APPENDIX A – ORDER from the United States Court of Appeals, Fourth Circuit denying request for Certificate of Appealability

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6732

KIRK A. SIMMONS,

Petitioner - Appellant,

v.

THOMAS SCARANTINO,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Richard E. Myers, II, Chief District Judge. (5:21-hc-02136-M)

Submitted: February 21, 2023 Decided: February 23, 2023

Before NIEMEYER and DIAZ, Circuit Judges, and MOTZ, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Kirk A. Simmons, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kirk A. Simmons appeals the district court's order denying relief on his 28 U.S.C. § 2241 petition in which he sought to challenge his conviction by way of the savings clause in 28 U.S.C. § 2255. Pursuant to § 2255(e), a prisoner may challenge his conviction in a traditional writ of habeas corpus pursuant to § 2241 if a § 2255 motion would be inadequate or ineffective to test the legality of his detention.

> [Section] 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of 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.

In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000).

We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Simmons v. Scarantino*, No. 5:21-hc-02136-M (E.D.N.C. May 26, 2022). 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 – ORDER from the United States District Court, Eastern District of North Carolina denying petitioner's habeas petition filed under 28 U.S.C. 2241.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:21-HC-02136-M

KIRK A. SIMMONS, Petitioner, v. THOMAS SCARANTINO, Respondent.	)	ORDER

On June 24, 2021, Kirk A. Simmons ("petitioner"), then an inmate at F.M.C. Butner, filed *pro se* a petition for writ of habeas corpus under 28 U.S.C. § 2241. See Pet. [D.E. 1].

On April 21, 2022, the court directed petitioner to show good cause why the petition was not rendered moot by his intervening release from federal custody. Order [D.E. 8].

On May 11, 2022, after petitioner failed to respond to the order to show cause in the time permitted, the court dismissed the action without prejudice for failure to prosecute, denied as moot the motion for an evidentiary hearing, denied a Certificate of Appealability, and directed the clerk to close the case. Order [D.E. 9]. Judgement was entered the following day. J. [D.E. 10].

On May 16, 2022, the court docketed petitioner's motion purporting to show good cause why the petition was not mooted by his intervening release from federal custody. Mot. [D.E. 11].

On May 19, 2022, the court deemed petitioner's May 16, 2022, motion a timely response to the order to show cause, found good cause shown, and directed the clerk to reopen the case.

The court now conducts its initial review of the petition under 28 U.S.C. § 2243 and, for the reasons discussed below, dismisses the action without prejudice for lack of jurisdiction.

Relevant Background:

On February 25, 2014, pursuant to a written plea agreement in the United States District Court for the District of Delaware, petitioner pleaded guilty to Attempted Enticement and Coercion of a Minor, in violation of 18 U.S.C. § 2422(b). See United States v. Simmons, No. 1:13-cr-00097-LPS-1 (D. Del. Feb. 25, 2014), Memo. of Plea Agreement [D.E. 28].

On August 15, 2014, petitioner was sentenced to, among other things, 120 months' imprisonment and 72 months of supervised released. Id., J. [D.E. 41]; Tr. [D.E. 53]. Petitioner did not directly appeal.

On June 4, 2015, petitioner moved to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Id., Mot. [D.E. 56]. On February 3, 2017, the sentencing court dismissed this § 2255 motion. Id., Mem. Op. [D.E. 96], Order [D.E. 97]. Petitioner appealed. Id., [D.E. 98]. On April 28, 2017, the United States Court of Appeals for the Third Circuit ("Third Circuit") denied petitioner's request for a Certificate of Appealability, id., Order [D.E. 100].

On August 29, 2018, petitioner moved under 28 U.S.C. § 2244 for leave to file a second or successive § 2255 motion, and the Third Circuit denied the motion on September 13, 2018. See In re: Kirk Simmons, No. 18-2904 (3d Cir. Sept. 13, 2018).

On October 26, 2018, petitioner moved under Federal Rule of Civil Procedure 60(b) to reopen/reconsider the denial of his § 2255 motion. Simmons, No. 1:13-cr-00097-LPS-1 (D. Del. Oct. 26, 2018), Mot. [D.E. 107]. On May 7, 2020, the sentencing court denied the motion. Id., Mem. [D.E. 117], Order [D.E. 118]. Petitioner appealed. Id., [D.E. 119]. On October 1, 2020, the Third Circuit found the Rule 60(b) motion was an unauthorized second or successive § 2255 motion or, alternatively, that petitioner was not entitled to Rule 60(b) relief. Id., Order [D.E. 121].

Petitioner's Argument:

Petitioner raises three grounds for relief: 1) his conviction was the result of prosecutorial misconduct "to conceal all evidence of inducement by police" that was revealed two years after his "uninformed" guilty plea; 2) he received ineffective assistance of counsel because his public defender "simply failed to investigate the case," "failed to review critical evidence that would have revealed [his] interrogation violated Miranda," "failed to review evidence that clearly supported entrapment," and "abandoned [petitioner] after sentencing with the forfeiture of appeal rights [sic]"; 3) he is actually innocent because the "prosecutor admitted petitioner not predisposed toward criminal conduct for which he was indicted [sic]," the evidence shows "clear inducement by police to engage in criminal conduct first proffered by the police," and that "inducement by police without predisposition is entrapment." Pet. [D.E. 1] at 6. Petitioner further asserts:

> Evidence supporting these grounds was concealed from petitioner throughout his federal prosecution and did not become known until the middle of his § 2255 proceedings. Attempts to amend 2255 brief were denied, attempts to secure a 2nd 2255 proceeding was rejected, attempts to reopen original 2255 via Rule 60 was flatly rejected. Appellate rights lost thru ineffective assistance [sic].

Id. at 7.

For relief, petitioner seeks: 1) an evidentiary hearing to "present these claims for the first time unobstructed"; 2) appointment of counsel; and 3) that his conviction be vacated. Id.

In his memorandum in support of his § 2241 petition, petitioner argues, *inter alia*: the prosecutor withheld exculpatory entrapment evidence that was not discovered until years after his conviction; his confession was obtained in violation of Miranda; his counsel failed to investigate his assertions of entrapment or the purported Miranda violation; and, after conviction, his counsel did not adequately confer with petitioner about an appeal. See Pet. Attach. [D.E. 1-1] at 18-31.

Discussion:

Section 2241 empowers the court to grant habeas relief to a prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(a), (c). Nevertheless, prisoners that are "convicted in federal court are required to bring collateral attacks challenging the validity of their judgment and sentence by filing a motion to vacate sentence pursuant to 28 U.S.C.A. § 2255." In re Vial, 115 F.3d 1192, 1194 (4th Cir. 1997) (en banc).

Because he collaterally attacks the validity of his conviction, not the execution of his sentence, petitioner "may file a habeas petition under § 2241 only if the collateral relief typically available under § 2255 'is inadequate or ineffective to test the legality of his detention.'" Prousalis v. Moore, 751 F.3d 272, 275 (4th Cir. 2014) (quoting the § 2255(e) "savings clause").

Under the "Jones test," section 2255 relief is "inadequate or ineffective" if:

> (1) [A]t the time of 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. (citing In re Jones, 226 F.3d 328, 333–34 (4th Cir. 2000) (per curiam)).

Unless a § 2241 petitioner satisfies the requirements a "savings clause" test, the court lacks jurisdiction to consider the petition on the merits. Rice v. Rivera, 617 F.3d 802, 807 (4th Cir. 2010) (per curiam); see also Farkas v. Butner, 972 F.3d 548, 559–60 (4th Cir. 2020).

Petitioner plainly cannot satisfy the second prong of the Jones tests because no change of law has made non-criminal his conduct of conviction. Cf. In re Jones, 226 F.3d at 333–34.

Although petitioner contends that the sentencing court wrongly denied his motions under § 2255 and Rule 60(b), that § 2255 relief now is procedurally barred, and that, pursuant to "new

evidence," he should be allowed to file a second or successive § 2255 motion, see Pet. Attach. [D.E. 1-1] at 1–18, "the remedy afforded by § 2255 is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provision [ ] or because an individual is procedurally barred from filing a § 2255 motion." In re Vial, 115 F.3d at 1194 n.5 (citations omitted).

In sum, because petitioner fails to satisfy the § 2255(e) "savings clause" requirements to demonstrate a § 2255 motion is "inadequate or ineffective to test the legality of his detention," the court lacks jurisdiction to consider this petition on the merits. See Rice, 617 F.3d at 807.

The court also may not convert this § 2241 petition into a second or successive § 2255 motion because petitioner has not received the required prior certification of the Third Circuit. See United States v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003).

Finally, because reasonable jurists would not find the court's treatment of any of these claims debatable or wrong, and because none of the issues are adequate to deserve encouragement to proceed further, the court also denies a Certificate of Appealability. See 28 U.S.C. § 2253(c); Miller-El v. Cockrell, 537 U.S. 322, 336–38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Conclusion:

In sum, the court DISMISSES WITHOUT PREJUDICE this § 2241 petition [D.E. 1] for lack of jurisdiction and DENIES a Certificate of Appealability. The clerk shall close the case.

SO ORDERED, this 26th day of May 2022.

Richard E Myers II

RICHARD E. MYERS II
Chief United States District Judge

APPENDIX C – ORDER from the United States Court of Appeals, Fourth Circuit denying request for rehearing enbanc

FILED: July 6, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6732
(5:21-hc-02136-M)

KIRK A. SIMMONS

Petitioner - Appellant

v.

THOMAS SCARANTINO

Respondent - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Diaz, and Senior Judge Motz.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D – Text of 28 U.S.C. Section 2255

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

APPENDIX E – Text of 28 U.S.C. Section 2244

28 U.S. Code § 2244 - Finality of determination

(a)
No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.
(b)
(1)
A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
(A)
the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(B)
(i)
the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
(ii)
the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
(3)
(A)
Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
(B)
A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
(C)
The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
(D)
The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E)
The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.
(4)
A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.
(c)
In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.
(d)
(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
(A)
the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B)
the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C)
the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D)
the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
(2)
The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.
(June 25, 1948, ch. 646, 62 Stat. 965; Pub. L. 89–711, § 1, Nov. 2, 1966, 80 Stat. 1104; Pub. L. 104–132, title I, §§ 101, 106, Apr. 24, 1996, 110 Stat. 1217, 1220.)