NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-2461

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE HALL,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
J. A. TERRIS, Warden,	)	THE EASTERN DISTRICT OF
	)	MICHIGAN
Respondent-Appellee.	)	
	)	
	)	

ORDER

Before: BOGGS, CLAY, and KETHLEDGE, Circuit Judges.

Eddie Hall, a pro se federal prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. 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, Hall pleaded guilty to distributing methamphetamine, in violation of 21 U.S.C. § 841(a)(1). He was sentenced to 195 months of imprisonment, to be followed by five years of supervised release. The Ninth Circuit Court of Appeals affirmed. *United States v. Hall*, 473 F. App'x 596 (9th Cir. 2012).

In 2017, after unsuccessfully pursuing post-conviction relief in the United States District Court for the Eastern District of Washington and the Ninth Circuit, including an unsuccessful motion to vacate his sentence under 28 U.S.C. § 2255 and an unsuccessful motion to reduce his sentence under 18 U.S.C. § 3582(c)(2), Hall filed the present § 2241 petition. He claims that,

pursuant to *Mathis v. United States*, 136 S. Ct. 2243 (2016), and its progeny, his prior felony drug conviction in Washington state court for delivery of marijuana no longer qualifies as a predicate offense for purposes of his career-offender enhancement. He also claims that he is permitted to challenge his sentence in the present § 2241 petition because he meets the requirements of § 2255's "savings clause" pursuant to *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016).

The district court denied the petition, concluding that Hall is not entitled to relief pursuant to § 2241 because he seeks to challenge his federal sentence, which ordinarily may be challenged only in a motion filed pursuant to § 2255—not a petition under § 2241. The district court explained that, although a prisoner may challenge his conviction or sentence if he meets the savings-clause requirements set forth in *Hill*, Hall did not meet those requirements because he was not sentenced under the mandatory sentencing-guidelines regime that existed before *United States v. Booker*, 543 U.S. 220 (2005), and because his *Mathis* claim is not based on a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review. Even if Hall's claim were cognizable, the district court added, he was not entitled to relief because he (1) failed to show that his prior felony drug conviction no longer qualifies as a predicate offense for purposes of the career-offender enhancement and (2) because his sentence would have been the same absent his career-offender designation. Hall now appeals the district court's judgment.

We review de novo a district court's denial of a § 2241 petition. *Hill*, 836 F.3d at 594. A challenge to the validity of a federal sentence is generally brought under § 2255, while a challenge to the manner or execution of the sentence is appropriate under § 2241. *Id.* Pursuant to our decision in *Hill*, however, a federal prisoner may challenge the validity of his sentence under § 2241 by establishing that his remedy under § 2255 is inadequate or ineffective. *Id.* To establish that a remedy under § 2255 is inadequate or ineffective for challenging a sentence, a petitioner must show that there is a case of statutory interpretation that is retroactive and could not have been invoked in the initial § 2255 motion and that the misapplied sentence "presents an error sufficiently grave to be deemed a miscarriage of justice or a fundamental defect." *Id.* at 595.

Hall cannot establish that the remedy under § 2255 is inadequate or ineffective because he has not shown that treating his prior conviction for delivery of marijuana in Washington state court as a "controlled substance offense" constitutes "a miscarriage of justice or a fundamental defect." *Id.* Even if Hall's marijuana-delivery conviction should not have counted as a predicate offense for purposes of the career-offender enhancement, *Hill* is limited to "only a narrow subset of § 2241 petitions" and applies only where the prisoner was sentenced "under the mandatory guidelines regime pre-[*Booker*]." *Id.* at 599. Because Hall was not sentenced under the pre-*Booker* mandatory-guidelines regime, *Hill* is inapplicable to his case. Thus, the district court correctly dismissed Hall's petition because he failed to allege that he was actually innocent of his underlying crimes and because his sentencing claim does not fall within the "narrow subset" described in *Hill*.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDDIE HALL,

Petitioner,

v.

J.A. TERRIS,

Respondent,

_____/

CASE NO. 2:17-CV-12085
HONORABLE VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

OPINION AND ORDER DENYING THE PETITION FOR WRIT OF HABEAS CORPUS BROUGHT PURSUANT TO 28 U.S.C. § 2241 AND GRANTING LEAVE TO APPEAL *IN FORMA PAUPERIS*

Eddie Hall, ("Petitioner"), a federal prisoner confined at the Federal Correctional Institution in Milan, Michigan, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241. In his *pro se* application, Petitioner challenges his sentence for Distribution of 50 Grams or More of a Mixture or Substance Containing Five Grams or More of Actual Methamphetamine, in violation of 21 U.S.C. § 841(a)(1).

For the reasons that follow, the petition for writ of habeas corpus is DENIED.

I. Background

Petitioner pleaded guilty in the United States District Court for the Eastern District of Washington.

Petitioner's Base Offense Level for the Federal Sentencing Guidelines at the time of sentencing was 32. He was given a two point upward adjustment under U.S.S.G. §

3C1.2 for obstruction of justice for his conduct at the time of arrest. However, pursuant to U.S.S.G. § 3E1.1(a) and (b), Petitioner was given a three level downward adjustment for acceptance of responsibility. *Id.* at 8-9. This resulted in a Total Offense Level of 31.

The Presentence Investigation Report indicated that Petitioner was a career offender within the meaning of U.S.S.G. § 4B1.1(a), because of his prior Washington State convictions for Delivery of Marijuana, in violation of Wash. Rev. Code Ann. § 69.50.401, and Residential Burglary, in violation of Wash. Rev. Code Ann. §9A.52.025.

At Petitioner's sentencing on April 21, 2011, the judge observed that the Total Offense Level was 31 regardless of whether Petitioner was classified as a career offender or whether the obstruction of justice enhancement was applied. Counsel agreed. The range of incarceration for a Total Offense Level of 31, coupled with Petitioner's Criminal History Category of VI, was 188-235 months. The Court sentenced Petitioner to 195 months incarceration, five years of supervised release, a $100.00 special penalty assessment, and no fine or restitution.

The Ninth Circuit affirmed Petitioner's conviction and sentence on appeal. *United States v. Hall*, 473 F. App'x. 596, 597 (9th Cir. 2012).

Petitioner filed a motion for habeas corpus relief, construed as a motion to vacate sentence brought under 28 U.S.C. § 2255. It was denied. *United States v. Hall*, No. CR-09-0116-RHW-1, 2014 WL 12705133 (E.D. Wash. Jan. 8, 2014).

Petitioner then filed a motion for reduction of sentence; it, too, was denied. *United States v. Hall*, No. 09-CR-00116-RHW-1, 2016 WL 9132007 (E.D. Wash. Feb. 2, 2016),

aff'd, 671 F. App'x. 661 (9th Cir. 2016).

The United States Court of Appeals for the Ninth Circuit granted Petitioner permission to file a second motion to vacate sentence, in order to challenge his predicate conviction for residential burglary under *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Hall v. United States,* No. 16-71751 (9th Cir. Jan. 24, 2017). The district court denied Petitioner's second motion to vacate sentence. *United States v. Hall*, No. 2:09-CR-116-RHW-1, 2017 WL 924468 (E.D. Wash. Mar. 8, 2017). The Ninth Circuit denied Petitioner a certificate of appealability. *Hall v. United States,* No. 17-35409 (9th Cir. Sept. 6, 2017); *reconsideration den.* No. 17-35409 (9th Cir. Oct. 4, 2017).

Petitioner filed a petition for writ of habeas corpus on the following ground: Is Petitioner entitled to re-sentencing as a result of the Supreme Court's decision in *United States v. Mathis* (and its progeny)?

II. Discussion

A. The second motion to amend the petition (Doc. # 7) is GRANTED.

Petitioner filed a second motion to amend the petition.

Petitioner filed this motion to amend the petition before respondent filed an answer to the petition; the motion to amend is granted. *See Anderson v. U.S.*, 39 F. App'x. 132, 136 (6th Cir. 2002).

B. Petitioner is GRANTED an extension of time to file his reply brief. (Doc. # 10).

Rule 5(e) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 states that a habeas petitioner "may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." *See Baysdell v. Howes,* No. 04-CV-73293-DT 2005 WL 1838443, * 4 (E.D. Mich. Aug. 1, 2005). The rules governing § 2254 cases may be applied at the discretion of the district court judge in habeas petitions not brought under § 2254. *See* Rules Governing § 2254 Cases, Rule 1(b), 28 U.S.C. foll. § 2254. The Court grants the motion for an extension to file a reply brief.

C. The petition for writ of habeas corpus is DENIED.

Petitioner seeks habeas relief for his classification as a career offender under the Federal Sentencing Guidelines. Petitioner claims that his Washington conviction for delivery of marijuana does not qualify as a predicate controlled substance offense under the career offender provisions because Wash. Rev. Code Ann. § 69.50.401, the statute that he was convicted under, contains a broader definition of delivery than the definition contained in the Federal Sentencing Guidelines; the state statute criminalizes a mere offer to sell a controlled substance. Petitioner bases his claim on the recent Supreme Court decision, *Mathis v. United States,* 136 S. Ct. 2243 (2016).

A federal prisoner may bring a claim challenging his or her conviction or the imposition of sentence under 28 U.S.C. § 2241 only if it appears that the remedy afforded under § 2255 is inadequate or ineffective to test the legality of the defendant's detention. *See Wooten v. Cauley,* 677 F.3d 303, 307 (6th Cir. 2012). Habeas corpus is not an additional, alternative, or supplemental remedy to the motion to vacate, set aside, or

correct the sentence. *See Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999). The burden to show that the remedy afforded under § 2255 is inadequate or ineffective rests on the habeas petitioner. The remedy afforded under § 2255 is not considered inadequate or ineffective simply because § 2255 relief has already been denied, or because the petitioner has been procedurally barred from pursuing relief under § 2255, or because the petitioner has been denied permission to file a second or successive motion to vacate sentence. *Wooten v. Cauley,* 677 F.3d at 303.

Until recently, a federal prisoner could not raise a challenge to his or her sentence under 28 U.S.C. § 2241. *See Gibbs v. United States*, 655 F.3d 473, 479 (6th Cir. 2011); *See also United States v. Peterman*, 249 F.3d 458,462 (6th Cir. 2001).

The Sixth Circuit modified this rule. In *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016), the Court held that certain federal prisoners may challenge career offender sentencing enhancements under § 2241 through the § 2255(e) savings clause: "(1) prisoners who were sentenced under the mandatory guidelines regime *pre-United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), (2) who are foreclosed from filing a successive petition under § 2255, and (3) when a subsequent, retroactive change in statutory interpretation by the Supreme Court reveals that a previous conviction is not a predicate offense for a career-offender enhancement." *Id.,* at 599-600.

Petitioner's case does not fall within the *Hill* exceptions for several reasons.

First, Petitioner was sentenced on April 21, 2011, after the Supreme Court's 2005 decision in *Booker* that the sentencing guidelines were advisory.

Second, Petitioner's claim does not come within the purview of § 2255(e) savings clause, because *Mathis,* which Petitioner relies on, does not involve a a new rule of constitutional law that has been made retroactive by the Supreme Court to cases on collateral review. *See In re Conzelmann*, 872 F.3d 375, 377 (6th Cir. 2017).

Third, Petitioner is not entitled to relief on his claim even if it were cognizable. Sentencing courts, in determining whether a prior conviction qualifies as a "crime of violence" for purposes of the Armed Career Criminal Act (ACCA), typically apply what is known as a "categorical approach," in which the sentencing court "must compare the elements of the statute forming the basis of the defendant's conviction with the elements of the "generic" crime—i.e., the offense as commonly understood." *Descamps v. United States,* 133 S. Ct. 2276, 2281 (2013). Under this approach, the prior state conviction qualifies as a predicate offense under the ACCA "only if the statute's elements are the same as, or narrower than, those of the generic offense." *Id.* Prior to *Descamps*, the Supreme Court had approved what it referred to as a "modified categorical approach," which involved cases in which a federal defendant had a prior state conviction for violating a so-called "divisible statute," that is, one that "sets out one or more elements of the offense in the alternative." *Id.* If one alternative under the statute was the equivalent of an element in the generic offense under the ACCA, but the other alternative mode of violating the statute was not, the modified categorical approach allowed a sentencing judge "to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Id.*

The court could then compare the elements of the prior state conviction, including the alternative element used in that defendant's case, with the elements of the generic crime. *Id.*

The Supreme Court in *Descamps* ruled that a sentencing court may not apply this modified categorical approach to determine whether a prior offense was a violent felony under the Armed Career Criminal Act (ACCA) when the crime for which the defendant was convicted has a single, indivisible set of elements that is broader than the generic definition of the offense under the ACCA. *Id.,* at 2283.

In *Mathis*, the Supreme Court reaffirmed these principles but went further and held that a prior conviction does not qualify as the generic form of burglary, arson, or extortion, to qualify as a predicate violent felony offense under the ACCA, if an element of the crime of conviction is broader than an element of the generic offense because the crime of conviction enumerates various alternative factual means of satisfying a single element. *Mathis,* 136 S. Ct. at 2251.

Although *Descamps* and *Mathis* dealt with the ACCA, the Sixth Circuit has relied on ACCA cases to determine whether a prior conviction qualifies as a crime of violence under the career-offender guideline. *See United States v. Denson*, 728 F.3d 603, 607 (6th Cir. 2013). The Fifth Circuit has applied the Supreme Court's rationale in *Mathis* to determine whether a prior drug conviction qualifies as a predicate drug offense under the guidelines. *See United States v. Hinkle*, 832 F.3d 569, 574-75 (5th Cir. 2016).

A controlled substance offense is defined, under the Federal Sentencing

Guidelines, in part, as:

> [A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
>
> USSG § 4B1.2(b).
>
> Wash. Rev. Code Ann. § 69.50.401, states, in relevant part:
>
> (1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

Petitioner's claim is without merit. Two circuits have held that Wash. Rev. Code Ann. § 69.50.401's definition is a categorical match for the definition of delivery contained in the Federal Sentencing Guidelines. *See United States v. Burgos-Ortega*, 777 F.3d 1047, 1053-55 (9th Cir. 2015); *United States v. Villeda–Mejia*, 559 F. App'x. 387, 389 (5th Cir. 2014). Petitioner is not entitled to relief because he failed to show that Washington's drug statute contains a broader definition of delivery than the federal sentencing guidelines. The Washington definition does not criminalize "a greater swath of conduct" than the federal definition, *Compare Hinkle*, 832 F. 3d at 576, Petitioner's delivery offense qualifies as a predicate career offender offense after *Mathis*. Petitioner is not entitled to habeas relief.

Fourth, the career offender determination was not necessary to support the sentence that was imposed. The judge indicated that the sentence would have been the same because of the amount of methamphetamine involved and Petitioner's Criminal

History under the Sentencing Guidelines.

III. ORDER

The Petition for Writ of Habeas Corpus brought pursuant to 28 U.S.C. § 2241 is **DENIED.** Because a certificate of appealability is not needed to appeal the denial of a habeas petition filed under § 2241, *Witham v. United States,* 355 F. 3d 501, 504 (6th Cir. 2004), Petitioner need not apply for one with this Court or with the Sixth Circuit before filing an appeal from the denial of his habeas petition. The Court grants Petitioner leave to appeal *in forma pauperis;* any appeal would be taken in good faith. *See Foster v. Ludwick,* 208 F. Supp. 2d 750, 765 (E.D. Mich. 2002).

S/Victoria A. Roberts
HONORABLE VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

Dated: November 21, 2017

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