# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
**FILED**
August 10, 2018
Lyle W. Cayce
Clerk

No. 17-40970

ERWIN EUGENE SEMIEN,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:15-CV-257

Before DAVIS, JONES, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Erwin Eugene Semien appeals the denial of his habeas corpus petition under 28 U.S.C. § 2241. He contends that the district court erred because: (1) he was entitled to a hearing for revocation of supervised release before returning to federal custody; (2) he was entitled to credit against his federal sentence for time spent at liberty after his erroneous release because he was subject to a federal detainer; (3) he was entitled to credit against his federal sentence for time spent at liberty after his erroneous release because the error

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

was caused by the Marshals Service; and (4) the district court abused its discretion by denying him an evidentiary hearing. Finding no error, we **AFFIRM.**

## BACKGROUND

In December 2005, Erwin Eugene Semien was charged via indictment in the Eastern District of Texas with conspiracy to possess with the intent to distribute less than 500 grams of cocaine, possession with the intent to distribute less than 500 grams of cocaine, possession with the intent to distribute less than 50 grams of methamphetamine, and possession of a firearm by a felon. At the time of his federal indictment, Semien was being held by Texas authorities for a parole violation. On December 29, 2005, Semien was transferred to the custody of the United States Marshals Service pursuant to a writ of habeas corpus ad prosequendum.

Semien was convicted by a jury on all federal charges, and on December 20, 2006, he was sentenced to a total of 115 months of imprisonment, to be served consecutively to any future parole revocation. This court affirmed the conviction and sentence. *United States v. Semien*, 248 F. App'x 615 (5th Cir. 2007).

Semien was returned to state custody on January 4, 2007, and his state parole was revoked on April 18, 2007. Semien was erroneously released from state custody on February 13, 2009.

Semien was arrested by the Marshals Service on May 2, 2014. After exhausting his administrative remedies, Semien filed the instant petition for a writ of habeas corpus under 28 U.S.C. § 2241, asserting that he was entitled to credit towards his federal sentence from February 13, 2009, the date he was first erroneously released by the Texas authorities, to May 2, 2014, the date he was taken into federal custody.

The magistrate judge ("MJ") recommended denying Semien's § 2241 petition. The MJ determined that Semien's federal sentence commenced on May 2, 2014, and concluded that Semien was not entitled to credit for the time he was at liberty. The MJ found that the Marshals Service did not err "in awaiting notice from the Texas prison system after filing a detainer asking the state authorities to notify them upon [Semien's] release." To the extent that Semien sought relief from his conviction and sentence under 28 U.S.C. § 2255, the MJ concluded that the motion was an unauthorized successive motion over which the court lacked jurisdiction.

Through counsel, Semien objected to the MJ's report and recommendation. Counsel asserted that there was no evidence from the Government to show the status of the federal detainer. His objections included a request for a hearing to resolve how Semien was released or to clarify the status of the detainer. Semien also filed pro se objections to the MJ's recommendation. He alleged that the record demonstrated an error by the Government that led to his release. Specifically, he noted that the USM number on his judgment was incorrect and belonged to a different federal prisoner. He argued that, therefore, the erroneous release was the fault of governmental authorities and he was entitled to credit for his time spent at liberty. He also asserted that his term of supervised release commenced upon his release from state custody and that his supervised release was revoked without a hearing.

The district court overruled Semien's objections and found that there was "no evidence the authority seeking to enforce the sentence erred." The court stated that Semien's assertions otherwise were "pure speculation." Accordingly, the court adopted the report of the MJ and denied Semien's § 2241 petition. Semien filed a timely notice of appeal.

## STANDARD OF REVIEW

In an appeal from the denial of habeas relief, this court reviews a district court's findings of fact for clear error and issues of law *de novo*. *Moody v. Johnson*, 139 F.3d 477, 480 (5th Cir. 1998). This court reviews the denial of an evidentiary hearing for abuse of discretion. *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992).

## DISCUSSION

*Revocation Hearing*

Semien first argues that he was entitled to a revocation hearing before ending his supervised release. He was not. Semien was released from state custody on February 13, 2009, not federal custody. For this reason, Semien's time at liberty was not a term of supervised release that was later revoked. *See* 18 U.S.C. § 3624(e). Without a term of supervised release, Semien was not entitled to a revocation hearing.

*Official Detention*

Semien further contends that he is entitled to sentence credit for the time he spent at liberty because he was subject to a federal detention order and a sentencing order pursuant to 18 U.S.C. §§ 3142(e) & 3143(a) (respectively), which constituted "official detention" under 18 U.S.C. § 3585(b). He also cites the Supreme Court's holding in *Reno v. Koray*, 515 U.S. 50, 115 S. Ct. 2021 (1995) as further support for receiving a sentence credit.

Both aspects of Semien's argument are mistaken. Section 3142(e) is inapplicable here, as it addresses "detention of [a] person before trial." 18 U.S.C. § 3142(e)(1). Further, *Koray* suggests that Semien is *not* entitled to credit for his time spent at liberty because he was not subject to the Bureau of Prison's ("BOP") control. The Court in *Koray* held that a defendant who spent time at a community treatment center while "released on bail" was not

officially detained "within the meaning of 18 U.S.C § 3585(b)" and therefore "not entitled to a credit against his sentence of imprisonment." *Koray*, 515 U.S. at 65, 115 S. Ct. at 2029. The Court explained that "[a] defendant who is 'released' is not in BOP's custody" while "[a] defendant who is 'detained,' however, is completely subject to BOP's control." *Id.* at 63, 115 S. Ct. at 2028. Accordingly, the fact that Semien was subject to detention and sentencing orders does not entitle him to sentence credit for the time he spent at liberty because he was not subject to BOP's control.

*Government Error*

Semien next argues that he is entitled to sentence credit because there is evidence that an error by the Government contributed to his mistaken release. The error at issue is a typo in the final judgment from Semien's criminal case. The judgment incorrectly notes Semien's USM number as "05696-078." Semien's actual USM number is 05695-078. He contends that this incorrect number on the judgment led to his mistaken release. Semien relies on this court's opinion in *Leggett v. Fleming*, 380 F.3d 232 (5th Cir. 2004) to bolster his claim for sentence credit.

*Leggett* addressed a prisoner's argument that he was entitled to sentence credit after he was erroneously released from Texas state prison because his federal detainer did not travel with him when he was moved between facilities. *Leggett*, 380 F.3d at 233-34. This court recognized that "[w]e have previously held that in some circumstances a prisoner may receive credit against his sentence if the error of government officials prevented the prisoner from serving his sentence." *Id.* at 234 (citing *Thompson v. Cockrell*, 263 F.3d 423, 427 (5th Cir. 2001)). The court went on to note that "we have also held that a delay in the commencement of a sentence by itself does not constitute service of that sentence." *Id.* (citing *Scott v. United States*, 434 F.2d 11, 23 (5th Cir.

1970); *United States ex. rel. Mayer v. Loisel*, 25 F.2d 300, 300 (5th Cir. 1928)). *Leggett* also noted "that in certain situations the government may waive jurisdiction of its right to execute a sentence if it significantly delays the enforcement of that sentence." *Id.* at 234 n.3 (citing *Shields v. Beto*, 370 F.2d 1003, 1005-06 (5th Cir. 1967)).

This court's precedents before *Leggett* indicate that Semien is not entitled to sentence credit for the government's apparent mistake. The opinion *Leggett* cites for the proposition that a governmental error could entitle a prisoner to sentence credit if that error prevented them from serving their sentence, *Thompson*, is inapplicable. The court in *Thompson* addressed facts distinct from those in the instant case: Thompson was erroneously released early from state prison and was then denied sentence credit by the Texas Board of Pardons and Paroles for the time he spent at liberty. *Thompson*, 263 F.3d at 424. The court held that "the Due Process Clause does not by itself prohibit states from denying prisoners calendar time after an erroneous release," but then found that "[t]he law in Texas from the time of Thompson's offense to [the time of the decision] require[d] the State to credit Thompson for time after an erroneous release, so long as [he] was not at fault." *Id.* at 426-27. The instant case does not involve any state-law interest in sentence credit.

