

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-40558
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

June 19, 2020

Lyle W. Cayce
Clerk

DANIEL THOMASON SMITH,

Petitioner - Appellant

v.

WARDEN, FCI BEAUMONT,

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:18-CV-581

Before BARKSDALE, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Proceeding *pro se* and *in forma pauperis*, Daniel Thomason Smith, federal prisoner # 29163-380, contests the dismissal of his 28 U.S.C. § 2241 petition challenging his convictions and sentences for: conspiracy to commit health-care fraud, in violation of 18 U.S.C. §§ 1347 and 1349; aiding and abetting health-care fraud, in violation of 18 U.S.C. §§ 2 and 1347; aiding and abetting aggravated identity theft, in violation of 18 U.S.C. §§ 2 and 1028; and

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

aiding and abetting making false statements related to a health-care matter, in violation of 18 U.S.C. §§ 2 and 1035. The district court dismissed the § 2241 petition because Smith's claims, based on *Rosemond v. United States*, 572 U.S. 65, 67 (2014) (holding, in prosecution for aiding and abetting violation of 18 U.S.C. § 924(c), Government must prove defendant had "advance knowledge that a confederate would use or carry a gun during the crime's commission"), did not satisfy 28 U.S.C. § 2255(e)'s savings clause, discussed *infra*. (Smith also contends his conditions of confinement violate the Eighth Amendment; however, this contention "will not be considered" because it is made "for the first time on appeal". *Wilson v. Roy*, 643 F.3d 433, 435 n.1 (5th Cir. 2011) (citation omitted).)

* The dismissal of Smith's § 2241 petition is reviewed *de novo*. *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000) (citation omitted). Section "2241 is typically used to challenge the manner in which a sentence is executed". *Reyes-Requena v. United States*, 243 F.3d 893, 900–01 (5th Cir. 2001) (citation omitted). Section "2255, on the other hand, is the primary means under which a federal prisoner may collaterally attack the legality of his conviction or sentence". *Id.* at 901 (citation omitted). Under § 2255(e)'s savings clause, however, petitioner may employ § 2241 to challenge a conviction and sentence if it "appears that the remedy [under § 2255] is inadequate or ineffective to test the legality of [petitioner's] detention". 28 U.S.C. § 2255(e). Petitioner satisfies the savings clause by showing his claim: "is based on a retroactively applicable Supreme Court decision which establishes that the petitioner 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 the petitioner's trial, appeal, or first § 2255 motion". *Id.* at 904.

Smith fails both prongs. Because *Rosemond* was decided in 2014 and Smith's trial was in 2016, he "has not demonstrated that *Rosemond* applies retroactively to [his] case[]". *United States v. Nix*, 694 F. App'x 287, 288 (5th Cir. 2017) (citations omitted). Moreover, because *Rosemond* was decided in 2014, his contentions were not foreclosed or unavailable at the time of his 2016 trial, and he could have also raised them either on appeal or in a § 2255 motion. See *Reyes-Requena*, 243 F.3d at 904. Accordingly, he fails to show the court erred by dismissing his § 2241 petition.

AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

DANIEL THOMASON SMITH,

Petitioner,

versus

WARDEN, FCI BEAUMONT,

Respondent.

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CIVIL ACTION NO. 1:18-CV-581

**MEMORANDUM ORDER OVERRULING PETITIONER'S OBJECTIONS AND
ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Petitioner Daniel Thomason Smith, an inmate confined at the Federal Correctional Complex in Beaumont, Texas, proceeding *pro se*, brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

The court referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge recommends that the above-styled petition should be dismissed.

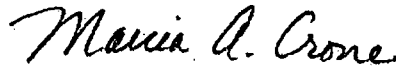
The court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record, pleadings and all available evidence. Petitioner filed objections to the magistrate judge's Report and Recommendation. This requires a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b).

After careful consideration, the court concludes petitioner's objections should be overruled. Petitioner's petition does not meet the criteria required to support a claim under the savings clause of 28 U.S.C. § 2255. *See Padilla v. United States*, 416 F.3d 424 (5th Cir. 2005); *Reyes-Requena v. United States*, 243 F.3d. 893 (5th Cir. 2001). Accordingly, the petition should be dismissed.

ORDER

Accordingly, petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation.

SIGNED at Beaumont, Texas, this 10th day of June, 2019.



MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

DANIEL THOMASON SMITH,

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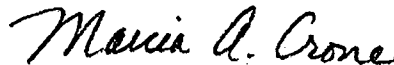
FINAL JUDGMENT

This action came on before the Court, Honorable Marcia A. Crone, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, it is

ORDERED and **ADJUDGED** that the above-styled petition for writ of habeas corpus is **DISMISSED**.

All motions by either party not previously ruled on are **DENIED**.

SIGNED at Beaumont, Texas, this 10th day of June, 2019.



MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

Appendix E

Daniel Thomason Smith's sentence, and its manner in which it is being executed, it is 'out of bounds', plainly unreasonable, and merits revocation pursuant to the double standard exemplified below.

Convicted Tuna-Fish Executive Sentenced

By DAVE SEBASTIAN

The former chief executive and president of Bumble Bee Foods LLC, was sentenced to more than three years in prison for his lead role in a conspiracy to fix prices of canned tuna, the Justice Department said.

A jury, after a four-week trial in late 2019, convicted the former executive, Christopher Lischewski, for participating in an antitrust scheme to fix canned-tuna prices in the U.S. from around November 2010 to December 2013. He had been charged in May 2018 for the case.

Mr. Lischewski was also ordered to pay a \$100,000 fine for the scheme, which affected



Bumble Bee's Christopher Lischewski was given prison time for a tuna price-fixing scheme.

more than \$600 million in canned-tuna sales, prosecutors said.

"The sentence imposed today will serve as a significant deterrent in the C-suite and the boardroom," Makan Delrahim, assistant attorney general for the department's antitrust division, said Tuesday. "Executives who cheat American consumers out of the benefits of competition will be brought to justice, particularly when their antitrust crimes affect the most basic necessity, food."

No One cares about 3.5 Million Dollars, which No One has proven Smith 'stole' from Medicare because you canNOT prove it, and I DISproven the government's Theoretical Presumption(s), Preponderance of Evidence, Circumstantial Evidence, and can 'hold' cross examination with ANY of the False Bearing Witnesses for which NO ONE ever even said a derogatory thing about me anyway, and even IF I did it, whatever it is, take a gander at this Newly pronounced verdict, and tell me why he only 'receives' 36 months?? Hmm?? Totally Out of Line for Smith. REDUCE THE SENTENCE. And that's

Mr. Lischewski on Tuesday said he denies claims of price fixing and will file an appeal. "I was found guilty of a crime I did not commit and a crime where there is no victim," he said in an opinion piece in Undercurrent News, a trade publication that covers the sea food industry.

Bumble Bee pleaded guilty for its role in a conspiracy to fix prices and was sentenced to pay a \$25 million fine, the Justice Department said. Starkist Co., another canned-products company, in September also pleaded guilty and was sentenced to pay \$100 million. The department said four executives, including Mr. Lischewski, were charged in the investigation, and three of those individuals pleaded guilty and testified in Mr. Lischewski's trial.

Bumble Bee didn't respond to requests to comment. Starkist in September 2019 said the sentencing resolved all its outstanding criminal antitrust issues. It declined to comment Wednesday.

In November 2019, Bumble Bee filed for bankruptcy protection with an agreement to sell its assets to Taiwan's FCF Fishery Co. for roughly \$925 million.

"attacking the sentence for the manner in which it is being executed". VIOLATION OF MY EIGHTH AMENDMENT RIGHT(S) EXCESSIVE SANCTION(S)

Source: Wall Street Journal
On or about June 22, 2020