

# APPENDIX A

CERTIORARI APPEAL 2241 MOTION

USDC NO 123-CV-168

**United States Court of Appeals  
for the Fifth Circuit**

United States Court of Appeals  
Fifth Circuit

**FILED**

August 23, 2024

Lyle W. Cayce  
Clerk

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No. 23-40639  
Summary Calendar

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EARL FRANCIS HART,

*Petitioner—Appellant,*

*versus*

CHARLES DANIELS, *Warden, USP Beaumont,*

*Respondent—Appellee.*

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 1:23-CV-165

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Before WIENER, HO, and RAMIREZ, *Circuit Judges.*

PER CURIAM:\*

Earl Francis Hart, federal prisoner # 27106-038, appeals the dismissal of a 28 U.S.C. § 2241 petition challenging his convictions and sentences for conspiracy to possess with intent to distribute Oxycodone, attempted possession with intent to distribute Oxycodone, possession of a firearm and ammunition by a felon, and using and brandishing a firearm in furtherance of

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\* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

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No. 23-40639

a drug trafficking crime. We review the district court's factual findings for clear error and its legal conclusions de novo. *Jeffrey v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001).

To collaterally challenge his convictions under § 2241, Hart must satisfy the “‘saving clause’” of 28 U.S.C. § 2255(e) by showing that “unusual circumstances make it impossible or impracticable to seek relief in the sentencing court.” *Jones v. Hendrix*, 599 U.S. 465, 478 (2023). He has abandoned any argument that he has satisfied the savings clause by failing to brief it before this court. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). To the extent Hart contends that actual innocence is an exception to the savings clause, he has not established that actual innocence provides a gateway for review of claims raised in a § 2241 petition. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Schlup v. Delo*, 513 U.S. 298, 315 (1995).

The judgment of the district court is AFFIRMED. Hart's motion for the appointment of counsel is DENIED.

APPENDIX

B

MAGISTRATE / JUDGE  
RECOMMENDATION

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

EARL FRANCIS HART	§	
VS.	§	CIVIL ACTION NO. 1:23-CV-165
WARDEN, USP BEAUMONT	§	

ORDER OVERRULING PETITIONER'S OBJECTIONS ADOPTING  
THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Earl Francis Hart, a prisoner confined at the United States Penitentiary in Beaumont, Texas, proceeding *pro se*, filed this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241.

The Court referred this matter to the Honorable Christine L. Stetson, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this Court. The magistrate judge recommends dismissing the Petition.

The Court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence. Petitioner filed Objections to the Report and Recommendation of United States Magistrate Judge.

The Court has conducted a *de novo* review of the Objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration, the Court concludes the Objections are without merit.

Petitioner contends that his sentence is illegal because he does not qualify as an armed career criminal under the Armed Career Criminal Act (ACCA) or as a career offender under United States

APPENDIX B

Sentencing Guideline § 4B1.1. *See Johnson v. United States*, 576 U.S. 591, 606 (2015) (holding that the residual clause of the ACCA, which allowed for the enhancement of a sentence for being a felon in possession of a firearm, was unconstitutionally vague). In most cases, a post-conviction challenge to a federal conviction or sentence must be brought pursuant to 28 U.S.C. § 2255 in the sentencing court. *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000). The “savings clause” of § 2255 allows a prisoner pursue relief under § 2241 only if it appears that the remedy by § 2255 motion “is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e). A prior unsuccessful § 2255 motion, or the inability to meet the requirements for filing a successive § 2255 motion, does not make § 2255 an inadequate or ineffective remedy. *Tolliver*, 211 F.3d at 878.

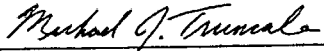
In this case, the savings clause does not provide Petitioner with an avenue for post-conviction relief under § 2241. Petitioner was able to raise his claims in a § 2255 motion. The sentencing court considered the merits of Petitioner’s claims and concluded that he was not entitled to relief. Petitioner’s lack of success in pursuing relief under § 2255 motion does not meet his burden of demonstrating that § 2255 is an inadequate or ineffective remedy, such that he should be allowed to pursue the same claims in a § 2241 petition.

#### ORDER

Accordingly, Petitioner’s Objections [Dkt. 5] are OVERRULED. The findings of fact and the conclusions of law of the magistrate judge are correct, and the magistrate judge’s Report and

Recommendation [Dkt. 3] is ADOPTED. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation.

SIGNED this 22nd day of October, 2023.

  
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Michael J. Truncala  
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
BEAUMONT DIVISION

EARL FRANCIS HART §  
VS. § CIVIL ACTION NO. 1:23-CV-165  
WARDEN, USP BEAUMONT §

REPORT AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Earl Francis Hart, a prisoner confined at the United States Penitentiary in Beaumont, Texas, filed this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241.

The Petition was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Factual Background

Petitioner is in custody pursuant to a judgment entered in the United States District Court for the District of Massachusetts in cause number 1:09-CR-1005. Following a jury trial, Petitioner was found guilty of: conspiracy to possess with intent to distribute Oxycodone (Count 1); attempted possession of Oxycodone with intent to distribute (Count 2); being a felon in possession of a firearm and ammunition (Count 3); and using and brandishing a firearm in furtherance of a drug trafficking crime (Count 4). On January 27, 2011, Petitioner was sentenced to 240 months of imprisonment for Counts 1 and 2, 293 months for Count 3, and a mandatory term of life imprisonment for Count 4. On direct appeal, the United States Court of Appeals for the First Circuit vacated the life sentence for Count 4 and remanded the case for re-sentencing. *United States v. Hart*, No. 11-1201 (1st Cir. Aug. 27, 2012).



During his re-sentencing, the district court determined that Petitioner was an armed career criminal under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and a career offender under § 4B1.1 of the United States Sentencing Guidelines. Petitioner was re-sentenced to a total of 360 months of imprisonment: 240 months for Counts 1 and 2; 276 months term for Count 3, to be served concurrently; and 84 months for Count 4, to be served consecutively to the other three sentences. The sentence was affirmed on appeal. *United States v. Hart*, No. 13-1199 (1st Cir. Apr. 17, 2014).

Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. Petitioner argued that his sentence was invalid because he no longer qualified as an armed career criminal after the United States Supreme Court struck down the residual clause of the ACCA in *Johnson v. United States*, 576 U.S. 591 (2015). The district court was not persuaded that Petitioner had a third qualifying predicate conviction in light of *Johnson*, but concluded that it was not necessary to resolve the issue because Petitioner would still be sentenced to 360 months as a career offender under U.S.S.G. § 4B1.1 since he had two qualifying convictions. *Hart v. United States*, 1:09-CR-10005-PBS, slip op. at 1-2 (D. Mass. May 22, 2018). Petitioner filed a notice of appeal, and the First Circuit denied his request for a certificate of appealability. *Hart v. United States*, No. 19-8002 (1st Cir. Dec. 10, 2019).

#### The Petition

Petitioner contends that his sentence is illegal because he does not qualify as an armed career criminal under the ACCA or as a career offender under U.S.S.G. § 4B1.1.

### Analysis

Title 28 U.S.C. § 2255 provides the primary means of collaterally attacking a federal conviction and sentence. *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000). Section 2241 is correctly used to attack the manner in which a sentence is executed. *Id.* A petition for writ of habeas corpus is not a substitute for a motion to vacate sentence pursuant to § 2255. *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001). A prisoner may use § 2241 as the vehicle for attacking the conviction only if it appears that the remedy by motion “is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255. Petitioner bears the burden of proving the inadequacy or ineffectiveness of a motion under § 2255. *Jeffers*, 253 F.3d at 830. A prior unsuccessful § 2255 motion, or the inability to meet the AEDPA’s requirements, does not make § 2255 inadequate or ineffective. *Tolliver*, 211 F.3d at 878.

The Fifth Circuit has set forth two requirements Petitioner must satisfy to file a § 2241 petition in connection with the savings clause of § 2255. In *Reyes-Requena v. United States*, the Fifth Circuit held that the savings clause of § 2255 applies to a claim that: (i) is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) was foreclosed by circuit law at the time when the claim should have been raised in the petitioner’s trial, appeal, or first § 2255 motion. *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001). To meet the first, or actual innocence, prong of this test, the petitioner must prove that, based on a retroactively applicable Supreme Court decision, he was convicted for conduct that did not constitute a crime. *Jeffers*, 253 F.3d at 830-31.

Petitioner’s claims regarding his sentence do not meet the *Reyes-Requena* standard. First, § 2255 is not an inadequate or ineffective remedy because he was able to raise his claims in his

Motion to Vacate, Set Aside, or Correct Sentence. Second, a challenge to the validity of a sentence enhancement is not the type of claim that warrants relief under § 2241. *Kinder v. Purdy*, 222 F.3d 209, 213-14 (5th Cir. 2000). Finally, Petitioner's claims do not meet the *Reyes-Requena* standard because Petitioner has not demonstrated that he was convicted for conduct that did not constitute a crime. Therefore, the Petition should be dismissed.

Recommendation

This Petition for Writ of Habeas Corpus should be dismissed.

Objections

Within fourteen days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from the entitlement of *de novo* review by the district court of proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court, except on grounds of plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

**SIGNED this the 15th day of May, 2023.**



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Christine L Stetson  
UNITED STATES MAGISTRATE JUDGE