COPY
Filed 6/25/04

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June 24th, 2004

Clerk of the Court
United States Court of Appeals
For the Fourth Circuit
1100 East Main Street
United States Courthouse Annex, 5th Fl.
Richmond, Virginia 23219

RE: Williams Kinjo Smith v. United State of America 03-7509

Dear Sir/Madam:

I, the above noted submit the enclosed Petition for Rehearing En Banc to be filed with the Honorable Court accordingly.

Thanking you in advance to the matter here held.

Respectfully yours,
William K. Smith
William Kinjo Smith

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

William Kinjo Smith,	:	
Petitioner-Appellant,	:	
	:	
v.	:	03-7509
	:	
United States of America,	:	
Respondent-Appellee.	:	

.....

PETITION FOR REHEARING EN BANC

COMES NOW, Petitioner-Appellant ("Petitioner"), William Kinjo Smith, pro se, pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, respectfully petitions this Honorable Court for a hearing **en banc** of the panel decision in the above encaptioned-case, filed May 14, 2004 (attached hereto as Exhibit "A"; hereinafter referred to as "Opinion").

STATEMENT OF PETITIONER-APPELLANT PRO SE

Petitioner express a belief, based upon reasonable research, studied, comprehendable conclusions that the panel decision is contrary to decisions of the United States Supreme Court: **Slack v. McDaniel, 529 U.S. 473, 484 (2000); Strickland v. Washington, 466 U. S. 668, 680, 685 (1984); Washington v. Texas, 388 U.S. 14, 19 (1967); United States v.Mendenhall, 446 U.S. 544, 554 (1980); McDonald v. United States, 335 U.S. 451, 459-460 (1948); Colautti v. Franklin, 439 U.S. 379 (1979); Davis v. United States, 417 U.S. 33, 346 (1974); Carlson v. Landon, 342 U.S. 524, 546 (1952); and Michelson v. United States, 335 U.S. 469, 475-476 (1948).**

FACTS

The Fourth Circuit panel consisting of the Honorable Circuit Judge Michael and Traxler, and Senior Circuit Judge Hamilton dismissed by unpublished per curiam opinion, relevant to Petitioner's failure to evince " a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) Hereto, the panel opinion upholding the District Court's Order declining to issue a certificate of appealability, thus, dismissing Petitioner's 28 U. S.C. § 2255 containing constitutional grounds.

Petitioner raised several claims therein the Preliminary Informal Brief for Habeas and Section 2255. (Id. at 1-11) Most significant significant under the Sixth Amendment thereto Ineffective Assistance of Counsel. Counsel's errors consisting of the following:

1. Arrest (Id. at, 1-11)
2. Inconsistent Statements (Id. at, 13-15)
3. Prejudicial Spillover (Id. at, 15-17)
4. Constructive Amendment (Id. at, 17-18)
5. Void for Vagueness (18 U.S.C. § 922(g)) (Id. at, 18-19)
6. Dismissal of Count Two (18 U.S.C. § 922(g)(1)) (Id. at, 19-21)
7. Identity Evidence Inadequate (Id. at 21-22)
8. Opening Statement (Id. at 22-23)
9. Character Evidence (Id. at, 23)
10. Inadmissible Exhibits in Jury Room (Id. at, 23-24)
11. Chain of Custody (Id. at 24-25)
12. Prior Convictions Assertions Prejudicial (Id. at, 25-26)
13. Miranda Rights Negated or Re-arrest (Id. at, 26-27)

14. Removal of Potential Jurors Prejudicial (Id. at, 27)

15. Prejudicial Comments by Prosecution (Id. at, 27-28)

16. Ineffective Assistance of Counsel (Trial and Appellate) (Id. at 28-30)

Hereto the aforementioned issues, Honorable Judge Leonie M. Brinkema's discretionary opinon explicated reasons for dismissal in the Order and accompanied Memorandum Opinion. However, the **Fourth Circuit** over-looks the fact that Honorable Judge Brinkema's opinion omits addressing the arrest warrant being invalid due to Petitioner being arrested prior to issuance/authorization by a State Judicial Officer, this was not a federal arrest warrant as Judge Brinkima alludes in the Opinion. (See Memorandum and Opinion at, 2) Review of the time sheets for the arrest warrant with time of arrest noted by law officers testimony and arrest reports evince conflict/dispute.

