

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JOSEPH PATRICK McMULLIN

Petitioner,

v.

// CIVIL ACTION NO. 1:16CV227
(Judge Keeley)

JENNIFER SAAD, Warden,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION [DKT. NO. 13] AND
DENYING AND DISMISSING PETITION WITHOUT PREJUDICE [DKT. NO. 1]

On December 2, 2018, the pro se petitioner, Joseph Patrick McMullin ("McMullin"), filed a Petition for Habeas Corpus Pursuant to 28 U.S.C. § 2241 ("Petition") (Dkt. No. 1). In his Petition, McMullin challenges the sentencing enhancement applied to his case under the Armed Career Criminal Act ("ACCA"). Id. at 6-7. Pursuant to 28 U.S.C. § 636 and the local rules, the Court referred the Petition to the Honorable Michael J. Aloi, United States Magistrate Judge, for initial review.

In a Report and Recommendation ("R&R") entered on January 11, 2018, Magistrate Judge Aloi recommended that the Court deny and dismiss McMullin's Petition without prejudice (Dkt. No. 13). Because petitioners typically must attack their sentence under § 2255, and McMullin has not established that § 2255 is an inadequate or ineffective remedy pursuant to In re Jones, 226 F.3d 328 (4th Cir. 2000), the R&R reasoned that McMullin cannot utilize § 2241 to challenge his ACCA enhancement (Dkt. No. 13 at 10). The R&R also informed McMullin of his right to file "written objections

**ORDER ADOPTING REPORT AND RECOMMENDATION [DKT. NO. 13] AND
DENYING AND DISMISSING PETITION WITHOUT PREJUDICE [DKT. NO. 1]**

identifying the portions of the Recommendation to which objections are made and the basis for such objections." It further warned that the failure to do so may result in waiver of the right to appeal. Id. at 10-11. Although McMullin received the R&R on January 17, 2018 (Dkt. No. 14), he has filed no objections.

When reviewing a magistrate judge's R&R, the Court must review de novo only the portions to which an objection has been timely made. 28 U.S.C. § 636(b)(1)(C). On the other hand, "the Court may adopt, without explanation, any of the magistrate judge's recommendations to which the prisoner does not object." Dellacirprete v. Gutierrez, 479 F. Supp. 2d 600, 603-04 (N.D.W. Va. 2007) (citing Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983)). Courts will uphold those portions of a recommendation to which no objection has been made unless they are "clearly erroneous." See Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005).

Because no party has objected, the Court is under no obligation to conduct a de novo review. Dellacirprete, 479 F. Supp. 2d at 603-04. Upon review of the R&R and the record for clear error, the Court:

- 1) **ADOPTS** the R&R (Dkt. No. 13);

**ORDER ADOPTING REPORT AND RECOMMENDATION [DKT. NO. 13] AND
DENYING AND DISMISSING PETITION WITHOUT PREJUDICE [DKT. NO. 1]**

- 2) **GRANTS** the respondent's Motion to Dismiss (Dkt. No. 7);
and
- 3) **DENIES** and **DISMISSES** McMullin's Petition **WITHOUT
PREJUDICE** (Dkt. No. 1).

It is so **ORDERED**.

The Court **DIRECTS** the Clerk to transmit copies of this Order to counsel of record and the pro se petitioner, certified mail and return receipt requested, to enter a separate judgment order, and to remove this case from the Court's active docket.

DATED: February 12, 2018.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE