NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2641

EUGENE DAVIS,
Appellant

v.

WARDEN ALLENWOOD FCI

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 3-17-cv-00968)
District Judge: Hon. A. Richard Caputo

Argued March 31, 2020

Before: GREENAWAY, JR., PORTER, and MATEY, *Circuit Judges*.

(Opinion filed: June 24, 2020)

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OPINION*

MATEY, *Circuit Judge.*

Eugene Davis petitioned under 28 U.S.C. § 2241 challenging his Armed Career Criminal Act ("ACCA") sentence enhancement. The District Court dismissed his petition for lack of jurisdiction. We will affirm.

I. BACKGROUND

In 2009, Davis pleaded guilty in the United States District Court for the Northern District of Iowa to unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The District Court determined that Davis's three prior convictions for burglary under Iowa law qualified as "violent felonies" under the ACCA. *See* 18 U.S.C. § 924(e). That increased the penalty for his § 922(g)(1) conviction from no more than 120 months' imprisonment to at least 180 months. The District Court ultimately imposed a sentence of 210 months, a decision later affirmed on direct appeal.

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

In 2012, Davis challenged his sentence under 28 U.S.C. § 2255, asserting ineffective assistance of counsel. The District Court denied that motion and declined to grant a certificate of appealability. In 2016, the United States Court of Appeals for the Eighth Circuit denied Davis's request to file a successive § 2255 petition.[1]

Later in 2016, Davis again asked the Eighth Circuit for permission to file a successive § 2255 petition. This time, he directed the court to *Mathis v. United States*, 136 S. Ct. 2243 (2016), which held that convictions under Iowa's burglary statute did not qualify as "violent felonies" under the ACCA. But the Eighth Circuit denied his request, concluding that *Mathis* "did not announce a new rule of constitutional law." (App. at 70.) *See* 28 U.S.C. § 2255(h)(2); *cf. United States v. Peppers*, 899 F.3d 211, 230 (3d Cir. 2018).

In 2017, Davis petitioned the United States District Court for the Middle District of Pennsylvania[2] for a writ of habeas corpus under § 2241, once again relying on *Mathis* to challenge his ACCA sentence enhancement. The District Court dismissed the petition for lack of jurisdiction, and Davis timely appealed.[3]

[1] That request relied on *Johnson v. United States*, in which the Supreme Court held that ACCA's residual clause was unconstitutionally vague. 135 S. Ct. 2551, 2557 (2015).

[2] Although § 2255 petitions are filed with the sentencing court, § 2241 petitions are filed in the district of confinement. *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 178 (3d Cir. 2017). As a result, Davis's § 2255 petition was filed in the United States District Court for the Northern District of Iowa (the court that sentenced him), and his § 2241 petition was filed in the United States District Court for the Middle District of Pennsylvania (where he was confined).

[3] "The District Court had the power to ascertain its own jurisdiction, and we have appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). We exercise plenary review over the District Court's order denying [Davis's] petition for lack of jurisdiction." *Gardner v. Warden Lewisburg USP*, 845 F.3d 99, 102 (3d Cir. 2017).

II. DISCUSSION

"Motions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences." *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002). But they are not the *exclusive* means, because a prisoner may petition for a writ of habeas corpus under § 2241 if § 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

We considered the language of this "safety-valve" clause in *In re Dorsainvil*, a case involving a petitioner convicted of violating 18 U.S.C. § 924(c)(1). 119 F.3d 245, 246, 249 (3d Cir. 1997). There, the petitioner challenged his sentence under § 2255, asserting ineffective assistance of counsel and double jeopardy, but that motion was denied. *Id.* at 246. After the Supreme Court later narrowed the scope of § 924(c)(1), the petitioner asked for permission to file a successive § 2255 petition based on that decision. *Id.* at 246–47. We denied the request, but noted that "under narrow circumstances, a petitioner in [this] uncommon situation"—i.e., a petitioner "claim[ing] that he is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision," with "no other avenue of judicial review available" to "challenge his conviction"—may use the safety-valve clause of § 2255 to challenge his conviction under § 2241. *Id.* at 248, 251–52.

Davis's petition does not fall into these "narrow circumstances." He is challenging neither his conviction under § 922(g)(1), nor his Iowa burglary convictions. Instead, he claims to be no longer eligible for the fifteen-year mandatory minimum sentence under 18 U.S.C. § 924(e). But that provision is only "a sentence enhancement . . . and does not create

a separate offense." *United States v. Mack*, 229 F.3d 226, 231 (3d Cir. 2000).[4] And we have never applied *Dorsainvil* to "issues that . . . arise regarding sentencing." *Gardner v. Warden Lewisburg USP*, 845 F.3d 99, 103 (3d Cir. 2017).[5]

III. CONCLUSION

Section 2255(e) does not permit Davis to challenge his sentencing enhancement under § 2241. So we will affirm the dismissal of Davis's petition.

[4] *Cf. United States v. Abbott*, 574 F.3d 203, 211 n.5 (3d Cir. 2009) (noting that 18 U.S.C. § 924(c)—the statute at issue in *Dorsainvil*—"defines a separate offense").

[5] *See Gardner*, 845 F.3d at 102–03 (no jurisdiction over petition alleging that a judge found facts that increased the mandatory minimum sentence, in violation of *Alleyne v. United States*, 570 U.S. 99 (2013)); *Okereke*, 307 F.3d at 120–21 (no jurisdiction over petition alleging that a judge found facts that increased the maximum sentence, in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)); *see also Cradle v. U.S. ex rel. Miner*, 290 F.3d 536, 538–39 (3d Cir. 2002) (per curiam) (no jurisdiction over petition alleging that the Government never notified petitioner of its intention to pursue enhanced recidivist sentence, in violation of 21 U.S.C. § 851). We note that *Dorsainvil*'s interpretation of § 2255 deviates from the textual conclusions reached by other courts. *See, e.g.*, *Prost v. Anderson*, 636 F.3d 578, 585 (10th Cir. 2011) (explaining that § 2255's safety-valve clause only "ensur[es] the prisoner an opportunity or chance to test his argument," with "no guarantee about outcome or relief," so that "[t]he ultimate result may be right or wrong as a matter of substantive law, but the . . . clause is satisfied so long as the petitioner had an opportunity to bring and test his claim"). But *Dorsainvil* and its progeny bind our analysis.

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Argued March 31, 2020

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JUDGMENT

This cause came to be considered on appeal from the United States District Court for the Middle District of Pennsylvania and was argued on March 31, 2020.

On consideration whereof, it is now hereby **ORDERED** and **ADJUDGED** by this Court that the order of the District Court entered on June 17, 2019, is hereby **AFFIRMED**. Each party to bear its own costs.

All of the above in accordance with the Opinion of the Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: June 24, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

EUGENE DAVIS, Petitioner, v. WARDEN SPAULDING, Respondent.	NO. 3:17-CV-00968 (JUDGE CAPUTO) (MAGISTRATE JUDGE MEHALCHICK)

MEMORANDUM

Presently before me is Magistrate Judge Mehalchick's Report and Recommendation ("R&R") (Doc. 25) regarding Petitioner Eugene Davis's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1). Magistrate Judge Mehalchick recommends that Davis's Petition be dismissed for lack of jurisdiction because he cannot proceed by way of Section 2241, as he is challenging the legality of his sentence and must therefore proceed under 28 U.S.C. § 2255 (even though any new Section 2255 motion would be barred as successive). (Doc. 25 at 6-10). Davis objects, arguing that his particular situation qualifies for the "saving clause" of 28 U.S.C. § 2255(e), which would permit me to consider his Petition on the merits. (Docs. 28, 29). Although Davis might prevail in other circuits, Third Circuit precedent forecloses the possibility of habeas relief through Sections 2255(e) and 2241 on the ground Davis raises—"innocence of the sentence." The R&R will therefore be adopted, and Davis's Petition will be dismissed without prejudice for lack of jurisdiction.

I. Background

Davis's story begins in 2009, when he

> pleaded guilty to possession of a sawed-off shotgun by an armed career criminal, in violation of [18 U.S.C.] §§ 922(g)(1) and 924(e)(1) [provisions of the Armed Career Criminal Act ("ACCA").] Davis admitted in his plea agreement that he had three prior burglary convictions, each of which constituted a "violent felony" under 18 U.S.C. § 924(e)(2)(B), and that he was

> an armed career criminal. His presentence investigation report (PSR) showed that his prior burglary convictions each involved the burglary of an automobile dealership. Davis did not object to these paragraphs of the PSR. But Davis did object to the PSR's application of U.S.S.G. § 4B1.2, maintaining that commercial burglary is not a "crime of violence" for purposes of the career offender provision. At sentencing, Davis's counsel acknowledged that "the Eighth Circuit Court of Appeals has defined the 'commercial burglary' as a crime of violence for that—for the purposes of career offender." Counsel advised the district court that he was "simply including that argument to preserve that issue for appeal." The district court overruled Davis's objection[, sentencing him to 17.5 years' imprisonment.]

United States v. Davis, 414 F. App'x 891, 892 (8th Cir. 2011). The designation of Davis's previous crimes matters because if his commercial burglaries did not constitute "crimes of violence," his mandatory minimum sentence of 15 years' imprisonment would have shrunk to a 10-year *maximum* sentence. *Compare* 18 U.S.C. § 924(a)(2) *with id.* § 924(e). The Eighth Circuit affirmed the district court's sentence in 2011, though, reasoning that burglary of a commercial building constitutes a crime of violence. *Davis*, 414 F. App'x at 892. Davis's petition for a writ of certiorari was subsequently denied on November 7, 2011. *Davis v. United States*, 565 U.S. 1015 (2011).

Then, on October 18, 2012, proceeding *pro se*, Davis filed a Section 2255 motion to vacate, set aside or correct his sentence. (*See* Doc. 10-1 at 13). In his motion, Davis argued, "among other things, that counsel had rendered ineffective assistance because the burglary predicates for the ACCA did not meet the definition of generic burglary." (Doc. 29 at 6-7). But because Davis had essentially already made that argument on direct appeal, the sentencing court denied the motion. *See Davis v. United States*, No. 1:12-cv-00107-LRR, Doc. 12 at 5 (N.D. Iowa Nov. 7, 2013) (citing *United States v. Lee*, 715 F.3d 215, 224 (8th Cir. 2013)). The court declined to issue a certificate of appealability. *Id.* at 8.

Finally, in 2015 and in 2016, Davis filed two petitions for permission to file successive habeas petitions with the Eighth Circuit, pursuant to 28 U.S.C. § 2255(h). (*See* Doc. 10-1 at 15-22). In the meantime, the Supreme Court decided *Mathis v. United States*, 136 S. Ct. 2243 (2016), holding that convictions under the same Iowa burglary statute Davis was

convicted under "cannot give rise to an ACCA sentence" because the statute encompasses more than just "generic burglary." *Id.* at 2257. In other words, *Mathis* rendered Davis "innocent of the sentence" he received. But *Mathis* did not constitute "newly discovered evidence" or a "new rule of constitutional law," per 28 U.S.C. § 2255(h), so the Eighth Circuit denied Davis's petitions. (*See* Doc. 10-1 at 16, 23-24).

Accordingly, on June 5, 2017, Davis filed the instant Petition pursuant to Section 2241, arguing that he may proceed under Section 2255(e)'s saving clause, which allows courts to entertain otherwise barred petitions if "the remedy by [Section 2255] motion is inadequate or ineffective to test the legality of [the petitioner's] detention." (*See* Doc. 1). (Section 2241 petitions must be filed in the district of confinement, *Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004); Davis is housed within this district at FCC Allenwood (Doc. 1 at 1)). The Government initially agreed with Davis, stating that he was entitled to relief in the form of re-sentencing. (Doc. 10 at 1). However, Magistrate Judge Mehalchick called the parties' attention to Third Circuit precedent suggesting innocence of the sentence claims like Davis's cannot be brought in Section 2241 petitions. (*See* Doc. 15). Magistrate Judge Mehalchick appointed Davis counsel, and both sides were provided an opportunity to respond. (*See id.*; Doc. 20; Doc. 24). The Government reversed its position, arguing the Petition must be dismissed. (*See* Doc. 20). In her R&R, Magistrate Judge Mehalchick recommends that Davis's petition be dismissed for lack of jurisdiction because, as she pointed out to the parties earlier, Section 2255(e)'s saving clause does not encompass claims like Davis's. (*See* Doc. 25 at 8-10). Davis timely objected to the R&R. (Doc. 28).

The R&R and Davis's objection have been fully briefed and are now ripe for review.

II. Legal Standard

If objections to a magistrate judge's R&R are filed, I must conduct a *de novo* review of the R&R's contested portions. *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989) (citing 28 U.S.C. § 636(b)(1)(C)). I may accept, reject, or modify, in whole or in part, the factual findings or legal conclusions of the magistrate judge. *See* 28 U.S.C. § 636(b)(1); *Owens v. Beard*, 829 F. Supp. 736, 738 (M.D. Pa. 1993). Although the review is *de novo*,

the law permits me to rely on the recommendations of the magistrate judge to the extent I deem it proper. *See United States v. Raddatz*, 447 U.S. 667, 675–76 (1980). Uncontested portions of the report may be reviewed at a standard determined by the district court. *See Thomas v. Arn*, 474 U.S. 140, 154 (1985). At the least, courts should review uncontested portions for clear error or manifest injustice. *See, e.g., Cruz v. Chater*, 990 F. Supp. 375, 376-77 (M.D. Pa. 1998).

III. Discussion

Davis's objection—and ultimately, his Petition—raises a question of law: whether Section 2255(e)'s saving clause applies where a petitioner, barred from filing a successive Section 2255 motion, claims his sentence exceeds a statutory maximum due to an intervening change in statutory interpretation. Magistrate Judge Mehalchick recommends (and the Government argues) that the answer is: No, the saving clause does not apply, largely because of the Third Circuit's decisions in *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997); *Okereke v. United States*, 307 F.3d 117 (3d Cir. 2002); and *Gardner v. Warden Lewisburg USP*, 845 F.3d 99 (3d Cir. 2017). (*See* Doc. 25 at 6-10). Davis, for his part, objects, arguing that persuasive out-of-circuit precedent suggests the saving clause should apply in his case. (*See* Doc. 29 at 14-17).

Section 2255 motions "are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution," *Okereke*, 307 F.3d at 120, or in violation of federal law. As alluded to before, second or successive motions under Section 2255 are not permitted, except under two circumstances: where the successive motion "contain[s]" (1) "newly discovered evidence" that would convincingly call into question the petitioner's guilt; or (2) a previously unavailable, retroactively applicable "new rule of constitutional law." 28 U.S.C. § 2255(h). There is, in effect, a third circumstance under which a successive motion is permitted: the "saving clause" of Section 2255(e). That circumstance requires the petitioner to show that although he "has failed to apply for relief, by motion, to the court which sentenced him" or "such court has denied him relief," "the remedy by motion is inadequate or ineffective to test the legality

of his detention." 28 U.S.C. § 2255(e). If the petitioner can make that showing, he can then proceed under Section 2241 and have his petition heard on its merits. *See In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997). The Third Circuit's decisions in *Dorsainvil*, *Okereke*, and *Gardner* interpret the meaning of the saving clause—specifically, whether "the remedy by motion" in a given case "is inadequate or ineffective."

In *Dorsainvil*, the petitioner "was convicted of using a gun in connection with a drug crime," even though the gun may have been merely present at the scene of the drug crime—conduct which fell within the scope of the statute of conviction at the time of conviction. *Pollard v. Yost*, 406 F. App'x 635, 637 (3d Cir. 2011). The Supreme Court later determined, after the petitioner "had exhausted his direct appeals and a § 2255 petition," that the "mere presence of a gun at the scene of a drug crime" does not constitute "use." *Id.* (citing *Bailey v. United States*, 516 U.S. 137 (1995)). The petitioner argued that the Supreme Court's decision effectively rendered him innocent, and that he deserved a habeas remedy. *Id.* The Third Circuit agreed, holding that the petitioner could proceed under Section 2241 pursuant to Section 2255(e)'s saving clause. *Dorsainvil*, 119 F.3d at 251. The court reasoned that if "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, [as the Supreme Court concluded in *Davis v. United States*, 417 U.S. 333, 346-47 (1974),] it must follow that it is the same 'complete miscarriage of justice' when [Section 2255's gatekeeping provisions] make[] that collateral remedy unavailable." *Id.* "In that unusual circumstance," the court explained, "the remedy afforded by § 2255 is 'inadequate or ineffective to test the legality of [the petitioner's] detention.'" *Id.* But the court cautioned that Section 2255 is not "inadequate or ineffective" "merely because th[e] petitioner is unable to meet the stringent gatekeeping requirements . . . ." *Id.*

Judge Sloviter, who authored the opinion in *Dorsainvil*, explained *Dorsainvil*'s limits in *Okereke v. United States*, 307 F.3d 117 (3d Cir. 2002). In *Okereke*, the petitioner argued that although he had exhausted his direct appeals and a Section 2255 petition, his collateral

attack on his sentence on the basis of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (a decision unavailable at the time of his direct appeal and first Section 2255 petition) was cognizable under *Dorsainvil* and Section 2255(e). *Okereke*, 307 F.3d at 120. The court disagreed. *Id. Dorsainvil* involved an "intervening change in law" that "potentially made the crime for which that petitioner was convicted non-criminal," whereas "*Apprendi* dealt with sentencing and did not render conspiracy to import heroin, the crime for which Okereke was convicted, not criminal." *Id.* Thus, even though *Apprendi* may have required Okereke receive a lesser sentence than that which he received, Section 2255 "was not inadequate or ineffective for Okereke to raise his *Apprendi* argument." *Id.* at 121.

Gardner v. Warden Lewisburg USP, 845 F.3d 99 (3d Cir. 2017) reaffirmed that *Dorsainvil* (and by extension, the saving clause) does not extend to sentencing error challenges. Gardner, like Okereke, argued that a new Supreme Court decision—*Alleyne v. United States*, 133 S. Ct. 2151 (2013)—rendered his sentence of life in prison unlawful because all sentence-enhancing facts were not submitted to a jury. *Gardner*, 845 F.3d at 102. But Gardner had already exhausted his direct appeals and filed an unsuccessful Section 2255 motion. *Id.* at 101. Accordingly, the court held that even though Gardner could not surmount Section 2255's gatekeeping requirements, the remedy afforded by Section 2255 was not "inadequate or ineffective." *Id.* at 103. This result was dictated, the court explained, under *Okereke*'s logic: new Supreme Court decisions that do not render "previously criminal conduct noncriminal" do not trigger *Dorsainvil* and the saving clause. *Id.* at 102-03. Holding otherwise would allow the saving clause to "swallow the rule that habeas claims presumptively must be brought in 2255 motions." *Id.* at 103.

That brings me to Davis's Petition, which alleges he was unlawfully deemed a career offender. I agree with Magistrate Judge Mehalchick that *Gardner* and *Okereke* preclude application of *Dorsainvil* and the saving clause in Davis's case. There is no principled way to distinguish Davis's claim—that his sentence should be lower because he should not have been designated a career offender per *Mathis*—from the claims of the petitioners in *Gardner* and *Okereke*. Both sets of claims involve petitioners barred from filing successive petitions

who argue, on the basis of new Supreme Court decisions, they have been unlawfully *sentenced*. But *Dorsainvil* and the saving clause are limited, at least in the Third Circuit, to claims of *actual innocence—i.e.*, that the petitioner should not have been detained at all. That is ostensibly because it would only be a "complete miscarriage of justice" for a potentially innocent petitioner, who "never had an opportunity to challenge his conviction as inconsistent with [a new Supreme Court decision,]" to have no habeas remedy, *Dorsainvil*, 119 F.3d at 251—even though a miscarriage of justice may be in the eye of the beholder, *see McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1111 (11th Cir. 2017) (Wilson, J., dissenting), and even though the *Dorsainvil* petitioner, under other courts' logic, already had his habeas remedy because he had the opportunity to challenge his conviction on the ground that later carried the day in the Supreme Court, *see Lewis v. English*, 736 F. App'x 749, 752 (10th Cir. 2018) ("Lewis at least had the *opportunity* to" argue his position "in the face of conflicting Fifth Circuit precedent" and "convince[] the Supreme Court or en banc Fifth Circuit that his position was correct"); *McCarthan*, 851 F.3d at 1087 ("[I]f McCarthan had raised his claim earlier, perhaps he could have been the successful litigant that [the petitioners in relevant Supreme Court cases] later came to be. . . . McCarthan, like [those petitioners,] had a meaningful opportunity to present his claim and test the legality of his sentence before the court of appeals and before the Supreme Court. A test often failed can nevertheless be an adequate test.") (quotation omitted); *Brown v. Caraway*, 719 F.3d 583, 598 (7th Cir. 2013) (Easterbrook, C.J., concerning the circulation under Circuit Rule 40(e)) ("The reason *Begay* came out as and when it did was that Begay made his argument at sentencing and pursued it all the way to the Supreme Court. Brown could have done the same but didn't."). Regardless, although Davis's situation "seems to fall between [*Dorsainvil* and *Okereke*,]" *United States v. Doe*, 810 F.3d 132, 160 (3d Cir. 2015), *Gardner* clarifies that only Supreme Court decisions that render previously criminal conduct noncriminal trigger the saving clause. *See Gardner*, 845 F.3d at 102-03. Since Davis is challenging his sentence, he cannot meet this standard.

Davis first argues that he is not actually challenging his sentence, but rather

challenging "his conviction and punishment under the ACCA, Section 924(e)." (Doc. 29 at 12). But Section 924(e) is a "penalty provision" which provides the "punishment associated with violating [18 U.S.C. § 922(g)(1).]" *United States v. Muhammad*, 146 F.3d 161, 163 (3d Cir. 1998). If Davis were granted habeas relief, his conviction under Section 922(g)(1) would not be impacted, resulting in a new sentence of not more than 10 years' imprisonment under the "default" penalty provision of Section 924(a)(2). *See, e.g.*, *United States v. Mathis*, 911 F.3d 903, 906 (8th Cir. 2018) (affirming Mathis's new 80-month sentence after remand from the Supreme Court; Mathis originally pled guilty to violations of 18 U.S.C. §§ 922(g)(1) and 924(e)). So Davis is claiming he is innocent of his sentence, not his conviction.

In the alternative, even if he is challenging his sentence, Davis contends that the saving clause is not limited by its terms to "claims involving only guilt or actual innocence[:]" it applies where a Section 2255 motion would be inadequate or ineffective "to test the *legality of his detention*[,]" not just the legality of his conviction. (Doc. 29 at 10) (emphasis in original) (quotation omitted). That is a convincing argument, but it is beside the point. *Gardner* and *Okereke* do not interpret the word "detention" in Section 2255(e), they interpret the words "inadequate or ineffective." That a petitioner is challenging the legality of his detention is a necessary, but not sufficient, condition to proceeding under the saving clause. Davis still has to show the inadequacy or ineffectiveness of his remedy by Section 2255 motion—which, under *Gardner* and *Okereke*, he cannot do.

Davis next attempts to distinguish *Gardner* on the ground that *Alleyne*, the new Supreme Court decision the petitioner in that case relied on, addressed a change to sentencing procedure as opposed to a "substantive" change like in *Mathis*. (Doc. 29 at 15). I do not find that reasoning persuasive. The only case Davis relies on for that distinction dealt with whether the Supreme Court's *Johnson* decision, which held the ACCA's residual clause unconstitutionally vague, "announced a substantive rule that has retroactive effect in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (holding it did). Neither the Court's holding in *Welch* nor its logic distinguishing substantive

rules from procedural ones impacts the application of *Dorsainvil* to the present case. The question under *Dorsainvil*, as *Gardner* clarifies, is whether the new Supreme Court decision "establish[es] a rule that ma[kes] prior criminal conduct noncriminal." *Gardner*, 845 F.3d at 103. *Gardner* does note that a "change in substantive law" led to the *Dorsainvil* exception; but it goes on to explain that the saving clause "provides a safety valve for actual innocence," not one through "which all sentencing issues based on new Supreme Court decisions could be raised via § 2241 petitions." *Id.* Here, Davis relies on *Mathis*, but as Magistrate Judge Mehalchick notes, *Mathis* did not render Davis's conduct noncriminal. (Doc. 25 at 9); *see Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016) (holding convictions under Iowa's burglary statute "cannot give rise to an ACCA sentence"). Thus, Davis cannot take advantage of the saving clause.

One cannot blame Davis for trying, though. Compounding the confusion are conflicting statements in non-precedential Third Circuit opinions on whether innocence of the sentence claims like Davis's might be cognizable in Section 2241 petitions. *Compare In re Baer*, 763 F. App'x 278 (3d Cir. 2019) ("[W]e have not determined whether § 2255(e)'s saving clause is available when a prisoner, like Baer, argues that an intervening U.S. Supreme Court case renders his career-offender designation invalid[.]"), *Thomas v. Warden Fort Dix FCI*, 712 F. App'x 126, 128 n.3 (3d Cir. 2017) ("We have not determined whether § 2255(e)'s saving clause is available when a defendant seeks to challenge his career-offender designation . . . .") (citation omitted), *and Pollard v. Yost*, 406 F. App'x 635, 638 (3d Cir. 2011) ("[W]e do not foreclose the possibility that *Dorsainvil* could be applied to a petitioner who can show that his or her sentence would have been lower but for a change in substantive law made after exhaustion of the petitioner's direct and collateral appeals under § 2255."), *with Murray v. Warden Fairton FCI*, 710 F. App'x 518, 520 (3d Cir. 2018) ("We have not held that innocence-of-the-sentence claims fall within the exception to the rule that habeas claims must be brought in § 2255 motions.") (citing *Gardner*, 845 F.3d at 103), *Pearson v. Warden Canaan USP*, 685 F. App'x 93, 96 (3d Cir. 2017) ("§ 2241 is not available for an intervening change in the sentencing laws.") (citing *Okereke*, 307 F.3d at

120-21), *Scott v. Shartle*, 574 F. App'x 152, 155 (3d Cir. 2014) ("[B]ecause [petitioner] is challenging his career offender designation and is not claiming that he is now innocent of the predicate offense, he does not fall within the 'safety valve' exception created in *In re Dorsainvil* and cannot proceed under § 2241."), *and United States v. Brown*, 456 F. App'x 79, 81 (3d Cir. 2012) (Section 2241 unavailable where petitioner asserted "only that he is 'innocent' of being a career offender"). And in the meantime, the circuit split on this very issue has deepened. *Compare United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018), *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016), *and Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013), *with McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc), *and Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011) (Gorsuch, J.).

Davis's petition is made all the more compelling by his particular situation: he brought up, on direct appeal, the same argument that carried the day in *Mathis*, regarding the same Iowa statute. It may seem odd to conclude that Section 2255 is "adequate" or "effective" where a petitioner denied relief "was right when [the lower courts] were wrong," *United States v. Doe*, 810 F.3d 132, 161 (3d Cir. 2015). But, compelling or not, Davis's situation does not render Section 2255 inadequate or ineffective under Third Circuit precedent. He was able to raise his *Mathis* claim before *Mathis* existed, albeit unsuccessfully. *See Gardner v. Warden Lewisburg USP*, 845 F.3d 99, 103 (3d Cir. 2017) (petitioner failed to explain "why the statutory scheme, as written, would not have allowed him to adequately raise his *Alleyne* claim in a § 2255 motion"). That means this Court does not have jurisdiction to consider Davis's Section 2241 petition. *See Fraser v. Zenk*, 90 F. App'x 428, 430 (3d Cir. 2004).

IV. Conclusion

For the reasons stated above, Magistrate Judge Mehalchick's R&R will be adopted. Davis's Petition will be dismissed without prejudice for lack of jurisdiction.

An appropriate order follows.

June 17, 2019
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

EUGENE DAVIS, Petitioner, v. WARDEN SPAULDING, Respondent.	NO. 3:17-CV-00968 (JUDGE CAPUTO) (MAGISTRATE JUDGE MEHALCHICK)

ORDER

NOW, this 17th day of June, 2019, upon review of the Report and Recommendation of Magistrate Judge Mehalchick (Doc. 25), **IT IS HEREBY ORDERED** that:

(1) The Report and Recommendation is **ADOPTED**.

(2) Petitioner Eugene Davis's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1) is **DISMISSED without prejudice** for lack of jurisdiction.

(3) The Clerk of Court is directed to mark this case **CLOSED**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

EUGENE DAVIS, Petitioner, v. WARDEN SPAULDING, Respondent.	CIVIL ACTION NO. 3:17-CV-968 (CAPUTO, J.) (MEHALCHICK, M.J.)

REPORT AND RECOMMENDATION

Petitioner, Eugene Davis, brings the instant petition for a writ of habeas corpus submitted pursuant to 28 U.S.C. § 2241, in which he challenges the legality of his sentence imposed by the Northern District of Iowa. At the time of the filing of this federal habeas petition, Davis was incarcerated at FCI Allenwood, Union County, Pennsylvania, within the confines of the Middle District of Pennsylvania. Specifically, Petitioner claims he is entitled to federal habeas corpus relief because he was improperly sentenced in light of the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). At issue before the Court is whether the savings clause of § 2255 encompasses sentencing claims such as the one presented by Petitioner here. The Court finds that, in accordance with applicable Third Circuit precedent, such claims are not encompassed by that savings clause, and for the reasons set forth below, it is recommended that the Court dismiss the petition for lack of jurisdiction.

I. BACKGROUND AND PROCEDURAL HISTORY

Petitioner Eugene Davis ("Davis" or "Petitioner") was convicted of third-degree burglary in Iowa. (Doc. 10-1 at 1). At the time of Davis' sentencing, third-degree burglary in Iowa was considered a violent felony under the enumerated-offenses clause of 18 U.S.C. §

924 (e).[1] (Doc. 10-1 at 23). Thus, Davis qualified under the Armed Career Criminal Act ("ACCA") for sentencing purposes and was ultimately sentenced to 210 months in prison. (Doc. 10-1 at 9 ¶ 43); (Doc. 24 at 6).[2] On March 30, 2011, the U.S. Court of Appeals for the Eighth Circuit upheld Davis's conviction and sentence. (Doc. 10-2 at 1-2). On October 18, 2012, Davis moved to vacate his sentence in the Northern District of Iowa, pursuant to § 2255. The court denied that motion. (Doc. 10-1 at 1 ¶ 1; at 2 ¶ 13).

In 2016, in the *Mathis v. United States* decision, the United States Supreme Court held that a conviction under the Iowa burglary statute did not qualify as a predicate offense for ACCA sentence enhancement because the elements of the Iowa burglary law are "broader than those of generic burglary" and the ACCA envisions a burglary conviction as limited to the generic elements. *Mathis v. United States*, 136 S. Ct. 2243, 2246 (2016); I.C.A. § 702. Under the ACCA, the elements required to convict for the crime of burglary are: 1) unlawful or privileged entry, 2) into a building or other structure, and 3) with intent to commit a crime therein. *Mathis*, 136 S. Ct. at 2248 (citing *Taylor v. United States*, 495 U.S. 575, 598 (1990)). Under the Iowa code, the location element for the burglary crime could be satisfied by a

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[1] The government identifies "two separate 2006 Iowa convictions for third degree burglary of commercial buildings" as the relevant offenses for sentencing purposes. (Doc. 10 at 2). The government cites criminal docket 1:09-cr-000052-LRR from the Northern District of Iowa, entry No. 40, a sealed presentencing report, as means of verifying the existence of these offenses.

[2] The ACCA imposes a 15–year mandatory minimum sentence on a defendant convicted of being a felon in possession of a firearm who also has three prior state or federal convictions "for a violent felony," including "burglary, arson, or extortion." *Mathis*, 136 S. Ct. at 2245. (citing 18 U.S.C. §§ 924(e)(1), (e)(2)(B)(ii)).

"building, other structure, or vehicle." *Mathis*, 136 S. Ct. at 2256 (citing *State v. Duncan*, 312 N.W.2d 519, 523 (Iowa 1981)).

On May 24, 2016, citing *Mathis*, Davis petitioned the Eighth Circuit Court of Appeals, seeking authorization to file a second petition for habeas corpus pursuant to § 2255 in the Northern District of Iowa. (Doc. 10-1 at 30 ¶ 1). The federal public defender's office represented Davis in his petition. (Doc. 10-1 at 30 ¶ 2). The Eighth Circuit denied his request, reasoning, *inter alia*, that the Supreme Court's decision in *Mathis* did not announce a new rule of Constitutional law. (Doc. 10-1 at 23).

On June 5, 2017, this Court received and filed a petition for a writ of habeas corpus submitted pursuant to 28 U.S.C. § 2241, mailed by Petitioner Eugene Davis ("Davis" or "Petitioner") on May 30, 2017. (Doc. 1).[3] Davis brings his habeas petition under § 2241, via the savings clause of 28 U.S.C. § 2255(e), alleging he is entitled to relief pursuant to *Mathis v. United States*, 136 S. Ct. 2243 (2016).

In its initial response, the government did not contest Davis's assertion that he is entitled to habeas relief. (Doc. 10 at 1). The government averred that, in its view, the two 2006 Iowa burglary convictions for third degree are not predicate offenses for an ACCA sentence. 18 U.S.C.A. § 924(e)1; (Doc. 10 at 6). If these two sentences were excluded, Davis would not qualify for the 15-year mandatory minimum under the ACCA; Davis would be a felon in possession of a firearm, an offense punishable for a maximum term of ten years. 18

[3] Petitioner did not sign or date his original submission. Pursuant to a court order, petitioner re-submitted a signed and dated habeas petition on October 5, 2017. (Doc. 7).

U.S.C.A. § 922; (Doc. 10 at 9). The Court scheduled a teleconference in this matter, directing the parties' attention to a line of district court decisions holding that *Mathis* did not announce a new rule of law to be applied retroactively, and not extending *Dorsainvil* to include situations where a prisoner is challenging a sentence based on an intervening change in substantive law and the claims presented are not based on a contention that *Mathis* decriminalized the conduct which led to his conviction. (Doc. 15). The Court also appointed counsel for Petitioner. (Doc. 15). Following the teleconference, the government submitted a motion to amend its response to Davis's habeas petition. (Doc. 17). The Court granted that motion. (Doc. 19). Both parties have fully briefed this petition, and the matter is now ripe for review. (Doc. 20); (Doc. 24).

II. DISCUSSION

Section 2241 sets out the general power of a federal court to issue a writ of habeas corpus. In pertinent part, 28 U.S.C. § 2241 (a) provides: "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." However, the presumptive means by which federal prisoners may challenge their convictions or sentences allegedly in violation of the Constitution is by motion made pursuant to 28 U.S.C. § 2255. *Okereke v. United States*, 307 F.3d 117 (3d Cir. 2002) (citing *Davis v. United States*, 417 U.S. 333, 342, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)); see *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997). A federal prisoner may seek habeas relief pursuant to § 2241 if he can establish that the remedy by motion under § 2255 is inadequate or ineffective to test the legality of his detention. *Boumediene v. Bush*, 553 U.S. 723, 776 (2008) (discussing § 2255's "saving clause"); *Bruce v. Warden USP Lewisburg*, 868 F.3d 170, 183 (3d Cir. 2017).

In order to challenge a conviction and sentence in a § 2241 petition, a defendant must prove that a § 2255 motion is inadequate or ineffective by showing both: 1) that he is actually innocent of the crime and 2) that he had no prior opportunity to bring the challenge to his conviction. *See United States v. Tyler*,732 F.3d 241, 246 (3d Cir. 2013); *In re Dorsainvil*, 119 F.3d 245,251-252 (3d Cir. 1997). The "safety valve" provided under § 2255 is extremely narrow and, in order for this Court to entertain a § 2241 challenge to a federal conviction and sentence, a prisoner must assert a claim of actual innocence when there is a change in statutory caselaw that applies retroactively in cases on collateral review. *Bruce*, 868 F.3d at 183; *Tyler*, 732 F.3d at 246; *Dorsainvil*, 119 F.3d at 252. Further, the prisoner must have "had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate." *Bruce*, 868 F.3d at 180 (quoting *Dorsainvil*, 119 F.3d at 251).

"Under the explicit terms of 28 U.S.C. § 2255, unless a § 2255 motion would be 'inadequate or ineffective,' a habeas corpus petition under § 2241 cannot be entertained by the court." *Cradle v. United States*, 290 F.3d 536, 538 (3d Cir. 2002) (quoting § 2255(e)). The burden is on the habeas petitioner to allege or demonstrate inadequacy or ineffectiveness. *See Application of Galante*, 437 F.2d 1164, 1165 (3d Cir. 1971). Two conditions must be satisfied before a prisoner may access § 2241; the first condition is that he must claim actual innocence, i.e. that his conduct was non-criminal.[4] *Bruce*, 868 F.3d at 183; *Tyler*, 732 F.3d at 246; *Dorsainvil*, 119 F.3d at 252.

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[4] In *Dorsainvil*, the petitioner sought to bring a successive § 2255 motion on the basis of the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995), in which the

To support an actual innocence claim, the petitioner must "establish that 'in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.'" *United States v. Garth,* 188 F.3d 99, 107 (3d Cir.1999) (quoting *Bousley v. United States,* 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)). "A petitioner can establish that no reasonable juror would have convicted him by demonstrating an intervening change in law that rendered his conduct non-criminal." *U.S. v. Tyler*, 732 F.3d 241, 246 (3d Cir. 2013) (citations omitted).

Citing case law from the Fourth, Sixth, and Seventh Circuit Courts of Appeal, Davis submits that the plain text of § 2255(e) does not limit it to claims involving only guilt or innocence, and as such the Court may entertain a § 2241 petition under that savings clause.

Court held that a defendant may not be convicted of using a firearm under 18 U.S.C. § 924(c) unless the government proves that the defendant "actively employed the firearm during and in relation to the predicate crime." *Dorsainvil,* 119 F.3d at 246-47 (quoting *Bailey,* 516 U.S. at 509). After the *Bailey* decision, the petitioner in *Dorsainvil* filed an application to file a successive § 2255 motion claiming that on the basis of *Bailey,* he was imprisoned for conduct that the Supreme Court had determined is not illegal. *Dorsainvil,* 119 F.3d at 247. The Third Circuit held that a prisoner who was convicted and filed his first § 2255 motion before the *Bailey* decision may not file a second § 2255 motion based on *Bailey* because the second motion based on *Bailey* does not present a claim of newly discovered evidence or a claim based on a new rule of constitutional law—the two situations in which § 2255 may allow a second or successive § 2255 motion. *Dorsainvil,* 119 F.3d at 247-48. Therefore, such a motion did not meet the stringent requirements created by the Antiterrorism and Effective Death Penalty Act for filing a second § 2255 motion. *Dorsainvil,* 119 F.3d at 248. Nevertheless, the Third Circuit went on to hold that although a prisoner may not file a second § 2255 motion based on *Bailey,* he may file a 28 U.S.C. § 2241 habeas corpus petition. *Dorsainvil,* 119 F.3d at 251. The Third Circuit cautioned, however, that its holding was narrow, and was meant to allow someone in Dorsainvil's unusual position – that of a prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate, even when the government concedes that such a change should be applied retroactively – is hardly likely to undermine the gatekeeping provisions of § 2255. *Dorsainvil,* 119 F.3d at 51.

(Doc. 24 at 10). See *United States v. Wheeler*, 886 F.3d 415, 427-28 (4th Cir. 2018), *cert. denied*, No. 18-420, 2019 WL 1231947 (U.S. March 18, 2019); *Lester v. Fournoy*, 909 F.3d 708, 716 (4th Cir. 2018); *Brown v. Rios*, 696 F.3d 638, 640-41 (7th Cir. 2012); *Hill v. Masters*, 836 F.3d 591, 595-96 (6th Cir. 2016). However, the Third Circuit and its District Courts have not extended the limited *Dorsainvil* exception to include situations where a prisoner is challenging a sentence based on an intervening change in substantive law. *Okereke*, 307 F.3d at 120 (refusing to extend *Dorsainvil* exception to sentencing challenge under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)); *Pearson v. Warden Canaan USP*, 685 Fed.Appx. 93, 96 (3d Cir. 2017) ("§ 2241 is not available for an intervening change in the sentencing laws", citing *Okereke*, 307 F.3d 117); *Jackson v. Kirby*, No. 17-4651, 2017 WL 3908868 (D.N.J. Sept. 6, 2017) (*Mathis*-based sentencing enhancement claim not properly asserted under § 2241); *Parker v. Warden FCI-Schuylkill*, No. 17-0765, 2017 WL 2445334 (M.D. Pa. Jun. 6, 2017) (dismissing § 2241 habeas petition on screening because *Mathis* based sentencing enhancement claim is not properly asserted under § 2241). Rather, the Third Circuit only permits access to § 2241 when a prisoner is asserting a claim of actual innocence on the theory that he is being detained for conduct that has subsequently been rendered non-criminal by a change in statutory caselaw that applies retroactively in cases on collateral review; and second, that the prisoner is otherwise barred from challenging the legality of the conviction under § 2255. *Bruce*, 868 F.3d at 180 (citations omitted). In other words, the prisoner must have had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate. *Id.*

Indeed, in *Gardner v. Warden Lewisburg USP*, the Third Circuit again recognized that § 2255's savings clause provided a safety valve for actual innocence, but declined to expand

that provision to allow all sentencing issues based on new Supreme Court decisions to be raised via § 2241 petitions, finding that "would swallow the rule that habeas claims presumptively must be brought in § 2255 motions." *Gardner v. Warden Lewisburg USP*, 845 F.3d 99, 103 (3d Cir. 2017). Specifically, in *Gardner*, the petitioner argued that his sentence could be challenged via a § 2241 petition where, subsequent to his sentencing, the Supreme Court rendered its decision in *Alleyne v. United States*[5], which regulated sentencing procedure but did not render previous criminal conduct noncriminal. The Third Circuit reiterated its holding in *Okereke* that "unlike the change in substantive law leading to the exception in *Dorsainvil*, issues that might arise regarding sentencing did not make § 2255 inadequate or ineffective." *Gardner*, 845 F.3d at 103; citing *Okereke*, 307 F.3d at 120–21.

Further, "innocence of a sentence enhancement is not the same as actual innocence of the underlying criminal offense such that the remedy afforded by § 2255 would be inadequate or ineffective." *Sliney v. Purdue*, 1:15-cv-1410, 2015 WL 6690212, *2 (M.D. Pa. October 30, 2015) (citing *United States v. Brown,* 456 F. App'x 79, 81 (3d Cir.2012) (*per curiam*) (stating "§ 2255's 'safety valve' applies only in rare circumstances… [petitioner] has not satisfied that standard here, as he makes no allegation that he is actually innocent of the crime for which he was convicted, but instead asserts only that he is 'innocent' of being a career offender"). *See also Jackson v. United States*, No. 3:16-CV-180, 2016 WL 853360, *4 (M.D. Pa. February 3, 2016) (*Report and Recommendation adopted* (2016 WL 852591 M.D. Pa. March 4, 2016)) (§ 2241 petitioner's claim that he was improperly sentenced as an armed career criminal should

[5] 133 S. Ct. 1251, 186 L.Ed.2d 314 (2013)

be addressed by the sentencing court pursuant to a motion to correct sentence under § 2255); 2018 WL 372164, *3 (M.D. Pa. January 11, 2018) (affirmed *Dusenberry v. Warden Allenwood USP*, 720 F. App'x 102 (3d Cir. 2018) (*cert. denied*, 2019 WL 1231793 (U.S. March 18, 2019)) (§ 2241 petitioner's claim was not based on a contention that *Mathis* rendered non-criminal the conduct for which he was convicted, but instead was a challenge to the basis for his sentence and sentencing enhancement pursuant to *Mathis*.)

Davis's petition is plainly a challenge to the sentence he received. Davis asserts that he "can show that he is actually innocent of the allegations that gave rise to his ACCA sentence." (Doc. 1 at 3). However, the effect of *Mathis* was not to overturn the Iowa burglary statute under which Davis was convicted, but instead to hold that the Iowa burglary statute under which Davis was convicted could not serve as a predicate offense for the ACCA sentencing-enhancement. The Supreme Court's decision in *Mathis* does not render his conduct "non-criminal." Davis submits that he was "wrongfully sentenced as an Armed Career Criminal" (Doc. 1 at 1), relying on *Mathis* to argue that his predicate offenses should not have qualified him for the ACCA. (Doc. 1 at 2; 4). However, Davis was not convicted of being an Armed Career Criminal; he was convicted pursuant to the Iowa Burglary Statutes. Thus, he does not and cannot claim actual innocence. Because Davis cannot meet the first of two mandatory conditions for seeking § 2241 habeas relief, the Court declines to discuss the second. *See Sliney*, 2015 WL 6690212, *2. *See also Hoyte v. Warden USP Allenwood*, No. 3:16-cv-1204, 2016 WL 4472967 (M.D. Pa. August 23, 2016) (finding that § 2241 petitioner's challenge his conviction and sentence, based on a claim other than actual innocence, must be dismissed for lack of jurisdiction and not discussing whether petitioner theoretically would have had another opportunity to challenge his conviction).

III. CONCLUSION AND RECOMMENDATION

Having considered the arguments of the parties, and concluding that the effect of *Mathis* is to hold that the Iowa burglary conviction could not serve as a predicate offence, but did not render Davis's conduct non-criminal, the Court finds that Davis's claim does not trigger the safety clause of 28 U.S.C. § 2255(e). For the foregoing reasons, it is recommended that Davis's § 2241 petition be dismissed for lack of jurisdiction.

Dated: April 10, 2019

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

EUGENE DAVIS, Petitioner, v. WARDEN SPAULDING, Respondent.	CIVIL ACTION NO. 3:17-CV-968 (CAPUTO, J.) (MEHALCHICK, M.J.)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing **Report and Recommendation** dated **April 10, 2019**.

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Dated: April 10, 2019

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
United States Magistrate Judge