

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

DWAINE WRIGHT,

Petitioner,

v.

CASE NO. 2:10-CV-00853

JUDGE ALGENON L. MARBLEY

MAGISTRATE JUDGE E.A. Preston Deavers

STATE OF OHIO, et. al.,

Respondent.

OPINION AND ORDER

On March 11, 2011, final judgment was entered dismissing the instant habeas corpus petition without consideration of Petitioner's objections. Petitioner's objections were due on or before February 7, 2011. (*See* Doc. 14.) Although he now indicates that he mailed his objections on February 7, 2011, the Clerk did not file such objections to the Magistrate Judge's *Report and Recommendation* until February 14, 2011. (Doc. 15.) This matter now is before the Court on Petitioner's March 28, 2011, motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Doc. 18.) In his motion, Petitioner requests that the Court consider his objections.

Although the docket indicates that he filed his objections on February 14, 2011, Petitioner has attached to his motion to alter or amend judgment a statement from his prison case manager indicating that Petitioner placed his objections in the prison mail system in on February 7, 2011, in a timely manner. *See Houston v. Lack*, 487 U.S. 266 (1988)(holding that a *pro se* prisoner's filing may be deemed to have been filed on the date it is turned over to prison officials for mailing.) Accordingly, Petitioner's motion to alter or amend is **GRANTED**. The Clerk's Judgment of March 11, 2011 is **VACATED**. The Court will, therefore, consider Petitioner's objections.

The Court has carefully reviewed Petitioner's objections. Based on that review, the Court again finds that Petitioner's objections to the Magistrate Judge's recommendation of dismissal of the challenge to his 1992 burglary conviction under 28 U.S.C. § 2254 are **O V E R R U L E D**. Petitioner's request that this action be transferred to the federal district court having jurisdiction over his claim, however, is **GRANTED**. This case hereby is **TRANSFERRED** to the United States District Court for the Southern District of Ohio, Western Division for a determination of whether this action should be construed under 28 U.S.C. § 2255 and, if so, for a decision on the merits of Petitioner's claims.

I.

On December 30, 2010, the Magistrate Judge issued a Report and Recommendation recommending that Petitioner's habeas corpus petition be dismissed for lack of jurisdiction because Petitioner is no longer in custody on the conviction at issue and because his sentence had long since expired prior to the filing of this § 2254 petition. Petitioner objects to the Magistrate Judge's recommendation of dismissal. Petitioner objects to the *Report and Recommendation* in so far as he contends that he is still in custody for purposes of habeas review to the extent his sentence on a subsequent federal charge was enhanced by the 1992 burglary charge. Petitioner's objections, insofar as the objections relate to the Magistrate Judge's determination that the Court lacks jurisdiction to invalidate his 1992 burglary conviction, are without merit.

Petitioner requests the Court to construe liberally his pleadings under § 2255.¹ He indicates that he seeks to challenge the federal sentence he is currently serving as invalid because his 1992


¹ Petitioner filed his habeas corpus petition under 28 U.S.C. § 2255, but because it appeared that he was challenging his 1992 state court conviction as invalid, the Magistrate Judge construed his motion under 28 U.S.C. § 2254.

burglary conviction improperly was used to enhance the term of this sentence under the Armed Career Criminal provision of U.S.S.G. § 4B1.4. On October 19, 2007, Petitioner was sentenced as an armed career criminal to 220 months imprisonment on being a felon in possession of a firearm in the United States District Court for the Southern District of Ohio, Western Division. *See United States of America v. Wright*, Case No. 2:04-CR-00003.² Petitioner further requests that this action be transferred to the sentencing Court so that he may raise this issue in the Court having jurisdiction over his claim.

II.

Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. Petitioner's objections to the Magistrate Judge's recommendation of dismissal of his challenge to his 1992 burglary conviction under 28 U.S.C. § 2254 are **OVERRULED**. Petitioner's request that this action be transferred to the federal district court having jurisdiction over his claim, to the extent he maintains it is an action under 28 U.S.C. § 2255, however, is **GRANTED**. This case hereby is **TRANSFERRED** to the United States District Court for the Southern District of Ohio, Western Division for consideration of whether this case should be construed as a cause of action under 28 U.S.C. § 2255 and, if so, for a decision on the merits of Petitioner's claims.

IT IS SO ORDERED.


ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

² Petitioner currently has a motion to vacate, set aside or correct sentence pending in the United States District Court for the Southern District of Ohio, Western Division. *Dwaine L. Wright v. United States*, Case No. 3:10-cv-00174/3:04-cr-0003. More recently, it appears Petitioner filed another Motion under 28 U.S.C. § 2254 to vacate his burglary conviction in the Western Division. *Dwaine Wright v. Ohio Attorney General*, Case No. 3:11-0096 (TSB-SLO).