United States Court of Appeals
For the First Circuit

No. 20-1256

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WALTER HIMMELREICH,

Petitioner - Appellant,

v.

STEPHEN SPAULDING, Warden, FMC Devens,

Respondent - Appellee.

Before

Howard, Chief Judge,
Thompson and Barron, Circuit Judges.

JUDGMENT

Entered: January 21, 2021

Appellant Walter Himmelreich appeals from the denial of his petition, brought under 28 U.S.C. § 2241 and the "savings clause" at 28 U.S.C. § 2255(e). The district court concluded that the claims pressed by appellant were not of the sort allowing for resort to the "savings clause" and § 2241. See generally Trenkler v. United States, 536 F.3d 85 (1st Cir. 2008) (discussing "savings clause" and related principles). Appellee has moved for summary disposition. With his brief and with his response to the motion for summary disposition, appellant makes no compelling developed argument for reversible error.

Appellee's motion for summary disposition is hereby **GRANTED**. The judgment of the district court is summarily **AFFIRMED**. See Local Rule 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc: Walter Himmelreich, Donald Campbell Lockhart

Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 19-40152-RGS

WALTER HIMMELREICH,
Petitioner

v.

WARDEN, FMC DEVENS
Respondent

MEMORANDUM AND ORDER ON
DEFENDANT'S MOTION FOR RECONSIDERATION

January 7, 2020

STEARNS, D.J.

The motion for reconsideration is DENIED.[1] Petitioner, Walter Himmelreich, has succumbed to the common confusion of the doctrine of legal innocence with that of factual innocence. The difference is not, as Himmelreich would have it, a mere "technical issue," but one that is fundamental to a correct understanding of habeas corpus law. As the Supreme Court explained in *Bousley v. United States*, 523 U.S. 614, 623-624 (1998), "[t]o establish actual innocence, petitioner must demonstrate that, 'in light of all the evidence,' 'it is more likely than not that no reasonable juror

[1] The motion is styled as a Motion to Alter or Amend Judgment.

would have convicted him' . . . [and] that 'actual innocence' means factual innocence, not mere legal insufficiency." *Id.* (internal citations omitted). *See also Wooten v. Cauley*, 677 F.3d 303, 307-308 (6th Cir. 2012). As the court previously explained, the First Circuit is firmly of the view that the Savings Clause to section 2255 may be properly invoked only in instances where a prisoner is claiming actual innocence, either factual or because a subsequent reinterpretation of law would have precluded the original finding of guilt, or where the prisoner was denied an unobstructed procedural opportunity to press his claim of innocence, none of which apply in Himmelreich's case. *See United States v. Barrett*, 178 F.3d 34, 52 (1st Cir. 1999) (noting with respect the intent of Congress "to streamline collateral review" and applying the *Bousley* limitation to petitions invoking the Savings Clause).[2]

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE

[2] In any event, Himmelreich is mistaken in his claim of legal innocence, namely that "the District Court at his Sentencing never found a specific date" on which petitioner's crime occurred. The exact date of an offense is not an essential element of federal crimes in general nor of the crime of which petitioner was convicted. *See, e.g., United States v. Escobar-De Jesus*, 187 F.3d 148, 168 (1st Cir. 1999).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Walter Himmelreich

Plaintiff

v. Civil Action No. 4:19-40152-RGS

Stephen Spaulding

Defendant

ORDER OF DISMISSAL

December 2, 2019

STEARNS, D.J.

In accordance with the Court's Memorandum and Order [Dkt # 5] issued on December 2, 2019, denying the petitioner's writ of habeas corpus, it is ORDERED that the above-entitled action be, and hereby is, dismissed.

By the Court,

/s/ Arnold Pacho
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 19-40152-RGS

WALTER HIMMELREICH

v.

STEPHEN SPAULDING, WARDEN

MEMORANDUM AND ORDER

December 2, 2019

On November 26, 2019, Walter Himmelreich, an inmate in custody at FMC Devens, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241. With the petition, he filed a motion proceed *in forma pauperis*. For the reasons stated below, the motion to proceed *in forma pauperis* is granted and the section 2241 petition is denied.

BACKGROUND

In 2006, Walter Himmelreich pled guilty in Middle District of Pennsylvania to a count of producing child pornography in violation of 18 U.S.C. § 2251(b) and his conviction and sentence was affirmed in 2008. *United States v. Himmelreich*, 265 Fed.Appx. 100 (3d Cir. 2008). He previously submitted petitions for a writ of habeas corpus in the Middle District of Pennsylvania, Northern District of Ohio, District of Connecticut and Court of Appeals for the Third and Sixth Circuits. *See Himmelreich v.*

United States, No. 09-cv-620 (YK), 2010 WL 4181450 (M.D. Pa. Oct. 20, 2010) (denying section 2255 petition), *aff'd*, 363 F. App'x 175 (3d Cir.) (per curiam), *cert. denied*, 131 S. Ct. 240 (2010); Order denying Certificate of Appealability, *United States v. Himmelreich*, No. 10-4720 (3d Cir. July 21, 2011) (summary order); Order denying App. For Leave to File Successive § 2255 Petition, *In Re: Walter J. Himmelreich*, No. 13-1133 (3d Cir. Mar. 12, 2013) (doc. 4), *reh'g denied*, No. 13-1133 (3d Cir. Apr. 10, 2013); *see also Mem. Of Decision & Order, Himmelreich v. Shartle*, No. 4:08-cv-1306 (JG) (N.D. Ohio June 18, 2008) (doc. 6) (denying section 2241 Petition), *aff'd*, No. 08-4193 (6th Cir. June 2, 2011); Mem. & Order, *Himmelreich v. Shartle*, No. 4:09-cv-560 (JG) (N.D. Ohio May 12, 2009) (doc. 10) (denying second section 2241 Petition); Order, *Himmelreich v. Warden FCI Danbury*, No. 3:14-cv-00930-SRU (D. Conn. Nov. 6, 2014) (doc. 10) (dismissing section 2241 Petition without prejudice to filing an application for leave to file a successive petition), *denying recons.*, Apr. 24, 2015 (doc. 15), *appeal dismissed*, No. 15-1539 (2d Cir. Aug. 11, 2015).

STANDARD OF REVIEW

A federal prisoner wishing to collaterally challenge the validity of his sentence generally must do so by filing a petition pursuant to 28 U.S.C. § 2255 in the federal court that imposed his sentence. 28 U.S.C. § 2255(a).

Section 2255 "encompasses claims [in which] 'the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.'" *Gonzalez v. United States*, 150 F.Supp.2d 236, 241 (D. Mass. 2001) (quoting *Jiminian v. Nash*, 245 F.3d 144, 147-48 (2d Cir. 2001); see 28 U.S.C. § 2255.

To preserve the finality of criminal convictions, Section 2255 relief is controlled by a gatekeeping mechanism pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254 et seq. *United States v. Barrett*, 178 F.3d 34, 38 (1st Cir. 1999). Because post-AEDPA Section 2255 requires an inmate to file in the court of conviction – here the Middle District of Pennsylvania - the intended result is to relieve the crushing load on courts in districts where federal prisons happen to be located. Moreover, under AEDPA, a prisoner bringing a second or successive habeas petition is required to obtain a COA authorizing a district court to consider the application. *Ellis v. United States*, 446 F.Supp.2d 1, 3 (D. Mass. 2006). Under AEDPA:

> a prisoner may file a second or successive § 2255 petition only if the court of appeals first certifies that the petition is based on either: (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.

Barrett, 178 F.3d at 40-41 (quoting 28 U.S.C. § 2255).

Under 28 U.S.C. § 2241, in certain circumstances, this court may entertain habeas petitions filed by individuals who were sentenced in other federal courts, but who are incarcerated in facilities located within Massachusetts. *Barrett*, 178 F.3d at 49-50 & n.10 (1st Cir. 1999). This is so where a petitioner challenges the execution of his sentence, or where he demonstrates "that the remedy [available] by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e) (often referred to as the savings clause).

The savings clause, however, applies only when the procedures of Section 2255 are "inadequate or ineffective to test the legality of [an inmate's] detention." Obviously, if a petition is based on a claim of newly discovered evidence or a new rule of constitutional law, the explicit exceptions set in Section 2255 apply and therefore Section 2255 by definition is not inadequate. Recourse to the savings clause has only been permitted in "rare and exceptional circumstances, such as those in which strict adherence to AEDPA's gatekeeping provisions would result in a 'complete miscarriage of justice[.]'" *Trenkler v. United States*, 536 F.3d 85, 99 (1st Cir. 2008)

(quoting *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997)). "[The First Circuit] has recognized that the savings clause is most often used in situations where a retroactive Supreme Court decision as to the meaning of a criminal statute would mean that a prisoner was not guilty of the crime of which he was convicted." *United States v. Almenas*, 52 F.Supp.3d 341, 345 (D. Mass. 2014).

"The remedy in section 2255 does not become 'inadequate or ineffective' simply by virtue of the fact that the prisoner is not able to meet the gate-keeping requirements for second or successive petitions." *Henderson v. Grondolsky*, No. 17-10451-JGD, 370 F.Supp.3d 186, 194 (D. Mass. 2019) (citing *Hernandez-Albino v. Haynes*, 368 F. App'x 156 (1st Cir. 2010). "[P]ost-conviction relief can be termed 'inadequate' or 'ineffective' only when, in a particular case, the configuration of section 2255 is such 'as to deny a convicted defendant any opportunity for judicial rectification.'" *Trenkler* at 99 (citations omitted).

DISCUSSION

Here Himmelreich is not arguing actual innocence. Quite the opposite, he claims (1) a denial of equal protection based on his membership in a politically unpopular group, namely criminals, (2) that the sex offender registration and lifetime supervised release components of his sentence are

unconstitutional, and (3) that in light of the post-commitment *Booker* decision he should have been given a lesser sentence under the Guidelines in lieu of the statutory mandatory minimum of 20 years.

Himmelreich raised many of these issues in petitions that have been adjudicated on the merits. He has not shown that his remedy under Section 2255 is inadequate or ineffective and under any formulation his claims do not qualify for the extraordinary relief provided by the savings clause of Section 2255. As a result, this Court may not entertain the proposed challenges to his sentence.

ORDER

Accordingly, it is hereby Ordered that:

1. Petitioner's motion [Docket Entry No. 2] for leave to proceed *in forma pauperis* is GRANTED.

2. The petition for a writ of habeas corpus under 28 U.S.C. § 2241 is DENIED.

3. The Clerk shall enter a separate order of dismissal.

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE