



## Alvarez v. Adams

2022 | Cited 0 times | N.D. West Virginia | January 31, 2022

1 IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MARTINSBURG

JESUS ALVAREZ, Petitioner, v. Civil Action No. 3:20-CV-49 ( G R O H ) PAUL ADAMS, Respondent.

### REPORT AND RECOMMENDATION

I. INTRODUCTION On March 18, 2020, the pro se Petitioner filed an Application for Habeas Corpus Pursuant to 28 U.S.C. § 2241. ECF No. 1. 1

Petitioner is a federal inmate who is housed at Hazelton FCI who is challenging the validity of his conviction and sentence imposed in the United States District Court for the Southern District of Texas.

The matter is now before the undersigned United States Magistrate Judge for a Report and Recommendation to the District Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR PL P 2. For the reasons set forth below, the undersigned recommends that the Petition be denied and dismissed without prejudice.

1 All CM/ECF references cited herein refer to civil case number 3:20-CV-49, unless otherwise noted.

2 II. FACTUAL AND PROCEDURAL HISTORY A. Conviction and Sentence 2 On March 24, 2010, Petitioner was indicted in the Southern District of Texas, Corpus Christi Division, with possession with intent to deliver 406.25 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). ECF No. 8. On April 19, 2010, Petitioner entered a plea, pursuant to a written agreement [ECF No. 14], to Count 1 of the indictment. ECF Nos. 13, 27. Petitioner was sentenced to 188 months of incarceration as a career offender on July 8, 2010. ECF Nos. 20, 28.

B. Direct Appeal Petitioner filed a notice of appeal on July 12, 2010, in the Fifth Circuit's docket number 10-40657 3

. ECF No. 22. The Fifth Circuit dismissed the appeal by order entered on November 8, 2010, based on



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Petitioner's motion to dismiss. ECF No. 36.

C. Motion to Vacate On June 13, 2016, Petitioner filed a motion 4

to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. ECF No. 41. Therein, Petitioner argued that pursuant to the holding in *Johnson v United States*, 135 S.Ct. 2551 (2015), he was improperly sentenced as a career offender. *Id.* The motion to vacate was denied on May 25, 2017. ECF No. 42.

2 All CM/ECF references in facts sections II.A., II.B., and II.C. refer to entries in the docket of Criminal Action No. 2:10-CR-250, in the Southern District of Texas, Corpus Christi Division.

3 That case was consolidated with two other appeals pending before the Fifth Circuit, 10-40660 and 10-40661. ECF Nos. 34, 36 at 1.

4 The motion to vacate was assigned a separate civil action number, 2:16-CV-250.

3 D. Instant Section 2241 Petition The instant § 2241 petition alleges a single ground for relief, that possession of a controlled substance with intent to deliver, is not a proper predicate offense for career offender enhancement. ECF No. 1 at 5. For relief Petitioner asks that the Court vacate his conviction and sentence. *Id.* at 8.

III. LEGAL STANDARDS A. Reviews of Petitions for Relief Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and the Court's Local Rules of Prisoner Litigation Procedure, this Court is authorized to review such petitions for relief and submit findings and recommendations to the district court. This Court is charged with screening Petitioner's case to determine if "i t plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing Section 2254 Cases in the U.S. District Courts; see also Rule 1(b), Rules Governing Section 2254 Cases in the U.S. District Courts (a district court may apply these rules to a habeas corpus petition not filed pursuant to § 2254).

B. Pro Se Litigants Courts must read pro se allegations in a liberal fashion and hold those pro se pleadings "to less stringent st andards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Pursuant to 28 U.S.C. § 1915A(b), the Court is required to perform a judicial review of certain suits brought by prisoners and must dismiss a case at any time if the Court determines that the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief. A complaint is frivolous if it is without arguable

4 merit either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (superseded by statute). The Supreme Court in *Neitzke* recognized that:



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is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11. To this end, the statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless. *Id.*

at 327.

IV. ANALYSIS Prisoners seeking to challenge the validity of their convictions or their sentences are required to proceed under § 2255 in the district court of conviction. By contrast, a petition for writ of habeas corpus, pursuant to § 2241, is generally intended to address the execution of a sentence, rather than its validity, and is to be filed in the district where the prisoner is incarcerated. *Fontanez v. O'Brien*, 807 F.3d 84, 85 (4th Cir. 2015). In a § 2241 petition, a prisoner may seek relief from such things as the administration of his parole, computation of good time or jail time credits, prison disciplinary actions, the type of detention, and prison conditions in the facility where incarcerated. *Id.*; see also *Adams v. United States*, 372 F.3d 132, 135 (2d Cir. 2004).

5 The version of 28 U.S.C. § 1915(d) which was effective when *Neitzke* was decided provided, “The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.” As of April 26, 1996, the statute was revised and 28 U.S.C. § 1915A(b) now provides, “On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint-- (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.”

5 While the terms of § 2255 expressly prohibit prisoners from challenging their convictions and sentences through a habeas corpus petition under § 2241, there is nonetheless a “savings clause” in § 2255, which allows a prisoner to challenge the validity of his conviction and/or his sentence under § 2241, if he can demonstrate that § 2255 is “inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e). The law is clearly developed, however, that relief under § 2255 is not inadequate or ineffective merely because relief has become unavailable under § 2255 because of (1) a limitation bar, 6

(2) the prohibition against successive petitions, or (3) a procedural bar due to failure to raise the issue on direct appeal. In *re Vial*, 115 F. 3d 1192, 1194 n. 5 (4th Cir. 1997). A petitioner bears the burden of demonstrating that the § 2255 remedy is “inadequate or ineffective,”



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7 and the standard is an exacting one. The Fourth Circuit has announced two tests for evaluating whether a petitioner's claim satisfies the § 2255(e) savings clause. Which test is to be applied depends on whether the petitioner is challenging the legality of his conviction or the legality of his sentence. See *United States v. Wheeler*, 886 F.3d 415, 428 (4th Cir. 2018); *In re Jones*, 226 F.3d 328, 333–34 (4th

6 In 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") was enacted, establishing a one-year limitation period within which to file any federal habeas corpus motion. 28 U.S.C. § 2255. The limitation period shall run from the last of:

a. The date on which the judgment of conviction becomes final; b. The date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; c. The date on which the right was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or d. The date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f).

7 This is the equivalent of saying that "the § 2255(e) savings clause is satisfied."

6 Cir. 2000). When a petitioner is challenging the legality of his conviction, § 2255 is deemed to be "inadequate or ineffective" only when all three of the following conditions are satisfied:

(1) at the time of the conviction, the settled law of this Circuit or of the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first section 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gate-keeping provisions of section 2255 because the new rule is not one of constitutional law. *In re Jones*, 226 F.3d at 333–34. When a petitioner is challenging the legality of his sentence, § 2255 is deemed to be "inadequate or ineffective" only when all four of the following conditions are satisfied:

(1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect. *Wheeler*, 886 F.3d at 429. The Fourth Circuit has specified that a change of substantive law within the Circuit, not solely in the Supreme Court, would be sufficient to satisfy the second prong of the four-part test established in *Wheeler*. *Id.*

7 Because the requirements of the savings clause are jurisdictional, a § 2241 petitioner relying on the § 2255(e) savings clause must meet the *Jones* test (if challenging the legality of his conviction) or the



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Wheeler test (if challenging the legality of his sentence) for the court to have subject-matter jurisdiction to evaluate the merits of the petitioner's claims. See Wheeler, 886 F.3d at 423–26.

Although the petition indicates that Petitioner only raises a challenge as to his sentence, in his request for relief Petitioner also asserts that he seeks to vacate his conviction. ECF No. 1 at 8.

Because Petitioner's direct appeal rights have expired and Petitioner has already filed one unsuccessful § 2255, he may seek leave to file a second or successive § 2255 under § 2255(h)(2) or he can file a § 2241 relying on the § 2255(e) savings clause. Petitioner's argument does not rely on newly discovered evidence or a new rule of constitutional law, thus relief under 28 U.S.C. § 2255(h) is inappropriate. Therefore, in order for Petitioner to obtain relief under § 2241, he must rely on the § 2255(e) savings clause.

As to Petitioner's challenge to his conviction in a § 2241, he must meet all three prongs of the Jones test to challenge his conviction for this Court to have jurisdiction to hear his challenge on the merits. In this case, even if Petitioner meets the first and third prongs of the Jones test as to his claim, he cannot meet the second prong. Subsequent to Petitioner's direct appeal and first section 2255 motion, the substantive law related to the conduct of which Petitioner was convicted has not changed so that that conduct is no longer deemed to be criminal. The crimes Petitioner was convicted of committing— possession with intent to deliver 406.25 kilograms of marijuana, in violation of 21 U.S.C.

8 §§ 841(a)(1) and 841(b)(1)(B)—is still a violation of law. Therefore, Petitioner cannot satisfy the second prong of Jones. Consequently, because Petitioner in attacking the validity of his conviction fails to establish that he meets the Jones requirements, he has not demonstrated that a section 2255 petition is an inadequate or ineffective remedy, and he cannot meet the savings clause, and may not be considered under § 2241.

Further, to the extent that Petitioner is challenging his sentence in a § 2241, he must meet all four prongs of the Wheeler test for this Court to have jurisdiction to hear his challenge on the merits. As to his challenge to his sentence, Petitioner does not cite to any substantive law change that has been deemed to apply retroactively on collateral review. As such, Petitioner has failed to satisfy the second prong of the Wheeler test, and the undersigned need not address the other prongs of the Wheeler test.

Because Petitioner cannot satisfy the savings clause of § 2255(e) under Jones or Wheeler, his claim may not be considered under § 2241, and this Court is without jurisdiction to consider his petition. When subject-matter jurisdiction does not exist, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S.Ct. 1003, 1012–16 (1998); *Reinbold v. Evers*, 187 F.3d 348, 359 n.10 (4th Cir. 1999).

V. RECOMMENDATION For the foregoing reasons, the undersigned RECOMMENDS that the



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petition [ECF No. 1] be DENIED and DISMISSED WITHOUT PREJUDICE.

The Petitioner shall have fourteen (14) days from the date of filing this Report and Recommendation within which to file with the Clerk of this Court, specific written objections, identifying the portions of the Report and Recommendation to which

9 objection is made, and the basis of such objection. A copy of such objections should also be submitted to the Honorable Gina M. Groh, Chief United States District Judge. Objections shall not exceed ten (10) typewritten pages or twenty (20) handwritten pages, including exhibits, unless accompanied by a motion for leave to exceed the page limitation, consistent with LR PL P 12.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. 28 U.S.C. §636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).

This Report and Recommendation completes the referral from the district court. The Clerk is directed to terminate the Magistrate Judge's association with this case. The Clerk of the Court is directed to mail a copy of this Report and Recommendation to the pro se Petitioner by certified mail, return receipt requested, to his last known address as reflected on the docket sheet.

DATED: January 31, 2022 / s / Robert W. Trumble R O B E R T W . T R U M B L E UNITED STATES  
MAGISTRATE JUDGE