Thus, rendering the plain view doctrine thereto the hand grenade nullified thereto with probable cause, and/or exigent circumstances due to the dismissal of Count III void by dismissal and arrest being illegal without an arrest warrant. Memorandum Opinion at 3

Considering the aforementioned factors, counsel's duties failed thereby conducting investigations relevant to these issues and addressing the matters accordingly. Honorable Judge Brinkema's alludes to Count III subject to suppression during the preliminary stages of trial, to which, Count III denied on suppression. Counsel failed to object to the admission of Count III under **res gestae**, due to no criminal conduct committed. Thus,

jury hearing evidential testimony relevant posits Count III prejudiced Petitioner's trial with introduction, references to conduct not deemed criminal. Honorable Judge Brinkema did not provide instructions to the jury on this matter being non-criminal conduct nor had counsel proposed such an instruction to deter testimonial or reference thereto. (Memorandum Opinion, at 3; 5-6) Cf. Preliminary Informal Brief, at 15-17 **Exhibit BB**

Honorable Judge Brinkema misconstrues Petitioner's argument relevant to "Void for Vagueness" (Informal Brief, at 18-19; Cf. Memorandum Opinion, at 6), which Petitioner argues "mere presence" at Gilbert's Small Arms Range did not constitute criminal conduct within the meaning of 18 U.S.C. § 922(g). No evidence substantiate Petitioner possessed any firearms personally at the gun range. It is hear where counsel's investigatory skills were pertinent to the procurement of Mr. Lloyd Wyatt, a patron/customer noted on the roster for the range. Mr. Wyatt plausibly clarifying Petitioner did not possess firearm(s) at Gilbert's Small Arms Range.

Miranda readings must be asserted upon a defendant under arrest, re-arrest from one judicial form or correctional facility to a judicial forum separate from the former offense/term of imprisonment warrants Miranda rights read anew. Honorable Judge Brinkema concentrates on Officer Charles Pak's Miranda readings on July 7, 2000 for offenses relevant to Alexandria criminal conduct. Once the conviction and judgment imposed, the proceedings warrant new offenses to be charged, state or federal subject defendant to Miranda warnings anew. Counsel failed to

address this factor nor object to the issue. Honorable Judge Brinkema rests solely with Officer Pak's initial Miranda reading as constitutional on re-arrest for offenses dismissed by the Alexandria Court. Memorandum Opinion, at 8-9 Cf. Petitioner's Informal Brief, at 26-27

Relevant to Honorable Judge Brinkema's judgment on the Prejudicial Spillover from Count III's dismissal, simulates aforementioned facts thereto suppression occurring prior to trial due to the dismissal of Count III. (Supra, at) Count III plausibly construed as criminal conduct by the jury, which Judge Brinkema asserts "Smith does not specifically identify the evidence he feels was wrongfully admitted." Memorandum Opinion, at 9 It is here where counsel failed to propose an instruction to the jury to strike any reference due Count III not being criminal conduct. Furthermore, Counts I and II derived from Count III's plain view application/probable cause/exigent circumstances, thus, nullifying the protective sweep and subsequent searches with evidence procured therefrom illegally obtained. Memorandum Opinion, at 9 Cf. Petitioner's Informal Brief, at 15-117

Honorable Judge Brinkema asserts Petitioner "correctly points out an inconsistency." Further noting "The inconsistency is slight and does not bear on the ultimate question of Smith's guilt." Memorandum Opinion, at 10-11 Honorable Judge Brinkema overlooks the fact that these inconsistencies adhere to Count III premises to arrest, which the jury conceived to be a valid arrest. Comprised with the jury instructions that Count

III did not represent criminal conduct and should not be considered during deliberation posits the inconsistencies substantial. Petitioner's Informal Brief, at 13-15 Thus, curative instructions.

Second hereto, counsel failed to investigate whether the management or maintence of Petitioner's apartment complex had indeed replaced or repaired the door due to damage occurring on the date of arrest. The blurry photos submitted were best that Petitioner could present to support this claim. Honorable Judge Brinkema over-steps this factor of counsel procuring, by investigation the documents depicting repair or replacement of the door/locks. Memorandum Opinion, at 10-11 Cf. Petitioner's Informal Brief, at 13-15

Honorable Judge Brinkema ignors the record for the defense does not evince any witnesses for the defense, in the absence of Ms. Karen Campbell's electing to take the Fifth, counsel made no endeavor to procure former defense counsel William Hicks. Memorandum Opinion, at 11-12 Cf. Petitioner's Informal Brief, at 28-29 Positing counsel failed to endeavor any line of investigation relevant to developing a defense theory.

In relation to "Character Evidence" which counsel failed to procure, Honorable Judge Brinkema fails to recognize that Petitioner held employment marketable for computer adeptness which deterred Petitioner's prior criminal behavior under the guise of rehabilitation, thus, depicting absorption back into society as a citizen, corrected for errors of the past pertinent for the jury's consideration. Memorandum Opinion, at 12-13 Cf. Petitioner's Informal Brief, at 23 However, counsel's failure

to interview former employers, current employer at time of arrest as well colleagues as to Petitioner's character traits, personality, behavior patterns, work ethics, the likes that illustrate working class citizens of this great country, the United States of America. Thus, positing Petitioner's behavior as charged fails to meet the allegations charged.

During the proceedings, pre-trial or trial there was no evidence, testimonial or otherwise confirming the identity of the persons donned in balaclava gear. Honorable Judge Brinkema affirming this identity solely on the government's reference to "the eyes" of the persons being Petitioner further prejudice Petitioner, which trial counsel failed to dispute or object due to lack of evidence sufficient to support and confirm identity. Memorandum Opinion, at 13 Recovering the photos from residence of Petitioner does not confirm identity being Petitioner. Cf. Petitioner's Informal Brief, at 21-22

Trial counsel permitted the entire binder containing the exhibits to enter the jury room for deliberation, counsel did not peruse/review the exhibits to ascertain whether exhibits not entered by the Honorable Judge Brinkema were contained therein the binder. Memorandum Opinion, at 13-14 Cf. Petitioner's Informal Brief, at 23-24 Honorable Judge Brinkema over looks the fact that countless exhibits pursuant to 3500 material were not introduced and contained therein the exhibits binder. Thus, positing prejudice unto Petitioner for exhibits not approved for support of the government's case or disputed by the defense.

The Honorable Judge Brinkema fails to recall that during the trial proceedings, the Court specifically administered to trial counsel's improper endeavor to raise the "Chain of Custody" issue during that stage of the sentencing proceedings. See Petitioner's Informal Brief, at 24-25, Petitioner's Exhibit (§ 2255, at 140) Cf. Memorandum Opinion, at 14

Honorable Judge Brinkema's discretion relevant to "References of Prior Convictions" is misplaced, in which, the numerous expounding thereto Petitioner's prior convictions are supported by the record and not at the "outset of the government's case in chief." The Honorable Judge Brinkema illustrating to the jury numerous prior convictions herewith the stipulation confirming prior convictions asserted accordingly. See Petitioner's Informal Brief, at 24-25 Cf. Memorandum Opinion, at 14-15

Honorable Judge Brinkema failed to addresses Petitioner's additional claims hereto counsel's ineffective assistance of counsel, to which, the three-panel court plausibly did not consider upon rendering the opinion/judgment.

To which, Honorable Judge Brinkema did not address Petitioner's claims thereof: Dismissal of Count II (Informal Brief, at 19-21); Opening Statement (Trial Counsel's Defense Theory) (Informal Brief, at 2223); Removal of Potential Jurors Prejudicial (Informal Brief, at 27-28); and Prejudicial Comments by Prosecution (Informal Brief, at 27-28)

Seemingly, Honorable Judge Brinkema selective elected counsel's cumulative arguments for dispensing the opinion,

deleting significant issues relevant to constitutional adherence thereof counsel's ineffective assistance during the trial proceedings.

For the reasons to be set forth below, Petitioner here respectfully request the Honorable Court reverse the per curiam opinion dismissal thereby the three panel Circuit Judges for the Fourth Circuit thereto Petitioner's Preliminary Informal Brief.

MEMORANDUM OF LAW
IN SUPPORT

The United States Supreme Court held that a COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right, § 2253(c)(2). **Slack v. McDaniel, 529 U.S. 473, 146 L.Ed.2d 542, 120 S.Ct. 1595 (2000)** Petitioner posits here under **Strickland v. Washington, 466 U.S. 668, 685, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)** ineffective assistance of counsel violates the Sixth Amendment right to effective assistance of counsel. To which counsel failed to subject the government's case to an adversarial testing.

