

# Appendix A

**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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Rec  
6/27/18

**No. 18-6123**

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MICHAEL KENTA DAVIS,

Petitioner - Appellant,

v.

JUSTIN ANDREWS, Warden,

Respondent - Appellee.

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Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Senior District Judge. (5:17-hc-02047-BR)

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Submitted: June 7, 2018

Decided: June 25, 2018

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Before KING and FLOYD, Circuit Judges, and SHEDD, Senior Circuit Judge.

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Affirmed by unpublished per curiam opinion.

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Michael Kenta Davis, Appellant Pro Se.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Michael Kenta Davis, a federal prisoner, appeals the district court's order dismissing his 28 U.S.C. § 2241 (2012) petition without prejudice for lack of jurisdiction. We review de novo whether a prisoner may bring a challenge pursuant to § 2241. *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 530 (4th Cir. 2005). Generally, federal prisoners “are required to bring collateral attacks challenging the validity of their judgment and sentence by filing a motion to vacate sentence pursuant to 28 U.S.C. § 2255 [(2012)].” *In re Vial*, 115 F.3d 1192, 1194 (4th Cir. 1997). A federal prisoner may, however, file a § 2241 petition challenging his conviction if § 2255 is “inadequate or ineffective to test the legality of [his] detention.” *In re Jones*, 226 F.3d 328, 333 (4th Cir. 2000) (internal quotation marks omitted); *see* 28 U.S.C. § 2255(e) (2012). Section 2255 is inadequate or ineffective to test the legality of a sentence when:

- (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner’s direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.

*United States v. Wheeler*, 886 F.3d 415, 429 (4th Cir. 2018).

In his § 2241 petition, Davis sought to challenge his career offender designation based on *Mathis v. United States*, 136 S. Ct. 2243 (2016). However, *Mathis* merely clarified when a court must apply the categorical approach, rather than the modified categorical approach, in determining the nature of a prior conviction, and did not effect a

change in the law. *Muhammad v. Wilson*, 715 F. App'x 251, 252 (4th Cir. 2017) (No. 14-7735) ("*Mathis* did not announce a substantive change to the law."). Davis, therefore, cannot bring this challenge in a § 2241 petition.

Accordingly, although we grant leave to proceed in forma pauperis, we affirm the district court's order and deny Davis' motion to assign counsel. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
No. 5:17-HC-2047-BR

MICHAEL KENTA DAVIS, )  
Petitioner, )  
v. ) ORDER  
JUSTIN ANDREWS, )  
Respondent. )

On 27 February 2017, petitioner, a federal inmate proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (DE # 1) together with a supporting memorandum and several exhibits (DE ## 1-1, 1-2). On 10 April 2017, Magistrate Judge Robert B. Jones, Jr. directed petitioner to submit either the filing fee or an application to proceed without payment of fees. (DE # 4.) On 28 July 2017, the court directed petitioner to show cause why the action should not be dismissed for failure to comply with Judge Jones' order. (DE # 6.) On 7 August 2017, petitioner responded to the court's order by paying the filing fee. (DE # 7.) This matter is before the court for a preliminary review under 28 U.S.C. § 2243.

On 5 November 2007, at his arraignment in this district, petitioner pleaded guilty to possession with intent to distribute more than 50 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1). See United States v. Davis, No. 7:07-CR-00086-D-1, DE # 26 (E.D.N.C.). On 12 February 2008, the court sentenced petitioner to 300 months' imprisonment. Id., DE # 29. Petitioner appealed his sentence, and on 12 December 2008, the Fourth Circuit Court of Appeals affirmed. Id., DE # 37.

On 7 September 2010, petitioner filed a motion to vacate his sentence under 28 U.S.C. §

2255, which Chief Judge James C. Dever III dismissed on 8 February 2012. Id., DE ## 40, 52. In March 2012, petitioner filed motions to alter the judgment and reduce his sentence, and in July 2013, Chief Judge Dever denied both motions. Id., DE # 63. Petitioner appealed the portion of the order denying his motion for a sentence reduction, and on 24 December 2013, the Fourth Circuit affirmed. Id., DE # 70.

On 20 December 2016, petitioner filed a motion under 28 U.S.C. § 2244 for an order authorizing him to file a second motion under section 2255, seeking to challenge his sentence under Mathis v. United States, 136 S. Ct. 2243 (2016). In re: Michael Davis, No. 16-3166, DE # 2 (4th Cir.). On 18 January 2017, the Fourth Circuit denied the motion. Id., DE # 8.

In the instant petition, petitioner's sole ground for relief is that he is not a career offender under section 4B1.1 of the United States Sentencing Guidelines ("the Guidelines"). More specifically, petitioner contends that in light of the Supreme Court's decision in Mathis, his prior South Carolina felony drug conviction no longer qualifies as a "controlled substance offense" under section 4B1.2(b) of the Guidelines. (DE # 1, at 7-8; DE # 1-1, at 6.) Petitioner asks for correction of his sentence or release and maintains that his continued incarceration under his current sentence violates his right to due process of law. (DE # 1, at 8; DE # 1-1, at 5.)

Although petitioner filed the current action under 28 U.S.C. § 2241, he attacks the legality, rather than the execution, of his sentence. A petitioner must challenge the legality of his sentence under 28 U.S.C. § 2255 unless the remedy under section 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e) ("savings clause"); see Rice v. Rivera, 617 F.3d 802, 807 (4th Cir. 2010); In re Jones, 226 F.3d 328, 332–33 (4th Cir. 2000). Section 2255 is inadequate or ineffective to test the legality of a sentence when three conditions are met:

(1) at the time of conviction, settled law of [the Fourth Circuit] or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

Jones, 226 F.3d at 333–34. If such a showing is made, federal courts retain jurisdiction to hear the section 2241 petition. See id. at 333. Otherwise, a court must dismiss the habeas petition for lack of jurisdiction. Rice, 617 F.3d at 807.

Petitioner's claim does not fall within section 2255's savings clause. First, his claim is not based upon a contention that the conduct which led to his federal conviction is no longer criminal as a result of some change in the law. Instead, he challenges the basis for his career offender sentence enhancement. However, the savings clause does not apply to a prisoner who argues only his innocence of a sentencing factor. See 28 U.S.C. § 2255(h)(1); Farrow v. Revell, 541 F. App'x 327, 328 (4th Cir. 2013) (per curiam) (section 2255's savings clause "only preserves claims in which petitioner claims actual innocence of convictions and not just innocence of [a] sentencing factor"). Moreover, Mathis did not establish a new rule of constitutional law. See Arazola-Galea v. United States, 876 F.3d 1257, 1259 (9th Cir. 2017) (collecting cases). Thus, petitioner cannot demonstrate that section 2255 is inadequate or ineffective to test the legality of his detention.

The court DISMISSES WITHOUT PREJUDICE petitioner's petition for lack of jurisdiction. A certificate of appealability is DENIED. See 28 U.S.C. § 2253(c); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Miller-el v. Cockrell, 537 U.S. 322, 335–36 (2003). The

clerk is DIRECTED to close this case.

This 16 January 2018.



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W. Earl Britt  
Senior U.S. District Judge

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