

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

ROY STEVE DAVIS,

Petitioner,

v.

**Civil Action No. 5:06cv111
(Judge Stamp)**

AL HAYNES,

Respondent.

REPORT AND RECOMMENDATION

The *pro se* petitioner initiated this case on September 20, 2006, by filing an Application for Habeas Corpus Pursuant to 28 U.S.C. § 2241 and a Memorandum in Support. Petitioner paid the required \$5.00 filing fee on September 28, 2006. This case is before the undersigned for an initial review and report and recommendation pursuant to LR PL P 83.09, *et seq.*

I. Factual and Procedural History

On May 25, 1990, Petitioner was convicted in the United States District Court for the Eastern District of Virginia of Bank Robbery in violation of 18 U.S.C. § 2113(a), Armed Bank Robbery in violation of 18 U.S.C. § 2113(d) and Use of a Firearm in violation of 18 U.S.C. § 924(c). Petitioner was sentenced to 262 months on the two Bank Robbery charges, to be followed by a five-year consecutive term for using a firearm. Petitioner did not file a direct appeal of his convictions and sentence. Petitioners' first motion to vacate his sentence under § 2255 was denied by the sentencing court in September 1997. Petitioners' second § 2255 motion was dismissed in 1998. Petitioners' appeals of both proceedings were dismissed. In his memorandum, Petitioner states that he has filed a previous challenge under § 2241.

II. Petitioner's § 2241 Petition

In the petition, Petitioner asserts the following grounds for relief:

- (1) trial counsel was ineffective for failing to file an appeal;
- (2) trial counsel was ineffective for failing to preserve his rights as to important issues during trial, including the failure to challenge the indictments;
- (3) there was insufficient evidence to support Petitioner's §924(c) conviction; and
- (4) the trial court incorrectly applied the sentencing guidelines.

In support of his claims, Petitioner argues in his memorandum that because of trial counsel's failure to file a direct appeal, he has not received a fair or reasonable opportunity to litigate his motions for post conviction relief. Moreover, Petitioner argues that trial counsel failed to challenge his robbery indictments, which in turn resulted in certain sentencing errors because bank robbery is a lesser included offense of armed bank robbery. Petitioner, citing Bailey v. United States, 516 U.S. 137 (1995),¹ also argues that counsel should have challenged his § 924(c) indictment and conviction because there was no evidence that he actively employed a firearm in relation to the predicate offense. Finally, Petitioner argues that his sentence was unreasonable under 18 U.S.C. § 3553(c) and that under United States v. Booker, 543 U.S. 220 (2005),² the sentencing judge incorrectly applied the sentencing guidelines.

¹ Finding that the "use" prong of § 924(c) requires a showing of the active employment of a firearm.

² In Booker, the Supreme Court held that the mandatory sentencing guidelines violated a defendant's Sixth Amendment right to a jury trial because a judge, not a jury, determines facts which could increase the defendant's sentence beyond the sentence which could be imposed based on jury fact finding. Accordingly, the Court severed the unconstitutional provisions from the Sentence Reform Act and made the guidelines advisory.

III. Analysis

A. Grounds One, Two, Three

In the Petition and supporting memorandum, Petitioner states that he has previously applied for relief under § 2241. Upon a review of the electronic docketing system of the United States Court's, the undersigned notes that Petitioner has applied for habeas relief under § 2241 ten times prior to the filing of this action.³ Moreover, the Court takes judicial notice of case number 1:04cv618 filed by Petitioner in the Western District of Louisiana on March 10, 2004. In that case, Petitioner challenged the same convictions and sentence at issue in this case by alleging that counsel was ineffective for failing to file an appeal, that there was insufficient evidence to sustain his conviction for use of a firearm pursuant to § 924(c), the trial judge gave erroneous instructions for bank robbery pursuant to § 2113(d), and that the trial judge applied incorrect sentencing guidelines for the manner of use of the gun. Those claims were denied on the merits by the Western District of Louisiana.⁴ Therefore, with the exception of Petitioner's Booker claim, all of the issues raised in the instant action have already been adjudicated on the merits.⁵

³ The Court's electronic docketing system can be accessed on the world wide web at <http://pacer.uspci.uscourts.gov>.

⁴ The Magistrate Judge in Louisiana issued two report and recommendations ("R&R"). The first R&R addresses each of the claims raised in the petition and recommends that the petition be dismissed with prejudice. That R&R was adopted by the District Judge in its entirety. However, on appeal, the Fifth Circuit Court of Appeals remanded the case back to the district court for further findings on Petitioner's Bailey claim. Therefore, the Magistrate Judge issued a second R&R recommending that Petitioner's Bailey claim be denied as time barred, or alternately, for lack of merit. The second R&R was adopted in its entirety by the District Judge. Petitioner did not appeal his case after the District Judge adopted the second R&R. The undersigned has attached a copy of each of those Orders.

⁵ The Court is unable to access copies of the decisions in most of Petitioner's cases because they occurred prior to the Court's conversion to image docketing. Therefore, it is possible, maybe even likely, given the number of habeas petitions filed by Petitioner, that these issues have also been addressed by

Prior to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), and the ensuing changes to the federal habeas corpus statutes, 28 U.S.C. § 2244 authorized dismissal of a successive habeas petition that presented “no new grounds not heretofore presented and determined.” See McClesky v. Zant, 499 U.S. 467, 483 (1991). That version of § 2244(a) provided:

No circuit or district judge shall be required to entertain an application for writ of habeas corpus to inquire into the detention of a person pursuant to a judgement of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such an inquiry.

