

APPENDIX A

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 15-7742

TITO LAMONT ANDERSON,

Petitioner - Appellant,

v.

JUSTIN ANDREWS, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at
Raleigh. Louise W. Flanagan, District Judge. (5:15-hc-02061-FL)

Submitted: November 17, 2017

Decided: January 8, 2018

Before GREGORY, Chief Judge, and NIEMEYER and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Tito Lamont Anderson, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Tito Lamont Anderson, a federal prisoner, appeals the district court's order dismissing without prejudice his 28 U.S.C. § 2241 (2012) petition. We have reviewed the record and find no reversible error. Anderson relies on the savings clause in 28 U.S.C. § 2255(e) (2012) to challenge his career offender designation, but we have "not extended the reach of the savings clause to those petitioners challenging only their sentence." *United States v. Poole*, 531 F.3d 263, 267 n.7 (4th Cir. 2008). As such, Anderson fails to satisfy his burden of demonstrating that 28 U.S.C. § 2255 (2012) is an inadequate or ineffective means of challenging the validity of his detention. *See Rice v. Rivera*, 617 F.3d 802, 807 (4th Cir. 2010).

We thus conclude that the district court properly dismissed without prejudice Anderson's § 2241 petition. Accordingly, we affirm for the reasons stated by the district court. *See Anderson v. Andrews*, No. 5:15-hc-02061-FL (E.D.N.C. Oct. 15, 2015). We grant Anderson leave to proceed on appeal in forma pauperis. 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

APPENDIX B

NO. 5:15-HC-2061-FL

Respondent.

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sentencing court for a reduction in petitioner's sentence pursuant to U.S.S.G. § 5K1.1. The sentencing court granted the government's motion, and then sentenced petitioner to a term of 198 months imprisonment. Id. Petitioner did not file an appeal.

On November 18, 2011, petitioner filed, in the sentencing court, a *pro se* motion seeking review of his sentence in light of the United States Court of Appeals for the Fourth Circuit's ruling in United States v. Simmons, 649 F.3d 237 (4th Cir. 2011). Id. at (Nov. 18, 2011.) Then, on August 14, 2012, petitioner's counsel filed a motion to vacate, correct, or modify petitioner's sentence pursuant to 28 U.S.C. § 2255 and, alternatively, a petition for a writ of *coram nobis*. Id. at (Aug. 14, 2012.) On July 1, 2013, the sentencing court issued an order dismissing petitioner's *pro se* motion for review and his motion to vacate, set aside, or correct his sentence. Id. at (July 1, 2013.) The sentencing court also denied petitioner's petition for a writ of error *coram nobis*. Id. Petitioner then appealed the sentencing court's judgment, and the Fourth Circuit Court of Appeals dismissed petitioner's appeal. United States v. Anderson, No. 13-7169 (4th Cir. Jan. 26, 2015).

On April 6, 2015, petitioner filed the instant action *pro se* pursuant to 28 U.S.C. § 2241 alleging that his presentence report is a correctable order under Federal Rule of Criminal Procedure 36. Petitioner also asserts that he is able to establish that § 2255 is inadequate or ineffective to test the legality of his detention in light of the United States Supreme Court's decisions in Persaud v. United States, 134 S.Ct. 1023 (2014), and Descamps v. United States, — U.S. —, 133 S.Ct. 2276 (2013), and the Fourth Circuit's decisions in United States v. Miller, 735 F.3d 141 (4th Cir. 2013) and Simmons.

DISCUSSION

Petitioner contends that his career offender sentencing enhancement no longer is applicable in light of the Fourth Circuit and Supreme Court's rulings in Simmons, Persaud, Miller, and Descamps. The court begins with petitioner's request that the court enter an order pursuant to Federal Rule of Criminal Procedure 36 directing the probation office to correct petitioner's presentence investigation report, in light of the aforementioned case law, to reflect that petitioner's prior convictions may not be used as career offender predicates.

Rule 36 provides that "[a]fter giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." Rule 36 applies to correct clerical, not legal errors. See United States v. Postell, 412 F. App'x 568, 569 (4th Cir. 2011) (per curiam) (citing United States v. Johnson, 571 F.3d 716, 718 (7th Cir. 2009)). Here, petitioner points to no clerical error. Rather, he seeks to attack his career offender sentencing enchantment, a legal determination, for which he may not seek relief pursuant to Rule 36. See id.

The court now turns to petitioner's request for relief pursuant to § 2241. Although petitioner filed his claim under 28 U.S.C. § 2241, he is in fact attacking the legality of, rather than the execution of, his sentence. The legality of one's sentence must be challenged under 28 U.S.C. § 2255 unless "the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255; see In re Vial, 115 F.3d 1192, 1194 (4th Cir. 1997) (en banc). A procedural impediment to § 2255 relief, such as the statute of limitations or the rule against successive petitions, does not render § 2255 review "inadequate" or "ineffective." Id. at 1194, n. 5.

The Fourth Circuit has examined the prerequisites for finding that § 2255 is an inadequate or ineffective remedy. See In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000). In Jones, the court held that:

§ 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of the conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

Id.

Petitioner is not able to satisfy the second prong of the Jones test because Simmons and Descamps¹ were decided prior to date the sentencing court issued its order denying petitioner's first § 2255 motion on July 1, 2013. Moreover, petitioner is unable to satisfy the second prong of the Jones test based upon any of the cases cited by petitioner because the substantive law has not changed so that petitioner's conviction for drug trafficking no longer is deemed criminal.

Even if petitioner could proceed with his § 2241 petition, the Fourth Circuit has not extended the reach of the savings clause to include petitioners, such as Anderson, who challenge only their sentencing enhancement. See United States v. Surratt, 797 F.3d 240, 248 (4th Cir. 2015); United States v. Foote, 784 F.3d 931, (4th Cir. 2015) (holding that petitioner's § 2255 petition, which was based on the argument that petitioner's career offender designation was later nullified by Simmons does not present a claim that is cognizable on collateral review). Further, the United States Supreme

¹ The Supreme Court also did not explicitly provide that the rule announced in Descamps was retroactive to cases on collateral review. See Thompson v. United States, C/A No. 7:14-2881-GRA, 2014 WL 3809538, at *2 n. 3 (D.S.C. July 30, 2014); Baker v. Zych, C/A No. 7:13-cv-512, 2014 WL 1875114, at *2 (W.D.Va. May 9, 2014) (collecting cases which hold that Descamps is not retroactive on collateral review).

court's decision in Persaud does not afford petitioner a basis for relief because petitioner was not sentenced based on imposition of a mandatory minimum, but rather received a below-guideline sentence. See Boyd v. United States, No. 5:13-CV-726-FL, 2015 WL 1967267, at *6 (E.D.N.C. Apr. 30, 2015).

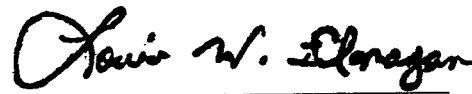
As for petitioner's reliance upon the Fourth Circuit's ruling in Miller, Miller likewise does not afford petitioner a basis for relief. Specifically, the court in Miller held that Simmons applies retroactively to cases in which a petitioner collaterally attacks his or her sentence by alleging actual innocence of the underlying conviction of being a felon in possession of firearm, in violation of 18 U.S.C. § 922(g). Miller, 735 F.3d at 146. Then, in United States v. Newbold, — F.3d —, No. 10–6929, 2015 WL 3960906 (4th Cir. June 30, 2015), the Fourth Circuit held that, pursuant to Miller, a petitioner could challenge a Simmons error resulting in erroneous designation as an armed career criminal on collateral review. The decision was based on the fact that the sentence the petitioner had received was “an illegal one” inasmuch as he “received a punishment that the law cannot impose on him.” Newbold, 2015 WL 3960906 at *4.

Petitioner, however, was not convicted of being a felon in possession of a firearm and does not allege that he is actually innocent of the predicate offense, but instead contends that the sentencing enhancement is inapplicable. Thus, the Fourth Circuit's rulings in Miller and Newbold do not apply. Based upon the foregoing, the court finds that petitioner has not satisfied the Jones criteria by establishing that § 2255 is “inadequate or ineffective to test the legality of his detention.”

The court cannot convert this § 2241 petition into a § 2255 petition because petitioner previously filed such a petition. A second or successive § 2255 petition may not be brought prior to the United States Court of Appeals for the Fourth Circuit certifying that the new petition contains

either newly discovered evidence or “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255; see United States v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003). Petitioner has not shown either of these. Therefore, petitioner has failed to satisfy the § 2255 gatekeeping provision. Accordingly, he may not proceed with this claim pursuant to 28 U.S.C. § 2241, and this action is DISMISSED without prejudice.

SO ORDERED, this the 15th day of October, 2015.

A handwritten signature in black ink, reading "Louise W. Flanagan". The signature is written in a cursive, flowing style.

LOUISE W. FLANAGAN
United States District Judge