

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-1663

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEMOND SMITH,

Petitioner-Appellant,

v.

J.A. TERRIS, Warden,

Respondent-Appellee.

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ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
MICHIGAN

FILED

Feb 02, 2018

DEBORAH S. HUNT, Clerk

O R D E R

Before: GILMAN and DONALD, Circuit Judges; HOOD, District Judge.*

Demond Smith, a federal prisoner proceeding pro se, appeals a district court judgment dismissing 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).

With the benefit of a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement, Smith pleaded guilty to possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). He was sentenced as an armed career criminal to serve 144 months of imprisonment after the district court granted the government's motion for a substantial-assistance downward departure,

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

followed by three years of supervised release. We dismissed Smith's appeal because it was untimely. *United States v. Smith*, No. 13-1741 (6th Cir. Aug. 15, 2013) (unpublished).

In 2014, Smith filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The district court dismissed Smith's motion and denied his motion to alter or amend the judgment. This court denied a certificate of appealability. *Smith v. United States*, No. 16-1122 (6th Cir. Sept. 15, 2016) (unpublished).

In this § 2241 petition, Smith challenged his sentence enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), arguing that he is "actually innocent" of that enhancement in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016). He argued that his prior conviction for delivery of a controlled substance under Michigan Compiled Laws § 333.7401 no longer qualifies as a predicate offense to support his sentence enhancement under the ACCA. The district court dismissed Smith's petition.

Smith filed a timely appeal. He reiterates the argument that, in light of *Mathis*, his prior Michigan drug conviction no longer qualifies as a predicate offense to support his ACCA sentence enhancement. He also argues that the district court erroneously dismissed his petition because he may pursue his sentencing claim under the holding of *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016). Smith requests appointment of counsel and leave to supplement and amend his appellate brief.

We review de novo the dismissal of a § 2241 petition. *Wooten v. Cauley*, 677 F.3d 303, 306 (6th Cir. 2012); *Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999).

When a federal prisoner challenges the execution of his sentence, he must file a § 2241 petition for habeas corpus relief. *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001); *Charles*, 180 F.3d at 755-56. But when a federal prisoner challenges his conviction or the imposition of his sentence, he ordinarily must file a § 2255 motion to vacate his sentence. *Peterman*, 249 F.3d at 461; *Charles*, 180 F.3d at 755-56. Because Smith 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) (emphasis added)). “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 pursuing 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. “The remedy afforded under § 2241 is not an additional, alternative or supplemental remedy to that prescribed under § 2255.” *Id.* at 758.

Until recently, we had held that “[c]laims alleging ‘actual innocence’ of a sentencing enhancement cannot be raised under § 2241.” *Jones v. Castillo*, 489 F. App’x 864, 866 (6th Cir. 2012); *see also Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003). But 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. *Hill* applied this test to a “narrow subset” of circumstances: when the petitioner was sentenced “under the mandatory [sentencing] guidelines regime” before *United States v. Booker*, 543 U.S. 220 (2005); the petitioner was “foreclosed from filing a successive petition under § 2255”; and “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.” 836 F.3d at 599-600.

But whether or not Smith meets the *Hill* requirements for filing a § 2241 habeas corpus petition, he fails to show that he benefits from *Mathis*. The ACCA requires a fifteen-year mandatory minimum sentence for any person who violates § 922(g) and has three prior convictions “for a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). A “serious drug offense” includes “an offense under State law, involving manufacturing, distributing, or possessing with intent to

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manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(ii). But this court has held that § 333.7401 qualifies as a predicate offense to support his ACCA sentence enhancement post *Mathis*. *United States v. Tibbs*, 685 F. App’x 456, 459, 462-63 (6th Cir.), *cert. denied*, 138 S. Ct. 209 (2017).

Smith points to the Fifth Circuit Court of Appeals’ decision in *United States v. Hinkle*, 832 F.3d 569, 570, 576 (5th Cir. 2016), which held, post-*Mathis*, that a Texas conviction “for delivery of a controlled substance” did not qualify as a controlled substance offense for purposes of a career-offender sentence enhancement because “[t]he ‘delivery’ element of Hinkle’s crime of conviction criminalizes a ‘greater swath of conduct than the elements of the relevant [Guidelines] offense’” (second alteration in original) (quoting *Mathis*, 136 S. Ct. at 2251). But *Hinkle* did not consider the Michigan statute under which Smith was convicted, the case is not binding on this court, and it does not otherwise present a basis to question this court’s decisions in *Tibbs*.

Accordingly, we **GRANT** the motions to supplement and amend the appellate brief, **DENY** the motion for appointment of counsel, and **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

DEMOND DESHON SMITH,

Petitioner,

Case Number: 2:17-CV-10992
HON. GEORGE CARAM STEEH

v.

J.A. TERRIS,

Respondent.

OPINION AND ORDER DISMISSING
PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

Petitioner Demond Deshon Smith, a federal inmate presently incarcerated at the Federal Correctional Institution in Milan, Michigan, has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. He challenges his federal sentencing enhancement under the Armed Career Criminal Act, and asks that his sentence be vacated.

Rule 4, Rules Governing Section 2254 cases, provides that the Court shall promptly examine a petition to determine “if it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief.” If the Court determines that the petitioner is not entitled to relief, the court shall summarily dismiss the petition. *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (“Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on

its face"). The Rules Governing Section 2254 cases may be applied at the discretion of the district court judge to petitions not filed under § 2254. *See Rule 1(b), Rules Governing Section 2254 Cases.* After undertaking a Rule 4 review of the petition, the Court concludes that the claims asserted by Smith are not properly filed under § 2241.

II. Procedural History

Smith pleaded guilty in this Court to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922 (g). *See United States v. Smith*, No. 2:12-cr-20103. On April 11, 2013, he was sentenced to 144 months in prison. (ECF No. 50). The Sixth Circuit dismissed Smith's appeal as untimely. (ECF No. 62). Smith filed a motion to vacate sentence under 28 U.S.C. § 2255, which the Court denied. (ECF No. 84). The Court also denied Smith's Motion to Amend/Correct under Rule 59(e). (ECF No. 87). The Sixth Circuit denied Smith's application for a certificate of appealability. (ECF No. 94). Over ten months after the district court denied Smith's § 2255 motion, Smith sought to amend his § 2255 motion to assert a claim based upon the Supreme Court's decision in *Mathis v. United States*, — U.S. —, 136 S. Ct. 2243 (2016). The Court construed the request as a second request for relief under § 2255 and transferred the matter to the Sixth Circuit Court of Appeals for a determination whether to authorize the filing of a second § 2255 motion. (ECF No. 97). On March 13, 2017, the Sixth Circuit dismissed the request to file a second application for habeas relief for want of prosecution. (ECF No. 99).

One week after the Sixth Circuit dismissed the application for permission to file a second § 2255 motion, Smith filed the instant petition for a writ of habeas corpus under

28 U.S.C. § 2241. He raises the same claim raised in his request to file a second § 2255 motion, that the Supreme Court's decision in *Mathis* invalidates his sentencing enhancement. Petitioner asserts that his remedy under 28 U.S.C. § 2255 is inadequate or ineffective and that he is actually innocent of the sentence enhancement.

III. Discussion

Smith brings this action as a habeas petition under 28 U.S.C. § 2241. The proper avenue for relief on a federal prisoner's claim that his conviction and sentence were imposed in violation of the federal constitution or federal law is a motion to vacate or correct sentence under 28 U.S.C. § 2255. *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001). A federal prisoner may bring a claim challenging his conviction or the imposition of sentence under 28 U.S.C. § 2241 only if it appears that the remedy afforded under section 2255 is inadequate or ineffective to test the legality of his detention.

Charles v. Chandler, 180 F.3d 753, 756 (6th Cir.1999). Habeas corpus is not an “additional, alternative, or supplemental remedy” to the motion to vacate, set aside, or correct the sentence. *Id.* at 758. Smith challenges the imposition of his sentence, and therefore his claims are properly filed pursuant to 28 U.S.C. § 2255, unless he can show that a motion under § 2255 is inadequate or ineffective.

The circumstances under which § 2255 might be deemed “inadequate” are narrow, as the “liberal allowance” of the writ under § 2241 would defeat the restrictions placed on successive petitions or motions for collateral relief imposed by 28 U.S.C. § 2244. *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001). The petitioner bears the burden of

showing that a § 2255 remedy is inadequate. *In re Gregory*, 181 F.3d 713, 714 (6th Cir. 1999). Smith sought permission to file a second § 2255 motion raising the same claim raised in the instant petition. The Sixth Circuit notified Smith that his application was defective for failing to satisfy the requirements of Sixth Circuit Rule 22, and allowed him 30 days to correct the error. When Smith failed to correct the deficiency, the action was dismissed. *In re: Demond Deshon Smith*, No. 17-1121 (6th Cir. March 13, 2017). Smith's lack of success in gaining authorization to file a second § 2255 motion, does not render the remedy under § 2255 inadequate or ineffective. *Charles*, 180 F.3d at 756. The Court, therefore, will dismiss the petition.

IV. Conclusion

The Court concludes that it plainly appears from the face of the petition that Petitioner is not entitled to habeas corpus relief pursuant to 28 U.S.C. § 2241, because the petition is not properly filed under § 2241. Accordingly, the Court **DISMISSES** the petition for a writ of habeas corpus.

Dated: May 16, 2017

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon Demond Smith 46678-039,
FCI Milan, P.O. Box 1000, Milan, MI 48160 on
May 16, 2017, by electronic and/or ordinary mail.

s/Marcia Beauchemin
Deputy Clerk

No. 17-1663
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 12, 2018
DEBORAH S. HUNT, Clerk

DEMOND SMITH,

Petitioner-Appellant,

v.

J.A. TERRIS, WARDEN,

Respondent-Appellee.

O R D E R

BEFORE: GILMAN and DONALD, Circuit Judges; HOOD, District Judge.*

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



Deborah S. Hunt, Clerk

*The Honorable Joseph M. Hood, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.