This court's decisions in *Shields v. Beto* and *Piper v. Estelle*, 485 F.2d 245 (5th Cir. 1973) provide the framework to analyze Semien's claim. This court held in *Shields* that Texas waived jurisdiction to enforce Shields's sentence because Texas "showed no interest in the return of the prisoner, either by agreement between the sovereigns, by detainer, or any other affirmative action." *Shields*, 370 F.2d at 1005-06. "The lack of interest in Shields by the State of Texas . . . [for] a lapse of more than 28 years, was equivalent to a pardon or commutation of his sentence and a waiver of jurisdiction." *Id.* at

1006. This court in *Piper* explained that for waiver under *Shields* "it is not sufficient to prove official conduct that merely evidences a lack of eager pursuit or even arguable lack of interest." *Piper*, 485 F.2d at 246. Rather, the prisoner must show that "the waiving state's action [was] so affirmatively wrong or its inaction so grossly negligent that it would be unequivocally inconsistent with 'fundamental principles of liberty and justice' to require a legal sentence to be served in the aftermath of such action or inaction." *Id.*

Neither *Shields* nor *Piper* suggest that Semien is entitled to a sentence credit for the time he spent at liberty. The five years and three months that Semien spent at liberty before the Marshals Service arrested him is a far cry from the twenty-eight years that passed before Texas attempted to enforce Shields's sentence after he was arrested in another state. Indeed, the delay in enforcing Semien's sentence is more akin to the twenty-seven-month delay in imprisonment at issue in *Scott*, which "[did] not constitute service of that sentence." *Scott*, 434 F.2d at 23. The federal government *did* show interest in Semien's return; the Marshals took the affirmative action of arresting him in 2014. Furthermore, a typo on Semien's final judgment that arguably led to his erroneous release for 63 months before serving his federal sentence is neither "so affirmatively wrong" nor "so grossly negligent that it would be unequivocally inconsistent with 'fundamental principles of liberty and justice' to require" Semien to serve his sentence now. *Piper*, 485 F.2d at 246. Accordingly, Semien is not entitled to sentence credit for the government's alleged error regarding his USM number.

*Evidentiary Hearing*

Finally, Semien appears to argue that the district court abused its discretion in denying him an evidentiary hearing for his habeas petition. A federal habeas court is not required to conduct an evidentiary hearing.

*McDonald v. Johnson*, 139 F.3d 1056, 1060 (5th Cir. 1998). "[T]he burden is on the habeas corpus petitioner to allege facts which, if proved, would entitle him to relief." *Ellis v. Lynaugh*, 873 F.2d 830, 840 (5th Cir. 1989) (citation omitted). Here, Semien contended that the government's error on his final judgment, and possibly on his detainer, contributed to his erroneous release. As discussed above, Semien would not be entitled to the relief he seeks even if he proved that the government's error contributed to his release. Accordingly, the district court did not abuse its discretion in denying Semien an evidentiary hearing.

## CONCLUSION

For the foregoing reasons, we **AFFIRM.**

APPEXDIX: B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

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| ERWIN EUGENE SIMIEN | § | |
| VS. | § | CIVIL ACTION NO. 1:15cv257 |
| UNITED STATES OF AMERICA | § | |

MEMORANDUM ORDER OVERRULING PETITIONER'S OBJECTIONS AND ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Erwin Eugene Simien, a federal prisoner, brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

The court referred this matter to the Honorable Keith F. Giblin, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The Magistrate Judge recommends the petition be denied.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record and pleadings. Petitioner filed objections to the Magistrate Judge's Report and Recommendation. This requires a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b).

After careful consideration, the court concludes petitioner's objections should be overruled. Petitioner seeks credit for time spent out of custody due to his erroneous release from the custody of the Texas Department of Criminal Justice on parole rather than being turned over to his federal detainer. However, there is no evidence the authority seeking to enforce the sentence erred. Petitioner's assertions otherwise are pure speculation. Accordingly, petitioner should not be allowed to avoid service of that sentence.

ORDER

Accordingly, petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the Magistrate Judge are correct and the report of the Magistrate Judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the Magistrate Judge's recommendations.

**SIGNED** this the 22 day of **August, 2017.**

Thad Heartfield
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

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| VS. | § | CIVIL ACTION NO. 1:15cv257 |
| UNITED STATES OF AMERICA | § | |

**FINAL JUDGMENT**

This action came on before the court, Honorable Thad Heartfield, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, it is

**ORDERED** and **ADJUDGED** that this petition for writ of habeas corpus is **DENIED** and **DISMISSED** with prejudice.

All motions by either party not previously ruled on are hereby **DENIED**.

