IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Kamil Johnson, Petitioner, v. Warden, W.E. Mackelburg, Respondent.	)	C/A No. 0:20-176-RMG-PJG **REPORT AND RECOMMENDATION**

The petitioner, Kamil Johnson, a self-represented federal prisoner, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.). Having reviewed the Petition in accordance with applicable law, the court concludes that it should be summarily dismissed.

I. Factual and Procedural Background

Petitioner is an inmate at the Federal Correctional Institution in Estill, South Carolina. Petitioner indicates that in 2002 he was convicted in the United States District Court for the District of Minnesota of murder in aid of racketeering and aiding and abetting murder in aid of racketeering pursuant to 18 U.S.C. § 1959 and sentenced to life imprisonment. (Pet., ECF No. 1 at 2.) Petitioner unsuccessfully challenged his conviction by way of direct appeal and a motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255. United States v. Johnson, Case No. 2-cr-13-PLS-FLN, ECF Nos. 200 & 209.[1] In 2012, the United States Supreme Court held in Miller v. Alabama, 567 U.S. 460 (2012), that sentencing a juvenile to life imprisonment without parole is

[1] The court may take judicial notice of Petitioner's sentencing court records. Fusaro v. Cogan, 930 F.3d 241 n.1 (4th Cir. 2019); Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239-40 (4th Cir. 1989).

"APPENDIX A"

unconstitutional. Petitioner indicates that in 2015, based on Miller, the sentencing court resentenced him to forty-two years' imprisonment. (Pet., ECF No. 1-1 at 2-4.)

Prior to his resentencing, Petitioner sought to argue to the court that because the murder in aid of racketeering statute, 18 U.S.C. § 1959(a)(1), provides only for two punishments—death or life imprisonment—his 2015 sentence is void because it is not a punishment established by Congress. United States v. Johnson, Case No. 2-cr-13-PLS-FLN, ECF No. 307 at 3-5. Petitioner's counsel refused to raise this argument, so Petitioner made the argument in a letter to the court. Id. The sentencing court considered and rejected Petitioner's argument because (1) Petitioner was represented by counsel and could not make *pro se* motions, (2) Miller did not prohibit life sentences where parole was available, and (3) the Supreme Court remanded Miller for resentencing even though the criminal statute at issue in that case only provided for punishments of death and life imprisonment.

Petitioner also made this argument to the sentencing court in a 2016 motion pursuant to 28 U.S.C. § 2255. Id., ECF No. 313 at 12-17. The sentencing court rejected the argument because it was successive and Petitioner had not obtained authorization to raise it from the United States Court of Appeals for the Eighth Circuit. Id., ECF No. 316. The sentencing court additionally found the argument was frivolous for the three reasons stated at resentencing. Id. at 5.

Petitioner now files this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner again argues that because the murder in aid of racketeering statute, 18 U.S.C. § 1959(a)(1) provides only for two punishments—death or life imprisonment—his 2015 sentence is void because it is not a punishment established by Congress.

II. Discussion

A. Standard of Review

Under established local procedure in this judicial district, a careful review has been made of the *pro se* petition filed in this case pursuant to the Rules Governing § 2254 Cases,[2] 28 U.S.C. § 2254; the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214; and in light of the following precedents: Denton v. Hernandez, 504 U.S. 25 (1992); Neitzke v. Williams, 490 U.S. 319, 324-25 (1989); Haines v. Kerner, 404 U.S. 519 (1972); Nasim v. Warden, Md. House of Corr., 64 F.3d 951 (4th Cir. 1995) (en banc); Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983).

This court is required to liberally construe *pro se* pleadings, which are held to a less stringent standard than those drafted by attorneys. Erickson v. Pardus, 551 U.S. 89, 94 (2007); King v. Rubenstein, 825 F.3d 206, 214 (4th Cir. 2016). Nonetheless, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. See Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990); see also Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) (outlining pleading requirements under Rule 8 of the Federal Rules of Civil Procedure for "all civil actions").

B. Analysis

A petitioner cannot challenge his federal conviction and sentence through § 2241 unless he can show under the "savings clause" of § 2255(e) that a § 2255 motion is "inadequate or ineffective to test the legality of his detention." See 28 U.S.C. § 2255(e); see also Rice v. Rivera, 617 F.3d 802, 807 (4th Cir. 2010) (providing that if a federal prisoner brings a § 2241 petition that does not

[2] The Rules Governing Section 2254 are applicable to habeas actions brought under § 2241. See Rule 1(b).

fall within the scope of the savings clause, the district court must dismiss the unauthorized habeas petition for lack of jurisdiction). The United States Court of Appeals for the Fourth Circuit has held that a petitioner must establish the following criteria to demonstrate that a § 2255 motion is inadequate or ineffective to test the legality of a prisoner's sentence:

> (1) [A]t the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.

United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018).

