

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

No: 19-1576

Larry Dean Cochrun

Petitioner - Appellant

v.

Bob Dooley, Warden

Respondent - Appellee

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:13-cv-04106-LLP)

JUDGMENT

Before KELLY, WOLLMAN, and ERICKSON, Circuit Judges.

The court has carefully reviewed the original file of the United States District Court and orders that this appeal be dismissed as untimely.

March 28, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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

Appendix B

No: 19-1576

Larry Dean Cochrun

Appellant

v.

Bob Dooley, Warden

Appellee

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:13-cv-04106-LLP)

ORDER

The petition for rehearing by the panel is denied.

May 01, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED

MAR 27 2014

[Signature]
*****CLER*****

LARRY DEAN COCHRAN,

CIV 13-4106

Petitioner,

vs.

JUDGMENT

BOB DOOLEY, Warden,

Respondent.

The Court having entered its Order dismissing Petitioner's Petition, it is hereby ORDERED, ADJUDGED and DECREED that Petitioner's application for writ of habeas corpus is dismissed, with prejudice, for the reasons stated in the Court's Order.

Dated this 27th day of March, 2014.

BY THE COURT:

Jaume L. Pison

Lawrence L. Piersol
United States District Judge

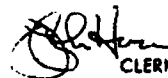
ATTEST:
JOSEPH HAAS, CLERK

BY: Summer Wahne
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED

MAR 27 2014


CLERK

LARRY DEAN COCHRUN,

Petitioner,

vs.

BOB DOOLEY, Warden,

Respondent.

CIV 13-4106

ORDER

The Report and Recommendation of Judge Simko and the Objections of Petitioner Cochrun and the remainder of this file have been reviewed de novo by this Court.

There is no jurisdiction in this Court to grant relief for these claims even if there was merit to the claims of Petitioner. The lack of jurisdiction for these claims in this Court is correctly set forth in the Report and Recommendation and the Report and Recommendation is incorporated into this Order of this Court.

Petitioner claims actual innocence on his prior conviction for rape. Even if there were jurisdiction to consider that claim on a sentence already fully served, no even colorable claim of actual innocence has been raised.

Petitioner's Objections are denied and the case is dismissed with prejudice. There is no basis for certifying any issue for appeal from this decision.

Accordingly,

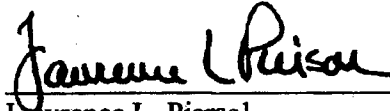
IT IS ORDERED:

1. That Petitioner Cochrun's Objections, Doc. 4, to the Report and Recommendation are DENIED, and the Report and Recommendation, Doc. 3, is ADOPTED and Petitioner's § 2254 Petition for Writ of Habeas Corpus, Doc. 1, is dismissed with prejudice.

2. That a Certificate of Appealability shall not issue.
3. That Petitioner's Motion to Proceed in forma pauperis, Doc. 6, is granted, and Petitioner's \$5.00 filing fee has already been paid to the Clerk of Courts.

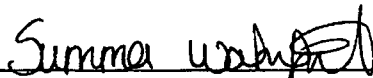
Dated this 27th day of March, 2014.

BY THE COURT:



Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: 
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED

NOV 15 2013


CLERK

LARRY DEAN COCHRUN,

CIV. 13-4106

Petitioner,

-vs-

REPORT and RECOMMENDATION

BOB DOOLEY, Warden,

Respondent.

Petitioner, Larry Dean Cochrun, an inmate at the Mike Durfee State Prison, has filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.¹

JURISDICTION

The pending matter was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Judge Schreier's Standing Order dated March 18, 2010.

BACKGROUND

Petitioner, Larry Cochrun (Cochrun) was convicted of distribution of marijuana to a minor and delivery of drug paraphernalia in 1987 and of statutory rape in 1991. He was sentenced to three years in prison for the 1987 convictions and twenty-five years in prison for the 1991 conviction and has fully served both sentences. *See* Doc. 1-2, p. 22-23, 29-30, 36. Cochrun was released from the penitentiary on the rape sentence on March 29, 2004. He was a free man until he was convicted of aggravated assault on July 31, 2006 and re-incarcerated pursuant to a Judgment of Conviction sentencing him to fifteen years in prison. *See* Doc. 1-2, p. 30.

Cochrun now claims he is actually innocent of the 1987 drug convictions and of the 1991 statutory rape conviction. Cochrun alleges that although he has fully served the sentence for the

¹In a companion case, Larry's son Dean has filed a § 2254 Petition on Larry's behalf. *See* Civ. 13-4065. The claims in both cases are similar.

1987 convictions and the 1991 rape conviction, he has since been charged with another crime and his sentence for the subsequent crime has been enhanced because of his previous wrongful convictions.

DISCUSSION

Petitioner's § 2254 claim must be dismissed. Rule 4 of the Rules pertaining to Section 2254 Cases requires that if it "plainly appears from the petition" that "the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner." A basic requirement of a petition for writ of habeas corpus under § 2254 is that the petitioner be "in custody pursuant to a judgment of a state court . . ." 28 U.S.C. § 2254(a).

The conviction about which Cochrun complains is not the conviction for which he is currently in custody, but the 1987 and 1991 convictions, which expired and for which he had been released from custody before he was convicted on the charges for which he is currently serving prison time. Cochrun's argument is foreclosed by *Cotton v. Mabry*, 674 F.2d 701, 703-04 (8th Cir. 1982). In that case, Cotton made the same argument as Cochrun does here--that he could challenge an expired sentence on habeas corpus because it prolonged a sentence he was currently serving.

The writ of habeas corpus is available only to one who is in custody. . . . Cotton contends he is in custody with respect to his 1969 jury conviction although he has served the five year sentence. He argues the effect of the 1969 jury conviction was to prolong the two subsequent sentences which he is presently serving. . . .

The influence which the five year sentence may have had on the subsequent sentences is a collateral consequence and does not give this court jurisdiction to grant habeas relief.

The custody requirement 'has been equated with significant restraint on liberty, such as parole or release on one's own recognizance.' Because Cotton has served his sentence and is no longer incarcerated or on parole in conjunction with the 1969 jury conviction, we find that he may not challenge that conviction because he is not in custody . . .

Id. at 703-04. Because Cochrun is not "in custody" for purposes of the conviction he wishes to challenge (the 1987 drug convictions or the 1991 rape conviction) he is not entitled to habeas corpus relief. In 1989, the United States Supreme Court decided *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923 (1989). The Supreme Court explicitly rejected Cochrun's argument as it explained:

The question presented by this case is whether a habeas petition remains 'in custody' under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted. We hold that he does not. While we have very liberally construed the 'in custody' requirement for purposes of federal habeas, we have never extended it to the situation where a habeas petitioner suffers no present restraint from a conviction. Since almost all states have habitual offender statutes, and many states provide as Washington does for specific enhancement of subsequent sentences on the basis of prior convictions, a contrary ruling would mean that a petitioner whose sentence has completely expired could nonetheless challenge the conviction for which it was imposed at any time on a federal basis. This would read the 'in custody' requirement out of the statute . . .

Maleng, id. 490 U.S. at 492, 109 S.Ct. at 1926.²

RECOMMENDATION

The face of Petitioner's § 2254 application indicates he is not in custody on the convictions he wishes to challenge. It plainly appears that Petitioner is not entitled to relief pursuant to the requirements of 28 U.S.C. § 2254(a). It is therefore respectfully recommended to the District Court that:

- (1) Petitioner's § 2254 Application for Writ of Habeas Corpus should be DISMISSED.
- (2) Petitioner has failed to make a "substantial showing of the denial of a constitutional right." It is therefore also respectfully RECOMMENDED that a certificate of appealability should not be issued in Petitioner's case. 28 U.S.C. § 2253(c)(2). Although 28 U.S.C. § 2253(c)(2) has been found to be "only a modest standard," Petitioner has not shown that "the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement or to proceed further." *Randolph v. Kemna*, 276 F.3d 401, 403 n.1 (8th Cir. 2002) (citations omitted).

NOTICE TO PARTIES

The parties have fourteen (14) days after service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. Failure to file timely objections will result in the waiver of the right to appeal questions

²It is also noted that Cochrun's petition is clearly barred by the AEDPA one year statute of limitations, 28 U.S.C. § 2244(d)(1).

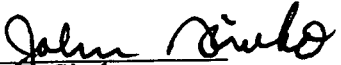
of fact. Objections must be timely and specific in order to require de novo review by the District Court.

Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990)

Nash v. Black, 781 F.2d 665 (8th Cir. 1986)

Dated this 15 day of November, 2013.

BY THE COURT:


John H. Simko
United States Magistrate Judge