

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-13996
Non-Argument Calendar

D.C. Docket No. 5:14-cv-00035-WTH-PRL

LLEWELLEN FERNANDO SMITH,
a.k.a. Llewelen F. Smith,

Petitioner-Appellant,

versus

WARDEN, FCC COLEMAN - LOW,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(August 28, 2017)

Before ED CARNES, Chief Judge, JULIE CARNES and JILL PRYOR, Circuit
Judges.

PER CURIAM:

Leland H. Kynes, appointed counsel on appeal for Llewellen F. Smith in this appeal from the dismissal of Smith's 28 U.S.C. § 2241 habeas petition, has filed a motion to withdraw on appeal, supported by a brief prepared pursuant to *Anders v. California*, 386 U.S. 738 (1967). Our independent review of the entire record reveals that counsel's assessment of the relative merit of the appeal is correct.

Because independent examination of the entire record reveals no arguable issues of merit, counsel's motion to withdraw is **GRANTED**, and the dismissal of Smith's § 2241 petition is **AFFIRMED**.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-13996-DD

LLEWELLEN FERNANDO SMITH,
a.k.a. Llewelen F. Smith,

Petitioner - Appellant,

versus

WARDEN, FCC COLEMAN - LOW,

Respondent - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellant's motion to adopt Appellee's Appendix is **GRANTED.**

Pro-se Appellant's motion to strike Anders Brief is **DENIED.**


UNITED STATES CIRCUIT JUDGE

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

LLEWELLEN FERNANDO SMITH,

Petitioner,

v.

Case No: 5:14-cv-35-Oc-10PRL

WARDEN, FCC COLEMAN - LOW

Respondent.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's Order entered on August 25, 2015, the Petition for Writ of Habeas Corpus is dismissed for lack of jurisdiction.

SHERYL L. LOESCH, CLERK

s/E. Norvell, Deputy Clerk

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

LLEWELLEN FERNANDO SMITH,

Petitioner,

v.

Case No:5:14-CV-35-Oc-10PRL

WARDEN, FCC COLEMAN – LOW,

Respondent.

ORDER

Petitioner, a federal inmate proceeding *pro se*, initiated this case by filing a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. (Doc. 1). Respondent has filed a Response to the Petition and requests dismissal. (Doc. 9). Petitioner has filed a Reply to the Response. (Doc. 12). Petitioner also filed a "Motion for Summary Judgment," and included a statement of undisputed facts. (Doc. 19). This case is ripe for review.

Background

Petitioner is a federal inmate currently incarcerated at the Coleman Correctional Complex within this district and division. In 1997, a jury in the United States District Court for the Eastern District of Virginia found Petitioner guilty of conspiracy to distribute more than 50 grams of cocaine base and more than 5 kilograms of powder cocaine in violation of 21 U.S.C. § 846. Respondent states that the district court calculated Petitioner's guidelines based on judicial findings that his offense had involved more than 1.5 kilograms of cocaine base, that Petitioner had a leadership role in the conspiracy and that Petitioner possessed a firearm in connection with the offense. (Doc. 9).

Respondent states that Petitioner's guidelines called for a sentence of life imprisonment, but the district court downwardly departed from the range to sentence Petitioner to 360 months imprisonment. Id. Respondent states that Petitioner was not sentenced pursuant to an enhanced penalty based on prior convictions. Id.

Petitioner did not appeal, but filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255, which was denied. In 2014, Petitioner filed his current federal habeas Petition. (Doc. 1). Petitioner states that the jury made no findings about a drug quantity of 1.5 kilograms of crack, possession of a dangerous weapon or a role in the offense adjustment. Id. Petitioner states that the Probation Office entered these "enhancements" into his Pre-sentence Report as facts, which are "materially false because his jury verdict did not support them." Id. Petitioner claims that he has the right to have a jury decide factual issues that increase his sentence." Id.

Petitioner argues that he is entitled to relief because Alleyne v. United States, 133 S.Ct. 2151 (2013), makes clear that the "enhancements the Probation Office entered in [his] PSR violate [his] Sixth Amendment rights." (Doc. 1). Petitioner states that the Probation Office has advised him that it does not have the authority to amend his Pre-sentence Report. Id. Petitioner further states that the "Sixth Amendment permits sentencing judges to determine sentencing facts that are not elements of the crime, because these enhancements are all elements of the crime, the Courts joined the Probation Office in further violating [his] Sixth Amendment rights." Id.

Petitioner argues that he has "suffered the effect of an improperly executed sentence [and] he has suffered the effect of being sentenced for a more serious crime than his offense of conviction." Id.

Further, Petitioner contends in a Supplement to the Petition that he raises an additional claim based on the Government's failure to comply with the procedural requirements of 21 U.S.C. § 851(a)(1) "in order for the Court to impose the enhancements." (Doc. 5). In response to the argument, Respondent states that Petitioner was not sentenced pursuant to an enhanced penalty based on any prior convictions and, therefore, no section 851 notice was required. (Doc. 9, fn. 1).

Discussion

Typically, ~~collateral attacks on the validity of a federal conviction or sentence~~ must be brought under 28 U.S.C. § 2255. Sawyer v. Holder, 326 F.3d 1363, 1365 (11th Cir. 2003). However, § 2255(e), the "savings clause," permits a federal prisoner to file a petition pursuant to § 2241 if a § 2255 motion "is inadequate or ineffective to test the legality of his detention." ~~28 U.S.C. § 2255(e)~~. The savings clause imposes a subject matter jurisdictional limit on petitions filed pursuant to § 2241. Williams v. Warden, 713 F.3d 1332, 1338 (11th Cir. 2013).

The United States Court of Appeals for the Eleventh Circuit has set forth five requirements that a petitioner must satisfy in order to demonstrate that his prior § 2255 motion was inadequate or ineffective such that he can proceed with a § 2241 petition under the savings clause. Bryant, 738 F.3d at 1253. Specifically, the petitioner must establish that: (1) throughout the petitioner's sentencing, direct appeal, and first § 2255 proceeding, Eleventh Circuit precedent had specifically and squarely foreclosed the claim raised in the § 2241 petition; (2) after the petitioner's first § 2255 proceeding, the Supreme Court overturned that binding precedent; (3) that Supreme Court decision applies retroactively on collateral review; (4) as a result of that Supreme Court decision

applying retroactively, the petition's current sentence exceeds the statutory maximum; and (5) the savings clause of § 2255(e) reaches his claim. Id. at 1374 (synthesizing the savings clauses tests discussed in Wofford v. Scott, 177 F.3d 1236 (11th Cir. 1999) and Williams v. Warden, 713 F. 2d 1332, 1343 (11th Cir. 2013)). See also Jeanty v. Warden, 757 F.3d 1283 (11th Cir. July 22, 2014) (applying the Bryant test to § 2241 petitioner's challenge to his sentence for two drug offenses).

The Eleventh Circuit has "categorically state[d], . . . that the savings clause does not apply to sentencing claims, at least not to those where the sentence imposed was within the statutory maximum." Gilbert v. United States, 640 F.3d 1293 (11th Cir. 2011) (rejecting attempt to bring a § 2241 claim that petitioner had been wrongly sentenced as a career offender under U.S.S.G. § 4B1.1).

In the instant case, Respondent argues, and the Court agrees, that Petitioner's attack on the substantive validity of his sentence is not reviewable in a section 2241 proceeding. Petitioner's arguments challenging the Pre-sentence Report and the accuracy of the information within the report under the Privacy Act leading to the "unconstitutional enhancements," or the lack of a section 851 notice could have and should been raised in the district court at sentencing, on direct appeal or in a timely section 2255 motion.

The attack on the Probation Office's inclusion of certain facts or information in the report, the Court's reliance on the report, and the challenge to the indictment and judgment were not foreclosed arguments. Petitioner's failure to raise his claims results in a procedural bar and default, and he has not demonstrated that he is actually innocent or otherwise entitled to bypass the impediment of the procedural bar.

Likewise, while it does not appear to be the case, even if Petitioner previously raised his claim before the sentencing court or the Court of Appeals and the claims were dismissed, there is *res adjudicata*.

While Petitioner may attempt to characterize his claim as a challenge to the execution of the sentence, Petitioner provides no authority and the Court is not aware of any law that would permit Petitioner to avoid the preclusive effect of Preiser v. Rodriguez, 411 U.S. 475 (1973), by allowing an attack on the mere execution of the sentence pursuant to § 2241 when a habeas challenge to the sentence itself is impermissible. Such a finding would allow a habeas petitioner whose claims do not address the legality of his or her confinement to obtain habeas relief by simply rephrasing the complaint as an attack on the BOP's execution of the sentence. Petitioner's argument that "all the errors that have led to the improper execution of his sentence derived from the Probation Office's unconstitutional and unlawful actions," is a challenge to the validity of his confinement, which is procedurally barred from consideration.

Further, Petitioner is not entitled to relief pursuant to the savings clause. It does not appear that Petitioner was sentenced beyond the statutory maximum sentence and he has pointed to no pertinent Supreme Court or Eleventh Circuit decision that applies retroactively on collateral review. Petitioner's reliance on Alleyne is misplaced. There is authority indicating that Alleyne is not retroactive. See Jeanty, 757 F.3d at 1285 (finding that Alleyne and Apprendi do not apply retroactively on collateral review.).

The Court recognizes that Petitioner argues in the Reply that he may rely on Alleyne even if it is not retroactive because he is challenging the accuracy of his Pre-

sentence Report, which he may do so at any time and "Alleyne is the controlling rule of law." (Doc. 12). The Court is not persuaded by this argument. Regardless of the manner in which Petitioner phrases his claim, he is attempting to use the decision in Alleyne to open the door to the portal that is closed in order to attack his sentence. In doing so, a retroactive application of Alleyne would occur, which is not appropriate. Also, Petitioner is mistaken that his challenge to the Pre-sentence Report, which allegedly led to a sentence for a "more serious crime than his offense of conviction" and is the basis for the request for the recalculation of the guidelines, can not be raised at any time. The claim and request for relief could have been previously raised and is now procedurally barred.

Applying the Bryant factors, Petitioner has not established that section 2255 was inadequate or ineffective to test the legality of his detention. For the foregoing reasons, Petitioner is not entitled to the requested relief of an amendment to the Pre-sentence Report in order to recalculate "his guidelines to reflect the offense of conviction after removing the unconstitutional enhancements."

Conclusion

Based on the foregoing, the Petition is **DISMISSED** for lack of jurisdiction. The Clerk is directed to enter judgment accordingly, terminate any pending motions, and close the file.

IT IS SO ORDERED.

DONE and **ORDERED** in Ocala, Florida on August 25th, 2015.



UNITED STATES DISTRICT JUDGE

Copies furnished to:

Llewelen F. Smith

Counsel of Record

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No. 15-13996-DD

LLEWELLEN FERNANDO SMITH,
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Petitioner - Appellant,

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Appeal from the United States District Court
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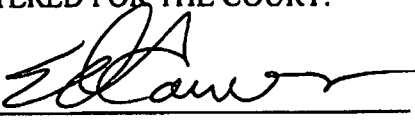
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, JULIE CARNES and JILL PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



CHIEF JUDGE

ORD-42