IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10489
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
January 24, 2019
Lyle W. Cayce
Clerk

VINCENT PISCIOTTA,

Petitioner-Appellant

v.

D. J. HARMON, Warden,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CV-2797

Before BENAVIDES, HIGGINSON, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

A jury in the Western District of Missouri convicted Vincent Pisciotta, federal prisoner # 23174-045, of arson, conspiracy to commit arson, and use of fire to commit a federal felony offense, and he was sentenced to an aggregate term of imprisonment of 240 months. He now appeals the district court's dismissal of his 28 U.S.C. § 2241 petition, which he filed in the Northern District of Texas, where he is currently incarcerated. Pisciotta generally

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

asserts that the district court erroneously concluded that he failed to meet the requirements of the savings clause of 28 U.S.C. § 2255(e), which would allow him to proceed under § 2241. Liberally construed, his petition challenged the validity of his sentence, asserted factual innocence, and argued that his convictions were constitutionally infirm because the jury instructions were defective, he was subjected to double jeopardy, and counsel was ineffective for failing to raise these claims and litigate other errors at trial and sentencing. Because the district court dismissed the § 2241 petition on the pleadings, this court's review is de novo. *See Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000).

A prisoner may use Section 2241 to challenge his sentence only if it "appears that the remedy [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). A § 2241 petition is not a substitute for a § 2255 motion, and Pisciotta must establish the inadequacy or ineffectiveness of a § 2255 motion by meeting the savings clause of § 2255. *See* § 2255(e); *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001). Under that clause, Pisciotta must show that his petition sets forth a claim "based on a retroactively applicable Supreme Court decision which establishes that [he] may have been convicted of a nonexistent offense" and that the claim "was foreclosed by circuit law at the time when [it] should have been raised in [his] trial, appeal, or first § 2255 motion." *Reyes-Requena*, 243 F.3d at 904.

Pisciotta presented no credible evidence of actual innocence, and his sentencing claims are not cognizable in a § 2241 proceeding. *See Padilla v. United States*, 416 F.3d 424, 426-27 (5th Cir. 2005). Pisciotta's reliance on *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), to support his remaining claims is misplaced. *Dimaya* did not address whether its holding might apply retroactively on collateral review

of a criminal conviction or establish that Pisciotta was imprisoned for noncriminal conduct. *See Dimaya*, 138 S. Ct. at 1211-12. *Mathis* neither sets forth a new rule of constitutional law nor applies retroactively to cases on collateral review. *See Mathis*, 136 S. Ct. at 2257; *In re Lott*, 838 F.3d 522, 523 (5th Cir. 2016). Moreover, *Mathis* implicates the validity of a sentence enhancement and does not establish that Pisciotta was convicted of a nonexistent offense. *See Padilla*, 416 F.3d at 425-27. Therefore, Pisciotta's *Dimaya* and *Mathis*-based claims do not satisfy the test for the savings clause of § 2255(e).

Accordingly, the district court did not err in determining that Pisciotta failed to satisfy the requirements of the savings clause of § 2255(e) and dismissing his § 2241 petition for lack of jurisdiction. *See Reyes-Requena*, 243 F.3d at 904. The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VINCENT PISCIOTTA, #23174-045	§	
Petitioner,	§	
	§	
v.	§	**CIVIL CASE NO. 3:17-CV-2797-L-BK**
	§	
DJ HARMON, Warden,	§	
Respondent.	§	

FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b) and *Special Order 3*, this action was referred to the United States magistrate judge for judicial screening. On October 11, 2017, Petitioner, a federal prisoner, filed a *pro se* petition for writ of habeas corpus seeking relief under 28 U.S.C. § 2241. Upon review of the relevant pleadings and applicable law, and for the reasons that follow, it is recommended that the petition be **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction.

I. BACKGROUND

In 2012, a jury convicted Petitioner in the United States District Court for the Western District of Missouri of conspiracy to commit arson, arson, and use of fire to commit a federal felony offense, and, in 2013, he was sentenced to a combined term of 240 months' imprisonment. The Court also ordered a three-year term of supervised release and restitution of $1,440,219.73. Doc. 5 at 3; *United States v. Pisciotta*, No. 4:10-CR-174-02 (W.D. Mo. 2013), *aff'd*, *United States v. Anderson*, 783 F.3d 727 (8th Cir. 2015), *cert. denied sub nom.*, *Pisciotta v. United States*, ___ U.S. ___, 136 S. Ct. 199 (2015). Petitioner unsuccessfully sought post-conviction relief under 28 U.S.C. § 2255. *Pisciotta v. United States*, No. 4:15-CV-1030, 2016

WL 4745186 (W.D. Mo. Sep. 12, 2016) (denying section 2255 relief), *certificate of appealability denied*, 2017 WL 5157748 (8th Cir. Mar. 1, 2017), *cert. denied*, No. 16-9515, 2017 WL 2573842 (U.S. Oct. 2, 2017).

In the petition *sub judice*, Petitioner again challenges his conviction, claiming actual innocence and a double jeopardy violation. Doc. 3 at 1 (original petition); Doc. 5 at 5 (amended petition on court form). He alleges that alibi witnesses can "verify [his] total and unequivocal innocence of all charges." Doc. 5 at 5. Petitioner also claims a double jeopardy violation stemming from "acts and Counts described as 'Arson' and 'Conspiracy to commit Arson.'" *Id.* In the brief attached to his original petition, Petitioner raises five grounds of ineffective assistance of counsel at trial and at sentencing. Doc. 3 at 7-26.

II. ANALYSIS

At the outset, this Court evaluates the substance of Petitioner's claims to determine if they are properly brought under 28 U.S.C. § 2241. The Court concludes they are not.

A section 2255 motion to vacate sentence provides the primary means of "collaterally attacking a federal sentence" and is the appropriate remedy for "errors that occurred at or prior to the sentencing." *Padilla v. United States*, 416 F.3d 424, 425-26 (5th Cir. 2005) (internal quotations and citations omitted). A section 2241 petition, on the other hand, is the proper procedural vehicle in which to raise an attack on "the manner in which a sentence is executed." *Id.* A petition filed under section 2241 is not a substitute for a section 2255 motion. *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001).

A section 2241 petition that seeks to challenge the validity of a federal sentence, by challenging errors that occurred at trial or sentencing, must either be dismissed or construed as a

section 2255 motion. *See Pack v. Yusuff*, 218 F.3d 448, 452 (5th Cir. 2000). But a federal prisoner "may bring a petition under § 2241 to challenge the legality of his conviction or sentence if he can satisfy the mandates of the 'savings clause' of § 2255." *Christopher v. Miles*, 342 F.3d 378, 381 (5th Cir. 2003) (citing *Reyes-Requena v. United States,* 243 F.3d 893, 900-01 (5th Cir. 2001)). Under the "savings clause" of section 2255, the petitioner has the burden of showing that the section 2255 remedy is "inadequate or ineffective to test the legality of his detention." *Jeffers*, 253 F.3d at 830; *see also Padilla*, 416 F.3d at 426.[1]

Although Petitioner filed his initial and amended habeas corpus petitions under section 2241, he does not seek to attack the manner in which his sentence is being executed and challenges, instead, his federal conviction and sentence. Doc. 3; Doc. 5. Petitioner also does not specifically invoke the savings clause of section 2255 to pursue his claims under § 2241. That notwithstanding, he fails to meet his burden of showing that the section 2255 remedy is either inadequate or ineffective to the test the legality of his detention. *See Jeffers*, 253 F.3d at 830 (petitioner bears burden "to show the inadequacy or ineffectiveness of a motion under § 2255").

Petitioner cannot rely on section 2241 merely because he cannot seek relief under section 2255. *Cf. Pack*, 218 F.3d 448, 453 (summarizing authority holding that prior, unsuccessful

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[1] The so-called "savings clause" provides that "[a]n 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. § 2555(e) (emphasis added).

Because Petitioner is incarcerated within the Northern District of Texas, this Court has jurisdiction to determine whether he may proceed under section 2241. *See Padilla,* 416 F.3d at 426 ("Only the custodial court has the jurisdiction to determine whether a petitioner's claims are properly brought under § 2241 via the savings clause of' 2255.").

section 2255 motion, limitations bar, and successiveness do not render section 2255 remedy inadequate or ineffective). Moreover, "the savings clause of section 2255 applies to a claim of actual innocence '(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.'" *Padilla*, 416 F.3d at 426 (quoting *Reyes-Requena*, 243 F.3d at 904); *see also Christopher*, 342 F.3d at 382. Petitioner fails to establish either requisite. Thus, he cannot prevail.

Petitioner does not premise his claims on a retroactively-applicable Supreme Court decision calling into question the validity of his conviction. Notably his amended petition does not cite any authority or Supreme Court opinion in support of his claims. Rather, Petitioner only alleges that alibi witnesses can "verify [his] total and unequivocal innocence of all charges." Doc. 5 at 5. He also vaguely references a double jeopardy violation, referencing "acts and Counts described as 'Arson' and 'Conspiracy to commit Arson.'" *Id.* Thus, neither claim demonstrates that (1) that Petitioner is actually innocent of the charges against him or (2) the conduct for which he was convicted was decriminalized by a retroactively-applicable Supreme Court decision.

The original habeas corpus petition fares no better. In ground 3, Petitioner claims in passing that "divisibility" should have been considered before sentencing, citing *Mathis v. United States*, ___ U.S. ___, 136 S. Ct. 2243 (2016).[2] Doc. 3 at 18. However, even if *Mathis*

[2] *Mathis* held that, for the purpose of determining whether an offense qualifies as an Armed Career Criminal Act (ACCA) predicate, the court takes a modified categorical approach, looking to the statutory elements of the offense rather than to the means of commission. 136 S. Ct. at 2257.

were remotely applicable to his case, it did not announce a new rule of constitutional law that has been made retroactive to cases on collateral review. *See In re Lott*, 838 F.3d 522, 523 (5th Cir. 2016) (denying authorization to file a successive application under 28 U.S.C. § 2255(h)(2) because *Mathis* did not set forth a new rule of constitutional law that has been made retroactive to cases on collateral review). Indeed, the Supreme Court explicitly stated in *Mathis* that it was not announcing a new rule and that its decision was dictated by decades of prior precedent. 136 S. Ct. at 2257; *see also Teague v. Lane*, 489 U.S. 288, 301 (1989) ("[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."). [3]

Moreover, the remaining claims in the original petition complain of ineffective assistance of counsel at trial and at sentencing, and do not seek to rely on any new retroactively applicable Supreme Court decision that establishes he was convicted of a nonexistent offense. Doc. 3 at 7-22. Petitioner asserts:

1. Counsel failed to object to the jury instructions and ignored "the Defendant's right to review and inspect all aspect of discovery," Doc. 3 at 7, 9,

2. Counsel failed to file pretrial motions with respect to alibi witnesses, suppression, severance, and double jeopardy issue, Doc. 3 at 10,

3. Counsel failed to request an evidentiary hearing to challenge unfounded allegations of violence in Petitioner's criminal history, which resulted in a harsher sentence, Doc. 3 at 12,

4. Counsel failed to object to jury instructions based on Double Jeopardy and raise issue in pretrial motions, causing Petitioner to be found guilty of arson in two counts, Doc. 3 at 19-21, and

[3] In the United States Court of Appeals for the Fifth Circuit, for purposes of the savings clause, there is no requirement "that the Supreme Court must have made the determination of retroactivity." *Santillana v. Upton*, 846 F.3d 779, 783 (5th Cir. 2017) (citing *Garland v. Roy*, 615 F.3d 391, 394 (5th Cir. 2010)).

5. Counsel failed to file a pretrial motion requesting that Petitioner's alibi witnesses be included and presented at trial, Doc. 3 at 22.

In sum, because Petitioner fails to raise a claim that is based on a retroactively applicable Supreme Court decision that establishes that the petitioner may have been convicted of a nonexistent offense, the Court is without jurisdiction to consider his habeas petition. *See Christopher*, 342 F.3d at 379 (remanding section 2241 habeas petition for dismissal for lack of jurisdiction because petitioner failed to show section 2255 remedy was inadequate or ineffective).

III. RECOMMENDATION

For the foregoing reasons, it is recommended that the petition for writ of habeas corpus under 28 U.S.C. § 2241 be **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction.

SIGNED January 31, 2018.

RENEE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VINCENT PISCIOTTA, #23174-045,	§	
	§	
Petitioner,	§	
v.	§	Civil Action No. **3:17-CV-2797-L-BK**
	§	
D.J. HARMON, Warden,	§	
	§	
Respondent.	§	

ORDER

On January 31, 2018, United States Magistrate Judge Renée Harris Toliver entered the Findings, Conclusions and Recommendation of the United States Magistrate Judge ("Report"), recommending that the court dismiss without prejudice for lack of jurisdiction this habeas action brought pursuant to 28 U.S.C. § 2241. On February 13, 2018, Petitioner moved for an extension of the deadline to file objections (Doc. 9), which the court **grants**, and, on February 20, 2018, filed objections to the Report, which the court deems as being filed timely.

Having reviewed the pleadings, file, record in this case, and Report, and having conducted a de novo review of that portion of the Report to which objection was made, the court determines that the findings and conclusions of the magistrate judge are correct; **accepts** them as those of the court; **overrules** Petitioner's objections; and **dismisses without prejudice** this action for lack of jurisdiction.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c),

the court prospectively **denies** a certificate of appealability.* The court determines that Petitioner has failed to show: (1) that reasonable jurists would find this court's "assessment of the constitutional claims debatable or wrong;" or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). In support of this determination, the court accepts and incorporates by reference the Report in this case. In the event that Petitioner files a notice of appeal, he must pay the $505 appellate filing fee or submit a motion to proceed *in forma pauperis* ("IFP"), unless he has been granted IFP status by the district court.

It is so ordered this 9th day of April, 2018.

Sam A. Lindsay
United States District Judge

*Rule 11 of the Rules Governing §§ 2254 and 2255 Cases provides as follows:

> **(a) Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
>
> **(b) Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.