

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THOMAS C. O'NEILL,

Petitioner,

v.

CASE NO. 13-3159-RDR

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER

This matter is a petition for habeas corpus filed pursuant to 28 U.S.C. § 2241. Petitioner, a federal prisoner at the Federal Correctional Institution, Texarkana, Texas, proceeds pro se. The court grants leave to proceed in forma pauperis.

Petitioner was convicted in the District of Kansas. *U.S. v. O'Neill*, 438 Fed. Appx. 661 (10th Cir. 2011). He seeks relief from the sentence imposed citing *Alleyne v. United States*, 133 S.Ct. 2151 (2013), which overruled prior U.S. Supreme Court case law and held:

Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime, It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. 133 S.Ct. at 2155 (citation omitted).

A petition brought pursuant to 28 U.S.C. §2241 must be filed in the district where the petitioner is incarcerated. See 28 U.S.C. §2241(a). In contrast, a motion filed pursuant to 28 U.S.C. §2255 must be filed in the district where the petitioner was sentenced. See §2255

and *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996).

Because petitioner is currently incarcerated in Texas, he may not proceed in this judicial district under § 2241. Rather, he must commence a petition in the district of his incarceration.

Finally, because the Supreme Court has not expressly determined that its holding in *Alleyne* should be applied retroactively, this court concludes it is not in the interest of justice to transfer this matter to the district court having jurisdiction to consider it. See 28 U.S.C. § 1631 and 28 U.S.C. § 2241(b).

IT IS, THEREFORE, BY THE COURT ORDERED petitioner's motion to proceed in forma pauperis (Doc. 2) is granted.

IT IS FURTHER ORDERED this matter is dismissed for lack of jurisdiction.

A copy of this order shall be transmitted to the petitioner.

IT IS SO ORDERED.

DATED: This 11th day of October, 2013, at Topeka, Kansas.

S/ Richard D. Rogers
RICHARD D. ROGERS
U.S. Senior District Judge