

FILED: August 27, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6064
(2:17-cv-00294-AWA-DEM)

JOHN TAYLOR TYER

Petitioner - Appellant

v.

ERIC WILSON, Warden

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

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UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-6064

JOHN TAYLOR TYER,

Petitioner - Appellant,

v.

ERIC WILSON, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Arenda L. Wright Allen, District Judge. (2:17-cv-00294-AWA-DEM)

Submitted: August 23, 2018

Decided: August 27, 2018

Before DUNCAN and FLOYD, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

John Taylor Tyer, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

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PER CURIAM:

John Taylor Tyer, a federal prisoner, appeals the district court's order accepting the recommendation of the magistrate judge and denying his 28 U.S.C. § 2241 (2012) petition without prejudice for lack of jurisdiction. We have reviewed the record and find no reversible error. Accordingly, although we grant leave to proceed in forma pauperis, we affirm for the reasons stated by the district court. *Tyer v. Wilson*, No. 2:17-cv-00294-AWA-DEM (E.D. Va. filed Dec. 5, 2017 & entered Dec. 7, 2017); see *United States v. Wheeler*, 886 F.3d 415, 423 (4th Cir. 2018) (holding that savings clause of 28 U.S.C. § 2255(e) (2012) is jurisdictional provision). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

JOHN TAYLOR TYER, #54606-056,

Petitioner,

v.

No. 2:17cv294

ERIC WILSON, *Warden*,

Respondent.

REPORT AND RECOMMENDATION

Petitioner John Tyer, a federal inmate, was convicted in 2011 of conspiracy to manufacture methamphetamine and possession of a firearm in furtherance of a drug trafficking crime. He filed this petition for a writ of habeas corpus 28 U.S.C. § 2241, seeking a resentencing hearing or evidentiary hearing to establish his actual innocence. He is currently serving a total of 192 months in prison. His petition argues that he is actually innocent of the crimes for which he was convicted and seeks to prove his innocence with newly discovered evidence. See Pet. at 4 (ECF No. 1). Because Tyer already raised similar claims in a motion for relief before the sentencing court, and his petition does not fall within the narrow range of claims which may be brought by federal prisoners under the so-called “savings provision” of 28 U.S.C. § 2255(e), the court should DISMISS Tyer’s petition under § 2241 for lack of jurisdiction.

I. STATEMENT OF THE CASE

On July 8, 2011, the United States District Court in the Eastern District of North Carolina sentenced Tyer to 226 months’ imprisonment. This sentence consisted of 166 months’

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imprisonment for conspiracy to manufacture methamphetamine and 60 months' imprisonment consecutive to the first sentence for possession of a firearm in furtherance of a drug trafficking offense.¹ J. Order at 3, United States v. Tyler, No. 5:10cr238-F-3 (E.D.N.C July 8, 2011) (ECF No. 179). After appealing his sentence to the Fourth Circuit unsuccessfully, Tyler moved under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. See Def.'s Mem. in Supp. of Mot. to Vacate, United States v. Tyler, No. 5:10cr238-F-3 (E.D.N.C. June 21, 2013) (ECF No. 258-1). The district court dismissed the motion to vacate under § 2255. Order, United States v. Tyler, No. 5:10cr238-F-3 (E.D.N.C. Feb. 27, 2015) (ECF No. 272). The Fourth Circuit upheld the dismissal of Tyler's motion. United States v. Tyler, No. 15-6526, slip op. (4th Cir. June 30, 2015).

Tyler remains in custody at Federal Correctional Institute Petersburg in the Eastern District of Virginia. See 28 U.S.C. § 127; Pet. Form at 1 (ECF No. 1). He files the present petition under 28 U.S.C. § 2241. Pet. at 2 (p. 8 to ECF No. 1). His present petition argues he is being detained for a crime of which he is actually innocent and has new evidence to support this claim. Specifically, as he did in his original § 2255 motion for relief, he argues he could not have possessed any firearms in furtherance of a drug trafficking crime because the government seized the weapons on the day they arrested him for the drug offense. Because Tyler has already filed a § 2255 motion in the district court where he was sentenced, and the time has passed for him to file a motion for reconsideration, he also claims that a petition pursuant to 28 U.S.C. § 2241 is proper. Id. at 3 (pp. 8-9 to ECF No. 1). It is not.

¹ In February 2016, Tyler moved for retroactive application of sentencing guidelines pursuant to 18 U.S.C. § 3582, seeking to benefit from the 2014 guideline amendments reducing the offense levels applicable to certain drug offenses. Resp't's Br. at 2 (ECF No. 7). The district court granted the motion and reduced Tyler's sentence on the conspiracy count to 132 months' imprisonment. Id.

