NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1757

ANTHONY L. VIOLA,
Appellant

v.

WARDEN MCKEAN FCI

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 17-cv-00214)
District Judge: Honorable Nora B. Fischer

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 25, 2018

Before: GREENAWAY, Jr., BIBAS, and ROTH, Circuit Judges

(Opinion filed: February 15, 2019)

OPINION*

PER CURIAM

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Appendix A

Anthony Viola appeals the District Court's order dismissing his petition filed pursuant to 28 U.S.C. § 2241. For the reasons below, we will affirm the District Court's order.

The factual background and the details of Viola's claims are well known to the parties, set forth in the District Court's opinion, and need not be discussed at length. Briefly, in 2012, Viola was sentenced in the United States District Court for the Northern District of Ohio to 150 months in prison after being convicted of thirty-three counts of wire fraud and two counts of conspiracy. He was also ordered to pay over $2.6M in restitution. After Viola filed multiple "repetitive and baseless" challenges to his conviction and sentence, the District Court enjoined Viola from filing any motions in his criminal action unless he received permission from the United States Court of Appeals for the Sixth Circuit to file a second or successive motion pursuant to 28 U.S.C. § 2255. In 2017, Viola filed the § 2241 petition at issue here in the United States District Court for the Western District of Pennsylvania. The District Court dismissed the petition for lack of jurisdiction. Viola filed a timely notice of appeal.

We have jurisdiction under 28 U.S.C. § 1291 and exercise plenary review over the District Court's legal conclusions. Cradle v. U.S. ex rel. Miner, 290 F.3d 536, 538 (3d Cir. 2002) (per curiam). Under the explicit terms of § 2255, a § 2241 petition cannot be entertained by a court unless a § 2255 motion would be "inadequate or ineffective." Id.

In his brief, Viola raises two arguments. First, he appears to argue that after being convicted in federal court, he was acquitted of identical charges in state court. He

contends that this demonstrates his actual innocence. He raised this argument in an unsuccessful motion for a new trial in his federal criminal proceedings. See United States v. Viola, No. 1:08 CR 506, 2012 WL 3044295, *1 (N.D. Ohio July 25, 2012). He also raised it in an unsuccessful motion to vacate his conviction filed pursuant to 28 U.S.C. § 2255. See United States v. Viola, No. 1:08 CR 506, 2015 WL 7259783, at *3 (N.D. Ohio Nov. 17, 2015) ("An acquittal on state charges is equally insufficient to establish that he was actually innocent of the federal charges."). In his § 2241 petition, Viola simply seeks to relitigate his prior challenges to his conviction. That he did not receive relief on his § 2255 motion does not demonstrate that such a motion was "inadequate or ineffective" but rather that Viola's arguments were without merit. "It is the inefficacy of the remedy, not the personal inability to use it, that is determinative. Section 2255 is not inadequate or ineffective merely because the sentencing court does not grant relief, the one-year statute of limitations has expired, or the petitioner is unable to meet the stringent gatekeeping requirements of the amended §2255." Cradle, 290 F.3d at 539 (citation omitted).

We have held that a defendant may proceed via a § 2241 petition if a court's subsequent statutory interpretation renders the defendant's conduct no longer criminal and he did not have an earlier opportunity to raise the claim. Bruce v. Warden Lewisburg USP, 868 F.3d 170, 180 (3d Cir. 2017); In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997). Here, however, there has been no intervening change in any substantive law which would render Viola's wire fraud no longer criminal.

Viola's second argument is that his sentence is being executed improperly because restitution is being paid to "non-victims." While a federal prisoner can use a § 2241 petition to challenge the *execution* of his sentence, see Cardona v. Bledsoe, 681 F.3d 533, 535 (3d Cir. 2012), a § 2241 petition cannot be used to challenge the *imposition* of the restitution portion of a sentence. See Arnaiz v. Warden, 594 F.3d 1326, 1330 (11th Cir. 2010) (per curiam). Viola is not challenging the manner in which he has to pay his financial obligations. See McGee v. Martinez, 627 F.3d 933, 937 (3d Cir. 2010) (allowing prisoner to use § 2241 petition to challenge increase in quarterly deduction from his account towards monetary portion of criminal judgment). But even if this claim did concern the execution of Viola's restitution and was cognizable in a § 2241 petition, Viola has not shown how he has been prejudiced. He has not alleged that any payments he has made have not been credited against the financial obligations of his sentence.[1]

[1] Viola makes several meritless assertions that are unsupported by his own exhibits. While he claims that the Government collected restitution but retained those funds for "costs of prosecution," the document he submits in support is from a codefendant's criminal proceedings in a *state* court in Ohio and not the *federal* court which oversaw Viola's criminal proceedings. He also alleges that a codefendant made a payment to the restitution amount for which they are jointly and severally liable but "that payment does not seem to be credited towards restitution." In support, he submitted a "journal entry" from a *state* court in Ohio, indicating that Viola's codefendant had been *ordered* to pay $1M of restitution, not that he had *paid* that amount. Additionally, he claims that the task force that prosecuted him has collected over $15M in restitution that is unaccounted for. However, the author of the letter Viola submitted as support for that number merely states that courts had *ordered* restitution totaling that amount, not that it had been *collected*. Viola claims that he contacted the victims listed in the restitution orders and they were not aware of any funds collected from Viola being sent to them. But in support, he attaches a response from the customer service department of a loan servicer simply informing Viola that he did not submit enough information for them to respond to

For the above reasons, the District Court did not err in determining that it lacked jurisdiction over Viola's § 2241 petition. Accordingly, we will affirm the District Court's judgment. The motion by S. Bruce Hiran to file an amicus brief and to file the brief out of time is denied. Hiran's brief does not address the issue on appeal: whether Viola may bring his claims in a § 2241 petition. See Fed. R. App. P. 29(a)(3)(B) (motion for leave to file must state "why the matters asserted are relevant to the disposition of the case.")

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his request.

ANTHONY L. VIOLA, Petitioner, v. WARDEN ZUNIGA, Respondent.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
2018 U.S. Dist. LEXIS 51060
Civil Action No. 17-214 Erie
March 28, 2018, Decided
March 28, 2018, Filed

Editorial Information: Prior History

Viola v. Zuniga, 2018 U.S. Dist. LEXIS 40141 (W.D. Pa., Mar. 9, 2018)

Counsel **{2018 U.S. Dist. LEXIS 1}**ANTHONY L. VIOLA, Petitioner, Pro se, BRADFORD, PA.

For WARDEN ZUNIGA, Respondent: Michael Comber, LEAD ATTORNEY, U.S. Attorney's Office, U.S. Post Office & Courthouse, Pittsburgh, PA.

Judges: Nora Barry Fischer, United States District Court Judge. Magistrate Judge Susan Paradise Baxter.

Opinion

Opinion by: Nora Barry Fischer

Opinion

MEMORANDUM ORDER

This action, filed pursuant to 28 U.S.C. § 2241, was referred to United States Magistrate Judge Susan Paradise Baxter for a report and recommendation in accordance with 28 U.S.C. § 636(b)(1) and Rule 72 of the Local Rules for Magistrate Judges. On March 9, 2018, the Magistrate Judge issued a Report and Recommendation [ECF No. 13] in which she recommended that the petition be denied. Objections were filed by the petitioner on March 27, 2018. [ECF No. 14]. After *de novo* review of the petition and documents in this case, together with the Report and Recommendation and Objections thereto, the following order is entered:

AND NOW, this 28th day of March, 2018;

IT IS HEREBY ORDERED that the claims raised in Viola's petition are DISMISSED with prejudice. The Report and Recommendation [ECF No. 13] is adopted as the opinion of the Court. The Clerk of Court shall mark this case CLOSED.

/s/ Nora Barry Fischer

United States District Court**{2018 U.S. Dist. LEXIS 2}** Judge

Appendix B

ANTHONY L. VIOLA, Petitioner, v. WARDEN ZUNIGA, Respondent.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
2018 U.S. Dist. LEXIS 40141
Civil Action No. 17-214 Erie
March 9, 2018, Decided
March 9, 2018, Filed

Editorial Information: Subsequent History

Adopted by, Writ of habeas corpus dismissed Viola v. Zuniga, 2018 U.S. Dist. LEXIS 51060 (W.D. Pa., Mar. 28, 2018)

Editorial Information: Prior History

United States v. Viola, 2013 U.S. App. LEXIS 26454 (6th Cir. Ohio, Nov. 6, 2013)

Counsel **{2018 U.S. Dist. LEXIS 1}**ANTHONY L. VIOLA, Petitioner, Pro se, BRADFORD, PA.

For WARDEN ZUNIGA, Respondent: Michael Comber, LEAD ATTORNEY, U.S. Attorney's Office, U.S. Post Office & Courthouse, Pittsburgh, PA.

Judges: SUSAN PARADISE BAXTER, United States Magistrate Judge.

Opinion

Opinion by: SUSAN PARADISE BAXTER

Opinion

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

Before the Court is a petition for a writ of habeas corpus filed by federal prisoner Anthony Viola pursuant to 28 U.S.C. § 2241. It is respectfully recommended that the petition be dismissed with prejudice.

II. REPORT

A. Background

Viola was convicted in 2011 in the United States District Court for the Northern District of Ohio of two counts of conspiracy to commit wire fraud and thirty-three counts of wire fraud, in violation of 18 U.S.C. §§ 371 and 1343. On January 5, 2012, that court sentenced Viola to sixty months' incarceration for each of the conspiracy counts and 150 months' incarceration for each of the wire fraud counts, with all terms to run concurrently, and as part of his sentence he was ordered to pay restitution. (Judgment, ECF No. 363, United States v. Viola, No. 1:08-cr-506 (N.D. Oh. Jan. 5, 2012)).1 On May 30, 2013, the government filed its notice of finalization of restitution as to each

Appendix C

defendant,{2018 U.S. Dist. LEXIS 2} including Viola. (Notice, ECF No. 427, Viola, No. 1:08-cr-506 (N.D. Oh. May 30, 2013)). The court issued its final restitution order on July 11, 2013, and ordered that Viola's total restitution was $2,649,865. (Order, ECF No. 428, Viola, No. 1:08-cr-506 (N.D. Oh. July 11, 2013)).

In the meantime, Viola was tried in the Cuyahoga County Court of Common Pleas on state charges of mortgage fraud, and on April 26, 2012, he was acquitted of those charges. The following year in Viola's federal criminal case, the Sixth Circuit Court of Appeals affirmed the district court's order denying a motion for a new trial. (Order, United States v. Viola, No. 12-3112, 2013 U.S. App. LEXIS 26454 (6th Cir. Nov. 6, 2013)). It denied his petition for rehearing *en banc* on March 10, 2014. (Order, Viola, No. 12-3112 (6th Cir. Mar. 10, 2014)).

Viola subsequently filed in the District Court for the Northern District of Ohio a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. On November 17, 2015, that court denied Viola's motion and denied a certificate of appealability. (Mem. Op. and Order, ECF No. 506, Viola, No. 1:08-cr-506, 2015 U.S. Dist. LEXIS 155221 (N.D. Oh. Nov. 17, 2015)). On November 23, 2016, the Sixth Circuit Court of Appeals issued an order in which it denied Viola's{2018 U.S. Dist. LEXIS 3} subsequent request for a certificate of appealability. (Order, Viola v. United States, No. 16-3023, 2016 U.S. App. LEXIS 23703 (6th Cir. Nov. 23, 2016)). The court of appeals denied Viola's subsequent motions for rehearing en banc. (Orders, Viola, No. 16-3023 (6th Cir. Apr. 26, 2017, and May 11, 2017)). On October 2, 2017, the Supreme Court of the United States denied Viola's petition for a writ of certiorari, and on November 28, 2017, it denied his petition for rehearing. (Orders, Viola v. United States, S. Ct. Docket No. 16-9452 (Oct. 2, 2017, and Nov. 27, 2017)).

The 1996 amendments that the Antiterrorism and Effective Death Penalty Act ("AEDPA") made to § 2255 bar a federal prisoner from filing a second or successive § 2255 motion unless the appropriate court of appeals first certifies the filing contains a claim based on:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.28 U.S.C. § 2255(h). See also 28 U.S.C. § 2244(a).

It does not{2018 U.S. Dist. LEXIS 4} appear that Viola has filed with the Sixth Circuit Court of Appeals an application for authorization to file a second or successive § 2255 motion. Unless he receives authorization from it, he cannot litigate another motion to vacate his sentence in the District Court for the Northern District of Ohio. Nevertheless, Viola has continued to file motions with that court in his criminal case. On September 1, 2017, that court issued a memorandum opinion and order in which it advised him that "[t]he case has long been terminated and no future filings will be accepted under this case number unless the Sixth Circuit authorizes a second or successive petition under 28 U.S.C. § 2255(h)." (Mem. Op. and Order at 2, ECF No. 541, Viola, No. 1:08-cr-506 (N.D. Oh. Sept. 1, 2017)). It also explained that "[t]he majority of the issues" Viola raised in his various motions "have been raised and addressed in a myriad of other motions and hearings and have been resolve against Mr. Viola in multiple decisions from this Court and the Sixth Circuit Court of Appeals. They are all aimed at re-visiting this Court's denial of Mr. Viola's original request for a new trial and/or his request for relief under § 2255. As such, they are barred by{2018 U.S. Dist. LEXIS 5} the law-of-the-case doctrine." (Id. at 2-3). In that same memorandum opinion and order, the court also denied Viola's most recent motion to reduce restitution, which he filed on August 14, 2017. (Id. at 4-5). It determined that "Viola has established a pattern of filing motions in this case that are

repetitive and baseless[,]" and it "permanently enjoined [him] from filing any further motions or other documents pertaining to his conviction and sentence in this criminal action unless and until he has received permission from the Sixth Circuit to file a second or successive petition under 28 U.S.C. § 2255." (Id. at 6).

