

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

ROBERT WILLIAM PETTY,

Petitioner,

v.

**Civil Action No. 2:09cv100
(Judge Maxwell)**

JAMES CROSS, Warden,

Respondent.

REPORT AND RECOMMENDATION

I. Procedural History

The *pro se* petitioner initiated this § 2241 action on August 17, 2009. After receiving payment of the required fee, the Court directed the respondent to show cause why the petition should not be granted.

On October 14, 2009, the petitioner filed a motion to amend his petition. That motion was granted.

On December 11, 2009, the respondent filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. Because the petitioner is proceeding without counsel, the Court issued a Roseboro Notice on December 14, 2009. The petitioner filed a response to the defendant's motion on January 21, 2010.

II. Contentions of the Parties

A. The Petition

In the petition, the petitioner raises the following grounds for relief:

(1) due to a change in the law regarding consideration of prior convictions used for enhancement by the Sentencing Commission, he is actually innocent of the Armed Career

Criminal designation he received;

(2) failure to issue the requested writ or correct his unlawful detention would violate the Suspension Clause of the United States Constitution and the Eighth Amendment's prohibition against cruel and unusual punishment;

(3) the ends of justice require this court to consider the petitioner's claim of actual, factual and legal innocence;

(4) the court must issue the writ to correct a manifest injustice;

(5) he is actually innocent of the career offender designation and it would be a miscarriage of justice to allow his continued detention;

(6) due to the ambiguity of 18 U.S.C. § 924, the rule of lenity should operate to allow the writ to issue to alleviate his detention;

(7) the sentencing court violated his due process rights by designating him a career offender under the Armed Career Criminal Act ("ACCA") over his objections;

(8) the law of the case doctrine must yield to the substantial injustice of the continued detention of a prisoner who was incorrectly designated as an Armed Career Criminal; and

(9) these claims must be considered in their entirety to achieve true justice in this matter.

In his amended petition, the petitioner asserts the following additional ground for relief:

(10) he received ineffective assistance of counsel during sentencing and on direct appeal when counsel failed to argue or prove that the three prior convictions used as predicates for enhancement purposes under the ACCA were part of a common scheme or plan related to petitioners' escape conviction in case number 7256.

In support of his claims, the petitioner asserts that on November 1, 2007, the United States Sentencing Commission amended the federal sentencing guidelines to clarify what constitutes related convictions for purposes of sentencing enhancements. He then contends that, under the amended guidelines, the three prior convictions used to sentence him under the ACCA would be considered related convictions,¹ and count as only one conviction for enhancement purposes. The petitioner asserts that the result would be a reduction in his guideline range of 140-175 months, to

¹The petitioner asserts that he was sentenced under the ACCA using the following three prior convictions:

(1) Assault with Intent to Murder [CT-82-1130];

(2) Burglary [CT-82-1131]; and

(3) Robbery with a Deadly Weapon [CT-82-1132A].

Petition at 8.

28-34 months. Although the petitioner acknowledges that this amendment (Amendment 709) is not retroactive, he asserts various other reasons why the court should consider freeing him from his “unlawful” detention.

B. The Respondent’s Response and Motion

In his response and motion, the respondent asserts that the petitioner is not entitled to relief under 28 U.S.C. § 2241 and that his petition should be dismissed and denied for the following reasons:

- (1) the court lacks jurisdiction to hear the petitioner’s claims challenging the imposition of the sentence and not the execution;
- (2) petitioners’ claim for sentence reduction is meritless because U.S.S.G. Amendment 709 is not retroactive; and
- (3) petitioners’ claim of ineffective assistance of counsel should be dismissed on the grounds it is successive, fails to meet the Jones test and because petitioner fails to demonstrate prejudice.

Accordingly, the respondent requests that the Court deny the petitioner’s writ of habeas corpus and dismiss this case with prejudice or, in the alternative, grant him judgment as a matter of law.

C. The Petitioner’s Response

In response, the petitioner more or less reiterates the arguments made in his prior pleadings.

III. Analysis

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, 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). The Fourth Circuit has examined the prerequisites for finding that § 2255 is an inadequate or ineffective remedy. In the case of In re Jones, 226 F.3d 328 (4th Cir. 2000), the court concluded 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.

Jones, 226 F.3d at 333-34.

Here, the petitioner has sought relief on his claims multiple times in the sentencing court and the appropriate court of appeals. In each instance, the petitioner's claims have been denied. Thus, because the petitioner can no longer seek relief on his claims on direct appeal or with the sentencing court under § 2255, he now seeks relief in this Court pursuant to § 2241. However, as previously noted, in order to challenge his federal sentence under § 2241, the petitioner must satisfy the requirements of the "savings clause" in § 2255. To do so, he must establish more than the fact that

relief has become unavailable through other means. Instead, he must show: (1) that 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. See In re Jones, 226 F.3d at 333-34.

Here, the petitioner clearly cannot meet the requirements for seeking § 2241 relief under Jones. However, because the Fourth Circuit Court of Appeals has found that an actual innocence exception applies in noncapital cases in the context of a career offender enhancement, or other habitual offender guideline provision, the petitioner may nonetheless be entitled to relief on this claim under § 2241. See United States v. Mikalajunas, 186 F.3d 490, 495 (4th Cir. 1999). Despite this exception, the petitioner nevertheless cannot benefit from Amendment 709 because, as he concedes, the amendment is not retroactive. Moreover, although the petitioner raises a myriad of other reasons why the court should apply the amendment despite its non-retroactivity, *i.e.*, ends of justice, miscarriage of justice, manifest injustice, the court finds that those claims lack merit.

