

MAY - 6 2019

AT LONDON
ROBERT R. CARR
CLERK U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
(at London)

JOSHUA SMITH,)
Petitioner,) Civil Action No. 6:19-CV-090-CHB
v.)
WARDEN BARNHART,) **JUDGMENT**
Respondent.)

*** * * * ***

Consistent with the Memorandum Opinion and Order entered this date, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Joshua Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 [**R. 1**] is **DENIED**. Judgment is entered in favor of the Respondent with respect to all issues raised in this proceeding.
2. This action is **DISMISSED** and **STRICKEN** from the Court's docket.
3. This is a **FINAL** and **APPEALABLE** Judgment, and there is no just cause for delay.

This the 6th day of May, 2019.



Claria Horn Boom
CLARIA HORN BOOM,
UNITED STATES DISTRICT COURT JUDGE
EASTERN AND WESTERN DISTRICTS OF
KENTUCKY

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JOSHUA SMITH,)
Petitioner,) Civil Action No. 6:19-CV-090-CHB
v.)
WARDEN BARNHART,) **MEMORANDUM OPINION**
Respondent.) **AND ORDER**
)

*** * * * *

Joshua Smith is an inmate at the Federal Correctional Institution in Manchester, Kentucky. Proceeding without a lawyer, Smith filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. [R. 1] This matter is now before the Court on initial screening pursuant to 28 U.S.C. § 2243. *See Alexander v. Northern Bureau of Prisons*, 419 F. App'x 544, 545 (6th Cir. 2011). For the reasons set forth below, the Court will deny Smith's petition.

In 2008, a jury convicted Smith of multiple federal crimes for his part in a multi-defendant drug conspiracy in Tennessee. *See United States v. Joshua Smith*, No. 1:07-cr-146 at R. 257 (E.D. Tenn. 2008). Those crimes included conspiracy to distribute more than five kilograms of cocaine and 100 kilograms of marijuana, as well as using a communication facility to commit a drug offense, all in violation of 21 U.S.C. §§ 841, 843, 846. *See id.* At sentencing, the trial court determined that Smith was a career offender pursuant to section 4B1.1 of the United States Sentencing Guidelines (U.S.S.G.) because he had at least two prior felony convictions for either a crime of violence or controlled substance offense. As a result, Smith's sentence was enhanced, and the trial court sentenced him to a total of 380 months in prison. *See id.* at Rs. 347, 386. Smith

then filed a direct appeal, but the United States Court of Appeals for the Sixth Circuit affirmed Smith's convictions and sentence and, in doing so, specifically held that "the district court did not err in designating Joshua [Smith] as a career criminal." *United States v. Smith et al.*, 395 F. App'x 223, 235 (6th Cir. 2010). Finally, Smith tried to vacate his sentence pursuant to 28 U.S.C. § 2255, but his efforts were unsuccessful.

Smith has now filed a § 2241 petition with this Court, and it is clear that he is attempting to challenge the validity of his sentence in his underlying criminal case. Smith primarily argues that, in light of intervening case law, his prior convictions are no longer valid predicate offenses for purposes of a sentence enhancement under U.S.S.G. § 4B1.1. [R. 1 at 4-5; R. 1-1 at 2-17]. That said, Smith also argues that the trial court improperly enhanced his sentence under other provisions of the guidelines, including U.S.S.G. §§ 2D1.1 and 3B1.1, and miscalculated his base offense level. [R. 1-1 at 27-32]. Ultimately, Smith asks this Court to "correct[] his sentence" and "resentenc[e] him to the statutory mandatory minimum of 240 months." [R. 1-1 at 32].

Smith's petition, however, constitutes an impermissible collateral attack on his sentence. Although a federal prisoner may challenge the legality of his sentence on direct appeal and through a timely § 2255 motion, he generally may not do so in a § 2241 petition. *See United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001) (explaining the distinction between a § 2255 motion and a § 2241 habeas petition). After all, a § 2241 petition is usually only a vehicle for challenges to actions taken by prison officials that affect the way the prisoner's sentence is being carried out, such as computing sentence credits or determining parole eligibility. *See Terrell v. United States*, 564 F.3d 442, 447 (6th Cir. 2009). Simply put, Smith cannot use a § 2241 petition as a way of challenging his sentence.

It is true that, in *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016), the United States Court of Appeals for the Sixth Circuit indicated for the first time that a prisoner may challenge his sentence in a § 2241 petition. However, in doing so, the court expressly limited its decision to the following, narrow circumstances:

(1) prisoners who were sentenced under the mandatory guidelines regime pre-*United States v. Booker*, 543 U.S. 220 . . . (2005), (2) who were foreclosed from filing a successive petition under § 2255, and (3) when 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.

Id. at 599-600.

Those circumstances do not apply in this case. That is because the trial court sentenced Smith in 2008, well after the Supreme Court's decision in *Booker* made the sentencing guidelines advisory rather than mandatory. On this basis alone, Smith's claims do not fall within *Hill*'s limited exception for bringing a § 2241 petition to challenge his federal sentence. *See Loza-Gracia v. Streeval*, No. 18-5923 (6th Cir. March 12, 2019) ("Loza-Gracia cannot proceed under *Hill* because he was sentenced in 2011, long after the Supreme Court's January 2005 *Booker* decision made the guidelines advisory rather than mandatory."); *Contreras v. Ormond*, No. 18-5020 (6th Cir. Sept. 10, 2018) ("[The petitioner's] case does not fall within the narrow exception recognized by *Hill* because he was sentenced post *Booker* in 2009, under the advisory sentencing guidelines."); *Arroyo v. Ormond*, No. 17-5837 (6th Cir. April 6, 2018) (holding that since the petitioner was sentenced after *Booker*, his "claim does not fall within *Hill*'s limited exception for bringing a § 2241 habeas petition to challenge a federal sentence"). Thus, Smith's attacks on his sentence are unavailing. Finally, to the extent that Smith's sentence was also enhanced pursuant to other provisions in the law, he has not clearly identified a subsequent, retroactive change in

statutory interpretation by the Supreme Court that reveals that his sentence was somehow improper. In short, Smith's § 2241 petition is without merit.

Accordingly, it is **HEREBY ORDERED** as follows:

1. Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 [R. 1] is **DENIED**.
2. This action is **DISMISSED** and **STRICKEN** from the Court's docket.
3. A corresponding Judgment will be entered this date.

This the 6th day of May, 2019.



Claria Horn Boom

CLARIA HORN BOOM,
UNITED STATES DISTRICT COURT JUDGE
EASTERN AND WESTERN DISTRICTS OF
KENTUCKY

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 19-5536

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Sep 25, 2019

DEBORAH S. HUNT, Clerk

JOSHUA SMITH,

)

Petitioner-Appellant,

)

v.

)

SANDRA BUTLER, Warden,

)

Respondent-Appellee.

)

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

Q R D E R

Before: MOORE, McKEAGUE, and READLER, Circuit Judges.

Joshua Smith, a pro se federal prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus under 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).

In 2008, a jury convicted Smith of conspiracy to distribute 5 kilograms or more of cocaine hydrochloride and 100 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(A), and (b)(1)(B), and two counts of conspiracy to use a communication facility to distribute controlled substances, in violation of 21 U.S.C. §§ 846 and 843(b). Based on the amount of drugs involved in the offense, plus enhancements for possessing a firearm and being an organizer or leader of criminal activity, the district court concluded that Smith's total offense level under the Sentencing Guidelines was 38. Smith's offense level, combined with his criminal history category of VI, produced an advisory sentencing range of 360 months to life imprisonment. The district court also determined that Smith was a career offender under USSG § 4B1.1 based on his

prior convictions in Tennessee for attempting to sell less than one-half gram of cocaine and attempted kidnapping. Smith's career-offender designation also produced an advisory sentencing range of 360 months to life imprisonment. The district court sentenced Smith to a total term of 380 months of imprisonment. We affirmed. *See United States v. Smith*, 395 F. App'x 223 (6th Cir. 2010).

In 2011, Smith moved to vacate his sentence under 28 U.S.C. § 2255. The district court denied the motion, and Smith did not appeal. We denied Smith permission to file successive motions to vacate in 2016 and 2019. *See In re Smith*, No. 19-5357 (6th Cir. July 23, 2019) (order); *In re Smith*, No. 16-5480 (6th Cir. Oct. 6, 2016) (order).

In April 2019, Smith filed a § 2241 habeas petition in the district court, raising four claims. Relying on *Mathis v. United States*, 136 S. Ct. 2243 (2016), and our decision in *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016), Smith claimed that his convictions for attempted sale of cocaine and attempted kidnapping were no longer predicate offenses for the career-offender enhancement. He also argued that his § 846 conviction no longer qualified as an underlying "controlled substance offense" that triggers the enhancement. Smith then claimed that the district court's determination of the amount of drugs involved in the offense was wrong, and that the court erred in applying the enhancements for his role in the offense and possessing a firearm. Smith asked the district court to resentence him to the mandatory minimum term of 240 months of imprisonment. The district court denied Smith's motion, finding that he could not challenge his career-offender sentence under § 2241 because he was sentenced under the advisory Sentencing Guidelines, *see Hill*, 836 F.3d at 599-600, and he failed to identify a retroactive Supreme Court decision that showed that the other sentencing enhancements were improper.

We review de novo a district court's judgment denying a § 2241 habeas petition. *See Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999) (per curiam). "A federal prisoner must challenge the legality of his detention by motion under 28 U.S.C. § 2255, but may challenge the manner or execution of his sentence under 28 U.S.C. § 2241." *Wooten v. Cauley*, 677 F.3d 303, 306 (6th Cir. 2012). Second or successive § 2255 motions are usually barred unless the motion is

based on newly discovered exculpatory evidence or a new rule of constitutional law that applies retroactively to the prisoner's case. *See* 28 U.S.C. § 2255(h); *In re Hanserd*, 123 F.3d 922, 929 (6th Cir. 1997). Under the "savings clause" of § 2255(e), however, a federal prisoner may challenge his conviction or imposition of sentence under § 2241 if the remedy available under § 2255 is "inadequate or ineffective to test the legality of his detention." *See Charles*, 180 F.3d at 756 (quoting 28 U.S.C. § 2255(e)).

In *Hill*, we held that a prisoner may utilize the § 2255(e) savings clause to file a § 2241 habeas petition challenging his sentence if he shows: "(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." *Hill*, 836 F.3d at 595. In *Snider v. United States*, 908 F.3d 183 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 1573 (2019), we held that a claim that the district court erroneously sentenced the petitioner as a career offender under the advisory Sentencing Guidelines does not present a cognizable claim for relief under § 2255 if he received a sentence that was within the guideline range without the career-offender enhancement, stating that such a sentence "cannot be plausibly characterized as a 'fundamental defect which inherently results in a complete miscarriage of justice.'" *Id.* at 191 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

Even if Smith's career-offender designation is invalid in view of *Mathis*,¹ including the use of his § 846 conviction to apply the enhancement,² the allegedly misapplied sentence does not result in a miscarriage of justice because his advisory sentencing range was 360 months to life

¹ *See also United States v. Havis*, 927 F.3d 382, 386-87 (6th Cir. 2019) (en banc) (holding that attempt crimes are not included within the career-offender guideline's definition of "controlled substance offense").

² *Cf. United States v. McCollum*, 885 F.3d 300, 307-09 (4th Cir. 2018) (holding that conspiracy to commit murder in aid of racketeering, 18 U.S.C. § 1959(a)(5), is broader than generic conspiracy because committing an overt act is not an element of the offense, and therefore it is not a "crime of violence" under the career-offender guideline); *but see United States v. Williams*, 53 F.3d 769, 772 (6th Cir. 1995) ("[W]e hold that the Sentencing Commission did not exceed its statutory authority by including conspiracy within the definition of a 'controlled substance offense' under the career offender guidelines.").

imprisonment without the enhancement, and he received a sentence within that range. *See id.* And Smith did not identify a previously unavailable, retroactive case of statutory interpretation that shows that the district court's calculation of the drug quantity involved in the offense was erroneous or that the other sentencing enhancements that he challenged in his petition no longer apply to him. *See Hill*, 836 F.3d at 595. The district court therefore correctly concluded that relief was unavailable to Smith under § 2241.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt
Deborah S. Hunt, Clerk

No. 19-5536

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSHUA SMITH,)
Petitioner-Appellant,)
v.)
SANDRA BUTLER, Warden,)
Respondent-Appellee.)

FILED
Nov 01, 2019
DEBORAH S. HUNT, Clerk

O R D E R

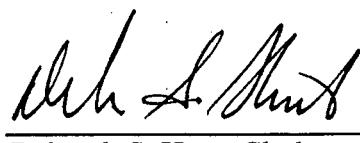
Before: MOORE, McKEAGUE, and READLER, Circuit Judges.

Joshua Smith, a pro se federal prisoner, petitions the court to rehear its order of September 25, 2019, affirming the district court's judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2241.

Smith has not shown that we overlooked or misapprehended a point of law or fact in affirming the district court's judgment. *See* Fed. R. App. P. 40(a)(2).

Accordingly, we **DENY** the petition.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk