No.: 24-5978 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

In Re: Marquis Deion Heard

PETITION FOR WRIT OF MANDAMUS

Marquis D. Heard
#14904-032
F.C.I. Gilmer
P.O. Boz 6000
Glenville, WV 26351

Questions Presented

1.) If the petitioner had two appeals on his 2255 motion and the second appeal was correct under Fed. R. App. P. (4) (a) (4) (a) (IV), does law-of-the-case-doctrine foreclose his right to be heard?

2.) By precluding a party's right to be heard on an issue concerning count one of his Jencks material that was given to him at trial, does that effect his opportunity at relief?

3.) If a search warrant was unreturned under rule 41 (F) of the Fed. R.Crim.P. and used against the petitioner at his jury trial, then added to his 2255 by the judge does this entail a fraud placed on the court?

Relief Sought

The petitioner prays for relief in the form of mandamus being issued to the Sixth Circuit Judges in the "parties" section of this writ allowing petitioner Heard to petition under the rules and standards of the Rules Governing 2255 motions. He also ask this Honorable court review his Jencks material given to him in regards to the testimony of one detective Danielle Barto in case 11-cr-73-73-Jbc on June 2, 2011 in the Eastern District of Kentucky concerning count one. He lastly ask that his search warrant in case 11-mj-5060-REW on June 5, 2011 in the eastern District of Kentucky be stricken upon review from this court of the record(s) of the above mentioned documents.

List of Parties Involved

1.) The party seeking mandamus in this matter is Marquis Deron Heard, a pro se prisoner currently housed at the Federal Correctional Institute Gilmer in Glenville WV.

2.) The parties involved against whom mandamus is sought are:

1) U.S. Sixth Circuit Judge Moore

2) U.S. Sixth Circuit Judge Griffin

3) U.S. Sixth Circuit Judge Murphy

Directly Related Cases:

U.S. v> Heard; case 11-cr-73-JBC, in the Eastern District of Kentucky: Judgement entered on 5/6/13; Search case 5: 11-5060- REW in EDKY.

Heard v. U.S.; case # 16-CV-0188, in the Eastern District of Kentucky: Judgement entered on 2/5/18 motion under Fed. R. Civ. P. 59 DENIED on 11/5/18.

Heard v. U.S.; in case(s) 1.) # 18-5288 and 2.) # 18-6261 in the Sixth Circuit Court of appeals: Judgement entered on (7/27/18 – 18-5288) and (4/26/19- 18-6261), en banc denied on ??? 6/18/19.

Table of Contents

Table of Authorities

Cases:

Statutes and Rules:

Orders Below

The decisions of the United States Court of Appeals for the Sixth Circuit are unreported.

1.) Heard v. U.S. COA #18- 5288 (2255)

2.) Heard v. U.S. COA #18-6261 (2255)

3.) In Re: Marquis Deron Heard COA #17- 6504 (Writ of Mandamus)

A copy of each of these decisions is attached to the appendixes portion of this petition.

The decision(s) of the United States District Court for the Eastern District of Kentucky is unreported.

1.) U.S. v. Heard #11 cr 73/ 16 – cv – 0188 (2255)

The recommended disposition is also unreported.

1.) U.S. v. Heard # 11 cr- 73 / 16 – cv – 0188 (2255)

A copy of each decision is attached to the appendixes portion of this petition.

Jurisdictional Statement

This court has jurisdiction under 28 U.S.C. 1651 (a) to issue an extraordinary writ. This writ is unguided by any time restrictions set by Supreme Court rule.

Constitutional Provisions & Statutes

This case involves Articles 1, 9, cl. 2 which provides:

The privilege of the writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or invasion public safety may require it.

This case involves Amendments I, IV, V, and VI to the United States Constitution which provides:

Amendment I: religious establishment prohibited freedom of speech and of press; right to assemble and petition.

Congress shall make no 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 peaceably assemble, and to petition the government for a redress of grievances.

Amendment IV: Protection from unreasonable search and seizure; The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Amendment V: Provisions concerning prosecution and due process of law, compensation of private property taken for public use;

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 case arising in the land or naval forces, or in the Militia 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 not shall private property be taken for public use, without just compensation.

Amendment VI: Rights of accused in criminal prosecutions:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature an cause of the accusation: to be confronted with the witnesses against him: to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statement of the Case

This case stems from petitioner Heard ("herein referred to as Heard") being denied the right to be heard.

To date Heard has been denied the right to petition for a certificate of appeal ability ("COA") in the Sixth Circuit on his 2016 motion under 28 U.S.C. 2255.

