UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6647

JESSIE TRAYLOR,

Petitioner - Appellant,

v.

STEVIE KNIGHT, Warden; MELISSA FORSYTH, Camp Administrator,

Respondents - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Bruce H. Hendricks, District Judge. (0:21-cv-00150-BHH)

Submitted: December 16, 2022 Decided: January 23, 2023

Before QUATTLEBAUM and HEYTENS, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Jessie Traylor, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jessie Traylor, a federal prisoner, appeals the district court's orders accepting the recommendation of the magistrate judge and denying relief on Traylor's 28 U.S.C. § 2241 petition in which Traylor sought to challenge his sentence by way of the savings clause in 28 U.S.C. § 2255, and denying reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's orders. 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

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

Jessie Traylor, Petitioner, v. Stevie Knight, *Warden*; Melissa Forsyth, *Camp Administrator*, Respondents.	Civil Action No. 0:21-cv-150-BHH **ORDER**

This matter is before the Court on Petitioner Jessie Traylor's pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. On April 15, 2021, Respondents filed a motion to dismiss, to which Petitioner filed a response in opposition. In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(d) (D.S.C.), the matter was referred to a United States Magistrate Judge for initial review.

On May 7, 2021, Magistrate Judge Paige J. Gossett filed a Report and Recommendation ("Report") outlining the issues and recommending that the Court grant Respondents' motion to dismiss in large part based on the Fourth Circuit's decision in *United States v. Surratt*, 855 F.3d 218 (4th Cir. 2017), where the court held that the President's commutation of a federal prisoner's mandatory life sentence to a term of 200 months' imprisonment rendered moot the prisoner's appeal in an action challenging the original mandatory life sentence.

Petitioner filed objections to the Magistrate Judge's Report, arguing that the cases relied upon by the Magistrate Judge do not involve alleged intervening changes in controlling law and that *Surratt* does not control the outcome of his case. Petitioner asserts

that he is seeking relief based on new statutory authority and he objects to the Magistrate Judge's conclusion that the Court lacks jurisdiction to consider his claim.

After review, the Court is not persuaded by Petitioner's objections, and the Court agrees with the Magistrate Judge that, pursuant to *Surratt*, the Court is without jurisdiction to address Petitioner's habeas corpus application. In *Surratt*, Surratt received a mandatory life sentence for his drug-trafficking conspiracy conviction based on four prior drug convictions, which, at the time, qualified as enhancing predicates. After Surratt's conviction became final and after his first § 2255 motion was rejected, the Fourth Circuit overruled the precedent under which Surratt's prior convictions qualified as enhancing predicates triggering a mandatory life sentence. *See United States v. Simmons*, 649 F.3d 237 (4 th Cir. 2011) (en banc). Surratt then filed a habeas corpus petitioner pursuant to § 2241, and while that petition was pending the President of the United States commuted his life sentence to a term of 200 months' imprisonment. Ultimately, the Fourth Circuit held that the Presidential commutation of Surratt's sentence rendered his petition moot, with the majority concluding that the court could not disturb Surratt's presidentially commuted sentence based on a claim that Surratt was improperly subjected to a mandatory minimum life sentence at his original sentencing. *Surratt*, 855 F.3d at 219. As Judge Wilkinson explained in his concurring opinion, "[a]bsent some constitutional infirmity in the commutation order, which is not present here, we may not readjust or rescind what the President, in the exercise of his pardon power, has done." *Id.*

Here, similar to *Surratt*, Petitioner challenges his original sentence because one of the prior convictions used to enhance his sentence under former 21 U.S.C. § 841 no longer qualifies as a predicate offense. As the Magistrate Judge explained, however, on January

17, 2017, the President of the United States commuted Petitioner's total sentence to a term of 240 months' imprisonment. *Traylor*, 2:08-cr-20036 (C.D. Ill. Dkt. No. 147). Thus, Petitioner is "no longer serving a judicially imposed sentence, but a presidentially commuted one." *Surratt*, 855 F.3d at 220 (Wilkinson, J., concurring). Ultimately, therefore, as in *Surratt*, the President's commutation renders moot Petitioner's claim that his original sentence is unlawful, and this Court lacks jurisdiction to consider Petitioner's claim. *See also Blount v. Clarke*, 890 F.3d 456, 462-63 (4th Cir. 2018) (finding that the district court erred as a matter of law in failing to apply *Surratt* and by failing to conclude that it lacked jurisdiction to consider Blount's habeas corpus application); and *Holmes v. United States*, No. 9:04-cr-429, 2019 WL 4689237, *2 (D.S.C. Sept. 26, 2019) (finding a § 2255 motion moot due to a presidential commutation and explaining that the court "was not free to decline to follow *Surratt*"). Accordingly, it is hereby

ORDERED that the Magistrate Judge's Report (ECF No. 16) is adopted and specifically incorporated; Petitioner's objections (ECF No. 18) are overruled; Respondents' motion to dismiss (ECF No. 10) is granted; and this action is dismissed without prejudice.

IT IS SO ORDERED.

/s/Bruce H. Hendricks
The Honorable Bruce Howe Hendricks

November 17, 2021
Charleston, South Carolina

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

Jessie Traylor, Petitioner, v. Stevie Knight, *Warden*; Melissa Forsyth, *Camp Administrator*, Respondents.	)	C/A No. 0:21-150-BHH-PJG **REPORT AND RECOMMENDATION**

Petitioner Jessie Traylor, a self-represented federal prisoner, filed this habeas corpus action pursuant to 28 U.S.C. § 2241. This matter is before the court pursuant to 28 U.S.C. § 636 and Local Rule 73.02(B)(2) (D.S.C.) for a Report and Recommendation on Respondents' motion to dismiss. (ECF No. 10.) Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), the court advised Petitioner of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to Respondents' motion. (ECF No. 11.) Petitioner filed a response in opposition. (ECF No. 14.) Having carefully considered the parties' submissions and the record in this case, the court concludes Respondents' motion should be granted.

BACKGROUND

The following allegations are taken as true for purposes of resolving Respondents' motion to dismiss. Petitioner was convicted in the United States District Court for the Central District of Illinois of conspiracy to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A) and other drug charges. United States v. Taylor, Cr. No. 2:08-cr-20036. (C.D. Ill.). At that time, a person convicted of distribution of five kilograms or more of cocaine after two or more prior convictions for a felony drug offense had become final was subject to a mandatory term of life imprisonment without release. 21 U.S.C. § 841(b)(1)(A) (eff. Apr. 15,

2009 to Aug. 2, 2010). Petitioner had two such prior convictions—a 1999 Illinois conviction for unlawful possession of a controlled substance near a school and a 2006 Illinois conviction for possession of cocaine. Accordingly, the court sentenced Petitioner to life imprisonment on the conspiracy to distribute charge. For the other charges, Petitioner was sentenced to one term of thirty years' imprisonment and two terms of four years' imprisonment.

The United States Court of Appeals for the Seventh Circuit affirmed Petitioner's convictions and sentences. United States v. Traylor, 405 F. App'x 73 (7th Cir. 2011). Petitioner then filed a motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255 that was denied by the sentencing court. However, on January 17, 2017, the President of the United States commuted Petitioner's total sentence to a term of 240 months' imprisonment. Traylor, 2:08-cr-20036 (C.D. Ill. Dkt. No. 147.) Subsequently, Petitioner filed a motion for home confinement and a motion for compassionate release that were denied by the sentencing court.

Petitioner now files this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 pursuant to United States v. Wheeler, 886 F.3d 415 (4th Cir. 2018). Petitioner argues that his sentence should be vacated because one of his Illinois convictions used to enhance his sentence under 21 U.S.C. § 841 no longer qualifies as a predicate offense in the Seventh Circuit. See United States v. De La Torre, 940 F.3d 938, 949 (7th Cir. 2019) (finding that use of an Illinois conviction for felony unlawful possession of a controlled substance to enhance a § 841 sentence affected De La Torre's substantial rights and required the plea agreement be set aside). Therefore, Petitioner argues, his sentence was unlawfully enhanced to life imprisonment under the former § 841(b)(1)(A) and he should be resentenced in light of this change in controlling law.

DISCUSSION

A. Rule 12(b)(6) Standard[1]

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) examines the legal sufficiency of the facts alleged on the face of the petition. Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999). To survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A petition "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). When considering a motion to dismiss, the court must accept as true all of the factual allegations contained in the petition. Erickson v. Pardus, 551 U.S. 89, 94 (2007). The court may also consider documents attached to the petition, see Fed. R. Civ. P. 10(c), or to the motion to dismiss, if they are integral to the petition and authentic. Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (citing Blankenship v. Manchin, 471 F.3d 523, 526 n.1 (4th Cir. 2006)).

Further, while the federal court is charged with liberally construing a petition filed by a *pro se* litigant to allow the development of a potentially meritorious case, see, e.g., Erickson, 551 U.S. 89, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990).

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[1] The Federal Rules of Civil Procedure apply to petitions for a writ of habeas corpus to the extent the rules are not contradicted by federal statute or previous practice in habeas proceedings. Fed. R. Civ. P. 81(a)(4).

B. Respondents' Motion to Dismiss

Respondents argue the presidential commutation of Petitioner's sentence renders this action moot under Fourth Circuit precedent. The court agrees.

In United States v. Surratt, the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, held that the President's commutation of a federal prisoner's mandatory life sentence rendered moot the prisoner's appeal in an action challenging his original mandatory life sentence. 855 F.3d 218 (4th Cir. 2017). The Fourth Circuit dismissed Surratt's appeal by published order of Chief Judge Roger L. Gregory but the order did not include a written, legal explanation as to why the appeal was moot. Writing in concurrence, Judge J. Harvie Wilkinson, III stated that Surratt is "no longer serving a judicially imposed sentence, but a presidentially commuted one." Surratt, 855 F.3d at 220 (Wilkinson, J., concurring).[2] The reasoning of Judge Wilkinson's concurrence has since been reaffirmed by the Fourth Circuit and district courts in this circuit. See Blount v. Clarke, 890 F.3d 456, 463 (4th Cir. 2018) (reversing the district court for adopting the reasoning of Judge Wynn's dissent rather than applying Judge Wilkinson's concurrence in reviewing a state sentence shortened by a governor's pardon); see also Holmes v. United States, CR No. 9:04-CR-0429, 2019 WL 4689237, at *2 (D.S.C. Sept. 26, 2019) (applying Surratt and Blount to find that the petitioner's § 2255 motion was mooted by a presidential commutation of the petitioner's sentence); United States v. Harris, Criminal No. 3:06CR61, 2018 WL 5831256, at *2 (E.D. Va.

[2] Judge James A. Wynn, Jr. dissented, stating that because Surratt continued to serve a portion of the sentence that was not commuted, his challenge to that sentence was not moot. Surratt, 855 F.3d at 220-33; see also Dennis v. Terris, 927 F.3d 955, 959 (6th Cir. 2019) (rejecting Surratt and holding that a commuted sentence continues to be subject to judicial scrutiny with respect to the portion of the sentence that has not been commuted), cert. denied, 140 S. Ct. 2571 (2020).

Nov. 6, 2018) (same); Taylor v. United States, No. 5:06-CR-279-D, 2018 WL 2016301, at *1 (E.D.N.C. Apr. 28, 2018) (applying Surratt).

Here, Petitioner argues his mandatory life sentence under the former § 841(b)(1)(A) is unlawful because of an intervening change in the case law retroactive on collateral review. But, Petitioner is no longer serving a life sentence imposed by the court. Instead, he is serving a sentence commuted by the President. See Surratt, 855 F.3d at 219 (Wilkinson, J., concurring) ("The President's commutation order simply closes the judicial door. Absent some constitutional infirmity in the commutation order, which is not present here, we may not readjust or rescind what the President, in the exercise of his pardon power, has done."). Therefore, the court is without jurisdiction to consider Petitioner's claim that his sentence is unlawful. See Blount, 890 F.3d at 462-63 (finding the district court erred as a matter of law in failing to apply Surratt because the court was without jurisdiction to opine on the constitutionality of the petitioner's original sentence in light of the Governor's pardon).

RECOMMENDATION

Based on the foregoing, the court recommends Respondents' motion to dismiss (ECF No. 10) be granted and the Petition be dismissed without prejudice.

Paige J. Gossett

May 7, 2021
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).