The petitioner has challenged his Armed Career Criminal status at sentencing, on direct appeal, in a motion pursuant to § 2255 and through various other post-conviction motions. Each time, the courts have considered the petitioner's arguments and denied relief. Clearly, the petitioner has received substantial and appropriate review of his claims on numerous occasions. Thus, further review of these claims under § 2241 is not contrary to the ends of justice, nor will it result in a miscarriage of justice or a manifest injustice. In addition, even if the Court were to find these claims appropriately raised under § 2241, it also finds them to be without merit.

With regard to the petitioner's Armed Career Criminal Status, his Presentence Investigation Report ("PSR") provides: "The defendant qualifies for this adjustment because the instant offense violates Title 18, U.S.C. Code, Section 922(g) and he has three previous convictions for violent felonies [see Guideline 4B1.4(a)²]." Dckt. 26 at Ex. 1 (parenthetical in original). The petitioner contends that the following three prior convictions were used to qualify him as an Armed Career Criminal:

- (1) Assault with Intent to Murder [CT-82-1130] (PSR ¶ 29);
- (2) Burglary [CT-82-1131] (PSR ¶ 32); and
- (3) Robbery with a Deadly Weapon [CT-82-1132A] (PSR ¶ 35).

Petition at 8. However, this is simply not the case.

According to the Addendum to the Presentence Report, the petitioner challenged his Armed Career Criminal Status for various reasons. Dckt. 26 at Ex. 27. In response to his objections, the parole office noted: "It is our belief that the convictions in paragraphs 25 [Robbery with a Deadly Weapon, CT80-45B], 29 [Assault with Intent to Murder, CT-82-1130], 35 [Robbery with a Deadly Weapon, CT-82-1132A] and 38 [Assault, 5028221A] are all violent felony convictions and more than qualify the defendant as an armed career criminal." *Id.* (parentheticals added). Therefore, even assuming that CT-82-1130, CT-82-1131 and CT-82-1132A are all "related convictions," and should

²In 1997, U.S.S.G. § 4B1.4(a) stated: "A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(c) is an armed career criminal." Moreover, Application Note 1 of § 4B1.4 stated: "This guideline applies in the case of a defendant subject to an enhanced sentence under 18 U.S.C. § 924(e). Under 18 U.S.C. § 924(e)(1), a defendant is subject to an enhanced sentence if the instant offense of conviction is a violation of 18 U.S.C. § 922(g) and the defendant has at least three prior convictions for a 'violent felony' or 'serious drug offense,' or both, committed on occasions different from one another. The terms 'violent felony' and 'serious drug offense' are defined in 18 U.S.C. § 924(e)(2)."

have counted as only one prior felony conviction for purposes of the petitioner's Armed Career Criminal Status, they would still equal one prior qualifying conviction, which when combined with CT80-45B and 5028221A, still amount to three prior qualifying convictions. Thus, even assuming the petitioner's contentions are true, and applying Amendment 709 to the circumstances of his case, the petitioner nevertheless qualifies as an Armed Career Criminal under the provisions of his PSR.

Next, the Court notes that it is not persuaded by the petitioner's suspension of the writ argument.³ See Hamden v. Rumsfeld, 126 S.Ct. 2749, 2818 (2006) (quoting Swain v. Pressley, 430 U.S. 372, 381 (1977) (It is well-established that "the substitution of a collateral remedy which is neither inadequate not ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus.")).

Finally, the Court notes that the petitioner's ineffective assistance of counsel claim is not properly raised in this § 2241 proceeding. The petitioner could have, but did not raise this issue in his first § 2255 motion filed with the sentencing court. Dckt. 23 at 14. Instead, he first attempted to raise this issue with the Fourth Circuit Court of Appeals in his Application for Relief to File a Second or Successive Motion to Vacate under § 2255. Id. That application was denied and the petitioner is now barred from raising this issue under § 2241.

IV. Recommendation

For the reasons stated, the undersigned recommends that the respondent's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (dckt. 22) be **GRANTED** and the petitioner's § 2241 habeas corpus petition (dckt. 1) and amended petition (dckt. 16) be **DENIED** and

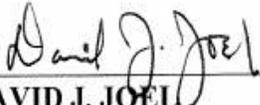
³ Article I, § 9, Clause 2 of the United States Constitution provides:
"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

DISMISSED with prejudice from the active docket of the Court.

Within **fourteen (14) days** after being served with a copy of this Report and Recommendation, any party may file with the Clerk, written objections identifying the portions of the recommendation to which objections are made, and the basis for such objections. A copy of such objections shall also be submitted to the Honorable Robert E. Maxwell, United States District Judge. Failure to timely file objections to the Recommendation set forth above 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 by certified mail, return receipt requested, to his last known address as shown on the docket, and to counsel of record via electronic means.

DATED: February 26, 2010.



DAVID J. JOEL
UNITED STATES MAGISTRATE JUDGE