On 3/14/18 after being denied de novo review in the Eastern District of Kentucky petitioner Heard filed a motion under Federal Civil rule 59 along with a notice of appeal. (D.E. 348)

Despite equitable tolling, while awaiting adjudication of the timely filed motion under rule 59, Heard was issued an appeal number and a ruling, denying his application for a "COA". (6th Cir. 18-5288, Heard v. U.S. D.E4)

After being denied a rule 59 review, Heard reapplied for a "COA" filing yet another NOTICE OF APPEAL and recieving another denial in his pursuit of review. This second denial was based on law- of- the- case- doctrine, which was held as binding on en banc reconsideration. (6th Cir. 18- 6261, Heard v. U.S.)

I. The timeline of events that led to petitioner Heard being arrested displays relevance into the cause and prejudice experienced by Heard at jury trial and on collateral review.

The petitioner would like to use trial excerpts that were made available to him as well as reference to records that are transcribed or filed. The excerpts will be referenced categorically in order to establish the petitioner's diligent contentions

Pre- arrest Relevant Facts:

1.) On 1/25/11, and one month prior in a state court house, Heard's unindicted coconspirator Victor Hernandez gave an out of court disposition to the state and then federal authorities. When directly ask "who did you conspire with "he did not indicate Heard in either meeting. (D.E. 273. App. A. i.e.; 2255 motion Appendix)

2.) On February 28, 2011 petitioner Heard was said to have made a sale of 250 grams of powder cocaine to a one Demarcus Lewis--- Government Informant.

3.) On June 2, 2011 an indictment and arrest warrant was issued as to one Marquis Deron Heard in Fayette County KY ("Lexington")

4.) The June 2, 2011 indictment had two conspiracies containing 5 or more kilos from the years 2008 until 2011, and one charge of cocaine sale on February 28, 2011. This was 3 charges along with a forfeiture allegation. (D.E. 1) Id

5.) IRS Special Agent Danielle Barto testified pertaining to the 3 counts as the sole grand jury witness on the drug charges.

6.) On June 6, 2011 in Jefferson County, KY ("Louisville") the United States placed a Lis Pen dens against Marquis Deron Heard.

7.) On June 7, 2011, the case agents did a kick door raid on Heard's home handing him a search warrant dating June 5, 2011.

8.) On June 9, 2011 an arrest warrant was returned in regards to Marquis Deron Heard in federal court. (D.E.11)

Pre -trial Relevant Facts:

1.) Despite later ruling that the petit jury's guilty verdict cures any defect in an indictment, the court at pre- trial conference first stated that a supersedes indictment cures any defect.(pre-trial at 43)

2.) At the pretrial conference Heard made inter alia, a motion challenging a concurrence of 12 jurors to vote on his June 2, 2011 indictment. (pretrial50 at 1-6)

3.) The trial court said... she would "check for irregularities in the grand jury proceedings". (pretrial 54 at 18-22) Id.

Relevant Trial Facts:

1.) At jury trial after receiving his Jencks Material Heard noticed a defect in the Grand Jury proceedings and asked several times ... " who was testifying about count one" (Tr. 3-101 at 12-17), (tr.3-103 at 3-18) Id.

2.) The trial court said that one of the two unindicted coconspirators [victor Hernandez] testimony established the "money laundering" conspiracy in count 6. (Tr.3-127 at 9-12) Id.

3.) This particular money laundering 5 kilo conspiracy is one the court was "concerned" with. (Tr. 3-113 at 2) Id.

4.) The government, in establishing charging Heard with multiplicities count stated the evidence used in prosecuting two conspiracies was "largely duplicitous". (Tr. 3-113 at 18) Id.

5.) The government reiterated this fact about the multiplicities count stating: "count six flows off of count one ". (Tr.2-123 at 13, 14), (Tr. 3-124 at 17-23), (Tr.3-125) Id.

6.) Although he was labeled a government informant Demarcus Lewis was dually assigned as Heard's coconspirator. (Tr. 3-171 at 1-3)

7.) Thou court seemingly aided the fact that count one could be established. (Tr. 3-130 at 11), (Tr. 3-165, 3-166)

8.) Despite Heard's attempt at resolve in order to defend his position in regards to count one on June 2, 2011the court warned Heard to steer clear of discussing indictment 11-cr-73-JBC n June 2. 2011. (Tr. 3-200 at 8-11), (Tr.1A 49), (Tr.1A50 at 1-3), (Tr. 4-4 at 13-24) Id.

Post -Trial facts:

1.) Heard filed a timely notice of appeal outlining his intent and desire to appeal the legality of his arrest an indictment. (D.E. 219) Id.

2.) Heard opted for counsel to appeal his issues which the Sixth Circuit appointed Neal Rosenwieg of Hollywood FL, who [along with Heard] filed [and was Granted] leave, citing Anders v. California as the reason for leave.

3.) Heard filed his brief docketing his indictment issue but was foreclosed on his claim due to appellate counsel filing a separate brief disallowing hybrid representation, United States v. Heard 762 F. 3d. 538 (6th Cir. 2014)

4.) Heard filed but was subsequently denied certiorari 136 S. Ct. 376 (2015)

Habeas (2255) Facts:

1.) Heard filed a timely 2255 motion in the Eastern District of Kentucky. (DE. 273)

2.) The government failed to address the issues surrounding the "statement" [i.e.; "Heard is already indicted on count one" Jencks material testimony SA Barto June 2, 2011] Id. , Heard filed and was granted a rule 5 motion under the rules governing 2255 proceedings.(D.E. 289)Id.

3.) After filing its supplemental response from the government, Heard filed a rule 5 (C) motion due to the response being vague. (D.E. 299)

4.) After filing reply, the magistrate granted an evidentiary hearing for the limited purpose of determining "meaningful adverbial testing" as Heard stipulated to his own competency. (D.E. 301)

5.) At the hearing former counsel [Andrew Stephens] testified he did not employ any strategy concerning Heard's instance on self-representation (D.E. 331 at p. 24, 5-10) (p.25 at 9, 10) Id.

6.) The magistrate issued a " recommendation and disposition" (D.E. 335), denying Heard relief while also failing to address the record contents of the claim associated to the Jencks material.(D.E.335)

7.) Heard filed timely objections citing record review concerning the statement "Heard is already indicted on count one".

8.) Heard then filed a WRIT of Mandamus to the circuit seeking "full and fair review" and was denied due to having an adequate means to relief. (Sixth Cir.COA # 17-6504 In Re: Marquis Deron Heard)

9.) The court adopted the magistrates "order" without giving a "full and fair" de novo review. (D.E. 344)

10.) Heard then filed a notice of appeal and a motion under Fed. R. Crim. 59€. (D.E.348,350)

11.) Heard was given appeal number COA # 18-5288 while awaiting adjuration on the timely filed motion under rule 59.

12.) On July 27, 2018 the Sixth circuit denied the appeal in case COA #18-5288.

13.) On November 5, 2018 the district court denied the motion under rule 59.

14.) On December 11, 2018, Heard again, appealed and was given COA# 18-6261 concerning the same 2255 case. I.e.: Heard v. U.S. 16-cv-0188.

15.) On April 26, 2019 the Sixth circuit denied the appeal in case # 18-6261, citing law- of- the- case- doctrine.

16.) Heard then filed en banc regarding equitable tolling (FRAP (4) (a) (4) (a) (IV)) and was denied on June 3, 2019.

17.) Heard filed a timely cert. to the Supreme Court but was asked to correct his "directly related cases" section of his writ.

18.) Heard mistakenly attempted to correct the orders below portion of his writ and tried several times unsuccessfully to file his writ. He then ask for filing instructions through letter, motion & then wrote the office of the administrative courts.

19.) Heard then filed suit against the District Court clerk assuming his case was purposely filed incorrectly initially. (Heard v. Carr. 20-cv-325)(EDKY)

20.) After two years upon filing to receive cert. Heard {finally fixing his direct cases page} was then told numerous corrections not previously mentioned in the return letter from two years prior.

21.) After making the necessary corrections there is still a flaw according to the clerk's offices as previously requested fixes to be made.

22.) The petitioner has written for specificity on which rule the mistake is under and has not received a response.

A. The record is clear and convincing of the petitioner's diligent contentions.

Starting at pretrial, in the case of unraveling the mystery of the construction of two of the [original] counts using 5 or more kilos to construct an indictment, the petitioner made an oral motion contesting the concurrence of the grand jury: Gaither v. United States 413 F. 2d. 1061, 134 US App. D.C. 154 (1969)

(Pretrial at 1-6):

USA v. HEARD, 5; 11-CR-73

Pretrial Conference (1/7/2013)

50

MR.HEARD: Because it's going to be an appeal issue. The foreperson never signed this, so I want to be able

3 to have – to make an oral motion to challenge the grand jury,

4 based on the fact that you said that actually once the witness

5 has testified. But I don't believe a grand jury was ever drawn,

6 your Honor, and I want to legally challenge it prior to trial.

The court then made a point to review the "irregularities"

(Pretrial 54 at 18-22)

18 Now, what I will look at tonight, to make sure, is that

19 if there is any other issue regarding irregularity of the grand

20 jury proceeding that this court is required to address I'll

21 take a look at the law on that tonight, a we'll take that up

21 first thing in the morning.

The petitioner would like to direct the courts attention that during the premature stage of developing an understanding of the counts, the court admonished to Heard that he should steer clear of mentioning the date that was later ruled in his 2255 motion to not being mentioned.

(Tr. 1A-48 at 7-21):

7 You're being charged and tried today for those items

8 listed in Indictment No.73, which is a superseding indictment

9 filed on November 3rd, 2011. Nothing more, nothing less.

10 The June indictment is not before this Court. It is not

11 before this jury. More importantly, any arguments about the

legality of an indictment should be made to this Court, this judge, and you have made those. They are not appropriate— these are not appropriate matter for the jury's consideration.

The jury is impaneled solely for the purpose of determining whether the government can factually prove the charges contained in Indictment 11-73, which is the superseding indictment on November 3rd, 2011.

So, I'm going to direct that you not talk to the jury or question any witnesses about the June 2nd indictment, because it is not before this Court.

(Tr. 4-4 at 19-25):

So, I'm going to abide by my prior ruling and will ask that you do the same, and that we just not talk about that first indictment. It really doesn't have any bearing on your guilt or innocence in the November 2011 indictment.

So if you'll please abide by my ruling and just stay away from that subject.

MR.HEARD: That's fine.

During jury trial after numerous witnesses testified, the petitioner was given his Jencks materials and was confused as to the nature of the grand jury testimony concerning count one & began asking the court in concern to this "irregularity" ;

(Tr. 3-101 at 9-17):

MR.HEARD: I was reading over it. I actually got a chance to skim over it because there's been so much going on, only so much time to read it.

I never really – it indicated in the packet that I was to receive that she testified to Count No.3 on the original plea, but I never really seen anything about Count 1, which is why I was taken aback. And don't know who was to testify about that. And if there was, was there anyone that has testified on the stand in my trial?

(Tr.3-103 at 3-18):

MR.HEARD: I want to know as far as who testified in Count 1 of my indictment. Because in the package, like I said, the information on the grand jury packet that I was given by Special Agent Barto, I never received anything indicating that she testified to Count 1 of the indictment.

This is the count that has the strong footing, the foundation for the indictment, all three of them, and so we have to figure these things out.

And I want to know—I want – I want that to be added as one of my grounds for my exculpatory motion, because I want to know who testified to that on June 2nd. Now, the other dates it doesn't matter, because that doesn't – then I'm not Sure if they have to even come back in: maybe they do, maybe they don't. But on that particular date I want to be able to get everything started from the foundation, from the footing of this case.

(Tr. 3-199 & 3-200 at 25-16)

MR.HEARD: Also one more thing, your Honor. Okay now,

In the grand jury matter that I have for Ms. Barto, which I was recently given, it references Mr. Hernandez in Count 3 of the original pleading, which I know we're not supposed to talk

about. But it references Mr. Hernandez in the money – laundering Count. Which is absolutely fine, okay?

In Count 2, it references the sale that I supposedly made to Mr. Lewis on February 28, 2011.

And even as an unindicted coconspirator, I cannot say who was referenced at the grand jury matter of Count 1 to be able to attack it. And so that still places me in a situation where I am unable to defend myself properly, you know, to a ghost. Because I can attack and say, okay, in Count 3, Mr. Hernandez was, you know, the bulk of who you said was an unindicted coconspirator, which is absolutely fair. But in Count 1, I still do not know who is an unindicted coconspirator as far as the grand jury proceedings go.

The court during the trial questioned the government about the two conspiracies having a " concern" in which the government [on the record] admitted to using evidence that was " largely duplicitous" Which equates to a multiplicities count forwarded the petitioner;

(Tr. 3-113 at 5-7, 18, 19):

THE COURT: Okay, All right. Let me first talk about proof of the conspiracy. We have two conspiracies; the

conspiracies to distribute crack cocaine and cocaine, and the money laundering conspiracy.

And to tell you the one I'm the most concerned about, Mr. Thompson, and I'd like to hear from you about, is the money laundering conspiracy. If you will remind me of any evidence in support of the money laundering conspiracy.

MR.THOMPSON: would you like –

THE COURT: and please respond to each one.

MR.THOMPSON: would like me to address it first, your honor, in Count 6?

THE COURT: You need not address it in any particular order, but it the one that's been troubling me.

MR. THOMPSON: Well, actually, if I may go in reverse, I think one leads into the other one.

THE COURT: Okay, you may.

MR. THOMPSON: And I think the evidence is largely duplicitous; I think sort of the same evidence applies, we believe, to both.

This notion was reiterated in several forms throughout the course of the trial;

(Tr. 3-123 at 13, 14)

MR. THOMPSON; If I may, I will go ahead with Count 6, because I think it sort of follows off of count 1.

(Tr. 3-124 at 17-23):

And in this case, and that's where I go back to the facts, the same sort of scenario that I just spoke about on Count 1 --- this flow of drugs, kilograms of cocaine going from Mr. Escalara to Victor Hernandez, to Mr. Heard, and then that money going back the other direction; Mr. Heard taking cash, U.S. currency in bulk, giving it back to Mr. Hernandez, who then sent it back to Mr. Escalara.

(Tr. 3-125 at 21, 22)

So the 1956, to be clear, is a promotion charge, your Honor, related to Count 1.

To confuse things even worse, the testimony of Victor Hernandez ("unindicted coconspirator") was assigned to count 6 immediately after being delegated to count one;

(Tr. 3-122 at 7-25):

Now, here we have had direct testimony by Mr. Hernandez and also, to some extent, Mr. Lewis. But Mr. Hernandez identified

the membership. He stated its objective and specifically testified about its overt acts, including the quantities of cocaine that was moved.

He named Mr. Escalara and himself and Mr. Heard as having a business agreement. He gave specific testimony about cutting the cocaine, repackaging it, exchanging drugs and money With Mr. Heard; describing in detail the amounts of drugs and money, because his own income was to some extent based on the quantities the he processed, for lack of a better term.

So based on that evidence, whether or not I believe it or whether or not the jury's going to believe it, the Court finds that the United States has presented sufficient evidence for this issue to go to the jury. Considering the evidence in the light most favorable to the government, they could convict – a reasonable jury could convict.

So I'm going to let that count, count 1 the conspiracy

(Tr.3-127 at 9-12):

THE COURT: Count 6 doesn't deal with – we'll talk about the house and things later. But what they are saying is

11 that this property that went between you and Mr. Escalara, the

12 testimony of Mr. Hernandez establishes that conspiracy.

This in turn left the only remaining " direct witness" who was a " government agent" to be used in dual roles as an agent and also an " unindicted coconspirator" for the jury to separate;

(Tr. 3-198 at 12-18)

12 MR. THOMPSON: Yes, you're Honor. The person we will

13 allege conspired with Mr. Heard to distribute cocaine is, among

14 others, Mr. Escalara, Mr. Hernandez, and Mr. Lewis as far as the

15 names that were specifically mentioned. Of course, inference

16 could be drawn that there were more persons, but those persons

17 have been addressed specifically within the province of the

18 trial.

(Tr. 3-199 at 13-24):

13 MR.THOMPSON: The one brief issue I will address that

14 Mr.Heard raised, I will certainly agree as a matter of law that

15 any action that Mr. Lewis took following his agreement to

16 cooperate with the United States cannot and has not been

17 considered to be a part of the conspiracy, because at that point

18 he is a government cooperator, it's not something he's doing of

19 his own free will.

20 So the extent that Mr. Lewis and Mr. Heard had an

21 agreement dating back in time that would have had to have been

22 preceding approximately November 2010. Anything after that,

23 once he was contacted by law enforcement, I agree none of those

24 following activities have contributed to the conspiracy.

The petitioner ask may he please receive a "regular" review of the actual record including the Jencks materials discussed included in this writ (supra) the recording of the search return in the fact-finding process so there is no "grave doubt" about the likely effect of an error on the judge's decision.

By "grave doubt" the petitioner references the matter being so evenly balanced in the judge's mind that he is with little doubt as to the harmlessness of the error.

II. Relief sought on direct

On 5/8/13 after losing at jury trial petitioner Heard filed a notice of appeal (D.E. 219)

When filing his notice, Heard requested counsel to articulate his position and was assigned attorney at law Neal Rosenwieg of Hollywood Fl.

Mr. Rosenwieg [prior to ordering transcript] for warned Heard he would file Anders brief; Anders v. California 386 U.S. 738 87 s. Ct.1396, 18 l. Ed. 2d. 493 (1967).

He [Mr. Rosenwieg] and both Heard filed to the Sixth Circuit for permission to allow Heard to file a supplement brief which was subsequently granted.

After being granted leave to file his supplemental brief and subsequent to several coordinated calls relaying his plans of filing, petitioner Heard was cut off from filing as Mr. Rosenwieg filed a 12th hour off – the – mark brief concerning competency.

The petitioner filed his brief but was foreclosed in the issue he sought to discuss as the Sixth Circuit cited hybrid representation as the legal standard that negated Heard's trial efforts on appeal.

III. Relief sought on 2255

On 6/9/16, after being denied on certiorari petitioner Heard filed a motion under 28 U.S.C. 2255 in the Eastern District of Kentucky. (D.E. 273)

On 9/19/17, Heard then filed mandamus to the Sixth Circuit complaining of his due process concerning the review of the record being circumvented. (D.E. 334)

On 9/20/17, on a recommended disposition & order petitioner Heard was denied by magistrate Hanley A. Ingram. (D.E. 335)

On 9/28/, Heard filed timely objections citing the fact based process absent record recitation. (D.E. 338)

On 2/[illegible]/18, the district court adopted and denied the magistrates "disposition & order" on de novo review without mentioning the record on its face in its decision. (D.E. 344)

On 2/22/18, the Sixth Circuit then denied Heard's mandamus a moot, citing Heard's adequate means to relief as its reasoning.

