

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Bobby Richardson

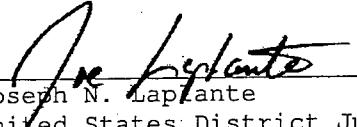
v.

Case No. 20-cv-1134-JL

FCI Berlin, Warden

ORDER

After due consideration of the objection filed, I herewith
approve the Report and Recommendation of Magistrate Judge Andrea
K. Johnstone dated June 24, 2021.



Joseph N. Lapiante

United States District Judge

Date: July 29, 2021

cc: Bobby Richardson, pro se

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Bobby Richardson

v.

Case No. 20-cv-1134-JL

Robert Hazlewood, Warden, FCI-Berlin

REPORT AND RECOMMENDATION

Bobby Richardson, an inmate at the Federal Correctional Institution in Berlin, New Hampshire ("FCI-Berlin"), has filed a petition for a writ of habeas corpus (Doc. No. 1) pursuant to 28 U.S.C. § 2241, challenging his conviction on a heroin distribution charge in the Eastern District of Virginia in United States v. Richardson, No. 3:09-CR-15-JAG-1 (E.D. Va.).

Along with his original petition, Mr. Richardson has filed three documents, entitled, "Emergency Motion to Expedite" (Doc. No. 2), "Motion to Dismiss" (Doc. No. 5), and "Motion for Judicial Notice" (Doc. No. 6), which this court has construed as addenda to the petition, to the extent those filings clarify the nature of Mr. Richardson's claims. The petition and those addenda are before this court to determine whether the claims asserted in

those filings are facially valid and may proceed. See 28 U.S.C. § 2243; LR 4.3(d)(4)(A); Rule 4 of the Rules Governing Section 2254 Cases ("§ 2254 Rules"); see also § 2254 Rule 1(b) (allowing application of § 2254 Rules to any habeas corpus petition). The

counts of forging currency (Counts 4-9). See United States v. Richardson, 442 F. App'x 37, 37 (4th Cir. 2011). The district court sentenced petitioner to 288 months imprisonment each on Counts 1-3 and 240 months imprisonment each on Counts 4-9 and further directed that all of those sentences be served concurrently. See id. The Fourth Circuit affirmed. See id. at 38-39.

Prior to trial, Mr. Richardson filed a motion to suppress evidence derived from the search of his business premises, which was denied after a hearing. At the hearing on that motion, and at the ensuing criminal trial, Petersburg Police Department ("PPD") officers testified that in the morning on August 6, 2008, before Mr. Richardson's arrest, a CI (nicknamed "Franklin") made a controlled buy of heroin from Mr. Richardson. The CI testified that he gave Mr. Richardson \$500.00 for the heroin, which the officers had previously given to him for the controlled buy, and the officers testified that they recovered the same bills provided to the CI from Mr. Richardson upon his arrest. As grounds for finding Mr. Richardson guilty of heroin distribution, the prosecutor's summation at trial cited the recovered funds, the officers' and CI's trial testimony about the controlled buy, and statements made by Mr. Richardson in a recorded, post-arrest phone call ("Franklin came to see [me]. And he bought \$500."), which the government argued was an

Mr. Richardson asserts that government agents fabricated the evidence underlying the heroin distribution charge, and then covered it up by redacting the PPD case numbers from the reports they generated. Mr. Richardson claims that those redactions obscured the absence of contemporaneous police reports regarding the alleged morning controlled-buy and also concealed the existence of a police log entry post-dating his arrest which had been marked with the same PPD case number as the lab certification of the heroin at issue. Mr. Richardson argues that the timing of that log entry (nine hours after his arrest) is evidence of both the officers' perjury about the sequence of events and his innocence, as he was in custody at the logged time and therefore could not have been selling the heroin to a CI, since the heroin must have come into police custody at the logged, post-arrest time. Mr. Richardson asserts that his conviction on Count 2, for heroin distribution, violated his Fifth and Sixth Amendment rights, because, he argues, officers had to have falsified the evidence that they used to frame and convict him, and because his trial counsel failed to provide him with effective representation.

The instant § 2241 petition (which is Mr. Richardson's second such petition) is the latest in a series of motions, applications, and petitions he has filed, raising essentially the same arguments and claims of innocence derived from the

file more than one § 2255 motion. See, e.g., 28 U.S.C. §§ 2244(a), 2255(f).

Section 2255(e), known as the "savings clause," preserves a limited role for the court in the district where a federal inmate is in prison to consider a § 2241 petition challenging the validity of his incarceration. See United States v. Barrett, 178 F.3d 34, 49 (1st Cir. 1999). Mr. Richardson, who is incarcerated at FCI-Berlin, seeks to invoke this court's savings clause jurisdiction under § 2255(e).

The savings clause provides, in pertinent part:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to [§ 2255], shall not be entertained . . . unless it . . . appears that the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e).

Relief under the savings clause is not available simply because a petitioner has been denied leave to file a successive § 2255 motion, or because the petitioner missed the deadline for filing a first motion under § 2255. Trenkler v. United States, 536 F.3d 85, 99 (1st Cir. 2008). Instead, section 2255's "adequacy and effectiveness must be judged ex ante," id.; to proceed on a petition challenging a conviction or sentence under § 2241, the petitioner must show that he would be denied any opportunity for relief under 28 U.S.C. § 2255. See id. ("post-

evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [Mr. Richardson] guilty of the offense.'" Richardson, 776 F. App'x at 107 (quoting 28 U.S.C. § 2255(h)(1)); see also In re Richardson, No. 20-266 (4th Cir. July 1, 2020) (denying permission to file successive § 2255 motion, based on same evidence and claims). Having had those opportunities for review of his new evidence and claims, Mr. Richardson cannot demonstrate here that the structure of § 2255 has rendered those procedures ineffective or inadequate to test the legality of his detention simply because his efforts to proceed under § 2255 were unsuccessful. See Trenkler, 536 F.3d at 99; Barrett, 178 F.3d at 50 ("A petition under § 2255 cannot become 'inadequate or ineffective,' thus permitting the use of [§ 2241 via the savings clause], merely because a petitioner cannot meet the AEDPA 'second or successive' requirements." (citation omitted)).

C. Actual Innocence Claim

Mr. Richardson's arguments seeking to invoke this court's savings clause jurisdiction also hinge on his claims of innocence and a miscarriage of justice, based on what he has concluded must be fabricated evidence of Count 2's controlled buy. Mr. Richardson argues that his Count 2 conviction for heroin distribution is a miscarriage of justice because, he

to the alleged August 6 morning controlled buy; (3) the uncontroverted fact that Mr. Richardson had been arrested at noon on August 6 and remained in custody at the time of the 9:59 p.m. log entry; and (4) the fact that the same PPD case number appears on that log entry and on the laboratory certificate identifying the substance at issue in Count 2 as heroin. Mr. Richardson cites that evidence in arguing here that the heroin at issue in Count 2 could not have come from a controlled buy in which he participated, as the police log entry relating to that heroin bears a time-stamp nine hours after his arrest, while he remained in custody.

Missing from Mr. Richardson's evidence, however, is "reliable" evidence, which the Supreme Court has characterized as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," Schlup, 513 U.S. at 324, that the 9:59 p.m. log entry of a "drug violation" at his business premises could not have related to an incident reported at that time, which had occurred earlier that day at the same place, such that no reasonable jurors could have found him guilty of committing the offense of heroin distribution near that location before noon. The evidence of guilt the jury heard as to Count 2 included evidence that specific funds given to the CI to buy drugs from Mr. Richardson were recovered from Mr. Richardson at the time of his arrest; Mr. Richardson's post-

claim of actual innocence or otherwise properly invoked this court's savings clause jurisdiction, this court lacks jurisdiction to grant the relief requested in his "Motion to Dismiss." Accordingly, the district judge should deny Mr. Richardson's "Motion to Dismiss" (Doc. No. 5), without addressing the merits of his arguments.

Conclusion

For the foregoing reasons, the magistrate judge recommends that:

- (1) the district judge should deny Mr. Richardson's motion to dismiss his indictment and conviction on Count 2 (Doc. No. 5), without prejudice;
- (2) the district judge should dismiss Mr. Richardson's § 2241 petition for lack of savings clause jurisdiction; and
- (3) the district judge should direct the clerk to enter judgment and close this case.

Any objections to this Report and Recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). The fourteen-day period may be extended upon motion. Failure to file objections within the specified time waives the right to appeal the district court's order. See Santos-Santos v. Torres-Centeno, 842 F.3d 163, 168 (1st Cir. 2016).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Bobby Richardson

v.

Case No. 20-cv-1134-JL

Robert Hazlewood, Warden, FCI-Berlin

O R D E R

Bobby Richardson, who is incarcerated at the Federal Correctional Institution in Berlin, New Hampshire ("FCI-Berlin"), has filed a petition for a writ of habeas corpus (Doc. No. 1) pursuant to 28 U.S.C. § 2241, challenging his conviction in the Eastern District of Virginia in United States v. Richardson, No. 3:09-CR-15 (E.D. Va.). Along with his original petition, Mr. Richardson has filed an "Emergency Motion to Expedite," a "Motion to Dismiss," and a "Motion for Judicial Notice" (Doc. Nos. 2, 5, 6), which this court deems to be addenda to the petition, to the extent those filings clarify his claims. This Order addresses Mr. Richardson's motion to expedite (Doc. No. 2) and motion for judicial notice (Doc. No. 6), to the extent those motions also seek non-dispositive relief.

Motion to Expedite (Doc. No. 2)

In his "Emergency Motion to Expedite" (Doc. No. 2), Mr.

Conclusion

For the foregoing reasons, this court denies Mr. Richardson's emergency motion to expedite (Doc. No. 2), without prejudice, and denies Mr. Richardson's motion for judicial notice (Doc. No. 6).

SO ORDERED.

Andrea K. Johnstone
Andrea K. Johnstone
United States Magistrate Judge

June 24, 2021

cc: Bobby Richardson, pro se

APPENDIX B

United States Court of Appeals For the First Circuit

No. 21-1716

BOBBY RICHARDSON,

Petitioner - Appellant,

v.

ROBERT HAZLEWOOD, Warden, FCI Berlin,

Respondent - Appellee.

Before

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

JUDGMENT

Entered: November 15, 2022

Bobby Richardson, a federal inmate proceeding pro se, appeals the district court's order dismissing his habeas filing invoking 28 U.S.C. § 2241. We review the dismissal of a 28 U.S.C. § 2241 petition de novo. See Francis v. Maloney, 798 F.3d 33, 36 (1st Cir. 2015) (citing Nadeau v. Matesanz, 289 F.3d 13, 15 (1st Cir. 2002)).

The district court concluded, based on the specific claims pressed and Richardson's prior pursuits of habeas relief, that Richardson could not rely upon 28 U.S.C. § 2241 and the 28 U.S.C. § 2255(e) "savings clause" to bypass the gatekeeping provisions of 28 U.S.C. § 2255(h). See United States v. Barrett, 178 F.3d 34, 38, 49-50 (1st Cir. 1999) (discussing "savings clause"); see also Trenkler v. United States, 536 F.3d 85, 98-99 (1st Cir. 2008) (same). Richardson shows no error in the district court's ruling. We note that other courts, including the Fourth Circuit, already have denied filings by Richardson pressing indistinguishable claims.

All pending motions, to the extent not mooted by the foregoing, are **DENIED**.

By the Court:

Maria R. Hamilton, Clerk

cc:

Bobby Richardson
Seth R. Aframe

APPENDIX C

United States Court of Appeals For the First Circuit

No. 21-1716

BOBBY RICHARDSON,

Petitioner - Appellant,

v.

ROBERT HAZLEWOOD, Warden, FCI Berlin,

Respondent - Appellee.

Before

Barron, Chief Judge,
Howard, Kayatta, Gelpí,
and Montecalvo, Circuit Judges.

ORDER OF COURT

Entered: January 18, 2023

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Bobby Richardson
Seth R. Aframe

APPENDIX D



U.S. Department of Justice

United States Attorney
District of New Hampshire

Federal Building
53 Pleasant Street, 4th Floor
Concord, New Hampshire 03301

603/225-1552

October 15, 2021

Maria Hamilton, Clerk
United States Court of Appeals for the First Circuit
Joseph Moakley Courthouse, Suite 2500
One Courthouse Way
Boston, MA 02210

Re: Bobby Richardson v. Warden
CA. No. 21-1716

Dear Ms. Hamilton:

I am writing to inform you that the Warden was never served in this matter and did not participate in the proceedings before the United States District Court. Therefore, the Warden is not a party to this appeal and will not participate in the First Circuit proceedings.

Should you have any questions or if I can be of further assistance in this matter, please contact me.

Sincerely,

JOHN J. FARLEY
Acting United States Attorney

By: /s/ Seth R. Aframe
Seth R. Aframe
Assistant U.S. Attorney

SRA/mem
cc: Bobby Richardson

10/18/2021

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