

2005 WL 178034 (N.D.Tex.)

Motions, Pleadings and Filings

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United States District Court,
N.D. Texas, Dallas Division.
Rigoberto RODRIGUEZ, # 30916-077, Petitioner,
v.
Dan JOSLIN, Warden, Respondent.
No. 3:04-CV-2202-G.
Jan. 27, 2005.

Rigoberto Rodriguez, 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 this court of conspiracy to possess with intent to distribute cocaine, cocaine base, and marijuana in violation of [21 U.S.C. § 846](#), and possession of cocaine with intent to distribute in violation of [21 U.S.C. § 841\(a\)\(1\)](#). *United States v. Rodriguez*, 3:97cr257-G(19) (N.D. Tex., Dallas 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 April 17, 2001. *Rodriguez v. United States*, No. 98-11238. Prior to filing this action, Petitioner filed a motion to vacate, set aside, or correct sentence pursuant to [28 U.S.C. § 2255](#). See *Rodriguez v. United States*, 3:02cv815-G (N.D. Tex., Dallas Div., filed Apr. 19, 2002). The trial court denied the motion on August 26, 2003, and the Fifth Circuit denied a request for a certificate of appealability on December 17, 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). Relying on the savings clause of [§ 2241](#), he alleges (1) the facts supporting his sentence were neither admitted by him nor found by a jury; and (2) the government failed to prove beyond a reasonable doubt the drug amount attributable to the defendant for sentencing purposes. (Petition at ¶¶ 7 and 10). [\[FN1\]](#)

[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 ... [and, thus, that] [§ 2255](#) is inadequate or ineffective to test the legality of Rodriguez's detention." (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 *Toliver*, 211 F.3d at 878. Accordingly, Petitioner is not entitled to relief under the savings clause of [§ 2241](#) and his petition should be denied.

Liberally construing the [§ 2241](#) petition as seeking relief under [§ 2255](#), the same is also subject to dismissal at the screening stage. [Section 2255](#) limits the circumstances under which a federal

prisoner may file a second or successive motion for post-conviction relief. It provides that a panel of the appropriate court of appeals must certify that a second or successive [§ 2255](#) motion contains one of the following two grounds:

(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.

[28 U.S.C. § 2255](#).

The Fifth Circuit has not issued an order authorizing the district court to consider this [§ 2255](#) motion. Moreover, as noted previously, the Supreme Court has not yet extended *Booker* to cases on collateral review.

Unless the Fifth Circuit Court of Appeals first grants Petitioner leave to file a new [§ 2255](#) motion, this court lacks jurisdiction to consider the same. See *Hooker v. Sivley*, 187 F.3d 680, 682 (5th Cir.1999); *United States v. Key*, 205 F.3d 773, 774 (5th Cir.2000). Therefore, the present [§ 2241](#) petition, construed as a [§ 2255](#) motion, should be dismissed for want of jurisdiction. Such a dismissal, however, is without prejudice to Petitioner's right to file a motion for leave to file a second or successive [§ 2255](#) motion in the United States Court of Appeals for the Fifth Circuit pursuant to [§ 2244\(b\)\(3\)\(A\)](#). See *In re Epps*, 127 F.3d at 364 (setting out the requirements for filing a motion for authorization to file a successive habeas petition in the Fifth Circuit Court of Appeals).

RECOMMENDATION:

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

It is further recommended that the [§ 2241](#) petition, construed as a motion under [28 U.S.C. § 2255](#), be dismissed without prejudice to Petitioner's right to file a motion for leave to file a second or successive [§ 2255](#) motion in the United States Court of Appeals for the Fifth Circuit pursuant to [28 U.S.C. §§ 2244\(b\)\(3\)\(A\)](#) and [2255](#).

*3 A copy of this recommendation will be mailed to Petitioner Rigoberto Rodriguez, BOP # 30916-077, FCI Seagoville, P.O. Box 9000, Seagoville, Texas 75159.

N.D.Tex., 2005.

Rodriguez v. Joslin

2005 WL 178034 (N.D.Tex.)

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

- [3:04CV02202](#) (Docket) (Oct. 12, 2004)

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