IV. Relief sought on 2255 "COA"

On 3/14/18, petitioner Heard filed a motion under the Fed. R. Civ. P. 59 (E). (D.E. 348)

ON 3/14/18, petitioner Heard also filed a notice of appeal. (D.E. 350)

On 7/27/18, while pending adjuration and a motion under rule 59, the Sixth Circuit wrote the petitioner stating he was denied in case 18-5288.

On 11/5/18, the district court denied Heard's rule 59 motion. (D.E. 365)

On 12/11/18, Heard filed a notice of appeal. (D.E. 378)

On 4/26/19, Heard's appeal filed on 12/11/18; 18-6261, was denied based on the previous appeal; 18-5288 and law – of – the – case doctrine.

On 5/10/19, Heard filed for en banc to the circuit.

On 6/3/19, the panel denied the rehearing.

V. Relief sought in the supreme court

On 8/26/19, Heard filed a timely writ of certiorari to the supreme court of the United States.

On 9/111/19, the Supreme Court clerk's office returned the writ with instructions to fix the directly related cases portion of the writ.

Petitioner Heard subsequently made several attempts to refile his writ mistakenly restructuring the orders below page of his writ only to be rejected.

Heard filed several motions letters, including writing to the administrative office of the United States Courts seeking filing instructions but was un-responded to.

Heard then filed suit against the district court clerk Robert Carr (official capacity) (Heard v. Carr, 20-cv-325,EDKY) seeking injunction to receive his criminal case file in his 2255 be placed under his civil # 16-cv-0188, Heard v. U.S.)

Since the suit Heard has received assistance in fixing the directly related case page, but now has been met with a barrage of "new" corrections, which after being fixed has not sufficed to gain access to the courts.

Reasons for Granting the Writ

I. Petitioner Heard is being denied his right to petition for a COA in his 2016 2255 case.

The Sixth Circuit decision issued on July 27, 2018 in Heard v. U.S., conflicts with not only precedent set by this honorable court, the circuit court(s), but also the IOP. Of the Sixth Circuit and most importantly the Federal Rules of Appellate Procedure (4) (a) (4) (a) (IV), (rule59 motion "toll[ed] the running of the appeal period") York v. Tate 858 F. 2d. 322,325, 326 (6th Cir. 1988).

The ruling in case 18-5288 was a prejudgment order that not only prejudiced Heards's substantial rights, but in turn denies access to the courts and the right to be heard, but also suspends the petitioners " one bite of the apple" 28 U.S.C. 2255 US Const. Art.1,9,cl.2

On March 14, 2018, when Heard filed a notice of appeal he also included [in the same envelope] a motion under Fed. R. Civ. P. 59. The clerk unbeknownst to Heard filed an appeal causing the two levels of courts to exercise dual jurisdiction. This was pending a timely filed motion under Rule 59; discussing the Federal rules of appellate procedure (4) (a) the filing of a motion of reconsideration under Fed. R, Civ. P. 59 cause[s] an earlier filed notice of appeal to "self-destruct"); Rule 59 (e) rehearing petition seeking reconsideration tolls the time for appeal) cf. United States v. Davis, 924 F. 2d. 501, 506 (3rd Cir. 1991)

a. The appendixes opinion attached to this motion show that the Sixth Circuit made a ruling, denying a certificate of appeal ability to petitioner Heard on July 27, 2018 in case 18-5288. Id (app.)A

The appendix also show a ruling on November 5, 2018 (D.E. 365) in the Eastern District of Kentucky Court Denying a motion under Rule 59 more than 90 days "after" being denied a certificate of appeal ability in the circuit court, which subsequently foreclosed Heard's right to be heard. (App. C

The appendix then show an appeal subsequent to the date of the district court ruling (i.e.; rule 59) in which Heard was denied on April 26, 2019 an application for a COA based on law-of- the - case doctrine, Rouse v. Daimler Chrysler Corp., 300 F. 3d. 711,715 (6th Cir. 2002) (citations omitted) (quoting U.S. v. McKinley 227 F. 3d. 716, 719 (6th Cir. 200); (6th Cir. 18-6261, Heard v. U.S.) (App. D

b. The Federal Rule of Appellate Procedure (4) (a) (4) (A) (IV) constitutes an implied and ministerial obligation on the Sixth circuit court(s) which as a right in this particular form of action creates an inseparable tether to access to the courts.

In California Motor Transport Co. V. Trucking Unlimited 404 U.S. 508 S. Ct. 609 30L Ed. 2d. 642 (1972) an opinion by Justice Douglas, the asserted that [t]he right of access to the courts is indeed but one aspect of the right to petition. Id. At 510.

