IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Joseph William Wolfe, Petitioner, v. Warden, FCI-Edgefield, Respondent.	C/A No. 5:16-2449-TMC **OPINION & ORDER**

This matter is before the court on Petitioner Joseph William Wolfe's ("Wolfe") petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02(B)(2), D.S.C., all pre-trial proceedings were referred to a magistrate judge. Magistrate Judge Kaymani D. West filed a Report and Recommendation ("Report") recommending Respondent's motion to dismiss (ECF No. 12) be granted, and the petition dismissed. (ECF No. 20). Wolfe was advised of his right to file objections to the Report (ECF No. 20 at 9), and he filed timely objections (ECF No. 21).

The Magistrate Judge makes only a recommendation to the court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter with instructions. 28 U.S.C. § 636(b)(1). However, the court need not conduct a de novo review when a party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). In the absence of a timely filed, specific objection, the Magistrate Judge's conclusions are reviewed only for clear

error. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005).

In her Report, the magistrate judge set out the procedural history and background and Wolfe did not object to that portion of the Report. Briefly, on February 23, 2009, in the Northern District of Texas, Wolfe was convicted of possession with intent to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii). He was sentenced to 235 month of imprisonment to be followed by five years of supervised release. His sentence was later reduced to 188 months of imprisonment. On direct appeal, his conviction and sentence were affirmed by the Fifth Circuit Court of Appeals. On February 11, 2011, he filed a § 2255 habeas petition which was denied by the sentencing court and the Fifth Circuit Court of Appeals affirmed the denial on February 25, 2015.

Wolfe is currently incarcerated in at the Federal Correctional Institution in Edgefield, South Carolina. Wolfe filed this habeas action pursuant to § 2241 on July 7, 2016, raising a claim of actual innocence. Specifically, he alleges he is actually innocent because the evidence seized during his traffic stop should have been suppressed and "without that evidence, there was no crime." While acknowledging that his claim that the search of his car was unconstitutional has been adjudicated by the Fifth Circuit Court of Appeals, Wolfe argues that was prior to the decision of the Supreme Court in *Rodriguez v. United States*, 135 S.Ct. 1609 (2015). In *Rodriguez*, the Court held that extending a traffic stop by even a de minimis length of time violates the Fourth Amendment. *Id.* at 1615-16. Wolfe also contends in his petition that the savings clause of § 2255 is unconstitutionally vague and thus should not bar the court from addressing his actual innocence claim.

The magistrate judge found that Wolfe's claim does not satisfy the savings clause of § 2255, and the savings clause in § 2255 is not unconstitutionally vague. Further, the magistrate judge found that Wolfe has failed to establish an actual innocence claim. The magistrate judge

concluded that Wolfe's petition is an improper attempt to circumvent the ADEDPA requirements regarding §2255 petitions, and Wolfe has already had his arguments regarding an alleged improper seizure fully considered by the Fifth Circuit Court of Appeals. In his objections, Wolfe argues that the magistrate judge erred in declining to find that the savings clause of § 2255(e) is void for vagueness, and in regard to his actual innocence claim, he argues that he has not had an opportunity to have his claim fully considered in any prior proceedings.

Although § 2241 provides a general grant of habeas corpus authority, the remedy under § 2241 is not an additional, alternative, or supplemental remedy to habeas relief provided for under § 2255. The "savings clause" contained in § 2255(e) allows a federal court to entertain a federal prisoner's § 2241 habeas petition in the limited circumstances where the prisoner demonstrates that the remedy in § 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). To invoke the "savings clause," a petitioner must establish: (1) at the time of his conviction, the settled law of the circuit or the Supreme Court established the legality of his conviction; (2) subsequent to his direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which he was convicted is now deemed not to be criminal; and (3) he cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law. *In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000).

Wolfe does not argue that he is incarcerated for an offense which is no longer a crime. Wolfe argues that, based on the holding in *Rodriquez,* he is actually innocent. However, based on *Rodriquez*, Wolfe cannot establish that the substantive law changed such that his conduct was not deemed criminal. Wolfe's reliance on the holding in *Rodrique*, at best, would have provided support for the suppression of the evidence seized during a traffic stop. Wolfe's "Fourth Amendment challenge does not go to the criminality of the conduct underlying his conviction; rather, his suppression claim relates to the Government's ability to introduce certain evidence of

his criminal actions at trial." *Simpson v. Masters*, C/A No. 1:15-cv-03479, 2106 WL 2940082, *3 (S.D. W.Va. April 6, 2016). Therefore, Wolfe cannot satisfy *Jones*. Moreover, Wolfe cites no credible case law in support of his argument that the savings clause of § 2255(e) is void for vagueness, and the few courts which have addressed the issue have held the savings clause is not unconstitutional for vagueness. *See, e.g., Hough v. Synder-Norris*, C/A No. 0:16-cv-43-HRW, 2016 WL 3820562, *4 (E.D. Ky. July 12, 2016) (holding that the savings clause is not vague and unconstitutional).[1]

As for Wolfe's claim that he is factually innocent, the court agrees with the magistrate judge that Wolfe has not shown factual innocence. Under *Schlup*, a petitioner may overcome a procedural default or expiration of the statute of limitations by (1) producing "new reliable evidence [of innocence] - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial," *Schlup v. Delo*, 513 U.S. 298, 324 (1995); and (2) showing "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327. The *Schlup* standard permits review only in the "extraordinary" case. *Id.* at 324.[2]

The Supreme Court, however, has cautioned that "tenable actual-innocence gateway pleas are rare." *McQuiggin*, 133 S.Ct. at 1928. "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* (*citing*

[1]A statute defining an offense is void on the ground of vagueness and violative of due process when the conduct prohibited or permitted is expressed in terms so vague that people differ as to its application. *Papachristou v. Jacksonville*, 405 U.S. 156 (1972); *United States v. Harris*, 347 U.S. 612 (1954).

[2]The court notes that actual innocence is not, in and of itself, a cognizable habeas claim. *Herrera v. Collins*, 506 U.S. 390, 404 (1993). Rather, actual innocence is "a gateway through which a habeas corpus petitioner must pass to have his otherwise barred constitutional claim considered on the merits. *Id.*

Schlup, 513 U.S. at 329); *see also House v. Bell*, 547 U.S. 518, 538 (2006) (emphasizing that the *Schlup* standard is demanding and seldom met).

To demonstrate actual innocence, a petitioner must identify "new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." *Schlup*, 513 U.S. at 324. That evidence must demonstrate the " 'conviction of one who is actually innocent.' " *Id.* at 327 (*quoting Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Thus, a "petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* Moreover, a petitioner must show factual innocence and not merely legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). Finally, new reliable evidence of innocence is a "rarity," *Calderon v. Thompson*, 523 U.S. 538, 559 (1998), and the quality of evidence necessary to support a claim of actual innocence "is obviously unavailable in the vast majority of cases," *Schlup*, 513 U.S. at 324. Here, Wolfe has not set forth any new evidence that would establish his actual innocence and, in fact, Wolfe is not alleging factual innocence. Accordingly, his objection is without merit.

After a thorough review of the Report and the record in this case pursuant to the standards set forth above, the court finds Wolfe's objections are without merit and adopts the Report. Accordingly, Respondent's motion to dismiss (ECF No. 12) is **GRANTED,** and the petition is **DISMISSED**.

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001).

In the instant matter, the court finds that Petitioner has failed to make "a substantial showing of the denial of a constitutional right." Accordingly, the court declines to issue a certificate of appealability.

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge

Anderson, South Carolina
July 21, 2017