

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PAUL R. BUTTS, §
§
Petitioner, §
§
VS. § No. 4:17-CV-1033-Y
§
RODNEY W. CHANDLER, Warden, §
FMC-Fort Worth, §
§
Respondent. §

OPINION AND ORDER

Before the Court is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 filed by Petitioner, Paul R. Butts, a federal prisoner confined at FMC-Fort Worth, against Rodney W. Chandler, warden of FMC-Fort Worth, Respondent. After having considered the petition and relief sought by Petitioner, the Court has concluded that the petition should be dismissed for lack of jurisdiction.

I. Factual and Procedural Background

In 2008, in the United States District of Arizona, which lies in the Ninth Circuit, Petitioner was sentenced to a term of 220 months in the Bureau of Prisons for his conviction on one count of distribution of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(3) and (b)(1) and 2256, and a term of 120 months for his convictions on fifteen counts of possession of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2) and 2256. (Resp't's App. 1-2, doc. 8.) By way of this petition, Petitioner

appears to challenge his conviction for distribution of child pornography by alleging that he is actually innocent of the offense because

the government did not claim[,] state, prove or even suggest that any files themselves had crossed state lines to affect the "in interstate or foreign commerce" nexus. The government only claimed that the prefabricated computer parts (hard drives) were manufactured outside of Arizona. The government was to "prove that the images actually crossed state lines."

(Pet. 6, doc. 1.) Petitioner relies primarily upon the Ninth Circuit cases of *United States v. Wright*, 625 F.3d 583 (9th Cir. 2010), and *United States v. Flyer*, 633 F.3d 911 (9th Cir. 2011), but he also cites cases from other circuits, including the Fifth Circuit.

II. Discussion

A § 2241 petition attacking a federal conviction may only be considered if the petitioner establishes that the remedy under § 2255(e) is "inadequate or ineffective to test the validity of his detention." 28 U.S.C. § 2255(e) (the so-called "savings clause"); *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000). To meet this burden, a petitioner must show that (1) the petition raises a claim that is based on a retroactively applicable United States Supreme Court decision, (2) the claim was foreclosed by circuit law at the time when it should have been raised in the petitioner's trial, appeal, or first § 2255 motion, and (3) that retroactively applicable decision establishes that the petitioner may have been

convicted of a nonexistent offense. *Garland v. Roy*, 615 F.3d 391, 394 (5th Cir. 2010); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001).

Petitioner fails to meet any of these requirements. The cases relied upon by Petitioner are not Supreme Court decisions made retroactive to cases on collateral review. And, even though *Wright* and *Flyer* were not decided until 2010 and 2011, respectively, Petitioner fails to identify any authority that would have foreclosed him from making the same argument at trial, on appeal, or in his initial § 2255 motion under then existing circuit law.¹ See *Gricco v. Keffer*, 335 Fed. App'x 423, 2009 WL 1806896, at *1 (5th Cir. June 24, 2009). Furthermore, Petitioner's claim was raised in his third § 2255 motion transferred by the convicting court to the Ninth Circuit, which construed the motion as an application to file a second or successive § 2255 motion and denied the application. (Resp't's App. 10-13, doc. 8.) Petitioner's inability to meet the requirements for filing a successive § 2255 motion does not make the § 2255 remedy inadequate. See *Toliver*, 211 F.3d at 878.

Because Petitioner has not met the criteria required to invoke the savings clause of § 2255, or demonstrated that the remedy under § 2255 is inadequate, as to the claim presented in this habeas-

¹In *Wright*, which was decided in 2010, the Ninth Circuit specifically noted that the matter was one of "apparent first impression." *Wright*, 625 F.3d at 590.

corpus proceeding, the Court is without jurisdiction to consider the petition. *Christopher v. Miles*, 342 F.3d 378, 385 (5th Cir. 2003).

For the reasons discussed, the Court DISMISSES the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 for lack of jurisdiction.

Further, Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability is issued under 28 U.S.C. § 2253. The certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "Under this standard, when a district court denies habeas relief by rejecting constitutional claims on their merits, 'the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *McGowen v. Thaler*, 675 F.3d 482, 498 (5th Cir. 2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When the district court denies the petition on procedural grounds without reaching the merits, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* (quoting *Slack*, 529 U.S. at 484). This inquiry involves two components, but a court

may deny a certificate of appealability by resolving the procedural question only. Petitioner has not made a showing that reasonable jurists would question this Court's procedural ruling. Petitioner has neither alleged nor demonstrated that he is entitled to proceed under 28 U.S.C. § 2241. Therefore, a certificate of appealability should not issue.

