

S. CT. NO. -----

IN THE
SUPREME COURT OF THE UNITED STATES

LLEWELEN F. SMITH
Petitioner

VS.

WARDEN, FCC COLEMAN-LOW
Respondent.

ON PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the district court have jurisdiction over petitioners 28 U.S.C.S § 2241; in which Smith claims that the deprivation of his fifth, and sixth amendments rights, due process rights, and a violation of § U.S.S.G.1B1.2 has cause him to be in illegal confinement eight years pass his release date, at the time he filed his 28 U.S.C.S. §2241.
2. Did the district court depart from the accepted and usual course of judicial proceeding, and deny Smith equal protection of law, by abstaining the grant of summary judgment in the absents of the showing of a genuine issue of material fact, or an opposing motion from respondent
3. Did the court of appeals depart from the accepted and usual course of judicial proceeding, and unduly prejudice petitioner by appointing unwanted attorney, and ordering him to file replacement briefs arguing issues that could not be, because they were not raised the district court or in an opening brief; after petitioner had already paid his appeal fee and filed both his opening, and reply briefs.

PARTIES TO THE PROCEEDINGS

All parties to this proceedings are listed on the caption of this petition. The WARDEN, FCC COLEMAN-LOW is the respondent in this action. LLEWELEN F. SMITH is the petitioner.

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OPINIONS BELOW

The opinion of the eleventh circuit court of appeals (Appx-A) is unpublished.

The eleventh circuit court of appeals opinion denying rehearing and rehearing en banc (Appx-B) is unpublished.

The United States District Court for the middle district of Florida, Ocala Division order dismissing § 2241 petition for lack of jurisdiction (Appx-C) is unpublished.

JURISDICTION

The eleventh circuit issued its opinion on august 28,2017 (Appx-A) and denied rehearing, and rehearing en banc on October 26, 2017 (Appx-B). This court has jurisdiction under 28 U.S.C. § 1254 (I).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

DUE PROCESS RIGHTS

FIFTH AND SIXTH AMENDMENTS RIGHTS

U.S.S.G. § 1B1.2

ADMINISTRATIVE LAW § 201

STATEMENT OF THE CASE

In 1996 petitioner Llewelen Smith, was arrested pursuant to an indictment that charged Smith with conspiracy to distribute crack, and powder cocaine; (21 U.S.C. § 846), count-3 of the indictment; see (Appx-D). Smith was subsequently convicted of count-3, see (Appx- E). On August 14, 1997 the probation department prepared petitioner's presentence report see (Appx- F). In the process of preparing Smith's P.S.I. ,the probation department violated his due process rights, his fifth and sixth amendments rights, and U.S.S.G. § 1B1.2. As a result of said violations, Smith's guidelines were calculated based on materially false offense conducts; that resulted in a sentence of 360 months, which is 239 months over the maximum sentence provided by the guidelines for his offense of conviction. A review of appendix-D will show that Smith is charged with count-3 only; also a review of appendix-E, will show that Smith was convicted of count-3 only; however, a review of appendix -F will show that Smith guidelines were calculated based on offense conducts other than the one he was charged with, and convicted of. See appendix-F, page (11) paragraph(86) where my guideline calculation is based on a conviction for firearm possession; not because it is my offense of conviction, but because it was the **probation officer's opinion**. Also see page(12) paragraph(89) where my guideline calculation is based on a conviction for 1.5 kilograms of crack , I was extended no due process on this drug quantity, or the firearm possession because they were not charged in the indictment and I did not have a chance to defend myself against them. Also see paragraph(92) my guideline calculation is based on a conviction for being a manager, or supervisor; again, no due process. See page(22) of appendix-F worksheet-A (offense level). On 7-8-2013 I filed administrative remedy challenging the accuracy of the information in my P.S.I., and the guideline calculation; pursuant to B.O.P., policy statement 5800.11. After exhausting my administrative remedy with the B.O.P., and the probation department refusal to **VERIFY** the information in the P.S.I., see appendix-G; I filed a habeas corpus pursuant to 28 U.S.C. § 2241. In his § 2241 petition Smith stated that a deprivation of his fifth, and sixth amendments rights, due process rights, and the violations of U.S.S.G. § 1B1.2 has cause him to be in illegal confinement eight years pass his release date; at the time he filed his § 2241 petition. The district court recharacterized my § 2241 as a § 2255(e) in violations of Castro, 540 U.S., at 383, 124., and dismissed the petition for lack of jurisdiction, see appendix-C. The record will also show that the district court denied me summary judgment in the absents of an opposing motion from respondent, or the showing of a genuine issue of material fact; in violations of FED. R. CIV. P. 56(c).

I filed a timely notice of appeal, and later filed an appeal with the court of appeals for the eleventh circuit. The court of appeals violated my due process rights, my right to an appeal, and the principle of party presentation. After I paid my appeal fee of \$505.00, filed my opening brief, respondent responded, I filed my reply brief, and was waiting for a ruling from the court of appeals. The court of appeals decided to disregard the appeal that I paid for and filed, and appointed an unwanted attorney of their choosing, and instructed him to file replacement briefs; arguing fore issues **that are not the issues I presented**, were not raised in the district court, and cannot be raised on appeal for the first time; by respondent or myself. See appendix-H. Smith objected to the appointment of attorney of attorney, and filing of replacement briefs, and sent e- mails and letters advising attorney that he do not wish to file replacement briefs, or be represented by him; see appendix-I. The court of appeals denied my appeal based on an anders brief filed by unwanted attorney, in which ALL the issues he raised are issues that respondent abandond in the district court and cannot now raise for the first time on appeal, and issues that were not raised in an opening brief; see appendix-J. Upon receiving a copy of the anders brief petitioner filed a motion to strike the anders brief; stating that the courts will consider said brief in deciding the appeal which will result in prejudice to Smith, see appendix-K.

REASON FOR GRANTING THE PETITION

There are a number of reasons for granting this petition; one of which is the district court has jurisdiction over my 28 U.S.C. § 2241, according to **habeas corpus [47-unconstitutional confinement]**. “ habeas corpus is available to effect discharge from any confinement contrary to the constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction”. As I have clearly shown with the documents in the appendix, based on the record my P.S.I., and guideline calculation were prepared in violation of my fifth and sixth amendments rights, due process rights, and U.S.S.G.§ 1B1.2. As a result said violations, petitioner has been illegally confined from (2005) to present date, because the maximum sentence he could have received for his offense of conviction is 121 months. I think twelve years of illegal confinement is a compelling reason to grant this petition; no one has provided any evidence to dispute my claim, and all the evidence I have used to support my claim are government documents; the indictment, the judgment, the P.S.I., and the response from the probation department. Another reason for granting is the decision of the lower courts; dismissing my 28 U.S.C. § 2241 petition for lack of jurisdiction is in conflict with other appellate courts, its own appellate court, and the supreme court. In *United States v. Crecencio Perez-Perez* 904 F. 2d 701, 1990 U.S App. The fourth circuit held that a prisoner who disputes the accuracy of the information in his P.S.I., may present evidence favorable to him to the parole commission. If Perez-perez is not satisfied with the result, “ **he may seek judicial review in habeas corpus filed pursuant to 28 U.S.C.§ 2241**”. In *United States v. George Vincent Peloso* 824 F.2d 914; 1987 U.S App. The eleventh circuit held that a defendant requesting to make corrections to his P.S.I., could have requested relief as a 28 U.S.C.S. § 2255 or a 28 U.S.C.S.§ 2241 habeas petition, **if he had objected to the report at the time of sentencing**. A review of appendix-F, addendum to the presentence report; will show that petitioner objected to his P.S.I., at the time of sentencing. In *Preiser v. Rodriguez*, 411 U.S. 475, 484,(498 F. Supp 2d 304) 93 S.Ct . 1827, 36 L. Ed 2d 439 (1973). This court held that an action lying at the core of habeas corpus “ is one that goes directly to the constitutionality of the prisoner physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration”. Id, at 489, 36 L Ed 2d at 450. **This court further stated that “ with regard to such actions habeas corpus is now considered the prisoners exclusive remedy”**. Accordingly my 28 U.S.C.S. § 2241 petition that was dismissed for lack of jurisdiction; fall within the core of habeas corpus.

“When a federal court is properly appealed in a case over which it has by law jurisdiction, it is its duty to take jurisdiction.... the right of a plaintiff to choose a federal court where there is a choice cannot be properly denied” Willcox v. Consolidated Gas Co, 212 US 19, 40 (53 L Ed 382, 29 S Ct 192). Another reason for granting this petition is the District Court denied petitioner equal protection of law with regards to his summary judgment. On October 27 2014, Smith filed a request for admission pursuant to F. R. CIV. P. 36(a)(3) requesting admission from respondent that his guidelines were erroneously calculated in violation of U.S.S.G§1B1.2; see appendix-L. Based on respondent refusal to respond to said request for admission; Smith filed for summary judgment on December, 4th 2014; see appendix-M. On December, 8th 2014 the district court issued a summary judgment notice see appendix-M. After respondent refused to comply with the summary judgment notice; the district court denied me judgment; see appendix-N. On appeal for the first time respondent claim that the court never received a copy of the request for admission. If this is true; why did the district court issue the summary judgment notice. My motion for summary judgment is based on respondent's refusal to respond to the request for admission, did the district court issue the summary judgment notice based on a request for admission that they had on knowledge of. On appeal the court of appeals for the eleventh circuit violated the principle of party presentation, when they disregarded the appeal that I paid for and filed; and appointed an unwanted attorney with instructions to file replacement briefs, arguing issues **that they the court framed**, see appendix-H. In Michael Greenlaw v. United States 554 US--, 128 S Ct--, 171 L Ed 2d 399, 2008. This court stated “ as a general rule, our adversary system is designed around the premis that the parties know what is best for them and are responsible for advancing the facts and arguments entitling them to relief” Id at 386, 124 S. Ct . 786, 157 L. Ed 2d 778. The court of appeals raised issues for the Warden, who is represented by the United States Attorney; “ counsel almost always know a great deal more about their case than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us, United States v. Samuels, 808 F. 2d 1298, 1301 (CA8 1987)”. The court of appeals cannot raise issues for the Warden or me; **they must serve as neutral arbiters of matters the parties present**. It would severely undermine congress instructions were appellate judges to sally forth on their own motion to take up errors adverse to the government when the designated department of justice official failed to do so. The record will show that the U.S attorney representing the warden did not respond to, or raise any issues in the district court, of the 35 docket entries in the district court the warden has only one; docket entry (9) on 5-6-2014; see appendix-O.

Therefore what did they preserve in the district court to raise on appeal, the answer is nothing; that is why the appeals court is raising issues for the warden for the first time on appeal. In the end the court of appeals denied my appeal based on issues and arguments that they could not consider, because those issues, and arguments were not raised in the district court or in an opening brief; and cannot be raised on appeal for the first time. **Both the district court and the court of appeals have departed from the accepted and usual course of judicial proceedings;** the district court with respect to the jurisdiction of my 28 U.S.C. § 2241, and the summary judgment; and the court of appeals with regards that I have not received the appeal that I paid \$505.00 for, framed my issues, and presented argument on; that appeal has not been decided or given any consideration. Instead the court of appeals denied the appeal that they framed the issues in and appointed counsel to file, and in doing so denied me justice and equal protection of law

CONCLUSION

It is clear from the record, and the response from the probation department dated July 31, 2013 in which they admitted that my guidelines were calculated based on testimony presented at trial, and **not my offense of conviction as required by U.S.S.G. § 1B1.2;**.. That my guidelines were erroneously calculated, and as a result I have been in prison twelve years pass my release date. The record will show that **it is because the district court recharacterized my 28 U.S.C. § 2241 as a 28 U.S.C. § 2255(e) in violations of United States v. Castro, 540 US at 383, 124 S. Ct. at 792 why it applied an erroneous standard of review (the bryant test), and concluded that it lack jurisdiction.** It is clear from the record that my case ended in summary judgment on 12-29-14, and I am entitled to judgment as a matter of law. It is clear that the court of appeals violated my due process rights, and the principle of party presentation. **I am asking this for only one thing; a chance to have my guidelines calculated according to the factors that U.S.S.G. § 1B1.2 agree should apply in determining what my guidelines calculations should be.**

Administrative law § 201, administrative action- judicial review states that” the united states supreme will not lightly infer that congress does not intend that rights it confers be afforded judicial protection against administrative agency actions **(the probation department)** taken in excess of delegated powers. The miscarriage of justice that petitioner Smith is now addressing with the court is the product of the probation department violations of U.S.S.G § 1B1.2, my due process rights, and my fifth and sixth amendments rights.

These rights are the most fundamental rights a defendant can have; when they are taken away the result is ambush. However, as important as these rights are, the court concern runs wider than the protection of a defendants individual constitutional rights; to concerns for honor of the government, and public confidence in the fair administration of justice in the federal scheme of government. If the court does not grant this petition Smith will suffer an additional five years of irreparable injury. Based on the facts presented in this petition, Smith ask this court to grant his petition, and order his immediate release because he has already served twelve years over the maximum sentence provided by the guidelines for his offense of conviction.

Respectfully submitted on this 2 day of JANUARY 2018

Llewellen Smith

Llewellen Smith pro se