

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALAN WADE BERGER,	§	
	§	
<i>Petitioner,</i>	§	
v.	§	CIVIL ACTION: H-06-1333
	§	
UNITED STATES OF AMERICA,	§	
<i>Respondent.</i>	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Alan Wade Berger, a federal inmate proceeding *pro se*, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241.¹ Berger asserts that the wrong sentencing guidelines were used in setting his sentence.

Berger expressly asserts that he is challenging his sentence, not his conviction. Section 2241 is the primary means for a prisoner to attack the manner in which a sentence is executed. Section 2255 is the primary means for a prisoner to attack a federal conviction or sentence. Relief under § 2255 is warranted to correct errors at trial or sentencing. Generally, a petition filed under § 2241 that seeks to correct sentencing errors is properly construed as a § 2255 motion. *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001).

Berger expressly seeks to correct errors in his sentencing, but he contends that his § 2241 claim is permitted by the “savings clause” of § 2255. The “savings clause” permits a § 2241 claim when the petitioner can show that the § 2255 remedy is inadequate and

¹ The district court referred the petition to this Magistrate for report and recommendation (Dkt. 4).

ineffective to test the legality of his sentence. *Id.* The petitioner has the burden to come forward with evidence to show the inadequacy or ineffectiveness of a § 2255 motion. *Id.* In order to satisfy the inadequacy or ineffectiveness requirements, the petitioner’s claim first must be “based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense,” and second, must have been “foreclosed by circuit law at the time when the claim should have been raised in the petitioner’s trial, appeal, or first § 2255 motion.” *Id.* (quoting *Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir. 2001)).

Berger argues that a § 2255 motion is inadequate and ineffective in this case because he is barred by his plea agreement from asserting a § 2255 claim and because his one year statute of limitations for a § 2255 claim has expired. Berger does not contend that his claim is based on a retroactively applicable Supreme Court decision, or that his claim was barred by the law of the Fifth Circuit at the time of his sentencing. In fact, it appears that the legal argument Berger makes could have been made in the first instance at his sentencing.²

Berger’s assertions do not satisfy his burden to meet the inadequacy and ineffectiveness standards for application of the “savings clause.” Therefore, Berger’s petition is properly construed as asserting § 2255 claim. Section 2255 claims are properly filed in the court which imposed the sentence and are generally transferred to the sentencing

² Specifically, Berger was sentenced to a mandatory minimum of 60 months pursuant to the Protect Act of 2003, which he argues was not in effect at the time of his offense and thus was not applicable to him.

court. However, here Berger concedes he is not entitled to pursue a § 2255 claim. Therefore, the court recommends that Berger's petition be denied.

The court further finds that Berger has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on May 25, 2006.



Stephen Wm Smith
United States Magistrate Judge