Here, Petitioner fails to meet the test in Wheeler because instead of relying on a change in the law that occurred after he was resentenced, Petitioner raises a claim that the sentencing court rejected. See 28 U.S.C. § 2255(e) (stating that a § 2241 petition "shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, *or that such court has denied him relief*") (emphasis added); see also In re Vial, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997) ("[T]he remedy afforded by § 2255 is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provision . . . .") (internal citations omitted). Accordingly, Petitioner is unable to meet the second element of the Wheeler test. Therefore, under Fourth Circuit precedent, Petitioner is unable to establish that § 2255 is inadequate or ineffective to test the legality of his detention, and this case should be dismissed because this court lacks jurisdiction over the Petition. See Wheeler, 886 F.3d at 426 (holding that the failure to meet the requirements of the savings clause is a jurisdictional defect that may not be waived).

III. Conclusion

Accordingly, the court recommends that the Petition in the above-captioned case be dismissed without prejudice and without requiring the respondent to file a return.

Paige J. Gossett

February 24, 2020
Columbia, South Carolina

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

The parties' attention is directed to the important notice on the next page.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Kamil Johnson, Petitioner, v. Warden, W.E. Mackelburg, Respondent.	Civil Action No. 0:20-00176-RMG **ORDER AND OPINION**

Before the Court is the Report and Recommendation ("R & R") of the Magistrate Judge (Dkt. No. 9) recommending that the petition for habeas relief under 28 U.S.C. § 2241 be summarily dismissed without prejudice. For the reasons set forth below, the Court adopts the R & R as the Order of the Court to dismiss the petition without prejudice.

I. Background

Kamil Johnson ("Petitioner") is a prisoner at the Federal Correctional Institution in Estill, South Carolina. (Dkt. No. 1 at 1.) He filed the instant *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. (*Id.*) In 2002, the Minnesota district court sentenced the petitioner to life imprisonment for convictions of murder in aid of racketeering and aiding and abetting murder in aid of racketeering. (*Id.* at 2.) Petitioner unsuccessfully challenged his conviction through a direct appeal and a motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255. *See United States v. Johnson*, Case No. 2-cr-13-PLS-FLN, Dkt. Nos. 200, 209.

In 2015, the Minnesota district court resentenced him to forty-two years' imprisonment pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012); *Johnson*, Dkt. No. 307 at 29. Prior to resentencing, petitioner argued that because the murder in aid of racketeering statute 18 U.S.C. § 1959(a)(1), only sets forth two punishments for death or life imprisonment, his 2015 sentence is

"APPENDIX B"

void because it is not a punishment established by Congress. *Johnson*, Dkt. No. 307 at 2–5. The sentencing court rejected his argument because: (1) he was represented by counsel and could not make *pro se* motions; (2) *Miller* did not prohibit life sentences where parole was available; and (3) the Supreme Court remanded *Miller* for resentencing although the juvenile defendants in that case were convicted under 18 U.S.C. § 1959 (a)(1) where the only punishments were death and life imprisonment. *Id.*

In 2016, petitioner filed an additional petition for habeas relief in the Minnesota district court pursuant to 28 U.S.C. § 2255 where he restated his arguments. *Id.* Dkt. No. 313 at 12–17. The court rejected the petition as successive, concluding that petitioner failed to obtain authorization to file a successive §2255 motion from the Court of Appeals for the Eighth Circuit. *Id.* at 316. The court also noted his argument was without merit and frivolous for the reasons articulated by the sentencing court. *Id.*

Petitioner filed the instant petition for habeas relief pursuant to 28 U.S.C. § 2241, arguing that because the murder in aid of racketeering statute only sets forth two punishments, death or life imprisonment, his 2015 sentence is void because it is not a punishment established by Congress. (Dkt. No. 1 at 9–11.)

II. Legal Standard

A. Review of R & R

The Magistrate Judge makes a recommendation to the Court that has no presumptive weight and the responsibility to make a final determination remains with the Court. *See, e.g.*, *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). Where there are specific objections to the R & R, the Court "makes a *de novo* determination of those portions of the report or specified proposed findings or recommendations

to which objection is made." *Id.* In the absence of objections, the Court reviews the R & R to "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72 advisory committee's note; *see also Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983) ("In the absence of objection . . . we do not believe that it requires any explanation."). Petitioner filed objections to the R & R and the Court conducts a *de novo* review.

III. Discussion

The Court finds that the Magistrate Judge properly concluded that the § 2241 petition should be dismissed without prejudice because the Court lacks jurisdiction. "[I]t is well established that defendants convicted in federal court are obligated to seek habeas relief from their convictions and sentences through § 2255" rather than § 2241. *Rice v. Rivera*, 617 F.3d 802, 807 (4th Cir. 2010). A petitioner may nonetheless proceed under § 2241 if § 2255 is "inadequate or ineffective to test the legality of [his] detention." *In re Jones*, 226 F.3d 328, 333 (4th Cir. 2010). To demonstrate that a § 2255 petition would be inadequate or ineffective, the petitioner must establish:

> (1) at the time of conviction, settled law of [the Fourth Circuit] or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provision of § 2255 because the new rule is not one of constitutional law.

United States v. Wheeler, 886 F.3d 415, 427 (4th Cir. 2018) (emphasis supplied) (citing *In re Jones*, 226 F.3d at 333-34).

The Court carefully considered petitioner's objections to the R & R, including that the Magistrate Judge "review[ed] his claim under an improper standard." (Dkt. No. 11 at 2–3.) Upon a review of the petition, the Court finds the Magistrate Judge applied the correct standard under *Wheeler* to conclude the petitioner fails to satisfy the requirements of the savings clause. (Dkt. No.

9 at 4.) Petitioner cannot satisfy element two under the *Wheeler* standard because he does not rely on a substantive change in the law. Instead, petitioner argues that because the murder in aid of racketeering statute only sets forth two punishments, death or life imprisonment, his 2015 sentence is void because it is not a punishment established by Congress. This claim was previously rejected by the Minnesota district court that imposed his sentence. *See* 28 U.S.C. 2255 (e) (noting that a § 2241 petitioner shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief.) A failure to meet the requirements of the savings clause is a jurisdictional defect that cannot be waived. *See Wheeler*, 886 F.3d at 426. Because Petitioner does not meet the *Wheeler* §2255 savings clause factors, his § 2241 petition must be dismissed for lack of jurisdiction. *Rice v. Rivera*, 617 F.3d 802, 807 (4th Cir. 2010).

IV. Certificate of Appealability

The governing law provides:

> (c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253; *see also* Rule 1(b) Governing Section 2254 Cases in the United States District Courts ("The district court may apply any or all of these rules to a habeas corpus petition not covered by [28 U.S.C. § 2254]."). A prisoner satisfies the standard by demonstrating that reasonable jurists would find the Court's assessment of his constitutional claims debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000);

Rose v. Lee, 252 F.3d 676, 683 (4th Cir. 2001). Here, the legal standard for the issuance of a certificate of appealability has not been met. Therefore a certificate of appealability is denied.

V. Conclusion

For the foregoing reasons, the Court **ADOPTS** the R & R of the Magistrate Judge (Dkt. No. 9) as the Order of the Court, and **DISMISSMES WITHOUT PREJDICE** the petition brought under 28 U.S.C. § 2241. (Dkt. No. 1.)

AND IT IS SO ORDERED.

s/ Richard M. Gergel
Richard M. Gergel
United States District Judge

March 20, 2020
Charleston, South Carolina

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6536

KAMIL JOHNSON,

Petitioner - Appellant,

v.

WARDEN, W. E. MACKELBURG,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Richard Mark Gergel, District Judge. (0:20-cv-00176-RMG)

Submitted: August 25, 2020 Decided: August 28, 2020

Before KING and AGEE, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Kamil Johnson, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

"APPENDIX C"

PER CURIAM:

Kamil Johnson, a federal prisoner,[1] appeals the district court's order adopting the magistrate judge's recommendation and denying relief on his 28 U.S.C. § 2241 petition in which he sought to challenge his criminal judgment by way of the savings clause in 28 U.S.C. § 2255.[2] Pursuant to § 2255(e), a prisoner may challenge his conviction or sentence in a traditional writ of habeas corpus pursuant to § 2241 if a § 2255 motion would be inadequate or ineffective to test the legality of his detention.

> [Section] 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000).

> [Section] 2255 is inadequate and ineffective to test the legality of a sentence when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the

---

[1] As a federal prisoner, Johnson need not obtain a certificate of appealability to appeal the district court's order. 28 U.S.C. § 2253(c)(1).

[2] Insofar as Johnson also made passing references to the All Writs Act, 28 U.S.C. § 1651(a), that statute does not provide a colorable vehicle for Johnson's claims. *See Carlisle v. United States*, 517 U.S. 416, 429 (1996) ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." (internal quotation marks omitted)); *United States v. Swaby*, 855 F.3d 233, 238 (4th Cir. 2017) (discussing availability of remedy); *United States v. Torres*, 282 F.3d 1241, 1245 & n.6 (10th Cir. 2002) (same).

> sentence now presents an error sufficiently grave to be deemed a fundamental defect.

United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018).

We have reviewed the record and find no reversible error, as Johnson can satisfy neither the *Jones* test nor the *Wheeler* test. Accordingly, we affirm substantially for the reasons stated by the district court. *Johnson v. Mackelburg*, No. 0:20-cv-00176-RMG (D.S.C. Mar. 20, 2020). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: November 12, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6536
(0:20-cv-00176-RMG)

KAMIL JOHNSON

Petitioner - Appellant

v.

WARDEN, W. E. MACKELBURG

Respondent - Appellee

MANDATE

The judgment of this court, entered August 28, 2020, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

11 APPENDIX D 11

FILED: November 3, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6536
(0:20-cv-00176-RMG)

KAMIL JOHNSON

Petitioner - Appellant

v.

WARDEN, W. E. MACKELBURG

Respondent - Appellee

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

"APPENDIX E"