In McClesky, the Supreme Court of the United States further found that raising a new claim in a subsequent habeas petition that could have been raised in a prior petition was an abuse of the writ. McClesky, 499 U.S. at 489. The abuse of the writ doctrine is a modified *res judicata* rule. See Felker v. Terpin, 518 U.S. 651, 664 (1996).

However, with the 1996 statutory amendments, § 2244(a) now reads:

No circuit or district judge shall be required to entertain an application for writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for writ of habeas corpus, except as governed in section 2255.

Prior to the 1996 amendments, several circuits had held that where a petitioner filed a § 2241 action which was dismissed on the merits, § 2244(a) barred a second § 2241 habeas action as an abuse of the writ. See George v. Perrill, 62 F.3d 333 (10th Cir. 1995); Glumb v. Honsted, 891 F.2d 872 (11th Cir. 1990); Poyner v. U.S. Parole Comm., 878 F.2d 275, 277 (9th Cir. 1989);

other Courts.

Sacco v. U.S. Parole Comm., 639 F.2d 441 (8th Cir. 1981). Although the new version of § 2244(a) does not expressly apply its provisions to habeas cases filed pursuant to § 2241, neither is it limited to any specific habeas statute. In fact, a few circuit and district courts have held that the AEDPA version of § 2244(a) also bars a second § 2241 as a successive petition where the grounds raised in the second petition were denied in a prior § 2241 action. See Valona v. United States, 138 F.3d 693, 695 (7th Cir. 1998); Chambers v. United States, 1106 F.3d 472, 475 (2d Cir. 1997); Singleton v. Dewalt, 2005 WL 1162940 (E.D.Va. April 5, 2005); Queen v. Smith, (2005 WL 1377835 (M.D.Pa. June 6, 2005).

Accordingly, because grounds one, two, and three of the instant petition could have been raised in Petitioner's prior habeas petitions and/or were actually adjudicated on the merits by the United States District Court for the Western District of Louisiana, those claims should be denied and dismissed with prejudice as successive and as an abuse of the writ.⁶

B. Petitioner's Booker Claim

The primary means of collaterally attacking a federal conviction and sentence is through a motion pursuant to 28 U.S.C. § 2255. A § 2241 petition is used to attack the manner in which a sentence is executed. Thus, a § 2241 petition that challenges a federal conviction and sentence is properly construed to be a § 2255 motion. The only exception to this conclusion is where a § 2241 petition attacking a federal conviction and sentence is entertained because the petitioner can satisfy the requirements of the "savings clause" in § 2255. Section 2255 states:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief,

⁶ Petitioner should not be entitled to relitigate his claims every time he is transferred to a new forum.

by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*

28 U.S.C. § 2255 (emphasis added).

The law is clearly developed, however, that merely because relief has become unavailable under § 2255 because of a limitation bar, the prohibition against successive petitions, or a procedural bar due to failure to raise the issue on direct appeal, does not demonstrate that the § 2255 remedy is inadequate or ineffective. In re Vial, 115 F. 3d 1192, 1194 (4th Cir. 1997).

Moreover, in Jones, the Fourth Circuit held that:

§ 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of the conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first §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 §2255 because the new rule is not one of constitutional law.

In re Jones, 226 F.3d 328, 333-334 (4th Cir. 2000).

Here, Petitioner clearly attacks the validity of his sentence rather than the means of execution and is seeking relief in this Court under § 2241 by attempting to invoke the savings clause of § 2255 by asserting a Booker claim. However, Petitioner's sentence became final in 1990 and his first § 2255 motion was denied in 1997. Booker was decided on January 12, 2005. Thus, Petitioner's claim is foreclosed by the Fourth Circuit's decision in United States v. Morris, 429 F.3d 65 (2005), in which the Court found that Booker is not retroactively applicable to cases on collateral review. Accordingly, Petitioner cannot show that § 2255 is inadequate or ineffective to test the legality of his sentence and he is not entitled to relief under § 2241.

IV. Recommendation

For the foregoing reasons, it is the recommendation of the undersigned that Petitioner's § 2241 petition be DENIED and DISMISSED with prejudice. Specifically, as to grounds one, two and three, the undersigned recommends that those claims be dismissed as successive and under the abuse of the writ doctrine. As to ground four, the undersigned recommends that Petitioner's Booker claim be denied because Petitioner has failed to show that he is entitled to invoke the savings clause of § 2255.

Within ten (10) days after being served with a copy of this recommendation, any party may file with the Clerk of Court written objections identifying those portions of the recommendation to which objection is made and the basis for such objections. A copy of any objections shall also be submitted to the Honorable Frederick P. Stamp, Jr., United States District Judge. Failure to timely file objections to this recommendation will result in waiver of the right to appeal from a judgment of this Court based upon such recommendation. 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).

The Clerk is directed to mail a copy of this Report and Recommendation to the *pro se* petitioner and counsel of record, as applicable.

DATED: October 3, 2006.

/s/ James E. Seibert
JAMES E. SEIBERT
UNITED STATES MAGISTRATE JUDGE