FILED
United States Court of Appeals
Tenth Circuit

August 27, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MANUEL GUERRERO,

Petitioner - Appellant,

v.

N. C. ENGLISH, Warden, USP-Leavenworth,

Respondent - Appellee.

No. 18-3078

ORDER

Before **BRISCOE**, **MATHESON**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

MANUEL GUERRERO, Petitioner - Appellant, v. N. C. ENGLISH, Warden, USP-Leavenworth, Respondent - Appellee.
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
2018 U.S. App. LEXIS 21333
No. 18-3078
August 1, 2018, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

(D.C. No. 5:18-CV-03068-JWL). (D. Kan.).Guerrero v. English, 2018 U.S. Dist. LEXIS 59695 (D. Kan., Apr. 9, 2018)

CounselMANUEL GUERRERO, Petitioner - Appellant, Pro se, Leavenworth, KS.
Judges: Before BRISCOE, MATHESON, and EID, Circuit Judges.

Opinion

Opinion by: Mary Beck Briscoe

Opinion

ORDER AND JUDGMENT*

Manuel Guerrero is a prisoner in the United States Penitentiary at Leavenworth, Kansas. He filed a petition for habeas corpus under 28 U.S.C. § 2241 in the United States District Court for the District of Kansas, seeking to challenge a sentence imposed by the United States District Court for the Northern District of Texas. The District of Kansas dismissed this action without prejudice for lack of statutory jurisdiction. We affirm.

I

In 2010, Guerrero pled guilty to conspiracy to possess 100 kilograms or more of marijuana with intent to distribute, and was sentenced in the Northern District of Texas to a prison term of 235 months. *United States v. Guerrero (Guerrero I)*, No. 10-cr-00067-A-1 (N.D. Tex.) (Doc. 37). On direct appeal to the Fifth Circuit, Guerrero argued that the district court erred in classifying him as a career offender under the Sentencing Guidelines "because one of his Texas state convictions on which the district court relied was obtained in violation of his Sixth Amendment right to counsel." *United States v. Guerrero (Guerrero II)*, 460 F. App'x 424, 425 (5th Cir. 2012) (per curium). The [*2] Fifth Circuit rejected this argument and affirmed the district court's sentence. *Id.* at 426.

More than a year after the Fifth Circuit's decision, Guerrero filed a 28 U.S.C. § 2255 motion in the Northern District of Texas. *See Guerrero v. United States (Guerrero III)*, No. 4:13-cv-00367-A (N.D. Tex.). He again argued that the district court erred by classifying him as a career offender. *Id.* at Doc.

11. The district court denied this claim, and concluded Guerrero had provided no support for his allegation that a Texas state conviction which served as a basis for his career offender classification had been vacated or overturned. *Id.*

Approximately four years later, in 2017, Guerrero filed two consecutive § 2255 motions in the Northern District of Texas. *See Guerrero v. United States (Guerrero IV)*, No. 4:17-cv-00498-A (N.D. Tex.); *Guerrero v. United States (Guerrero V)*, No. 4:17-cv-00604-A (N.D. Tex.). Because both were second or successive § 2255 motions filed without the permission of the Fifth Circuit, the district court dismissed both matters for lack of jurisdiction.

Guerrero then filed a "Motion to Correct a Plain Error" under the case number for his original criminal case in the Northern District of Texas. [*3] *See Guerrero I*, No. 10-cr-00067-A-1 (N.D. Tex.) (Doc. 66). The district court denied the motion, noting it was "another attempt to obtain relief that is not available . . . without leave of" the Fifth Circuit. *Id.* at Doc. 67.

Finally, in March of this year, Guerrero filed this § 2241 motion in the District of Kansas. Guerrero argues that the methodology that federal courts use to classify career offenders has changed since his sentence, and he now seeks relief in light of *Mathis v. United States*, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016); *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016); and *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017), *supplemented by* 854 F.3d 284 (5th Cir. 2017). The district court held that the savings clause of 28 U.S.C. § 2255(e) does not apply to Guerrero because he has not shown that § 2255 is an inadequate or ineffective vehicle for relief. *Guerrero v. English (Guerrero VI)*, No. 18-3068-JWL, 2018 U.S. Dist. LEXIS 59695, 2018 WL 1706515, at *4 (D. Kan. Apr. 9, 2018). The district court dismissed the case without prejudice for lack of statutory jurisdiction. *Id.*

II

When a § 2241 motion is filed, the district court first determines whether it has statutory jurisdiction to consider the motion. *See Abernathy v. Wandes*, 713 F.3d 538, 557 (10th Cir. 2013). A § 2255 motion is the primary vehicle to attack the validity of a federal conviction or sentence. *See Prost v. Anderson*, 636 F.3d 578, 581 (10th Cir. 2011). A § 2241 motion is "generally reserved for complaints about the nature of a prisoner's confinement, not the fact of his confinement." *Id.* But "in rare instances, a prisoner may attack his [*4] underlying conviction by bringing a § 2241 habeas corpus application under the savings clause in § 2255(e)." *Hale v. Fox*, 829 F.3d 1162, 1165 (10th Cir. 2016) (citation and quotation omitted). Under § 2255(e), if a § 2255 motion is "inadequate or ineffective to test the legality of his detention," then the prisoner can attack his conviction or sentence through a § 2241 motion. *Id.* (quoting 28 U.S.C. § 2255(e)). However, "when a federal petitioner fails to establish that he has satisfied § 2255(e)'s savings clause test-thus, precluding him from proceeding under § 2241-the court lacks statutory jurisdiction to hear his habeas claims." *Abernathy*, 713 F.3d at 557.

"To invoke the savings clause, there must be something about the initial § 2255 procedure that itself is inadequate or ineffective for testing a challenge to detention." *Prost*, 636 F.3d at 589. A mere "failure to use" § 2255 or not "prevail[ing] under it" is not sufficient to satisfy § 2255(e)'s savings clause. *Id.* Because "[t]he savings clause doesn't guarantee results, only process," we have held that "the possibility of an erroneous result-the denial of relief that should have been granted-does not render the procedural mechanism Congress provided for bringing that claim (whether it be 28 U.S.C. §§ 1331, 1332, 2201, 2255, or otherwise) an inadequate or ineffective *remedial vehicle for testing* its merits within the plain meaning of the savings [*5] clause." *Id.* (emphasis in original).

Guerrero argues that-in light of rulings issued after he was sentenced, such as *Mathis, Hinkle*, and *Tanksley*-the Northern District of Texas should not have classified him as a career offender. That is, he argues that the methodology used in the Fifth Circuit to classify career offenders when he was

sentenced differs from present day procedures. But an intervening change in how a provision is interpreted does not render § 2255 inadequate or ineffective. *Prost*, 636 F.3d at 588.1 Merely because the relevant Fifth Circuit case law which was applied when Guerrero was sentenced was later overruled by a subsequent Supreme Court decision does not mean § 2255 was an inadequate or ineffective vehicle. *See Abernathy*, 713 F.3d at 548. Even if his chances of success were not high, Guerrero still could have challenged the Fifth Circuit's then-existing precedent in his § 2255 motion. *See id.; see also Prost*, 636 F.3d at 590.

Guerrero argues that he can show actual innocence of the career offender status. Aplt. Br. at 15-18. But "a showing of actual innocence is irrelevant" when a court determines whether it has statutory jurisdiction to consider a § 2241 motion. *Abernathy*, 713 F.3d at 546 n.7. Instead, the focus is on whether § 2255 is an inadequate or ineffective vehicle for relief. *Prost*, 636 F.3d at 589 [*6] . Further, the fact that a § 2255 movant must point to "newly discovered evidence" or "a new rule of constitutional law" to bring a second or successive petition, 28 U.S.C. § 2255(h), does not mean that the § 2255 remedial regime is inadequate or ineffective, *Prost*, 636 F.3d at 588.

In short, under our precedent there is no statutory jurisdiction over a § 2241 motion unless the movant shows that "the § 2255 remedial vehicle is inadequate or ineffective." *Id.* at 590. Because Guerrero has not done that, the district court was correct to dismiss this case without prejudice for lack of statutory jurisdiction.

III

We **AFFIRM** the decision of the district court. Appellant's motion to proceed in forma pauperis is **GRANTED**.

Entered for the Court

Mary Beck Briscoe

Circuit Judge

Footnotes

*

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1

Guerrero urges us to overrule *Prost*. But we cannot overrule a previous published decision of this court "absent intervening Supreme Court or en banc authority to the contrary." *United States v. Little*, 829 F.3d 1177, 1181 (10th Cir. 2016) (quotations omitted).

MANUEL GUERRERO, Petitioner, v. N.C. ENGLISH, Warden, USP-Leavenworth, Respondent.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
2018 U.S. Dist. LEXIS 59695
CASE NO. 18-3068-JWL
April 9, 2018, Decided
April 9, 2018, Filed

Editorial Information: Prior History

United States v. Guerrero, 460 Fed. Appx. 424, 2012 U.S. App. LEXIS 2929 (5th Cir. Tex., Feb. 15, 2012)

Counsel **Manuel Guerrero**, Petitioner, Pro se, Leavenworth, KS.
Judges: JOHN W. LUNGSTRUM, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: JOHN W. LUNGSTRUM

Opinion

MEMORANDUM AND ORDER

This matter is a petition for habeas corpus filed under 28 U.S.C. § 2241. Petitioner, a prisoner in federal custody at USP-Leavenworth, proceeds pro se. Petitioner challenges his designation as a career offender. The Court has screened his Petition (Doc. 1) under Rule 4 of the Rules Governing Habeas Corpus Cases, foll. 28 U.S.C. § 2254, and dismisses this action without prejudice for lack of statutory jurisdiction.

Background

On September 3, 2010, Petitioner was sentenced in the Northern District of Texas to 235 months' imprisonment following his guilty plea conviction for conspiracy to possess 100 kilograms or more of marijuana with intent to distribute. *United States v. Guerrero*, No. 10-cr-00067-A-1 (N.D. Tex.) (Doc. 37). Petitioner appealed, claiming "that the district court erred in applying the career offender enhancement because one of his Texas state convictions on which the district court relied was obtained in violation of his Sixth Amendment right to counsel." *United States v. Guerrero*, 460 F. App'x 424 (5th Cir. 2012). The Fifth Circuit affirmed the judgment of the district court. *Id.* at 426.

Petitioner filed a § 2255 motion on May 2, 2013, claiming ineffective assistance of counsel (which he later withdrew), and that the court's determination of his career offender status, and subsequent enhancement under section 4B1.1 of the United States Sentencing Guidelines, violated his Fifth Amendment rights. *Guerrero v. United States*, No. 4:13-cv-00367-A (N.D. Tex.). The district court denied the motion on June 28, 2013, finding no basis for his claim because the conviction Petitioner was challenging had not been overturned or vacated. *Id.* at Doc. 11. On June 19, 2017, Petitioner filed a second § 2255 motion in the district court, seeking to vacate his career offender enhancement based on the decisions in *Mathis v. United States*, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016), *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), and *United States v. Tanksley*, 848 F.3d 347 (5th

Cir.), *supplemented by* 854 F.3d 284 (5th Cir. 2017). *Guerrero v. United States*, No. 4:17-cv-00498-A (N.D. Tex.) (Doc. 1). On June 20, 2017, the district court dismissed the motion as a second or successive § 2255 motion filed without leave from the Fifth Circuit. *Id.* at Doc. 4. On July 24, 2017, Petitioner filed another motion which the district court denied as another second or successive motion under § 2255. *Guerrero v. United States*, No. 17-cv-00604-A (N.D. Tex.) (Doc. 4).

Petitioner filed a Motion to Correct Plain Error in his criminal case on August 21, 2017, arguing for relief under *Mathis, Hinkle*, and *Tanksley*, which the district court denied on August 22, 2017. *United States v. Guerrero*, 10-cr-00067-A-1 (N.D. Tex.) (Docs. 66, 67). In denying relief, the district court noted that the motion was another attempt to seek relief without leave of the Fifth Circuit. *Id.* at Doc. 67. The district court further noted that *Mathis* "has not been made retroactive." *Id.* (citing *In re Lott*, 838 F.3d 522, 523 (5th Cir. 2016)).

On March 21, 2018, Petitioner filed the instant petition under 28 U.S.C. § 2241, again arguing for relief under *Mathis, Hinkle*, and *Tanksley*. Petitioner invokes the savings clause of § 2255(e), arguing that § 2255 is inadequate or ineffective to test the legality of his detention.

Analysis

The Court must first determine whether § 2241 was the proper vehicle to bring Petitioner's claims. Because "that issue impacts the court's statutory jurisdiction, it is a threshold matter." *Sandlain v. English*, 2017 U.S. App. LEXIS 19424, 2017 WL 4479370 (10th Cir. Oct. 5, 2017) (unpublished) (finding that whether *Mathis* is retroactive goes to the merits and the court must first decide whether § 2241 is the proper vehicle to bring the claim) (citing *Abernathy v. Wandes*, 713 F.3d 538, 557 (10th Cir. 2013)).

A federal prisoner seeking release from allegedly illegal confinement may file a motion to "vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). A motion under § 2255 must be filed in the district where the petitioner was convicted and sentence imposed. *Sines v. Wilner*, 609 F.3d 1070, 1073 (10th Cir. 2010). Generally, the motion remedy under 28 U.S.C. § 2255 provides "the only means to challenge the validity of a federal conviction following the conclusion of direct appeal." *Hale v. Fox*, 829 F.3d 1162, 1165 (10th Cir. 2016), *cert. denied sub nom. Hale v. Julian*, 137 S. Ct. 641, 196 L. Ed. 2d 539 (2017). However, under the "savings clause" in § 2255(e), a federal prisoner may file an application for habeas corpus under 28 U.S.C. § 2241 in the district of confinement if the petitioner demonstrates that the remedy provided by § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

The Tenth Circuit has held that "it is the infirmity of the § 2255 remedy itself, not the failure to use it or to prevail under it, that is determinative. To invoke the savings clause, there must be something about the initial § 2255 procedure that *itself* is inadequate or ineffective for *testing* a challenge to detention." *Prost v. Anderson*, 636 F.3d 578, 589 (10th Cir. 2011). "The savings clause doesn't guarantee results, only process," and "the possibility of an erroneous result-the denial of relief that should have been granted-does not render the procedural mechanism Congress provided for bringing that claim (whether it be 28 U.S.C. §§ 1331, 1332, 2201, 2255, or otherwise) an inadequate or ineffective *remedial vehicle* for *testing* its merits within the plain meaning of the savings clause." *Id.* (emphasis in original).

Petitioner argues that he is entitled to relief under *Mathis, Hinkle*, and *Tanksley*. When a petitioner is denied relief on his first motion under § 2255, he cannot file a second § 2255 motion unless he can point to either "newly discovered evidence" or "a new rule of constitutional law," as those terms are defined in § 2255(h). *Haskell v. Daniels*, 510 F. App'x 742, 744 (10th Cir. 2013) (unpublished) (citing *Prost*, 636 F.3d at 581).

It does not appear that Petitioner sought authorization from the Fifth Circuit to file a second or successive § 2255 motion, and Petitioner does not argue that the cases he relies on are "a new rule of constitutional law." Regardless, preclusion from bringing a second motion under § 2255(h) does not establish that the remedy in § 2255 is inadequate or ineffective. Changes in relevant law were anticipated by Congress and are grounds for successive collateral review only under the carefully-circumscribed conditions set forth in § 2255(h). The Tenth Circuit has rejected an argument that the "current inability to assert the claims in a successive § 2255 motion-due to the one-year time-bar and the restrictions identified in § 2255(h)-demonstrates that the § 2255 remedial regime is inadequate and ineffective to test the legality of his detention." *Jones v. Goetz*, 712 Fed. Appx. 722, 2017 WL 4534760, at *5 (10th Cir. 2017) (unpublished) (citations omitted); *see also Brown v. Berkebile*, 572 F. App'x 605, 608 (10th Cir. 2014) (unpublished) (finding that petitioner has not attempted to bring a second § 2255 motion, and even if he were precluded from doing so under § 2255(h), that "does not establish the remedy in § 2255 is inadequate") (citing *Caravalho v. Pugh*, 177 F.3d 1177, 1179 (10th Cir. 1999) and *Prost*, 636 F.3d at 586). If § 2255 could be deemed "inadequate or ineffective" "any time a petitioner is barred from raising a meritorious second or successive challenge to his conviction-subsection (h) would become a nullity, a 'meaningless gesture.'" *Prost*, 636 F.3d at 586; *see also Hale*, 829 F.3d at 1174 ("Because Mr. Hale cannot satisfy § 2255(h), he cannot, under *Prost*, satisfy § 2255(e), and § 2241 review must be denied.").

Petitioner argues that the decision in *Mathis* is a new interpretation of statutory law. The AEDPA "did not provide a remedy for second or successive § 2255 motions based on intervening judicial interpretations of statutes." *Abernathy v. Wandes*, 713 F.3d 538, 547 (10th Cir. 2013), *cert. denied* 134 S. Ct. 1874, 188 L. Ed. 2d 916 (2014). However, prisoners who are barred from bringing second or successive § 2255 motions may still be able to petition for habeas relief under the savings clause in § 2255(e). *Id.* However, § 2255 has been found to be "inadequate or ineffective" only in "extremely limited circumstances." *Id.* (citations omitted).

Petitioner argues that he meets the savings clause tests adopted in other circuits. Petitioner acknowledges that there is a split among the circuits regarding the applicability of the savings clause, and urges the Court to issue its own interpretation.1 However, the Tenth Circuit has addressed the question of "whether a new Supreme Court decision interpreting a statute that may undo a prisoner's conviction renders the prisoner's initial § 2255 motion 'inadequate or ineffective.'" *Haskell*, 510 F. App'x at 744. The Tenth Circuit answered the question in the negative in *Prost*, holding that if "a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion[,] . . . then the petitioner may not resort to . . . § 2241." *Prost*, 636 F.3d at 584.

Nothing about the procedure of Petitioner's prior § 2255 motion prevented him from making this same argument despite the fact that the Supreme Court decision he seeks to rely on was not in existence yet.2 The Tenth Circuit has concluded that although a petitioner may have benefitted from a cite to a Supreme Court decision announced after his § 2255 motion, this is not reason enough to find the original § 2255 motion "inadequate or ineffective." *See Prost*, 636 F.3d at 589; *Haskell*, 510 F. App'x at 745; *Sandlain*, 2017 U.S. App. LEXIS 19424, 2017 WL 4479370, at *3 ("Nor does it matter that *Mathis* was not in existence at the time he filed his initial § 2255 motion").

Petitioner argues that prior to the decision in *Tanksley*, his argument was foreclosed by the Fifth Circuit's decision in *United States v. Ford*, 509 F.3d 714 (5th Cir. 2007). However, § 2255 is not "inadequate or ineffective" merely because adverse circuit precedent existed at the time. *Abernathy*, 713 F.3d at 548 (citing *Prost*, 636 F.3d at 590-93); *Sandlain*, 2017 U.S. App. LEXIS 19424, 2017 WL 4479370, at *3 ("[E]ven assuming there was contrary circuit precedent, nothing prevented him from raising the argument in his initial § 2255 motion and then challenging any contrary precedent via en

banc or certiorari review."). The Tenth Circuit created a new savings clause test in *Prost* and declined to follow the previous test used under *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001). *Abernathy*, 713 F.3d at 541, 545-46, n.6-7 (10th Cir. 2013). The Tenth Circuit has also rejected the argument that the decision in *Prost*-rejecting the erroneous circuit foreclosure test-violates equal protection. *Brown*, 572 F. App'x at 608 ("We reject this argument because a circuit split does not deny Mr. Brown equal protection.") (citations omitted). Petitioner *could* have made his argument, regardless of the likelihood of success on such an argument, even if it was foreclosed by then-controlling circuit precedent. *Abernathy*, 713 F.3d at 548. "The savings clause doesn't guarantee results, only process." *Id.* (quoting *Prost*, 636 F.3d at 590).

Petitioner, like the petitioner in *Abernathy*, argues that he is "actually innocent" of the sentence enhancement. In *Abernathy*, the Tenth Circuit noted that although other circuits "have adopted somewhat disparate savings clause tests, most requir[ing] a showing of 'actual innocence' . . . [u]nder the *Prost* framework, a showing of actual innocence is irrelevant." *See also Sandlain*, 2017 U.S. App. LEXIS 19424, 2017 WL 4479370, at *4 (finding that petitioner's claim that § 2255 is inadequate or ineffective because he is actually innocent of the career offender enhancement under *Mathis*, merely restates the argument he could have brought in his initial § 2255 motion, and possible misuse of a prior conviction as a predicate offense under the sentencing guidelines does not demonstrate actual innocence); *see also Brown*, 572 F. App'x at 608-09 (rejecting argument that petitioner is actually innocent and that the court's failure to follow the other circuits in *Prost* violated the Supreme Court's "fundamental miscarriage of justice" exception); *see also Boose v. Mays*, No. 13-3016-RDR, 2014 U.S. Dist. LEXIS 10053, 2014 WL 298604, at *4 (D. Kan. Jan. 28, 2014) ("[I]t has generally been held that § 2255's savings clause cannot be invoked to challenge a sentence enhancement rather than the underlying conviction.") (citations omitted).

The petitioner has the burden to show that the remedy under § 2255 is inadequate or ineffective. *Hale*, 829 F.3d at 1175. Petitioner has failed to meet that burden. The Court finds that the savings clause of § 2255(e) does not apply and therefore the Court lacks statutory jurisdiction. Accordingly,

IT IS THEREFORE ORDERED BY THE COURT that the petition is **dismissed without prejudice.**

IT IS SO ORDERED.

Dated in Kansas City, Kansas, on this 9th day of April, 2018.

/s/ John W. Lungstrum

JOHN W. LUNGSTRUM

UNITED STATES DISTRICT JUDGE

Footnotes

1

Petitioner urges this Court to disregard or "overrule" *Prost*. This Court is bound by Tenth Circuit precedent. *United States v. Spedalieri*, 910 F.2d 707, 709, n.2 (10th Cir. 1990) ("A district court must follow the precedent of this circuit, regardless of its views concerning the advantages of the precedent of our sister circuits.") (citations omitted); *see also Leatherwood v. Allbaugh*, 861 F.3d 1034, 1042 n.6 (10th Cir. 2017) ("[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.") (quoting *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015)).

2

The Court expresses no opinion on the applicability of *Mathis* to Petitioner's claim. *See Haskell*, 510 F. App'x at 745, n.4; *see also Sandlain v. English*, No. 17-3152, 2017 U.S. App. LEXIS 19424, 2017 WL 4479370, at n.8 (10th Cir. 2017).