**SIGNED** this the 22 day of **August, 2017.**

Thad Heartfield
United States District Judge

# APPENDIX: C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

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| EDWIN EUGENE SEMIEN | § | |
| VS. | § | CIVIL ACTION NO. 1:15cv257 |
| UNITED STATES OF AMERICA | § | |

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Edwin Eugene Semien, an inmate confined at the Federal Correctional Complex in Beaumont, Texas, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

The above-styled action was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 and the Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

The Petition

Petitioner brings this petition for writ of habeas corpus contesting the execution of his sentence by the Bureau of Prisons ("BOP"). Petitioner contends he has been denied proper credit toward the completion of his sentence. Specifically, petitioner claims he should be given credit toward his federal sentence for time spent at liberty following his erroneous release from the Texas Department of Criminal Justice, Correctional Institutions Division. Additionally, petitioner claims he should be given credit for time spent in custody while "labeled as a federal prisoner." Petitioner asserts he should be given credit for a total of five years and three months toward the completion of his sentence.

The Response

The respondent was ordered to show cause why relief should not be granted. In response, the respondent asserts petitioner is not allowed credit for time spent awaiting commencement of his sentence without being in custody. Accordingly, the respondent asserts petitioner's petition should be denied.

Factual Background

On August 18, 1999, in the 75th Judicial District Court for Liberty County, Texas, following a plea of guilty pursuant to a written plea agreement, petitioner was convicted of possession of a controlled substance. *See State v. Semien*, Cause Number CR22500. Petitioner was placed on deferred adjudication probation for a period of five years. *Id.*

On July 26, 2001, following the revocation of his deferred adjudication probation in cause number CR22500, petitioner was convicted of possession of a controlled substance in Liberty County and sentenced to a term of ten years confinement in the Texas Department of Criminal Justice. *See Semien v. Director*, 1:08cv879 (E.D. Tex. July 2, 2009). Petitioner was subsequently released from the Texas Department of Criminal Justice on parole.

On May 19, 2005, petitioner was arrested by state authorities on a parole violation warrant issued on March 23, 2005. *See Semien v. Director*, 1:08cv879, Exhibit K. Additionally, a detainer was placed against him by the United States Marshal. On December 29, 2005, while in state custody, petitioner was borrowed pursuant to a Federal Writ of Habeas Corpus *Ad Prosequendum* based on a federal indictment in the Eastern District of Texas for drug and gun charges. *See United States v. Semien*, 1:05cr158 (E.D. Tex. Dec. 21, 2006).

On June 9, 2006, following a trial by jury in the Eastern District of Texas, petitioner was convicted of the charges against him. On December 21, 2006, petitioner was sentenced to a term of 115 months' imprisonment. Petitioner appealed his conviction and sentence to the Fifth Circuit Court of Appeals. The judgment of the district court was affirmed on October 23, 2007.

On April 18, 2007, petitioner's state parole was revoked on his July 26, 2001 conviction and ten year sentence from Liberty County, Texas for possession of a controlled substance. *See Semien v. Director*, 1:08cv879 at 5. Petitioner was subsequently sent to the Texas Department of Criminal Justice, Correctional Institutions Division to serve the remainder of his state sentence.

On December 18, 2008, while confined in the Texas Department of Criminal Justice, petitioner filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255

attacking his federal conviction. *See Semien v. United States*, 1:08cv890 (E.D. Tex. Aug. 3, 2009). The motion was dismissed on August 3, 2009. *Id.*

On February 13, 2009, petitioner was released on parole by the Texas Department of Criminal Justice, Correctional Institutions Division in error instead of being detained pursuant to the U.S. Marshal's detainer to begin service of his federal sentence. Petitioner remained out of custody at liberty until he was arrested on May 13, 2014.

Petitioner filed this petition for writ of habeas corpus on June 30, 2015.

Analysis

Title 28 U.S.C. § 2241 gives the district court authority to grant a writ of habeas corpus where a state prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

*Calculation of Sentence*

Petitioner contends he has been denied proper credit toward the completion of his sentence. Specifically, petitioner claims he should be given credit for time spent at liberty following his erroneous release from the Texas Department of Criminal Justice, Correctional Institutions Division. Additionally, petitioner claims he should be given credit for time spent in custody while "labeled as a federal prisoner." Petitioner asserts he should be given credit for a total of five years and three months toward the completion of his sentence, the period from his erroneous release by state officials on February 13, 2009 through May 2, 2014, the date of his arrest by United States Marshals.

Title 18 U.S.C. § 3584(a) provides in relevant part the following:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively.... Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

Here, multiple terms of imprisonment were imposed at different times with a notation in the federal judgment that the terms were to run concurrently to each other but consecutively to any parole revocation from the state. Thus, petitioner's terms at issue here are to run consecutively.

The calculation of a term of imprisonment is governed by Title 18 U.S.C. § 3585 which provides the following:

> (a) Commencement of sentence. - A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.
>
> (b) Credit for prior custody. - A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences -
>
> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

The earliest date a federal sentence can commence is the date on which it is imposed. *United States v. Flores*, 616 F.2d 840, 841 (5th Cir. 1980); Program Statement 5880.28, Sentence Computation Manual, page 1-21. This is true even if a sentence is to run concurrent with a previously imposed term. *Id.* (holding "sentence could not be concurrent prior to the date it is pronounced, even if made concurrent with a sentence already being served").

Generally, the sovereign which first arrested the offender has primary jurisdiction over the offender, unless that sovereign relinquishes it to another sovereign by, for example bail, release, dismissal of state charges, parole release, or expiration of state sentences. *McCarthy v. Warden*, 168 Fed.Appx. 276, 277 (10th Cir.), *cert. denied*, 548 U.S. 914, 126 S.Ct. 2949, 165 L.Ed.2d 968 (2006); *United States v. Cole*, 416 F.3d 894, 897 (8th Cir. 2005); *Rowell v. Beeler*, 135 Fed.Appx. 590, 594 n.2 (4th Cir. 2005); *Phillips v. Kaiser*, 47 Fed.Appx. 507, 511 (10th Cir. 2002) (finding that state had primary jurisdiction over petitioner, although he was on supervised release for his federal conviction at the time of his arrest by state authorities); *United States v. Warren*, 610 F.2d 680, 684-85 (9th Cir.

1980); *Williams v. Taylor*, 327 F.2d 322, 323 (10th Cir. 1964) ("It is well settled that in our two systems of courts, the one which first takes custody of a prisoner in criminal cases is entitled to the custody of the prisoner until final disposition of the proceedings in that court, but during this time the prisoner is not immune from prosecution by the other sovereign."). Where a convicted federal prisoner claims credit for time served in a state jail or prison, the burden is on the prisoner to establish that the state confinement was exclusively the product of such action by federal law enforcement officials so as to justify treating the state jail time as the practical equivalent of a federal one. Even then, if he receives credit for the time he served against the state charges, none is to be granted against the federal sentence. *United States v. Garcia-Gutierrez*, 835 F.2d 585, 586-87 (5th Cir. 1988); *United States v. Wilson*, 916 F.2d 1115, 1118 (6th Cir. 1990). Time spent by a prisoner in federal custody under a writ of habeas corpus *ad prosequendum* is not counted towards the federal sentence if that time was credited toward his state sentence. *See McKinley v. Haro*, 83 F. App'x 591 (5th Cir. 2003) (unpublished); *United States v. Brown,* 753 F.2d 455, 456 (5th Cir. 1985).

Here, petitioner was in state custody prior to being sent to federal custody for prosecution and sentencing on a Writ of Habeas Corpus *Ad Prosequendum*. Further, petitioner was returned to state custody following his federal sentencing. Accordingly, petitioner is not entitled to credit toward his federal sentence under § 3585. The Bureau of Prisons commenced his 115 month sentence on May 2, 2014, the date he came into exclusive federal custody when he was arrested to begin his federal sentence, and has been running it continuously since that time.

Petitioner does not argue he did not receive credit toward the completion of his state sentence of the time for which he was in the Texas Department of Criminal Justice. In fact, the state of Texas credited petitioner with time toward that sentence from December 28, 2005 through the date of his erroneous release on February 13, 2009.

Petitioner's argument that he should receive credit for time spent out of custody between February 13, 2009 and May 2, 2014 is foreclosed by 18 U.S.C. § 3585(b) and Fifth Circuit precedent. Section 3585(b) does not allow credit for this time period because petitioner was not in official

detention. Further, the Fifth Circuit "has expressly held that a prisoner is not entitled to a credit when there is merely a delay in the execution of one's sentence." *Leggett v. Fleming*, 380 F.3d 232, 235 (5th Cir. 2004). "Where there is no evidence that the governmental authority seeking to enforce the prisoner's sentence has erred, a prisoner should not be allowed to avoid service of that sentence." *Id.* at 235-36.

Here, as in *Leggett*, the Marshal's Service did not act erroneously in awaiting notice from the Texas prison system after filing a detainer asking the state authorities to notify them upon petitioner's release. Petitioner's erroneous release by state authorities merely caused a delay in the execution of his federal sentence. Accordingly, petitioner is not entitled to credit against his federal sentence for the time prior to the commencement of the sentence on May 2, 2014, the date on which he was arrested by U.S. Marshals to begin service of his sentence. Thus, in accordance with 18 U.S.C. § 3585(b), petitioner has been credited with all time to which he is entitled. Accordingly, petitioner's claim should be denied.

*Unlawful Conviction and Sentence*

Finally, while the focus of petitioner's petition appears to be the execution of his sentence, petitioner also asserts he is "illegally restrained in his liberty by virtue of conviction and remedy by § 2255 motion is inadequate or ineffective to test the legality of his detention." Additionally, petitioner requested relief in the form of "vacating his unlawfully obtained conviction and sentence." Therefore, in an abundance of caution, the court will also address the petition as an attack on petitioner's conviction and sentence.

Section 2255 provides the primary means of collaterally attacking a federal conviction and sentence. *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000). Relief under this section is warranted for errors that occurred at trial or sentencing. *Cox v. Warden, Fed. Detention Ctr.*, 911 F.2d 1111, 1113 (5th Cir. 1990). Section 2241 is correctly used to attack the manner in which a sentence is executed. *Tolliver*, 211 F.3d at 877. A petition filed under § 2241 which attacks errors that occurred at trial or sentencing is properly construed as a § 2255 motion. *Id.* at 877-78.

However, there is one exception to this general rule. A prisoner may use Section 2241 as the vehicle for attacking the conviction if it appears that the remedy by motion "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255.

As petitioner attacks the legality of his conviction and sentence, his petition should be construed as a motion to vacate, set aside or correct sentence. However, as set forth above, petitioner has previously filed a motion to vacate, set aside or correct sentence. Accordingly, this court is without jurisdiction to entertain a motion to vacate without prior permission of the appellate court, which petitioner has not obtained. *See* 28 U.S.C. § 2255(h). Further, as petitioner's conviction became final in 2007, any attack on the legality of his conviction and sentence is barred by the applicable one-year statute of limitations. *See* 28 U.S.C. § 2255(f).

A petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 is not a substitute for a motion to vacate sentence pursuant to 28 U.S.C. § 2255, and the burden of coming forward with evidence to show the inadequacy or ineffectiveness of a motion under § 2255 rests squarely on the petitioner. *Jeffers v. Chandler*, 253 F.3d 827 (5th Cir. 2001). A prior unsuccessful § 2255 motion, or the inability to meet AEDPA's "second or successive" requirement, does not make § 2255 inadequate or ineffective. *Tolliver*, 211 F.3d at 878.

The United States Court of Appeals for the Fifth Circuit has set forth the factors that must be satisfied for a petitioner to file a § 2241 petition in connection with § 2255's savings clause. *See Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir. 2001). In *Reyes-Requena*, the Fifth Circuit held that "the savings clause of § 2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion." *Id.* at 904.

Here, petitioner's claims do not amount to a claim that he was convicted of "a nonexistent offense" as required by the actual innocence prong of *Reyes-Requena*, nor are they based on a retroactively applicable Supreme Court decision that was foreclosed by circuit law at the time he

should have raised the claims at trial or on appeal. Accordingly, petitioner does not meet the criteria required to support a claim under the savings clause of § 2255. Thus, the petition should be dismissed.

Recommendation

The above-styled petition for writ of habeas corpus should be denied.

Objections

Within fourteen days after being served with a copy of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636 (b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from the entitlement of *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

**SIGNED** this 28 day of March, 2016.

KEITH F. GIBLIN
UNITED STATES MAGISTRATE JUDGE

# APPENDIX: D

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

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No. 17-40970

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ERWIN EUGENE SEMIEN,

Petitioner - Appellant

v.

UNITED STATES OF AMERICA,

Respondent - Appellee

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Appeals from the United States District Court
for the Eastern District of Texas

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ON PETITION FOR REHEARING EN BANC

(Opinion 8/10/18, 5 Cir., _____, _____ F.3d _____ )

Before DAVIS, JONES, and ENGELHARDT, Circuit Judges.

PER CURIAM:

( X ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel

Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Edith H. Jones

UNITED STATES CIRCUIT JUDGE