

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 1, 2018

Elisabeth A. Shumaker
Clerk of Court

MANUEL GUERRERO,

Petitioner - Appellant,

v.

N. C. ENGLISH, Warden, USP-
Leavenworth,

Respondent - Appellee.

No. 18-3078
(D.C. No. 5:18-CV-03068-JWL)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BRISCOE**, **MATHESON**, and **EID**, Circuit Judges.

Manuel Guerrero is a prisoner in the United States Penitentiary at Leavenworth, Kansas. He filed a petition for habeas corpus under 28 U.S.C. § 2241 in the United States District Court for the District of Kansas, seeking to challenge a sentence imposed by the United States District Court for the Northern District of Texas. The District of Kansas dismissed this action without prejudice for lack of statutory jurisdiction. We affirm.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I

In 2010, Guerrero pled guilty to conspiracy to possess 100 kilograms or more of marijuana with intent to distribute, and was sentenced in the Northern District of Texas to a prison term of 235 months. *United States v. Guerrero (Guerrero I)*, No. 10-cr-00067-A-1 (N.D. Tex.) (Doc. 37). On direct appeal to the Fifth Circuit, Guerrero argued that the district court erred in classifying him as a career offender under the Sentencing Guidelines “because one of his Texas state convictions on which the district court relied was obtained in violation of his Sixth Amendment right to counsel.” *United States v. Guerrero (Guerrero II)*, 460 F. App’x 424, 425 (5th Cir. 2012) (per curiam). The Fifth Circuit rejected this argument and affirmed the district court’s sentence. *Id.* at 426.

More than a year after the Fifth Circuit’s decision, Guerrero filed a 28 U.S.C. § 2255 motion in the Northern District of Texas. *See Guerrero v. United States (Guerrero III)*, No. 4:13-cv-00367-A (N.D. Tex.). He again argued that the district court erred by classifying him as a career offender. *Id.* at Doc. 11. The district court denied this claim, and concluded Guerrero had provided no support for his allegation that a Texas state conviction which served as a basis for his career offender classification had been vacated or overturned. *Id.*

Approximately four years later, in 2017, Guerrero filed two consecutive § 2255 motions in the Northern District of Texas. *See Guerrero v. United States (Guerrero IV)*, No. 4:17-cv-00498-A (N.D. Tex.); *Guerrero v. United States (Guerrero V)*, No. 4:17-cv-00604-A (N.D. Tex.). Because both were second or

successive § 2255 motions filed without the permission of the Fifth Circuit, the district court dismissed both matters for lack of jurisdiction.

Guerrero then filed a “Motion to Correct a Plain Error” under the case number for his original criminal case in the Northern District of Texas. *See Guerrero I*, No. 10-cr-00067-A-1 (N.D. Tex.) (Doc. 66). The district court denied the motion, noting it was “another attempt to obtain relief that is not available . . . without leave of” the Fifth Circuit. *Id.* at Doc. 67.

Finally, in March of this year, Guerrero filed this § 2241 motion in the District of Kansas. Guerrero argues that the methodology that federal courts use to classify career offenders has changed since his sentence, and he now seeks relief in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016); *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016); and *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017), *supplemented by* 854 F.3d 284 (5th Cir. 2017). The district court held that the savings clause of 28 U.S.C. § 2255(e) does not apply to Guerrero because he has not shown that § 2255 is an inadequate or ineffective vehicle for relief. *Guerrero v. English (Guerrero VI)*, No. 18-3068-JWL, 2018 WL 1706515, at *4 (D. Kan. Apr. 9, 2018). The district court dismissed the case without prejudice for lack of statutory jurisdiction. *Id.*

II

When a § 2241 motion is filed, the district court first determines whether it has statutory jurisdiction to consider the motion. *See Abernathy v. Wanders*, 713 F.3d 538, 557 (10th Cir. 2013). A § 2255 motion is the primary vehicle to attack the validity of

a federal conviction or sentence. *See Prost v. Anderson*, 636 F.3d 578, 581 (10th Cir. 2011). A § 2241 motion is “generally reserved for complaints about the nature of a prisoner’s confinement, not the fact of his confinement.” *Id.* But “in rare instances, a prisoner may attack his underlying conviction by bringing a § 2241 habeas corpus application under the savings clause in § 2255(e).” *Hale v. Fox*, 829 F.3d 1162, 1165 (10th Cir. 2016) (citation and quotation omitted). Under § 2255(e), if a § 2255 motion is “inadequate or ineffective to test the legality of his detention,” then the prisoner can attack his conviction or sentence through a § 2241 motion. *Id.* (quoting 28 U.S.C. § 2255(e)). However, “when a federal petitioner fails to establish that he has satisfied § 2255(e)’s savings clause test—thus, precluding him from proceeding under § 2241—the court lacks statutory jurisdiction to hear his habeas claims.” *Abernathy*, 713 F.3d at 557.

“To invoke the savings clause, there must be something about the initial § 2255 procedure that itself is inadequate or ineffective for testing a challenge to detention.” *Prost*, 636 F.3d at 589. A mere “failure to use” § 2255 or not “prevail[ing] under it” is not sufficient to satisfy § 2255(e)’s savings clause. *Id.* Because “[t]he savings clause doesn’t guarantee results, only process,” we have held that “the possibility of an erroneous result—the denial of relief that should have been granted—does not render the procedural mechanism Congress provided for bringing that claim (whether it be 28 U.S.C. §§ 1331, 1332, 2201, 2255, or otherwise) an inadequate or ineffective *remedial vehicle for testing* its merits within the plain meaning of the savings clause.” *Id.* (emphasis in original).

Guerrero argues that—in light of rulings issued after he was sentenced, such as *Mathis*, *Hinkle*, and *Tanksley*—the Northern District of Texas should not have classified him as a career offender. That is, he argues that the methodology used in the Fifth Circuit to classify career offenders when he was sentenced differs from present day procedures. But an intervening change in how a provision is interpreted does not render § 2255 inadequate or ineffective. *Prost*, 636 F.3d at 588.¹ Merely because the relevant Fifth Circuit case law which was applied when Guerrero was sentenced was later overruled by a subsequent Supreme Court decision does not mean § 2255 was an inadequate or ineffective vehicle. *See Abernathy*, 713 F.3d at 548. Even if his chances of success were not high, Guerrero still could have challenged the Fifth Circuit’s then-existing precedent in his § 2255 motion. *See id.*; *see also Prost*, 636 F.3d at 590.

Guerrero argues that he can show actual innocence of the career offender status. *Aplt. Br.* at 15–18. But “a showing of actual innocence is irrelevant” when a court determines whether it has statutory jurisdiction to consider a § 2241 motion. *Abernathy*, 713 F.3d at 546 n.7. Instead, the focus is on whether § 2255 is an inadequate or ineffective vehicle for relief. *Prost*, 636 F.3d at 589. Further, the fact that a § 2255 movant must point to “newly discovered evidence” or “a new rule of constitutional law” to bring a second or successive petition, 28 U.S.C. § 2255(h),

¹ Guerrero urges us to overrule *Prost*. But we cannot overrule a previous published decision of this court “absent intervening Supreme Court or en banc authority to the contrary.” *United States v. Little*, 829 F.3d 1177, 1181 (10th Cir. 2016) (quotations omitted).

does not mean that the § 2255 remedial regime is inadequate or ineffective, *Prost*, 636 F.3d at 588.

In short, under our precedent there is no statutory jurisdiction over a § 2241 motion unless the movant shows that “the § 2255 remedial vehicle is inadequate or ineffective.” *Id.* at 590. Because Guerrero has not done that, the district court was correct to dismiss this case without prejudice for lack of statutory jurisdiction.

III

We **AFFIRM** the decision of the district court. Appellant’s motion to proceed in forma pauperis is **GRANTED**.

Entered for the Court

Mary Beck Briscoe
Circuit Judge