SIGNED September 19, 2018.

Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Exhibit B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

No. 18-11272
Summary Calendar

FILED
June 3, 2019
Lyle W. Cayce
Clerk

PAUL R. BUTTS,

Petitioner - Appellant

v.

ERIC D. WILSON, Warden, FMC-Fort Worth,

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CV-1033

Before BARKSDALE, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Paul R. Butts, federal prisoner # 84674-008 and proceeding *pro se*, challenges the dismissal of his 28 U.S.C. § 2241 petition, in which he contests his convictions in 2008 for distributing and possessing child pornography, in violation of 18 U.S.C. §§ 2252A and 2256, and his resulting sentence of, *inter alia*, 220-months' imprisonment. He asserts on appeal: he is actually innocent of the charged offenses; the district court in 2008 lacked jurisdiction because

* 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.

the Government failed to allege or prove that any of the images he possessed or distributed had traveled in interstate commerce; and the immediate district court's refusal to consider the claim results in a complete miscarriage of justice.

The dismissal of Butts' § 2241 petition is reviewed *de novo*. *Padilla v. United States*, 416 F.3d 424, 425 (5th Cir. 2005). In that regard, a prisoner may use § 2241 to challenge his conviction only if the remedy under 28 U.S.C. § 2255 is inadequate or ineffective to contest the legality of his detention. § 2255(e).

A § 2241 petition is not a substitute for a § 2255 motion, and, to meet the savings clause of § 2255(e), Butts must establish the inadequacy or ineffectiveness of a § 2255 motion. *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). To satisfy that clause, he must show his petition states a claim that: "is based on a retroactively applicable Supreme Court decision which establishes . . . [he] may have been convicted of a nonexistent offense"; and "was foreclosed by circuit law at the time when the claim should have been raised in [his] trial, appeal, or first § 2255 motion". *Reyes-Requena*, 243 F.3d at 904.

Butts has waived—by failing to brief—any contention challenging the district court's conclusion that his claim did not qualify for savings-clause relief because it did not rely on any retroactively applicable Supreme Court decision. *See Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1993); *Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Along that line, he has not identified a retroactively applicable Supreme Court decision concerning whether he was convicted of conduct that is not a crime. *See Padilla*, 416 F.3d at 425–26.

Although Butts urges that the court's refusal to consider his claim results in a miscarriage of justice, the true nature of his complaint is that he cannot meet the requirements for filing a successive § 2255 motion, but he should nevertheless be allowed to proceed because his claim is based on new circuit-court decisions not available at the time of his conviction. As the court concluded correctly, however, Butts' inability to meet the requirements for filing a successive § 2255 motion does not entitle him to proceed under § 2241. *See Tolliver v. Dobre*, 211 F.3d 876, 878 (5th Cir. 2000).

AFFIRMED.

Exhibit C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 17 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PAUL RICHARD BUTTS,

No. 17-71604

Applicant,

v.

ORDER

UNITED STATES OF AMERICA,

Respondent.

Before: CANBY, Trott, and GRABER, Circuit Judges.

We treat the writ of habeas corpus, transferred by the district court on June 1, 2017, as supplemented by the applicant's subsequent filings, as an application to file a second or successive section 2255 motion in the district court.

The application is denied. The applicant has not made a prima facie showing under 28 U.S.C. § 2255(h) of:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

To the extent the applicant may seek to file a 28 U.S.C. § 2241 habeas corpus petition under section 2255(e), we cannot entertain this petition and he must file the petition directly with the district court.

Any pending motions are denied as moot.

No further filings will be entertained in this case.

DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11272

PAUL R. BUTTS,

Petitioner - Appellant

v.

ERIC D. WILSON, Warden, FMC-Fort Worth,

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 06/03/19, 5 Cir., _____, _____ F.3d _____)

Before BARKSDALE, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:

() Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

() Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

July 22, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-11272 Paul Butts v. Eric Wilson
USDC No. 4:17-CV-1033

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa B. Courseault

By: Melissa B. Courseault, Deputy Clerk
504-310-7701

Mr. Paul R. Butts
Mr. Brian Walters Stoltz

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