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COURT OPINIONS

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-6137

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 13, 2018
DEBORAH S. HUNT, Clerk

DAVID ROMO,)
)
Petitioner-Appellant,)
)
v.) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE EASTERN DISTRICT OF
) KENTUCKY
J. RAY ORMOND, Warden,)
)
Respondent-Appellee.)
)
)

ORDER

Before: BATCHELDER, ROGERS, and GRIFFIN, Circuit Judges.

David Romo, a federal prisoner proceeding pro se, appeals the district court's judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Romo has filed a motion to proceed in forma pauperis ("IFP") on appeal. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a).*

In 2011, Romo pleaded guilty in the United States District Court for the Western District of Texas to conspiracy to possess with the intent to distribute cocaine and heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. The United States filed a notice, pursuant to 21 U.S.C. § 851, that Romo faced an enhanced mandatory minimum sentence because he had several prior felony drug convictions. The district court imposed a 280-month term of imprisonment, and Romo did not appeal. *See Romo v. United States*, Nos. A-13-CA-782-SS, A-11-CR-360(12)-SS, 2013 WL 12113203, at *1 (W.D. Tex. Oct. 31, 2013). In 2013, the district

court denied Romo's 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence as untimely. *Id.* at *3. The district court later granted Romo's motion to reduce his sentence to 240 months of imprisonment.

In May 2017, Romo filed the instant § 2241 petition, in which he argued that his prior drug-related convictions no longer qualify as predicate offenses to enhance his sentence under § 841(b)(1)(A) in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016), which limited the use, in certain circumstances, of the modified categorical approach to determine whether a prior offense qualifies as a violent felony for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The district court dismissed Romo's § 2241 petition after concluding that: (1) Romo's claim is not cognizable under § 2241 because it challenges the legality of his sentence; (2) Romo failed to demonstrate that the remedy afforded by § 2255 is inadequate or ineffective to test the legality of his detention; (3) Romo failed to meet the requirements outlined in *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016), for permitting a prisoner to challenge his sentence in a § 2241 petition; and (4) Romo's claim is meritless. Romo timely appealed.

On appeal, Romo advances four arguments in support of his position that the district court erred by dismissing his § 2241 petition. First, he contends that his prior convictions were improperly used to enhance his sentence because they are not "felony drug offense[s]" within the meaning of § 841(b)(1)(A). Second, he argues that the district court failed to apply the "categorical approach" to determine whether his prior offenses qualified as "felony drug offense[s]." Third, Romo argues that he is entitled to challenge his sentence in a § 2241 petition because he satisfies the requirements outlined in *Hill*. Finally, he argues that he is entitled to a new sentencing hearing.

As a threshold matter, Romo has filed a motion for a limited remand so that the district court may rule upon his post-judgment motion filed under Federal Rule of Civil Procedure 59(e) and/or 60(b). However, a review of the docket reflects that the district court denied Romo's post-judgment motion on December 20, 2017. Romo's motion for a limited remand is therefore denied as moot. Romo also moves this court to reconsider a clerk's order denying his request to file a supplemental appellate brief. We deny the motion to reconsider because the issue Romo

seeks to raise is without merit. *See United States v. Martinez*, 588 F.3d 301, 328 (6th Cir. 2009). We also deny Romo's motions for leave to submit supplemental authority, to consolidate his appeal with certain other appeals currently pending before this court, to submit a supplemental brief prepared by a paralegal, and for oral argument.

We review the district court's denial of a § 2241 petition de novo. *Wooten v. Cauley*, 677 F.3d 303, 306 (6th Cir. 2012); *see also Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999). An attack on the validity of a conviction or sentence must be brought under § 2255 as opposed to § 2241, under which a petitioner may challenge only the execution of his sentence. *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001); *Charles*, 180 F.3d at 755-56. Because Romo challenges the imposition of his sentence, rather than the execution of his sentence, the proper manner for pursuing his claim is a § 2255 motion to vacate, not a § 2241 habeas corpus petition. *See Peterman*, 249 F.3d at 461; *Charles*, 180 F.3d at 755-56.

However, a federal prisoner may challenge "the legality of his detention" under § 2241 "if he falls within the 'savings clause' of § 2255," which requires him to show that the remedy provided by § 2255 "is inadequate or ineffective to test the legality of his detention." *Wooten*, 677 F.3d at 306-07 (quoting 28 U.S.C. § 2255(e)). "The circumstances in which § 2255 is inadequate and ineffective are narrow . . ." *Peterman*, 249 F.3d at 461. "[T]he § 2255 remedy is not considered inadequate or ineffective simply because § 2255 relief has already been denied, or because the petitioner is procedurally barred from pursing relief under § 2255, or because the petitioner has been denied permission to file a second or successive motion to vacate." *Charles*, 180 F.3d at 756 (citations omitted). "The remedy afforded under § 2241 is not an additional, alternative or supplemental remedy to that prescribed under § 2255." *Id.* at 758.

We have found the savings clause to apply only in certain circumstances where the petitioner also demonstrates "actual innocence." *Wooten*, 677 F.3d at 307. A viable actual-innocence claim requires a petitioner to "demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). Actual innocence is defined as "factual innocence, not mere legal insufficiency." *Id.* (quoting *Bousley*, 523 U.S. at 623). "One way to establish factual

innocence is to show an ‘intervening change in the law that establishes [the petitioner’s] actual innocence.’” *Id.* (quoting *Peterman*, 249 F.3d at 462).

In *Hill*, we held that a § 2241 petition may be used to challenge a sentence if the petitioner can show “(1) a case of statutory interpretation, (2) that is retroactive and could not have been invoked in the initial § 2255 motion, and (3) that the misapplied sentence presents an error sufficiently grave to be deemed a miscarriage of justice or a fundamental defect.” 836 F.3d at 595.

Romo’s petition does not meet the requirements described in *Hill* for challenging his sentence in a § 2241 petition. Even assuming that *Mathis* applies retroactively to initial cases on collateral review, *see Sutton v. Quintana*, No. 16-6534, 2017 WL 4677548, at *2 (6th Cir. July 12, 2017), Romo has not shown that his sentence was “misapplied.” *Mathis*, upon which Romo relies, is inapplicable to sentences enhanced under § 841(b)(1)(A). *See generally Harden v. Young*, 612 F. App’x 256, 257 (5th Cir. 2015) (per curiam) (holding that *Descamps v. United States*, 570 U.S. 254 (2013)—of which *Mathis* is an extension, *see Mathis*, 136 S. Ct. at 2257—does not concern the enhanced penalties of § 841(b)(1)); *see also United States v. Soto*, 8 F. App’x 535, 541 (6th Cir. 2001) (“[T]his court does not employ a categorical approach to determining whether a prior conviction constitutes a ‘felony drug offense’ for purposes of section 841(b)(1).”).

Accordingly, we **DENY** Romo’s pending motions except that we **GRANT** his motion to proceed IFP for purposes of this appeal. We **AFFIRM** the district court’s judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

DAVID ROMO, Petitioner, v. J. RAY ORMOND, Warden, Respondent.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, SOUTHERN
DIVISION
2017 U.S. Dist. LEXIS 149743
Civil Action No. 6: 17-73-DCR
September 14, 2017, Decided
September 14, 2017, Filed

Editorial Information: Prior History

Romo v. United States, 2013 U.S. Dist. LEXIS 194052 (W.D. Tex., Oct. 30, 2013)

Counsel David Romo, Petitioner, Pro se, PINE KNOT, KY.

Judges: Danny C. Reeves, United States District Judge.

Opinion

Opinion by: Danny C. Reeves

Opinion

MEMORANDUM OPINION AND ORDER

Inmate David Romo has filed an original and two amended petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. [Record Nos. 1, 10, 12] This matter is before the Court to conduct an initial screening. 28 U.S.C. § 2243; *Alexander v. Northern Bureau of Prisons*, 419 F. App'x 544, 545 (6th Cir. 2011). The Court will deny the requested relief and dismiss the petitions because Romo's claims cannot be asserted under 28 U.S.C. § 2241 and because they lack merit.

I.

Romo was indicted in Austin, Texas, in July 2011 for his role in a large-scale drug trafficking ring operated by the Texas Mexican Mafia. The government filed a notice pursuant to 21 U.S.C. § 851 that Romo was subject to an enhanced sentence because he had up to 17 prior convictions dating back to 1972. The prior convictions included illegal possession of firearms, drug possession, and drug trafficking. As a result, Romo faced a mandatory minimum sentence of twenty years to life imprisonment under 21 U.S.C. § 841(b)(1)(A).

Romo pled guilty (without a written plea agreement) to conspiracy to distribute cocaine and heroin in violation of 21 U.S.C. § 846. The trial court imposed a 280-month sentence in December 2011. Romo did not appeal, and the trial court later denied his initial motion filed pursuant to 28 U.S.C. § 2255 as untimely. In November 2015, the trial court granted an agreed motion to reduce Romo's sentence to 240 months of imprisonment pursuant to Amendment 782 to the Sentencing Guidelines. *United States v. Romo*, No. 1: 11-CR-360(12) (E.D. Tex. 2011).

In a separate criminal prosecution in this Court, on May 27, 2015, Romo pled guilty to a single count

of conspiracy to distribute heroin in violation of 21 U.S.C. § 846. As part of his plea agreement with the government, Romo expressly waived his right to appeal or collaterally attack his conviction or sentence except on grounds of ineffective assistance of counsel. Romo was sentenced in August 2015 to 235 months of imprisonment to run concurrently with his prior federal sentence from Texas, a sentence enhanced pursuant to the career offender provision in U.S.S.G. § 4B1.1. *United States v. Romo*, No. 6:14-CR-21-GFVT (E.D. Ky. 2014).

Romo argues in his current petition that the sentence enhancement imposed in Texas pursuant to 21 U.S.C. § 841(b)(1)(A) violates his due process and equal protection rights because his prior convictions were not evaluated as possible predicate offenses using the same "categorical approach" described in *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016), which is applied to evaluate prior convictions for possible sentence enhancements imposed pursuant to 18 U.S.C. § 924(e)(2).

II.

A habeas corpus petition filed pursuant to § 2241 may be used to challenge actions taken by prison officials that affect the manner in which the prisoner's sentence is being carried out, such as computing sentence credits or determining parole eligibility. *Terrell v. United States*, 564 F.3d 442, 447 (6th Cir. 2009). If a federal prisoner instead wishes to challenge the legality of his federal conviction or sentence, he must do so by filing a motion for post-conviction relief under 28 U.S.C. § 2255 in the court that convicted and sentenced him. *Capaldi v. Pontesso*, 135 F.3d 1122, 1123 (6th Cir. 2003). A habeas corpus petition pursuant to 28 U.S.C. § 2241 may not be used for this purpose because it does not function as an additional or alternative remedy to the one available under § 2255. *Hernandez v. Lamanna*, 16 F. App'x 317, 320 (6th Cir. 2001).

The "savings clause" of 28 U.S.C. § 2255(e) creates an extraordinarily narrow exception to this prohibition if the remedy afforded by § 2255 is "inadequate or ineffective" to test the legality of the prisoner's detention. *Truss v. Davis*, 115 F. App'x 772, 773-74 (6th Cir. 2004). A motion under § 2255 is not "inadequate or ineffective" simply because the prisoner's time to file a § 2255 motion has passed; he did not file a § 2255 motion; or he did file such a motion and was denied relief. *Copeland v. Hemingway*, 36 F. App'x 793, 795 (6th Cir. 2002); *Taylor v. Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002) (holding that § 2241 is available "only when a structural problem in § 2255 forecloses even one round of effective collateral review ..."). In other words, prisoners cannot use a habeas petition under § 2241 as yet another "bite at the apple." *Hernandez v. Lamanna*, 16 F. App'x 317, 319 (6th Cir. 2001).

To properly invoke the savings clause, the petitioner must be asserting a claim that she is "actual innocent" of the underlying offense by showing that after the petitioner's conviction became final, the Supreme Court re-interpreted the substantive terms of the criminal statute under which she was convicted in a manner that establishes that her conduct did not violate the statute. *Wooten v. Cauley*, 677 F.3d 303, 307-08 (6th Cir. 2012) (citing *United States v. Peterman*, 249 F.3d 458, 461-62 (6th Cir. 2001)); *Hayes v. Holland*, 473 F. App'x 501, 501-02 (6th Cir. 2012) ("To date, the savings clause has only been applied to claims of actual innocence based upon Supreme Court decisions announcing new rules of statutory construction unavailable for attack under section 2255."). The Supreme Court's newly-announced interpretation must, of course, be retroactively applicable to cases on collateral review. *Wooten*, 677 F.3d at 308.

Romo's petition will be denied because his claims are not ones of actual innocence, and are not cognizable in a § 2241 petition. Romo asserts that the enhancement of his sentence pursuant to 21 U.S.C. § 841(b)(1)(A) is unconstitutional because it was not the product of the categorical approach applicable to enhancements under 18 U.S.C. § 924(e)(2). First, this is not a claim based upon

statutory interpretation but a constitutional claim which falls outside the purview of § 2241. Second, it is not a claim based upon *Mathis* at all. Instead, it is predicated on the categorical approach, a doctrine established more than a decade before Romo's sentence was imposed. See *Taylor v. United States*, 495 U.S. 575, 600-601, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990); *Shepard v. United States*, 544 U.S. 13, 26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). Thus, it is a claim he could and must have asserted before the trial court, upon direct appeal, or in a motion pursuant to 28 U.S.C. § 2255. As a result, his claims may not be pursued under § 2241.

Romo also challenges his sentence. The decidedly narrow scope of relief under § 2241 applies with particular force to sentencing challenges. *Peterman*, 249 F.3d at 462; *Hayes v. Holland*, 473 F. App'x 501, 502 (6th Cir. 2012) ("The savings clause of section 2255(e) does not apply to sentencing claims."). In *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016), the Sixth Circuit articulated a very narrow exception to this general rule, permitting a challenge to a sentence to be asserted in a § 2241 petition, but only where: (1) the petitioner's sentence was imposed when the Sentencing Guidelines were mandatory before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005); (2) the petitioner was foreclosed from asserting the claim in a successive petition under § 2255; and (3) after the petitioner's sentence became final, the Supreme Court issued a retroactively applicable decision establishing that - as a matter of statutory interpretation - a prior conviction used to enhance his federal sentence no longer qualified as a valid predicate offense. *Hill*, 836 F.3d at 599-600.

Romo's claim fails to satisfy at least the first and third requirements of *Hill*. Romo was sentenced in 2011, long after *Booker* was decided, under a discretionary guidelines regime. And as noted above, Romo's claims are not based upon any recent Supreme Court decision. Instead, he seeks to challenge the limited applicability of the categorical approach on constitutional grounds, a situation in effect for decades before his sentence was imposed. Therefore, Romo's challenge to his sentence falls outside the limited exception articulated in *Hill*.

And of equal importance, Romo's claim is wholly without merit. Determining whether a prior conviction was for a "serious drug offense" within the meaning of 18 U.S.C. § 924(e)(2)(A) may involve a complex assessment of whether the prior offense involved the manufacture, distribution, or possession with intent to do one of these things within the meaning of the statute. Cf. *United States v. Hinkle*, 832 F.3d 569, 572-73 (5th Cir. 2016). When making that assessment, the categorical approach guides the district court when comparing each of the numerous elements which collectively constitute the underlying offense against the elements of its generic counterpart. See, e.g., *Taylor*, 495 U.S. at 591. But Romo's sentence was not enhanced under this statute. Instead, his sentence was enhanced under the far simpler provision found in 21 U.S.C. § 841(b)(1)(A) because he had previously committed numerous "felony drug offenses." To qualify as a "felony drug offense," no detailed comparison of elements is required. Rather, 21 U.S.C. § 802(44) merely requires that the prior state or federal offense: (1) be punishable by more than one year in prison, and (2) that it "prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." By its terms, § 802(44) does not require that the prior offense constitute any particular species of crime, but only that it "relat[e] to" conduct involving drugs. Given the breadth of this definition the use of the categorical approach is neither necessary nor appropriate. The more complex analysis described in *Taylor* and *Mathis* is not relevant to Romo's circumstances.

III.

Romo's petition fails to establish any basis for habeas relief. Accordingly, it is hereby
ORDERED as follows:

1. Romo's original and amended petitions for a writ of habeas corpus [Record Nos. 1, 10, 12] are **DENIED**.

2. A corresponding Judgment will be entered this date.

3. This matter is **DISMISSED**, with prejudice, and **STRICKEN** from the docket.

This 14th day of September, 2017.

Signed By:

Danny C. Reeves

United States District Judge

No. 17-6137

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Nov 15, 2018

DEBORAH S. HUNT, Clerk

DAVID ROMO,

Petitioner-Appellant,

v.

J. RAY ORMOND, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: BATCHELDER, ROGERS, and GRIFFIN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

John S. Shad

Deborah S. Hunt, Clerk

**Additional material
from this filing is
available in the
Clerk's Office.**