

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution: "No person shall be... compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law."

The Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall... have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution: "No State shall... deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

18 USC §2510(4): "'intercept' means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."

18 USC §2510(12): "'electronic communication' means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce."

18 USC §2511(2)(c): "It shall not be unlawful under this chapter [18 USC §§2510 et seq] for a person acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication."

18 USC §2518(8)(a): "The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter [18 USC §§2510 et seq] shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such was as will protect the recording from editing or other alterations."

28 USC §2241(a): "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

28 USC §2244(a): "No circuit or district judge shall be required to entertain

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
(CONTINUED)

an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in [28 USC] §2255."

28 USC §2244(b)(1): "A claim presented in a second or successive habeas corpus application under [28 USC] §2254 that was presented in a prior application shall be dismissed."

28 USC §2244(b)(2): "A claim presented in a second or successive habeas corpus application under [28 USC] §2254 that was not presented in a prior application shall be dismissed unless —

- (A) the applicant shows that the claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
- (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

28 USC §2244(b)(3)(A): "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

28 USC §2255(a): "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the sentence... is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
(CONTINUED)

28 USC §2255(e): "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section [28 USC §2255], 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, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

28 USC §2255(h): "A second or successive motion must be certified as provided in [28 USC] §2244 by a panel of the appropriate court of appeals to contain (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."

United States Court of Appeals
for the Fifth Circuit

No. 21-10961
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

August 25, 2022

Lyle W. Cayce
Clerk

ADELBERT H. WARNER, II,

Petitioner—Appellant,

versus

K. ZOOK, *Warden, FCI Seagoville,*

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:21-CV-1473

Before HIGGINBOTHAM, DUNCAN and WILSON, *Circuit Judges.*

PER CURIAM:*

Adelbert H. Warner, II, federal prisoner # 13604-040, seeks to proceed in forma pauperis (IFP) in this appeal from the denial of his 28 U.S.C. § 2241 petition. In doing so, he challenges the district court's certification that the appeal was not taken in good faith. *See Baugh v. Taylor,*

* Pursuant to 5TH CIRCUIT RULE 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 CIRCUIT RULE 47.5.4.

No. 21-10961

117 F.3d 197, 202 (5th Cir. 1997); 28 U.S.C. § 1915(a)(3). To obtain IFP status, Warner must show not only that he is a pauper but also that his appeal raises a nonfrivolous issue. *See Carson v. Polley*, 689 F.2d 562, 586 (5th Cir. 1982); *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983).

Warner's § 2241 petition attacks his convictions for producing and distributing child pornography, which he previously challenged without success under 28 U.S.C. § 2255. To attack a conviction or sentence under § 2241, a federal prisoner must satisfy the savings clause of § 2255(e) by showing the inadequacy or ineffectiveness of the § 2255 remedy. *Reyes-Requena v. United States*, 243 F.3d 893, 900–01 (5th Cir. 2001). A prisoner makes this showing if he demonstrates that his petition raises a claim previously foreclosed by circuit law and based on a retroactively applicable Supreme Court decision establishing that he may have been convicted of a nonexistent offense. *Id.* at 904.

In Warner's view, the savings-clause test does not apply here because he asserts actual innocence. But the cases he cites do not establish, and this court has not held, that innocence provides an independent gateway for review of claims presented in a § 2241 petition. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Schlup v. Delo*, 513 U.S. 298, 315 (1995). Warner also does not suggest that he can make the requisite showing under the savings clause. *See Reyes-Requena*, 243 F.3d at 904.

Accordingly, Warner fails to demonstrate that his appeal involves legal points of arguable merit. *See Howard*, 707 F.2d at 220. Accordingly, his motion to proceed IFP is DENIED, and the appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 202 & n.24; 5TH CIR. R. 42.2. Warner's motions to supplement his brief are DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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Suite 115
NEW ORLEANS, LA 70130

August 25, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 21-10961 Warner v. Zook
 USDC No. 3:21-CV-1473

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, and advise them of the time limits for filing for rehearing and certiorari. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By: Whitney M. Jett, Deputy Clerk

Enclosure(s)

Mr. Adelbert H. Warner II

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ADELBERT H. WARNER, II,
BOP Register No. 13604-040,

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Petitioner,

V.

No. 3:21-cv-1473-M

K. ZOOK, Warden, FCI Seagoville,

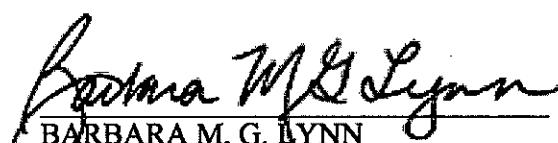
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Respondent.

**ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

The United States Magistrate Judge made Findings, Conclusions, and a Recommendation in this case. Objections were filed [ECF 6]. The District Court reviewed *de novo* those portions of the proposed Findings, Conclusions, and Recommendation to which objection was made, and reviewed the remaining proposed Findings, Conclusions, and Recommendation for plain error. Finding no error, the Court ACCEPTS the Findings, Conclusions, and Recommendation of the United States Magistrate Judge.

SO ORDERED this 10th day of September, 2021.


BARBARA M. G. LYNN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ADELBERT H. WARNER, II,
BOP Register No. 13604-040,

Petitioner,

V.

K. ZOOK, Warden, FCI Seagoville,

Respondent.

No. 3:21-cv-1473-M-BN

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE**

Petitioner Adelbert H. Warner, II, a federal prisoner incarcerated in this district, “pled guilty to a two-count indictment charging him with the production of child pornography, in violation of 18 U.S.C. §§ 2251(a) and (e), and distribution of child pornography in violation of 18 U.S.C. §§ 2252A(a)(1) and (b)(1),” and he was sentenced “to 360 months on count one and 240 months on count two, to be served concurrently.” *United States v. Warner*, 399 F. App’x 88, 89 (6th Cir. 2010) (affirming the criminal judgment).

Warner unsuccessfully challenged his convictions and sentences under 28 U.S.C. § 2255. See *United States v. Warner*, No. 1:08-cr-63, 2013 WL 12343704 (W.D. Mich. Feb. 8, 2013), *reconsideration denied*, 2013 WL 12343705 (W.D. Mich. Mar. 14, 2013).

Now, through an amended *pro se* petition [Dkt. No. 4], Warner raises challenges to his convictions and sentences under 28 U.S.C. § 2241, asserting that he is actually innocent. And Chief Judge Barbara M. G. Lynn referred this habeas action

to the undersigned United States magistrate judge under 28 U.S.C. § 636(b) and a standing order of reference.

Generally, if a prisoner has challenged his conviction with a failed § 2255 motion, he doesn't get a second bite at the apple under § 2241. *See Santillana v. Upton*, 846 F.3d 779, 781-83 (5th Cir. 2017). In fact, a prisoner generally can't use § 2241 to challenge his conviction.

But there's an exception: Under § 2255(e)'s "savings clause," *id.*, a prisoner can use § 2241 to challenge his conviction if § 2255 "is inadequate or ineffective to test the legality of his detention." And § 2255 is "inadequate or ineffective" if "(1) the § 2241 petition raises a claim that is based on a retroactively applicable [United States] Supreme Court decision; (2) the claim was previously foreclosed by circuit law ... and (3) that retroactively applicable decision establishes that the petitioner may have been convicted of a nonexistent offense." *Santillana*, 846 F.3d at 782 (cleaned up). "The petitioner bears the burden" of "com[ing] forward with evidence showing each element of [that] test." *Garland v. Roy*, 615 F.3d 391, 394 (5th Cir. 2010) (cleaned up).

Abram v. McConnell, 3 F.4th 783, 785 (5th Cir. 2021).

Reframing these elements to fit an explicit assertion of actual innocence, the United States Court of Appeals for the Fifth Circuit has held that "a prisoner who wishes to proceed under the savings clause must make a showing of both actual innocence and retroactivity" by demonstrating that "his claim (1) 'is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense' and (2) '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.'" *Wilson v. Roy*, 643 F.3d 433, 435 (5th Cir. 2011) (quoting *Reyes-Querena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); citation omitted).

Here, Warner has not carried his burden to show each element of this circuit's

standard to invoke the savings clause. For example, he fails to identify a retroactively applicable Supreme Court decision. And, absent the savings clause, the Court is without jurisdiction to consider Warner's Section 2241 petition attacking his underlying convictions and sentences. *See, e.g., Carter v. Blackmon*, 732 F. App'x 268, 270 (5th Cir. 2018) (per curiam) ("Although the district court did not address its jurisdiction under the savings clause, we are required to examine it. Carter has failed to show that he was actually innocent of the crime of conviction, and he is not entitled to use the savings clause of § 2255 to challenge his sentence by petitioning under § 2241. Because Carter failed to meet the savings-clause standard and was convicted and sentenced in the Eastern District of Missouri, the district court for the Southern District of Mississippi lacked jurisdiction to consider his *Johnson* and *Mathis* claims." (citations omitted)).

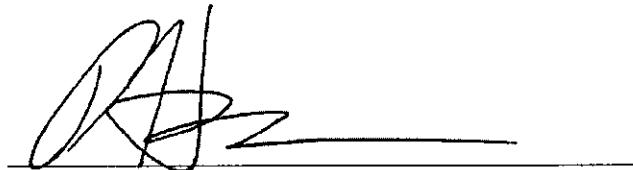
Recommendation

The Court should dismiss the amended 28 U.S.C. § 2241 petition for lack of jurisdiction.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation

where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: August 18, 2021



DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

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