APPENDIX

APPENDIX A

REVELANT LOWER COURT DECISIONS

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6018

CARLOS DEMOND ROBINSON,

Petitioner - Appellant,

v.

WARDEN JANSON,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Beaufort. Henry M. Herlong, Jr., Senior District Judge. (9:23-cv-03347-HMH)

Submitted: May 30, 2024 Decided: June 4, 2024

Before GREGORY and HARRIS, Circuit Judges, and MOTZ, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Carlos Demond Robinson, Appellant Pro Se.

FILED: June 4, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6018
(9:23-cv-03347-HMH)

CARLOS DEMOND ROBINSON

Petitioner - Appellant

v.

WARDEN JANSON

Respondent - Appellee

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

APPENDIX B

REPRODUCTION OF 18 U.S.C. 924(C)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Carlos D. Robinson, *a/k/a Carlos Demond Robinson*, Petitioner, v. Warden Janson, Respondent.	)	C/A No. 9:23-03347-HMH-MHC **REPORT AND RECOMMENDATION**

Petitioner Carlos D. Robinson, proceeding pro se and *in forma pauperis*, brings this action as an application for writ of habeas corpus (Petition) pursuant to 28 U.S.C. § 2241 (§ 2241). He is a federal inmate at FCI-Edgefield. Under 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.), pretrial proceedings in this action have been referred to the assigned United States Magistrate Judge.

I. BACKGROUND

"On May 26, 2004, after a jury trial, Petitioner was found guilty of conspiracy to possess and possession with intent to distribute crack cocaine and cocaine in violation of 21 U.S.C. § 841(b)(1)(A), two counts of possession with intent to distribute 50 grams or more of crack cocaine and a quantity of cocaine in violation of 21 U.S.C. § 841(b)(1)(A), two counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), and two counts of using and carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)." *Robinson v. Phelps*, No. 920CV02356HMHMHC, 2021 WL 3375524, at *1 (D.S.C. July 12, 2021), *report and recommendation adopted*, 2021 WL 3375520 (D.S.C. Aug. 3, 2021). Petitioner was ultimately sentenced to 960 months' imprisonment (including a 360-month sentence on the drug charges, 120-month concurrent sentence on the felon in possession charges, and two

consecutive 300-month sentences on the § 924(c) convictions). He appealed his convictions and the Fourth Circuit remanded pursuant to *United States v. Booker*, 543 U.S. 220, 245 (2005). *See United States v. Robinson*, 221 F. App'x 236, 244 (4th Cir. 2007). Petitioner was again sentenced to a 960-month sentence based on the advisory sentencing guidelines, and the Fourth Circuit affirmed Petitioner's convictions and sentences on February 14, 2008. *See United States v. Robinson*, 264 F. App'x 332, 333–34 (4th Cir. 2008).

Petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, that was dismissed on October 27, 2008. *See United States v. Robinson*, No. CR. 6:03-616-HMH, 2008 WL 4833015, at *5 (D.S.C. Oct. 27, 2008). The Fourth Circuit dismissed his appeal. *See United States v. Robinson*, 350 F. App'x 837, 838 (4th Cir. 2009). On August 5, 2010, Petitioner filed a motion for relief from judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure, which the District Court denied. *See United States v. Robinson*, Cr. No. 6:03-616-HMH (D.S.C. Aug. 11, 2010), Doc. No. 238.[1] Petitioner appealed, and the Fourth Circuit dismissed the appeal, explaining that Petitioner's Rule 60 motion directly attacked his convictions and therefore was an unauthorized and successive § 2255 motion. *See United States v. Robinson*, 416 F. App'x 317, 317–18 (4th Cir. 2011). Petitioner filed two other motions in 2011 and 2014, which were dismissed as successive § 2255 motions. *See United States v. Robinson*, No. CR 6:03-616-HMH, 2011 WL 13238748, at *1 (D.S.C. Aug. 8, 2011); *United States v. Robinson*, No. CR 6:03-616-HMH, 2014 WL 12634793, at *1–2 (D.S.C. Dec. 1, 2014).

On July 13, 2016, the Fourth Circuit granted Petitioner's application requesting permission to file a second or successive § 2255 motion in light of *Johnson v. United States*, 576 U.S. 591 (2015) (holding that the residual clause in the Armed Career Criminal Act, 18 U.S.C.

[1] Subsequent notations to "Doc. No. __" in this report and recommendation refer to pleadings in Petitioner's criminal case number 6:03-cr-00616-HMH.

§ 924(e)(2)(B)(ii), was unconstitutionally vague). Petitioner argued that he was improperly sentenced as a career offender under the United States Sentencing Guidelines (U.S.S.G.), § 4B1.1 pursuant to *Johnson*. However, the § 2255 motion was dismissed for lack of merit. It was noted that even assuming *Johnson* applied to career offender enchantments under the U.S.S.G., it would afford Petitioner no relief because he still qualified as a career offender under the U.S.S.G. because he had at least two qualifying convictions for either a controlled substance offense or a crime of violence. *See United States v. Robinson*, No. CR 6:03-616-HMH, 2016 WL 7496167, at *3 (D.S.C. July 18, 2016). The Fourth Circuit dismissed his appeal. *See United States v. Robinson*, 672 F. App'x 330, 330–31 (4th Cir. 2017).

Petitioner then filed a motion for sentence reduction pursuant to § 404 of the First Step Act, Pub. L. No. 115-391, December 21, 2018, 132 Stat. 5194, and for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). On June 10, 2020, the District Court denied his motion for compassionate release and reduced Petitioner's sentence to a total of 601 months' imprisonment followed by an 8-year term of supervised release. *United States v. Robinson*, No. CR 6:03-616-HMH, 2020 WL 3071939, at *3–5 (D.S.C. June 10, 2020). The Fourth Circuit affirmed the District Court's decision. *United States v. Robinson*, No. 20-7451, 2021 WL 4957598 (4th Cir. Oct. 26, 2021).

Petitioner filed a § 2241 habeas petition in June 2020, in which he argued that his felon in possession conviction under § 922(g)(1) should be vacated in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019) because the jury instructions were allegedly defective. His Petition was dismissed for lack of jurisdiction. *Robinson v. Phelps*, No. 920CV02356HMHMHC, 2021 WL 3375524 (D.S.C. July 12, 2021), *report and recommendation adopted*, 2021 WL 3375520 (D.S.C. Aug. 3, 2021).

In August 2020, Petitioner filed another motion for compassionate release (Doc. No. 445),

that was denied in September 2020 (Doc. No. 450), and the Fourth Circuit affirmed on October 26, 2021. *See United States v. Robinson*, No. 20-7451, 2021 WL 4957598 (4th Cir. Oct. 26, 2021). On September 2, 2022, Petitioner filed a renewed motion (Doc. No. 462) for compassionate release, that was denied (Doc. 468) on October 4, 2022. The Fourth Circuit affirmed on February 24, 2023. *See United States v. Robinson*, No. 22-7205, 2023 WL 2204398 (4th Cir. Feb. 24, 2023)

Petitioner filed another motion (Doc. No. 463) to vacate under § 2255 on September 2, 2022, that was dismissed on October 4, 2022 (Doc. No. 467). On October 17, 2022, Petitioner appealed to the Fourth Circuit (Doc. No. 475), and the case was placed in abeyance (Doc. No. 494) pending a decision by the Fourth Circuit in *United States v. Newby*, Case No. 21-4018.

In this Petition pursuant to § 2241, Petitioner asserts that he is "seeking a Review of Section 924(c) and a determination of the Constitutionality of that statute[.]" ECF No. 1 at 2. He does not list any ground for relief on the standard petition for a writ of habeas corpus under § 2241 form (Form AO-242), and instead directs the Court to his attached memorandum. *See* ECF No. 1 at 6, 8, 10-21. In his memorandum, Petitioner asserts that he seeks a declaratory judgment "that the criminal statute 18 U.S.C. § 924(c) as written, prior to the First Step Act of 2018, is unconstitutionally vague." ECF No. 1 at 10. He also "seeks a second declaratory judgment to the effect to apply the 18 U.S.C. § 924(c) as amended by the First Step Act of 2018, is unconstitutional under the Expo Facto clause."[2] *Id.* (errors in original).

[2] Petitioner appears to be referring to the ex post facto clause. Article 1, Section 9, Clause 3 of the United States Constitution prohibits the enactment of any law that is retrospective in nature and disadvantages the offender affected by it. *See Lynce v. Mathis*, 519 U.S. 433, 441 (1997); *Weaver v. Graham*, 450 U.S. 24, 28(1981). A law is retrospective if it "changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31. An offender is disadvantaged by "any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Weaver*, 450 U.S. at 28 (citations omitted). As discussed below, this Court lacks jurisdiction over this § 2241 Petition. Even if this Court has jurisdiction over Petitioner's claim, he has not alleged any facts to indicate that the change in law violates the ex post facto clause because the later change in law he identifies

II. STANDARD OF REVIEW

A pro se habeas petition is reviewed pursuant to the procedural provisions of the Rules Governing Section 2254 Proceedings in the United States District Court, 28 U.S.C. § 2254;[3] the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996; 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); and *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983). The Court screens a petitioner's lawsuit to determine "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court[.]" Rule 4 of Rules Governing Section 2254 Cases in the United States District Courts.

Pro se petitions are held to a less stringent standard than those drafted by attorneys, and a court is charged with liberally construing a petition filed by a pro se litigant to allow the development of a potentially meritorious case. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). However, even when considered under this less stringent standard, for the reasons set forth below, the Petition submitted in this case is subject to summary dismissal.

III. DISCUSSION

Although Petitioner characterizes his Petition as seeking a declaratory judgment that § 924(c) is unconstitutionally vague, he brought this action under § 2241. It also appears that Petitioner is attempting to have the Court find that his sentence is unconstitutional because a petition under § 2241 is a habeas corpus proceeding, and habeas corpus proceedings are used by a prisoner to challenge the legality or duration of his custody. *See Preiser v. Rodriguez*, 411 U.S.

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did not make an act punishable that was not punishable at the time he committed it and does not impose additional punishment.

[3] The Rules Governing Section 2254 are applicable to habeas actions brought under § 2241. *See* Rule 1(b), Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254.

475, 484 (1973). Thus, this report and recommendation addresses Petitioner's claims under § 2241 as well as a motion for declaratory judgment.

A. § 2241

"[I]t is well established that defendants convicted in federal court are obliged to seek habeas relief from their convictions and sentences through § 2255," not through a petition filed pursuant to § 2241. *Rice v. Rivera*, 617 F.3d 802, 807 (4th Cir. 2010) (citing *In re Vial*, 115 F.3d 1192, 1194 (4th Cir. 1997)). Petitioner cannot challenge his federal conviction and sentence under § 2241 unless he can satisfy the § 2255 savings clause, which provides:

> 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, 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 U.S.C. § 2255(e); *see also Rice*, 617 F.3d at 807 (court lacked jurisdiction over § 2241 petition outside savings clause). "[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, or because an individual is procedurally barred from filing a § 2255 motion." *In re Vial*, 115 F.3d at 1194 n. 5.[4]

The Supreme Court recently held that the savings clause of § 2255(e) does not authorize "a prisoner [to] seek[] relief based on a newly adopted narrowing interpretation of a criminal statute that circuit precedent had foreclosed at the time of the prisoner's trial, appeal, and first

[4] A district court may raise a petitioner's failure to satisfy the savings clause sua sponte, and if a petitioner cannot meet the savings clause requirements, then the § 2241 petition "must be dismissed for lack of jurisdiction." *See Rice*, 617 F.3d at 807; *see also Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999) (explaining that a district court has an independent duty to ensure that jurisdiction is proper and to dismiss a case whenever it appears that subject matter jurisdiction is lacking).

§ 2255 motion[,]" thus abrogating the Fourth Circuit's savings clause test in *In re Jones*, 226 F.3d 328, 331 (4th Cir. 2000).[5] *See Jones v. Hendrix*, 143 S. Ct. 1857, 1868 (2023). Additionally, it appears that the Supreme Court's ruling in *Jones v. Hendrix* has overruled *Wheeler*. *See, e.g., Hall v. Hudgins*, No. 22-6208, 2023 WL 4363658, at *1 (4th Cir. July 6, 2023) (noting *Jones v. Hendrix* held a petitioner cannot use § 2241 to mount a successive collateral attack on validity of a federal sentence and affirming district court's dismissal of § 2241 petition for lack of jurisdiction).

In *Jones v. Hendrix*, the Court noted that there are only two conditions under which a § 2255 motion may proceed. *Id.* at 1868. The statute specifically identifies the two conditions as:

> (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.

28 U.S.C. § 2255(h). The Court further explained that:

> The inability of a prisoner with a statutory claim to satisfy those conditions does not mean that he can bring his claim in a habeas petition under the saving clause. It means that he cannot bring it at all. Congress has chosen finality over error correction in his case.

Jones v. Hendrix, 143 S. Ct. at 1869.

Here, Petitioner has not satisfied either of the two conditions of § 2255(h). First, he has not identified any newly discovered evidence. Second, although Petitioner challenges the constitutionality of § 924(c), he has not identified any new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable. Further, to the extent Petitioner bases his claim on an intervening change in statutory interpretation,

[5] To proceed under § 2241 prior to *Jones v. Hendrix*, a petitioner in the Fourth Circuit had to meet the savings clause test as contemplated in *In re Jones*, 226 F.3d at 333-334 (challenges to convictions) or *United States v. Wheeler*, 886 F.3d 415, 429 (4th Cir. 2018) (challenges to sentences).

"§ 2255(e)'s saving clause does not permit a prisoner asserting an intervening change in statutory interpretation to circumvent AEDPA's restrictions on second or successive § 2255 motions by filing a § 2241 petition." *Jones v. Hendrix*, 143 S. Ct. at 1864.[6]

Thus, this action is subject to summary dismissal for lack of jurisdiction because Petitioner fails to satisfy the savings clause in 28 U.S.C. § 2255(e). *See McNeill v. Warden R. Ramos*, No. 23-6488, 2023 WL 6442551 (4th Cir. Oct. 3, 2023) (citing *Jones v. Hendrix* in dismissing the petitioner's § 2241 petition seeking to challenging his conviction and sentence by way of the savings clause in § 2255, finding that the petitioner could not assert that he was actually innocent of his 18 U.S.C. § 924(c) conviction due to an alleged change in the statutory interpretation of the statute); *Hubbard v. Brown*, No. 23-6023, 2023 WL 4839396, at *1 (4th Cir. July 28, 2023) (holding that *Jones v. Hendrix* precluded the petitioner's challenge to his conviction by way of the savings clause on the basis of an intervening change in statutory interpretation); *Holmes v. United States*, No. 23-6434, 2023 WL 4839596, at *1 (4th Cir. July 28, 2023) (holding that *Jones v. Hendrix* precluded the petitioner's § 2241 challenge to his conviction and sentence by way of the savings clause). To the extent Petitioner is attempting to file another § 2255 motion, his potential remedy may be to seek permission from the United States Court of Appeals for the Fourth Circuit

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[6] Here, Petitioner appears to only challenge his sentence (not his conviction). Under *Wheeler*, to demonstrate that a § 2255 motion is inadequate or ineffective to test the legality of a sentence, a petitioner must show that:

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

Wheeler, 886 F.3d at 429. Even if the *Wheeler* test was not abrogated by *Jones v. Hendrix* and is applicable, Petitioner cannot meet the second prong of *Wheeler* as he has not alleged any facts to indicate that, subsequent to his direct appeal and first § 2255, the settled substantive law changed and was deemed to apply retroactively on collateral review.

to file a successive § 2255 petition in this Court.

B. Declaratory Judgment

As noted above, Petitioner states that he seeks only a declaratory judgment. However, he fails to state the basis for such relief. Even if this action is construed as a motion for a declaratory judgment pursuant to Rule 57 of the Rules of Civil Procedure and 28 U.S.C. § 2201 (§ 2201),[7] it is still subject to summary dismissal. *See Manigault v. Lamanna*, No. 8:06-0047-JFABHH, 2006 WL 1328780 at 4 n. 4 (D.S.C. May 11, 2006) ("This Court is not bound by [the petitioner's] characterization of his claims because, when considering the issue of its own jurisdiction, district courts are authorized to disregard such characterizations to avoid 'unjust manipulation or avoidance of its jurisdiction.'"). Although Rule 57 and § 2201 permit a party to seek a declaration of rights and "'the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate,' . . . a declaratory judgment should not be granted where a special statutory proceeding is provided." *Miller v. Burt*, No. 3:06-cv-2755-TLW-JRM, 2007 WL 2428542, at *5 (D.S.C. Aug. 21, 2007).

Instead, a prisoner, like Petitioner in this case, must obtain equitable relief through the habeas statutes as provided by Congress. *See Miller v. Burt*, 2007 WL 2428542, at *5; *see also Pruitt v. Campbell*, 429 F.2d 642, 645 (4th Cir. 1970) ("Where habeas corpus is an available

[7] This statute provides, in pertinent part:

> (a) In a case of actual controversy within its jurisdiction, except with respect to ..., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). Section 2201 is "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995) (citation omitted). As such, the Court's assumption of jurisdiction over a declaratory judgment action is not "automatic or obligatory." *Id.* at 288.

remedy, it becomes unnecessary to consider whether declaratory relief may be granted."). Therefore, a declaratory judgment action is not appropriate, and Petitioner's motion for declaratory judgment should be denied without prejudice to his right to seek relief through the appropriate habeas statute.[8] *See Miller v. Burt*, 2007 WL 2428542, at *5; *see also Wilson v. North Carolina*, No. 5:23-CT-3199-M, 2023 WL 4569537 (E.D.N.C. July 14, 2023) ("To the extent [the petitioner] attacks the validity of his conviction, he cannot circumvent the provisions of AEDPA through the Declaratory Judgment Act."); *Cyrus v. United States*, No. 8:07-cv-2720-CMC, 2007 WL 2815589, at *4 (D.S.C. Sept. 25, 2007) (noting that the plaintiff was not entitled to declaratory relief because of the special provisions of the habeas statutes and that the relief he sought was properly pursued in a habeas action); *United States ex rel. Bennett v. Illinois*, 356 F.2d 878, 879 (7th Cir. 1996) (stating that the Declaratory Judgment Act "may not be used as a substitute for a petition to correct a sentence in the court where the sentence was imposed").

IV. RECOMMENDATION

Accordingly, it is **RECOMMENDED** that the Petition in this action be **DISMISSED** without prejudice and without requiring Respondent to file a return.

Petitioner's attention is directed to the important notice on the next page.

Molly H. Cherry
United States Magistrate Judge

October 10, 2023
Charleston, South Carolina

[8] To the extent Petitioner seeks habeas relief pursuant to 28 U.S.C. § 2255 in the sentencing court, he must obtain authorization from the United States Court of Appeals for the Fourth Circuit to file a second or successive § 2255 motion. 28 U.S.C. §§ 2255, 2244(b)(3).

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
Post Office Box 835
Charleston, South Carolina 29402

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
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Carlos D. Robinson, Petitioner, vs. Warden Janson, Respondent.	)	C.A. No. 9:23-3347-HMH **OPINION & ORDER**

This matter is before the court for review of the Report and Recommendation of United States Magistrate Judge Molly H. Cherry made in accordance with 28 U.S.C. § 636(b)(1) and District of South Carolina Local Civil Rule 73.02. Petitioner Carlos D. Robinson, a federal prisoner proceeding pro se, filed this action seeking habeas corpus relief under 28 U.S.C. § 2241. For the reasons below, the court dismisses the petition for lack of jurisdiction.

I. BACKGROUND[1]

In May 2004, a jury found Petitioner guilty of conspiracy to possess and possession with intent to distribute crack cocaine and cocaine, in violation of 21 U.S.C. § 841(b)(1)(A); two counts of possession with intent to distribute 50 grams or more of crack cocaine and a quantity of cocaine, in violation of 21 U.S.C. § 841(b)(1)(A); two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g); and two counts of using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c). On December 13, 2004, Petitioner was sentenced to 960 months' imprisonment. Petitioner appealed the conviction and sentence on December 28, 2004. On March 22, 2007, the Fourth Circuit

[1] ECF citations in this section refer to docket entries in Petitioner's criminal case, No. 6:03-cr-00616-HMH-1.

remanded the case in light of United States v. Booker, 543 U.S. 220 (2005), for resentencing under the advisory guidelines regime. United States v. Robinson, No. 05-4028, 2007 WL 869159, at *7 (4th Cir. Mar. 22, 2007) (unpublished).

On June 18, 2007, at resentencing, based on the advisory sentencing guidelines, the court again imposed a 960-month sentence. On June 22, 2007, Petitioner appealed his conviction and sentence, which the Fourth Circuit affirmed on February 14, 2008. United States v. Robinson, No. 07-4638, 2008 WL 398245, at *2 (4th Cir. Feb. 14, 2008) (unpublished). Petitioner subsequently filed a motion to vacate, set aside, or correct his sentence under § 2255. The court summarily dismissed Petitioner's motion on October 27, 2008. United States v. Robinson, Cr. No. 6:03-616-HMH, 2008 WL 4833015, at *5 (D.S.C. Oct. 27, 2008) (unpublished). Petitioner appealed, and the Fourth Circuit dismissed his appeal. United States v. Robinson, No. 08-8465, 2009 WL 3651641, at *1 (4th Cir. Nov. 5, 2009) (unpublished).

On August 5, 2010, Petitioner filed a motion for relief from judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure. Finding his claims without merit, the court denied his motion. United States v. Robinson, Cr. No. 6:03-616-HMH, 2010 WL 11570521, at *1 (D.S.C. Aug. 11, 2010) (unpublished). Petitioner appealed, and the Fourth Circuit dismissed the appeal. United States v. Robinson, No. 10-7197, 2011 WL 880761, at *1 n.* (4th Cir. Mar. 15, 2011) (unpublished). On July 27, 2011,[2] Petitioner filed a motion to alter or amend the record, which was construed as a § 2255 motion because it attacked his § 924(c) conviction and sentence. That motion was dismissed as successive on August 8, 2011. United States v. Robinson, Cr. No. 6:03-616-HMH, 2011 WL 13238748, at *1 (D.S.C. Aug. 8, 2011) (unpublished). Petitioner filed

[2] Houston v. Lack, 487 U.S. 266 (1988).

another § 2255 motion on November 12, 2014,[3] which was dismissed as successive on December 1, 2014. United States v. Robinson, Cr. No. 6:03-616-HMH, 2014 WL 12634793, at *1 (D.S.C. Dec. 1, 2014) (unpublished).

On July 13, 2016, the Fourth Circuit granted Petitioner's request to file a second or successive § 2255 motion in light of Johnson v. United States, 576 U.S. 591 (2015), which held that the definition of "violent felony" found in the Armed Career Criminal Act's residual clause is unconstitutionally vague. The court dismissed the § 2255 motion on July 18, 2016. United States v. Robinson, Cr. No. 6:03-616-HMH, 2016 WL 7496167, at *3 (D.S.C. July 18, 2016) (unpublished). Petitioner appealed, and the Fourth Circuit dismissed the appeal on January 12, 2017. United States v. Robinson, 672 F. App'x 330, 330 (4th Cir. Jan. 12, 2017) (unpublished).

On June 10, 2020, the court reduced the Petitioner's sentence from 960 months' imprisonment to 601 months' imprisonment pursuant to § 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222. United States v. Robinson, Cr. No. 6:03-616-HMH, 2020 WL 3071939, at *3 (D.S.C. June 10, 2020) (unpublished). An amended judgment was entered on June 10, 2020. (Am. J., ECF No. 444.)

Petitioner filed a § 2241 habeas petition in June 2020, in which he argued that his felon-in-possession conviction under § 922(g)(1) should be vacated in light of Rehaif v. United States, 139 S. Ct. 2191 (2019), because the jury instructions were allegedly defective. This petition was dismissed for lack of jurisdiction. Robinson v. Phelps, No. 9:20-cv-02356-HMH-MHC, 2021 WL 3375524 (D.S.C. July 12, 2021) (unpublished), report and recommendation adopted by 2021 WL 3375520 (D.S.C. Aug. 3, 2021) (unpublished).

[3] Houston v. Lack, 487 U.S. 266 (1988).

On August 19, 2020, Petitioner filed a motion for compassionate release, which was denied on September 18, 2020. (Sept. 18, 2020, Order, ECF No. 450.) Petitioner appealed the denial of his motion for compassionate release, and the Fourth Circuit affirmed the court's decision on October 26, 2021. United States v. Robinson, No. 20-7451, 2021 WL 4957598, at *1 (4th Cir. Oct. 26, 2021) (unpublished).

Petitioner filed a renewed motion for compassionate release on September 2, 2022. In addition, Petitioner filed a § 2255 motion on August 31, 2022, and a motion to hold his § 2255 motion in abeyance pending the determination of his motion for compassionate release. (§ 2255 Mot., ECF Nos. 463, 464.) These motions were denied and dismissed on October 4, 2022. (Oct. 4, 2022, Orders, ECF Nos. 467, 469.) On October 17, 2022, Petitioner appealed, and the case was placed in abeyance pending a decision by the Fourth Circuit in United States v. Newby, Case No. 21-4018.

II. DISCUSSION

Petitioner filed the instant § 2241 petition on July 13, 2023. He seeks declaratory judgments that "18 U.S.C. § 924(c) as written, prior to the First Step Act of 2018, is unconstitutionally vague" and that enforcement of "the amended section 924(c) statute retroactively violates the Ex Post Facto Clause." (§ 2241 Petition 10, 21, ECF No. 1.) In her Report and Recommendation filed on October 10, 2023, Magistrate Judge Cherry recommends dismissing the petition without prejudice and without requiring Respondent to file a return for lack of jurisdiction because Petitioner cannot proceed under § 2241 as he fails to satisfy the saving clause in 28 U.S.C. § 2255(e). (R&R 8, 10, ECF No. 5.) Petitioner filed timely objections to the Report and Recommendation. (Obj., generally, ECF No. 12.)

A report and recommendation carries no "presumptive weight," and the responsibility for making a final determination remains with the court. Mathews v. Weber, 423 U.S. 261, 271 (1976). The court reviews de novo "those portions of the report . . . to which objection is made" and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge" or "recommit the matter . . . with instructions." 28 U.S.C. § 636(b)(1). "To trigger de novo review, an objecting party 'must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection.'" Elijah v. Dunbar, 66 F.4th 454, 460 (4th Cir. 2023) (quoting United States v. Midgette, 478 F.3d 616, 622 (4th Cir. 2007)). In the absence of specific objections, the court reviews only for clear error, Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005), and need not give any explanation for adopting the report, Camby v. Davis, 718 F.2d 198, 200 (4th Cir. 1983).

Some of Petitioner's objections are non-specific, unrelated to the dispositive portions of the magistrate judge's Report and Recommendation, or merely restate his claims. However, the court was able to glean the following objections. First, Petitioner contends that the Antiterrorism and Effective Death Penalty Act's ("AEDPA") limitations on second or successive habeas petitions and 2255(e)'s saving clause are unconstitutional. (Objs. 2-3, ECF No. 12.) Second, he argues that he should be allowed to proceed with his claims under the Declaratory Judgment Act, 28 U.S.C. § 2201. (Id. at 3-5, ECF No. 12.)

Petitioner's first objection is without merit. The Supreme Court has rejected a variety of constitutional challenges to AEDPA's limitations on successive habeas petitions. See Felker v. Turpin, 518 U.S. 651, 664 (1996) (holding that AEDPA's restrictions on successive habeas petitions do not amount to an unconstitutional suspension of the writ of habeas corpus); Jones v.

Hendrix, 599 U.S. 465, 482-88 (2023) (finding that AEDPA's limitations on successive collateral attacks do not "raise[] serious constitutional questions"). Moreover, Petitioner does not address the magistrate judge's determination that the court lacks jurisdiction to consider his § 2241 petition.

Generally, a federal prisoner seeking to attack the validity of his conviction or sentence must do so through a § 2255 motion. Rice v. Rivera, 617 F.3d 802, 807 (4th Cir. 2010). Section 2255's saving clause, however, allows a federal prisoner to proceed under § 2241 if he establishes that the remedy afforded by § 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The Supreme Court recently clarified in Jones v. Hendrix that such recourse is available only "where unusual circumstances make it impossible or impracticable to seek relief in the sentencing court, as well as for challenges to detention other than collateral attacks on a sentence." 599 U.S. at 478. Jones also held that the saving clause "does not permit a prisoner asserting an intervening change in statutory interpretation to circumvent AEDPA's restrictions on second or successive § 2255 motions by filing a § 2241 petition."[4] Id. at 471. "The inability of a prisoner with a statutory claim to satisfy those conditions," the Court explained, "does not mean that he can bring his claim in a habeas petition under the saving clause. It means that he cannot bring it at all." Id. at 480. In light of Jones, Petitioner cannot proceed with his claims under § 2241 by way of the saving clause in § 2255. Based on the foregoing, Petitioner's first objection fails.

[4] A prisoner cannot bring a second or successive § 2255 motion unless the appropriate court of appeals first certifies that the motion contains either (1) "newly discovered evidence" or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h).

Turning to his second objection, Petitioner contends that he should be allowed to proceed under the Declaratory Judgment Act, 28 U.S.C. § 2201. This argument is also without merit. Petitioner is plainly attempting to attack the constitutionality of 18 U.S.C. § 924(c), one of his statutes of conviction. However, "§ 2255 is the exclusive method of collaterally attacking a federal conviction or sentence," and a petitioner cannot use "another mechanism, such as [the Declaratory Judgment Act], to sidestep § 2255's requirements." United States v. Ferguson, 55 F.4th 262, 270 (4th Cir. 2022); Pruitt v. Campbell, 429 F.2d 642, 645 (4th Cir. 1970) ("[A] district court has no jurisdiction to entertain a declaratory judgment action as a substitute for post conviction remedies under 28 U.S.C. § 2255 . . . ."); Calderon v. Ashmus, 523 U.S. 740, 746 (1998) (stating that "[a]ny claim by a prisoner attacking the validity or duration of his confinement must be brought under the habeas sections of Title 28 of the United States Code" and holding that a prisoner cannot bring a declaratory judgment action for the purpose of determining "a collateral legal issue governing certain aspects of [his] pending or future [habeas] suits"); Wilson v. North Carolina, No. 5:23-CT-3199-M, 2023 WL 4569537, at *2 (E.D.N.C. July 14, 2023) (unpublished) ("To the extent [the petitioner] attacks the validity of his conviction, he cannot circumvent the provisions of AEDPA through the Declaratory Judgment Act.") (collecting cases); Morris v. Cardillo, No. 0:10-443-JFA-PJG, 2010 WL 2722992, at *1 (D.S.C. July 9, 2010) (unpublished) ("The plaintiff cannot bring a declaratory judgment action to circumvent the habeas statutory requirements . . . ."). Accordingly, this objection is without merit.[5]

[5] To the extent that Petitioner seeks a declaration that § 924(c) is unconstitutional as applied to some future, hypothetical defendant, the court lacks the authority to do so. "[F]ederal courts [have] no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as [they are] called upon to adjudge the legal rights of litigants in actual controversies." United States v. Raines, 362 U.S. 17, 21 (1960) (internal quotation marks omitted).

III. CONCLUSION

For the reasons discussed above, the court lacks jurisdiction to consider the petition and adopts the Magistrate Judge Cherry's Report and Recommendation and incorporates it herein.

It is therefore

ORDERED that the petition is dismissed without prejudice and without requiring Respondent to file a return. It is further

ORDERED that a certificate of appealability is denied because Petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).[6]

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
November 30, 2023

NOTICE OF RIGHT TO APPEAL

Petitioner is hereby notified that he has the right to appeal this order within sixty (60) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

[6] District courts must issue certificates of appealability when entering "a final order adverse to the applicant." Rule 11(a), Rules Governing § 2254 Cases. These rules may be applied to other types of habeas corpus petitions. Rule 1(b), Rules Governing § 2254 Cases.

§ 924. Penalties [Caution: See prospective amendment notes below.]

(a) (1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929 [18 USCS § 929], whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter [18 USCS §§ 921 et seq.] to be kept in the records of a person licensed under this chapter [18 USCS §§ 921 et seq.] or in applying for any license or exemption or relief from disability under the provisions of this chapter [18 USCS §§ 921 et seq.];

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922 [18 USCS § 922];

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l) [18 USCS § 922(1)]; or

(D) willfully violates any other provision of this chapter [18 USCS §§ 921 et seq.],

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (h), (i), (j), or (o) of section 922 [18 USCS § 922] shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter [18 USCS §§ 921 et seq.] to be kept in the records of a person licensed under this chapter [18 USCS §§ 921 et seq.], or

(B) violates subsection (m) of section 922 [18 USCS § 922],

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) [18 USCS § 922(q)] shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any

other law a violation of section 922(q) [18 USCS § 922(q)] shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 [18 USCS § 922] shall be fined not more than $1,000, imprisoned for not more than 1 year, or both.

(6) (A) (i) A juvenile who violates section 922(x) [18 USCS § 922(x)] shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) [18 USCS § 922(x)] or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x) [18 USCS § 922(x)]—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 [18 USCS § 931] shall be fined under this title, imprisoned not more than 3 years, or both.

(8) Whoever knowingly violates subsection (d) or (g) of section 922 [18 USCS § 922] shall be fined under this title, imprisoned for not more than 15 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c) (1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.].

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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