NOT RECOMMENDED FOR PUBLICATION

No. 21-2698

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 25, 2022
DEBORAH S. HUNT, Clerk

MICHAEL DAVID HOWER, Petitioner-Appellant, v. JONATHAN R. HEMINGWAY, Respondent-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: COLE, GIBBONS, and ROGERS, Circuit Judges.

Michael David Hower, a pro se federal prisoner, appeals the judgment of the district court dismissing his 28 U.S.C. § 2241 petition for a writ of habeas corpus. 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 2009, Hower pleaded guilty to charges of sexual exploitation of a child and receipt of child pornography. He was sentenced to 420 months of imprisonment. We dismissed his direct appeal on the basis that he waived the right to appeal in his plea agreement. *United States v. Hower*, No. 09-2548 (6th Cir. Nov. 9, 2011).

Hower filed an initial 28 U.S.C. § 2255 motion to vacate in 2012, claiming that his plea was involuntary, the prosecutor vindictively recommended certain sentencing enhancements, and counsel was ineffective for coercing Hower into accepting the plea and for disregarding his request to later withdraw the plea. The district court denied the motion on the basis that the record contradicted Hower's contention that his guilty plea was not knowing or voluntary and that he was

coerced to accept it; Hower's plea agreement waived his right to contest his sentence based on challenges to the calculation of his guidelines range; and counsel was not ineffective because the record of Hower's plea hearing showed that it would have been "virtually impossible" for counsel to demonstrate good cause to withdraw the plea. *Hower v. United States*, No. 1:12-cv-1348 (W.D. Mich. Aug. 30, 2013). We denied Hower's motion for a certificate of appealability. *Hower v. United States*, No. 13-2556 (6th Cir. May 29, 2014).

Hower has since filed seven motions for this court's authorization to pursue another motion to vacate raising some version of these claims, arguing that, because the district court did not hold an evidentiary hearing on his original motion, his claims were not decided "on the merits" and a new motion would therefore not be successive. The motions have been denied. *See United States v. Hower*, No. 15-1685 (6th Cir. Jan. 12, 2016); No. 16-2449 (6th Cir. July 25, 2017); No. 17-2052 (6th Cir. Mar. 22, 2018); No. 18-1899 (6th Cir. Feb. 1, 2019); No. 19-1152 (6th Cir. June 4, 2019); No. 20-1304 (6th Cir. Sept. 10, 2020); No. 20-2075 (6th Cir. Apr. 6, 2021).

Hower filed this § 2241 petition on April 9, 2021, claiming that he was denied his due process rights in connection with his initial § 2255 motion when the district court failed to hold an evidentiary hearing, limited the scope of the motion, and precluded him from expanding the record to include private attorney-client communications. He explained that he submitted affidavits describing incidents of ineffective assistance of counsel and that "at no time" have his attorneys offered any contradictory statements; because these uncontradicted affidavits must be taken as true, he argued, the district court had an obligation to hold a hearing to investigate his claims. Because it did not—and no court has held a hearing since—he claims that his remedy under § 2255 is "inadequate or ineffective" to challenge the legality of his detention.

The district court reviewed the petition pursuant to Rule 4 of the Rules Governing § 2254 Cases and concluded that it must be dismissed. In particular, the district court determined that Hower's claims concerned the validity of his federal conviction and that his remedy under § 2255 was not inadequate or ineffective.

On appeal, Hower first asserts that he is factually innocent of the crime, claiming that he never viewed child pornography or sexually exploited anyone. He also argues that his claims of

constitutional error—that he was coerced by his own counsel to plead guilty to a crime that he did not commit and that counsel refused an order to withdraw the guilty plea before sentencing—have been "ignored and dismissed without any meaningful review that could be proven true through an evidentiary hearing." He again claims that his remedy under § 2255 is inadequate and ineffective because the courts will not allow him to establish a record to support his allegations of ineffective assistance of counsel. He claims that the only way he can obtain relief is through a writ of habeas corpus because he cannot otherwise get his case reviewed "on the merits."

We review de novo the district court's judgment dismissing a habeas petition filed under § 2241. *Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999) (per curiam). Generally, federal prisoners must use § 2255 to challenge their convictions or imposition of their sentences and § 2241 to challenge the manner in which their sentences are served. *Id.* at 755-56. Pursuant to § 2255(e)'s "savings clause," however, a federal prisoner may challenge his conviction or the imposition of his sentence under § 2241, rather than § 2255, if he establishes that his remedy under § 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e); *see Charles*, 180 F.3d at 756.

"The petitioner carries the burden to establish that the savings clause applies to his petition and '[t]he circumstances in which § 2255 is inadequate and ineffective are narrow.'" *Hill v. Masters*, 836 F.3d 591, 594 (6th Cir. 2016) (quoting *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001)). It is not sufficient to show that "§ 2255 relief has already been denied," that the prisoner "is procedurally barred from pursuing relief under § 2255," or that the prisoner "has been denied permission to file a second or successive motion to vacate." *Charles*, 180 F.3d at 756. To obtain relief under the savings clause, the prisoner must not only be barred from proceeding under § 2255 but also must show that he is "actually innocent." *Wooten v. Cauley*, 677 F.3d 303, 307 (6th Cir. 2012); *Peterman*, 249 F.3d at 462. Moreover, his claim of innocence must be one that he could not have brought previously. *See Wright v. Spaulding*, 939 F.3d 695, 705 (6th Cir. 2019).

Hower did not establish that his remedy under § 2255 is inadequate or ineffective. First, the district court's denial of § 2255 relief without conducting an evidentiary hearing, standing alone, is insufficient to establish that the § 2255 remedy is inadequate or ineffective. *See Genoa*

v. Hemingway, 14 F. App'x 300, 302 (6th Cir. 2001) (citing *Tripati v. Henman*, 843 F.2d 1160, 1163 (9th Cir. 1988)). Second, Hower has had multiple opportunities to assert that he did not commit the charged crimes. In fact, he has previously claimed his actual innocence, but his claim was rejected on the basis that he did not present new evidence that could not have been discovered previously. He has also previously claimed that his guilty plea was coerced and that counsel was ineffective, and those claims have been repeatedly rejected. Consequently, he may not raise these claims under § 2241, and the district court did not err by dismissing his petition.

We **AFFIRM** the judgment of the district court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL DAVID HOWER,

Defendant.

CASE NO. 1:08-CR-84

HON. ROBERT J. JONKER

AFFIDAVIT

AFFIDAVIT

I Michael David Hower, the defendant in the above titled proceedings swear by Almighty God, that the following statement is the truth, the whole truth and nothing but the truth, to the best of my Knowledge, belief and Recollection. I do so swear under the penalty of perjury under the laws of the United States of America - So Help me God:

On, but not limited to February 9th 2009 in the attorney-client room at the Federal Courthouse in Grand Rapids MI, My attorney Nunzio instructed me to plead guilty even when I told him I was innocent. Nunzio told me to take the AUSA's "off the record" promise of 15 years. He told me that my innocence did not matter, I was going to prison for either 15 years or 50 years, my choice. He told me That I could not tell the Judge. He told me to lie to the Judge Hon. Robert J. Jonker. Nunzio told me if I did not lie, my wife Judi would be arrested, my Kids put in Fostercare, I would be charged in State Court.

Nunzio again showed me through the wire divider in the attorney client room, the charging document to refresh my memory from last time so I could answer the judges questions during the plea hearing.

I fired Nunzio when it became apparent the "promise" was broken, he refused to withdraw the plea and just gave up on helping me.

ON November 23rd 2009 in the attorney client Room in the Newaygo County Jail and on November 24th 2009 walking into Judge Jonkers courtroom, I ordered my attorney Graham to withdraw my guilty plea because I am innocent but he refused and 7 days later I was sentenced to 420 months in prison for a crime I did not commit.

3-28-18
Michael David Howe

I declare under penalty of perjury that the foregoing is true and correct. A copy of the foregoing was mailed first-class postage prepaid to:

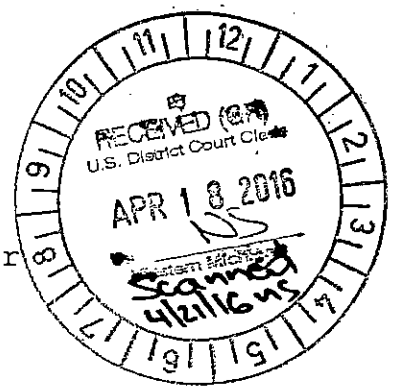
U.S. Attorneys office P.O. BOX 208 Grand Rapids MI 49501

3-28-18
Michael David Howe

Notary:

J. Twigg 4/2/18

JENNIFER DIANE TWIGG
Notary Public-Maryland
Allegany County
My Commission Expires
May 30, 2021



MICHAEL DAVID HOWER
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

Case no. 15-1685

1:12-cv-1348
Robert J. Jonker
Chief U.S. District Judge

Robert J. Jonker

March 29th 2016

Dear Sixth Circuit Court of Appeals,
Dear U.S. Supreme Court,

I am not an attorney and have no legal degree. I do not know if this letter means anything to this court or anyone else. But I have to write it. I am not gulity of any of the charges I plead gulity to. I was forced to plead gulity by my attorney, and when I ordered him to withdraw my plea, he refused. All of the lower courts refuse to review my case because I plead gulity, but my plea waiver only stops review on non constitutional claims. All claims on the §2255 and 60(b) are constitutional violations. Even though this court in previous decisions require an evidentuary hearing for claims like mine, no court has ordered a hearing. If there was a hearing, my attorneys would have to answer to the charge of constitutional error. They would have to answer if there was a "off the record" promise or if I ordered them to withdraw my gulity plea. But no court really wants the truth.

This court, over the years has been very clear on if a defendant can have his PSR, yet the lower courts refuse to allow

me to have mine? I believe that, because there are five PSRs the AUSA and USPO would have to explain why my guideline calculation went from thirty years to life for no reason, since the only enhancements that were added were double and triple. This is the evidence of prosecutorial vindictivness that I claim in my §2255. I was punished for standing up for my self. Neither district court, court of appeals or this Supreme Court never gave any review of this claim or gave any reason why this action was not vindictive. This way of review was also done to deny my claim that my sentence exceeded the statutory maximum. I gave the lower courts Blakely v. Washingtion to explain what the statutory maximum was and district courts response was that I was wrong and failed to explain how it came to that belief. The courts have a constitutional responsibility to follow the law as it is written not to make it up as they go. District court avoided proper review of these and other claims of constitutional error because if they applied the law as written my plea would be clearly void.

Why if the AUSA, in open court tells me and the court that I can appeal constitutional violations, why will no court review my claims of constitutional error on the merits? How can any court review claims on the merits without explaining how they determined the facts when the record is unclear and key evidence is missing? They cant because they are hiding the real reason which is improper and cant be put on the record.

Michael Hower
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Federal Correctional Institution
P.O. Box 1000
Cumberland MD 21501

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