton v. U.S., 359 F.3d 855, 857 (7th Cir. 2004) (explaining that "prisoners cannot avoid the AEPDA's rules by inventive captioning. Any motion filed in the district court that imposed the sentence, and substantively within the scope of § 2255, is amotion under

under § 2255, no matter what title the prisoner plasters on the cover.").

Accordingly, the district court judge clearly lacked subject-matter jurisdiction to adjudicate Petitioner's unauthorized second or successive § 2255 motion and should have issued an order of transfer to the Sixth Circuit Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Don Mell Hawkins

Date: 4/16/19