

In The
Supreme Court of the United States

MICHAEL D. SMITH,

Petitioner,

v.

DEREK GORDON, STEVE MILNER, WILLIAM HAYES,
HAYES LAW GROUP, GUTRHIE TRUE,
TRUE GUARNIERI AYER, LLP, WILLIS COFFEY,
COFFEY & FORD PSC, JULIE ROBERT GILLIUM,
JEFF HOOVER, JOE A. JARRELL, PATRICK NASH,
NASH MARSHALL, PLLC, THE COURIER JOURNAL,
THE LEXINGTON HERALD LEADER, WDKY
FOX NEWS, WKYT 27 NEWS C/O GRAY, WLEX
COMMUNICATIONS, LLC, WTVQ 36 NEWS,

Respondents.

**On Petition For Writ Of Certiorari
To The Court Of Appeals Of Kentucky**

BRIEF IN OPPOSITION

PATRICIA C. LE MEUR*
KATHERINE T. WATTS
PHILLIPS PARKER ORBERSON &
ARNETT, PLC
716 West Main Street, Suite 300
Louisville, Kentucky 40214
Telephone: (502) 583-9900
tlemeur@ppoalaw.com
kwatts@ppoalaw.com
Attorneys for Respondent
Steve Milner
**Counsel of Record*

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INTRODUCTION

Petitioner's characterization of the facts and questions presented do not accurately reflect the issues decided below. This case presents only questions of state law, which were properly decided by Kentucky's trial and appellate courts. Kentucky's Supreme Court left undisturbed a detailed opinion in which the Court of Appeals considered the legal and pseudo-factual issues raised by the Petitioner and affirmed the Garrard Circuit Court's dismissal of Petitioner's claims against all Respondents. Specifically, Petitioner erroneously asserts that he was previously convicted in federal court based on a fatally flawed indictment. He claims that all Respondent attorneys knew of the purported lack of indictment and committed professional negligence and engaged in a conspiracy to secure his conviction by failing to advise him of the imagined issues with the indictment.

The initial source of Petitioner's concern appears to have stemmed from the presence in the federal district court file of a redacted copy of the indictment; the unredacted indictment is contained in the file under seal. Petitioner has claimed alternatively that the indictment was not properly signed and that it does not reflect that it is a "true bill." Notwithstanding the federal district court judge's certification of the original, sealed indictment as having been properly brought and signed, Petitioner continues to insist that no actual indictment exists. Pet.App.26.

In his civil action below, Petitioner asserted state law professional negligence and conspiracy claims against multiple lawyers, including Stephen Milner who never represented him, as well as against multiple media entities. The state circuit court correctly applied Kentucky law and concluded that all of Petitioner's claims were time-barred and that his failure to state claims upon which relief could be granted further warranted dismissal. Kentucky's Court of Appeals carefully considered the case and affirmed on all counts. It also noted that Petitioner's complaint was "problematic because it rests upon a claim that there was no valid indictment in his federal criminal case – a claim which is completely refuted by the record." Pet.App.41. The Court of Appeals reviewed the record containing a copy of the redacted indictment, as well as the federal district judge's certification that the sealed indictment was properly brought with appropriate signatures, and concluded: "Put bluntly, a null premise lies at the heart of [Petitioner's] complaint, and the circuit court did not err in dismissing it." Pet.App.42. In short, this is a matter in which Kentucky law was carefully applied to Petitioner's state law claims, and dismissal of those claims does not implicate any federal question or constitutional rights. Petitioner has identified no basis for further review, and his petition should be denied.

STATEMENT OF THE CASE

I. Smith was properly indicted and convicted in federal court, and his multiple direct and collateral attacks on the indictment, conviction, and sentence were unsuccessful.

Petitioner, Michael D. Smith, was the owner and operator of Target Oil and Gas Company, which utilized financial backing from investors to develop and operate gas and oil wells in Kentucky and several neighboring states. In December 2008, Smith and others were indicted on charges of mail fraud, securities fraud, and wire fraud arising from misrepresentations to their investors regarding the viability and productivity of the wells. Pet.App.31-32; *United States v. Smith*, No.21-5371, 2021 WL 7210170 (6th Cir., Nov. 15, 2021); Certified Indictment, TR.595-621. Smith and his brother were tried together in a four-week jury trial in the Federal District Court in the Eastern District of Kentucky. During the trial, the prosecutors voluntarily dismissed the securities charges, and Smith was convicted of one count of conspiracy to commit mail fraud (18 U.S.C. §1349) and multiple counts of mail fraud (18 U.S.C. §1341), and he was acquitted on the remaining charges. He was sentenced to 120 months in prison and was ordered to pay over \$5,000,000 in restitution. Pet.App.32; *United States v. Smith*, 749 F.3d 465, 473-76 (6th Cir. 2014).

