IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50394

JESUS JAIME JIMENEZ,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeals from the United States District Court
for the Western District of Texas

O R D E R:

Jesus Jaime Jimenez, Texas prisoner # 1363409, moves for a certificate of appealability (COA) to challenge the dismissal of his 28 U.S.C. § 2254 petition without prejudice for lack of jurisdiction. His § 2254 petition challenged his 1991 convictions and sentences for burglary, at least one of which was used to enhance the 50-year sentence of imprisonment for engaging in organized criminal activity that he is currently serving. Jimenez argues that the district court erroneously determined that he was not "in custody" pursuant to the burglary convictions, and he contends that he is suffering collateral consequences. He further argues that his § 2254 petition was cognizable in light of his claim of ineffective assistance of counsel. Also, Jimenez moves for permission to proceed in forma pauperis (IFP).

To obtain a COA, Jimenez must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). A petitioner satisfies the *Slack* standard by showing that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Even if the district court's "in custody" determination is debatable, its conclusion that Jimenez may not collaterally challenge his burglary convictions is not. *See Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394, 401-04 (2001). Therefore, Jimenez's request for a COA is DENIED. His IFP motion also is DENIED.

/s/ Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

A True Copy
Certified order issued Jan 29, 2020

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JESUS JAIME JIMENEZ,	§	
TDCJ No. 01363409,	§	
	§	
Petitioner,	§	
	§	
v.	§	**SA-19-CA-0294-XR**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER OF DISMISSAL

Before the Court is Petitioner Jesus Jaime Jimenez's petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 (ECF No. 1) and accompanying Memorandum in Support (ECF No. 2). For the reasons set forth below, Petitioner's federal habeas corpus petition is dismissed without prejudice for lack of jurisdiction. Petitioner is also denied a certificate of appealability.

Analysis

According to his petition and supplemental memorandum, Petitioner was charged by indictment with two counts of burglary alleged to have occurred in Kerr County during February 1991. Petitioner plead guilty in April 1991 to both counts and, pursuant to the plea agreement, was sentence to five years of probation for the first count and ten years of probation for the second count. Because Petitioner has already fully discharged these sentences, however, he is no longer "in custody" pursuant to these convictions.[1] Thus, this court lacks jurisdiction under § 2254 to entertain his challenge. *Maleng v. Cook*, 490 U.S. 485, 492 (1989) ("While we have

[1] Petitioner is currently in the custody of TDCJ, albeit for a separate 2006 conviction for engaging in organized criminal activity that is unrelated to the 1991 burglary convictions. *State v. Jimenez*, No. B06-146 (198th Dist. Ct., Kerr Cnty., Tex. Apr. 7, 2006).

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."). Even if Petitioner were to challenge another conviction as having been improperly enhanced based upon his 1991 convictions, that effort would likewise be foreclosed by well-settled Supreme Court precedent. *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 401 (2001) (holding that attacks on expired convictions, even when used to enhance current sentences, generally do not state a cognizable claim in § 2254 proceedings).

The Supreme Court recognized two exceptions to the foreclosure principle it announced in *Lackawanna*. The first applies to cases in which a criminal defendant was denied the assistance of counsel in violation of the fundamental constitutional principle announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Lackawanna*, 532 U.S. at 404-05. Petitioner does not make such an allegation. The second exception applies in situations in which either (1) some state action prevented the petitioner from raising or obtaining review of a federal constitutional claim or (2) newly discovered evidence (i.e., that which the petitioner could not have uncovered in a timely manner) establishes the defendant is actually innocent of the crime for which he was convicted. *Lackawanna*, 532 U.S. at 405-06. Petitioner makes no such showing in his petition or supporting memorandum.

Conclusion

Rule 4 Governing Habeas Corpus Proceedings states a habeas corpus petition may be summarily dismissed "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Because Petitioner

has not satisfied the preconditions for review set forth by § 2254, dismissal of his petition is warranted.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Petitioner's § 2254 petition (ECF No. 1) is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction;

2. Petitioner failed to make "a substantial showing of the denial of a federal right" and cannot make a substantial showing that this Court's procedural rulings are incorrect as required by Fed. R. App. P. 22 for a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, this Court **DENIES** Petitioner a certificate of appealability. *See* Rule 11(a) of the Rules Governing § 2254 Proceedings; and

3. All other remaining motions, if any, are **DENIED**, and this case is now **CLOSED**.

It is so ORDERED.

SIGNED this 25th day of March, 2019.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

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