

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.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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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,

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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 *United States v. Smith*, No. 13-1741 (6th Cir. Aug. 15, 2013) (unpublished).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 *Smith v. United States*, No. 16-1122 (6th Cir. Sept. 15, 2016) (unpublished).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