Viola is incarcerated at FCI McKean, which is located within the territorial boundaries of the Western District of Pennsylvania. In August 2017, he filed with this Court the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. (ECF No. 1). He raises two claims for relief.

In Claim 1, Viola contends that the restitution order is unconstitutional because it violates the Eighth Amendment's prohibition against excessive fines. In support, Viola cites to testimony given at his trial and information contained in his presentence investigation report and contends that the record in his federal criminal case "confirms that Deutsche Bank**{2018 U.S. Dist. LEXIS 6}** and other lenders did not lose any money or even request restitution." (ECF No. 1 at 11). He also relies upon more recent events. He contends that following his federal criminal trial "the government became aware of evidence that lenders knowingly waived their lending guidelines and knowingly made 'no moeny [sic] down' loans concerning the same properties at issued" in his federal criminal case. (Id. at 4). Charges were filed against the lenders and, according to Viola:

> [i]n January 2017 Deutsche Bank, the entity that originated and/or securitized almost every loan in USA v. Viola, reached a multi-billion dollar settlement with the Justice Department where the bank admitted knowingly making 'no moeny [sic] down' mortgage loans that did not meet its lending guidelines then lying about that practice. Deutsche Bank also reached civil settlements with purchasers of its mortgage backed securities, including the bond pools holding loans at issue in USA v. Viola, Exhibit E. Since this bank has admitted engaging fraud and paid the owners of the loans, further restitution from [Viola] to this bank and owners of these mortgages constitutes unlawful indemnity to Deutsche Bank of its illegal behavior,**{2018 U.S. Dist. LEXIS 7}** or unjust enrichment, neither of which is permitted.(Id. at 11). It is Viola's contention that "[s]ince the lenders in USA v. Viola have reached multi-billion dollar settlements with the Justice Department and admitted engaging in unlawful actions concerning mortgage and securitization *involving the same properties* as USA v. Viola, the banks are no longer eligible to receive any restitution[.]" (Id. at 13 (emphasis in the petition)).

In Claim 2, Viola he contends that the sentence imposed upon him must be vacated because he is innocent. In support, he argues that the "[a]dmissions by Deutsche Bank as part of its January, 2017 $7.2 billion dollar settlement with the Department of Justice defeat the required 'materiality' element of any alleged misrepresentation in a wire fraud prosecution." (Id. at 5). He also argues that "the government's pursuit of multiple theories of criminality concerning the same properties is a violation of the Constitutional guarantee of Due Process of Law." (Id.)

In his answer (ECF No. 9), the Respondent contends that this Court must dismiss Viola's petition for lack of jurisdiction. Viola filed a reply (ECF No. 10) in which he argues that this Court has jurisdiction over his claims under**{2018 U.S. Dist. LEXIS 8}** § 2241 because they fall within § 2255's "savings clause," which is discussed below.

B. Discussion

"The 'core' habeas corpus action is a prisoner challenging the authority of the entity detaining him to do so, usually on the ground that his predicate sentence or conviction is improper or invalid." McGee v. Martinez, 627 F.3d 933, 935 (3d Cir. 2010)). As the United States Court of Appeals for the Third Circuit recently explained in Bruce v. Warden Lewisburg USP, 868 F.3d 170 (3d Cir. 2017), prior to § 2255's enactment, federal prisoners seeking habeas relief could only do so by filing a petition under

§ 2241 in the federal district court in the district the prisoner was incarcerated.2Id. at 178. "An increase in the number of federal habeas petitions produced serious administrative problems and overburdened the few district courts in the jurisdictions with major federal prisons." Id. (citing United States v. Hayman, 342 U.S. 205, 210-19, 72 S. Ct. 263, 96 L. Ed. 232 (1952)). To alleviate that burden, Congress in 1948 enacted § 2255:

> A new remedial mechanism, § 2255 "replaced traditional habeas corpus for federal prisoners (at least in the first instance) with a process that allowed the prisoner to file a motion with the sentencing court on the ground that his sentence was, *inter alia*, imposed in violation of the Constitution or laws of the United States." Boumediene v. Bush, 553 U.S. 723, 774, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008) (internal quotation marks omitted). The statute's "sole purpose was**{2018 U.S. Dist. LEXIS 9}** to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." Hayman, 342 U.S. at 219, 72 S. Ct. 263; see also Hill v. United States, 368 U.S. 424, 427, 428 n.5, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962) (describing the § 2255 remedy as "exactly commensurate" with § 2241's writ of habeas corpus); United States v. Anselmi, 207 F.2d 312, 314 (3d Cir. 1953).
>
> So it is that a federal prisoner's first (and most often only) route for collateral review of his conviction or sentence is under § 2255.Id.

Importantly, § 2255 expressly prohibits a court from entertaining a § 2241 petition filed by a federal prisoner who is raising the types of claims that must be raised in a**{2018 U.S. Dist. LEXIS 10}** § 2255 motion unless it "appears that the remedy by [§ 2255 motion] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). This provision of § 2255 is commonly referred to as the "savings clause." See, e.g., Bruce, 686 F.3d at 174, 178-79.

In its landmark case In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997), the Third Circuit Court of Appeals recognized the one circumstance under which it has found § 2255's remedy to be inadequate of ineffective since AEDPA amended § 2255 in 1996 to include a one-year statute of limitations and the prohibition against the filing of second or successive motions. The petitioner in Dorsainvil, Ocsulis Dorsainvil, was convicted, *inter alia*, of using a gun in connection with a drug crime under 18 U.S.C. § 924(c)(1). He was so convicted notwithstanding that he did not "use" the gun but the gun was merely present in the car from which the drugs were to be bought. After he had exhausted his appeals and litigated his first § 2255 motion, the Supreme Court in Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995) construed the criminal statute under which Dorsainvil was convicted (18 U.S.C. § 924(c)(1)) to exclude from the ambit of the statute mere presence of a gun at a drug crime, thus arguably rendering him actually innocent of the crime of using a gun in connection with a drug offense.

After the Supreme Court issued Bailey, Dorsainvil applied to**{2018 U.S. Dist. LEXIS 11}** the Third Circuit Court of Appeals for authorization to file in the district court a second or successive § 2255 motion. The court had no choice but to deny his request because he could not satisfy AEDPA's gatekeeping requirements for the filing of a second or successive § 2255 motion. That was because the decision in Bailey was one of *statutory construction* and, therefore, did not constitute "a new rule of *constitutional law* . . . that was previously unavailable[.]" Dorsainvil, 119 F.3d at 247-48 (quoting 28 U.S.C. § 2255 (now at § 2255(h)) (emphasis added)). Under these circumstances, the court of appeals determined that Dorsainvil had established that § 2255 was "inadequate or ineffective" to test the legality of his detention and, as a result, he could bring his claim in a § 2241 habeas corpus petition:

> A similar case "involv[ing] the availability of collateral relief from a federal criminal conviction based upon an intervening change in substantive law" came before the Supreme Court in Davis

v. United States, 417 U.S. 333, 334, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974). In that case, the Court stated that a Supreme Court decision interpreting a criminal statute that resulted in the imprisonment of one whose conduct was not prohibited by law "presents exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus**{2018 U.S. Dist. LEXIS 12}** is apparent." Id. at 346 (internal quotations omitted). The Court held that "*if [petitioner's] contention is well taken, then [his] conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and present(s) exceptional circumstances that justify collateral relief under § 2255.*" Id. at 346-47 (internal quotations omitted); see also United States v. Addonizio, 442 U.S. 178, 186-87, 99 S. Ct. 2235, 60 L. Ed. 2d 805, (1979) (discussing Davis and observing that a refusal to have vacated his sentence "would surely have been a 'complete miscarriage of justice,' since the conviction and sentence were no longer lawful").

The decision in Davis that § 2255 was broad enough to cover a defendant imprisoned for a crime that an intervening decision negates does not govern Dorsainvil's motion before us only because he has brought his claim for relief on a second § 2255 motion [subject to the gatekeeping provisions of AEDPA]. In the earlier part of this opinion, we construed the AEDPA to preclude our certification of a second § 2255 motion that relied on the intervening decision in Bailey as a basis for certification. Thus, Dorsainvil does not have and, because of the circumstance that he was convicted for**{2018 U.S. Dist. LEXIS 13}** a violation of § 924(c)(1) before the Bailey decision, never had an opportunity to challenge his conviction as inconsistent with the Supreme Court's interpretation of § 924(c)(1). If, as the Supreme Court stated in Davis, it is a "complete miscarriage of justice" to punish a defendant for an act that the law does not make criminal, thereby warranting resort to the collateral remedy afforded by § 2255, it must follow that it is the same "complete miscarriage of justice" when the AEDPA amendment to § 2255 makes that collateral remedy unavailable. In that unusual circumstance, the remedy afforded by § 2255 is "inadequate or ineffective to test the legality of [Dorsainvil's] detention."

There is no reason why § 2241 would not be available under these circumstances, provided of course that Dorsainvil could make the showing necessary to invoke habeas relief, an issue for the district court.Id. at 250-51 (emphasis added).

Post Dorsainvil, a federal prisoner confined within the Third Circuit must satisfy two conditions in order to satisfy § 2255's savings clause and be permitted to utilize § 2241 to collaterally attack his federal sentence in the district of his confinement:

First, a prisoner must assert a "claim of 'actual innocence' on the theory that 'he is being**{2018 U.S. Dist. LEXIS 14}** detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision' and our own precedent construing an intervening Supreme Court decision"-in other words, when there is a change in statutory caselaw that applies retroactively in cases on collateral review. [United States v. Tyler, 732 F.3d 241, 246 (3d Cir. 2013] (quoting Dorsainvil, 119 F.3d at 252). And second, the prisoner must be "otherwise barred from challenging the legality of the conviction under § 2255." Id. Stated differently, the prisoner has "had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate." Dorsainvil, 119 F.3d at 251. It matters not whether the prisoner's claim was viable under circuit precedent as it existed at the time of his direct appeal and initial § 2255 motion. What matters is that the prisoner has had no earlier opportunity to test the legality of his detention since the intervening Supreme Court decision issued.Bruce, 868 F.3d at 180.

In Claim 2, Viola contends that he is actually innocent and seeks to have his sentence vacated, but his claim is not premised upon the theory he is being detained for conduct that has been rendered

non-criminal by an intervening decision of statutory construction issued by the Supreme Court. Therefore,**{2018 U.S. Dist. LEXIS 15}** he cannot satisfy the requirements that are necessary in the Third Circuit for a district court to exercise jurisdiction of his claim of actual innocence under § 2241.

Viola is not without any mechanism to challenge the validity of his criminal sentence if in fact the alleged new evidence upon which he relies does support a credible claim that he is actually innocent. He can apply to the Sixth Circuit Court of Appeals for authorization to file a second or successive § 2255 motion on the grounds that there is "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense[.]" 28 U.S.C. § 2255(h)(1). For the purpose of disposing of the § 2241 habeas petition that is now before this Court, however, it is irrelevant whether that court of appeals would authorize him to file a second or successive § 2255 motion. Even if it denied his application, this Court would still lack jurisdiction to consider the challenge to the validity of his convictions and sentence that he makes in Claim 2 for the reasons already discussed. Dorsainvil, 119 F.3d at 251 ("We do not suggest that § 2255 would be 'inadequate or**{2018 U.S. Dist. LEXIS 16}** ineffective' so as to enable a second petitioner to invoke § 2241 *merely because that petitioner is unable to meet the stringent gatekeeping requirements of [AEDPA's amendments to] § 2255. Such a holding would effectively eviscerate Congress's intent in amending § 2255.*") (emphasis added). See also Cradle v. United States ex rel. Miner, 290 F.3d 536, 539 (3d Cir. 2002) (per curiam) ("Section 2255 is not inadequate or ineffective merely because the sentencing court does not grant relief, the one-year statute of limitations has expired, or the petitioner is unable to meet the stringent gatekeeping requirements of the amended § 2255."); Young v. Yost, 363 F.App'x 166, 169 (3d Cir. 2010) (per curiam) ("Section 2255 is not 'inadequate or ineffective' merely because the Fourth Circuit Court of Appeals denied [the petitioner] permission to file a second or successive § 2255 motion raising his present claim."); Gilbert v. United States, 640 F.3d 1293, 1308 (10th Cir. 2011) ("We join all other circuits in refusing to interpret the savings clause in a way that would drop the § 2255(h) bar on second and successive motions, defeat its purpose, and render it pointless."). Under the law of the Third Circuit, Viola can only attack the validity of his sentence by way of a § 2241 petition if he is in the circumstance confronted by the petitioner in Dorsainvil. Our court of appeals in Bruce recently made clear what that entails and Viola has not met**{2018 U.S. Dist. LEXIS 17}** the requirements as outlined in that decision.

As for Viola's challenge to the restitution part of the sentence imposed by the District Court for the Northern District of Ohio (Claim 1), it is not a challenge to the validity of his custody and, therefore, is not a cognizable habeas claim. Arnaiz v. Warden, Federal Satellite Low, 594 F.3d 1326, 1328-30 (11th Cir. 2010) (per curiam) (petitioner cannot collaterally attack the restitution part of his federal sentence in § 2241 habeas petition); Easton v. Williamson, 267 F.App'x 116, 117 (3d Cir. 2008) (same); United States v. Ross, 801 F.3d 374, 380-82 (3d Cir. 2015) (petitioner could not challenge the monetary component of the district court's sentence (a $100 special assessment) in a § 2255 motion); but see Weinberger v. United States, 268 F.3d 346, 351-52 (6th Cir. 2001) (allowing a § 2255 claim challenging restitution if there is a meritorious claim of ineffective assistance of counsel).

Finally, although § 2241 does "confer[ ] habeas jurisdiction to hear the petition of a federal prisoner who is challenging not the validity but the execution of his federal sentence[,]"3McGee v. Martinez, 627 F.3d 933, 935 (3d Cir. 2010) (quoting Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001) and citing Woodall v. Federal Bureau of Prisons, 432 F.3d 235, 241 (3d Cir. 2005)), Viola is not in either of his claims challenging "the execution of his federal sentence." In Cardona v. Bledsoe, 681 F.3d 533 (3d Cir. 2012), the Third Circuit Court of Appeals analyzed what it means for a federal prisoner to challenge the execution of his sentence, and it is clear that neither of Viola's claims qualify. It explained:

*In order to challenge the execution{**2018 U.S. Dist. LEXIS 18**} of his sentence under § 2241, Cardona would need to allege the BOP's conduct was somehow inconsistent with a command or recommendation in the sentencing judgment. Cardona has failed to do so here. He has not alleged that BOP's conduct was inconsistent with any express command or recommendation in his sentencing judgment.* Indeed, at oral argument, Cardona conceded that there was nothing in the judgment forbidding, or even concerning, his placement in the [Special Management Unit]. *Cardona's petition simply does not concern how BOP is "carrying out" or "putting into effect" his sentence, as directed in his sentencing judgment. Consequently, Cardona has not challenged the execution of his sentence, such that the District Court would have jurisdiction over his petition under § 2241*Cardona, 681 F.3d at 537 (emphasis added). In this case, Viola's challenge to the restitution part of his sentence (Claim 1) and his claim of actual innocence (Claim 2) do not concern how the BOP is "carrying out" or "putting into effect" the sentence the District Court for the Northern District of Ohio imposed upon him.

III. CONCLUSION

For the foregoing reasons, it is respectfully recommended that the petition for a writ of habeas corpus be dismissed**{2018 U.S. Dist. LEXIS 19}** with prejudice.4

Pursuant to the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Civil Rules, the parties are allowed fourteen (14) days from the date of this Order to file objections to this Report and Recommendation. Failure to do so will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n.7 (3d Cir. 2011).

Dated: March 9, 2018

/s/ Susan Paradise Baxter

SUSAN PARADISE BAXTER

United States Magistrate Judge

Footnotes

1

The documents filed in Viola's case before the District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit are available on PACER.

2

Section 2241 petitions must be filed in the federal district court in the district the prisoner is incarcerated because:

[t]he prisoner must direct his [§ 2241] petition to "the person who has custody over him." § 2242; see also Wales v. Whitney, 114 U.S. 564, 574, 5 S. Ct. 1050, 29 L. Ed. 277 (1885); Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494-95, 93 S. Ct. 1123, 35 L. Ed. 2d 443 (1973). Longstanding practice under this immediate custodian rule 'confirms that in habeas challenges to present physical confinement...the default rule is that the proper respondent is the warden of the facility where the prisoner is being held." Rumsfeld v. Padilla, 542 U.S. 426, 435, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004). And under the statute's jurisdiction of confinement rule, district courts may only grant habeas relief against custodians "within their respective jurisdictions." § 2241(a); see also Braden, 410 U.S. at 495, 93 S. Ct. 1123 ("[T]he language of § 2241(a) requires nothing more than

that the court issuing the writ have jurisdiction over the custodian.").Bruce, 868 F.3d at 178.
3

That is why, for example, federal prisoners often litigate in their district of confinement § 2241 petitions challenging the manner in which the Federal Bureau of Prisons (the "BOP") is carrying out the term of imprisonment imposed by another federal district court.
4

28 U.S.C. § 2253 codified standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. Federal prisoner appeals from the denial of a habeas corpus proceeding are not governed by the certificate of appealability requirement. United States v. Cepero, 224 F.3d 256, 264-65 (3d Cir. 2000) (en banc), abrogated on other grounds by Gonzalez v. Thaler, 565 U.S. 134, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012). As such, the Court should make no certificate of appealability determination in this matter.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1757

ANTHONY L. VIOLA,
Appellant

v.

WARDEN MCKEAN FCI

(W.D. Pa. No. 1-17-cv-00214)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and ROTH,* *Circuit Judges*.

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

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* Judge Roth's vote is limited to panel rehearing only.

Appendix D

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: July 11, 2019
Lmr/cc: Anthony L. Viola
Laura S. Irwin
S. Bruce Hiran

THE COURT OF COMMON PLEAS
COUNTY OF CUYAHOGA
JUSTICE CENTER
1200 ONTARIO STREET
CLEVELAND, OHIO 44113

DANIEL GAUL
Judge
(216) 443-8706

February 17, 2017

Anthony L. Viola - ID #32238-160
McKean Federal Correctional Institution
P.O. Box 8000
Bradford, PA 16701

Dear Tony:

I hope you are as well as a person can be in federal prison.

Just thought I would write to express my feelings of regret on your continued incarceration. I had hoped that your exoneration in my courtroom would have assisted you in overturning your federal conviction.

In any case, I am writing to inform you that there is a newly elected Cuyahoga County Prosecutor. His name is Mike O'Malley. His office may be willing to take a fresh look at Daniel Kasaris' misconduct in your case. If Kasaris participated in your federal case, O'Malley's office may be able to intervene, or at least support a post-release remedy before Judge Nugent.

Anyway, this is just a thought. Please let me know if I may assist you in any way.

I regard you as an extremely decent man and I do hope you will have your conviction overturned.

Sincerely,

Daniel Gaul
Judge

DG/mtl

Attachment 1

witness' prior drug use would certainly be more than reasonable, and in turn eliminate the risk of unfair prejudice to the United States.

For the reasons set forth above, the United States respectfully requests that the Court preclude the introduction at trial of any evidence or argument, or cross-examination on the subject of any witnesses' prior drug use.

In the alternative, the United States requests a voir dire hearing, outside the presence of the jury, to establish what effect, if any, a witness' prior drug use has on his/her ability to recall relevant events.

F. Conflict of Interest Issue

On March 25, 2010, the United States filed its Motion for Conflict of Interest Inquiry (Doc. #110) under seal with this Court. Because the motion was filed under seal, the United States will not detail the issue in its trial brief. However, it is the position of the United States that the conflict of interest still remains and reiterates its requested remedy.

G. Bifurcated Trial

Because the Superseding Indictment includes forfeiture counts, the United States anticipates that the trial will be bifurcated into the guilt and forfeiture phases. The United States will be seeking money judgments against each of the Defendants. The determination of the amount of the money judgments is an issue for the Court to determine, and not for jury determination. With respect to the forfeiture, see the United States' Bill of Particulars regarding forfeiture previously filed.

Attachment 2

(2) The issue of restitution still needs to be determined. However, the parties agreed in the written plea agreement that the loss caused to the lenders by Clover's fraudulent conduct exceeded $1 million. Accordingly, Clover will have a substantial restitution amount to pay, and her probation should be continued to allow the Court to oversee her restitution;

(3) As this Court knows, Clover provided false testimony during the trial of this matter. Because of her false testimony, the government did not move for the full amount of 5K1.1 contemplated by the plea agreement and, as such, Clover's sentencing guideline range 15 to 21 months in Zone D, based on an offense level of 14 with a criminal history category of I. Accordingly, Clover should have been sentenced to a term of imprisonment. However, the Court granted defense's request for a further reduction of levels pursuant to 5K1.1 and placed Clover in a range and zone allowing for a sentence of probation. Clover has already been given an extremely favorable sentence and this Court should not give her the additional benefit of the early termination of her probation;

(4) As part of her plea agreement, Clover was not prosecuted for her role in other mortgage fraud schemes, nor did the government request that this Court take into consideration at the time of sentencing her involvement in other mortgage fraud schemes as "other relevant" conduct, which would have greatly increased her guideline sentencing range. Clover has already

Attachment 3