> "Thus, a fair trial is one in which evidence is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled."

Id. 466 U.S. at 685

Relevant to counsel's skills and knowledge applicable to render a fair trial thereto presentation of evidence, counsel must conduct an investigation where "there is only one plausible line of defense."

Clearly demonstrated by "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone indicating that compliance with the officer's request might be compelled." **Id. 446 U.S. at 554** See Petitioner's § 2255, at 9-10 Hereto, **McDonald v. United States, 335 U.S. 451, 93 L.Ed. 153, 69 S.Ct. 191 (1948)** evinces an officer taking matters into his own hands must be justifiable by "pointing to some real immediate and serious consequences if he postponed action to get a warrant." **Id. 335 U.S. 459-460** Herein the instant matter, the justification rested with plain view, probable cause, and plausibly exigent circumstances derived from the hand grenades, which proved to be non-criminal conduct. **Colautti v. Franklin, 439 U.S. 379 (1979); Davis v. United States, 417 U.S. 333, 346 (1974)** With dismissal of Count III prior to jury trial commencing posits the arrest void due to plain view, probable cause, and/or exigent circumstances negating this count. **Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980)**

Counsel permitting the Honorable Judge Brinkema to allow evidence relevant to Count III under **res gestae** prejudiced Petitioner, considering Count III dismissed due to offense being non-criminal conduct, posting innocent conduct spilled over to Counts I and II, prejudicial spillover incurring. (See Petitioner's § 2255, at 6-8; Informal Brief, at 15-17) Counsel made no objections or references of law proscribing non-criminal conduct. **See Davis and Colautti, supra**

In accord with the United States Supreme Court's assertion in **Carlson v. Landon, 342 U.S. 524, 96 L.ed. 547, 72 S.Ct. 525 (1952),**

"It has been said that the rule in criminal cases is that a warrant once executed is exhausted." **Id. 342 U.S. at 546** Exhaustion posits rearrest merits Miranda warnings in the absence of error in release or an escaped or secured release by trick. **Id. 342 U.S. at 546-547** The Fourth Circuit amplifies this matter of "in custody" relevant to a "formal arrest" under **Miranda v. Arizona, 384 U.S. 436, 479 (1966).** See **United States v. Parker, 262 F.3d 415, 419 (4th Cir. 2001):** Petitioner's § 2255, at 26-27; Informal Brief, at 26-27

Considering this conflict is explicated by the Seventh Circuit here supported by **Parker**, where a second imdictment reasons additional charges warrants a rearrest proper, however, justified by the continuing existence of "probable cause." **United States v. Holmes, 452 F.2d 249, 260-261 (7th Cir. 1971)** Further exerting,

> "The Fourth Amendment requires both a reasonable foundation for a charge of crime and also the "rash and unreasonable interferences with privacy."

Hereto **Holmes** asserts probable cause is negated thereby the rearrest of Petitioner on federal offenses due to **Miranda** opined by Judge Brinkema stemming from the initial arrest and **Miranda** by Alexandria Police Officer Charles Pak being sufficient, arrest on federal offenses herein the instant matter are void based upon exhaustion of first arrest.

Thus, Counts I and II posits dismissal hereto aforementioned and as demonstrated in Petitioner's § 2255 and Informal Brief. (See Respectively at 12-18 and 18-21) Furthermore, Officer Duquette's inconsistencies evinced therewith Captain Corle's depiction relevant to the grenade and door barricaded by bed suggests counsel's representation inadequate, presented no evidence disputing these factors nor challenging or objections afforded.

See Petitioner's § 2255, at 12-14; Informal Brief, at 13-15

Bifurcation of the charged offenses negates the government's introduction of rebuttal evidence relevant to Petitioner's criminal history, Judge Brinkema avoids this issue therein Petitioner's § 2255 Petition. (Id. at 23-26) Thus reducing the prejudice unto Petitioner with bifurcation of the charged offenses. The laws of the United States Supreme Court and Fourth Circuit preclude the government from prejudicial illustrations/assertions of a defendant's criminal hisotry. **Michelson v.United States, 335 U.S. 469, 475-476 (1948)**

Relevant to Identity Evidence, no evidence confirmed that person clad in "balaclava gear" to be Petitioner. Counsel making no efforts to ascertain nor dispute such person to be Petitioner.

