

2005 WL 177959 (N.D.Tex.)

[Motions, Pleadings and Filings](#)

Only the Westlaw citation is currently available.

United States District Court,
N.D. Texas, Dallas Division.
Emilio GODINES, # 42099-198, Petitioner,
v.
Dan JOSLIN, Warden, Respondent.
No. 3:04-CV-2094-L.
Jan. 27, 2005.

Emilio Godines, Seagoville, TX, pro se.

US Attorney's Office, Department of Justice, Dallas, TX, for Respondent.

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

[SANDERSON](#), Magistrate J.

*1 Pursuant to the provisions of [28 U.S.C. § 636\(b\)](#), and an order of the court in implementation thereof, this case has been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge, as evidenced by his signature thereto, are as follows: *FINDINGS AND CONCLUSIONS*:

Type of Case: This is a petition for a writ of habeas corpus brought by a federal prisoner pursuant to [28 U.S.C. § 2241](#).

Parties: Petitioner is currently confined at the Federal Correction Institution (FCI) in Seagoville, Texas. Respondent is the warden at FCI Seagoville. The court has not issued process in this case pending a preliminary screening of the habeas petition.

Statement of Fact: Petitioner was convicted in the Western District of Texas, San Antonio Division of conspiracy to distribute a controlled substance in violation of [21 U.S.C. §§ 846, 841\(a\)\(1\) and \(b\)\(1\)\(C\)](#), and [18 U.S.C. § 2](#). *United States v. Godines*, 5:00-CR-354(3) (W.D. Tex., San Antonio Div.). The trial court imposed a sentence of 211 months imprisonment and a three-year term of supervised release. *Id.* The Fifth Circuit Court of Appeals affirmed the conviction and sentence on November 13, 2001.

Prior to filing this action, Petitioner filed a motion to vacate, set aside, or correct sentence pursuant to [28 U.S.C. § 2255](#). *See Godines v. United States*, 5:02cv400 (W.D. Tex., San Antonio Div., filed Apr. 22, 2002). The trial court denied the motion on August 30, 2002, and the Fifth Circuit denied his request for a certificate of appealability on May 15, 2003.

In the present [§ 2241](#) action, Petitioner seeks to challenge his conviction and sentence under [Blakely v. Washington](#), 542 U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). He alleges (1) he was denied jury findings as to the amount of drugs used at sentencing in violation of his Fifth and Sixth Amendment right to a jury finding; (2) counsel rendered ineffective assistance at sentencing, and (3) the indictment was flawed and deficient. [\[FN1\]](#)

[FN1](#). In *Blakely*, a majority of the Supreme Court held that an enhanced sentence imposed by a judge under the Washington Sentencing Reform Act, which was based on fact neither admitted by the defendant nor found by a jury, violated the Sixth Amendment to the United States Constitution. [Blakely](#), --- U.S. at ----, 124 S.Ct. at 2538. The Supreme Court recently extended *Blakely* to the federal sentencing guidelines. [Booker v. Washington](#), --- U.S. ----, 125 S.Ct. 738, --- L.Ed.2d----, 2005 WL 50108 (2005). That holding, however, has thus far only been made applicable to cases on direct review. *Id.* at *23.

Findings and Conclusions: Although Petitioner denominates his current petition as one for relief under [28 U.S.C. § 2241](#), the petition clearly seeks to attack the validity of his federal conviction and, thus,

the legality of the sentence that he is currently serving. [FN2] A collateral attack on a federal criminal conviction is generally limited to a motion to vacate, set aside or correct a sentence under [28 U.S.C. § 2255](#). *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir.2001); *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir.2000); *Cox v. Warden, Fed. Detention Center*, 911 F.2d 1111, 1113 (5th Cir.1990). A [§ 2241](#) habeas petition is properly construed as a [§ 2255](#) motion if it seeks relief based on errors that occurred at trial or sentencing. *Tolliver*, 211 F.3d at 877-88. Habeas relief under [§ 2241](#) may be appropriate only when the remedy provided under [§ 2255](#) is "inadequate or ineffective."--i.e., the so-called "savings clause." *Jeffers*, 253 F.3d at 830. "A [§ 2241](#) petition is not, however, a substitute for a motion under [§ 2255](#), and the burden of coming forward with evidence to show the inadequacy or ineffectiveness of a motion under [§ 2255](#) rests squarely on the petitioner." *Id.* [FN3]

[FN2]. Since Petitioner is incarcerated in the Dallas Division of the Northern District of Texas, this Court is the appropriate division to make the determination whether Petitioner may proceed under [28 U.S.C. § 2241](#). See *Hooker v. Sivley*, 187 F.3d 680, 682 (5th Cir.1999) (citing *United States v. Weathersby*, 958 F.2d 65, 66 (5th Cir.1992)).

[FN3]. The savings clause of [§ 2255](#) states as follows:

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*.

(Emphasis added).

In *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir.2001), the Fifth Circuit recently held that the savings clause of [§ 2255](#) applies to a claim (i) that is based on a retroactively applicable Supreme Court decision, which establishes that petitioner may have been convicted of a nonexistent offense, and (ii) that 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. See also *Jeffers*, 253 F.3d 827.

The first prong of the *Reyes-Requena*'s savings-clause test requires that a retroactively applicable Supreme Court decision establish that the petitioner is "actually innocent." See *Reyes-Requena*, 243 F.3d at 903- 04. In explaining the requirement, the Fifth Circuit stated that "the core idea is that the petitioner may have been imprisoned for conduct that was not prohibited by law." *Id.* at 903.

*2 Petitioner has not provided any valid reason why the [§ 2255](#)'s remedy is either inadequate or ineffective. He merely states that "the AEDPA of 1996 forbids the filing of more than one 2255 motion." (Petition ¶ 10). This contention is meritless. The Fifth Circuit has long held that "[a] prior unsuccessful [§ 2255](#) motion, or the inability to meet the AEDPA's second or successive requirement, does not make [§ 2255](#) inadequate or ineffective." *Jeffers*, 253 F.3d at 830; see also *Tolliver*, 211 F.3d at 878.

Moreover Petitioner's claims do not fall under the savings clause. None of his claims are (i) based on a

retroactively applicable Supreme Court's decision which established that the petitioner may have been convicted of a nonexistent offense, and (ii) that 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, 243 F.3d at 904](#). While the Supreme Court has made its decision in *Booker* applicable to all cases on direct review, [United States v. Booker, --- U.S. ----, 125 S.Ct. 738, --- L.Ed.2d----, 2005 WL 50108, *23 \(2005\)](#), it has not yet addressed whether *Booker* should be extended to collateral-review cases. Accordingly, Petitioner is not entitled to relief under the savings clause of [§ 2241](#) and his petition should be denied.

RECOMMENDATION:

For the foregoing reasons it is recommended that the District Court deny the habeas corpus petition pursuant to [28 U.S.C. § 2241](#).

A copy of this recommendation will be mailed to Petitioner Emilio Godines, BOP # 42099-198, FCI Seagoville, P.O. Box 9000, Seagoville, Texas 75159.

N.D.Tex., 2005.

Godines v. Joslin

2005 WL 177959 (N.D.Tex.)

Motions, Pleadings and Filings [\(Back to top\)](#)

- [3:04CV02094](#) (Docket) (Sep. 27, 2004)

END OF DOCUMENT

(C) 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.