

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES WARDELL QUARY - Petitioner

V.

N.C. ENGLISH, Warden - Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JAMES WARDELL QUARY (PRO SE)
REG. NO. 04868-031
U.S. PENITENTIARY
P.O. BOX 1000
LEAVENWORTH, KS 66048

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 28, 2019

Elisabeth A. Shumaker
Clerk of Court

JAMES WARDELL QUARY,

Petitioner - Appellant,

v.

No. 18-3212

N.C. ENGLISH,

Respondent - Appellee.

ORDER

Before **HOLMES, MATHESON, and EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

JAMES WARDELL QUARY, Petitioner - Appellant, v. N.C. ENGLISH, Respondent - Appellee.
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
2018 U.S. App. LEXIS 36138
No. 18-3212
December 21, 2018, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2018 U.S. App. LEXIS 1}(D.C. No. 5:18-CV-03158-SAC). (D. Kan.). Quary v. United States, 2018 U.S. Dist. LEXIS 158859 (D. Kan., Sept. 18, 2018)

Counsel JAMES WARDELL QUARY, Petitioner - Appellant, Pro se,
Leavenworth, KS.

Judges: Before HOLMES, MATHESON, and EID, Circuit Judges.

Opinion

Opinion by: Scott M. Matheson, Jr.

Opinion

ORDER AND JUDGMENT*

Pro se federal prisoner James Quary appeals from the dismissal of his application for a writ of habeas corpus under 28 U.S.C. § 2241.1 Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the dismissal.²

I. BACKGROUND

Mr. Quary was convicted in 1997 of federal drug and firearms offenses. He was sentenced to life in prison for the drug crimes and to an additional 60 months for the gun offense. This court affirmed his convictions on direct appeal. *United States v. Quary*, 188 F.3d 520 (10th Cir. 1999) (unpublished). The district court denied his first motion for habeas relief under 28 U.S.C. § 2255 and we denied a certificate of appealability ("COA"). *United States v. Quary*, 60 F. App'x 188 (10th Cir. 2003) (unpublished). The court later reduced his life sentence to 360 months under 18 U.S.C. § 3582(c). Mr. Quary filed a second § 2255 motion, which the district court dismissed as an unauthorized second or successive motion. We denied a certificate of appealability to appeal that decision. *United States v. Quary*, 881 F.3d 820 (10th Cir. 2018).

In June 2018, Mr. Quary filed his § 2241 application underlying this appeal. He argued his firearms conviction under 18 U.S.C. § 924(c) should be vacated because the aiding and abetting jury instructions at {2018 U.S. App. LEXIS 2} trial were erroneous under *Rosemond v. United States*, 572 U.S. 65, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014).³ The district court said this claim must be raised in a § 2255 motion unless § 2255(e)'s savings clause permitted him to bring his claim under § 2241.

CIRHOT

1

04868031

2241 appeals. *McIntosh v. U.S. Parole Comm.*, 115 F.3d 809 (10th Cir. 1997). Accordingly, the district court does not need to assess and should not **{2018 U.S. App. LEXIS 5}** assess partial payments under § 1915(b). We therefore vacate the portions of the district court's order that conditioned Mr. Quarry's *ifp* status on his making partial payments of the filing fee.

III. CONCLUSION

We affirm the district court's dismissal of Mr. Quarry's § 2241 application. We vacate the partial payment portions of the district court's *ifp* order as described above.

Entered for the Court

Scott M. Matheson, Jr.

Circuit Judge

Footnotes

*

This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

1

Because Mr. Quarry is pro se, we liberally construe his filings but do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

2

A federal prisoner is not required to obtain a certificate of appealability to seek review of a district court's denial of a habeas application under § 2241. *Eldridge v. Berkebile*, 791 F.3d 1239, 1241 (10th Cir. 2015).

3

In *Rosemond*, the Supreme Court held that an unarmed accomplice cannot aid and abet a § 924(c) violation without knowing beforehand "that one of his confederates will carry a gun." 572 U.S. at 77.