UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3673

MICHAEL LEE GORDON,
Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 3-18-cv-02420)
District Judge: Honorable Malachy E. Mannion

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *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 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: August 3, 2021
CJG/cc: Michael Lee Gordon
Melissa A. Swauger, Esq.

RESUBMIT BLD-164

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3673

MICHAEL LEE GORDON,
Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 3-18-cv-02420)
District Judge: Honorable Malachy E. Mannion

Submitted for Possible Summary Action
Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
April 27, 2021
Before: AMBRO, GREENAWAY, JR. and BIBAS, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on April 27, 2021. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered November 8, 2019, be and the same hereby is affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: June 17, 2021

RESUBMIT BLD-164 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA

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April 27, 2021
Before: AMBRO, GREENAWAY, JR. and BIBAS, Circuit Judges

(Opinion filed: June 17, 2021)

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.

Michael Lee Gordon appeals from an order of the United States District Court for the Middle District of Pennsylvania, which dismissed for lack of jurisdiction his petition filed under 28 U.S.C. § 2241. Because no substantial question is raised by his appeal, we will summarily affirm the District Court's judgment.

In 1998, Gordon was convicted in the United States District Court for the Southern District of Ohio of seven counts of using a firearm during a violent crime, under 18 U.S.C. § 924(c), and seven counts of Hobbs Act robbery, under 18 U.S.C. § 1951. He was sentenced to 137 years and 6 months in prison. United States v. Gordon, C.A. No. 99-3679, 2000 WL 1785905, at *1 (6th Cir. 2000) (unpublished disposition). Gordon was unsuccessful on direct appeal and in his first proceeding under 28 U.S.C. § 2255. Since that time, he has filed numerous applications in the Sixth Circuit for permission to file a second or successive § 2255 motion.

In December 2018, Gordon, who was imprisoned at the federal prison in Lewisburg, Pennsylvania, at the time, filed a petition under 28 U.S.C. § 2241 in the United States District Court for the Middle District of Pennsylvania. He claimed that Johnson v. United States, 576 U.S. 591 (2015), and Sessions v. Dimaya, 138 S. Ct. 1204 (2018), rendered his conviction unconstitutional. He argued that he could raise his claims in a § 2241 petition, as § 2255 was ineffective to challenge his conviction. Gordon also filed supplements, raising claims under the First Step Act and United States v. Davis, 139

S. Ct. 2319 (2019). The District Court dismissed the petition for lack of jurisdiction. Gordon timely appealed and provided argument in support of his appeal.

We held this appeal c.a.v. pending a decision in United States v. Copes, C.A. No. 19-1494, and United States v. Monroe, C.A. No. 16-4384 (consolidated for decision). After that decision was issued, we directed the parties to address how the decision in Copes and Monroe affects this appeal, if at all. Those responses have now been received.[1]

We have jurisdiction under 28 U.S.C. § 1291.[2] We exercise plenary review over the District Court's legal conclusions and review its factual findings for clear error. See Cradle v. United States ex rel. Miner, 290 F.3d 536, 538 (3d Cir. 2002) (per curiam). As the District Court properly noted, a motion under 28 U.S.C. § 2255, and not a habeas corpus petition under 28 U.S.C. § 2241, generally is the exclusive means to challenge a federal sentence. See Okereke v. United States, 307 F.3d 117, 120 (3d Cir. 2002) ("Motions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences[.]").

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[1] The Government oddly states that the decision does not affect this appeal because Gordon "is challenging the district court's decision to revoke his *in forma pauperis* status. (Doc. 61)." App. Dkt. #13. We are not aware of any order revoking Gordon's in forma pauperis status and there are only 16 entries on the District Court docket.

[2] A certificate of appealability is not required to appeal from the denial of a § 2241 petition filed by a federal prisoner. See Burkey v. Marberry, 556 F.3d 142, 146 (3d Cir. 2009).

When a federal prisoner attacks the validity of his conviction, he may proceed under § 2241 only if he asserts a sufficiently colorable claim that (1) he is actually innocent on the theory that "he is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision," and (2) he is "otherwise barred from challenging the legality of the conviction under § 2255." Cordaro v. United States, 933 F.3d 232, 239 (3d Cir. 2019) (quoting Bruce v. Warden Lewisburg USP, 868 F.3d 170, 180 (3d Cir. 2017)).

Gordon's claims do not meet this standard. In short, he has not shown that the conduct for which he was convicted has been decriminalized by a subsequent Supreme Court decision. First, Gordon has not shown that his Hobbs Act robbery convictions have been invalidated by a subsequent Supreme Court decision. Indeed, as we explained recently in United States v. Walker, 990 F.3d 316, 324-25 (3d Cir. 2021), we have concluded that the Supreme Court's Davis decision did not change our conclusion that Hobbs Act robbery is categorically a crime of violence.[3] Second, the District Court properly determined that the First Step Act is not retroactively applicable on collateral review. See United States v. Hodge, 948 F.3d 160, 163 (3d Cir. 2020). Thus, Gordon cannot meet the narrow exception that allows a federal prisoner to challenge his conviction or sentence via a § 2241 petition.

[3] We made a similar decision in Copes, C.A. No. 19-1494, and Monroe, C.A. No. 16-4384, the cases for which we held this appeal c.a.v. See United States v. Monroe, 837 F. App'x 898, 900-01 (3d Cir. 2021) (not precedential).

Accordingly, for the reasons explained herein, the District Court lacked jurisdiction over Gordon's § 2241 petition and properly dismissed the petition.[4]

[4] In light of our disposition, appointment of pro bono counsel to represent Gordon is not necessary.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL LEE GORDON,	:	
Petitioner	:	**CIVIL ACTION NO. 3:18-2420**
v	:	
		(JUDGE MANNION)
UNITED STATES OF AMERICA,	:	
Respondent	:	

MEMORANDUM

Petitioner, Michael Lee Gordon, an inmate currently confined in the United States Penitentiary, Lewisburg, Pennsylvania ("USP-Lewisburg"), filed this petition for writ of habeas corpus pursuant to 28 U.S.C. §2241. (Doc. 1). He challenges his 1999 convictions under 18 U.S.C. §924(c) for the use of a firearm during a Hobbs Act robberies. For the reasons set forth below, the Court will dismiss the petition for writ of habeas corpus.

I. Background

Petitioner was convicted In the United States District Court for the Southern District of Ohio, of seven (7) counts of using a firearm during a violent crime (18 U.S.C. § 924(c)) and seven (7) counts of violating the Hobbs Act (18 U.S.C. §1951). United States v. Gordon, 238 F.3d 425, (6th Cir. 2000). He was sentenced to 1,651 months imprisonment and three (3) years

supervised release, and his conviction and sentence were affirmed in 2000. Id.

On September 30, 2002, the sentencing court denied Gordon's first motion to vacate sentence under 18 U.S.C. §2255. (Doc. 7-1 at 3-26, Docket for United States v. Gordon, S.D. Oh. No. 2:97-cr-137). Petitioner then filed numerous unsuccessful motions with the Sixth Circuit seeking leave to file a second or successive §2255 petition, including the following two most recent motions.

In 2016, Gordon filed a motion for leave to file a second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. §2255, on the basis of Johnson v. United States, 135 S. Ct. 2551 (2015), in which the Supreme Court held that the residual clause of the definition of "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e)(2)(B), is unconstitutionally vague. (Doc. 7-1 at 38, In re: Michael Lee Gordon, No. 16-3629 (6th Cir. Sep. 1, 2016)). Gordon asserted that Johnson also applies to §924(c) and invalidates his convictions under that statute. Id.

By Order dated September 1, 2016, the Sixth Circuit denied Gordon's motion, finding the following:

> Before we may grant a movant permission to file a second or successive petition under 28 U.S.C. §2255, the movant must

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> make a prima facie showing that a new rule of constitutional law applies to his case that the Supreme Court has made retroactive to cases on collateral review. See 28 U.S.C. §2255(h); In re Green, 144 F.3d 384, 388 (6th Cir. 1998). Gordon cannot make this showing. Although the Supreme Court has held that Johnson is a new rule of constitutional law that is retroactively applicable to cases on collateral review, see Welch v. United States, 136 S. Ct. 1257, 1268 (2016), we have held that Johnson does not invalidate §924(c), Taylor, 814 F.3d at 375-79.

(Doc. 7-1 at 38, In re: Michael Lee Gordon, No. 16-3629 (6th Cir. Sep. 1, 2016)).

In 2018, Gordon filed another motion in the United States Court of Appeals for the Sixth Circuit, for an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. §2255. In re: Michael Lee Gordon, No. 18-3449 (6th Cir. Aug. 14, 2018). In support of his current motion, Gordon asserts that his convictions for Hobbs Act robbery do not qualify as crimes of violence under 18 U.S.C. §924(c)(3)(B) in light of the Supreme Court's decision in Sessions v. Dimaya, 138 S. Ct. 1204, 1210-11 (2018), holding that the identically worded definition of "crime of violence" under 18 U.S.C. §16(b) is unconstitutionally vague. Id.

By Order dated August 14, 2018, the Sixth Circuit denied Gordon's motion as follows:

> To obtain this court's authorization for a second or successive §2255 motion to vacate, Gordon must make a prima facie showing that his proposed motion relies on "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)(2); see 28 U.S.C. §2244(b)(3)(C). Gordon cannot make such a showing. The government asserts that Dimaya announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review, but did so with respect to only §16(b), not §924(c)(3)(B). Even if the Supreme Court had announced that Dimaya applies to §924(c)(3)(B), that rule has no effect on Gordon's case because his convictions for Hobbs Act robbery qualify as crimes of violence under §924(c)(3)(A) as offenses having "as an element the use, attempted use, or threatened use of physical force against the person or property of another." See United States v. Gooch, 850 F.3d 285,291-92 (6th Cir.), cert. denied, 137 S. Ct. 2230 (2017).

In re: Michael Lee Gordon, No. 18-3449 (6th Cir. Aug. 14, 2018).

On December 21, 2018, Petitioner filed the above captioned petition for writ of habeas corpus, in which he requests this Court to vacate his 1999 conviction and resentence him in light of the Supreme Court decisions in Johnson v. United States, 135 S. Ct. 2551 (2015) and Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

On February 5, 2019, Gordon filed a motion in the sentencing court, to reduce sentence based on §403(a) of the First Step Act of 2018. (Doc. 7-1 at 3-26, Docket for United States v. Gordon, S.D. Oh. No. 2:97-cr-137).

On February 8, 2019, the sentencing court denied Gordon's motion to

reduce sentence, finding that the First Step Act of 2018 is not retroactively applied to sentences imposed before its enactment. Id.

On June 3, 2019, Gordon filed a supplement to the instant petition, raising the additional issue of "whether or not the enactment of the First Step Act of 2018 is unconstitutional as it pertains to Petitioner's conviction and sentence." (Doc. 10).

II. Discussion

"[T]he usual avenue for federal prisoners seeking to challenge the legality of their confinement" is a section 2255 motion. In re Dorsainvil, 119 F.3d 245, 249 (3d Cir. 1997). A challenge to either the validity of a conviction or to a sentence must be brought in the sentencing court by way of a section 2255 motion. See United States v. Miller, 197 F.3d 644, 648 n.2 (3d Cir. 1999). Here, Petitioner is clearly challenging his conviction and sentence. Thus, his proper avenue of relief is a section 2255 motion filed in the district court where he was convicted and sentenced. See section 2255 ¶5 (the motion must be filed in "the court which sentenced him").

A defendant can pursue a §2241 petition only when he shows that the remedy under section 2255 would be "inadequate or ineffective to test the

legality of his detention." 28 U.S.C. §2255; see also United States v. Brooks, 230 F.3d 643, 647 (3d Cir. 2000). A motion under §2255 is "'inadequate or ineffective'" only where it is established "'that some limitation of scope or procedure would prevent a 2255 proceeding from affording the prisoner a full hearing and adjudication of his claim of wrongful detention.'" In re Dorsainvil, 119 F.3d at 251-52; Cagel v. Ciccone, 368 F.2d 183, 184 (8th Cir. 1966). "Critically, §2255 is not inadequate or ineffective merely because the petitioner cannot satisfy §2255's timeliness or other gatekeeping requirements." Long, 611 F. App'x at 55; see Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1988), cert. denied, 488 U.S. 982 (1988); Litterio v. Parker, 369 F.2d 395, 396 (3d Cir. 1966) (per curiam). "It is the inefficacy of the remedy, not a personal inability to utilize it, that is determinative...." Garris v. Lindsay, 794 F.2d 722, 727 (D.C. Cir. 1986), cert. denied, 479 U.S. 993 (1986). If a petitioner improperly challenges a federal conviction or sentence under §2241, the petition must be dismissed for lack of jurisdiction. Application of Galante, 437 F.2d at 1164, 1165 (3d Cir. 1971) (per curiam) (quoting United States ex rel. Leguillou v. Davis, 212 F.2d 681, 684 (3d Cir. 1954)). Specifically, the Third Circuit has "applied the safety valve where an intervening and retroactive change in law had decriminalized the petitioner's

underlying conduct, but he had no prior opportunity to challenge his conviction and could not satisfy the stringent standard for filing a second or successive §2255 motion." Long v. Fairton, 611 F. App'x 53, 55 (3d Cir. 2015) (citations omitted); see In re Dorsainvil, 119 F.3d 245, 251-52 (3d Cir. 1997).

The Third Circuit has also noted that extraordinary circumstances may justify invoking the savings clause. See Long, 611 F. App'x at 55. The burden is on the habeas petitioner to demonstrate inadequacy or ineffectiveness. See In re Dorsainvil, 119 F.3d at 251-52; Cagel v. Ciccone, 368 F.2d 183, 184 (8th Cir. 1966). "Critically, §2255 is not inadequate or ineffective merely because the petitioner cannot satisfy §2255's timeliness or other gatekeeping requirements." Long, 611 F. App'x at 55; see Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1988), cert. denied, 488 U.S. 982 (1988); Litterio v. Parker, 369 F.2d 395, 396 (3d Cir. 1966) (per curiam). "It is the inefficacy of the remedy, not a personal inability to utilize it, that is determinative...." Garris v. Lindsay, 794 F.2d 722, 727 (D.C. Cir. 1986), cert. denied, 479 U.S. 993 (1986). If a petitioner improperly challenges a federal conviction or sentence under §2241, the petition must be dismissed for lack of jurisdiction. Application of Galante, 437 F.2d at 1165.

However, as recognized in Dorsainvil, a federal prisoner can pursue

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relief under §2241 only where a subsequent statutory interpretation reveals that the prisoner's conduct is not criminal so as to avoid a complete miscarriage of justice. Dorsainvil, 119 F.3d at 251; see also Okereke v. United States, 307 F.3d 117, 120-21 (3d Cir. 2002) (holding §2241 may not be used to raise an Apprendi v. New Jersey, 530 U.S. 466 (2000) claim that is barred by the procedural limitations imposed by the AEDPA); Brown v. Mendez, 167 F. Supp. 2d 723, 726-27 (M.D. Pa. 2001). "Section 2241 is not available for intervening changes in the sentencing law," such as arguments based on Apprendi. United State v. Kenney, 391 F. App'x 169, 172 (3d Cir. 2010). Sentencing claims "[do] not fall within the purview of the savings clause." Adderly v. Zickefoose, 459 F. App'x 73 (3d Cir. 2012); 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.").

Here, Petitioner attempts to challenge his 1999 criminal conviction and sentence, based on issues that have previously been raised before the Sixth Circuit and rejected. As discussed above, to proceed under §2241, he must demonstrate that a §2255 motion "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. §2255(e). Petitioner has not met this burden. As such, his claim does not fall within the purview of the savings

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clause, as he has not demonstrated that an intervening change in the law made his underlying conviction non-criminal and that he had no prior opportunity to challenge his conviction, and could not satisfy the stringent standard for filing a second or successive §2255 motion. The fact that the Sixth Circuit denied Petitioner's requests to file a second or successive §2255 motion does not make §2255 relief inadequate or ineffective. See Cradle v. United States ex rel. Miner, 290 F.3d 536, 539 (3d Cir. 2002) (per curiam) (stating that a petitioner "cannot contend that §2255 is inadequate or ineffective to protect him, even if he cannot prevail under it"); Long, 611 F. App'x at 55 ("Critically, §2255 is not inadequate or ineffective merely because the petitioner cannot satisfy §2255's timeliness or other gatekeeping requirements.").

"The remedy afforded under §2241 is not an additional, alternative, or supplemental remedy to that prescribed under §2255." Dusenbery v. Oddo, No. 17-2402, 2018 WL 372164, at *4 (M.D. Pa. Jan. 11, 2018). Because Petitioner has failed to demonstrate that a §2255 motion is inadequate or ineffective to test the legality of his detention, permitting him to proceed under §2241, the Court will dismiss Petitioner's petition for a writ of habeas corpus under 28 U.S.C. §2241, for lack of jurisdiction.

III. Conclusion

Based on the foregoing, Gordon's petition for writ of habeas corpus will be **DISMISSED** for lack of jurisdiction. Because Petitioner is not detained because of a process issued by a state court and the petition is not brought pursuant to §2255, no action by this Court with respect to a certificate of appealability is necessary. An appropriate order follows.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

Dated: November 8, 2019
18-2420-01