A 2255 movant bears the burden of proving his or her allegations by preponderance of the evidence McQueen v. United States 58 F. App. X 73, 76 (6th Cir.2003) (percuriam). This has been excruciatingly difficult to do without viewing the actual record, depriving Heard a safeguard in this case is retrogressive of law development and absent his right to access to the courts all his fundamental rights are illvisory.

II. Why Relief is not available in the lower courts

Relief is unavailable in the lower courts due to the stage in the proceedings, that being en banc consideration has already been sought and denied, and the Supreme Court being supervisory to the inferior courts.

III. Jurisdictional Aid

Jurisdictional aid in this case relies upon the protection and constitutional guarantee to apply under the section of the "great writ" under the AEDPA 28 U.S.C. 2255

Aid in this case is also relied upon by the Federal Rule of Appellate Procedure (4) (a) (4) (A) (IV), which in itself would mandate the rule of equitable tolling. This in turn beckons a supervisory and executive court to ensure the petitioners rights.

IV. Why this supervisory court is needed

The equal protection clause does in fact include petitioner Heard, who as an aggrieved party in Heard v. U.S. and is [n]ot an alien nor a terrorists, and his motion under the Habeas Corpus statute 28 U.S.C. 2255 deserves a full and fair review; Hamdan v. Rumsfeld 548 U.S. 557 (2006), U.S. Const.Art. 1, 9, cl2 ("At its historical core" the writ" served as a means for reviewing the legality of the executive detention") INS v. Cyn, 533 U.S. 289,301,121 S. Ct. 2271 (2001).

If this court allows manipulation of the congressional framework then petitioner Heard would have lost 30 years of his life due to a miscarriage of justice. It is archived of Heard's diligent efforts long before filing for 2255, this has been since the onset of the action lodged, against Heard absent effective advocacy. U.S. v. Frady 456 U.S. 152,166, 71 l. Ed.2d. 816, 102 S. Ct. 1584 (1982)

By mandamus issuing this court will put an exclamation point on this long standing controversy in not only the 2011 case of U.S. v. Heard (11-cr-73-JBC June 2, 2011) but also Heard v. U.S. (16-cv-0188, June 9, 2016/2255) This is in regards to the legality of not only Heard's detention but also his indictment, arrest and jury trial which an unreturned search warrant was used placing a fraud upon the court.

Petitioner Heard is suffering an ongoing injury through a fraud placed upon the court from an unreturned search warrant.

The issue at bar in regards to the search is the representation of an actual search warrant being returned to publically announce conformity within the executive branch. This breach of trust is why the petitioner is suddenly realizing the search said to be returned was actually an arrest warrant [which is what is docketed] (D.E.) (11-cr-73-JBC, 6/ /11, U.S. v. Heard EDKY), and he [Heard] never engaged [in his belief] to any further dispute of said trust; see Hazel Atlas Glass Co v. Hartford – Empire Co. 322 US at 245 (1994).

Every householder, the good and the bad, the guilty and the innocent is "entitled" to the protection designed to secure the common interest against unlawful invasion of the house. Kaufman v. U.S. 394, 217, 22 L. Ed.2d 227, 89 S. Ct. 1068 (1968).

Heard's door was kicked off the hinges and an unreturned search warrant was placed on his stove. This mishap was missed by:

1.) Two trial attorney's

2.) An appellate attorney

3.) And 2255 counsel who could have made a supplemental motion presenting [what counsel deemed] substantial claims upon review of the record absent any attorney – client discussion, as Heard's appellate counsel did ; Kaufman at 219 n. 2

A. The court erred in admitting an unreturned search record in the petitioners 2255 motion hearing due to a fraud placed upon the court.

Throughout this entire case the government and case agents have represented the search warrants executed on June 7, 2011 as validly returned.

This representation continued throughout the petitioner's pretrial detention, at and throughout trial and continues to be falsely accused as being the basis of arrest.

During the onset of Heard's jury trial the government during his opening statements forwarded the search (es) as being properly executed;

(Tr. 1A 20 at 20-25):

20 things -- all of these things led agents to seek and to obtain a

21 federal search warrant for the person and property of Mr. Heard

22 early last summer'

23 On the morning of June 7th, 2011, officers and agents

24 executed a search warrant a the home of Mr. Heard in Merrick

25 Place apartments in Lexington, Kentucky. They also

The searches were also represented by case agent Richard Qualls;

(Tr. 3-87 at15-20)

15 Q. detective Qualls, you testified previously about a search

16 Warrant that was executed al Milam. Do you recall that?

17 Testimony?

18 **A. Yes I do.**

19 Q. were you present for that search warrant?

20 **A. I was**

By case agent Brian Grove who testified concerning the "forced entry" of the petitioner's home;

(Tr. 2-155 at 1-12):

Brian Grove, Direct Examination by Mr. Thompson

2-155

1 Q. and for approximately how long did you continue the ruse?

2 **A. I think we tried for maybe 10 of 15 minutes.**

3 Q. When he did not exit the residence, what happened next?

4 **A. We decided to make a forcible entry. We approached the**

5 **front door, knocked and announced, breeched the front door open**

6 **and cleared the house.**

7 Q. and were you one of the persons who breached the door on

8 that date?

9 **A.I wasn't the one holding the ram, but I was one of the first**

10 **into the house, yes.**

11 Q. And did you assist in the actual search of the home?

12 **A. Yes.**

And by the lead detective Danielle Barto who testified that 80% to 90% of all the trial evidence came from the unreturned search warrant; (Tr. 3-68 at 12-17) Id. The most damaging representation came from the lead detective who on one hand said she is familiar with procedure;

(Tr.3-69 at 11-19)

11 **A. Every agency has different procedures; but yes, I am**

12 **familiar with mine**

13 Q. okay. And your familiar, and so you have been to trial,

14 and you know how the whole – pretty much how the system works

15 as detective of the United States government. Correct?

16 **A. Yes.**

But without returning the warrant stated she's never had a faulty warrant;

(Tr. 3-71 at7-10)

By MR. HEARD:

Q. Well, anyway, if you had evidence that came from, let's say, a faulty search warrant, what would happen to the evidence in trial?

A. I've never had a faulty search warrant.

Q. Well, what would you guess would happen?

In the petitioner's 2255 motion hearing in his "order" (D.E. 301) (App.) the magistrate added the unreturned and un-docketed search information from case # 5:11- mj- 5060-REW. This however was predicated by the fraud placed upon the court;

B. the Federal Rules of Criminal procedure precludes the legal effect on an unreturned search.

The Fed. R. Crim. P. calls for a prompt return with a copy of the inventory [which was part of the petitioners discovery] to the magistrate who issued the warrants; Fed. Crim. P. 41 (f) Id. Absent this return the fact that it : (i.e. the warrants)were "presumed executed " does not validate it, nor should be ratified as the basis of fruit obtained from it; see Wong sun v. U.S. 371 US 471, 492, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Any "legal effect" on an "action" concerning the "performance" surrounding those searches should be eliminated.

C. The court erred in ruling counsel effective on an unchallenged and unreturned search warrant.

It can be fairly read that the officers in the case did in fact have probable cause due to an [a]rrest warrant based on the indictment on June 2, 2011. However this was not forwarded as probable cause and as a result of this the petitioner has suffered injury and hardship, starting from ineffective counsel. It would take a great deal of guesswork to assume that although the petitioner had several attorney's under the CJA Act, that they [the attorney's] were bound as amicus counsel due to the lis pen dens placed on Heard on June 6, 2011. It does ask the question of why even after filing for discovery & reviewing the docket under competent ABA standard of advocacy would these [federal] attorneys forfeit on what one would deem a "dead bang winner". (See Banks v. Reynolds. 54 F. 3d 1508, 1515 n. 13 (10th Cir. 1995)

Even Heard's standby counsel represented the search in a justifiable manner at jury trial;

(Tr. 3-107 at 8-25:

So the first issue that he is asking me to raise is based in part on what he perceived to be an irregularity, in that the first indictment, albeit not the one he's being tried on, was issued and then referred to in the affidavit obtaining the search warrant, which actually occurred on June 5, 2011, by Judge Wier.

Then the search was executed on the various and sundry locations on June 7th. And based in great measure on the fruits of that search, subsequent to the indictment, the first superseding and then the second superseding came about.

18 And while your Honor I think understood that clearly

19 before the lunch break and I think even ruled that there's

20 nothing impermissible about that procedure. Mr. Heard has asked

21 me to ask for purposes of this record to quash superseding

22 indictment No.1 and superseding indictment No. 2, that with

23 which he was tried, because of the process that got us from the

24 original indictment, through the search, to today.

25 THE COURT: All right. I understand better now.

The magistrate included a record that should be considered inconclusive for appellate review and upon reviewing counsels performance could have:

1.) Made a sue sponte determination that the record concerning the search was [im] proper for 2255 review.

2.) Left the issue open for de novo & clear error review to the higher court's [who adopted in whole] or;

3.) Ruled counsel ineffective for deficient representation on behalf of the petitioner by overlooking the minimal investigative obligations of advocacy.

Conclusion

As part of a working solution and sense of normalcy petitioner Heard should simply enjoy his rights to be restored and he receive a full and fair Habeas Corpus review under the rule governing 2255 proceedings.

September 30, 2024

Marquis D. Heard