United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 14, 2025
Decided January 15, 2025

Before

MICHAEL B. BRENNAN, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 22-1269

NEVILLE MCGARITY,
Petitioner-Appellant,

v.

DAN SPROUL,
Respondent-Appellee.

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

No. 3:21-cv-00370

Nancy J. Rosenstengel,
Chief Judge.

ORDER

Neville McGarity appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2241 and the saving clause of § 2255(e). Section 2255(e) bars habeas corpus review of a federal prisoner's conviction or sentence unless a motion to vacate under § 2255(a) "is inadequate or ineffective to test the legality of his detention." In *Jones v. Hendrix*, the Supreme Court held that the § 2255 remedy is not rendered inadequate or ineffective by a court's previous error in applying the law. 599 U.S. 465, 480 (2023).

In his petition, McGarity asserts that the district court that sentenced him in Florida did not have sufficient evidence to convict him, erred in admitting certain evidence against him, and lacked jurisdiction over him. But *Jones* squarely forecloses

any argument that a motion to vacate is inadequate or ineffective because of an asserted legal error by the sentencing court. This includes asserted errors regarding jurisdiction. A § 2255 applicant is expressly authorized to argue, to the sentencing judge, that the court had been "without jurisdiction." 28 U.S.C. § 2255(a). McGarity otherwise insists he can seek habeas corpus relief because he is innocent. Authorization to file a successive motion under 28 U.S.C. § 2255(h)(1) provides a possible remedy for a prisoner asserting his innocence, but McGarity must seek such relief in the Eleventh Circuit (if at all). Any failure to satisfy the strict conditions for a successive motion does not permit a prisoner to resort to habeas corpus instead. *Jones*, 599 U.S. at 477–78.

The judgment of the district court is **SUMMARILY AFFIRMED**.

Appendix "B"

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

NEVILLE MCGARITY,	
Petitioner,	
v.	**Case No. 3:21-CV-00370-NJR**
DAN SPROUL,	
Respondent.	

MEMORANDUM AND ORDER

ROSENSTENGEL, Chief Judge:

Petitioner Neville McGarity, an inmate in the Bureau of Prisons, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 (Doc. 1) to challenge his conviction in *United States v. McGarity*, Case No. 3:08-cr-00022-LC-EMT-6 (N.D. Fla.). Pending before the Court are several *pro se* motions for *in forma pauperis* status, appointment of counsel, service of process at government expense, copies of trial records, and an evidentiary hearing (Doc. 2-6). The Court must additionally conduct preliminary review of the Petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in United States District Courts. For the reasons set forth below, the Court denies the petition and dismisses it with prejudice.

RELEVANT FACTS AND PROCEDURAL HISTORY

On January 14, 2009, Neville McGarity was convicted at trial on eleven counts relating to his involvement in a child exploitation enterprise. *McGarity*, 08-cr-00022-LC-EMT-6 at Doc. 478. McGarity was sentenced on April 14, 2009, to a term of life imprisonment, supervised release for a term of life, and a special assessment of $600. *Id.* at Doc. 592, 611. McGarity appealed his conviction to the Eleventh Circuit, which vacated his convictions for

obstruction of justice and conspiracy, yet this did not change his sentence of life imprisonment on the remaining counts. *Id.* at Doc. 903, 919. McGarity attempted to appeal to the Supreme Court, which denied certiorari. *Id.* at Doc. 929. McGarity then filed a petition under 28 U.S.C. § 2255, which was terminated in 2016. *McGarity v. United States*, 3:13-cv-00536-LC-EMT (N.D. Fla.). McGarity filed the instant petition on April 8, 2021 (Doc. 1).

In his petition, McGarity attempts to challenge his original conviction, arguing that his participation in the criminal enterprise could not be proven as no encryption key was found on his person, that the court in the Northern District of Florida lacked jurisdiction over him, a citizen of Texas, and that evidence was collected illegally by Australian law enforcement and passed on federal authorities.

LEGAL STANDARD

Generally, petitions for writ of habeas corpus under 28 U.S.C. § 2241 may not be used to raise claims of legal error in conviction or sentencing, but are instead limited to challenges regarding the execution of a sentence. *See Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998). Thus, aside from the direct appeal process, a prisoner who has been convicted in federal court is generally limited to challenging his conviction and sentence by bringing a motion pursuant to 28 U.S.C. § 2255 in the court which sentenced him. A Section 2255 motion is ordinarily the "exclusive means for a federal prisoner to attack his conviction." *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003).

Under very limited circumstances, however, it is possible for a prisoner to challenge his federal conviction or sentence under Section 2241. Specifically, 28 U.S.C. § 2255(e) contains a "savings clause" which authorizes a federal prisoner to file a Section 2241 petition where the remedy under Section 2255 is "inadequate or ineffective to test the legality of his

detention." 28 U.S.C. § 2255(e). *See Hill v. Werlinger*, 695 F.3d 644, 648 (7th Cir. 2012) ("'Inadequate or ineffective' means that 'a legal theory that could not have been presented under § 2255 establishes the petitioner's actual innocence.'") (citing *Taylor v. Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002); *see also United States v. Prevatte*, 300 F.3d 792, 798–99 (7th Cir. 2002). The Seventh Circuit construed the savings clause in *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998): "A procedure for postconviction relief can be fairly termed inadequate when it is so configured as to deny a convicted defendant *any* opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense."

Following *Davenport* and its progeny, the Seventh Circuit has enunciated a three-part test for determining whether § 2255 is inadequate or ineffective, thus triggering the savings clause:

> (1) the federal prisoner must seek relief based on a decision of statutory interpretation (as opposed to a decision of constitutional interpretation, which the inmate could raise in a second or successive § 2255 motion);
>
> (2) the statutory rule of law in question must apply retroactively to cases on collateral review *and* could not have been invoked in a first § 2255 motion; and
>
> (3) a failure to afford the prisoner collateral relief would amount to an error "grave enough" to constitute "a miscarriage of justice."

Worman v. Entzel, 953 F.3d 1004, 1008 (7th Cir. 2020) (citing *Montana v. Cross*, 829 F.3d 775, 783 (7th Cir. 2016); *Beason v. Marske*, 926 F.3d 932, 935 (7th Cir. 2019)). *See also Chazen v. Marske*, 938 F.3d 851, 856 (7th Cir. 2019); *Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013). Thus, "there must be some kind of structural problem with section 2255 before section 2241 becomes available. In other words, something more than a lack of success with a section 2255 motion must exist before the savings clause is satisfied." *Webster v. Daniels*, 784 F.3d 1123,

1136 (7th Cir. 2015).

ANALYSIS

Here, McGarity seeks to challenge his conviction under § 2241, and the savings clause does not apply because none of McGarity's claims are based on a retroactive decision of statutory interpretation that he could not previously have brought up on appeal or in his § 2255 petition. Accordingly, these claims must be dismissed pursuant to the Court's Rule 4 preliminary review. The Court finds as moot McGarity's pending motions regarding IFP status and counsel and dismisses his petition with prejudice.

CONCLUSION

McGarity's Petition for writ of habeas corpus under 28 U.S.C. § 2241 (Doc. 1) is **DISMISSED with prejudice**. The Clerk of Court is directed to enter judgment accordingly.

If McGarity wishes to appeal the dismissal of this action, his notice of appeal must be filed with this Court within 60 days of the entry of judgment. FED. R. APP. P. 4(a)(1)(B). A motion for leave to appeal *in forma pauperis* ("IFP") must set forth the issues McGarity plans to present on appeal. *See* FED. R. APP. P. 24(a)(1)(C). If McGarity does choose to appeal and is allowed to proceed IFP, he will be liable for a portion of the $505.00 appellate filing fee (the amount to be determined based on his prison trust fund account records for the past six months) irrespective of the outcome of the appeal. *See* FED. R. APP. P. 3(e); 28 U.S.C. § 1915(e)(2); *Ammons v. Gerlinger*, 547 F.3d 724, 725-26 (7th Cir. 2008); *Sloan v. Lesza*, 181 F.3d 857, 858-59 (7th Cir. 1999); *Lucien v. Jockisch*, 133 F.3d 464, 467 (7th Cir. 1998). A proper and timely motion filed pursuant to Federal Rule of Civil Procedure 59(e) may toll the 60-day appeal deadline. FED. R. APP. P. 4(a)(4). A Rule 59(e) motion must be filed no more than twenty-eight (28) days after the entry of the judgment, and this 28-day deadline cannot be

extended. Other motions, including a Rule 60 motion for relief from a final judgment, do not toll the deadline for an appeal.

It is not necessary for McGarity to obtain a certificate of appealability from this disposition of his Section 2241 petition. *Walker v. O'Brien*, 216 F.3d 626, 638 (7th Cir. 2000).

IT IS SO ORDERED.

DATED: June 30, 2021

Nancy J. Rosenstengel

NANCY J. ROSENSTENGEL
Chief U.S. District Judge

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

NEVILLE MCGARITY,	
Petitioner,	
v.	**Case No. 3:21-CV-00370-NJR**
DAN SPROUL,	
Respondent.	

MEMORANDUM AND ORDER

ROSENSTENGEL, Chief Judge:

Pending before the Court is a Motion for Reconsideration filed by Petitioner Neville McGarity (Doc. 11). McGarity, an inmate in the Bureau of Prisons, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 (Doc. 1) to challenge his conviction in *United States v. McGarity*, Case No. 3:08-cr-00022-LC-EMT-6 (N.D. Fla.). The Court denied the Petition and dismissed this case with prejudice on July 1, 2021 (Doc. 9). McGarity now moves for reconsideration of the Court's Order. For the reasons set forth below, the Court denies the motion for reconsideration.

After his 2009 conviction in the Northern District of Florida, Neville McGarity was sentenced to a term of life imprisonment, supervised release for a term of life, and a special assessment of $600. *McGarity*, 08-cr-00022-LC-EMT-6 at Docs. 478, 592, 611. McGarity appealed his conviction to the Eleventh Circuit, and two of the six counts of his conviction were vacated, but the length of his sentence was unaffected. *Id.* at Docs. 903, 919. McGarity then attempted to appeal to the United States Supreme Court, which denied certiorari. *Id.* at Doc. 929. Next, McGarity filed a petition under 28 U.S.C. § 2255 which was terminated in

2016. *McGarity v. United States*, 3:13-cv-00536-LC-EMT (N.D. Fla.). McGarity filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 with this Court on April 8, 2021 (Doc. 1). In his Petition, McGarity attempted to challenge his original conviction on several grounds.

The Court dismissed his Petition because McGarity sought to challenge to his conviction, and the savings clause of § 2255 did not apply to any of his claims, as none were based on a retroactive decision of statutory interpretation that he could not previously have brought up on appeal or in his § 2255 petition.

While the Federal Rules of Civil Procedure do not explicitly provide for motions for reconsideration, the Seventh Circuit has permitted district courts to construe such motions as having been filed pursuant to Rule 59(e) or Rule 60(b). *See, e.g., Mares v. Busby*, 34 F.3d 533, 535 (7th Cir. 1994); *United Staes v. Deutsch*, 981 F.2d 299, 300 (7th Cir. 1992). "[W]hether a motion filed within [28] days of the entry of judgment should be analyzed under Rule 59(e) or Rule 60(b) depends on the substance of the motion, not on the timing or label affixed to it." *Obriecht v. Raemisch*, 517 F.3d 489, 493 (7th Cir. 2008).

Rule 59(e) allows a court to alter or amend a judgment to correct manifest errors of law or fact or to address newly discovered evidence. *Obriecht*, 517 F.3d at 494. "A 'manifest error' is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (internal citations omitted). Rule 60(b) sets forth a more exacting standard than Rule 59(e), although it permits relief from a judgment for many reasons, including mistake or "any other reason that justifies relief." Fed. R. Civ. P. 60(b). Relief under Rule 60(b) is considered an extraordinary remedy that is only granted in exceptional circumstances. *McCormick v. City of Chicago*, 230 F.3d 319, 327 (7th Cir. 2000).

"Reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion." *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996). To summarize, "[a] motion to reconsider is proper where the Court has misunderstood a party, where the Court has made a decision outside the adversarial issues presented to the Court by the parties, where the Court has made an error of apprehension (not of reasoning), where a significant change in the law has occurred, or where significant new facts have been discovered." *Battle v. Smoot*, 2018 WL 2604855, at *2 (S.D. Il. June 4, 2018).

Under the requirements of either Rule 59(e) or 60(b), McGarity's motion fails. McGarity argues that the "savings clause" in 28 U.S.C. § 2255(e) is unconstitutional and that the circuit split regarding the statute's requirements is concerning. He also asserts that *In Re Davenport*, a Seventh Circuit case cited in the Court's order of dismissal (Doc. 9), contradicts § 2241(c)(3) because a violation of the Constitution should qualify as a "miscarriage of justice" per the statute. McGarity also raises several arguments against his original conviction including lack of jurisdiction, lack of evidence, lack of due process, and actual innocence (all of which he raised in his original Petition).

None of the arguments raised by McGarity convince the Court there was a misunderstanding, error, a change of law, or newly discovered facts that warrant reconsideration. McGarity attempts to rehash previously rejected arguments from his Petition and prior appeals. Moreover, McGarity offers no cognizable argument as to why the Court's original order dismissing his Petition is errant or why the savings clause in § 2255(e) should apply to his claims. The Court remains persuaded that its dismissal of the Petition was correct. As such, McGarity's Motion for Reconsideration (Doc. 11) is **DENIED.**

If McGarity wishes to appeal the dismissal, he may file a notice of appeal with the Court within sixty (60) days of the entry of this order. Fed. R. App. P. 4(a)(1)(B) and 4(a)(4)(A). A motion for leave to appeal *in forma pauperis* should set forth the issues McGarity plans to present on appeal. *See* Fed. R. App. P. 24(a)(1)(C). If McGarity does choose to appeal and is allowed to proceed *in forma pauperis*, he will be liable for a portion of the $505.00 appellate filing fee in order to pursue his appeal (the amount to be determined based on his prison trust fund account records for the past six months) irrespective of the outcome of the appeal. *See* Fed. R. App. P. 3(e); 28 U.S.C. § 1915(e)(2); *Ammons v. Gerlinger*, 547 F.3d 724, 725-26 (7th Cir. 2008); *Sloan v. Lesza*, 181 F.3d 857, 858-59 (7th Cir. 1999).

IT IS SO ORDERED.

DATED: January 14, 2022

Nancy J. Rosenstengel

NANCY J. ROSENSTENGEL
Chief U.S. District Judge

Appendix "C"

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 21, 2025

Before

MICHAEL B. BRENNAN, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 22-1269

NEVILLE MCGARITY,
Petitioner-Appellant,
v.

DAN SPROUL,
Respondent-Appellee.

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

No. 3:21-CV-00370

Nancy J. Rosenstengel,
Chief Judge.

ORDER

Petitioner-appellant filed a petition for rehearing and for rehearing en banc on February 5, 2025. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to deny panel rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.