"UNPUBLISHED" ?

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6152

TERRION DEONDRE HERMAN,

Petitioner - Appellant,

v.

R. BROWN,

Respondent - Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. Gina M. Groh, District Judge. (3:24-cv-00012-GMG-RWT)

Submitted: June 25, 2024 Decided: June 28, 2024

Before RICHARDSON and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Terrion Deondre Herman, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

(APPENDIX A)

ALSO → (PAGE #1-B)

FILED: June 28, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6152
(3:24-cv-00012-GMG-RWT)

TERRION DEONDRE HERMAN

Petitioner - Appellant

v.

R. BROWN

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

(Page #1B)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

TERRION DEONDRE HERMAN,

Petitioner,

v. **CIVIL ACTION NO.: 3:24-CV-12 (GROH)**

R. BROWN,

Respondent.

ORDER DISMISSING PETITION

Pending before the Court is a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, seeking to vacate the Petitioner's 360-month sentence[1] imposed pursuant to his conviction for possession with intent to distribute a mixture or substance containing a cocaine base ("crack"), in the Central District of Illinois, case number 2:10-CR-20003: See ECF No. 1.

---

[1] Following his June 15, 2011, conviction by a jury of possession of 50 grams or more of a mixture or substance containing cocaine base ("crack") with the intent to distribute it, the Petitioner was sentenced to a term of life imprisonment on January 24, 2012. C.D. Ill. 2:10-CR-20003, ECF Nos. 7, 46, 53. That sentence was on December 10, 2012, vacated and remanded by the Court of Appeals for the Seventh Circuit. C.A.7th 12-1183, ECF No. 28. C.D. Ill. 2:10-CR-20003, ECF No. 72. The mandate for that order issued on January 2, 2013. Id. Thereafter, the sentencing court entered a "Text Only Order" on March 4, 2021, which states in part:

> Defendant was sentenced by this court on January 23, 2012 to mandatory life imprisonment. Mr. Herman appealed this sentence. On January 2, 2013, the United States Court of Appeals for the Seventh Circuit granted a joint motion to remand, vacated Mr. Hermans life sentence, and remanded the case back to this Court for resentencing in accordance with United States v. Dorsey, 132 S.Ct. 2321 (2012) and the Fair Sentencing Act. On September 25, 2013, **Mr. Herman was resentenced to 360 months imprisonment** in accordance with the Fair Sentencing Act, which removed his mandatory life sentence and instead subjected him to a mandatory minimum 300 month term of imprisonment and a guideline range of 360 months to life. Accordingly, Mr. Herman has already been resentenced in accordance with the Fair Sentencing Act, which renders him ineligible for a first Step Act reduction.

(Emphasis added).

(Appendix A)

Also ⟶ (#1-A)

A case must be dismissed if a petitioner does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); see also Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008) (applying the Twombly standard and emphasizing the necessity of *plausibility*). Further, in proceedings where the prisoner appears *in forma pauperis*, "the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim on which relief may be granted[.]" 28 U.S.C. § 1915(e)(2)(B)(ii).

Prisoners seeking to challenge the validity of their convictions or sentences are required to proceed under "28 U.S.C. § 2255" in the district court of conviction. By contrast, a petition for writ of habeas corpus pursuant to § 2241 is generally intended to address the execution of a sentence and should be filed in the district where the prisoner is incarcerated. Fontanez v. O'Brien, 807 F.3d 84, 85 (4th Cir. 2015).

Although § 2255 expressly prohibits a prisoner from challenging their conviction or the imposition of their sentence through a § 2241 petition, there is nonetheless a "saving clause" that permits an otherwise prohibited challenge under § 2241 if they show § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The law is clearly developed, however, that relief under § 2255 is not inadequate or ineffective merely because relief has become unavailable under § 2255 due to (1) a limitation bar, (2) the prohibition against successive petitions, or (3) a procedural bar from failure to raise the issue on direct appeal. In re Vial, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997).

"A petitioner bears the burden of "demonstrating" that the § 2255 remedy is "inadequate or ineffective," and the standard is an exacting one." The Supreme Court held

(PAGE #1-A.)

in Jones v. Hendrix, 599 U.S. 465, 143 S. Ct. 1857 (2023), that a petitioner cannot use a § 2241 petition to mount a successive collateral attack on the validity of a federal sentence. See also Hall v. Hudgins, 2023 WL 436358, (4th Cir. 2023).

The Supreme Court's decision in Hendrix invalidates the tests previously established by the Fourth Circuit for a petitioner to challenge the legality of his conviction or sentence. See In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000) and United States v. Wheeler, 886 F.3d 415, 428 (4th Cir. 2018). Because the requirements of the saving clause are jurisdictional, a § 2241 petitioner relying on the § 2255(e) saving clause must strictly meet the statutory test for this Court to have subject matter jurisdiction. Absent subject matter jurisdiction, there is nothing left for the Court to do but dismiss a case.

Here, the Petitioner first alleges he is entitled to relief because: (1) his Fourth Amendment rights were violated by investigating officers on February 3, 2010 [ECF No. 1 at 5]; (2) the warrantless dog sniff search method outside of the Petitioner's apartment, which led to the seizure of controlled substances, was later found unconstitutional under the holding of United States v. Whitaker, 820 F.3d 849 (7th Cir. 2016), [2] which the Petitioner asserts established a new, substantive rule of constitutional law that applies retroactively [id. at 5–6, 8–9]; (3) his conviction resulted in a miscarriage of justice and presents exceptional circumstances which justify relief under § 2241 [id. at 7]; and (4) his conviction is the result of plain error [id. at 9]. As relief, the

[2] In Whitaker, the Seventh Circuit "extended" the holding of Florida v. Jardines [569 U.S. 1 (2016)] to hold the use of a drug-sniffing dog in the "hallway outside [the defendant's] apartment door" unconstitutional. Whitaker, 820 F.3d at 852, 854. However, the Seventh Circuit does not announce new rules of constitutional law for the Fourth Circuit. Moreover, the Fourth Circuit, in an unpublished per curiam opinion, upheld the use of a drug-sniffing dog to search of the curtilage of a defendant's property because "the common hallway of the apartment building, including the area in front of [the defendant's] door, was not within the curtilage of his apartment." United States v. Makell, 721 F. App'x 307, 308 (4th Cir. 2018). Therefore, the Petitioner does not rely on a new rule of constitutional law.

(Extreme Conflict between the Circuits. (Page #1-A)

Petitioner requests the Court grant him immediate release, and he "be set free" from his "wrongful bondage." Id. at 14.

The Petitioner does not rely on newly discovered evidence or, as explained above, a new rule of constitutional law. Thus, relief under 28 U.S.C. § 2255(h) is inappropriate. For the Petitioner to obtain relief under § 2241, he must rely on the narrowly tailored application of § 2255(e). The Petitioner cannot meet this limited exception.

Because the Petitioner cannot satisfy § 2255(e), his claim may not be considered under § 2241, and this Court is without jurisdiction to consider his Petition. When subject matter jurisdiction does not exist, "the only function remaining to the [C]ourt is that of announcing the fact and dismissing the cause." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); Reinbold v. Evers, 187 F.3d 348, 359 n.10 (4th Cir. 1999).

This Court lacks subject matter jurisdiction. Therefore, the Petitioner's § 2241 Petition, case number **3:24-CV-12** is **DENIED AND DISMISSED WITHOUT PREJUDICE.** ECF No. 1.

The Clerk of Court is **DIRECTED** to remove this case from the Court's active docket. The Clerk is further **DIRECTED** to forward a copy of this Order to all counsel of record and to mail a copy to the Petitioner, certified mail, at his last known address.

DATED: February 9, 2024

GINA M. GROH
UNITED STATES DISTRICT JUDGE

(Page #1-A)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

TERRION DEONDRE HERMAN,

Petitioner,

v. **CIVIL ACTION NO.: 3:24-CV-12 (GROH)**

R. BROWN,

Respondent.

ORDER DENYING PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT

Pending before the Court is the Petitioner's Motion to Alter or Amend Judgment, filed on March 1, 2024. ECF No. 12. The P ioner's Motion is filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Id. at 1. Rule 59(e) provides that a "motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). The Petitioner's Motion is timely filed.

The Fourth Circuit has held a "Rule 59(e) motion may only be granted in three situations: '(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.' Zinkand v. Brown, 478 F.3d 634, 637 (4th Cir. 2007) (citations omitted). It is an extraordinary remedy that should be applied sparingly. EEOC v. Lockheed Martin Corp., 116 F.3d 110, 112 (4th Cir. 1997). Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 378 (4th Cir. 2012).

The Petitioner asserts he filed his Motion because the Court's prior dismissal of

(APPENDIX A)
ALSO ⟶ (PAGE #1-A)

this action pursuant to Jones v. Hendrix[1] [ECF No. 5] presents a "clear miscarriage of justice[.]" ECF No. 12 at 2. In support, he argues the Court's dismissal Order [ECF No. 5] is "clearly [and] plainly in opposite of federal law and facts of the merits." Id. Specifically, the Petitioner contends he should be permitted to proceed under § 2241 because he is no longer "in the jurisdiction/territory of the District Court[] . . . that 'convicted [him].'" Id. at 4. According to the Petitioner, this is the "#1 reason that make[s] . . . [§] 2255 inadequate [and] ineffective." Id.

The Court has reviewed, and liberally construed, the Petitioner's Motion [ECF No. 12] and found no intervening change in controlling law; new evidence; clear error of law; or manifest injustice—especially in light of the fact that the Court's prior dismissal Order [ECF No. 5] is currently on appeal before the Fourth Circuit. See ECF No. 6. Accordingly, the Petitioner's Motion [ECF No. 12] is **DENIED**.

The Clerk of Court is **DIRECTED** to transmit copies of this Order to the *pro se* Petitioner by certified mail, return receipt requested, at his last known address as reflected on the docket sheet.

DATED: March 4, 2024

GINA M. GROH
UNITED STATES DISTRICT JUDGE

[1] 599 U.S. 465 (2023).

(PAGE # 1-A)

FILED: September 3, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6152
(3:24-cv-00012-GMG-RWT)

TERRION DEONDRE HERMAN

Petitioner - Appellant

v.

R. BROWN

Respondent - Appellee

ORDER

The petitions for rehearing en banc were circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petitions for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

(APPENDIX A)

ALSO → (PAGE # 1-C)

"UNPUBLISHED" ?

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6152

TERRION DEONDRE HERMAN,

Petitioner - Appellant,

v.

R. BROWN,

Respondent - Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. Gina M. Groh, District Judge. (3:24-cv-00012-GMG-RWT)

Submitted: June 25, 2024 Decided: June 28, 2024

Before RICHARDSON and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Terrion Deondre Herman, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

(APPENDIX A)

ALSO → (PAGE #1-B)

FILED: June 28, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6152
(3:24-cv-00012-GMG-RWT)

TERRION DEONDRE HERMAN

Petitioner - Appellant

v.

R. BROWN

Respondent - Appellee

J U D G M E N T

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

(Page #1B)

PER CURIAM:

Terrion Deondre Herman, a federal inmate, appeals the district court's order dismissing his 28 U.S.C. § 2241 petition. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's order. *Herman v. Brown*, No. 3:24-cv-00012-GMG-RWT (N.D.W. Va. Feb. 9, 2024). 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

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FILED: September 3, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6152
(3:24-cv-00012-GMG-RWT)

TERRION DEONDRE HERMAN

Petitioner - Appellant

v.

R. BROWN

Respondent - Appellee

ORDER

The petitions for rehearing en banc were circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petitions for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

(APPENDIX A)

ALSO → (PAGE # 1-C)

TERRION HERMAN, Petitioner, v. WARDEN, USP MCCREARY,1 Respondent.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, SOUTHERN DIVISION
2022 U.S. Dist. LEXIS 38469
Civil Action No. 6: 22-040-DCR
March 4, 2022, Decided
March 4, 2022, Filed

Editorial Information: Subsequent History

Affirmed by Herman v. United States, 2022 U.S. App. LEXIS 25635 (6th Cir. Ky., Sept. 13, 2022)

Editorial Information: Prior History

United States v. Herman, 588 Fed. Appx. 493, 2014 U.S. App. LEXIS 19345, 2014 WL 5072599 (7th Cir. Ill., Oct. 10, 2014)

Counsel **{2022 U.S. Dist. LEXIS 1}**Terrion D Herman, Petitioner, Pro se, Pine Knot, KY.

Judges: Danny C. Reeves, Chief United States District Judge.

Opinion

Opinion by: Danny C. Reeves

Opinion

MEMORANDUM OPINION AND ORDER

Petitioner Terrion Herman was convicted on June 15, 2011, of one count of possession with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii), in a case before the United States District Court for the Central District of Illinois. *See, e.g., United States v. Herman*, No. 2:10-cr-2006, Record No. 46 (C.D. Ill. June 15, 2011). He successfully challenged his initial sentence of life imprisonment on appeal, and the case was remanded for resentencing. *See United States v. Herman*, 588 F. App'x 493 (7th Cir. 2014).

On remand, Herman raised a new argument that the Supreme Court's recent decision in *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), "requires the suppression of evidence that had been seized after a drug-detection dog alerted in the hallway of the apartment building where [he] lived." *Id.* Finding that this argument was beyond the scope of the appellate mandate, the district court denied relief and resentenced the petitioner to 360 months' imprisonment. *Id.* at 493-94.

Herman then appealed the allegedly unlawful search. The United States Court of Appeals for the Seventh Circuit rejected the *Jardines* argument because the search at issue**{2022 U.S. Dist. LEXIS 2}** was lawful at the time it was conducted under Seventh Circuit precedent and *Davis v. United States*, 564 U.S. 229, 231-32, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011), which "holds that the exclusionary rule cannot be used to suppress evidence that had been properly seized under authoritative precedent, even if that precedent later is overruled or otherwise disapproved." *Id.* at

(Page # 2-A)

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494.

Herman raised the *Jardines* argument again in a 2016 collateral proceeding under 28 U.S.C. § 2255. *See Herman v. United States*, 2: 16-cv-02202 (C.D. Ill. 2016). He also relied on the Seventh Circuit's decision in *United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016), which applies *Jardines*. *Id.* at Record No. 7. The district court, however, denied relief because the defendant did not comply with the one-year limitations period set forth in 28 U.S.C. § 2255(f). *Id.*

Herman filed the current 28 U.S.C. § 2241 petition in the United States District Court for the Central District of Illinois on May 18, 2021. [Record No. 1] He again seeks to challenge the constitutionality of the search, using § 2241 and the savings clause of § 2255(e) to assert that relief is warranted under *Jardines* and *Whitaker*. [*Id.*] Conducting a preliminary review under § 2243 and Rules 1(b) and 4 of the Rules Governing Section 2254 Cases in the United States District Courts,2 Chief United States District Judge Sara Darrow summarily dismissed the petition with prejudice because savings clause relief was not warranted. [Record No. 3] Specifically, Chief Judge Darrow concluded that "Herman's**{2022 U.S. Dist. LEXIS 3}** claim is simply a recitation of his previous filings" and that "[h]e does not rely on any new case law, let alone a new rule of statutory interpretation," as is required for savings clause relief. [*Id.* at p. 3.]

On appeal, the Seventh Circuit determined that Herman, who is incarcerated within the Eastern District of Kentucky, had filed his petition in the wrong district.3 [Record No. 8] The appellate court vacated the judgment, and remanded the case with the instruction that it be transferred to this Court. [*Id.*] Chief Judge Darrow accordingly transferred the matter on February 28, 2022.

Thus, the petition is again ripe for preliminary review pursuant to § 2243 and Rules 1(b) and 4. Section 2241 "grants federal courts the authority to issue writs of habeas corpus to prisoners whose custody violates federal law," but § 2255 "severely restrict[s] section 2241's applicability." *Taylor v. Owens*, 990 F.3d 493, 495 (6th Cir. 2021) (citing *Wright v. Spaulding*, 939 F.3d 695, 698 (6th Cir. 2019)). "Indeed, section 2255 now serves as the primary means for a federal prisoner to challenge his conviction or sentence-those things that were ordered in the sentencing court." *Id.* This contrasts with § 2241, which "typically facilitates only challenges to 'the execution or manner in which the sentence is served'-those things occurring within prison." *Id.* (quoting *Charles v. Chandler*, 180 F.3d 753, 755-56 (6th Cir. 1999) (per**{2022 U.S. Dist. LEXIS 4}** curiam)).

"If a prisoner can file a section 2255 motion in the sentencing court but fails to do so or is unsuccessful in his motion, then a court shall not entertain his application for a writ of habeas corpus under section 2241." *Id.* (cleaned up) (citing 28 U.S.C. § 2255(e)). There is an exception to this rule: § 2255(e)'s "savings clause," which allows consideration of a § 2241 petition under these circumstances where it "appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." *Id.* (quoting 28 U.S.C. § 2255(e)).

But the savings clause is narrow in its application. "[T]he § 2255 remedy is not considered inadequate or ineffective simply because § 2255 relief has already been denied . . . or because the petitioner is procedurally barred from pursuing relief under § 2255. . . or because the petitioner has been denied permission to file a second or successive motion to vacate." *Wooten v. Cauley*, 677 F.3d 303, 307 (6th Cir. 2012) (alterations in original) (quoting *Charles*, 180 F.3d at 756). The "[p]etitioner must also allege and prove that he is 'actually innocent.'" *Id.* (citations omitted).

"Actual innocence" involves "factual innocence, not mere legal insufficiency." *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 623-24, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998)). "Where a petitioner asserts factual innocence of his crime of conviction due to a change of law," he may demonstrate the inadequacy**{2022 U.S. Dist. LEXIS 5}** or ineffectiveness of § 2255 relief by showing: "(1) 'the

existence of a new interpretation of statutory law,' (2) 'issued after the petitioner had a meaningful time to incorporate the new interpretation into his direct appeals or subsequent motions,' (3) that is retroactive, and (4) applies to the petition's merits such that it is 'more likely than not that no reasonable juror would have convicted' the petitioner." *Hill v. Masters*, 836 F.3d 591, 594-95 (6th Cir. 2016) (quoting *Wooten*, 677 F.3d at 307-08). "[A] federal prisoner cannot bring a claim of actual innocence in a § 2241 petition through the saving clause without showing that he had no prior reasonable opportunity to bring his argument for relief." *Wright*, 939 F.3d at 705.

As Chief Judge Darrow found in her prior preliminary review of the petition, Herman is plainly not entitled to relief. Most obviously, the petitioner could, and in fact has, raised his arguments before in either his second direct appeal, his prior unsuccessful collateral proceeding, or both. Additionally, his petition contains constitutional arguments premised on an allegedly unlawful search, and he does not assert actual innocence based on a change in statutory interpretation. A standard § 2255 motion, not a § 2241 petition brought *via* the savings clause, is the appropriate statutory**{2022 U.S. Dist. LEXIS 6}** vehicle to litigate such claims. *See, e.g., Weems v. Beard*, No. 0:20-cv-045-JMH, 2020 U.S. Dist. LEXIS 77144, 2020 WL 2097750, at *2-3 (E.D. Ky. May 1, 2020) (constitutional challenges, including an allegedly unlawful search and seizure, needed to be raised on direct appeal or in a standard § 2255 motion); *Saint v. Stine*, No. 6:05-531-DCR, 2006 U.S. Dist. LEXIS 2356, 2006 WL 197058, at *4-5 (E.D. Ky. Jan. 21, 2006) (explaining that constitutional challenges "are not the kind permissible in a habeas petition presented under the savings clause.").

Thus, relief is clearly unwarranted.4 "Section 2255(e) limits district courts' subject-matter jurisdiction. A district court has no jurisdiction over an application for habeas under section 2241 if the petitioner could seek relief under section 2255, and either has not done so or has done so unsuccessfully." *Taylor*, 990 F.3d at 493. Accordingly, it is hereby

ORDERED as follows:

1. Petitioner Terrion Herman's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 [Record No. 1] is **DISMISSED** for lack of subject-matter jurisdiction.

2. A corresponding Judgment shall issue this date.

Dated: March 4, 2022.

/s/ Danny C. Reeves

Danny C. Reeves, Chief Judge

United States District Court

Eastern District of Kentucky

JUDGMENT

In accordance with the Memorandum Opinion and Order entered this date, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby

ORDERED and **ADJUDGED** as follows:

1. Petitioner Terrion Herman's petition**{2022 U.S. Dist. LEXIS 7}** for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 [Record No. 1] is **DISMISSED** for lack of subject-matter jurisdiction.

2. This action is **DISMISSED** and **STRICKEN** from the Court's docket.

3. This is a **FINAL** and **APPEALABLE** Judgment and there is no just cause for delay.

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Dated: March 3, 2022.

/s/ Danny C. Reeves

Danny C. Reeves, Chief Judge

United States District Court

Eastern District of Kentucky

(Page #2-A)

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U.S. District Court

Eastern District of Kentucky

Notice of Electronic Filing

The following transaction was entered on 3/4/2022 at 9:32 AM EST and filed on 3/4/2022

Case Name: Herman v. USA
Case Number: 6:22-cv-00040-DCR
Filer:
WARNING: CASE CLOSED on 03/04/2022
Document Number: 11

Docket Text:
MEMORANDUM OPINION & ORDER:1. Petition for writ of habeas corpus DE [1] is DISMISSED for lack of subject-matter jurisdiction. 2. Corresponding Judgment shall be issued. Signed by Judge Danny C. Reeves on 3/4/22.(JLC)cc: CORand Terrion Herman, Pro Se by US Mail

6:22-cv-00040-DCR Notice has been electronically mailed to:

6:22-cv-00040-DCR Notice will not be electronically mailed to:

Terrion D Herman
14995-026
US Penitentiary McCreary
P.O. Box 3000
Pine Knot, KY 42635

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1033394914 [Date=3/4/2022] [FileNumber=5055573-0]

Page #2-A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
(at London)

TERRION HERMAN,	)	
	)	
Petitioner,	)	Civil Action No. 6: 22-040-DCR
	)	
V.	)	
	)	
WARDEN, USP MCCREARY,	)	**JUDGMENT**
	)	
Respondent.	)	

*** *** *** ***

In accordance with the Memorandum Opinion and Order entered this date, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby

ORDERED and **ADJUDGED** as follows:

1. Petitioner Terrion Herman's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 [Record No. 1] is **DISMISSED** for lack of subject-matter jurisdiction.

2. This action is **DISMISSED** and **STRICKEN** from the Court's docket.

3. This is a **FINAL** and **APPEALABLE** Judgment and there is no just cause for delay.

Dated: March 3, 2022.

Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

(Page #2-A)

TERRION D. HERMAN, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2022 U.S. App. LEXIS 25635
No. 22-5240
September 13, 2022, Filed

Notice:

CONSULT 6TH CIR. R. 32.1 FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Editorial Information: Subsequent History

Rehearing denied by, En banc **Herman** v. United States, 2022 U.S. App. LEXIS 30846 (6th Cir., Nov. 7, 2022)

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1}ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.Herman v. Warden, USP McCreary, 2022 U.S. Dist. LEXIS 38469, 2022 WL 662275 (E.D. Ky., Mar. 4, 2022)

Counsel **TERRION** D. **HERMAN**, Petitioner - Appellant, Pro se, Pine Knot, KY.
Judges: Before: CLAY, BUSH, and MURPHY, Circuit Judges.

Opinion

ORDER

Terrion D. **Herman**, a pro se federal prisoner, appeals the district court's judgment dismissing his 28 U.S.C. § 2241 habeas corpus petition for lack of subject-matter jurisdiction. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2010, police officers in Urbana, Illinois, obtained a warrant to search Herman's apartment for illegal drugs. Probable cause for the warrant was based in part on a drug-detecting dog's positive alert on the exterior hallway door of the apartment. The officers did not have a warrant for the canine sniff. Once inside, the officers found almost 94 grams of crack cocaine. **Herman** was subsequently indicted and convicted in the United States District Court for the Central District of Illinois for possessing with intent to distribute 50 or more grams of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii). The district court sentenced him to life imprisonment. **Herman** appealed, and the Seventh Circuit vacated his life**{2022 U.S. App. LEXIS 2}** sentence and remanded the case for resentencing under the Fair Sentencing Act of 2010.

Once back in the district court, **Herman** moved to suppress the fruits of the search of his apartment pursuant to *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). *Jardines* held that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Id.* at 11-12. Consequently,

(PAGE #2-B)

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police officers need a warrant or exigent circumstances to use drug-sniffing dogs to search the curtilage of a home. *See id.* at 15 (Kagan, J., concurring). In his motion to suppress, **Herman** sought to apply *Jardines* to the hallway of his apartment, but the district court ruled that revisiting suppression issues was beyond the scope of the Seventh Circuit's mandate. The court therefore denied Herman's motion to suppress and sentenced him to 360 months of imprisonment.

The Seventh Circuit affirmed the district court's denial of Herman's motion to suppress because its pre-*Jardines* case law permitted police officers to collect evidence in apartment hallways without a warrant or probable cause, and "the exclusionary rule cannot be used to suppress evidence that had been properly seized under authoritative precedent, even if that precedent later is**{2022 U.S. App. LEXIS 3}** overruled or otherwise disapproved." *United States v.* ***Herman***, 588 F. App'x 493, 494 (7th Cir. 2014) (citing *Davis v. United States*, 564 U.S. 229, 232, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011)).

In 2016, **Herman** raised his *Jardines* claim in a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence that he filed in the Illinois district court. The district court denied the motion as untimely, ***Herman*** *v. United States*, No. 2:16-cv-2202 (C.D. Ill. Nov. 16, 2017), and **Herman** did not appeal.

In May 2021, **Herman**, seeking to invoke 28 U.S.C. § 2255(e)'s "savings clause," raised his *Jardines* claim in a § 2241 petition that he filed in the Illinois district court. The Illinois district court summarily dismissed the petition. On appeal, the Seventh Circuit vacated that judgment because **Herman** had filed his § 2241 petition in the wrong venue and ordered the district court to transfer the petition to the United States District Court for the Eastern District of Kentucky, the district of Herman's confinement at USP McCreary. ***Herman*** *v. United States*, No. 21-2163 (7th Cir. Feb. 28, 2022).

Upon transfer of the petition to the Eastern District of Kentucky, the district court conducted a preliminary review pursuant to 28 U.S.C. § 2243 and Rules 1 and 4(b) of the Rules Governing Section 2254 Cases and concluded that **Herman** plainly was not entitled to relief. The district court ruled that **Herman** could not raise his *Jardines* claim in a § 2241 petition because he had raised it on direct appeal and again in a § 2255 motion. Furthermore, the court held**{2022 U.S. App. LEXIS 4}** that Herman's claim did not satisfy § 2255(e) because it was based on constitutional arguments concerning the search of his apartment and not on a change in statutory interpretation demonstrating his actual innocence. The court concluded therefore that it lacked subject matter jurisdiction over Herman's § 2241 petition and dismissed it.

In his timely appeal, **Herman** continues to argue that he is entitled to relief from his conviction under *Jardines* because of the allegedly illegal canine sniff on the hallway door of his apartment.

We review de novo a district court's order denying a petition for a writ of habeas corpus filed under 28 U.S.C. § 2241. *Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999) (per curiam). A federal prisoner seeking to challenge his conviction or sentence ordinarily must file a § 2255 motion in the sentencing court. *Id.* at 755-56. A prisoner who wants to challenge the execution of his sentence or the manner in which his sentence is being served must file a petition for a writ of habeas corpus under § 2241 in the district where he is incarcerated. *Id.* at 756. A prisoner cannot challenge his conviction or sentence under § 2241 unless he proves that the remedy provided by § 2255 "is inadequate or ineffective to test the legality of his detention." *Id.* (quoting 28 U.S.C. § 2255(e)). Section § 2255(e) applies if the petitioner demonstrates**{2022 U.S. App. LEXIS 5}** he is actually, i.e., factually, innocent of the offense of conviction. *Wooten v. Cauley*, 677 F.3d 303, 307 (6th Cir. 2012). A petitioner satisfies § 2255(e) "by identifying a Supreme Court decision that post-dates his original section 2255 proceedings, adopts a new interpretation of the statute of conviction, and supports his innocence claim." *Taylor v. Owens*, 990 F.3d 493, 499 (6th Cir. 2021). Herman's *Jardines* claim does

not meet this standard.

First, *Jardines* is a constitutional decision-the Court did not address the elements of a § 841(a)(1) violation or adopt a new interpretation of the statute in that case. *See Jardines*, 569 U.S. at 3 ("We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment."). And **Herman** could not satisfy § 2255(e) to the extent that his § 2241 petition relied on circuit court decisions. *See Taylor*, 990 F.3d at 499.

Second, *Jardines* does not post-date Herman's original § 2255 proceedings-he could and did raise his *Jardines* claim at resentencing in the Illinois district court, on direct appeal to the Seventh Circuit, and then again in his § 2255 motion to vacate.

And third, *Jardines* does not establish that **Herman** is actually innocent of possessing with intent to distribute crack cocaine. *See Dunning v. Morrison*, 58 F. App'x 628, 629 (6th Cir. 2003).

Because Herman's *Jardines* claim does not satisfy § 2255(e), the district court correctly dismissed his § 2241 petition for lack of subject-matter{**2022 U.S. App. LEXIS 6**} jurisdiction. *See Taylor*, 990 F.3d at 499.

We therefore **AFFIRM** the district court's judgment.

Attachment A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Terrion Deandre Herman
#14995-026 Gilmer Federal
Correction Institution. P.O. Box
6000. Glenville WV. 26351-6000.
(Full name under which you were convicted, prison number, place of confinement, and full mailing address) Pro-Se Prisoner.

Petitioner,

vs.

R. Brown,
(Name of Warden or other authorized person where you are incarcerated)

Respondent.

Petition for Habeas Corpus Pursuant to 28 U.S.C. § 2241

Civil Action No. _____
(to be assigned by Clerk)

Important notes to read before completing this form:

★ Please read the entire petition before filling it out. Answer only those questions which pertain to your claim(s).

---

1. This petition concerns (check the appropriate box):

- ☑ a conviction
- ☐ a sentence
- ☐ jail or prison conditions
- ☐ prison disciplinary proceedings
- ☐ a parole problem
- ☐ other, state briefly: _____

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2. Are you represented by counsel? ☐ Yes ☑ No

If you answered yes, list your counsel's name and address:

3. List the name and location of the court which imposed your sentence:
"Urbana" District Court For the Central District of Illinois. 201 South. Vine Street. Urbana. IL. 61802

4. List the case number, if known: # 10-CR-20003. Lexis 123947

5. List the nature of the offense for which the sentence was imposed:
(#1) 50 grams or more Cocaine with the intent to distribute in violation of 21 U.S.C §§ 841 (a)(1). Non-Violent.

6. List the date each sentence was imposed and the terms of the sentence:
(#1) Jan. 23. 2012 "Life without Parole".

7. What was your plea to each count? (Check one)

☐ Guilty
☑ Not Guilty
☐ Nolo Contendere

8. If you were found guilty after a plea of not guilty, how was that finding made?

☑ A jury
☐ A Judge without a jury
☐ A Magistrate Judge without a jury

9. Did you appeal from the judgment of conviction or imposition of the sentence?

☑ Yes ☐ No

10. If you did appeal, give the following information for each appeal:

A. Name of Court: The United States Court of Appeals 7th Cir. IL.
B. Result: Remand in light of "Dorsey", 567 U.S. 3 "Jardines." 30-years".
C. Date of Result: Aug. 7, 2013 & Sept. 2013.
D. Grounds raised (List each one): #1. "Dorsey" The Fair-Sentencing Act "2010" the 1 to 100 & the 18 to 1 Sentence disparities, framework. #2. "Then" "Jardines, 133 S. Ct. 1409 (2013), That the K-9 Sniff (Door) ← On My "Secure & Locked Apartment Complex "off limit to the Public → Meaning in Herman Case there's (No-Common) Hallway's.

Note: if you filed an appeal in more than one court, attach an additional sheet of paper of the same size and give all of the information requested in Question 10, A through D.

11. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? This is called a post-conviction pleading.

☑ Yes ☐ No

If your answer was yes, complete the following sections:

A. First post-conviction proceeding:
I. Name of Court: United State Court of Appeals Seventh Circuit, Everett Mc. Kinley Dirken Courthouse.

C. Federal Bureau of Prisons unlawfully denied me credit for time served in state or federal prison.

D. Federal Bureau of Prisons or State prison system unlawfully revoked my good time credits.

E. There is an unlawful detainer lodged against me.

F. I am a citizen and resident of a foreign country and I am in custody for an act which I had a right to commit under the laws of my country.

✓G. The act for which I was convicted is no longer considered to be a crime, and I cannot raise this issue in a §2254 petition or a §2255 motion.

CAUTION: if you fail to set forth all of the grounds in this petition at this time, you may be barred from presenting additional grounds at a later date.

State clearly every ground on which you are seeking relief. Summarize briefly the facts supporting each ground. If necessary, attach a total of five (5) typed or ten (10) neatly printed pages maximum for all grounds and all attachments.

A. Ground one: "Whitaker #14-3290: 820 F.3d 849: 2016 U.S. App. Lexis 6655

Argued: April 20, 2015.

Decided: April 12, 2016.

Supporting facts: tell your story briefly without citing cases or law. You are cautioned that you must state facts, not conclusion, in support of your grounds. A "rule of thumb" to follow is this: who did exactly what to violate your rights at what time and place).

Investigator Jay Loschen, Sergeant Morgan & Investigator Michael Cervantes they All Violated My Rights Especially My 4th. Amendment Right's and Due Process right's as A United State Citizen on the Day of February 3, 2010. Without A Control Buy.

B. Ground two:

2241 & 28 U.S.C. Habeas Corpus

Extra Papers for "A. Ground one"

My Issue is Exclusively "Whitaker #14-3290", 820 F. 3d 849; 2016 U.S. App. In truth I'm Clearly being held in "Violation of the Constitution of the United States" for Years. Both the "Substantive Rule" which Applies retroactively to Cases on Collateral Review; Because it Alters the range of Conduct for A "Group"; Or Class of persons Convicted of Conduct the Law does not Make Criminal. Whitaker #14-3290 is A "New Substantive" by Contrast, Apply retroactively Id. AT 1562 This includes decisions that Narrow the Scope of A Criminal Statute by Interpreting it's terms A well "Constitutional Determination" that Place Particular "Conduct" And Mass of People, or Persons Covered by the statue beyond the State's Power to Punish. It is "Facts Undisputed" that Whitaker #14-3290 Announced A New Substantive Rule Narrows the Scope of A Criminal Statute by Interpreing It's terms. It Applies Retroactively. 1)

2241 & 28 U.S.C. Habeas Corpus

Extra Papers for "A. Ground One"

IF the defendant's Conviction and Punishment Ate For An Act that the Law does NOT MAKE Criminal, then there Can be NO room for doubt that Such A Circumstance Inherently results IN A Complete "Miscarrigge of Justice" And Presents To "Exceptional Circumstance: "Circuit" that Justify Collateral relief under 28 U.S.C.S. § 2241. Accordingly, IN ANAlogous Cases, Other Circuit Courts have Found Prejudice Justifying Collateral Relief WHEN the defendant's Conviction or Sentence IS "No-Longer Authorized by Law". To establish Prejudice to EXCUSE Procedural default, A defendANT Must Show that the error Worked to his "Actual" and "Substantial Disadvantage." 28 U.S.C.S. § 1331 Provides that "district Courts" have Jurisdiction Over All Civil Actions Arising Under the Constitution, Laws or treaties of the United States.

2241 & 28 U.S.C. Habeas Corpus

Extra Papers For A. Ground One

"Also" the "Watershed" rule:, Due too "Whitaker" Applies to My Case, which is a watershed rule due to that "Whitaker" is A Extention that Applies "Supreme Court" retroactives Cases. Whitaker is A Foundation of that. In truth Watershed Analysis Must Center on the Significance of the Procedural rule. Watershed Rule Must Not Only Improve Accuracy. but Also "Alter" the Courts' understanding of the "bedrock Procedural ("elements Essential to the "Fairness" of A Proceeding. Also to qualify As A Watershed Rule which Whitaker is to My Case As My "Case" was too his (See Exhibit 6-Pages), A New Rule Must Also require: Infringement of the Rule Must Seriously diminish the likelihood of obtaining An Accurate Conviction → Without the "Illegal K-9 Sniff" there's NO Case Period.

2241 & 28 U.S.C. Habeas Corpus.

Extra Papers for A. Ground One.

Last but not Lease "Undisputed Facts": Plain, Concise Statement of the Facts that are Undisputed, ⅓ Indeed: United States Court of Appeals for the Fourth Circuit "generally" Prefers for the "district Court" to Consider An issue in the First instance. The Court has declined to Remand, is Case where NO Fact-Finding is required. The Issue has been Fully briefed by each Side, And the Result is Obvious And is "Plain-Error" Due to "God" through Whitaker #14-3290→: Retroactive Application of "Substantive rule" is Justified because "They Necessarily Carry A "Significant Risk" that a defendant Stands "Convicted of An Act" that the law does not Make Criminal or Faces A Punishment that the Law Cannot Impose upon him, Most Indeed without Doubt Whitaker #14-3290 Applies in this Instance Case....

Thanks

(Page #1-A)

4)

Supporting FACTS

For A. of Ground One.

Without Consent From ME the APARTMENT "Owner", Not From the LandLord, Or Any TENANT, Not Probable CAUSE Just hear-SAY. Even SergeANT. Morgan Admitted IN TriAL too there "TresPASSing" & K-9 SNiFF INTrudion & UNLAWful entrANCE. That they had too "SNEAK IN Behind" AN UNAWARE rent PAYER TENANT. (Why) BECAUSE there's (NO) (IT A LOCK & Secure Apt. Complex.) COMMON HALLWAY too the APARTMENT Complex I Rented & Lived IN, THAT IS because the Apt. Complex WAS certainly "off-LimiT" to the "Public" you Needed A "Code or Key" too HAVE or GAIN ENTRACE, or "PermiSSion" therein. IN the Light of Truth My CASE IS More of A "TRANSparent Violation" then WhitAker Clearly. IN truth they had "NO-Right" SNooping AROUND

Supporting 'FACT's

For A. of Ground One

In a "Secure Complex" using "Sensitive devices" Not Avaiable to the general Public, especial in a Apartment Complex (THAT'S) Lock's out "unwelcome" Parties. On 2-3-10 the use of the drug-sniffing dog "Agent" clearly invaded reasonable Privacy Expectation where Herman had A reasonable expectation of Privacy "Especially" in a "Locked Apartment Complex". Against Persons in the Hallways meaning the Urbana State Police Clearly Engaged in a "Warrantless" Search within the Meaning of the Fourth Amendment & My Due Process Right's. When they had A drug-Sniffing dog Come to the "Door" of the Apartment #25 and Search for the Scent of illegal drugs. Indeed this is extremely Wrong doing and reckless on the Officers Part to bring A Super-Sensitive Instrument A drug-detecting dog. by the police "Outside" an Apartment door to investigate the "Inside" of the Apartment without A Warrant.....

2)

I rest My Case of Fact's And Thanks!

Supporting facts:

13. Were all of the above grounds presented to another court, state or federal? If not, state which grounds were not presented. If yes, state the name of the court, date of decision, and the nature of the outcome:
YES, THE UNITED STATES DISTRICT COURT for the "SIXTH CIRCUIT", AND the "SIXTH CIRCUIT COURT OF APPEALS" #22-5240. 9-13-22. AN "PERVERSE or REVERSE" METHOD WAS, AND HAS been "VERY" WRONGFULLY USED AGAINST ME too use JARDINES AGAIN & AGAIN too "CANCEL OUT" the CLEAR MERIT OF WHITAKER IN MY CASE SHAMEful but TRUE... I "RECALLED THE MANDA 11-22-22

14. If this petition concerns prison disciplinary proceedings, a parole problem, computation of sentence, or other case under 28 U.S.C. § 2241, answer the following questions:

A. Did you present the facts in relation to your present petition in the prison's internal grievance procedure?

☐ Yes ☑ No

1. If your answer to "A" above was yes, what was the result:

16. If a previous motion to vacate or modify a prisoner's sentence, pursuant to Section 2255, was not filed, or if such a motion was filed and denied, the reasons why Petitioner's remedy by way of Section 2255 is inadequate or ineffective to test the legality of the detention.

"TIME BARRED." "ALL" MY PROPERTY ESPECIALLY MY "LEGAL PAPER WORK" WAS SEIZED IN LATE NOV. 2014 AT MT. DOWELL F.C.I. TOO "STAGNANT" WRONGFULLY THE FILING OF MY 2255 TIMELY.

Signed this 15 (day) day of JAN. (month); 2024 (year).

Your Signature

Pro Se.

Signature of Attorney (if any)

I declare (or certify, verify, or state), under penalty of perjury, that the foregoing is true and correct.

Date of Signature: 1-15-2024.

Your Signature

In the United States District Court

For the Northern District of West Virginia.

Terrion D. Herman, Pro-Se, Petitioner,	Petition For "59(e) Motion" of Habeas Corpus P. 28 U.S.C 2241.
Vs.	
R. Brown, Warden Respondent.	Civil Action # 3:24-CV-12 Judge (GROH).

A 59(e) Motion to Alter or Amend the Judgment of Document "5" Filed "2-9-24" in the United States District Court for the Northern District of West Virginia Martinsburg. Petitioner, Terrion D. Herman Objections to the Report & Recommendation Associated with Document "5" on 2-9-24, the Goverment's Motion going Against My Habeas Corpus P. U.S.C. 2241 put forth 1-15-24; of Immediate Release. Justly due too A New Rule of Constitutional L & The Substantive Rule & The Watershed Rule "All" applies to this Instant Case Clearly Due too: 7th. Cir. Court of Appeals Passing of Whitaker # 820 F. 3d 849: 2016. # 14-3290.

AND THATS the Cir. Courts ; Jurisdiction I WAS Tried ; Convicted IN the 7th Cir. ILL. Central Distrct. It IS A Clear Miscarriage of Justice to Stike Defendant Motion For IMMEDIATE Release Under "28 U.S.C § 2241" Petition to be "Ordered Sticken" From the Docket AS this Court's "Order ; OPINION." IS Clearly ; PLAINLY IN Opposite of Federal LAW ; FACTS of the Merits of this Pro-Se Petitioner when LAWS ; Justice Should be Indeed WAY More "MEANIful" then Tech. FAULT's, excusable Neglect ; MISTAKE, Governing the Before ; After INSTANT Situation of this CASE IN the 4th. Cir. seeking Justice ; REASONING. To prevent ANY further, MANIFESTATION of INJUSTICE, From Occuring, AGAINST Terrion D. HERMAN DENIAL of Liberty thur ; by ANY further Prolong UNJUST INCARCERATION. "NOW" → Terrion D. HERMAN Shows ; DEMONSTRATES IN "details" the 2255 remedy IS Inadequate or INEFFECTIVE to Show ; Test the Legality of his detention. SO I'M rightfully

Using the Saving Clause of the 2255", And Come Forth in the Clear developed Law's Gateway Vehicle of the Habeas Corpus Petition under U.S.C. § 2241 With taken All the steps of the burden of Demonstrating As a Pro-Se Prisoner. #1.) The 2255 is Mainly A "Jurisdictional-Matter" → The right power, or Authority to Administrate Justice by Motion's or heatings And determining Federal Law's, Controversies. The, Territory Over which Authority is Exercised. The Instant Case # 3:24-CV-12 Comes under the Jurisdiction of the 4th Cir. Local Federal Courts, And A "Prisoner" Seeking to challenge the Validity of their Conviction or Sentence Are "Required" to Proceed under 28 U.S.C. § 2255 In the District Court's Jurisdiction of his or her's "Conviction". Now Clearly Demonstrating's the Record will Show I'm "Outside" of the Jurisdiction of the Court that "Convicted Me." I Show And Right Fully Invoke the Saving Clause of the 2255 in the Vessel

and Vehicle of the 2241 Habeas Corpus to Show & Prove I'm clearly being held & detain against the Constitution of the United States. Which is Generally Intended to Address the Execution of A Sentence And "Should" be Filed in the District where the Prisoner is Held at or Incarcerated At! Seeing, that Tertion D. Herman is Now being Housed in West Virginia An entire different Jurisdiction outside My Powers, then the Courthouse that Convicted ME. With Now Actions & Litigations "Involving" R. Brown & F.C.I. Gilmer. That was the #1 reason that make My 2255 Inadequate & Ineffective, Because I'm Know longer in the Jurisdiction/Territory of the District Court's of the 7th. Circuit C.D. Ill. that "Convicted ME!" So to put An end too this Clear & Plain Error & Miscarriage of Justice I Must use the 2255 Saving Clause thur the Vehicle of the 2241 U.S.C. Habeas Corpus. So My Motion for Righteous Freedom Can hopefully Now heated on the Merit's of Whitaker. 820 F. 3d at 852, 854. Clearly Proven I'm being Illegally held Against the Law's of the Constitutional Law of Whitaker (2016) (Page #1-A) 4)

Which Happens, as an Extention of Supreme Court's Retroactive Case Law; A Substantial Rule For A Group or Mass of Defendents or Prisoners Like Hetman Convicted in the 7th. Cir. C.D Ill. #2.) Reason why My 2255 is Inadequate or Ineffective is Because: The Court I was Convicted in (Declined) to Rule on My 2255, by Time-Batting it. So the Miscarriage of Justice is Covered-up & Not litigated on the Merit of Whitaker. #3.) My 2255 has Not Resulted Justice Relief, So time Passed & I was Shipped From the Court that Convicted Me. Now being A Prisoner "forced" to be in A different Jurisdiction & Courthouses "outside" of My Powers. So I'm Must litigate through the 2255 Saving Clause in the Vessel of it's 2241, Now Rightfully Demonstrated as this Court issued Explained in detail. I Also Prove that the "Saving Clause" of the 2255 in A Form of A 2241 is Also Justified by Invoking "Actual (Innocence (involves) "factual Innocence," Not Mere Legal Insufficiency. Where A Petitioner "Asserts" Factual Innocence of his Crime of Conviction due to A Change of "Law." he May demonstrate the Inadequacy or Ineffective of § 2255 Relief By Showing (1) the existence of A New Interpretation of

Statutory Law, (2) Issued After the Petitioner had A Meaningful time to Incorporate the New Interpretati Into his direct Appeals or Subsequent Motions (3) that is retroactive, And (4) Applies to the Petitions "Meri Such that it is More likely than not that No Reasonable Juror would have Convicted the Petitioner....

"Peace ⅓ Thanks and May this 59 (e) be heard in the Light of Justice."

From: Tertion Deondre Herman
#14995-026 Gilmer F.C.I.
P.O. Box 6000
Glenville W.V. 26351-6000

Mailing Date:
2-26-24.

⅓ by: [signature]

Within the 28 Day Filing For A 59(e).
Thanks. (Page #1-A)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

TERRION DEONDRE HERMAN,

Petitioner,

v. **CIVIL ACTION NO.: 3:24-CV-12 (GROH)**

R. BROWN,

Respondent.

ORDER DISMISSING PETITION

Pending before the Court is a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, seeking to vacate the Petitioner's 360-month sentence[1] imposed pursuant to his conviction for possession with intent to distribute a mixture or substance containing a cocaine base ("crack"), in the Central District of Illinois, case number 2:10-CR-20003: See ECF No. 1.

---

[1] Following his June 15, 2011, conviction by a jury of possession of 50 grams or more of a mixture or substance containing cocaine base ("crack") with the intent to distribute it, the Petitioner was sentenced to a term of life imprisonment on January 24, 2012. C.D. Ill. 2:10-CR-20003, ECF Nos. 7, 46, 53. That sentence was on December 10, 2012, vacated and remanded by the Court of Appeals for the Seventh Circuit. C.A.7th 12-1183, ECF No. 28. C.D. Ill. 2:10-CR-20003, ECF No. 72. The mandate for that order issued on January 2, 2013. Id. Thereafter, the sentencing court entered a "Text Only Order" on March 4, 2021, which states in part:

> Defendant was sentenced by this court on January 23, 2012 to mandatory life imprisonment. Mr. Herman appealed this sentence. On January 2, 2013, the United States Court of Appeals for the Seventh Circuit granted a joint motion to remand, vacated Mr. Hermans life sentence, and remanded the case back to this Court for resentencing in accordance with United States v. Dorsey, 132 S.Ct. 2321 (2012) and the Fair Sentencing Act. On September 25, 2013, **Mr. Herman was resentenced to 360 months imprisonment** in accordance with the Fair Sentencing Act, which removed his mandatory life sentence and instead subjected him to a mandatory minimum 300 month term of imprisonment and a guideline range of 360 months to life. Accordingly, Mr. Herman has already been resentenced in accordance with the Fair Sentencing Act, which renders him ineligible for a first Step Act reduction.

(Emphasis added).

(Appendix A)

Also ⟶ (#1-A)

A case must be dismissed if a petitioner does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); see also Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008) (applying the Twombly standard and emphasizing the necessity of *plausibility*). Further, in proceedings where the prisoner appears *in forma pauperis*, "the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim on which relief may be granted[.]" 28 U.S.C. § 1915(e)(2)(B)(ii).

Prisoners seeking to challenge the validity of their convictions or sentences are required to proceed under "28 U.S.C. § 2255" in the district court of conviction. By contrast, a petition for writ of habeas corpus pursuant to § 2241 is generally intended to address the execution of a sentence and should be filed in the district where the prisoner is incarcerated. Fontanez v. O'Brien, 807 F.3d 84, 85 (4th Cir. 2015).

Although § 2255 expressly prohibits a prisoner from challenging their conviction or the imposition of their sentence through a § 2241 petition, there is nonetheless a "saving clause" that permits an otherwise prohibited challenge under § 2241 if they show § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The law is clearly developed, however, that relief under § 2255 is not inadequate or ineffective merely because relief has become unavailable under § 2255 due to (1) a limitation bar, (2) the prohibition against successive petitions, or (3) a procedural bar from failure to raise the issue on direct appeal. In re Vial, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997).

"A petitioner bears the burden of demonstrating" that the § 2255 remedy is "inadequate or ineffective," and the standard is an exacting one." The Supreme Court held

(PAGE #1-A.)

in Jones v. Hendrix, 599 U.S. 465, 143 S. Ct. 1857 (2023), that a petitioner cannot use a § 2241 petition to mount a successive collateral attack on the validity of a federal sentence. See also Hall v. Hudgins, 2023 WL 436358, (4th Cir. 2023).

The Supreme Court's decision in Hendrix invalidates the tests previously established by the Fourth Circuit for a petitioner to challenge the legality of his conviction or sentence. See In re Jones, 226 F.3d 328, 333–34 (4th Cir. 2000) and United States v. Wheeler, 886 F.3d 415 428 (4th Cir. 2018). Because the requirements of the saving clause are jurisdictional, a § 2241 petitioner relying on the § 2255(e) saving clause must strictly meet the statutory test for this Court to have subject matter jurisdiction." Absent subject matter jurisdiction, there is nothing left for the Court to do but dismiss a case.

Here, the Petitioner first alleges he is entitled to relief because: (1) his Fourth Amendment rights were violated by investigating officers on February 3, 2010 [ECF No. 1 at 5]; (2) the warrantless dog sniff search method outside of the Petitioner's apartment, which led to the seizure of controlled substances, was later found unconstitutional under the holding of United States v. Whitaker, 820 F.3d 849 (7th Cir. 2016), [2] which the Petitioner asserts established a new, substantive rule of constitutional law that applies retroactively [id. at 5–6, 8–9]; (3) his conviction resulted in a miscarriage of justice and presents exceptional circumstances which justify relief under § 2241 [id. at 7]; and (4) his conviction is the result of plain error [id. at 9]. As relief, the

[2] In Whitaker, the Seventh Circuit "extended" the holding of Florida v. Jardines [569 U.S. 1 (2016)] to hold the use of a drug-sniffing dog in the "hallway outside [the defendant's] apartment door" unconstitutional. Whitaker, 820 F.3d at 852, 854. However, the Seventh Circuit does not announce new rules of constitutional law for the Fourth Circuit. Moreover, the Fourth Circuit, in an unpublished per curiam opinion, upheld the use of a drug-sniffing dog to search of the curtilage of a defendant's property because "the common hallway of the apartment building, including the area in front of [the defendant's] door, was not within the curtilage of his apartment." United States v. Makell, 721 F. App'x 307, 308 (4th Cir. 2018). Therefore, the Petitioner does not rely on a new rule of constitutional law.

(Extreme Conflict between the Circuits. (Page #1-A)

Petitioner requests the Court grant him immediate release, and he "be set free" from his "wrongful bondage." Id. at 14.

The Petitioner does not rely on newly discovered evidence or, as explained above, a new rule of constitutional law. Thus, relief under 28 U.S.C. § 2255(h) is inappropriate. For the Petitioner to obtain relief under § 2241, he must rely on the narrowly tailored application of § 2255(e). The Petitioner cannot meet this limited exception.

Because the Petitioner cannot satisfy § 2255(e), his claim may not be considered under § 2241, and this Court is without jurisdiction to consider his Petition. When subject matter jurisdiction does not exist, "the only function remaining to the [C]ourt is that of announcing the fact and dismissing the cause." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); Reinbold v. Evers, 187 F.3d 348, 359 n.10 (4th Cir. 1999).

This Court lacks subject matter jurisdiction. Therefore, the Petitioner's § 2241 Petition, case number **3:24-CV-12** is **DENIED AND DISMISSED WITHOUT PREJUDICE.** ECF No. 1.

The Clerk of Court is **DIRECTED** to remove this case from the Court's active docket. The Clerk is further **DIRECTED** to forward a copy of this Order to all counsel of record and to mail a copy to the Petitioner, certified mail, at his last known address.

DATED: February 9, 2024

GINA M. GROH
UNITED STATES DISTRICT JUDGE

(Page #1-A)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

TERRION DEONDRE HERMAN,

Petitioner,

v.

CIVIL ACTION NO.: 3:24-CV-12 (GROH)

R. BROWN,

Respondent.

ORDER DENYING PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT

Pending before the Court is the Petitioner's Motion to Alter or Amend Judgment, filed on March 1, 2024. ECF No. 12. The P ioner's Motion is filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Id. at 1. Rule 59(e) provides that a "motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). The Petitioner's Motion is timely filed.

The Fourth Circuit has held a "Rule 59(e) motion may only be granted in three situations: '(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.' Zinkand v. Brown, 478 F.3d 634, 637 (4th Cir. 2007) (citations omitted). It is an extraordinary remedy that should be applied sparingly. EEOC v. Lockheed Martin Corp., 116 F.3d 110, 112 (4th Cir. 1997). Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 378 (4th Cir. 2012).

The Petitioner asserts he filed his Motion because the Court's prior dismissal of

(APPENDIX A)

ALSO ⟶ (PAGE #1-A)

this action pursuant to Jones v. Hendrix[1] [ECF No. 5] presents a "clear miscarriage of justice[.]" ECF No. 12 at 2. In support, he argues the Court's dismissal Order [ECF No. 5] is "clearly [and] plainly in opposite of federal law and facts of the merits." Id. Specifically, the Petitioner contends he should be permitted to proceed under § 2241 because he is no longer "in the jurisdiction/territory of the District Court[] . . . that 'convicted [him].'" Id. at 4. According to the Petitioner, this is the "#1 reason that make[s] . . . [§] 2255 inadequate [and] ineffective." Id.

The Court has reviewed, and liberally construed, the Petitioner's Motion [ECF No. 12] and found no intervening change in controlling law; new evidence; clear error of law; or manifest injustice—especially in light of the fact that the Court's prior dismissal Order [ECF No. 5] is currently on appeal before the Fourth Circuit. See ECF No. 6. Accordingly, the Petitioner's Motion [ECF No. 12] is **DENIED**.

The Clerk of Court is **DIRECTED** to transmit copies of this Order to the *pro se* Petitioner by certified mail, return receipt requested, at his last known address as reflected on the docket sheet.

DATED: March 4, 2024

GINA M. GROH
UNITED STATES DISTRICT JUDGE

[1] 599 U.S. 465 (2023).

(Page # 1-A)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INFORMAL BRIEF

No. 24-6152, Terrion Herman v. R. Brown

3:24-cv-00012-GMG-RWT

1. **Declaration of Inmate Filing**

An inmate's notice of appeal is timely if it was deposited in the institution's internal mail system, with postage prepaid, on or before the last day for filing. Timely filing may be shown by:

- a postmark or date stamp showing that the notice of appeal was timely deposited in the institution's internal mail system, with postage prepaid, or
- a declaration of the inmate, under penalty of perjury, of the date on which the notice of appeal was deposited in the institution's internal mail system with postage prepaid. To include a declaration of inmate filing as part of your informal brief, complete and sign the declaration below:

Declaration of Inmate Filing

Date NOTICE OF APPEAL deposited in institution's mail system: 2-28-24

I am an inmate confined in an institution and deposited my notice of appeal in the institution's internal mail system. First-class postage was prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Signature: [signature] Date: 2-28-24

[*Note to inmate filers: If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(A)(iii).*]

2. **Jurisdiction**

Name of court or agency from which review is sought: United States Court of Appeals for the Fourth Circuit.

Date(s) of order or orders for which review is sought: Before, or by 3-18-2024.

3. **Issues for Review**

Use the following spaces to set forth the facts and argument in support of the issues you wish the Court of Appeals to consider. The parties may cite case law, but citations are not required.

Issue 1. Whitaker #14-3290. 820 F. 3d 849: "2016" U.S. App. →

Supporting Facts and Argument. Investigator Jay Loschen, Sergeant Morgan & Investigator Michael Cervantes "All" Violated My Rights Especially My "Fourth Amendment & Due Process Constitution Right's As A United State Citizen on the Day of Febtuary 3, 2010. "Without A Control Buy"; "Without Consent (Doc #1-B)

U.S.C. : 2241. → Informal Opening Brief."

Issue #1. A. Also Ground #1. My Issue is "Whitaker #14-3290" which Demonstrates in this Instant Case #24-6152 Manifestation of Injustice. In the Face of Plain Error-Clear Law. Wrongfully I'm being held in Violation of the Constitution of the United States for years. "Both" the "Substantive Rule" Applies to this Instant Case #24-6152 which is retroactive to Cases on Collateral Review. Because it "Alters" the range of Conduct For A "Group", or "Class" of People Convicted in the 7th. Circuit Conduct the LAW does NOT MAKE Criminal. Also Whitaker #14-3290 is A "New Substantive" that Applies retroactively Id. At 1562 this Includes decisions that "Narrow the Scope" of A "Criminal Statute by Interpreting" it's terms As well "Constitutional Determination" that Place "Particular Conduct" of A Mass of People, or Persons "Covered" by the Statue beyond the State's Power to Punish.

(Page #1-B) 1.)

#14-3290 Announces(2016) A New Substantive Rule.

"If" the defendant Conviction & Punishment are for an -Act/Conduct- that the Law does not make Criminal, then there can be no-Room for doubt or bondage. That such a Circumstance Inherently result in a Complete transparent "Miscarriage of Justice" and Presents-clear "Exceptional Circumstance." "Circuits" that Justify Collateral relief under 28 U.S.C. § 2241. Accordingly in analogous Cases, Other Circuit Court's have Found "Prejudice" Justifying Collateral Relief when the defendant Conviction or Sentence is "No-Longer Authorized by Law." "To establish "Prejudice" to "Excuse Procedural default." (Pro SE 2241) A defendant must "Show" that the Error Worked to his or her's "Actual" And "Substantial Disadvantage." Also the "Watershed Rule" Applies to this Instant Case due to "Whitaker" #14-3290 that is an Extention & Applies "Supreme Court" retroactives Case Law. Whitaker is a Foundation of that. In truth "Watershed

Rule Is Not Limited On The Retroactivity Of The

Procedural Rule. Watershed Rule "Must Not Only Improve Accuracy. but Also "Alter" the Court's Understanding of the "bedrock Procedural" elements Essential to the "Fairness" of A Proceeding. Also to qualify As A Watershed Rule which Whitaker is to my Case As My "Case" was to his For his Freedom (See 6-page Exhibit) which can also Explain Everything. A New Rule Must Also require: Infringement of the Rule Must "Seriously diminish" the likelihood of Obtaining An Accurate Conviction "Without" the "Illegal Warrantless K-9 sniff on My Door," There's "NO Case" Period. Without Doubt Whitaker #14-3290 Fit's this Instance Case.

This is Obviously A "Plain - Error" Situation.

Thanks

For Issue 1.

From me (Herman) the Apartment "Owner," Not From the "Land Lord" or From Any "Tenant," Not Any "Probable Cause" Just heat-Say. Even Sergeant. Morgan Admitted in Trial too their "Trespassing" & K-9 Sniff Intrudion & Unlawful Entrance upon the Locked Apartment Complex. They Recklessly had too "Sneak" in behind an unaware rent Paing Tenant. (Why). Because there's "(No)" Common Hallway's It's a Lock & Secure Apt. Complex I rented, and Lived in. Surely (Herman's) Lock & Secure Apartment Complex was Certainly "OFF-Limit" "to the" "Public" you Need A "Code or Key" too have or gain entrance, or Permission therein. In the Light Justice & Truth My Case Is More of a Transpatent Violation then Whitaker #14-3290 Clearly. The Urbana Police had "No-Right" Snooping Around in a "Secured Apartment Complex" using "Sensitive Devices"

(Page #1-B)

Not available to the General Public Especially

In Apartment Complexes that Locks out "Unwelcome" Parties. Indeed on "2-3-10" the use of a drug Sniff-ing "Dog Agent" Clearly & Plainly "Invaded" (reasonable Expectation of Privacy). "Especially" in a Secured Apartment Complex. Against the Urbana Police Snooping in the Secure Hallways "Engaged" in a "Warrantless" Search within the Meaning of the Fourth Amendment & My Due Process Rights Plain-Error Violations. In this Instant Case. When they had a drug-Sniffing dog Agent Come to the "Door" of the Apartment #25. And Search For the Scent of Illegal drugs. Indeed this is extremely Wrong doing And "reckless" on the Officers Part to bring into a Secure Apt. Complex a "Super Sensitive Instrument" a drug detecting dog "Outside" an Apartment Door too "Investigate" the "Inside" of (Herman's) Apartment (without a Warrant at "that" Time.)

Issue 2. Now I Show's ! "Demonstrates" In "details" why the 2255 remedy Is Inadequate or Ineffective to Test the Legality of MY detention.

Supporting Facts and Argument.

Now Terrion D. Herman Rightfully Invoke's USE the "28 U.S.C. § 2255 Saving Clause". And Come Forth IN the Clear developed LAW And GATEWAY Vehicle of the "Habeas Corpus Petition Under U.S.C. § 2241". With taken the Steps of the burden of Demonstrating (why) the Saving Clause Necessary NEED.

Issue 3. Actual Innocence

Supporting Facts and Argument. I Also Put Forth that the "Saving Clause of the "2255" In A Form of A "2241" Is Also Justified by Invoking "Actual Innocence" Involves) "Factual Innocence," NOT mere Legal Insufficiency. Where "A Petitioner "Asserts" Factual Innocence of his Crime of Conviction due to "A change of Law." He may demonstrate the showing of his 2255 In - Effectiveness for Relief. I WAS (Time Barred) "2016" with Whitaker #14-3290. The existence of A New Interpretation of Statutory Law. That Is retroactive And Applies to the Petition "Merit". Thanks.

Issue 4.

Supporting Facts and Argument

4. **Relief Requested**

Identify the precise action you want the Court of Appeals to take: I'm asking this Court of Justice too Rightfully Free Me from this Bondage, And Too Immediate Release Me.

Thanks /(Page #1-B)

Supporting Facts And Argument

#1.) The 2255 is Mainly A "Jurisdictional-Matter:" The right power or Authority to Administrate Justice by Motion & or hearing. And determining Federal Law & Controversies. The Territory Over which Authority is Exercised. The Instant Case # 24-6152 Comes under the Jurisdiction of the 4th. Circuit Court of Appeals Now. I'm A "Prisoner" Seeking to challenge the Validity of my/their Conviction or Sentence are "Required" to Proceed Under 28 U.S.C. § 2255 In the District Court & Jurisdiction of his or her's "Conviction". Now Clearly Demonstrating & the Record will show I'm "Outside" of the Jurisdiction of the Court that "Convicted Me." I show and Rightfully Invoke the Saving Clause of the 2255 in the Vessel & Vehicle of the "2241 habeas Corpus" to show & Prove I'm clearly being held & Detain

Federal Laws. Which is Generally Intended to Redress the Execution of a Sentence and "Should" be Filed in the District "where" the Prisoner is held at or Incarcerated At. Seeing that Terrion D. Herman is "Now" being Housed in West Virginia an entire different Jurisdiction "Outside" My Powers. Then the Courthouse that Convicted Me. "With Now Action's Litigations Involving R. Brown's F.C.I Gilmer." That's #1.) reason that makes my 2255's Inadequate's Ineffective, Because I'm Know Longer in the Jurisdiction/Territory of the District Court of the 7th. Circuit C.D. ILL. that "Convicted Me." Hopefully this clear showing of Fact's will finally put an end too this Plain-Error's Miscarriage of Justice I "Must" use the "2255's Saving Clause" that the "Vehicle" of the "2241's U.S.C. Habeas Corpus." So that my Motion For Righteous Freedom Can hopefully Now be heared on the Merit's of Whitaker #14-3290. Clearly Proves I'm being Illegally held's detain Against the Constitutional Laws, Federal Laws, & the Law of Whitaker (2016)

5. **Prior appeals (for appellants only)**
A. Have you filed other cases in this court? Yes [ ] No [✓]

B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

Signature
[Notarization Not Required]

TERRION D. HERMAN
[Please Print Your Name Here]

CERTIFICATE OF SERVICE
****

I certify that on _____ I served a copy of this Informal Brief on all parties, addressed as shown below:

_____
Signature

NO STAPLES, TAPE OR BINDING PLEASE

(PAGE #1-B)

Copy #1 Hand-original written.

CASE# 6:22-CV-40-DCR - CASE No. 6:22-CV-40-DCR

United States Court of Appeals For The Sixth Circuit

RECEIVED
MAR 17 2022
DEBORAH S. HUNT, Clerk

Petitioner, Terrion D. Herman,

V.

Warden, USP McCreary, Pine Knot, KY. 42635. Names are: Previously C. Gomez & Now J. Gilley.(1) U.S.A

Respondents.

Sentencing Date: 1-23-12.

Case # & Civil Action # 6:22-040-DCR

Wrote: Date 3-10-22. Jerry H

*"Appealing" the District Court of Eastern
*District of Kentucky Southern Division
* (At London) Case Closed 3-4-2

Pro Se Litigant, Section 28 U.S.C "2241" Petitioner For Writ of Habeas Corpus 60(B)

Now comes Terrion Herman, "Appealing" the Eastern District of Kentucky Southern Division (At London) Ruling As to My 28 U.S.C. 2241. Enlight of the U.S. Supreme Court Attached to "Florida Vs. Jardines" 133 S. Ct. 1409 (2013). A New Rule of Law Made Retroactive by the Supreme Court. I'm Seeking "Post-Conviction Relief" In relation to the Instant Case # 6:22-040-DCR, under the "Provisional Scope" of the U.S. Supreme Court Ruling Attached to Florida Vs. Jardines. Also the "Enlightenment" of the Seventh Circuit Court of Appeals ruling Attached to "Whitaker" Which Serves As An "Extention" to Jardines. See, USA Vs. Whitaker (2016) BL 113879 "7th. Circuit" #14-3290 April 12, 2016." I'm Justly Seeking "Immediate Release," Because the "K-9 Sniff" was "Illegally" Did At 3 On My Apt. Door" Without A Warrant: Without Consent. "Illegal Evidence" was "Clearly" used to Prosecute Me. The Exclusionary Rule & The Plain Error Rule Applies In this Instant Case. Plus "My Hallway" wasn't A "Common-Way" Hallway. My Apartment Complex "was A" Locked Doors & Secure" Apt. Complex with Outter Lockings

(Page # 2-B)

"NOT" AVAILABLE TO THE GENERAL PUBLIC. THIS IS CLEARLY RECKLESS Conduct by the URBANA Police Dept. It's Clearly on the Record the officers stated they "Shucked" in the Secure Apt. Complex. You Need Special Keys or a Code# to get IN. Hopefully this Appeals Court Also Finds & Sees Exceptional Circumstances. I'm Seeking Immediate-Release. My "224" Clearly proves & shows I'm in Custody that "Violates Federal LAW." I Also Site in Support for Justice: "The Poisonous Tree Doctrine" Evidence from a Tainted Origin is Unavailable for any use in any form of Prosecution. There should be No-Grounds to Sustain the Conviction Attached to the Instant Case. Last but Not lease I Also Site: "Teague Vs. LANE, 489 U.S. 288." → is Also Retroactively "IF" a Person can Show & Identify Right's so Fundamental that "Any" System of ordered Liberty is Obliged to Include them. (Thanks)

In Accordance with the Aforementioned Claims Presented Herein, And the Arguements of clear Merit Attached thereto. Mr. Herman is Seeking Over Due Relief & Justice in the form of Immediate Release. "Thanks"

Wrote on 3-10-22.

"US Penitentiary McCreary"
P.O. Box 3000
Pine Knot, KY. 42635

Jerrion Herman
Jerrion Herman

(Thanks)

(Page #2-B)

(2.

NOT RECOMMENDED FOR PUBLICATION

No. 22-5240

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRION D. HERMAN,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
UNITED STATES OF AMERICA,	)	KENTUCKY
	)	
Respondent-Appellee.	)	

ORDER

Before: CLAY, BUSH, and MURPHY, Circuit Judges.

Terrion D. Herman, a pro se federal prisoner, appeals the district court's judgment dismissing his 28 U.S.C. § 2241 habeas corpus petition for lack of subject-matter jurisdiction. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2010, police officers in Urbana, Illinois, obtained a warrant to search Herman's apartment for illegal drugs. Probable cause for the warrant was based in part on a drug-detecting dog's positive alert on the exterior hallway door of the apartment. The officers did not have a warrant for the canine sniff. Once inside, the officers found almost 94 grams of crack cocaine. Herman was subsequently indicted and convicted in the United States District Court for the Central District of Illinois for possessing with intent to distribute 50 or more grams of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii). The district court sentenced him to life imprisonment. Herman appealed, and the Seventh Circuit vacated his life sentence and remanded the case for resentencing under the Fair Sentencing Act of 2010.

First, *Jardines* is a constitutional decision—the Court did not address the elements of a § 841(a)(1) violation or adopt a new interpretation of the statute in that case. *See Jardines*, 569 U.S. at 3 ("We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment."). And Herman could not satisfy § 2255(e) to the extent that his § 2241 petition relied on circuit court decisions. *See Taylor*, 990 F.3d at 499.

Second, *Jardines* does not post-date Herman's original § 2255 proceedings—he could and did raise his *Jardines* claim at resentencing in the Illinois district court, on direct appeal to the Seventh Circuit, and then again in his § 2255 motion to vacate.

And third, *Jardines* does not establish that Herman is actually innocent of possessing with intent to distribute crack cocaine. *See Dunning v. Morrison*, 58 F. App'x 628, 629 (6th Cir. 2003).

Because Herman's *Jardines* claim does not satisfy § 2255(e), the district court correctly dismissed his § 2241 petition for lack of subject-matter jurisdiction. *See Taylor*, 990 F.3d at 499.

Pure Whitaker claim now, with understanding!

We therefore **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

(Page #23)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: November 15, 2022

Mr. Robert R. Carr
Eastern District of Kentucky at London
310 S. Main Street
London, KY 40741

Re: Case No. 22-5240, *Terrion Herman v. USA*
Originating Case No. : 6:22-cv-00040

Dear Mr. Carr,

Enclosed is a copy of the mandate filed in this case.

Sincerely yours,

s/Austin D. Tyree
for Jennifer Strobel, Case Manager

cc: Mr. Terrion D. Herman

Enclosure

(Page #2-B)

In the Name of "God", Most Gracious, Most Merciful

#1-Copy original.

Wrote: 11-17-22.

RECEIVED
NOV 22 2022
DEBORAH S. HUNT, Clerk

United States Court of Appeals for the Sixth Circuit.

Tertion D. Herman,
Petitioner,

v.

J. Gilley, Warden, USP Mc. Creary, Pine Knot, KY. 42635, & U.S.A. Respondents.

Case # 22-5240 in Appeal Court &

Original Case # 6:22-CV-00040.

Pro Se Litigant, Section 28 U.S.C. 2241 Petitioner for Writ of Habeas Corpus 60 (B).

Now comes Tertion D. Herman in Responds to the "Mandate" I received 11-17-22, but was Filed 11-15-22, Pursuant to the Court's Disposition that was Filed 9-13-22. which the Appeal Court 6th Cir. "Affirm" the district Court's Judgment: State's Dismissed For lack of Subject-Matter Jurisdiction. "Going against" My Immediate-Release as of Today & the Paper-work I have received as of Today. I'm Protesting the legality of My Imprisonment, I'm clearly being Illegally Held-Against Federal Law. Therefore I'm Motioning this Appeal Court which has the "Inherent Authority" for Justice to Recall the Mandate of Dismissing My 2241. I understand that Such Power, Should only be Exercised in Extraordinary Circumstances & Exceptional Circumstances, and Clear-Error. I know this Case Warrants a Recall if there's Really Justice in the Land. I'm Seeking that the Judgment I received on 9-13-22.

be Amended, And changed too Immediate Release, And that the Case be Final heard & Argued on the "Clear Merit" of The Seventh Circuit "Court of Appeals" Ruling Attached to "Whitaker Which Serves As An "Extention" "to" Jardines. See, U.S.A. Vs. Whitaker (2016) BL 113879 7th. Circuit # 14-3290 April 12, 2016. Clearly Whitaker "Applies" Jardines. My "Litigation" Is Whitaker Only, "NOT" Plain Jardines Again & Again that Will truely be "Futile." I'm putting Forth "Clear Proof" My 2241 Petition Does Relie on Circuit Court Decisions. → Whitaker 7th. Cir. # 14-3290 the Soul of My 2241. Due too this Change of Federal Law there Is Grave, unforeseen Contingencies, I can demonstrate Exceptional Circumstance In My Case # 22-5240. With this Additional Motion being put Forth that My "Claim" Is Whitaker # 14-3290 Only, And that the "Mandate be Recalled" and Judgment be Amended too Immediate Release. Clearly this Case Wartants A Recall. * Also to give "Clear Credit" too My "Issue" And Claim Is "Another" Extra 6-Page Exhibit of the Entire Appeal Case of "Lonnie Whitaker" → 820 F.3d 849; 2016 U.S. App. Lexis 6655 # 14-3290 & 14-3506 → Decided April 12, 2016. With Petition. "Thanks" and MAY "GOD" Let Truth & Justice Prevail.....

(Page # 2-B)

TERRION HERMAN
#14995-026
United States P. McCreary
P.O. Box 3000
Pine Knot, KY. 42635

7022 0410 0000 5284 7954

$0.00

RECEIVED
NOV 2 5
DEBORAH S. HUNT, Clerk

3-Page Motion &
Extra 6-page Exhibit
L. Whitaker.

"Recall Mandate of Dismissal"
Due To Federal Law.....

OFFice of the Clerk: United States
Court of Appeals For the Sixth District

100 E. Fifth Street, Room 540
Cincinnati, Ohio 45202-3988

(PAGE # 2-B)

Terrion Herman
#14995-026
United States P. McCreary
P.O. Box 3000
Pine Knot, KY. 42635

CERTIFIED MAIL
7022-0410-0000-5284-7954

U.S. POSTAGE PAID
FCM LG ENV
PINE KNOT, KY
42635
NOV 18, 22
AMOUNT
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RDC 99
45202

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X-RAY
U.S. MARSHAL

3-page Motion &
Extra 6 page Exhibit
L. Whitaker.

"Recall Mandate of Dismissal."
Due Too Federal Law....

Office of the Clerk: United States
Court of Appeals for the Sixth District.
100 E. Fifth Street Room 540
Cincinnati, Ohio 45202-3988

(Page # 2-B)

TERRION D. HERMAN, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2022 U.S. App. LEXIS 30846
No. 22-5240
November 7, 2022, Filed

Editorial Information: Prior History

Herman v. United States, 2022 U.S. App. LEXIS 25635 (6th Cir. Ky., Sept. 13, 2022)

Counsel {2022 U.S. App. LEXIS 1}TERRION D. HERMAN, Petitioner - Appellant, Pro se, Pine Knot, KY.

Judges: BEFORE: CLAY, BUSH, and MURPHY, Circuit Judges.

Opinion

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

(Page # 2-e)

14995026

U.S. District Court
Eastern District of Kentucky (London)
CIVIL DOCKET FOR CASE #: 6:22-cv-00040-DCR
Internal Use Only

Herman v. USA
Assigned to: Judge Danny C. Reeves
Referred to: P SO
Case in other court: Illinois Central, 1:21-cv-01153
Cause: 28:2241 Petition for Writ of Habeas Corpus (federa

Date Filed: 02/28/2022
Date Terminated: 03/04/2022
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Terrion D Herman

represented by **Terrion D Herman**
14995-026
US Penitentiary McCreary
P.O. Box 3000
Pine Knot, KY 42635
PRO SE

V.

Respondent

United States of America

Date Filed	#	Docket Text
05/18/2021	1	PETITION for Writ of Habeas Corpus, filed by Terrion D Herman. (Attachments: # 1 envelope)(ANW) [Transferred from ilcd on 2/28/2022.] (Entered: 05/18/2021)
05/18/2021		TEXT ORDER entered by Chief Judge Sara Darrow directing the Petitioner to pay the filing fee of $5.00 within 30 days of this Order. If Petitioner is unable to pay the required filing fee, he may file a Motion for Leave to Proceed in Forma Pauperis. If Petitioner fails to pay the required filing fee or file a Motion for Leave to Proceed in Forma Pauperis within 30 days, his Petition under 28 U.S.C. § 2241 for Writ of Habeas 1 will be dismissed without prejudice by this court (ANW) [Transferred from ilcd on 2/28/2022.] (Entered: 05/18/2021)
06/01/2021	2	Letter from Terrion Herman regarding filing fee (RES) [Transferred from ilcd on 2/28/2022.] (Entered: 06/01/2021)
06/02/2021	3	ORDER entered by Chief Judge Sara Darrow on 6/2/2021. Petitioner Herman's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 1 is SUMMARILY DISMISSED WITH PREJUDICE pursuant to 28 U.S.C. § 2255(e). This case is CLOSED. See Written Order. (ANW) [Transferred from ilcd on 2/28/2022.] (Entered: 06/02/2021)
06/15/2021		Filing fee: $5.00; receipt number 24626010080. (DS) [Transferred from ilcd on 2/28/2022.] (Entered: 06/15/2021)
06/23/2021	4	NOTICE OF APPEAL as to 3 Order by Terrion D Herman. (Attachments: # 1 Envelope) (JRK) [Transferred from ilcd on 2/28/2022.] (Entered: 06/23/2021)
06/23/2021	5	Short Record of Appeal Sent to US Court of Appeals re 4 Notice of Appeal (JRK) [Transferred from ilcd on 2/28/2022.] (Entered: 06/23/2021)
06/24/2021	6	NOTICE of Docketing Record on Appeal from USCA regarding 4 Notice of Appeal filed by

		Terrion D Herman. USCA Case Number 21-2163 (RES) (Main Document 6 replaced on 6/24/2021) (JRK). [Transferred from ilcd on 2/28/2022.] (Entered: 06/24/2021)
06/24/2021	7	USCA Circuit Rule 3(b) Notice as to 4 Notice of Appeal filed by Terrion D Herman (RES) [Transferred from ilcd on 2/28/2022.] (Entered: 06/24/2021)
07/26/2021 IFP JUST.		USCA Appeal Fees received $ 505, receipt number 24626010145 re 4 Notice of Appeal filed by Terrion D Herman. (BMG) [Transferred from ilcd on 2/28/2022.] (Entered: 07/26/2021)
02/28/2022	8	MANDATE and ORDER of USCA as to 4 Notice of Appeal filed by Terrion D Herman. See Written Order. (ANW) [Transferred from ilcd on 2/28/2022.] (Entered: 02/28/2022)
02/28/2022		TEXT ORDER REOPENING CASE entered by Chief Judge Sara Darrow on 2/28/2022. Pursuant to the Seventh Circuit's Mandate and Order 8 , the Court's Judgment is vacated. The Clerk is DIRECTED to reopen the case and transfer the case to the Eastern District of Kentucky. (ANW) [Transferred from ilcd on 2/28/2022.] (Entered: 02/28/2022)
02/28/2022	9	CASE TRANSFERRED IN from District of Illinois Central. Case number 1:21-cv-01153. Original file, certified copy of transfer order and docket sheet received electronically. cc: Pro Se filer via US Mail (Entered: 02/28/2022)
02/28/2022	10	IMPORTANT NOTICE to Pro Se Filer: Information relating to pro se filings and F.R.Civ.P. 5.2 requiring personal identifiers be partially redacted from documents filed with the court. Click here for more information on the rules. It is the sole responsibility of counsel and the parties to comply with the rules requiring redaction of personal data identifiers.cc: pro se filer via U.S. Mail (Attachments: # 1 Sample Caption)(JLC) (Entered: 02/28/2022)
03/04/2022	11	MEMORANDUM OPINION & ORDER:1. Petition for writ of habeas corpus DE 1 is DISMISSED for lack of subject-matter jurisdiction. 2. Corresponding Judgment shall be issued. Signed by Judge Danny C. Reeves on 3/4/22.(JLC)cc: COR and Terrion Herman, Pro Se by US Mail Modified date filed and text on 3/4/2022 (JLC). (Entered: 03/04/2022)
03/04/2022	12	JUDGMENT: IT IS ORDERED AND ADJUDGED:1. Petition for writ of habeas corpus DE 1 is DISMISSED for lack of subject-matter jurisdiction. 2. Action is DISMISSED and STRICKEN from docket. 3. This is a FINAL and APPEALABLE Judgment with no just cause for delay. Signed by Judge Danny C. Reeves on 3/3/22.(JLC)cc: COR and Terrion Herman, Pro Se by US Mail Modified file date on 3/4/2022 (JLC). (Entered: 03/04/2022)
03/07/2022	13	MOTION Requesting Vacated Conviction, Sentence, and Immediate Release by Terrion D Herman, Pro Se. Motions referred to P SO. (Attachments: # 1 Envelope postmarked 3/4/22) (JLC) (Entered: 03/08/2022)
03/07/2022		***MOTION SUBMITTED TO CHAMBERS of PSO for review: re 13 MOTION Requesting Vacated Conviction, Sentence, and Immediate Release by Terrion D Herman, Pro Se. (JLC) (Entered: 03/08/2022)
03/09/2022	14	ORDER:Petitioner's motion for relief 13 is DENIED. Signed by Judge Danny C. Reeves on 3/9/22. (JLC)cc: CORand Terrion Herman, Pro Se by US Mail (Entered: 03/09/2022)
03/17/2022	15	NOTICE OF APPEAL as to 11 Memorandum Opinion & Order, 12 Judgment, by Terrion D Herman, pro se. (SHORT RECORD MAILED). NOTE: Documents received from 6CCA on 3/29/2022 and filed pursuant to Fed.R.App.P.4(d) on 3/17/2022 (Filing date same as 6CCA). cc: COR, 6CCA (Attachments: # 1 Exhibit - Declaration of Terrion Deondre Herman, # 2 Envelope postmarked 3/14/2022, # 3 Letter from 6CCA)(APR) (Entered: 03/29/2022)

IN THE NAME OF GOD, MOST GRACIOUS, MOST MERCIFUL

Copy # 3.

5-11-21.

UNITED STATES DISTRICT COURT
For the CENTERAL DISTRICT OF ILLINOIS
(URBANA DIVISION)

"Motion under 28 U.S.C § 2241" Habeas Corpus Action --- To VACATE, SET ASIDE or CORRECT the SENTENCE OF A PERSON IN Federal Custody.

TERRION HERMAN
DEFENDANT - PETITIONER

CRIMINAL # 2:10-CR-20003 MPM.

V.

UNITED STATES OF AMERICA
PLAINTIFF - RESPONDENT

DATE SENTENCE: JANUARY 23, 2012

NOW COMES TERRION DEONDRE HERMAN, A Pro SE Petitioner SEEKING to INVOKE the SAVING CLAUSE OF the 2255 IN order to PROCEED under 28 U.S.C § 2241 CONSTITUTIONAL DUE PROCESS VIOLATIONSSS. "GROUNDS for relief & SUPPORTING FACTSSS."

1) "U.S. SUPREME COURT ruling" ATTACHED to "FLORIDA VS. JARDINES", 133 S. Ct. 1409, 185 L. Ed 2d 495 "(2013)". A NEW RULE OF CONSTITUTIONAL LAW MADE RETROACTIVE by the "SUPREME COURT".

2) THAT the NEW RULE applies RETROACTIVELY to an COLLATERAL REVIEW.

(PAGE # 3-A) 1)

3) The Clear Extraordinary Circumstance & Error is grave enough to be Deem A Clear Miscarriage of Justice.

Mr. Herman is hereby seeking Post-Conviction relief in relation to the instant case, under the Provisional Scope of the U.S. Supreme Court ruling Attached to Florida Vs. Jardines, 133 S. ct. 1409 (2013), And Enlightenment of the "Seventh Circuit Court of Appeals ruling Attached to "Whitaker", Which serves as an "Extention" to "Jardines". See, USA Vs. Whitaker 2016 BL 113879, 7th Cir., #. 14-3290 April 12, 2016. Furthermore Mr. Herman is seeking relief in the form of A Vacated Conviction & Immediate Release. Based on the "Facts" that the "Warrant Issued" in relation to the instant case, was secured in violation of his Constitutional Rights. That's even "Pre-Date" Mr. Herman case's Addictional Support "U.S. Supreme Court Ruling Attached Kyllo Vs. United States", 533 U.S. 27 (2001). Constitutional Right's has been clearly Violated under the Provisional Scope of the Procedural aspect of "Due-Process", And "Especially" Illegal Search and Seizure under the Fourth & Fifth Amendment respectively. Plus the "K-9" Sniff was did without A "Warrant", Plus No "Consent" whatsoever into A "Lock-Doors" Apartment "NOT" available to the General Public is A "Clear" Invadion. The Good-Faith Exception "Didn't" Apply where "No" Appellate Decision Specifically Authorized the use of a Super-Sensitive" Instrument (K-9 Noses), "A drug-detecting Dog Agent"

By

MIME-Version:1.0
From:ECF_Returns@ilcd.uscourts.gov
To:ECF_Notices
Bcc:
--Case Participants: W. Scott Simpson (allison.ramsdale@usdoj.gov, caseview.ecf@usdoj.gov, w.scott.simpson@usdoj.gov), Chief Judge Sara Darrow (chambers.darrow@ilcd.uscourts.gov, sara_darrow@ilcd.uscourts.gov)
--Non Case Participants:
--No Notice Sent:

Message-Id:<4101128@ilcd.uscourts.gov>
Subject:Activity in Case 1:21-cv-01153-SLD Herman v. USA Order on Petition for Writ of Habeas Corpus (2241 & 2254)
Content-Type: text/html

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

CENTRAL DISTRICT OF ILLINOIS

Notice of Electronic Filing

The following transaction was entered on 6/2/2021 at 12:45 PM CDT and filed on 6/2/2021
Case Name: Herman v. USA
Case Number: 1:21-cv-01153-SLD
Filer:
WARNING: CASE CLOSED on 06/02/2021
Document Number: 3

Docket Text:
ORDER entered by Chief Judge Sara Darrow on 6/2/2021. Petitioner Herman's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. ◆ 2241 [1] is SUMMARILY DISMISSED WITH PREJUDICE pursuant to 28 U.S.C. ◆ 2255(e). This case is CLOSED. See Written Order. (ANW)

1:21-cv-01153-SLD Notice has been electronically mailed to:

W. Scott Simpson w.scott.simpson@usdoj.gov, allison.ramsdale@usdoj.gov, CaseView.ECF@usdoj.gov

1:21-cv-01153-SLD Notice has been delivered by other means to:

(Page #3-A)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 7, 2021
Decided January 4, 2022

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 21-2163

TERRION HERMAN,
Petitioner-Appellant,

v.

UNITED STATES,
Respondent-Appellee.

Appeal from the United States District Court for the Central District of Illinois.

No. 21-cv-1153

Sara Darrow,
Chief Judge.

ORDER

In 2011 the District Court for the Central District of Illinois convicted Terrion Herman of possessing cocaine base with intent to distribute it. Herman appealed and we remanded the case for resentencing; after the resentencing, he again appealed, this time challenging the denial of his motion to suppress evidence, but we affirmed. *United States v. Herman*, 588 F. App'x 493, 494 (7th Cir. 2014). Next, Herman repeated his suppression argument in a motion to vacate his sentence under 28 U.S.C. § 2255, but the district court dismissed the motion as untimely. *See* No. 2:16-cv-2202 (C.D. Ill. Nov. 16, 2017).

Four years later, Herman filed a petition for a writ of habeas corpus citing 28 U.S.C. § 2241—again in the Central District of Illinois, and again challenging the

(Page #3-B)

denial of suppression. The district court summarily dismissed the petition with prejudice because it concluded Herman was not entitled to relief.

Yet the court should not have reached the question whether a federal judge may afford relief on this claim—because the Central District of Illinois was not the appropriate forum for resolving the petition with prejudice. A habeas corpus petition (as opposed to a successive § 2255 motion, which typically is forbidden by § 2255(h)) may be filed only in the district in which the petitioner is imprisoned and should name the petitioner's warden as respondent. *See In re Hall*, 988 F.3d 376, 378 (7th Cir. 2021); *Moore v. Olson*, 368 F.3d 757, 758 (7th Cir. 2004). According to the Bureau of Prisons website and the return address on Herman's petition, he was and is imprisoned at the United States Penitentiary in McCreary County, Kentucky, within the Eastern District of Kentucky. He was thus obligated to file any petition for a writ of habeas corpus at the district court located there. The district court in the Central District of Illinois, having received a petition filed in the wrong venue, should have transferred it to the proper one. 28 U.S.C. § 1404.

We therefore VACATE the district court's judgment and REMAND with instructions to transfer the petition to the Eastern District of Kentucky.

IN THE NAME of "GOD", MOST GRACIOUS, MOST MERCIFUL.

Copy #3. HANDWRITEN.

"Previous Motion Something Extra To Enlighten The Clerk of Eastern Dist of Kentucky.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TERTION D. HERMAN, PETITIONER,

V.

UNITED STATES, RESPONDENT.

SENTENCING DATE: 1-23-12.

CASE # 21-CV-1153-SLD

WROTE: DATE 6-7-21

"TWO" NEW CASES OF "STATUTORY INTERPRETATION"

PRO SE LITIGANT. SECTION 28 U.S.C "2241" PETITIONER FOR WRIT OF HABEAS CORPUS 60(B).

NOW COMES TERTION HERMAN, "APPEALING" A DISTRICT COURT RULING AS TO MY 28 U.S.C. "2241". ENLIGHT OF U.S. SUPREME COURT ATTACHED TO "FLORIDA VS. JARDINES" 1338. Ct. 1409 (2013). A NEW RULE OF LAW MADE RETROACTIVE BY THE SUPREME COURT. I'M SEEKING POST-CONVICTION RELIEF IN RELATION TO THE INSTANT CASE, UNDER THE "PROVISIONAL SCOPE" OF THE U.S. SUPREME COURT RULING, ATTACHED TO FLORIDA VS. JARDINES, AND ALSO "ENLIGHTENMENT" OF YOU ALL THE SEVENTH CIRCUIT COURT OF APPEALS" RULING ATTACHED TO "WHITAKER" WHICH SERVES AS AN "EXTENTION" TO JARDINES. SEE, USA VS. WHITAKER (2016) BL 113879 7th. CIRCUIT, # 14-3290 APRIL 12, 2016. I'M JUSTLY SEEKING "IMMEDIATE RELEASE", BECAUSE THE K-9 SNIFF WAS did "WITHOUT A WARRANT NOR CONSENT", AND PEOPLE OF THE APPEALS COURT THE OFFICER'S "LIED". MY HALLWAY "WASN'T A" "COMMON-WAY" HALLWAY. "MY" APARTMENT COMPLEX WAS A "LOCKED; SECURE" APT. COMPLEX "OUTTER" LOCKINGS "NOT" AVAILABLE TO THE "GENERAL-PUBLIC." THIS IS "CLEAR RECKLESS CONDUCT BY THE OFFICER'S, IT'S EVEN ON THE "RECORD". THE OFFICER'S "SNEAKED" IN, YOU NEEDED "KEYS" OR A "CODE" TO GET IN. I'M PRAYING NOW THIS COURT SEE EXCEPTIONAL CIRCUMSTANCES..... PLUS ON 10-10-2014, CASE # 13-3210 THIS SAME COURT STATED: 11-03-14, ALL THESE "QUESTIONS" ARE RESERVED FOR FUTURE CASES WHERE A DOG IS USED AFTER JARDINES... WHITAKER (2016) "7th. CIRCUIT" # 14-3290 APRIL. 12. "THANKS"

(PAGE #3-B)

UNITED STATES DISTRICT COURT
FOR THE CENTERAL DISTRICT OF ILLINOIS
(URBANA DIVISION)

MOTION UNDER 28 U.S.C. §2255 — TO VACATE, SET ASIDE, OR CORRECT THE SENTENCE OF A PERSON IN FEDERAL CUSTODY

TERRION DEONDRE HERMAN,
Defendant/Petitioner,

v.

Case No. 10-CR-20003

UNITED STATES OF AMERICA,
Plaintiff/Respondent.

Prisoner's No.: 14995-026

Place of Confirment: Federal Correctional Institution - Florence, Colorado

MOTION

1) a. The name and location of the court that entered the judgment Mr. Herman is hereby challenging is the -- United States District Court for the Central District of Illinois - (Urbana Division) -at- 201 South Vine Street, Urbana, Illinois 61802.

b. Case No.: 10-CR-20003

2) a. The date of the judgment of the conviction was June 15, 2011.

b. The date of sentencing was January 23, 2012.

3) Length of Sentence: the original sentence imposed in this matter was (life), the sentence was later reduced to (360 months and/or 30 years).

4) Nature of crime (all counts): (Count 1 of a single count indictment).

Count 1 -- violation of 21 U.S.C. §841(a)(1) and (b)(1)(A), for knowingly possessing 50 grams or more of a mixture and substance containing cocaine base ("crack"), a Schedule II controlled substance, with intent the intent to distribute.

(Mr. Herman also had "two" prior drug convictions, thus a life sentence was a relevant element attached to the sentencing scheme governing the instant case).

5) Mr. Herman elected to proceed to (jury trial), in relation to the instant case, and was found guilty of the one count alleged in the indictment.

6) Mr. Herman was convicted via (jury trial).

7) Mr. Herman did not testify during the trial phase of the proceedings attached to the instant case.

8) Yes, Mr. Herman did file a direct appeal in relation to the instant case, and the judgment attached thereto.

(Page #3-C)

9) The following answers (a-g), are attached to question #9, as Mr. Herman did file an appeal in connection with the conviction attached to the instant case.

a. Mr. Herman filed the appeal attached to the instant case in the **United States Court of Appeals for the Seventh Circuit.**

b. Appeal Case No. **13-3210**

c. Mr. Herman received a two-fold result in relation to the appeal he filed in connection to the instant case. The Appeals Court, granted Mr. Herman relief in the form of a sentence reduction under the provisional scope of the Fair Sentencing Act of 2010, and the U.S. Supreme Court ruling attached to Dorsey v. U.S.A., 132 S. Ct. 2321, 183 L.Ed. 2d 250 (2012), in which. Mr. Herman sentence was reduced from (life) to (**360 months and/or 30 years**).

During remand, Mr. Herman attempted to raise an additional argument under the U.S. Supreme Court ruling attached to Florida v. Jardines, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), in relation to issues pertaining to exactly how the warrant was obtained in relation to the instant case. The Appeals Court denied Mr. Herman any form of relief in relation to this issue, and affirmed the District Court's denial in relation to suppression of the evidence collected as a result of the search warrant.

d. The Seventh Circuit Court of Appeals, issued the aforementioned ruling on October 10, 2014.

e. U.S.A. v. Terrion Herman, (CA7 C.D. Ill), 588 Fed. Appx 493; 2014 U.S. App. LEXIS 19345.

f. **Ground(s) raised on appeal:** Mr. Herman sought relief in the form of a reduction of his sentence under the provisional scope of the Fair Sentencing Act of 2010, and the U.S. Supreme Court ruling attached to **Dorsey v. U.S.A.**, 132 S. Ct. 2321, 183 L.Ed. 2d 250 (2012).

Mr. Herman also sought relief under the scope of **Florida v. Jardines**, 133 S. Ct. 1409, 185 L.Ed. 2d 495 (2013), in relation to the search warrant that was issued, and used to secure the evidence against Mr. Herman in connection with the instant case.

g. Yes, Mr. Herman did seek certiorari review in connection with the aforementioned appeal at the U.S. Supreme Court level.

1) The docket/case no. attached to the certiorari review is unknown at this time.

2) As a result of the aforementioned request, certiorari review was **denied.**

3) Certiorari was denied on February 23, 2015.

4) Herman v. U.S.A., 2015 U.S. LEXIS 1174

5) Mr. Herman sought review of the denial of his **Florida v. Jardines** claim.

10) No, Mr. Herman has filed no other petitions for the purpose of seeking post-conviction relief in relation to the instant case.

11) The questions attached to #11 of the standard §2255 application -- sections (a., 1-8 and b.-c.), do not apply in relation to the instant case/petition, as Mr. Herman has not filed any post-conviction petition in relation to the instant case prior to this instant §2255 petition.

(Page #3-C)

12) **Grounds for relief.**

Note: Mr. Herman is hereby seeking post-conviction relief in relation to the instant case, under the provisional scope of the U.S. Supreme Court ruling attached to **Florida v. Jardines**, 133 S.Ct. 1409, 185 L.Ed 2d 495 (2013); and, the Seventh Circuit Court of Appeals ruling attached to "**Whitaker**," which serves as an extention to "**Jardines.**" See, **U.S.A. v. Whitaker**, 2016 BL 113879, 7th Cir., No. 14-3290, April 12, 2016.

Furthermore, Mr. Herman is seeking relief in the form of a **vacated conviction**, based on the premise, that the warrant issued in relation to the instant case, was secured in violation of his constitutional rights under the provisional scope of the **procedural aspect of due process**, and **illegal search and seizure** under the **Fifth** and **Fourth Amendments** respectively.

Mr. Herman has assumed this position, based upon the fact, that the search warrant used to secure the evidence against him was obtained under the scope of the "Poisonous Tree Doctrine," and is therefore of a tainted origin, and unavailable for use in any form of prosecution. Thus, without the use of the evidence seized as a result of the execution of the warrant, there is no evidence of criminal activity on Mr. Herman's part whatsoever, and no grounds to sustain the conviction attached to the instant case.

Ground One: The conviction attached to the instant case, was obtained in violation of Mr. Herman's -- Fifth Amendment right to "due process" and his Fourth Amendment right to protection from illicit search and seizure.

(Supporting Facts, Ground 1): Mr. Herman is of the opinion that the search warrant utilized to obtain the evidence against him, was obtained in violation of his constitutional rights to **due process** and **protection against illegal search and seizure**, because the warrant itself was secured in violation of governing procedure in the form of an "illicit dog sniff," that served to alert to the presence of an illegal substance behind a locked apartment door.

In order to secure the warrant to search the residence occupied by Mr. Herman, in which, the evidence of criminal activity was recovered." Law enforcement, utilized and/or relied upon the "positive alert/result," of the trained drug detection dog, however. The aforementioned "alert/result," was obtained in violation of Mr. Herman's -- Fourth Amendment right, "protecting against an illegal search and seizure," in that. Law enforcement officials **were not authorized**, nor was permission sought to use the "dog agent" inside the locked entrance hallway of the building in which the residence was located. Thus,

procedure was not followed, resulting in the aforementioned violation of the Fourth Amendment, in that. Law enforcement obtained the "search warrant," with the use of an illicit element that violates due process and the Fourth Amendment, under the scope of **Florida v. Jardines**; and, now, "**Whitaker**," which serves to extend **Florida v. Jardines**, "to dog sniffs related to shared hallways in apartment buildings." In addition, the aforementioned ruling under "**Whitaker**," applies as well to an apartment tenant's "actual doorway," in which. Serves as a direct relation to Mr. Herman's case, as law enforce- officials elected to gain entry to a locked and/or otherwise unaccessable hallway of an apartment building by questionable means, and thereafter conducted an "illicit" dog sniff, in which. Was later utilized to obtain the search warrant, that would result in the recovery of the evidence required to prove criminal conduct on the part of Mr. Herman.

The aforementioned events fall under the provisional scope of the "fruit (tree) of the poisonous doctrine," as they serve to detail, an illicit action on the part of law enforcement, that further serves to violate Mr. Herman's constitutional rights in a significant manner under the provisional scopes of both **due process** and his **Fourth Amendment right to protection against illegal search and seizures.**

Pursuant to the aforementioned doctrine of law -- ("fruit of the poisonous tree"), it has firmly been established that --

> "evidence derived from an illegal **search**, arrest, or interrogation is inadmissible, because the evidence ("the fruit") was tainted by the illegality ("the poisonous tree").

And, in relation to the instant case, the "illegality" results from the "illicit dog sniff," utilized to obtained the search warrant leading to the recovery of the evidence against Mr. Herman. Furthermore, because the warrant was obtained by illicit means, it serves to represent a significant element of the poisonous tree.

Ground Two: The Seventh Circuit Court of Appeals' ruling attached to "Whitaker," in relation to "Jardines," must be applied retroactively under both exceptions of "Teague," (Teague v. Lane, 489 U.S. 288).

(Supporting Facts, Ground 2) -- Pursuant to "Teague," a new rule of law will be applied retroactively if, it is either "substantive" or "procedural" in nature.

The Supreme Court established with the "Teague" ruling, the following:

> **Substantive** rules of law are those, that "narrow the scope of a criminal statute by interpreting its terms, as well as **constitutional determinations** that place particular conduct or persons covered by the statute (or in this case, the element of **procedure**), beyond the State's (government's) power to punish.
>
> Furthermore, the Court established, that **procedural** rules of law are those, that "represent a "watershed" rule of criminal procedure, implicating the fundamental fairness and accuracy of a proceeding." Thus, a procedural rule is "one that raises the possibility that someone convicted with the use of an invalidated procedure, might have otherwise been acquitted." Therefore, to qualify under this exception, the procedural rule must "not only improve accuracy, but serve to alter the bedrock procedural elements essential to the fairness of the proceeding."

In relation to this instant case/matter, both exceptions of "Teague," are met in connection with the "Whitaker" ruling, in that. The "substantive" element of "Teague" is met, because the "Whitaker" ruling attaches to the Fourth Amendment in relation to the elements of procedure that must be satisfied in relation to search and seizures protocol. Thus, "Whitaker" is a constitutional ruling, in and of itself, as it serves to interpret elements relevant to the Fourth Amendment.

Furthermore, the "Whitaker" ruling, serves as a "watershed" ruling, as it speaks directly to the procedure that must be followed in connection with the conduct attached to obtaining warrants. Thus, it essentially serves to speak directly to the fundamental fairness of the criminal proceeding, and the procedure that must be followed in order to represent a legal and clean prosecution/proceeding.

Therefore, Mr. Herman is of the opinion, that for the aforementioned reasons the "Whitaker" ruling qualifies under both exceptions of the Teague Doctrine,

(Page #3-C)

and must be applied "retroactively," in a full capacity.

Note: The questions at #12 of the standard §2255 application at sections -- (b., 1-2 and c., 1-7), do not apply in relation to this matter/instant petition, as Mr. Herman is presenting this claim to the Court for the **first time** based upon a **new** ruling -- (Seventh Circuit Court of Appeals). Applying, **U.S.A. v. Whitaker**, (April 12, 2016).

13) The claim/issue presented herein this instant petition, is being present to the Court for the first time, **as is**, as it is based upon a new Appeals Court ruling. Applying, **U.S.A. v. Whitaker**, (CA7, April 12, 2016).

14) No, Mr. Herman has no other post-conviction petition pending in relation to the instant case at this time.

15) Mr. Herman was represented by the following person(s), at each specified stage of the instant criminal proceeding/case.

(a-d), the preliminary hearing through sentencing phase -- **Ray E. Richards**, Law Office of Ray E. Richards II - PLC, Royal Oak, Michigan.

(e), appeal phase, 1) **Federal Public Defender's Office -- Springfield, IL., (Brandon Shiller, (Chicago, IL.)**

(f-g) post-conviction proceeding, including appeals if necessary -- (**Pro se Litigant**).

16) No, Mr. Herman was sentenced in accordance with one count of a single count, solitary indictment.

17) No, Mr. Herman has no other sentence to serve at the conclusion of the term attached to the instant federal matter.

18) **Timing of this instant petition.**

This instant petition represents a timely filing in accordance with 28 U.S.C. §2255, as Mr. Herman seeks relief in accordance with a **new** ruling of law via the Seventh Circuit Court of Appeals; applying, **U.S.A. v. Whitaker**, (April 12, 2016). Thus, the one year in which to seek relief in accordance with §2255, should be tolled from April 12, 2016, based upon the premise that "Whitaker" represents a new ruling of law, subject to retroactive application under the scope of the Teague Doctrine.

Relief Sought.

In accordance with the aforementioned claims presented herein, and the arguments of merit attached thereto. Mr. Herman is hereby seeking relief in the form of a **vacated conviction/sentence**, and **an order of immediate release**, as the conviction attached to the instant case is no longer sustainable after "**Whitaker**," which requires retroactive application under the provisional scope of the Teague Doctrine.

Furthermore, Mr. Herman has successfully shown that the evidence collected against him is "tainted," based upon the premise that it is "fruit of a poisonous tree," that serves to significantly violate his constitutional rights under both the Fourth and Fifth Amendments. Thus, resulting in a conclusion that is unreliable, and represents a miscarriage of justice.

(Page #3-C)

Terrion D. Herman #14995-026

TERRION D. HERMAN, #14995-026
FEDERAL CORRECTIONAL INSTITUTION
P.O. BOX 6000
FLORENCE, COLORADO 81226

I, **Terrion D. Herman**, hereby declare under the penalty of perjury that the foregoing is true and correct, and that this instant petition/motion under 28 U.S.C. §2255, was placed in the prison's (FCI-Florence), mailing system on **June** 20th, **2016**, and (3 copies) were sent to the following:

The Clerk of the Court
U.S. District Court
(District of Central Illinois - Urbana Div.)
201 South Vine Street
Urbana, Illinois 61802

Executed on JUNE 20, 2016

Terrion D. Herman

Terrion D. Herman

Respectfully submitted this 20th **day of June, 2016.**

(PAGE #3-C)

IN THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

TERRION HERMAN,
Defendant-Petitioner,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Respondent.

Civil No. 2:16-CV-02202-JES

Criminal No. 2:10-CR-20003-MPM

DECLARATION OF TERRION DEONDRE HERMAN

I, Terrion Deondre Herman, do hereby declare the following under penalty of perjury pursuant to 28 U.S.C. §1746:

1.) My name is Terrion Deondre Herman and I was born on July 11, 1976 in Urbana, Illinois, and I am presently serving a 30-year federal sentence under Bureau of Prisons Register No. 14995-026 at the Federal Correctional Institution in Florence, Colorado.

2.) I am the defendant in the above entitled criminal case and I was sentenced to a mandatory life sentence on January 23, 2012 after being convicted by a jury of possessing 50 or more grams of cocaine base with intent to distribute pursuant to 21 U.S.C. §841(b)(1)(A)(iii).

3.) Because I was unable to pay the cost of my appeal, retained trial counsel Ray E. Richards II withdrew and the Court appointed attorney Brendan Shiller to represent me on appeal. Although I instructed Mr. Shiller to challenge the illegal search on appeal, he refused to do so and only argued that I should be resentenced under the Fair Sentencing Act of 2010 pursuant to Dorsey v. United States, 567 U.S. ___, 132 S.Ct. 2321, 183 L.Ed.2d 250 (2012).

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4.) The Seventh Circuit consequently remanded my case to the District Court for resentencing and the U.S. Marshals transported me from USP Terre Haute to the Paxton County Jail on June 24, 2013. Appellate counsel Shiller was removed from my case and a Mr. Daniels from the Federal Public Defenders Office in Springfield was appointed to represent me at resentencing. However, before I was resentenced, Mr. Daniels filed with the District Court a "Motion to Reopen Suppression Proceedings" (Dkt. 74) based on a Supreme Court decision issued on March 26, 2013 in Florida v. Jardines, 133 S.Ct. 1409, 185 L.Ed.2d 495, which held that the use of a drug-sniffing dog on a homeowner's porch constitutes a search under the Fourth Amendment.

5.) On August 7, 2013, the Honorable U.S. District Judge Michael P. McCuskey issued an opinion finding "that this case does present extraordinary circumstances which warrant the consideration of an issue outside the scope of the remand..." and granted me the right to rechallenge the constitutionality of the search. See United States v. Herman, 2013 U.S. Dist. LEXIS 110938, slip op. at 6 (C.D. Ill., Aug. 7, 2013).

6.) For reasons unknown to me, Judge McCuskey subsequently vacated his opinion, recused himself from my case, and the matter was reassigned to Judge James E. Shadid, who resentenced me to 360 months as a Career Offender under the U.S. Sentencing Guidelines. I was so upset by this turn of events that when I arrived back to the penitentiary at USP Terre Haute on October 8, 2013, I refused to return to General Population and spent the next 10+ months in the Special Housing Unit ("SHU;" the Hole), receiving four (4) Incident Reports for "Refusing to Program."

7.) On appeal of the District Court's refusal to consider Jardine, I was assigned attorney Jerry Brown of Chicago. During the appeal, I was transferred from USP Terre Haute to FCI McDowell in West Virginia on August 28, 2014. I was provided with my personal property and legal papers on September 23, 2014 while still in SHU. However, after attorney Brown informed me by letter

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in early November that the Seventh Circuit had denied my appeal, when the next scheduled cell change occurred on November 26, 2014, I refused to cuff-up. The institution SORT Team was called in and when they arrived with their video-camera for the cell extraction, I consented to be handcuffed and they video-recorded my verbal declaration that I was being unjustly imprisoned by the Government. They also videotaped the confiscation of my personal property and all my legal paperwork. None of this property or legal papers were ever returned to me.

8.) On December 19, 2014, I was transferred from from FCI McDowell to the Oklahoma City Transit Center on Con-Air. When I was being processed in, I once again refused to go to General Population, informing Lt. Shaffer that the Government was conspiring to put false charges on me. I was placed in SHU and subsequently received another Incident Report for refusing to program.

9.) I was transferred to FCI Atlanta on December 30, 2014 and I was again placed in SHU where I remained for over nine (9) months. During that period I repeatedly requested the return of my personal property and legal papers, to no avail. On several occasions, when scheduled cell change moves were initiated, I refused to cuff-up, forcing the SORT Team to physically extract me from my cell. During these confrontations, they videotaped my verbal demands for the the return of my legal papers and personal property. During my stay in FCI Atlanta SHU, I received a total of seven (7) Incident Reports, one for disruptive behavior, one for interfering with staff and insolence, and five (5) for refusing to program.

10.) On the morning of September 23, 2015 I was transported by bus to FCI Edgefield in South Carolina, where I spent the next six-and-a-half (6½) months in SHU. As soon as I arrived, I asked for my property and legal work, insisting that I would not go to General Population until I received it. I consequently received

four (4) more Incident Reports for refusing to program. On February 2, 2016 when lunch was being served, I asked a staff member about my property and legal papers, and he said, "Haven't you figured it out yet? Your property is probably somewhere in Alaska by now." At this point I finally realized that my papers and personal property had probably been destroyed, so I jammed my arm through the food-slot in my door and held it open, forcing the SORT Team to respond on numerous occasions thereafter. I received six (6) Incident Reports for interfering with security devices.

11.) Sometime in March of 2016, I informed staff at FCI Edgefield that I would go to General Population if they sent me to some other institution. They agreed, and I was designated to FCI Florence here in Colorado. I left FCI Edgefield on April 6, 2016, spending twelve days in the FCI Atlanta SHU and three days in the OKC Transit Center SHU, arriving here in Florence on April 21, 2016 and going directly to General Population for the first time in over thirty-one (31) months. During the months of May and June, I enquired several times to R&D (Receiving and Discharge) staff about my legal papers and property. They finally informed me that they have no record of any property of mine anywhere in the Bureau of Prisons.

12.) During my stays in the FCI Atlanta and FCI Edgefield SHUs, I asked on several occasions to use the SHU law library. I was always informed, "You're on the list," but was never actually given access. So when I arrived here, I immediately accessed the LEXIS law computers, and having no §2255 forms, I obtained help in typing up the crude motion I submitted on June 20, 2016. There are other potential issues that I may wish to raise, so if this Court should grant me equitable tolling of the one-year statute of limitations I would like to amend my motion so as to include all cognizable claims and grounds for relief.

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE WHITAKER, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
820 F.3d 849; 2016 U.S. App. LEXIS 6655
Nos. 14-3290 and 14-3506
April 12, 2016, Decided
April 20, 2015, Argued

Editorial Information: Subsequent History

Rehearing denied by United States v. Whitaker, 2016 U.S. App. LEXIS 11285 (7th Cir. Wis., June 10, 2016)

Editorial Information: Prior History

{2016 U.S. App. LEXIS 1}Appeals from the United States District Court for the Western District of Wisconsin. Nos. 14-cr-00017, 07-cr-00123 - Barbara B. Crabb, Judge.United States v. Whitaker, 2014 U.S. Dist. LEXIS 196036 (W.D. Wis., June 26, 2014)

Counsel For United States of America, Plaintiff - Appellee (14-3290, 14-3506): Rita M. Rumbelow, Attorney, Office of The United States Attorney, Madison, WI.
For Lonnie Whitaker, Defendant - Appellant (14-3290, 14-3506): Mark A. Eisenberg, Attorney, Eisenberg Law Offices, S.C., Madison, WI.

Judges: Before WOOD, Chief Judge, HAMILTON, Circuit Judge, and DARRAH, District Judge.*

CASE SUMMARY The judgment denying appellant's motion to suppress was reversed because the police engaged in a warrantless search within the meaning of the Fourth Amendment when they had a drug-sniffing dog come to the door of the apartment and search for the scent of illegal drugs.

OVERVIEW: HOLDINGS: [1]-The use of the drug-sniffing dog clearly invaded reasonable privacy expectations where appellant had a reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public; [2]-The police engaged in a warrantless search within the meaning of the Fourth Amendment when they had a drug-sniffing dog come to the door of the apartment and search for the scent of illegal drugs; [3]-The good-faith exception did not apply where no appellate decision specifically authorized the use of a super-sensitive instrument, a drug-detecting dog, by the police outside an apartment door to investigate the inside of the apartment without a warrant.

OUTCOME: Judgment reversed.

LexisNexis Headnotes

Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress
Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Motions to Suppress

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When reviewing appeals from denials of motions to suppress, an appellate court reviews legal questions de novo and factual findings for clear error.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Expectation of Privacy
Criminal Law & Procedure > Search & Seizure > Seizures of Things

The government's use of a trained police dog to investigate a home and its immediate surroundings is a search under the Fourth Amendment. A defendant has an expectation of privacy in his porch, which is part of the home's curtilage and enjoys protection as part of the home itself. This is because the curtilage is intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened. When the police physically intruded onto a defendant's property to gather evidence without a warrant or consent, they conduct a search without a license to do so, in violation of the Fourth Amendment.

Criminal Law & Procedure > Search & Seizure > Seizures of Things
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection

Where the government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant. That rule reflects a concern with leaving the homeowner at the mercy of technology that could discern all human activity in the home. A dog search conducted from an apartment hallway comes within this rule's ambit. A trained drug-sniffing dog is a sophisticated sensing device not available to the general public.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith

Evidence obtained in violation of the Fourth Amendment should not be suppressed, when the police conduct a search in objectively reasonable reliance on binding appellate precedent.

Opinion

Opinion by: John W. Darrah

Opinion

{820 F.3d 850} Darrah, *District Judge*. Acting on information that drugs were being sold from a certain apartment in Madison, Wisconsin, law enforcement obtained the permission of the apartment property manager and brought a narcotics-detecting dog to the locked, shared hallway of the apartment building. The dog alerted to the presence of drugs at a nearby apartment door and then went to the targeted apartment where Whitaker was residing. After the officers obtained a search warrant, Whitaker was arrested and charged with drug and firearm crimes based on evidence found in the apartment. At the time of his arrest,**{2016 U.S. App. LEXIS 2}** Whitaker was serving a term of supervised release in Case No. 07-cr-123, a conviction for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). After the district court denied his pretrial motions challenging

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the search and the dog's reliability, Whitaker entered a conditional guilty plea that pre-served his right to appeal the district court's ruling.

On appeal, Whitaker raises four issues. First, he argues the use of the dog was a search under the Fourth Amendment and *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). Second, he contends that the district court should have granted him a *Franks* hearing **{820 F.3d 851}** because there was a material omission in the affidavit used to obtain the search warrant. Third, Whitaker claims that the dog's training records should have been turned over to him, pursuant to *Florida v. Harris*, 568 U.S. 237, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013). Finally, he argues his term of supervised release had expired and he should not have been sentenced after revocation. For the reasons discussed below, we reverse the district court's holding regarding the search. The remaining issues are therefore moot.

I. BACKGROUND

In October 2013, Dane County Sheriff's Deputy Joel Wagner met with a confidential informant about drug dealing at 6902 Stockbridge Drive, Apartment 204, in Madison, Wisconsin. The informant**{2016 U.S. App. LEXIS 3}** told Wagner that "Javari" lived in Apartment 204, drove a black Cadillac Escalade and carried a handgun in his waistband. The informant reported seeing Javari and another individual selling drugs in the apartment.

On October 14, 2013, Wagner met with the property manager for 6902 Stockbridge Drive and learned that Apartment 204 was leased to Ruthie Whitaker. The property manager took Wagner to the underground parking garage, where Wagner observed a black Cadillac Escalade in the parking stall for Apartment 204. The license plate showed that the Escalade was registered to Ruthie Whitaker.

Over a month later, on November 25, 2013, the same informant sent Wagner a text message. The text message indicated that one of the individuals dealing drugs contacted the informant and told the informant that the individual was back in town and was at the apartment with a lot of "h." The informant knew "h" to mean heroin. On December 4, 2013, the property manager signed a consent form, authorizing a K9 search of 6902 Stockbridge Drive. On December 17, 2013, Wagner received an anonymous complaint concerning drug activity at 6902 Stockbridge Drive. The anonymous informant did not specifically mention**{2016 U.S. App. LEXIS 4}** Apartment 204 but indicated that the person who was selling out of 6902 Stockbridge Drive drove a black Cadillac Escalade.

On January 7, 2014, Wagner and Deputy Jay O'Neil, with his drug-sniffing K9 partner, "Hunter," went to 6902 Stockbridge Drive. Hunter first alerted on the Escalade parked in the space for Apartment 204. Upon a later search of the Escalade, no drugs were found.

The officers took Hunter to the second floor of the apartment building and into its locked hallway, where there were at least six to eight apartments. According to his police report (produced during discovery), O'Neil took Hunter on a quick walk through the hallway in order to get used to any people or animal smells. During the first pass, Hunter showed extreme interest in Apartment 204 but did not alert. Hunter then alerted to the presence of drugs at the door of nearby Apartment 208. Wagner told O'Neil that it was not the targeted apartment. On a secondary sniff, Hunter alerted on Apartment 204.

After obtaining the search warrant, the officers recovered cocaine, heroin, and marijuana in Apartment 204. Whitaker was the sole occupant at the time the warrant was executed, and, in a post-arrest interview, he admitted**{2016 U.S. App. LEXIS 5}** he lived there. He also told officers about a handgun in his apartment and consented to the officers' re-entry to retrieve it.

On April 11, 2014, Whitaker filed a motion to suppress the evidence seized during the search. He

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also requested a *Franks* hearing and the production of Hunter's training records. On May 19, 2014, the {820 F.3d 852} magistrate judge issued a Report and Recommendation, recommending that Whitaker's motions be denied. On June 16, 2014, the district court adopted the Report and Recommendation. On October 9, 2014, Whitaker was sentenced to consecutive terms of 12 months' imprisonment on Count 1, possession with intent to distribute heroin and cocaine, and 60 months' imprisonment on Count 3, use of a firearm in furtherance of a drug trafficking crime. On November 14, 2014, the district court revoked Whitaker's supervised release in Case No. 07-cr-123 and sentenced him to a term of 18 months' imprisonment to run consecutively with the sentence given for Count 3 and concurrently with the sentence given for Count 1.

II. ANALYSIS

A. The Fourth Amendment and Jardines

When reviewing appeals from denials of motions to suppress, we review legal questions *de novo* and factual findings for clear error. *United States v. Breland*, 356 F.3d 787, 791 (7th Cir. 2004). Whitaker{2016 U.S. App. LEXIS 6} contends that the district court erred in holding that he had no expectation of privacy in the apartment building's common hallway and denying his motion to suppress the evidence gathered from his apartment.

In *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 1417-18, 185 L. Ed. 2d 495 (2013), the Supreme Court held that the government's use of a trained police dog to investigate a home and its immediate surroundings was a search under the Fourth Amendment. The Court explained that the defendant had an expectation of privacy in his porch, which is part of the home's curtilage and "enjoys protection as part of the home itself." *Id.* at 1414. This is because the curtilage "is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" *Id.* at 1415 (quoting *California v. Ciraolo*, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210). The Court was clear that its holding was based on the trespass to the defendant's curtilage, not a violation of the defendant's privacy interests. *Id.* at 1417-20. Therefore, when the police physically intruded onto the defendant's property to gather evidence without a warrant or consent, they had conducted a search without a license to do so, in violation of the Fourth Amendment. *Id.* at 1417.

Whitaker argues that *Jardines* should be extended to the hallway outside his apartment door because the law enforcement took the dog to{2016 U.S. App. LEXIS 7} his door for the purpose of gathering incriminating forensic evidence. He cites to *United States v. Herman*, 588 F. App'x 493, 494 (7th Cir. 2014), in which we specifically left open the question of whether "*Jardines* applies to apartment hallways (which are open to many persons other than a given tenant's family and invitees), whether consent of another tenant or the landlord would permit a dog to enter, and whether, if the use of the dog is a search, what is required for that search to be reasonable (reasonable suspicion? probable cause? probable cause plus a warrant?)." Although Whitaker recognizes that *Jardines* was premised on trespass to property, he also argues that this use of a drug-detection dog violated his privacy interests under *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001), and *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

The use of a drug-sniffing dog here clearly invaded reasonable privacy expectations, as explained in Justice Kagan's concurring opinion in *Jardines*. The police in *Jardines* could reasonably and lawfully {820 F.3d 853} walk up to the front door of the house in that case to knock on the door and ask to speak to the residents. The police were not entitled, however, to bring a "super-sensitive instrument" to detect objects and activities that they could not perceive without its help. 133 S. Ct. at 1418. The police could not stand on the front{2016 U.S. App. LEXIS 8} porch and look inside with binoculars or

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put a stethoscope to the door to listen. Similarly, they could not bring the super-sensitive dog to detect objects or activities inside the home. As Justice Kagan explained, viewed through a privacy lens, *Jardines* was controlled by *Kyllo*, which held that police officers conducted a search by using a thermal-imaging device to detect heat emanating from within the home, even without trespassing on the property. 133 S. Ct. at 1419.

Kyllo held that where "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." 533 U.S. at 40. That rule reflects a concern with leaving "the homeowner at the mercy of ... technology that could discern all human activity in the home." *Id.* at 35-36. A dog search conducted from an apartment hallway comes within this rule's ambit. A trained drug-sniffing dog is a sophisticated sensing device not available to the general public. The dog here detected something (the presence of drugs) that otherwise would have been unknowable without entering the apartment.1

Indeed, the fact that this was a search of a home distinguishes this case from dog sniffs in public places in *United States v. Place*, 462 U.S. 696, 698, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983) (luggage at airport), and *Illinois v. Caballes*, 543 U.S. 405, 406, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (traffic stop). Neither case implicated the Fourth Amendment's core concern of protecting the privacy of the home. It is true that Whitaker did not have a reasonable expectation of complete privacy in his apartment hallway. See *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991). Whitaker's lack of a reasonable expectation of complete privacy in the hallway does not also mean that he had no reasonable**{2016 U.S. App. LEXIS 10}** expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public.

Whitaker's lack of a right to exclude did not mean he had no right to expect certain norms of behavior in his apartment hallway. Yes, other residents and their guests (and even their dogs) can pass through the hallway. They are not entitled, though, to set up chairs and have a party in the hallway right outside the door. Similarly, the fact that a police officer might lawfully walk by and hear loud voices from inside an apartment does not mean he could put a stethoscope to the door to listen to all that is happening inside. Applied to this case, this means **{820 F.3d 854}** that because other residents might bring their dogs through the hallway does not mean the police can park a sophisticated drug-sniffing dog outside an apartment door, at least without a warrant. See *Jardines*, 133 S. Ct. at 1416.

The practical effects of *Jardines* also weigh in favor of applying its holding to dog sniffs at doors in closed apartment hallways. Distinguishing *Jardines* based on the differences between the front porch of a stand-alone house and the closed hallways of an apartment building draws arbitrary lines.**{2016 U.S. App. LEXIS 11}**

First, there is the middle ground between traditional apartment buildings and single-family houses. How would courts treat a split-level duplex? Perhaps even one that had been converted from a house into apartments? Does the number of units in the building matter, or do all multi-unit buildings lack the protection *Jardines* gives to single-family buildings? And what about garden apartments whose doors, like houses, open directly to the outdoors?

Second, a strict apartment versus single-family house distinction is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity. For example, according to the Census's American Housing Survey for 2013, 67.8% of house-holds composed solely of whites live in one-unit detached houses. For households solely composed of blacks, that number dropped to 47.2%. And for Hispanic households, that number was 52.1%. The percentage of households that live in single-unit, detached houses consistently rises with income. At

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the low end, 40.9% of households that earned less than $10,000 lived in single-unit, detached houses, and, at the high end, 84% of households that earned more than $120,000 did so. See United{2016 U.S. App. LEXIS 12} States Census Bureau, American Housing Survey, *Table Creator*, (allowing the breakdown of housing type by race and income).

The police engaged in a warrantless search within the meaning of the Fourth Amendment when they had a drug-sniffing dog come to the door of the apartment and search for the scent of illegal drugs.

B. The Good-Faith Exception and Davis

Davis v. United States, 564 U.S. 229, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011), held that evidence obtained in violation of the Fourth Amendment should not be suppressed, "when the police conduct a search in objectively reasonable reliance on binding appellate precedent." 131 S. Ct. at 2434. This holding was based on the reasoning that officers should be permitted to rely on police practices specifically authorized by binding appellate precedent. *Id.* at 2439.

At the time of this search, there was no recognized expectation of privacy in the common areas of a multi-unit apartment building. See *United States v. Espinoza*, 256 F.3d 718, 723 (holding "tenants lack a legitimate expectation of privacy in the common areas of multi-family buildings"); *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) (holding "tenant has no reasonable expectation of privacy in the common areas of an apartment building"); *Henry v. City of Chicago*, 702 F.3d 916 (7th Cir. 2012) ("Absent certain particular facts not alleged here, there is no reasonable expectation of privacy in common areas of multiple dwelling buildings."). However, no appellate{2016 U.S. App. LEXIS 13} decision specifically authorizes the use of a super-sensitive instrument, a drug-detecting dog, by the police outside an apartment door to investigate the inside of the apartment without a warrant. {820 F.3d 855} Therefore, the officer could not reasonably rely on binding appellate precedent, and the good-faith exception does not apply.

Moreover, *Kyllo* was decided before the search of Whitaker's apartment. The logic of *Kyllo* should have reasonably indicated by the time of this search that a warrantless dog sniff at an apartment door would ordinarily amount to an unreasonable search in violation of the Fourth Amendment.

III. CONCLUSION

Accordingly, we REVERSE the denial of Whitaker's motion to suppress and REMAND for proceedings consistent with this opinion.

Footnotes

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There is little doubt{2016 U.S. App. LEXIS 9} that a highly trained drug-detecting dog is a "super-sensitive instrument" under *Kyllo*. See *Jardines*, 133 S. Ct. at 1418-19 (Kagan, J., concurring). *Kyllo* described a category of "sense-enhancing technology" that is "not available to public use." 533 U.S. at 34. A trained dog's nose is a detection device capable of alerting the handler to the presence of odors at almost non-existent levels. Mark E. Smith, *Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences*, 46 Hous. L. Rev. 103, 116-31 (2009). Like any technology, it is a tool that must be deployed in a particular way by a trained handler to be effective. *Id.* And like other sophisticated detection tools, the results and accuracy of dog searches are subject to detailed research and analysis. *Id.*

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Truely the TAINTED Evidence Never Should've been USED AGAINST ME. IF ONLY the 7th. Circuit AND Sister Circuit "WholeheARTedly" beforehand Fully RESPECTED the Supreme Court Ruling. (Exhibit #1)

DANNY LEE KYLLO, Petitioner

vs.

UNITED STATES

533 US 27, 150 L Ed 2d 94, 121 S Ct 2038

[No. 99-8508]

Argued February 20, 2001.

Decided June 11, 2001.

DECISION

Warrantless use of thermal-imaging device aimed at private home from public street to detect relative amounts of heat within home held to constitute unlawful search within meaning of Federal Constitution's Fourth Amendment.

SUMMARY

On the basis of a suspicion that marijuana was being grown inside a home, an agent of the United States Department of the Interior decided to use a thermal imaging device to scan the building to determine whether the amount of heat emanating from the home was consistent with use of the high-intensity lamps typically required for growing marijuana indoors. The scan, which took only a few minutes, was performed at 3:20 a.m. from the passenger seat of the agent's vehicle across the street from the front of, and also from the street in back of, the home. The scan showed that the roof over the garage and a side wall of the home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes, and the agent correctly concluded that the homeowner was using halide lights to grow marijuana in the house. Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of the home, and agents found an indoor growing operation involving more than 100 plants. The homeowner was indicted on one count of manufacturing

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marijuana, in violation of 21 USCS § 841(a)(1). After the United States District Court for the District of Oregon denied the homeowner's motion to suppress the seized evidence (809 F.2d 787), the homeowner entered a conditional guilty plea. The United States Court of Appeals for the Ninth Circuit vacated the homeowner's conviction and remanded the case for an evidentiary hearing regarding the intrusiveness of thermal imaging (37 F.3d 526). On remand, the District Court upheld the validity of the warrant and reaffirmed the denial of the motion to suppress, finding that the particular device used (1) was a non-intrusive device which <*pg. 95> emitted no rays or beams, (2) showed a crude visual image of the heat being radiated from the outside of the house, (3) did not show any people or activity within the walls of the structure, (4) could not penetrate walls or windows to reveal conversations or human activities, and (5) did not allow observation of intimate details of the home. The Court of Appeals initially reversed (140 F.3d 1249), but that opinion was withdrawn and the panel (after a change in composition) affirmed, concluding that (1) the homeowner had shown no subjective expectation of privacy, as he had made no attempt to conceal the heat escaping from his home; and (2) there was no objectively reasonable expectation of privacy, because the thermal imaging device did not expose any intimate details of the homeowner's life, but rather only amorphous hot spots on the roof and exterior wall (190 F.3d 1041).

On certiorari, the United States Supreme Court reversed the Court of Appeals' judgment and remanded the case for further proceedings. In an opinion by Scalia, J., joined by Souter, Thomas, Ginsburg, and Breyer, JJ., it was held that the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constituted a search within the meaning of the Federal Constitution's Fourth Amendment and use of such imaging without a warrant was unlawful under the Fourth Amendment as such a use involved obtaining, by sense-enhancing technology that was not in general public use, information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area.

Stevens, J., joined by Rehnquist, Ch. J., and O'Connor and Kennedy, JJ., dissenting, expressed the view that (1) since what was involved in the case at hand was nothing more than drawing inferences from "off-the-wall" surveillance, rather than any "through-the-wall" surveillance, the agent's conduct did not amount to a search and was perfectly reasonable; (2) the Supreme Court should not erect a constitutional impediment to the use of sense-enhancing technology unless such technology provides the user with the functional equivalent of actual presence in the area being searched, and (3) the Supreme Court should give legislators an unimpeded opportunity to grapple with these emerging issues rather than shackle them with prematurely devised constitutional constraints.

RESEARCH REFERENCES

16 Am Jur 2d, Constitutional Law §§ 603-611; 68 Am Jur 2d, Searches and Seizures §§ 327, 329, 346

USCS, Constitution, Amendment 4

L Ed Digest, Search and Seizure § 23

L Ed Index, Arrest; Constitutional Law; Police; Search and Seizure

ANNOTATION REFERENCES

http://www.bloomberglaw.com/public/document/UNITED_STATES_OF_AMERICA_PlaintiffAppellee_v_No_TIMOTHY_IVORY_CAR.

Search and Seizure

7th Cir. Extends Jardines Rule on Dog Sniffs To Locked, Shared Hall in Apartment Building

Police officers violated the Fourth Amendment when they walked a drug-detection dog up to a suspect's door in the common hallway of an apartment building and used the dog's "alert" to secure a search warrant, the U.S. Court of Appeals for the Seventh Circuit ruled April 12 (*United States v. Whitaker*, 2016 BL 113879, 7th Cir., No. 14-3290, 4/12/16).

The case is significant because this is the first time a federal circuit court has extended the dog-sniff rule from *Florida v. Jardines*, 2013 BL 79684 (U.S. 2013) (92 CrL 781, 3/27/13), to the apartment hallway scenario.

Jardines Extends to Apartment Hall. The government argued that *Jardines* didn't apply because that case involved police trespassing on the curtilage of a standalone home, whereas Lonnie Whitaker's apartment door opened to a shared hallway that was open to anyone.

But the court didn't accept that distinction.

Just because Whitaker didn't have the right to exclude people from the hallway didn't mean that he had no right to expect some "norms of behavior," the court said in an opinion by Judge John W. Darrah, sitting by designation from the Northern District of Illinois.

Although Whitaker could anticipate that other tenants—and their dogs—would walk past his door, he had the right to expect that they wouldn't "set up chairs and have a party in the hallway outside his door," the court added.

It characterized as "troubling" the suggestion that apartment dwellers don't have the same expectation of privacy as the owners of single family homes "because it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity."

Analogy to Thermal-Imaging. The court found guidance in Justice Elena Kagan's concurring opinion in *Jardines*. Kagan argued that the outcome there was dictated by *Kyllo v. United States*, 533 U.S. 27 (2001), which held that using a thermal-imaging device from a public vantage point to monitor the radiation of heat from a home qualified as a search within the meaning of the Fourth Amendment.

Just as an officer wouldn't be allowed to place a stethoscope on an apartment door to listen, so, too, are the police barred from intruding into a person's privacy with the "super-sensitive" nose of a drug dog, it said.

The court also rebuffed the government's argument that the good-faith exception to the exclusionary rule saved the search because prior Seventh Circuit precedent suggested there was no recognized expectation of privacy in common areas of multi-unit apartment complexes.

The existing law under *Kyllo* established that police can't use a sophisticated device to learn facts about the inside of a residence that would otherwise be unknowable without physical intrusion.

Chief Judge Diane P. Wood and Judge David F. Hamilton joined the opinion.

Mark A. Eisenberg, Madison, Wis., argued for Whitaker. Rita M. Rumbelow, of the U.S. Attorney's Office, Madison, argued for the government.

BY LANCE J. ROGERS

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Full text at http://www.bloomberglaw.com/public/document/United_States_v_Whitaker_No_143290_and_143506_2016_BL_113879_7th_.

Confrontation

Child Victim's Discussion With ER Nurse Is Admissible as Nontestimonial Statement

A child victim's statements to a nurse trained to examine sex assault victims were admissible at trial even though the accused never got a chance to cross-examine or otherwise confront the child, the U.S. Court of Appeals for the Fifth Circuit ruled April 13 (*United States v. Barker*, 2016 BL 116232, 5th Cir., No. 14-51117, 4/13/16).

The decision makes clear that, despite their special training, these nurses are not acting as evidence-gathering officials for purposes of triggering the protections of the confrontation clause.

This is particularly true when the speaker is a small child who has no intention, let alone understanding, that his or her words will later serve as a substitute for trial testimony, the court said in an opinion by Judge Edith H. Jones.

Medical Evaluation. The court found guidance in *Ohio v. Clark*, 2015 BL 193921 (2015) (97 CrL 314, 6/24/15), where the U.S. Supreme Court ruled that a young child's statements to a teacher about who had injured him weren't sufficiently "testimonial" for purposes of triggering a constitutional right of confrontation.

It rebuffed Brandon Earl Barker's argument that *Clark* didn't control this situation because the nurse who examined the child in this case wasn't a mere teacher but was instead a Sexual Assault Nurse Examiner (SANE), specially trained by the state to collect evidence and prepare a report.

That certification didn't convert the essential purpose of the conversation from medical evaluation to evidence collection, the court said. It noted that police aren't allowed in the room while the SANE performs a thorough physical exam and that the SANE evaluates whether the victim needs medication or referral to other healthcare professionals.

It agreed that the hospital emergency room in this case was a "more formal environment" than the school lunch room setting in *Clark*, but it said that a discussion in an emergency room is still far different from the law enforcement interrogation that has been found to raise Confrontation Clause problems in other cases.

(APPENDIX B) (PAGE #3-C)

TERRION D. HERMAN, Petitioner, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, URBANA DIVISION
2017 U.S. Dist. LEXIS 189993
Case No. 2:16-cv-02202-JES
November 16, 2017, Decided
November 16, 2017, Filed

Editorial Information: Prior History

United States v. Herman, 588 Fed. Appx. 493, 2014 U.S. App. LEXIS 19345 (7th Cir. Ill., Oct. 10, 2014)

Counsel {2017 U.S. Dist. LEXIS 1}Terrion D Herman, Petitioner, Pro se, ATWATER, CA.

For United States of America, Respondent: Eugene L Miller, LEAD ATTORNEY, US ATTY, Urbana, IL.

Judges: James E. Shadid, Chief United States District Judge.

Opinion

Opinion by: James E. Shadid

Opinion

Order

Before the Court are the Petitioner, Terrion Herman's, *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255 (D. 1),1 the Respondent, the United States of America's, Response (D. 4), and the Petitioner's Reply (D. 5). For the reasons set forth below, the Petitioner's § 2255 Motion is DENIED and the Court declines to issue a certificate of appealability. This matter is now terminated.

In 2010, the Urbana Police Department obtained a search warrant to search the Petitioner's apartment for illegal narcotics. Part of the basis for the warrant was a positive alert by a trained narcotics detection canine on the Petitioner's door. The canine detected the odor while in a common hallway of the Petitioner's apartment building. Officers executed the search warrant, found 93.8 grams of crack cocaine, and arrested the Petitioner. In 2011, a jury found the Petitioner guilty of possession of 50 grams or more of cocaine base with the intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii). (Cr. D. 46)2{**2017 U.S. Dist. LEXIS 2**}. At trial, the Petitioner did argue, unsuccessfully, that he was entitled to a motion to suppress evidence. (Cr. D. 19). None of his arguments were based on grounds that the canine sniff violated his Fourth Amendment rights. The Court sentenced the Petitioner to life in prison and a $100 assessment. (Cr. D. 53).

On his first direct appeal in 2012, the Petitioner did not argue that his Fourth Amendment rights were violated. Instead, he challenged his sentence pursuant to *Dorsey v. United States*, 567 U.S. 260, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012). The Seventh Circuit granted a Joint Motion to Remand in January 2013, specifically for the purpose of resentencing. (Cr. D. 72). In March 2013, the Supreme Court ruled that the "government's use of trained police dogs to investigate the home and its

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immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Florida v. Jardines*, 569 U.S. 1, 11-12, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).

In May 2013, the Petitioner filed a Motion to Reopen Suppression Proceedings based on the Supreme Court's ruling in *Jardines*. (Cr. D. 74). The Court initially granted the Petitioner's Motion. (Cr. D. 80). The Government filed a Motion to Reconsider (Cr. D. 81), however, which the Court subsequently granted, vacating its prior order (Cr. D. 87). The Court explicitly found that there were no extraordinary facts in the Petitioner's case**{2017 U.S. Dist. LEXIS 3}** which warranted a new suppression hearing. *Id.* at pp. 2-3. The Court sentenced the Petitioner to 360 months' imprisonment. (Cr. D. 89).

In November 2014, the Seventh Circuit affirmed the Petitioner's conviction on his second direct appeal, noting its prior holding in *United State v. Gutierrez*, 760 F.3d 750 (7th Cir. 2014), that "under circuit law the use of the dog was proper before *Jardines*[.]" *United States v. Herman*, 588 Fed. Appx. 493, 494 (7th Cir. 2014). According to the Seventh Circuit, this triggered the rule in *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011), which holds that "the exclusionary rule cannot be used to suppress evidence that had been properly seized under authoritative precedent, even if that precedent later is overruled or otherwise disapproved." *Id.* (citing *Davis*, 564 U.S. at 231-32). The Supreme Court denied the Petitioner's petition for a writ of *certiorari* on February 23, 2015. (No. 13-3210).

In June 2016, the Petitioner moved pursuant to 28 U.S.C. § 2255 to have his sentence vacated, set aside, or corrected. (D. 1). Once again, he argued that *Jardines* applied to his case, this time in light of the Seventh Circuits recent ruling in *United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016), which applied *Jardines*. *Id.* The Government responded, asserting that the Petitioner's claim was untimely, not cognizable on collateral review, and already addressed on direct appeal. (D. 4 at pp. 7-10).

Section 2255's one-year limitation period starts to run**{2017 U.S. Dist. LEXIS 4}** from "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). Accordingly, the Petitioner's § 2255 Petition must have been filed by February 23, 2016-one year after the Supreme Court denied his petition for a writ of *certiorari*-in order to be deemed timely. Relevant to the Petitioner's claim here, the one-year limitation period begins anew only when a right asserted is newly recognized by the Supreme Court and made retroactive to cases on collateral review. 28 U.S.C. § 2255(f)(3). Even if *Jardines* recognized a new right, it was decided in 2013, clearly more than one year before the Petitioner filed his present grievance. Likewise, *Whitaker* is not a Supreme Court case capable of starting a fresh clock. Here, the Petition at issue was filed in June 2016. Therefore, it is not timely and is not properly before the Court. Thus, the Petition (D. 1) is DENIED.

The Court further notes that Rule 11(a) of the Rules Governing § 2255 Proceedings directs district courts to either issue or deny a certificate of appealability when entering a final order adverse to the applicant. To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C § 2253(c)(2). "When the district court denie[s] a habeas petition on procedural grounds**{2017 U.S. Dist. LEXIS 5}** without reaching the prisoner's underlying constitutional claim," a certificate of appealability should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Here, no reasonable jurist could conclude that the Petitioner filed his § 2255 Petition in a timely manner. Accordingly, this Court will not issue a certificate of appealability. This matter is now terminated.

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It is so ordered.

Entered on November 16, 2017

/s/ James E. Shadid

James E. Shadid

Chief United States District Judge

Footnotes

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Other Documents

2:16-cv-02202-JES Herman v. United States of America

18,HABEAS,PROSE

U.S. District Court

CENTRAL DISTRICT OF ILLINOIS

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The following transaction was entered on 9/12/2016 at 4:05 PM CDT and filed on 9/12/2016

Case Name: Herman v. United States of America
Case Number: 2:16-cv-02202-JES
Filer: Terrion D Herman
Document Number: 5

Docket Text:
Petitioner's Response re [4] Response to Motion by Terrion Herman. (Attachments: # (1) Declaration)(VH, ilcd)

2:16-cv-02202-JES Notice has been electronically mailed to:

Eugene L Miller eugene.miller@usdoj.gov, CaseView.ECF@usdoj.gov, staci.klayer@usdoj.gov

2:16-cv-02202-JES Notice has been delivered by other means to:

Terrion D Herman
14995-026
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Document description: Main Document
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Electronic document Stamp:
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] [902e8fc1bc59b4c0b9d8093885a9e271bf22f089561bbcc963223f57a6bf10e754f
187c16927cac7daede359a9f1239818c2c0241b8ad4f4374da382dc08fa94]]
Document description: Declaration

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UNITED STATES OF AMERICA, Plaintiff, v. TERRION D. HERMAN, Defendant.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, URBANA DIVISION
2013 U.S. Dist. LEXIS 110938
Case No. 10-CR-20003
August 7, 2013, Decided
August 7, 2013, Filed

Editorial Information: Subsequent History

Decision reached on appeal by United States v. Herman, 588 Fed. Appx. 493, 2014 U.S. App. LEXIS 19345 (7th Cir. Ill., Oct. 10, 2014)

Editorial Information: Prior History

United States v. Herman, 2010 U.S. Dist. LEXIS 123947 (C.D. Ill., Nov. 23, 2010)

Counsel For USA, Plaintiff: Eugene L Miller, LEAD ATTORNEY, US ATTY, Urbana, IL.

Judges: MICHAEL P. McCUSKEY, U.S. DISTRICT JUDGE.

Opinion

Opinion by: MICHAEL P. McCUSKEY

Opinion

This case is before the court for ruling on the Motion to Reopen Suppression Proceedings (#74) filed by Defendant, Terrion D. Herman. This court has carefully considered the arguments raised in Defendant's Motion (#74), the Government's Response (#75) and Defendant's Reply (#77). Following this careful review, Defendant's Motion to Reopen Suppression Proceedings (#74) is GRANTED.

BACKGROUND

On February 9, 2010, the grand jury returned a one-count indictment (#7) against Defendant. Defendant was charged with, on or about February 3, 2010, knowingly possessing 50 grams or more of a mixture and substance containing cocaine base ("crack"), a Schedule II controlled substance, with the intent to distribute it. Defendant was represented by retained counsel, Ray E. Richards, II, of Royal Oak, Michigan.

On July 9, 2010, Defendant filed a Motion to Suppress Evidence (#19) and a Motion to Suppress Statement (#20). Defendant's Motions incorporated a Brief in Support. In his Motion to Suppress Evidence (#19), Defendant argued that the search of the property at 1200 S. **{2013 U.S. Dist. LEXIS 2}**Vine Street, Apartment #25, Urbana, Illinois, violated his constitutional rights because the search warrant lacked particularity and was issued without probable cause. In his Motion to Suppress Statement (#20), Defendant argued that statements he made during the search should be

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suppressed. On July 28, 2010, the Government filed a Response to Defendant's Motion to Suppress Evidence (#21) and a Response to Defendant's Motion to Suppress Statements (#22).

An evidentiary hearing was held on August 19, 2010. At the hearing, the Government presented the testimony of three witnesses, Investigator Jay Loschen, Sergeant Sylvia Morgan and Investigator Michael Cervantes of the Urbana Police Department. Defendant did not present any evidence. This court found the testimony of the Government's witnesses to be credible.

The evidence presented showed that, on February 3, 2010, Loschen spoke with an individual who was arrested during a "parolee roundup." This individual said that Defendant had been selling crack cocaine as recently as January 31, 2010, from an apartment next to the Urbana Middle School. Loschen verified through multiple sources that Defendant resided at 1200 S. Vine Street, Apartment **{2013 U.S. Dist. LEXIS 3}**25, in Urbana, which was located directly across the street from Urbana Middle School. Loschen also determined that Defendant was currently on parole and had four prior drug convictions.

That same day, Loschen took his trained narcotics detection canine, Hunter, outside the third floor door which had "25 " on it. Loschen testified that he has been a trained K9 officer since March 2002 and his required monthly training with Hunter was up to date on February 3, 2010. Loschen stated that Hunter had been with the Urbana Police Department since October 1, 2008, and had previously assisted law enforcement agencies in the recovery of illegal drugs. Loschen testified that Hunter alerted to the presence of narcotics within the apartment. Loschen then sought and obtained a state court search warrant for Defendant's apartment located at 1200 S. Vine Street, Apartment #25, Urbana.

The Government provided the court with a copy of the search warrant and the complaint and affidavit for search warrant. The complaint was signed under oath by Loschen. Loschen stated that he received information that "a black male known as TERRION HERMAN was selling crack cocaine as recently as January 31, 2010 from an **{2013 U.S. Dist. LEXIS 4}**apartment adjacent to The Urbana Middle School located at 1201 S. Vine Street, Urbana, Illinois, Champaign County." Loschen stated that he confirmed, from several sources, that Defendant was on parole and resided at 1200 S. Vine Street, Apartment #25, in Urbana. Loschen stated that he checked Defendant's criminal history and learned that he had 8 charges and 4 convictions for dangerous drugs. Loschen stated that he and "Inv. Michael Cervantes and Sgt. Sylvia Morgan conducted a drug investigation at 1200 S. Vine Street, Urbana, Champaign County, Illinois by conducting a canine sniff (K9 Sweep) at the door located on the third floor and that door displayed the number '25', on it." Loschen stated that he ran his canine partner Hunter along that door and "Hunter alerted to the odor of illegal drugs within the residence by sitting."

The search warrant issued based upon Loschen's complaint authorized the search of "1200 S. VINE STREET APARTMENT #25, URBANA, CHAMPAIGN COUNTY, ILLINOIS, A RED BRICK BUILDING WITH GRAY SIDING, APARTMENT ON THIRD FLOOR WITH #25 ON DOOR." The search warrant was executed the day it was issued, February 3, 2010. Defendant was the only individual present inside the **{2013 U.S. Dist. LEXIS 5}**apartment. Based upon his observations of Defendant while seated on the couch, Investigator Matthew Quinley asked Morgan to search a clock hanging above the kitchen entrance door. Inside the back of the clock, Morgan found approximately 95 grams of cocaine base ("crack") in a plastic bag.

After Morgan found the crack cocaine, Loschen advised Defendant of his Miranda rights. Defendant stated he understood his rights and agreed to speak with officers. Defendant made numerous admissions, including admitting that he possessed the crack cocaine found in the clock, that he was involved in selling narcotics, and that one of the items seized by the officers from his apartment was

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a digital scale. Each of the items seized by the officers, including the crack cocaine, digital scale, plastic bags, cellular telephone and $134 United States currency was specifically listed as items to be seized in the search warrant.

Following the evidentiary hearing, the parties filed written argument with the court. On November 23, 2010, this court entered an Opinion (#29) which denied the Motion to Suppress Evidence and Motion to Suppress Statements. This court agreed with the Government that: (1) the search warrant **{2013 U.S. Dist. LEXIS 6}**was supported by probable cause based upon the information received and the alert by the canine; (2) even if Defendant could show that the warrant was not supported by probable cause, the *Leon* good faith exception applies; and (3) the search warrant sufficiently described the location to be searched and the items to be seized. This court stated that it agreed with the Government that the use of a canine to sniff the exterior of the apartment was not a search implicating the Fourth Amendment. *See Illinois v. Caballes*, 543 U.S. 405, 409-10, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (use of a well-trained narcotics-detection dog "generally does not implicate legitimate privacy interests"). This court further agreed that a positive dog indication for narcotics provides sufficient probable cause for the issuance of a search warrant. *See Caballes*, 543 U.S. at 406-07. This court noted that it agreed with the Government that Defendant's one sentence argument that the "K-9 hit is not a finding of fact but indicia of the possible presence of drugs that once again cannot be cross examined but only affirmed by the testimony of the K-9 handler" made little sense. This court therefore concluded that there was no reason to address **{2013 U.S. Dist. LEXIS 7}**it. 1 This court also concluded that Defendant did not present any facts or argument which would warrant suppressing the statements Defendant made after he was advised of his *Miranda* rights.

The case proceeded to a jury trial on July 13, 2011. At trial, Loschen testified that Defendant's apartment building was a "secured building." Morgan testified that it was a "three-story apartment building with secure entrance doors." She stated that the entrance doors were locked and "[y]ou have to get buzzed into the, the entrance doors." Morgan testified that, when the officers executed the search warrant, they "waited in the parking lot until we saw a resident come home" and then she "went in behind them and held the door for the other officers." Defendant was found guilty by the jury. On January 23, 2012, this court sentenced Defendant to a term of life imprisonment.

Defendant appealed and the Seventh Circuit appointed **{2013 U.S. Dist. LEXIS 8}**counsel to represent him on appeal. Defendant's attorney raised only one issue, that the case should be remanded for resentencing under the Fair Sentencing Act in light of *Dorsey v. United States*, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012). In his Brief, filed on November 26, 2012, Defendant's counsel included a section regarding Defendant's belief that there were multiple constitutional violations in the proceedings. In this section, Defendant's counsel discussed the motion to suppress and the dog sniff. Based upon this discussion, it appears that Defendant's appellate counsel did not raise the issue of the dog sniff because trial counsel made an insufficient record in this court.

After the Brief was filed, the parties filed a Joint Motion to Remand in light of Dorsey. The Seventh Circuit granted the Joint Motion on December 10, 2012. On January 2, 2013, the Mandate (#72) was filed in this court. The Seventh Circuit's Mandate stated that Defendant's sentence was vacated "and the case is **REMANDED** to the district court for resentencing in accordance with *Dorsey v. United States*, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012), and the Fair Sentencing Act." Following remand, Defendant's appellate counsel was allowed to withdraw **{2013 U.S. Dist. LEXIS 9}**and the Federal Public Defender for the Central District of Illinois was appointed to represent Defendant.

On March 26, 2013, the United States Supreme Court decided *Florida v. Jardines*, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). In *Jardines*, the Court considered the following issue: "whether using a

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drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment." In discussing this issue, the Court stated:

> But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat to his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961). This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.
>
> We therefore regard the area "immediately surrounding and associated with the home"-what our cases call the curtilage-as "part **{2013 U.S. Dist. LEXIS 10}**of the home itself for Fourth Amendment purposes." *Oliver v.* United States, 466 U.S. 170, 180, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984)]. That principle has ancient and durable roots. Just as the distinction between the home and the open fields is "as old as the common law," *Hester v. United States*, 265 U.S. 57, 59, 44 S. Ct. 445, 68 L. Ed. 898 (1924), so too is the identity of home and what Blackstone called the "curtilage or homestall," for the "house protects and privileges all its branches and appurtenants." 4 W. Blackstone, Commentaries on the Laws of England 223, 225 (1769). This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened." *California v. Ciraola*, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).
>
> While the boundaries of the curtilage are generally "clearly marked," the "conception defining the curtilage" is at any rate familiar enough that it is "easily understood from our daily experience." *Oliver*, 466 U.S. at 182, n.12, 104 S. Ct. 1735. Here there is no doubt that the officers entered it: The front porch is the classic exemplar of an area adjacent to the home and "to which the activity of home life extends." *Ibid.Jardines*, 133 S. Ct. at 1414-15.

The **{2013 U.S. Dist. LEXIS 11}**Court then concluded that the officers' use of a trained police dog to explore the area around the home in hopes of discovering incriminating evidence was a search within the meaning of the Fourth Amendment. *Jardines*, 133 S. Ct. at 1416-18. The Court noted that "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Jardines*, 133 S. Ct. at 1416, *quoting Kentucky v. King*, 563 U.S. __, __, 131 S. Ct. 1849, 1862, 179 L. Ed. 2d 865 (2011). The Court noted that "the background social norms that invite a visitor to the front door do not invite him there to conduct a search." *Jardines*, 133 S. Ct. at 1416. The Court therefore affirmed the ruling of the Supreme Court of Florida which had affirmed the trial court's decision to suppress marijuana plants found in a home. *Jardines*, 133 S. Ct. at 1417-18. The plants were found during the execution of a search warrant which was obtained after a trained police dog sniffed the base of the front door of a home and alerted for the presence of narcotics. *Jardines*, 133 S. Ct. at 1413.

On May 23, 2013, Defendant filed his Motion to Reopen Suppression Proceedings (#74) **{2013 U.S. Dist. LEXIS 12}**based on *Jardines*.

ANALYSIS

In his Motion to Reopen, Defendant argued that, because this case has been remanded and is not yet final, *Jardines* should be applied in this case. Defendant noted that the United States Supreme Court has stated that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to *all cases*, state or federal, pending on direct review or *not yet final*, with no exception for cases in which the new rule constitutes a "clear break" with the past." *Griffith v. Kentucky*, 479

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U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Defendant pointed out that in *United States v. Martin*, the Seventh Circuit remanded the case in light of an intervening Supreme Court decision, even though the defendant in *Martin* did not raise below the issue decided by the Supreme Court in *United States v. Jones*, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012), whether the attachment of a GPS device to a vehicle is a search. *United States v. Martin*, 712 F.3d 1080, 1081 (7th Cir. 2013). Defendant argued that this court denied Defendant's suppression motion because the dog sniff established probable cause to obtain the search warrant. Defendant argued that, in doing so, this court concluded that the dog sniff was not a search **{2013 U.S. Dist. LEXIS 13}**for Fourth Amendment purposes, a finding which cannot be squared with the Supreme Court's decision in *Jardines*.

Defendant argued that the facts adduced at trial showed that Defendant's apartment building had a secured entrance. He stated:

> In other words, Mr. Herman's apartment door was not accessible to the general public. And so, it was even more sheltered than the front porch in *Jardines*; the public did not even have a license to knock on Mr. Herman's front door. And there was certainly not a license to "introduc[e] a trained police dog to explore the area around the [apartment door] in hopes of discovering incriminating evidence." *Jardines*, 133 S. Ct. at 1416.
>
> The importance of this issue cannot be understated. Because of the unlawful search, officers were able to obtain a warrant to search Mr. Herman's apartment, and that search uncovered crack cocaine. That crack cocaine in turn led to Mr. Herman's conviction at trial, and he now faces the potential of an extremely long sentence (the advisory Guidelines range is 30 years to life). Before this Court imposes a significant sentence, it should first ensure that the underlying conviction was not based on a Constitutional violation. And **{2013 U.S. Dist. LEXIS 14}**if it is, as Mr. Herman can demonstrate, the conviction should not stand, nor should a sentence be imposed.Defendant argued that "[c]learly, in these circumstances, it would work a manifest injustice if this Court did not reopen the suppression proceedings in light of the Supreme Court's decision in *Jardines*."

The Government filed its Response (#75) on June 11, 2013. The Government argued that Defendant's Motion should be denied because: reopening the suppression proceedings is outside the scope of the Seventh Circuit's remand order for resentencing; this new Fourth Amendment challenge was waived by Defendant during the initial district court proceeding and on appeal; even if this court has discretion, the circumstances do not warrant such an extraordinary remedy; and Defendant's ineffective assistance of counsel claims are without merit. The Government argued that *Jardines* is distinguishable from the facts of this case and, even if *Jardines* holding that a canine sniff on the front porch of a home is a "search" applied to the facts of this case, it does not necessarily follow that the search was unreasonable. The Government contended that the search warrant application contained other **{2013 U.S. Dist. LEXIS 15}**information sufficient to establish probable cause. The Government also argued that, even if probable cause was lacking without the canine sniff, suppression would not be warranted because of the officers' good faith reliance on the search warrant under *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). The Government also argued that Defendant's counsel was not ineffective for failing to anticipate the Supreme Court's decision in *Jardines*.

Defendant was allowed to file a Reply (#77), which was filed on June 28, 2013. Defendant clarified that he was not raising the issue of ineffective assistance of counsel. Defendant also argued that the mandate rule does not prohibit this court from reopening the suppression proceedings, noting that one of the cases cited by the Government, *United States v. Buckley*, 251 F.3d 668, 669-70 (7th Cir.

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2001), actually recognizes the point that "extraordinary circumstances" permit district courts to consider issues outside the scope of remand. Defendant argued that this case presents such "extraordinary circumstances" because this court denied the suppression motion after determining that the dog sniff was not a search for Fourth Amendment purposes, a finding called **{2013 U.S. Dist. LEXIS 16}**into serious question by the decision in *Jardines.* Defendant also pointed out that the Government's Response was silent regarding Defendant's citation of *Griffith.* Defendant argued that, under *Griffith*, "*Jardines* applies to this case because this case is not yet final" and "because *Jardines* is an intervening Supreme Court decision, this Court should reopen the suppression proceedings so Mr. Herman may seek appropriate relief." Defendant also argued that any waiver of the issue should be excused as it was in *Martin.* Defendant also countered the Government's arguments regarding the applicability of the *Jardines* decision. Defendant argued that the search warrant application, which did not include any information regarding the source of the information regarding Defendant's drug dealing, did not contain sufficient information to establish probable cause for the issuance of a search warrant without the canine sniff. Defendant also argued that, without the canine sniff, the officers could not have relied in good faith on the search warrant.

This court has carefully considered the arguments presented by the parties and the case law cited. Following this careful consideration, this court concludes **{2013 U.S. Dist. LEXIS 17}**that the suppression proceedings should be reopened based upon the decision of the Supreme Court in *Jardines.* This court concludes that this case does present extraordinary circumstances which warrant the consideration of an issue outside the scope of the remand and which warrant excusing Defendant's waiver of the issue.

This court is particularly persuaded by the Seventh Circuit's decision in *Martin.* In *Martin*, the defendant appealed the district court's denial of his motion to suppress the firearm and drugs found in his car. The Seventh Circuit affirmed, after concluding that the police did not violate the defendant's rights under the Fifth Amendment, the only question he presented in the appeal. *United States v. Martin*, 664 F.3d 684 (7th Cir. 2011). While the defendant's timely petition for rehearing with suggestion for rehearing en banc was pending before the Seventh Circuit, the Supreme Court decided *United States v. Jones*, __ U.S. __, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) and held that the installation of a GPS device to track the vehicle's location constitutes a search within the meaning of the Fourth Amendment. *Martin*, 712 F.3d at 1081. Following *Jones*, the defendant added arguments based **{2013 U.S. Dist. LEXIS 18}**on the warrantless GPS in his case to his other arguments for suppression. *Martin*, 712 F.3d at 1081. The Seventh Circuit then ordered a limited remand for the district court to consider whether the defendant's plea agreement allowed him to challenge the evidence against him under *Jones* and whether *Jones* justified the suppression of the evidence against him. *Martin*, 712 F.3d at 1081.

This court concludes that, just as the district court in *Martin* considered the validity of the warrantless GPS in light of *Jones*, this court should consider the validity of the dog sniff in this case in light of *Jardines.* This court agrees with Defendant that *Martin* is good authority for the proposition that, if this case had still been in the Seventh Circuit when *Jardines* was decided, the case would have been remanded to this court to consider *Jardines.* This case was open when the Supreme Court decided *Jardines* and this court concludes that *Jardines* is directly applicable to the facts of this case. A decision of the Supreme Court construing the Fourth Amendment "is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." *Griffith*, 479 U.S. at 324, *quoting {2013 U.S. Dist. LEXIS 19}United States v. Johnson*, 457 U.S. 537, 562, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982).

Accordingly, this court concludes that Defendant's Motion to Reopen Suppression Proceedings (#74) must be granted. Defendant will be allowed to file a Motion to Suppress based upon *Jardines.* An

evidentiary hearing and briefing schedule will then be set.

IT IS THEREFORE ORDERED THAT:

(1) Defendant's Motion to Reopen Suppression Proceedings (#74) is GRANTED.

(2) This case remains scheduled for a status conference on August 9, 2013, at 9:00 a.m. The Motion to Withdraw (#79) filed by Defendant's attorneys will be taken up at that time. Defendant will be allowed time to file a Motion to Suppress based upon *Jardines* when the representation issues are resolved.

(3) Because sentencing will not proceed pending this court's ruling on the Motion to Suppress, Defendant's Motion to Continue Due Date for the Filing of Objections to the Remand Memorandum (#79) is MOOT.

ENTERED this 7th day of August, 2013

/s/ Michael P. McCuskey

MICHAEL P. McCUSKEY

U.S. DISTRICT JUDGE

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NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued October 9, 2014
Decided October 10, 2014

CERTIFIED COPY
A True Copy
Teste:
Deputy Clerk
of the United States
Court of Appeals for the
Seventh Circuit

Before

WILLIAM J. BAUER, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 13-3210

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TERRION HERMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois.

No. 10-20003
James E. Shadid, *Chief Judge.*

Order

Terrion Herman was sentenced to life imprisonment following his conviction for possessing 50 or more grams of cocaine base with intent to distribute. 21 U.S.C. §841(a)(1), (b)(1)(A)(iii). He presented a single contention on appeal: that *Dorsey v. United States*, 132 S. Ct. 2321 (2012), entitled him to be resentenced under the Fair Sentencing Act of 2010. We agreed and remanded for that purpose.

Back in the district court, Herman sought to raise a new argument: that *Florida v. Jardines*, 133 S. Ct. 1409 (2013), requires the suppression of evidence that had been seized after a drug-detection dog alerted in the hallway of the apartment building where Herman lived. *Jardines* holds that a dog's entry into a home's curtilage is a search under the Fourth Amendment; Herman contended that the holding should be applied to apart-

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ment hallways as well, at least when the apartment building's front door is locked. Herman had filed a motion to suppress before his trial but had not made an argument along these lines.

The district court declined to hold a new suppression hearing, invoking the mandate rule, under which a district court must implement a court of appeals' instructions. We had remanded for a specific purpose, not generally. The court then resentenced Herman to 360 months' imprisonment. He does not contest that sentence but maintains that he should not have been convicted at all and that a change of law can justify departure from the mandate.

That's true enough, but Herman encounters a different problem. *Davis v. United States*, 131 S. Ct. 2419, 2423–24 (2011), holds that the exclusionary rule cannot be used to suppress evidence that had been properly seized under authoritative precedent, even if that precedent later is overruled or otherwise disapproved. Herman's principal contention (which he repeats in this court) is that *Jardines* worked a dramatic shift in the law, which justifies raising an issue outside the scope of the mandate. And if that is so, then *Davis* means that the exclusionary rule is unavailable.

We held exactly this in *United States v. Gutierrez*, 760 F.3d 750 (7th Cir. 2014), a case in which the defendant proposed to suppress evidence that had been seized as a result of a dog's alert on a home's front porch. We concluded that under circuit law the use of the dog was proper before *Jardines*, bringing the rule of *Davis* into play. Likewise, circuit law before *Jardines* allowed police to collect evidence in apartment hallways without probable cause or a search warrant. See, e.g., *United States v. Villegas*, 495 F.3d 761, 767–69 (7th Cir. 2007); *United States v. Concepcion*, 942 F.2d 1170, 1172–73 (7th Cir. 1991).

In light of *Davis* and *Gutierrez*, we need not decide how *Jardines* applies to apartment hallways (which are open to many persons other than a given tenant's family and invitees), whether consent of another tenant or the landlord would permit a dog to enter, and whether, if the use of the dog is a search, what is required for that search to be reasonable (reasonable suspicion? probable cause? probable cause plus a warrant?). Nor need we address the fact that the eventual search of Herman's apartment was supported by a warrant, attempt to determine whether the warrant would be valid even if evidence about the dog's alert were disregarded, or determine how *United States v. Leon*, 468 U.S. 897 (1984), applies to warrant-authorized searches in which a violation of *Jardines* produces some of the evidence discussed in the affidavit. All these questions are reserved for future cases where a dog is used after *Jardines*. → whitaker.

AFFIRMED

(Page #4-B)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TERRION HERMAN, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
588 Fed. Appx. 493; 2014 U.S. App. LEXIS 19345
No. 13-3210
October 10, 2014, Decided
October 9, 2014, Argued

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Herman v. United States, 135 S. Ct. 1467, 191 L. Ed. 2d 412, 2015 U.S. LEXIS 1174 (U.S., Feb. 23, 2015)Post-conviction relief denied at, Certificate of appealability denied Herman v. United States, 2017 U.S. Dist. LEXIS 189993 (C.D. Ill., Nov. 16, 2017)

Editorial Information: Prior History

{2014 U.S. App. LEXIS 1}Appeal from the United States District Court for the Central District of Illinois. No. 10-20003. James E. Shadid, Chief Judge.United States v. Herman, 2013 U.S. Dist. LEXIS 110938 (C.D. Ill., Aug. 7, 2013)

Disposition:

AFFIRMED.

Counsel

For UNITED STATES OF AMERICA, Plaintiff - Appellee: Eugene L. Miller, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Urbana Division, Urbana, IL.

For TERRION D. HERMAN, Defendant - Appellant: Jerry D. Brown, Attorney, LAW OFFICE OF JERRY BROWN, Chicago, IL.

Judges: Before WILLIAM J. BAUER, FRANK H. EASTERBROOK, MICHAEL S. KANNE, Circuit Judges.

Opinion

{588 Fed. Appx. 493} Order

Terrion Herman was sentenced to life imprisonment following his conviction for possessing 50 or more grams of cocaine base with intent to distribute. 21 U.S.C. § 841(a)(1), (b)(1)(A)(iii). He presented a single contention on appeal: that *Dorsey v. United States*, 567 U.S. 260, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012), entitled him to be resentenced under the Fair Sentencing Act of 2010. We agreed and remanded for that purpose.

Back in the district court, Herman sought to raise a new argument: that *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), requires the suppression of evidence that had been seized after a drug-detection dog alerted in the hallway of the apartment building where Herman

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lived. *Jardines* holds that a dog's entry into a home's curtilage is a search under the Fourth Amendment; Herman contended that the holding should be applied to apartment hallways as well, at least when the{2014 U.S. App. LEXIS 2} apartment building's front door is locked. Herman had filed a motion to suppress before his trial but had not made an argument along these lines.

The district court declined to hold a new suppression hearing, invoking the mandate {588 Fed. Appx. 494} rule, under which a district court must implement a court of appeals' instructions. We had remanded for a specific purpose, not generally. The court then resentenced Herman to 360 months' imprisonment. He does not contest that sentence but maintains that he should not have been convicted at all and that a change of law can justify departure from the mandate.

That's true enough, but Herman encounters a different problem. *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 2423-24, 180 L. Ed. 2d 285 (2011), holds that the exclusionary rule cannot be used to suppress evidence that had been properly seized under authoritative precedent, even if that precedent later is overruled or otherwise disapproved. Herman's principal contention (which he repeats in this court) is that *Jardines* worked a dramatic shift in the law, which justifies raising an issue outside the scope of the mandate. And if that is so, then Davis means that the exclusionary rule is unavailable.

We held exactly this in *United States v. Gutierrez*, 760 F.3d 750 (7th Cir. 2014), a case in which the defendant proposed to suppress evidence that{2014 U.S. App. LEXIS 3} had been seized as a result of a dog's alert on a home's front porch. We concluded that under circuit law the use of the dog was proper before *Jardines*, bringing the rule of Davis into play. Likewise, circuit law before *Jardines* allowed police to collect evidence in apartment hallways without probable cause or a search warrant. See, e.g., *United States v. Villegas*, 495 F.3d 761, 767-69 (7th Cir. 2007); *United States v. Concepcion*, 942 F.2d 1170, 1172-73 (7th Cir. 1991).

In light of *Davis* and *Gutierrez*, we need not decide how *Jardines* applies to apartment hallways (which are open to many persons other than a given tenant's family and invitees), whether consent of another tenant or the landlord would permit a dog to enter, and whether, if the use of the dog is a search, what is required for that search to be reasonable (reasonable suspicion? probable cause? probable cause plus a warrant?). Nor need we address the fact that the eventual search of Herman's apartment was supported by a warrant, attempt to determine whether the warrant would be valid even if evidence about the dog's alert were disregarded, or determine how *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), applies to warrant-authorized searches in which a violation of *Jardines* produces some of the evidence discussed in the affidavit. All these questions are reserved for future cases where a dog is{2014 U.S. App. LEXIS 4} used after *Jardines*.

Affirmed ↘ Which is "Now" Whitaker. See U.S. V. Whitaker (2016) BL 113879 7th. Circuit #14-3290 April 12 2016.

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Terrion Herman, Petitioner v. United States.
SUPREME COURT OF THE UNITED STATES
574 U.S. 1181; 135 S. Ct. 1467; 191 L. Ed. 2d 412; 2015 U.S. LEXIS 1174; 83 U.S.L.W. 3679
No. 14-7972.
February 23, 2015, Decided

Editorial Information: Prior History

United States v. Herman, 588 Fed. Appx. 493, 2014 U.S. App. LEXIS 19345 (7th Cir. Ill., Oct. 10, 2014)
Judges: {2015 U.S. LEXIS 1}Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

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