No. 18-6171

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 21, 2019
DEBORAH S. HUNT, Clerk

BOBBY G. PULLEN,

Petitioner-Appellant,

v.

J. RAY ORMOND, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: SUHRHEINRICH, BATCHELDER, and NALBANDIAN, Circuit judges.

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

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Clerk

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Filed: November 21, 2019

Mr. Bobby G. Pullen
U.S.P. Atwater
P.O. Box 019001
Atwater, CA 95301

Re: Case No. 18-6171, *Bobby Pullen v. J. Ormond*
Originating Case No.: 6:17-cv-00155

Dear Mr. Pullen,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Thomas Lee Gentry
Mr. Kyle M. Melloan
Mr. Charles P. Wisdom Jr.

Enclosure

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-6171

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BOBBY G. PULLEN,

Petitioner-Appellant,

v.

J. RAY ORMOND, Warden,

Respondent-Appellee.

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

ORDER

Before: SUHRHEINRICH, BATCHELDER, and NALBANDIAN, Circuit Judges.

Bobby G. Pullen, a federal prisoner proceeding pro se, appeals a district court judgment denying without prejudice 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).

In 1999, a jury found Pullen guilty of possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). Because Pullen had two prior felony convictions for crimes of violence as defined by USSG § 4B1.2(a), the United States District Court for the District of Kansas sentenced him as a career offender, under the then-mandatory federal sentencing guidelines, to serve 262 months of imprisonment followed by five years of supervised release. The United States Court of Appeals for the Tenth Circuit affirmed Pullen's conviction. *United States v. Pullen*, No. 99-3226, 2000 WL 1480362 (10th Cir. Oct. 6, 2000) (unpublished).

In 2006, Pullen filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, which the district court denied as time-barred. Pullen did not appeal. Pullen sought post-judgment relief under Federal Rule of Civil Procedure 60(b), which the district court denied. The Tenth Circuit Court of Appeals denied a certificate of appealability, *United States v. Pullen*, 285 F. App'x 535 (10th Cir. 2008), and the United States Supreme Court denied certiorari.

In 2015, the district court denied Pullen's motion for a sentence modification under 18 U.S.C. § 3582(c)(2). He did not appeal.

In 2016, the Tenth Circuit Court of Appeals granted Pullen "authorization to file a second or successive § 2255 motion in the district court to raise a claim based on *Johnson v. United States*," 135 S. Ct. 2551 (2015). *In re Pullen*, No. 16-3053 (10th Cir. May 9, 2016) (unpublished). In his second or successive motion to vacate, filed through counsel, Pullen asserted that he no longer qualified for a career-offender sentence enhancement under USSG § 4B1.1 because his prior Missouri felony escape-from-confinement conviction no longer qualified as a crime of violence after *Johnson*. In a supplemental brief filed after *Beckles v. United States*, 137 S. Ct. 886 (2017) was decided, Pullen challenged the mandatory sentencing guidelines, under which he was sentenced, on vagueness grounds.

The district court dismissed Pullen's motion, concluding that he did not demonstrate that it was based on a new, retroactively applicable, rule of constitutional law, and granted a certificate of appealability as to whether the motion satisfied the requirements of 28 U.S.C. § 2255(h)(2). The Tenth Circuit Court of Appeals affirmed, concluding that Pullen's second or successive motion to vacate was properly dismissed under § 2255(h)(2) because "*Johnson* did not create a new rule of constitutional law applicable to the mandatory Guidelines." *United States v. Pullen*, 913 F.3d 1270, 1285 (10th Cir. 2019).

While his second or successive § 2255 proceedings were pending, and while he was confined in federal prison in Kentucky, Pullen filed this § 2241 petition. Pullen asserted that his sentence was erroneously enhanced under the career-offender provision of § 4B1.1 because his prior felony escape conviction "is not categorically a crime of violence." He relied on *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016). The

district court denied Pullen's petition without prejudice, finding it premature because his second or successive § 2255 proceedings were, at that time, pending on appeal to the Tenth Circuit Court of Appeals.

Pullen filed a timely appeal, which we review de novo. *Wooten v. Cauley*, 677 F.3d 303, 306 (6th Cir. 2012); *see also 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.

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 § 2255(e)). "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.

That said, a § 2241 petition may be used to challenge a sentence under the savings clause of § 2255(e) 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." *Hill*, 836 F.3d at 595. This test has been applied to a "narrow subset" of circumstances: when the petitioner was (1) "sentenced under the mandatory [sentencing] guidelines regime" before *United States v. Booker*, 543 U.S. 220 (2005); the petitioner was (2) "foreclosed from filing a successive petition under § 2255"; and (3) "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." *Hill*, 836 F.3d at 599-600.

The district court found that Pullen's § 2241 petition failed under *Hill's* second prong: he could not make a colorable argument that his remedy was "inadequate and ineffective" under § 2255 when, at that time, "Pullen's pending § 2255 motion may render his claims in this proceeding moot." (R. 33 at 3.) The district court was correct. We reiterated in *Hill* that "our decision addresse[d] only a narrow subset of § 2241 petitions,"—and those petitions include only those from prisoners "who are foreclosed from filing a successive petition under § 2255." 836 F.3d at 599–600. For example, when Hill filed his § 2241 petition, it had been years since courts denied his various § 2255 challenges, and it was undisputed that he was "barred from filing a successive § 2255 petition." *Id.* at 593, 600.

In contrast here, at the time Pullen filed his § 2241, he was not "foreclosed" from relief under § 2255. Instead, Pullen's § 2255 motion argued that his Missouri felony-escape conviction no longer qualified as a predicate offense for his career-offender enhancement. This is the same argument he now makes in his § 2241 petition to this circuit. So if Pullen won his § 2255 in the Tenth Circuit—vacating his sentence—his § 2241 would have become moot. As a result, Pullen cannot satisfy the narrow requirements in *Hill*. Indeed, to hold otherwise would expand the scope of *Hill* and invite premature filings of § 2241 petitions in this circuit.

This result is also consistent with how we routinely treat § 2241 petitions while a § 2255 motion is pending. As the government highlights, we have denied § 2241 petitions in a variety of situations when a § 2255 motion remains pending. (*See* Appellee's Br. at 7–8.) And Pullen offers no persuasive reason for us to depart from this practice. *See, e.g.*, *Cox v. United States*, No. 18-4048 (6th Cir. Feb. 19, 2019) (holding that § 2241 petitioner was unable to show that § 2255 remedy was inadequate or ineffective because his § 2255 petition remained pending in New Jersey); *Cox v. United States*, No. 16-4074 (6th Cir. Mar. 1, 2017) (same); *Besser*, 478 F. App'x at 1001 (affirming denial of post-judgment motions for relief from dismissal of § 2241 petition as premature due to pending § 2255 motion asserting the same claim asserted in § 2241 petition).

To be sure, the Tenth Circuit has since denied Pullen's § 2255. *See Pullen*, 913 F.3d at 1280–84. But that simply means that a § 2241 petition may be ripe, should Pullen choose to refile. That is why, after all, the district court dismissed Pullen's petition *without* prejudice, which was in its discretion to do. *See Carter v. Mitchell*, 829 F.3d 455, 464 (6th Cir. 2016); *Moon v. Unum Provident Corp.*, 461 F.3d 639, 642 (6th Cir. 2006) ("This Circuit has defined an abuse of discretion as definite and firm conviction that the trial court committed a clear error of judgment.') (internal quotation marks and citation omitted).

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

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 18-6171, *Bobby Pullen v. J. Ormond*
Originating Case No. 6:17-cv-00155

Dear Mr. Pullen and Counsel:

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager

cc: Mr. Robert R. Carr

Enclosure

Mandate to issue