

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

FREDERICK LEE PADGETT,

Petitioner,

v.

Civil Action No. 5:16CV98  
(Criminal Action No. 5:98CR11-01)

UNITED STATES OF AMERICA,

(STAMP)

Respondent.

**MEMORANDUM OPINION AND ORDER**  
**AFFIRMING AND ADOPTING REPORT AND**  
**RECOMMENDATION OF MAGISTRATE JUDGE**

I. Background

The petitioner, Frederick Lee Padgett, by counsel Brendan S. Leary, Assistant Federal Public Defender, filed a motion (Civil Action No. 5:16-CV-98, ECF No. 1; Criminal Action No. 5:98-CR-11, ECF No. 150)<sup>1</sup> under 28 U.S.C. § 2255 moving this Court to vacate petitioner's sentence in the above-style action. This Court then entered an order directing the government to respond. ECF No. 154. After the government's delay in filing its response, the magistrate judge entered an order to show cause. ECF No. 160. The government then filed a response in opposition to the petitioner's motion. ECF No. 163.

This civil action was referred to United States Magistrate Judge Robert W. Trumble under Local Rule of Prisoner Litigation

---

<sup>1</sup>Unless dual ECF numbers are cited to both the civil and criminal action, all citations to ECF numbers in this memorandum opinion and order refer to Criminal Action No. 5:98-CR-11.

Procedure 2. Magistrate Judge Trumble issued a report and recommendation (Civil Action No. 5:16-CV-98, ECF No. 4; Criminal Action No. 5:98-CR-11, ECF No. 164) recommending that the petitioner's motion be denied and dismissed with prejudice as untimely. Id. at 1, 5. The petitioner did not file objections to the report and recommendation. For the following reasons, this Court affirms and adopts the report and recommendation in its entirety.

## II. Applicable Law

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. As to findings where no objections were made, such findings and recommendations will be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). Because the petitioner did not file any objections to the report and recommendation, the magistrate judge's findings and recommendations will be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

## III. Discussion

This Court, after review, finds no clear error in the determinations of the magistrate judge and adopts and affirms the report and recommendation (ECF No. 4/ECF No. 164) in its entirety.

In his report and recommendation, the magistrate judge addressed the government's argument that the petition is untimely. As the magistrate judge correctly noted, in the instant case, because the Supreme Court has not yet addressed whether the residual clause of the mandatory Sentencing Guidelines is unconstitutionally vague, the right on which petitioner relies has not yet been "recognized" for purposes of § 2255(f)(3). Id. at 4-5. This Court finds that the magistrate judge correctly determined that because petitioner's right has not yet been recognized by the Supreme Court, his motion under § 2255 is untimely. Therefore, the magistrate judge properly concluded that petitioner's motion must be dismissed.

Finally, this Court finds that the petitioner was properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action would result in a waiver of appellate rights. Because the petitioner has failed to object, he has waived his right to seek appellate review of this matter. See Wright v. Collins, 766 F.2d 841, 844-45 (4th Cir. 1985).

Upon review, this Court finds no clear error in the determinations of the magistrate judge and thus upholds his recommendation.

IV. Conclusion

For the reasons set forth above, the report and recommendation of the magistrate judge (ECF No. 4/ECF No. 164) is AFFIRMED and ADOPTED in its entirety. The petitioner's motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 (ECF No. 1/ECF No. 150) is DENIED. It is further ORDERED that this case be DISMISSED WITH PREJUDICE and STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to the petitioner by certified mail to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: February 26, 2019

/s/ Frederick P. Stamp, Jr.  
FREDERICK P. STAMP, JR.  
UNITED STATES DISTRICT JUDGE