Counsel's failure to persue or review the exhibit binder noting to the Honorable Court that certain exhibits were not introduced into evidence, presumption such exhibits prejudice the defense. Endeavors to ensure all exhibits were introduced by Judge Brinkema were not attempted by counsel.

The Honorable Judge Brinkema misplaces adherence asserted by the court thereto counsel's error of law, stating to counsel, "The arguments about chain of custody and those sorts of issues, again, I think might be better made in the context of a trial where the high burden of proof beyond reasonable doubt is necessary." Here, recognizing counsel's duty that must ""include" "'an independent examination of the facts, circumstances, pleadings and laws involved." **Strickland v. Washington, 466 U.S. at 680**

References thereto "prior convictions" posits prejudice to defendant relevant to the jury's deliberations on the evidence

presented by the government thereto charged offenses. Counsel elects no objection hereto, positing the law asserts duty to address accordingly,

> ""Evidence of a prior crime 'is always ... prejudicial to a defendant. It diverts the attention of the jury from the question of the defendant's repsonsibility for the crime charged to improper issue of his bad character.'"

U.S. v. Aldrich, 169 F.3d 526, 528 (8th Cir. 1999)

Remaining issues not addressed by the Honroable Judge Brinkema rest as illustrated herein (supra, at 2-3). Most pertinent to recognize here is counsel's assistance can be deemed in violation of the Sixth Amendment right to effective assistance of counsel as illustrated by Petitioner.

Appellate counsel failed to consider these issues for appeal, most importantly that trial counsel's errors being cumulative with clear indications from the record evincing no evidence by defense presented at any stage of the trial or sentencing proceedings. **Strickland v. Washington, 466 U.S. 668, 685 (1984)** Affirming "a fair trial is one in which evidence is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Hereto, counsel made no significant objections relevant to the issues raised herein.

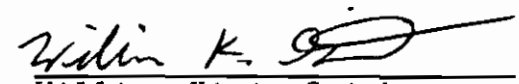
The Fourth Circuit's three panel Judges hereto overlooks the issued raised contrasting District Judge Brinkema's misplacement, abuse of discretion, and misconstruing Petitioner's arguments, each of which are supported by exhibits and the record. Thus, it is here that Petitioner respectfully request an **en banc** hearing with replete review of issues congruent to filings and record hereto. Positing a COA to be rendered in light of Constitutional violations.

Thus, Honorable Judge Brinkema's preliminary consideration pursuant to Rule 4 of the Rules Governing Section 2255 Proceedings posits an abuse of discretion incurred thereby this preliminary omission of the Government's Answer pursuant to Rule 5 thereof.

CONCLSUION

For the reasons set forth above Petitioner respectfully request the an **en banc** hearing overturn by reversing the three panel Judges' Opinion and Mandate, remanding to the district court for further development of the record thereby a **Franks** hearing.

Respectfully submitted,



DATED: June 24th, 2004
Cumberland, Maryland

William Kinjo Smith
Pro Se Litigant
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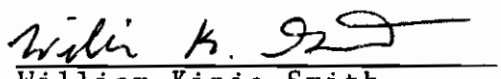
Cumberland, MD 21502-1000

CERTIFICATE OF SERVICE

I, William Kinjo Smith, Petitioner-Appellant, pro se, hereby swears under the penalty of perjury pursuant to 28 U.S.C. § 1746, that I have forward the original and one copy to the Clerk of the Court with an additional copy forward to the opposing counsel of record.



DATED: June 24th, 2004
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PETITIONER'S
EXHIBITS

TABLE OF CONTENTS

JUDGMENT

FILED: May 13, 2004

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 03-7509
CR-00-421
CA-03-561

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

WILLIAM KINJO SMITH

Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

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In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

AA

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-7509

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

WILLIAM KINJO SMITH,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (CR-00-421; CA-03-561)

Submitted: February 19, 2004 Decided: May 13, 2004

Before MICHAEL and TRAXLER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

William Kinjo Smith, Appellant Pro Se. G. David Hackney, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

PER CURIAM:

William Kinjo Smith seeks to appeal the district court's order denying relief on his petition filed under 28 U.S.C. § 2255 (2000). The order is appealable only if a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683 (4th Cir. 2001).

We have independently reviewed the record and conclude that Smith has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED