

FILED: April 30, 2019

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 19-6160**  
**(7:18-cv-00292-MFU-RSB)**

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DARYLL KEITH SHUMAKE,

Plaintiff - Appellant,

v.

THE COMMONWEALTH OF VIRGINIA,

Defendant - Appellee.

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ORDER

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Daryll Keith Shumake applies under the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(b) (2012), to proceed on appeal without prepayment of fees. If an applicant has had three actions or appeals dismissed on the ground that they were frivolous, malicious, or failed to state a claim upon which relief may be granted, the applicant may not proceed without prepayment of fees unless the applicant is under “imminent danger of serious physical injury.” 28 U.S.C. § 1915(g) (2012).

We previously determined Shumake has had at least three such prior dismissals. *See Shumake v. Wallens Ridge State Prison*, No. 08-7500 (4th Cir. Dec. 11, 2008) (order

denying motion to proceed without prepayment of fees under the PLRA). Shumake has not alleged that he is under imminent danger of serious physical injury. We therefore deny the motion to proceed without prepayment of fees under the PLRA.

Entered at the direction of the panel: Chief Judge Gregory, Judge Niemeyer, and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

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

Alexandria Division

Daryll Shumake,  
Petitioner,

v.

Commonwealth of Virginia,  
Respondent.

1:18cv1170 (LMB/MSN)

ORDER

Daryll Shumake, a Virginia inmate proceeding pro se, has filed a pleading captioned as a "Motion for Summary Judgment" supported by an affidavit in which he states that he was convicted of a carjacking that actually was committed by his cousin. While Shumake never directly asserts his innocence, he asks, "I the plaintiff was already in custody for multiple carjacking, why would I need to get my cousin ... to write me a [sic] affidavit as well as get it notarized saying that he actually did the crime if I really did the crime?" It thus appears that Shumake intends to challenge his carjacking conviction. The exclusive statutory basis for a litigant's right to apply to federal court for relief from a conviction or sentence entered by a state court is 28 U.S.C. § 2254. Preiser v. Rodriguez, 411 U.S. 475 (1973); Bruce v. Commonwealth, 850 F.2d 688, 1988 WL 67852 (E.D. Va. 1988). Therefore, the Court must interpret these pleadings as seeking relief pursuant to § 2254. Gonzalez v. Crosby, 545 U.S. 524, 531 (2005). Petitioner has neither paid the applicable filing fee nor applied to proceed in forma pauperis in the action.

Moreover, for the reasons stated below, the pleadings on file do not conform to all requirements for § 2254 habeas petitions, and petitioner will be directed to provide additional

e9 Appendix <sup>D.S</sup> ~~F~~ F

ORDERED that petitioner particularize and amend his petition within thirty (30) days of the date of this Order by **thoroughly** completing the attached form for filing a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner must include civil action number **1:18cv1170 (LMB/MSN)**, on the first page of his amended petition, and this amended petition will serve as the **SOLE** petition in this civil action; and it is further

ORDERED that petitioner's failure to comply with any part of this Order within **THIRTY (30) DAYS FROM THE DATE OF THIS ORDER**, or failure to notify this Court immediately in the event he is transferred, released, or otherwise relocated, may result in the dismissal of this complaint pursuant to Fed. R. Civ. P. 41(b).

The Clerk is directed to send a copy of this Order, an application to proceed in forma pauperis, and a standard 28 U.S.C. § 2254 form to petitioner, as well as a copy of this Order and the Inmate Account Report Form to petitioner's current institution of confinement.

Entered this 17<sup>th</sup> day of September 2018.

Alexandria, Virginia

/s/ LMB  
Leonie M. Brinkema  
United States District Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>DARYLL KEITH SHUMAKE,</b>	)	
<b>Plaintiff,</b>	)	<b>Civil Action No. 7:18cv00292</b>
	)	
<b>v.</b>	)	<b><u>MEMORANDUM OPINION</u></b>
	)	
<b>THE COMMONWEALTH OF VIRGINIA,</b>	)	<b>By: Michael F. Urbanski</b>
<b>Defendant.</b>	)	<b>Chief United States District Judge</b>

Daryll Keith Shumake, a Virginia inmate proceeding *pro se*, filed this civil rights action pursuant to 42 U.S.C. § 1983, against the Commonwealth of Virginia, challenging the validity of his conviction. Shumake alleges that his cousin “was caught red handed in possession of the property that [he was] convicted of” and possession is “9-10 of the law.” He further alleges that, “twelve to [thirteen] year[s] later,” his cousin has agreed to sign a sworn affidavit stating “that he actually did the crime,” in order to “clear [Shumake’s] name.” Shumake claims that the “Commonwealth is liable for withholding [unidentified] exculpatory evidence.” As relief, Shumake asks to be “released back to society” and awarded \$5.75 million for his pain and suffering. For the following reasons, the court will dismiss this action.

“When a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.” Preiser v. Rodriguez, 411 U.S. 475, 500 (1973), see generally, Wilkinson v. Dotson, 544 U.S. 74, 78-82 (2005) (summarizing the distinctions between § 1983 and habeas actions). To the extent Shumake challenges the validity of his conviction and seeks immediate release from incarceration, his claim is not cognizable in a § 1983 action.

To the extent Shumake seeks damages, his claim is barred.<sup>1</sup> “When a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.” Heck v. Humphrey, 512 U.S. 477, 487 (1994). Because Shumake has neither alleged nor demonstrated that his underlying conviction has been invalidated, his claim is barred by Heck. Accordingly, the court will dismiss Shumake’s complaint without prejudice pursuant to 28 U.S.C. § 1915A(b)(1) for failure to state a claim.

ENTER: This 18<sup>th</sup> day of December, 2018.

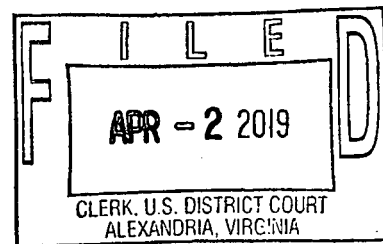
/s/ Michael F. Urbanski  
Chief United States District Judge

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<sup>1</sup> Moreover, the Commonwealth of Virginia is not a proper defendant. See Will v. Michigan Dep’t of State Police, 491 U.S. 58, 70 (1989); Monell v. New York City Dep’t of Social Servs., 436 U.S. 658, 690, n.55 (1978); Lee-Thomas v. Prince George’s Cty. Pub. Sch., 666 F.3d 244, 248 (4th Cir. 2012).

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

Alexandria Division



Daryll Shumake,  
Petitioner,

v.

Commonwealth of Virginia,  
Respondent.

1:18cv1170 (LMB/MSN)

ORDER

Daryll Shumake, a Virginia inmate proceeding pro se, initiated this action by filing a pleading captioned as a "Motion for Summary Judgment" supported by an affidavit in which he stated that he was convicted of a carjacking that actually was committed by his cousin. By an Order entered September 17, 2018, Schumake's pleading was construed as a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254, and he was directed to particularize and amend the petition using a set of standardized forms within 30 days. [Dkt. No. 3] Schumake also was directed either to pay the applicable filing fee of \$5.00 or to apply to proceed in forma pauperis. Schumake did none of these things, and instead appealed the Order to the Fourth Circuit Court of Appeals. The appeal has now been dismissed for lack of jurisdiction and the matter remanded to allow Schumake another opportunity to file an amended § 2254 petition as directed. [Dkt No. 19] Accordingly, it is

ORDERED that petitioner either pay the \$5.00 filing fee that was assessed in the Order of September 17, 2018 or complete the attached application to proceed in forma pauperis. If the Court grants petitioner in forma pauperis status, petitioner will not be required to pay the fee.  
FAILURE TO PAY THE \$5.00 FILING FEE OR TO RETURN THE COMPLETED  
ATTACHED APPLICATION WITHIN THIRTY (30) DAYS WILL RESULT IN DISMISSAL.

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OF THIS ACTION WITHOUT PREJUDICE; and it is further

ORDERED that the Clerk request petitioner's institution to provide an Inmate Account Report Form on petitioner within thirty (30) days of the date of this Order; and it is further

ORDERED that petitioner particularize and amend his petition within thirty (30) days of the date of this Order by thoroughly completing the attached form for filing a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner must include civil action number 1:18cv1170 (LMB/MSN), on the first page of his amended petition, and this amended petition will serve as the SOLE petition in this civil action; and it is further

ORDERED that petitioner's Motion to Amend Declaration [Dkt. No. 14] is GRANTED to the extent that petitioner may include any grounds for relief he wishes to invoke in the amended petition; and it is further

ORDERED that petitioner's Motion for Status Hearing [Dkt. No. 18] be and is DENIED, WITHOUT PREJUDICE as premature; and it is further

ORDERED that petitioner's failure to comply with any part of this Order within THIRTY (30) DAYS FROM THE DATE OF THIS ORDER, or failure to notify this Court immediately in the event he is transferred, released, or otherwise relocated, may result in the dismissal of this petition pursuant to Fed. R. Civ. P. 41(b).

The Clerk is directed to send a copy of this Order, an application to proceed in forma pauperis, and a standard 28 U.S.C. § 2254 form to petitioner, as well as a copy of this Order and the Inmate Account Report Form to petitioner's current institution of confinement.

Entered this 2<sup>nd</sup> day of April 2019.

Alexandria, Virginia

/s/ LMB  
Leonie M. Brinkema  
United States District Judge



FILED: May 30, 2019

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 19-6160  
(7:18-cv-00292-MFU-RSB)

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DARYLL KEITH SHUMAKE

Plaintiff - Appellant

v.

THE COMMONWEALTH OF VIRGINIA

Defendant - Appellee

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O R D E R

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The court dismisses this proceeding for failure to prosecute pursuant to Local  
Rule 45.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk