

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARLO DONATO,	:	CIVIL NO. 1:CV-12-0618
Petitioner	:	(Judge Rambo)
v.	:	(Magistrate Judge Mannion¹)
WARDEN OF THE UNITED STATES PENITENTIARY AT ALLENWOOD, PENNSYLVANIA and UNITED STATES ATTORNEY GENERAL,	:	
Respondent s	:	

MEMORANDUM

Before the court is a November 15, 2012 report of Magistrate Judge Mannion (Doc. 16) in which he recommends that the *pro se* petition for writ of habeas corpus filed by Carlo Donato pursuant to 28 U.S.C. § 2241 be dismissed. The magistrate judge notified Donato that he had an opportunity to recharacterize his petition as one pursuant to § 2255 but Donato elected not to do so. The petition was given preliminary consideration pursuant to Rule 4 governing Section 2255 cases, as made applicable to § 2241 cases by Rule 1 thereof. *See* 28 U.S.C. foll. 2255. After being granted an extension of time, Donato filed objections to the report and recommendation.

The magistrate judge noted that in order to bring a § 2241 petition for a writ of habeas corpus, the petition must establish that the remedy by a § 2255 motion

¹Judge Mannion has recently been elevated to a United States District Judge within this district.

is inadequate or ineffective to test the legality of his detention. A section 2255 proceeding is not ineffective or inadequate because an individual has been unable to obtain relief under that provision, or because an individual is procedurally barred from filing a § 2255 motion, or that he is unable to meet the stringent gatekeeping requirements of § 2255. *Cradle v. United States ex rel. Miner*, 290 F.3d 536, 539 (3d Cir. 2002).

Donato clearly states he previously challenged his conviction and sentence under § 2255 in March of 1998. (Doc. 14 at 2.) He further states that the district court denied his petition; however, on appeal his sentence was recalculated. (*Id.* at 3.) On September 24, 2006, the petitioner filed a motion for a writ of habeas corpus pursuant to § 2241. (*Id.*) The United States District Court for the Eastern District of New York characterized the filing as a successive § 2255 petition and denied the petition. (*Id.*) The Second Circuit Court of Appeals denied the petitioner's subsequent appeal. (*Id.* at 4.)

The petitioner has indicated to the court that he wishes to proceed pursuant to § 2241. Nevertheless, the petitioner is attacking the conduct of his criminal trial, which must be brought pursuant to § 2255. A review of the petition supports the magistrate judge's finding that the petition constitutes a challenge to his conviction and, therefore, must be brought pursuant to § 2255. Furthermore, the record indicates that petition would be barred from now raising a § 2255 petition.

On December 25, 2012,² Donato filed objections to the report and recommendation (Doc. 20). The objections were supplemented by an affidavit (Doc. 21). All of the objections cite to errors in his trial proceedings – the same issues

²This date is the date of mailing.

raised in Donato's § 2241 petition. This court agrees with the magistrate judge that all of Donato's allegations constitute a challenge to his conviction and sentence and therefore such must be brought under § 2255. An appropriate order will be issued.

s/Sylvia H. Rambo
United States District Judge

Dated: January 18, 2013.

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ORDER

For the reasons set forth in the accompanying memorandum, **IT IS
HEREBY ORDERED THAT:**

- 1) The court adopts the report and recommendation of the magistrate judge.
- 2) The amended petition for a writ of habeas corpus pursuant to 42 U.S.C. § 2241 (Doc. 14) is **DISMISSED**.
- 3) This court declines to issue a certificate of appealability.
- 4) The Clerk of Court shall close the file.

s/Sylvia H. Rambo
United States District Judge

Dated: January 18, 2013.

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