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II. ANALYSIS

A. The savings clause in § 2255 of the Habeas Corpus Statute is narrowly construed.

Federal prisoners must ordinarily challenge their sentence by motion under 28 U.S.C. § 2255, “which channels collateral attacks by federal prisoners to the sentencing court (rather than to the court in the district of confinement) so that they can be addressed more efficiently.” In re Jones, 226 F.3d 328, 332 (4th Cir. 2000) (quoting Triestman v. United States, 124 F.3d 361, 373 (2d Cir. 1997)). Section 2255(h) prohibits successive motions for relief except in certain circumstances. See 28 U.S.C. § 2255(h). This gatekeeping provision, enacted with the Antiterrorism Effective Death Penalty Act (“AEDPA”), limits successive motions to those that are timely² and based upon either (1) newly discovered evidence or (2) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. United States v. Poole, 531 F.3d 263, 266 n. 4 (4th Cir. 2008) (citing 28 U.S.C. § 2255(h)).

Tyer has already sought relief from the district of conviction using § 2255, and his petition does not allege any new rule of constitutional law or timely discovery of innocence-proving evidence since the filing of that petition. As a result, he has filed this petition for a writ of habeas corpus under § 2241, asserting that § 2255 is inadequate or ineffective to test the legality of his confinement. Pet. at 2 (p. 8 to ECF No. 1); see 28 U.S.C. § 2255(e). “Indeed, when § 2255 proves ‘inadequate or ineffective to test the legality of . . . detention,’ a federal prisoner may seek a writ of habeas corpus pursuant to § 2241.” In re Jones, 226 F.3d at 333 (quoting 28 U.S.C. § 2255(e)).³

² Tyer admits he is outside the limitation period for relief under § 2255. Pet. at 2 (p. 8 to ECF No. 1).

³ Section 2255(e) provides:

An application for a writ of habeas corpus [(§ 2241 petition)] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section [2255], shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced

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The Fourth Circuit has interpreted this so-called “savings clause” of § 2255 narrowly. Claims challenging the validity of a federal prisoner’s conviction or sentence may be brought under § 2241 only when § 2255 is “inadequate or ineffective to test the legality of [the prisoner’s] detention.” § 2255(e).⁴ And, § 2255 is inadequate or ineffective only when:

- (1) at the time of conviction, settled law of [the Fourth 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 gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

In re Jones, 226 F.3d at 333-34. Importantly, the savings clause in § 2255 is available only to those alleging “actual innocence of the underlying offense of conviction.” Darden v. Stevens, 426 F. App’x 173, 174 (4th Cir. 2011) (unpublished); see In re Jones, 226 F.3d at 333-34 (“such that the conduct of which the prisoner was convicted is deemed not to be criminal” (emphasis added)); United States v. Poole, 531 F.3d 263, 267 n. 7 (4th Cir. 2008) (citing In re Jones, 226 F.3d at 333-34) (“Fourth Circuit precedent has likewise not extended the reach of the savings clause to those petitioners challenging only their sentence.”). While petitions under § 2241 may be used to challenge the execution of a federal sentence, United States v. Little, 392 F.3d 671, 679 (4th Cir. 2004), challenges to the validity of a federal sentence must fit within the Fourth Circuit’s limited view of the savings clause articulated in In re Jones. Tyer’s challenge does not.

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.

⁴ Section 2255(e) limits the Court’s jurisdiction to hear a § 2241 petition. See § 2255(e) (“An application for a writ of habeas corpus . . . shall not be entertained . . .”) (emphasis added); Rice v. Rivera, 617 F.3d 802, 807 (4th Cir. 2010) (“[T]he district court lacked jurisdiction over the Habeas Motion because Rice is unable to satisfy the second prong of the Jones rule.”).

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B. Tyer's Petition fails to meet the In re Jones test because he alleges no substantive law change that would affect the legality of his conviction.

Tyer urges the court to consider his petition under § 2241 because he “can no longer file a § 2255 motion,” due to that section’s statute of limitations. Pet. at 2 (p. 8 to ECF No. 1). More is required to fit within § 2255’s savings clause. As explained above, the Fourth Circuit has made clear the district courts only have jurisdiction to hear § 2241 petitions in the limited circumstance that the law has changed to make the conduct underlying a conviction no longer criminal. See In re Jones, 226 F.3d at 333-34. Tyer has cited no change in the law that would make innocent the conduct underlying his conviction. In this way, he fails to meet the second of the In re Jones elements, which requires that the “substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal.” See id. at 334. In fact, the claims Tyer attempts to allege here are nearly identical to those alleged in his original motion for relief made under § 2255. Because he has not presented a change in the law that would render the conduct underlying his conviction non-criminal, this court lacks jurisdiction to consider his claim under § 2241. Accordingly, Tyer’s petition should be DISMISSED.

III. RECOMMENDATION

Because Tyer’s petition does not allege a claim cognizable under 28 U.S.C. § 2241, the Court lacks jurisdiction to reach the merits of his claim. Accordingly, the court RECOMMENDS the Petition (ECF No. 1) be DISMISSED.

IV. REVIEW PROCEDURE

By copy of this Report and Recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

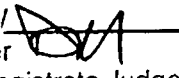
1. Any party may serve upon the other party and file with the Clerk any written objections to the foregoing findings and recommendations within fourteen (14) days from the

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date of mailing of this Report to the objecting party, 28 U.S.C. § 636(b)(1)(C), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof.

2. A district judge shall make a de novo determination of those portions of this report or specified findings or recommendations to which objection is made.

Failure to file timely objections to the findings and recommendations set forth above will result in a waiver of right to appeal from a judgment of this Court based on such findings and recommendations. Thomas v. Arn, 474 U.S. 140 (1985); Carr v. Hutto, 737 F.2d 433 (4th Cir.1984); United States v. Schronce, 727 F.2d 91 (4th Cir.1984).

/s/ 
Douglas E. Miller
United States Magistrate Judge

DOUGLAS E. MILLER
UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia
November 2 2017

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CLERK'S MAILING CERTIFICATE

A copy of the foregoing Report and Recommendation was mailed this date to the following:

John Taylor Tyer
#54606-056
F.C.I. Petersburg Low
Inmate Mail/Parcels
P.O. Box 1000
Petersburg, VA 23804

Andrew Bosse
United States Attorney Office
101 W. Main St.
Suite 8000
Norfolk, VA 23510

Fernando Galindo,
Clerk of Court

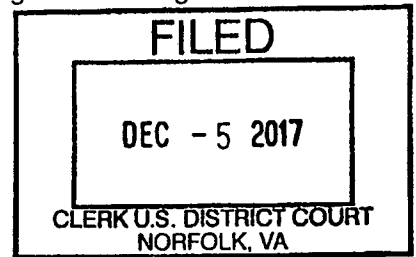
By: _____

Deputy Clerk

November 2, 2017

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division



JOHN TAYLOR TYER, #54606-056,

Petitioner,

v.

ERIC WILSON, Warden,

Respondent.

Civil No. 2:17cv294

*Appeal sent
on 1-11-18*

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2241. The Petitioner seeks a resentencing hearing or an evidentiary hearing to establish Petitioner's actual innocence.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The Report was filed on November 2, 2017, recommending dismissal of the Petition because Petitioner raised similar claims in a motion for relief before the sentencing court, and because his Petition falls outside the narrow range of claims that may be brought by federal prisoners under the so-called "savings provision" of 28 U.S.C. § 2255(e). ECF No. 10.

By copy of the report, each party was advised of the right to file written objections to the findings and recommendations. On November 15, 2017, the Court received Petitioner's Objections to the Magistrate Judge's Report and Recommendation. ECF No. 11. The Respondent has filed no response to the Objections and the time for doing so has now expired.

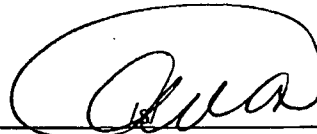
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The Court has reviewed the record *de novo* and has examined the objections filed by the Petitioner to the Magistrate Judge's Report. The Court adopts and approves the findings and recommendations set forth in the Report of the United States Magistrate Judge filed November 2, 2017. Accordingly, it is ORDERED that the petition (ECF No. 1) is DENIED and DISMISSED and Judgment shall be entered in favor of the Respondent. Petitioner's Objections (ECF No. 11) are OVERRULED.

Petitioner may appeal from the Judgment entered pursuant to this Final Order by filing a Notice of Appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within sixty days from the date of entry of such Judgment.

Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right," and this Court declines to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. *See Miller-El v. Cockrell*, 123 S.Ct. 1029, 1039 (2003).

The Clerk shall please mail a copy of this Final Order to Petitioner and provide an electronic copy of the Final Order to counsel of record for Respondent.



Arenda L. Wright Allen
United States District Judge

Norfolk, Virginia

12.4 2017



**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

JOHN TAYLOR TYER,

Petitioner,

v.

CASE NO. 2:17-CV-294

ERIC WILSON,

Respondent,

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by the Court.** This action came for decision by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petition is **DENIED** and **DISMISSED** and Judgment shall be entered in favor of the Respondent. Petitioner's Objections are **OVERRULED**.

DATED: December 7, 2017

FERNANDO GALINDO
Clerk of Court

/s/

By _____
Jaime Meyers
Deputy Clerk

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**Additional material
from this filing is
available in the
Clerk's Office.**