

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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LARRY DEVORE,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civ. No. 3:04CV00813 (AWT)
	:	Crim. No. 3:92CR00058 (AWT)
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	
-----x	:	

**RULING ON PETITION FOR WRIT OF
HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241**

Petitioner Larry Devore ("Petitioner") has filed a "Motion for Relief from Illegally Imposed Sentence of Imprisonment," arguing that he should not have been sentenced as an armed career criminal. The Petitioner requests that the court re-sentence him and order his immediate release. Recognizing that he is procedurally barred under 28 U.S.C. § 2255, the Petitioner files the instant petition pursuant to 28 U.S.C. § 2241, as well as the All Writs Act, i.e., 28 U.S.C. § 1651, and the United States Constitution. For the reasons set forth below, the petition is being transferred to the United States Court of Appeals for the Second Circuit.

I. Background

On September 1, 1992, the Petitioner was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). On April 22, 1993, the grand jury returned a

superseding indictment, charging the Petitioner with one count of violating 18 U.S.C. § 922(g)(1) and adding a charge of violation of 18 U.S.C. § 924(e), the latter being the enhanced penalty provision applicable to armed career criminals.

In July 1993, the Petitioner was found guilty after a two-day trial. At the close of the government's case-in-chief, the Petitioner moved for a judgment of acquittal; he renewed the motion after the jury rendered its verdict. Both motions were denied. Subsequently, he was sentenced to a 235-month term of incarceration. The Petitioner appealed his conviction and sentence. On appeal, he raised three issues: first, he claimed that the court improperly denied his motions for acquittal; second, he argued that the court improperly denied his motion to suppress evidence; and third, he claimed that the court improperly sentenced him as an armed career criminal. By summary order dated February 24, 1995, the Second Circuit affirmed the Petitioner's conviction and sentence.

On April 28, 1997, the Petitioner filed a motion under 28 U.S.C. § 2255. The Petitioner advanced three grounds in support of his contention that his conviction and sentence were unconstitutional, namely, ineffective assistance of counsel at trial, sentencing and appeal. The § 2255 motion was denied when the court accepted the Recommended Ruling filed March 9, 1999. The Petitioner filed an untimely motion for an extension of time

to file an objection to the Recommended Ruling. The motion was denied.

The Petitioner acknowledges that because he has already submitted a motion under 28 U.S.C. § 2255, "relief under that provision is unlikely." (Mot. for Relief from Illegally Imposed Sentence of Imprisonment (Doc. No. 1) at 4.) He argues, however, that he is "actually innocent" of violating 18 U.S.C. § 924(e). (Id.)

II. Discussion

"In some very limited circumstances, claims that fall within the substantive scope of § 2255 may properly be made in a petition filed under § 2241." Poindexter v. Nash, 333 F.3d 372, 378 (2d Cir. 2003). As the court explained in Poindexter:

In order to fit within this exception authorizing a petition under § 2241 for a claim that is within the substantive scope of § 2255, it is insufficient simply that relief under § 2255 is unavailable because, for example, a prior motion under § 2255 has been made and a successive motion under that section is disallowed by the court of appeals under the gatekeeping provisions of 28 U.S.C. §§ 2244 and 2255, or because § 2255 relief is unavailable because the Supreme Court has not made a new rule of constitutional law retroactive to cases on collateral review. The application not only must show that relief is procedurally unavailable under § 2255, but also must assert a claim of actual innocence that (a) is "prov[able] . . . on the existing record," and (b) "could not have effectively [been] raised . . . at an earlier time."

Id. (internal citations omitted).

Here the petitioner contends that he is asserting a claim of "actual innocence" of armed career criminal status. However,

that is not the case. The Petitioner, like the petitioner in Poindexter, makes a technical argument that does not constitute "a claim of 'actual innocence' as that term is used either in [Spence v. Superintendent, Great Meadow Correctional Facility, 219 F.3d 162 (2d Cir. 2000) or United States v. Maybeck, 23 F.3d 888 (4th Cir. 1994)] or in habeas jurisprudence generally." Poindexter, 33 F.3d at 380. This is so because the Petitioner argues that there is insufficient proof that he qualifies for armed career criminal status under 18 U.S.C. § 924(e) because the government did not produce certified copies of court judgments with respect to the predicate convictions but, rather, simply proffered rap sheets and police reports. Thus, the Petitioner is not asserting that he did not actually commit the predicate offenses. (Mot. for Relief from Illegally Imposed Sentence of Imprisonment (Doc. No. 1) at 2-3.)

In addition, the Petitioner fails to satisfy the requirement that his claim could not have effectively been raised at an earlier time. When the Petitioner appealed his conviction and sentence, he raised the argument that the district court improperly sentenced him as an armed career criminal. In addition, the Petitioner also had the opportunity to raise this argument as part of his first § 2255 motion.

Thus, the Petitioner fails to satisfy at least two of the prerequisites under Poindexter for fitting within the exception

authorizing a petition under § 2241 for a claim that is within the substantive scope of § 2255, and this court does not have the authority to entertain the petitioner's motion. See Poindexter, 33 F.3d at 382. This court must construe the petition as a second 2255 motion and transfer the petition to the Court of Appeals for certification. See Jiminian v. Nash, 245 F.3d 144, 148 (2d Cir. 2001) ("[W]hen presented with a § 2241 petition raising previously available claims appropriately the subject of a § 2255 motion, district courts should construe the petition as a second or successive § 2255 motion and transfer it to this Court for certification, so long as the prisoner had a prior § 2255 motion dismissed on the merits.") (internal citations omitted).

In light of the holding in Jiminian, the court does not reach the Petitioner's argument that he is also entitled to relief under the All Writs Act and the United States Constitution. See also Triestman v. United States, 124 F.3d 361, 380 n.24 (2d Cir. 1997) ("Triestman argues that, pursuant to the All Writs Act, he is entitled to seek a writ of *error coram nobis*, and/or a writ of *audit querela*. Few courts ever have agreed as to what circumstances would justify relief under these old remedies. It is possible that these remedies might be deemed available if their existence were necessary to avoid serious questions as to the constitutional validity of both § 2255 and

§ 2244 - if, for example, an actually innocent prisoner were barred from making a previously unavailable claim under § 2241 as well as § 2255. But that situation is not before us, and we hence have no reason to attempt to define the scope of those ancient writs here.") (internal quotation marks and citations omitted).

III. Conclusion

For the reasons set forth above, the Petitioner's Motion for Relief from Illegally Imposed Sentence of Imprisonment is hereby transferred to the United States Court of Appeals for the Second Circuit for certification.

It is so ordered.

Dated this 15th day of December 2004, at Hartford,
Connecticut.

_____/s/_____
Alvin W. Thompson
United States District Judge