

UNPUBLISHED

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

No. 18-7260

BRADFORD METCALF,

Petitioner - Appellant,

v.

S. KALLIS, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the Northern District of West Virginia,
at Martinsburg. Gina M. Groh, Chief District Judge. (3:17-cv-00121-GMG)

Submitted: February 21, 2019

Decided: February 26, 2019

Before GREGORY, Chief Judge, and AGEE and DIAZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Bradford Metcalf, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Bradford Metcalf, a federal prisoner, appeals the district court's order accepting the recommendation of the magistrate judge and dismissing his 28 U.S.C. § 2241 (2012) petition without prejudice. 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. *Metcalf v. S. Kallis*, No. 3:17-cv-00121-GMG (N.D.W. Va. Oct. 3, 2018). 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

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

BRADFORD METCALF,

Petitioner,

v.

**CIVIL ACTION NO.: 3:17-CV-121
(GROH)**

S. KALLIS, Warden,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

Pending before the Court is the Amended Report and Recommendation (“R&R”) of United States Magistrate Judge Robert W. Trumble. ECF No. 9. Pursuant to this Court’s Local Rules, this action was referred to Magistrate Judge Trumble for submission of a proposed R&R. Magistrate Judge Trumble issued his R&R on June 14, 2018. In his R&R, Magistrate Judge Trumble recommends that the Petitioner’s § 2241 petition [ECF No. 1] be denied and dismissed without prejudice.

I. Background

The Petitioner in this case was convicted by a federal jury in the Western District of Maryland of: (1) conspiracy to possess machine guns to threaten to assault and murder federal employees; (2) two counts of unlawfully possessing a firearm silencer and a destructive device; (3) four counts of unlawful possession of a machine gun; and (4) carrying a semiautomatic assault weapon during and in relation to a crime of violence. The Petitioner asserts that he is actually innocent because the charges are unconstitutional. In the instant petition, the Petitioner seeks to have the statutes

declared unconstitutional, have his indictment dismissed, and be immediately released from prison.

II. Standard of Review

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a *de novo* review of the magistrate judge's findings where objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge to which no objection is made. Thomas v. Arn, 474 U.S. 140, 150 (1985). Failure to file timely objections constitutes a waiver of *de novo* review and of a Petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984).

Objections to Magistrate Judge Trumble's R&R were due within fourteen plus three days of service. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Petitioner filed a motion for extension of time to file his objections. ECF No. 14. The Court granted Petitioner's request for an extension, giving Petitioner until October 1, 2018 to file objections. ECF No. 15. Having timely filed objections [see ECF No. 18], the Court will conduct a *de novo* review of the portions of the R&R to which the Petitioner objects.

III. Discussion

Magistrate Judge Trumble recommended that the petition be dismissed because Petitioner seeks relief relating to the validity of his conviction and sentence, which are matters properly considered on direct appeal or in a § 2255 motion. While § 2255 contains a savings clause, Magistrate Judge Trumble determined that the Petitioner is not entitled to its application. Specifically, Magistrate Judge Trumble provided that

Petitioner cannot satisfy the second element of the Jones test because the conduct of which Petitioner was convicted remains to be criminal. In his objections, Petitioner attempts to set forth case law to establish that his conviction is unconstitutional. This portion of Petitioner's objections fails to take into consideration that he still does not satisfy the second element of Jones. Petitioner also claims that there are other § 2241 cases which address the issues of actual innocence and miscarriage of justice. Furthermore, he asserts that establishing a claim of actual innocence is all he is required to do to bring his claim under § 2241. However, Petitioner's arguments do not change the test established in Jones.

The charges to which the Petitioner pleaded guilty remain unlawful. The Petitioner does not argue, nor could he, that there has been a change in law legalizing conspiracy to possess machine guns to threaten to assault and murder federal employees, unlawfully possessing a firearm silencer and a destructive device, unlawful possession of a machine gun, or carrying a semiautomatic assault weapon during and in relation to a crime of violence. As a result, the Petitioner cannot satisfy the second Jones requirement. See In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000). Therefore, as addressed in the R&R, the savings clause is inapplicable to the Petitioner's attack on his underlying conviction.

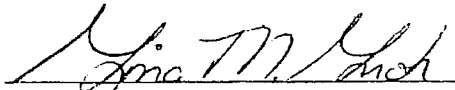
IV. Conclusion

In sum, the Petitioner does not meet the requirements for the savings clause codified in 28 U.S.C. § 2255(e) and the Petitioner's claims cannot be considered under § 2241. Accordingly, upon careful review, the Court **ORDERS** that Magistrate Judge Trumble's Report and Recommendation [ECF No. 9] is **ADOPTED** for the reasons more

fully stated therein. The Petitioner's § 2241 Petition [ECF No. 1] is **DENIED** and **DISMISSED WITHOUT PREJUDICE**.

The Clerk is **DIRECTED** to strike this matter from the Court's active docket. The Clerk is further **DIRECTED** to transmit copies of this Order to all counsel of record herein and to mail a copy of this Order to the *pro se* Petitioner by certified mail, return receipt requested.

DATED: October 3, 2018


GINA M. GROH
CHIEF UNITED STATES DISTRICT JUDGE

FILED: May 6, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7260
(3:17-cv-00121-GMG)

BRADFORD METCALF

Petitioner - Appellant

v.

S. KALLIS, Warden

Respondent - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Agee, and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk