

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division**

LORENZO OWEN SPELLMAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 3:12CV571
	)	
E.D. WILSON,	)	
	)	
Respondent.	)	

**MEMORANDUM OPINION**  
**(Dismissing 28 U.S.C. § 2241 Petition)**

Lorenzo Owen Spellman, a federal inmate proceeding *pro se*, submitted a submitted a 28 U.S.C. § 2241<sup>1</sup> petition (ECF No. 1, “§ 2241 Petition”).<sup>2</sup> For the reasons set forth below, Spellman’s § 2241 Petition will be dismissed.

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<sup>1</sup> That statute provides, in pertinent part:

- (c) The writ of habeas corpus shall not extend to a prisoner unless—
- (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
  - (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
  - (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

28 U.S.C. § 2241(c)(1)-(3).

<sup>2</sup> On July 28, 2008, the Court sentenced Spellman to 204 months imprisonment with supervised release of five years for conspiracy to distribute cocaine hydrochloride, in violation of 21 U.S.C. § 846. By Memorandum Opinion and Order, the Court denied a prior 28 U.S.C. § 2255 motion filed by Spellman. *See Spellman v. United States*, No. 3:08CR107-HEH, 2011 LEXIS 62559, at \*8-9 (E.D. Va. June 13, 2011). By Memorandum Opinion and Order, the Court dismissed the Rule 60(b) motion filed by Spellman as a successive, unauthorized motion under § 2255. *See Spellman v. United States*, No. 3:08CR107-HEH, 2011 LEXIS 48113, at \*3 (E.D. Va. Apr. 3, 2012).

**A. Motions under 28 U.S.C. § 2255 Compared to Petitions under 28 U.S.C. § 2241**

A motion pursuant to 28 U.S.C. § 2255 provides the primary means of collateral attack on the imposition of a federal conviction and sentence and must be filed with the sentencing court. *See Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000) (quoting *Cox v. Warden, Fed. Det. Ctr.*, 911 F.2d 1111, 1113 (5th Cir. 1990)). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) restricted the jurisdiction of the district courts to hear second or successive applications for federal habeas corpus relief by prisoners attacking the validity of their convictions and sentences by establishing a “‘gatekeeping’ mechanism.” *Felker v. Turpin*, 518 U.S. 651, 657 (1996). Specifically, “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A).<sup>3</sup>

A federal inmate may not proceed under 28 U.S.C. § 2241 unless he or she demonstrates that the remedy afforded by 28 U.S.C. § 2255 “is inadequate or ineffective

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<sup>3</sup> An inmate may not file a second or successive § 2255 motion, unless a panel of the appropriate Court of Appeals certifies that the motion contains:

- (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(h).

to test the legality of his detention.” 28 U.S.C. § 2255(e).<sup>4</sup> For example, “attacks on the execution of a sentence are properly raised in a § 2241 petition.” *In re Vial*, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997) (citing *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996); *Hanahan v. Luther*, 693 F.2d 629, 632 n.1 (7th Cir. 1982)). Nevertheless, the United States Court of Appeals for the Fourth Circuit has emphasized that “the remedy afforded by § 2255 is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provision or because an individual is procedurally barred from filing a § 2255 motion.” *Id.* (internal citations omitted).

The Fourth Circuit has stressed that an inmate may proceed under § 2241 to challenge his conviction “in only very limited circumstances.” *United States v. Poole*, 531 F.3d 263, 269 (4th Cir. 2008) (internal quotation marks omitted). The “controlling test,” *id.*, in the Fourth Circuit is as follows:

[Section] 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner’s direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner *was convicted is deemed not to be criminal*; and (3) the prisoner 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) (emphasis added).

## **B. Analysis of Spellman’s § 2241 Petition**

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<sup>4</sup> “This ‘inadequate and ineffective’ exception is known as the ‘savings clause’ to [the] limitations imposed by § 2255.” *Wilson v. Wilson*, No. 1:11cv645 (TSE/TCB), 2012 WL 1245671, at \*3 (E.D. Va. Apr. 12, 2012) (quoting *In re Jones*, 226 F.3d 328, 333 (4th Cir. 2000)).

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Spellman fails to satisfy the second prong of *In re Jones*. *Id.* at 334. Specifically, Spellman fails to demonstrate that “subsequent to [his] direct appeal and [his] first § 2255 motion, the substantive law changed such that the conduct of which [he] *was convicted is deemed not to be criminal.*” *Id.* (emphasis added). The conduct of which Spellman stands convicted, conspiracy to distribute cocaine hydrochloride in violation of 21 U.S.C. § 846, remains a crime.

Spellman seeks to proceed by § 2241 to challenge his enhanced sentence. As explained below, Spellman fails to establish that he can utilize the savings clause and § 2241 to pursue alleged sentencing errors. “Fourth Circuit precedent has . . . not extended the reach of the savings clause to those petitioners challenging only their sentence.” *Poole*, 531 F.3d at 267 n.7 (citing *In re Jones*, 226 F.3d at 333-34); *see also Darden v. Stephens*, 426 F. App’x 173, 174 (4th Cir. 2011) (“[O]ur cases have confined the § 2255 savings clause to instances of actual innocence of the underlying offense of conviction . . . .”); *Little v. Hamidullah*, 177 F. App’x 375, 375-76 (4th Cir. 2006) (affirming district court’s determination that a federal prisoner could not utilize § 2241 to pursue a “claim[ ] that he was ‘actually innocent’ of being a career offender”).

Because Spellman challenges only the validity of his sentence and not the legality of his underlying conviction, he cannot pursue such a challenge by a § 2241 petition.

*Wilson*, 2012 WL 1245671, at \*3.<sup>5</sup>

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<sup>5</sup> Moreover, because Spellman has not demonstrated his factual innocence of the predicate crimes used to enhance his sentence, Spellman cannot demonstrate his actual innocence of the enhanced sentence provision. *See United States v. Pettiford*, 612 F.3d 270, 284 (4th Cir. 2010) (holding that “actual innocence applies in the context of habitual

An appeal may not be taken from the final order in a § 2255 proceeding unless a judge issues a certificate of appealability (“COA”). 28 U.S.C. § 2253(c)(1)(B). A COA will not issue unless a prisoner makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requirement is satisfied only when “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). No law or evidence suggests that Spellman is entitled to further consideration in this matter. A certificate of appealability is therefore denied.

An appropriate Order shall accompany this Memorandum Opinion.

*HEH*

/s/

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HENRY E. HUDSON  
UNITED STATES DISTRICT JUDGE

Date: *AUG 25, 2013*  
Richmond, Virginia

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offender provisions only where the challenge to eligibility stems from factual innocence of the predicate crimes, and not from the legal classification of the predicate crimes” (citing *United States v. Maybeck*, 23 F.3d 888, 894 (4th Cir. 1994))).