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

Richmond Division

ITEMUS WILSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 81-1095-R
	)	
OFFICER H. L. HALL, III,	)	
	)	
Defendant.	)	

MEMORANDUM

This case presents a "mixed" claim: plaintiff seeks immediate release from prison and monetary damages on the grounds that his conviction was secured by perjury of defendant. By order of December 22, 1981, the court stated that it would treat the complaint insofar as it requested immediate release as a petition for a writ of habeas corpus, and would treat the complaint insofar as it sought monetary damages as an action under 42 U.S.C. § 1983. The court also stayed further action in the case until plaintiff submitted an appropriate petition for a writ of habeas corpus, which the court would treat as an amendment to the original complaint. Plaintiff has not responded to the order.

The court considered it necessary to receive a petition for a writ, in order that it be informed whether or not plaintiff had properly exhausted state remedies. A state prisoner may not challenge the validity of his conviction in a federal district court without having exhausted available state remedies upon the expedient of confining himself to a § 1983 claim for monetary damages, while omitting a request for immediate release from his imprisonment. Hamlin v. Warren, No. 79-6769 (4th Cir., November 3, 1981) (published). Thus, even if plaintiff here had confined himself to a request for monetary damages only, the court would be unable to act, absent knowledge whether plaintiff had exhausted the state remedies available to him.

Also, even if plaintiff already has exhausted available state remedies, and had he named the proper respondents for a petition for a writ of habeas corpus, plaintiff still would be

unable to obtain any of the relief he seeks. Plaintiff has not alleged subornation of perjury or recantation by defendant of his testimony. Credibility of witnesses is within the sole province of a jury and is not susceptible to review. Pigford v. United States, 518 F.2d 831 (4th Cir. 1975). Also, perjury cannot be proved by conclusory charges, or by pointing out trivial inconsistencies or conflicts in evidence. United States v. Spadafora, 200 F.2d 140, 143 (7th Cir. 1952). Thus, plaintiff's bare allegation of perjury is insufficient to maintain a claim.

Furthermore, the court cautions plaintiff that he does not have a right to an unlimited number of attempts to obtain immediate release via a petition for a writ of habeas corpus. In particular, the court cautions plaintiff that "before you bring any claims [for a writ of habeas corpus] to federal court, be sure that you first have taken each one to state court." Rose v. Lundy, 50 U.S.L.W. 4272, 4275 (March 2, 1982).

An appropriate order accompanies this memorandum.

DATE: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE