

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 16-6752

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 07, 2017
DEBORAH S. HUNT, Clerk

DALE LLOYD CHALLONER,

Petitioner-Appellant,

V.

MICHAEL SEPANEK, Warden,

Respondent-Appellee.

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

O R D E R

Before: SUHRHEINRICH, MOORE, and CLAY, Circuit Judges.

Dale Lloyd Challoner, a pro se federal prisoner confined at the United States Penitentiary-Big Sandy in Inez, Kentucky, appeals the district court's judgment denying his 28 U.S.C. § 2241 petition for a writ of habeas corpus and its order denying his Federal Rule of Civil Procedure 59(e) motion to alter or amend that judgment. Challoner also moves to proceed in forma pauperis. 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 2000, a federal jury in the United States District Court for the District of Colorado convicted Challoner of seven offenses stemming from a bank-robbery conspiracy, and the district court sentenced him to an aggregate term of 1,080 months of imprisonment. *See United States v. Challoner*, 65 F. App'x 222, 224-25 (10th Cir. 2003). His direct appeal was unsuccessful, *id.*; *Challoner v. United States*, 540 U.S. 922 (2003), as was his 28 U.S.C. § 2255 motion to vacate, *United States v. Challoner*, No. CRIM.00-CR-00482-EWN, 2008 WL 4211103 (D. Colo. Sept. 10, 2008), *aff'd*, 583 F.3d 745 (10th Cir. 2009).

Challoner then filed a § 2241 petition in the United States District Court for the Eastern District of Kentucky. His first two claims alleged that he is actually innocent of conspiracy to commit bank robbery, attempted bank robbery, and using a firearm in relation to a crime of violence because the bank at the center of those charges was not federally insured, which deprived the federal court of jurisdiction. In his third claim, Challoner raised another jurisdictional argument: that he is actually innocent of the charge of damaging an elementary school by means of fire because the public school that he was convicted of burning did not engage in interstate commerce. Challoner's fourth and fifth claims alleged that he is actually innocent of using a destructive device in furtherance of a crime of arson and of possessing an unregistered device because he did not use the device in question—a Molotov cocktail—as a weapon. In his sixth claim, Challoner argued that he is actually innocent of the crime of using fire during the commission of another felony, because the predicate “[l]other felony” was conspiracy to commit bank robbery, which—as Challoner maintained in his first claim—was itself void. Seventh, Challoner asserted that the prosecutor committed misconduct. His eighth claim was that his sentence exceeded the statutory maximum. For all of his claims but his seventh, Challoner also alleged that his counsel was ineffective for failing to make the arguments asserted in the claims. The district court denied the petition. Challoner moved to alter or amend that judgment, *see* Fed. R. Civ. P. 59(e), which the district court also denied.

We review the denial of a § 2241 petition de novo. *Wooten v. Cauley*, 677 F.3d 303, 306 (6th Cir. 2012); *Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999). Because we review the denial of a motion to alter or amend judgment under a standard that is more deferential to the district court, *Nolfi v. Ohio Kentucky Oil Corp.*, 675 F.3d 538, 552 (6th Cir. 2012), we need not analyze the district court's denial of Challoner's Rule 59(e) motion in addition to reviewing its denial of his § 2241 petition.

“A federal prisoner must challenge the legality of his detention by motion under 28 U.S.C. § 2255, but may challenge the manner or execution of his sentence under 28 U.S.C. § 2241.” *Wooten*, 677 F.3d at 306. Challoner challenged the legality of his detention, not how it

is being carried out, and, thus, § 2241 is not the appropriate means for obtaining the relief he seeks.

“Still, pursuant to the ‘savings clause’ in § 2255, a federal prisoner may bring a claim challenging his conviction or imposition of sentence under § 2241, if it appears that the remedy afforded under § 2255 is ‘inadequate or ineffective to test the legality of his detention.’” *Charles*, 180 F.3d at 756 (quoting 28 U.S.C. § 2255(e)). “It is the petitioner’s burden to establish that his remedy under § 2255 is inadequate or ineffective,” *id.*, and “[t]he circumstances in which § 2255 is inadequate and ineffective are narrow,” *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001). “To date, the savings clause has only been applied to claims of actual innocence based upon Supreme Court decisions announcing new rules of statutory construction unavailable for attack under § 2255,” *Reminsky v. United States*, 523 F. App’x 327, 328-29 (6th Cir. 2013) (citing *Martin v. Perez*, 319 F.3d 799, 804-05 (6th Cir. 2003); *Peterman*, 249 F.3d at 461-62)), and to a “narrow subset” of sentencing claims not relevant here, *see Hill v. Masters*, 836 F.3d 591, 599-600 (6th Cir. 2016).

Although several of Challoner’s claims nominally alleged that he is actually innocent, none were based on a new rule of statutory construction. Therefore, Challoner has not shown that his remedy under § 2255 is inadequate or ineffective to test the legality of his confinement.

Accordingly, we **GRANT** Challoner’s motion to proceed in forma pauperis for the limited purpose of this appeal, and we **AFFIRM** the district court’s judgment and order.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Case No. 16-6752

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ORDER

DALE LLOYD CHALLONER

Petitioner - Appellant

v.

MICHAEL SEPANEK, Warden

Respondent - Appellee

BEFORE: SUHRHEINRICH, Circuit Judge; MOORE, Circuit Judge; CLAY, Circuit Judge;

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk



Issued: September 12, 2017

79 (6th Cir. 1990) (quoting *Aronson v. May*, 85 S. Ct. 3, 5 (1964) (Douglas, J., in chambers)). As the Sixth Circuit has explained, “[t]here will be few occasions where a prisoner will meet this standard.” *Id.* And Challoner has given the Court no reason to believe he falls among those few cases. Finally, Challoner’s motion for the appointment of counsel on appeal should be directed not to this Court but to the Sixth Circuit—the court to which he now appeals.

Accordingly it is **ORDERED** as follows:

- (1) Pursuant to 28 U.S.C. § 1915(a)(3), the Court **CERTIFIES** that Challoner’s appeal, R. 11, is not taken in good faith.
- (2) Challoner’s motion to proceed *in forma pauperis* on appeal, R. 12, is **DENIED**.
- (3) Challoner’s motion for bond pending appeal, R. 14, is **DENIED**.
- (4) Challoner’s motion for appointment of counsel, R. 15, is **DENIED**.

This the 22nd day of December, 2016.



Signed By:

Amul R. Thapar

AT

United States District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**