Smith unsuccessfully appealed his conviction to the Sixth Circuit Court of Appeals, alleging numerous errors, including sufficiency of evidence regarding

charges against him, inappropriate sentencing and forfeiture, erroneous evidentiary rulings and denial of his motion for a new trial, and erroneous exclusion of purported expert testimony. In a detailed opinion, the Sixth Circuit affirmed the District Court's judgment in all respects, and the United States Supreme Court subsequently denied Smith's petition for certiorari. *Id.*; *Smith v. U.S.*, 574 U.S. 918, 135 S.Ct. 307, 190 L.Ed.2d 223 (2014). Smith had, thus, exhausted his direct appeal, and his conviction was final by no later than October 2014.

While he was imprisoned and subsequently under supervised release, Smith filed numerous, unsuccessful post-conviction motions and actions collaterally attacking the underlying indictment, trial, conviction, and sentencing. Significantly, he repeatedly argued that the criminal indictment was fatally defective, alternatively because it was not signed by a government attorney or grand jurors, or because it did not reflect that it was a "true bill." *Smith v. Cadle*, 2021 WL 7210172 at *1 (6th Cir., Nov. 18, 2021) (identifying multiple post-conviction actions initiated by Smith between 2015 and 2019 in which he claimed the indictment was defective).¹

¹ The case that Smith is currently pursuing in the 9th Circuit Court of Appeals (Case: 23-55030) is another attempted attack on his conviction. He filed suit in a federal district court in California, a state with absolutely no relation to his Kentucky cases, in an attempt to have his conviction set aside. It is unlikely that this will be successful, for all of the reasons contained in the government's cogent briefing in that matter. Case: 23-55030, DN 13.

The record, however, demonstrates that the indictment was proper. Pet.App.32, 41- 42. The indictment was sealed, and a redacted version was provided for the district court's file to protect the confidentiality of the grand jury. *Cadle*, 2021 WL 7210172 at *1. In response to Smith's repeated insistence that the redacted indictment in the court's file evidenced the lack of indictment, the federal district court judge reviewed and certified that the indictment was properly brought and signed. The Sixth Circuit Court of Appeals affirmed that the indictment was proper:

Due to the important governmental interest in maintaining the secrecy of the grand jury process, Smith was not entitled to an unredacted copy of the indictment absent a particular demonstration that grounds might exist for a motion to dismiss based on materials concerning the grand jury. Smith's unsupported and frivolous assertions of defects in the indictment do not satisfy this standard. In any event, an indictment is not required to have a "true bill" notation, and the district court certified that Smith's indictment contains the requisite signatures.

Cadle, 2021 WL 7210172 at *1 (internal citations omitted). Further, the Sixth Circuit noted, any absence of requisite signatures would have been a mere technical defect that would not render the indictment invalid so long as it gave Smith sufficient notice of the charges against him. *Id.* Smith has never claimed that the indictment did not give him adequate notice of the claims against him. *Id.* Ultimately, none of the

post-indictment relief that Smith sought was granted, and in February 2020, he completed his term of imprisonment and was released under supervision.

II. Kentucky’s Court of Appeals correctly affirmed dismissal of Smith’s state law civil claims on several grounds, and the Kentucky Supreme Court appropriately denied Smith’s motion for discretionary review.

Shortly after his release from prison, Smith filed the underlying suit against his own attorneys and those representing his co-defendants, as well as multiple media entities. He alleged that the attorneys had committed legal malpractice, that the media entities had defamed him, and that all had engaged in a civil conspiracy to convict and imprison him despite his proclaimed innocence based on the purportedly defective indictment. Pet.App.33-34. He readily admitted in his Complaint that attorney Stephen Milner (who passed away during the pendency of this matter) and many of the other attorneys he had named as defendants did not represent him at any stage of his criminal trial and appeal or in any other civil or criminal proceeding. [Complaint at ¶¶2, 6-7, TR.2, 4-5] Consistent with Smith’s concession, in his verified Answer to the Complaint, Milner stated:

Further, Defendant Steve Milner has not ever represented plaintiff [Smith] herein in any jurisdiction and he was not present at any trial to which plaintiff may be referring. Plaintiff has never paid undersigned any money to

represent him nor has defendant ever been appointed by any court, state or federal, to represent Plaintiff in any matter, criminal or civil.

[Milner's Verified Answer, TR.30-34] Additionally, the Eastern District of Kentucky's docket for Smith's criminal case demonstrates that Milner was not present for Smith's 2010 trial, and in fact, appeared in that case only twice, both times in 2009 on a motion unrelated to Smith. [E.D. Ky. Docket, TR.105-106] Nonetheless, Smith insists that Milner owed him a professional duty to interfere with the representation provided by Smith's counsel of choice.

All the attorney and media defendants below filed motions to dismiss Smith's complaint based on applicable limitations defenses and for failure to state claims against them upon which relief could be granted. The complaint was untimely, as the one-year limitations period for attorney malpractice and conspiracy claims had elapsed well before Smith filed suit. Pet.App.37-38. Additionally, Smith's professional negligence claim against all of the attorneys is foreclosed by the exoneration rule, and further, with respect to Milner, by the lack of an attorney-client relationship giving rise to any duty of representation. Rules of ethics and professional conduct also foreclosed Milner from taking action on behalf of Smith, a party represented by his counsel of choice in the matter. Pet.App.39-40.

The Kentucky Court of Appeals correctly rejected Smith's argument that the statute of limitations was tolled while he was imprisoned. Importantly, it reaffirmed that the indictment was proper and that Smith's confusion regarding the implications of the sealed and redacted indictment cannot form the basis of any viable claims against any Respondent. The Court of Appeals appropriately affirmed the Trial Court's dismissal of Smith's claims pursuant to CR 12.02(f) against Milner and all Respondents. Pet.App.42.

The Kentucky Supreme Court denied Smith's motion for discretionary review on June 7, 2023. Pet.App.29.

REASONS FOR DENYING CERTIORARI

I. Smith's claims were correctly dismissed as time-barred, and Smith has not demonstrated any conflict among the circuits or unresolved federal question on this issue.

Smith filed suit against Milner and the other Respondents well outside the applicable limitations periods, and he has articulated no viable basis for enlarging his time to file these claims. Pursuant to Kentucky Revised Statutes, KRS §413.245 and KRS §413.140(1)(c), Smith was required to assert any claim for legal malpractice, negligence, or civil conspiracy within one year after the occurrence giving rise to the action. The occurrences underlying Smith's claims

against Milner are his 2008 indictment and 2010 trial and conviction. As discussed above, the Sixth Circuit Court of Appeals affirmed Smith's conviction on direct appeal. *Smith*, 749 F.3d at 498. The U.S. Supreme Court subsequently denied his petition for certiorari on October 6, 2014, which is the latest date by which Smith's conviction can be considered final. *Smith*, 574 U.S. 918, 135 S.Ct. 307, 190 L.Ed.2d 223 (2014). Thus, Smith was required to assert his professional negligence and conspiracy claims no later than October 6, 2015. *Stephens v. Denison*, 64 S.W.3d 297, 299 (Ky.App.2001) (holding that statute of limitations in KRS §413.245 starts to run when the appeal of the criminal case becomes final, *i.e.*, "fixed and nonspeculative"). Smith did not file the underlying civil action in Garrard Circuit Court until February 19, 2021, over five years after the most liberally-calculated limitations period had elapsed. Accordingly, his claims were time-barred, and dismissal was appropriate.

Smith's attempt to enlarge the applicable limitations periods through reliance on the discovery rule and on a statute that was long-ago repealed fail for lack any legal or factual support. First, Smith disingenuously argues that he first obtained knowledge of alleged defects in the indictment after he was released from prison, when the FBI advised in response to his open records request that it did not have a copy of the indictment.² However, Smith admittedly was aware of

² The unredacted indictment is maintained under seal in the Eastern District of Kentucky's file, and a redacted copy is contained in the electronic records file. *U.S. v. Smith*, 2017 WL

alleged defects in the indictment *during* the criminal trial in federal court. Pet. Brief at p.16-17; *Smith*, 749 F.3d at 480-483. Further, Smith initiated multiple collateral actions between 2015 and 2021 attacking the sufficiency and existence of the indictment, plainly demonstrating that he “discovered” his putative causes of action based on alleged defects in the indictment long before 2020. *Cadle*, 2021 WL 7210172 at *1; *U.S. v. Smith*, 2019 WL 4015438, *1-2 (E.D. Ky., Aug. 26, 2019).

Plainly stated, the discovery rule is inapplicable to this case. In certain circumstances, it delays commencement of a cause of action until a plaintiff discovers that he has been injured as a result of a defendant’s conduct. *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 60 (Ky.2010). Importantly, however, “the discovery rule is available only in cases where the fact of injury or the offending instrumentality is not immediately evident or discoverable with the exercise of reasonable diligence.” *Id.*; KRS §413.245. It is clear that Smith had “discovered” his alleged injury due to purported defects in the indictment well before 2020. Smith certainly had sufficient personal knowledge of his alleged injury and its putative cause to initiate multiple legal challenges throughout his incarceration. Thus, even if the discovery rule did apply herein, under the most

2766099, at *8 (E.D. Ky., June 26, 2017). Thus, the FBI did not have the original, unredacted indictment, and its response to Smith’s FOIA request is not relevant to his claim that the indictment was defective or does not exist.

favorable construction, its application to this case does not rescue Smith's untimely lawsuit.

Smith further claims, incorrectly, that he was under a legal disability due to his imprisonment and that his cause of action did not accrue until his release in February 2020. However, imprisonment has not been considered a legal disability in Kentucky since KRS §413.310 was repealed by the General Assembly effective 1990, and it cannot operate to toll the commencement of a limitation period. *Duffy v. Kindred Healthcare, Inc.*, 2005 WL 1057547, n.3 (Ky.App., May 6, 2005); *Hamilton v. Meridian Mut. Ins. Co.*, 2003 WL 22064128 at *3 (Ky.App., Sept. 5, 2003). Additionally, as a matter of fact, Smith's incarceration was no bar to his ability to repeatedly litigate, for years, the same claims that he has asserted in this matter. *Cadle*, 2021 WL 7210172 at *1; *Smith*, 2017 WL 4015438 at *1-2.

Because Smith's claims were all untimely, discovery would not have impacted the outcome. Dismissal of his claims as time-barred was the only appropriate outcome.

II. Smith's complaint was properly dismissed for failure to state a claim upon which relief could be granted, and there is no constitutional or other question requiring review or resolution.

In addition to failing to timely file suit, Smith also failed to state a claim against Milner upon which relief could be granted. Smith is not "entitled to relief

under any set of facts which could be proved" in support of his claims. *Peyton v. Sims*, 585 S.W.3d 250, 252 (Ky.App.2019), quoting *Fox v. Grayson*, 317 S.W.2d 1, 7 (Ky.2010). Smith's substantive claims against Milner are limited to an alleged failure to take some action on Smith's behalf with respect to non-existent defects in the indictment. [Complaint at ¶¶2, 7, TR.2, 4-5] The indictment, however, is certified and indisputably valid. Discovery would not have produced evidence entitling Smith to relief, nor is there any constitutional or other issue requiring further review of this matter.

A. Smith cannot satisfy the requirements of the exoneration rule, warranting dismissal of Smith's claims without need for discovery.

The exoneration rule precludes Smith's lawsuit against Milner, and Kentucky's Court of Appeals appropriately affirmed dismissal of Smith's claims on this basis. The exoneration rule provides:

To survive a motion to dismiss for failure to state a claim in a professional malpractice case against a criminal defense attorney, the convicted client must plead in his complaint that he has been exonerated of the underlying criminal conviction. He or she need not prove actual innocence, but they also may not rely solely upon a claim of actual innocence in the absence of an exonerating court decision through appeal or post-conviction order.

Lawrence v. Bingham, Greenebaum, Doll, 567 S.W.3d 133, 141 (Ky.2018). Notwithstanding Smith’s insistence to the contrary, this rule provides an avenue for legitimate dispute regarding representation by a criminal defense attorney, while also recognizing that it is the criminal defendant’s own actions which are the “‘sole, proximate, and producing cause of the indictment, conviction, and resultant incarceration.’” *Id.* at 138, quoting *Ray v. Stone*, 952 S.W.2d 220, 224 (Ky.App.1997). Thus, Smith’s contention that lawyers cannot be sued by prisoners “no matter what they have done” is refuted by the plain language of *Lawrence*, the case upon which he relies, and simply does not support his petition for certiorari.

It is indisputable that Smith cannot satisfy the requirements of the exoneration rule with respect to Milner. First, Smith and Milner never had an attorney-client relationship. Second, Smith’s direct appeal and numerous collateral attacks on his indictment and conviction have all failed. His conviction has not been overturned, and he has not been exonerated of any portion of the judgment against him in the criminal case. Again, discovery would not have resulted in a different outcome, as it is based on the settled federal opinions from Smith’s multiple attacks on all aspects of his indictment, trial, and conviction, as well as upon the allegations contained in his complaint in this matter. Dismissal of Smith’s claims against Milner on this basis was correct, and there is no unresolved federal question or other basis for further review of this matter.

B. Milner did not owe any duty of representation to Smith, and dismissal for failure to state a cognizable claim was appropriate.

Smith's allegations against Milner fail for the further, simple reason that there was never an attorney-client relationship between the two. To state a cognizable claim against Milner for professional negligence and conspiracy, Smith was required to demonstrate that Milner owed him a duty of care. *Lawrence*, 567 S.W.3d at 138, citing *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky.2003); *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88 (Ky.2003). Smith freely admits that Milner has never represented him in any legal matter whatsoever, and it is undisputed that Milner was not present during Smith's criminal trial. In the absence of any professional relationship between himself and Milner, Smith cannot maintain his claims against Milner. Pet.App.39-40. Additionally, as the Court of Appeals noted, Milner and the other attorneys who did not represent Smith "ran the risk of violating professional ethics rules if they had attempted the sort of aid which Smith now claims they should have provided." Pet.App.39-40; *Shoney's, Inc. v. Lewis*, 875 S.W.2d 514, 515 (Ky.1994); SCR 3.130(4.2). Again, discovery would not have produced evidence warranting a different outcome, nor has Smith identified any split among state or federal courts on this issue requiring resolution by this Court.

C. Smith's demonstrably erroneous assertions that his indictment was defective or non-existent cannot support any of his claims.

Smith's misunderstanding regarding the sealed, redacted indictment in his federal criminal case cannot form the basis of a viable civil complaint against Milner. While Smith's factual allegations must be accepted as true for purposes of a motion to dismiss for failure to state a claim, mere conclusory statements are not considered. *James v. Wilson*, 95 S.W.3d 875, 883 (Ky.App.2002); *Moss v. Roberson*, 712 S.W.2d 351, 352 (Ky.App.1986). This is consistent with federal law, which provides that, while a *pro se* plaintiff's complaint is to be liberally construed, "the court need not accept unsupported or conclusory factual allegations devoid of any reference to actual events, or legal conclusions couched as factual allegations." *Lewis v. Senior Lifestyle*, 2023 WL 8478901 (U.S.Dist.Ct.Md., Dec. 7, 2023), quoting *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

Herein, Smith has continued to insist, without basis in fact or law, that he was never properly indicted in federal court for the charges on which he was convicted. Smith's position, as the Court of Appeals noted, "is completely refuted by the record." [Exh.1 at p.8] In fact, in response to one of Smith's many collateral attacks on the indictment, Judge Hood certified as follows:

The Court has reviewed the document in question and **CERTIFIES** that the indictment

was properly brought with the signature of the foreperson of the grand jury, resulting in the conviction of Smith on some, but not all, of the charges listed therein. Moreover, Smith's conviction was affirmed on appeal. . . .

Pet.App.26. The Sixth Circuit also recognized the "unsupported and frivolous" nature of Smith's allegations of defects in the indictment. *Cadle*, 2021 WL 7210172 at *1. All of Smith's claims rest upon his erroneous insistence that he was not properly indicted. This conclusory position constitutes "a null premise at the core of Smith's complaint," and it does not provide a basis for review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PATRICIA C. LE MEUR*
KATHERINE T. WATTS
PHILLIPS PARKER ORBERSON &
ARNETT, PLC
716 West Main Street, Suite 300
Louisville, Kentucky 40214
Telephone: (502) 583-9900
tlemeur@ppoalaw.com
kwatts@ppoalaw.com
Attorneys for Respondent
Steve Milner
**Counsel of Record*