

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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|----------------------------------|---|--|
| <b>HUGH GRAVES,</b>              | ) |  |
|                                  | ) |  |
| <b>Petitioner,</b>               | ) | <b>Civil Action No. 08 - 152 Erie</b>  |
|                                  | ) |  |
| <b>v.</b>                        | ) | <b>Magistrate Judge Susan Paradise</b> |
|                                  | ) | <b>Baxter</b>                          |
| <b>UNITED STATES OF AMERICA,</b> | ) |  |
|                                  | ) |  |
| <b>Respondent.</b>               | ) |  |

**MEMORANDUM OPINION AND ORDER**

Petitioner, Hugh Graves, a federal prisoner currently incarcerated at the Federal Correctional Institution at McKean, which is located in Bradford, Pennsylvania, has filed a Petition for Writ of Habeas pursuant to 28 U.S.C. § 2241, in which he challenges his conviction in the United States District Court for the Northern District of Ohio. For the reasons set forth below, this action will be dismissed for lack of subject matter jurisdiction in accordance with the directives of the federal habeas corpus statute, as amended. An appropriate order follows.

**A. Relevant Factual History**

On October 19, 2005, in the United States District Court for the Northern District of Ohio before the Honorable Judge James S. Gwin, Graves entered a guilty plea to the charge of Distribution of Cocaine Base (Crack) in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) (ECF No. 13-1, p. 5). On January 27, 2006, he was sentenced to a term of imprisonment of 240 months to be followed by ten years of supervised release (ECF No. 13-2, p. 3). Graves did not file a direct appeal of his conviction or sentence.

On October 4, 2006, Petitioner filed a Motion to Vacate, Set Aside, or Correct his sentence pursuant to 28 U.S.C. § 2255, in which he alleged the following five grounds for relief: 1) his “conviction was obtained and the sentence imposed in violation of [his] rights to due process”; 2) he was denied effective assistance of counsel in connection with his guilty plea and plea agreement; 3) he “is entitled [to] specific performance under the terms and conditions of the Plea Agreement”; 4) the court “should depart downward from the mandatory minimum and not the default to the applicable guideline range”; and 5) he is entitled to resentencing because “the 100 to 1 ratio is

unreasonable and [] this Court possesses the discretion to sentence him at less than the guideline range based upon ‘crack.’” ECF No. 13-4. Thereafter, the government filed a Fed. R. Crim. P. 35(b) motion for a reduction of sentence based upon Graves’ substantial assistance and a motion to dismiss Graves’s § 2255 motion. On February 9, 2007, the district court granted the government’s Fed. R. Crim. P. 35(b) motion and in an amended judgment, reduced Graves’s sentence to 121 months of imprisonment followed by five years of supervised release. Also on February 9, 2007, the district court granted the government’s motion to dismiss and dismissed Graves’s § 2255 motion as moot.

On February 12, 2008, Graves filed a motion to modify his sentence pursuant to 18 U.S.C. § 3582(c)(2). On February 19, 2009, the district court granted Graves’s motion and reduced his sentence to 100 months of imprisonment, leaving undisturbed all other provisions of the February 9, 2007, Judgment. *See* ECF No. 135 at Petitioner’s criminal docket number 1:05-433-JG-5.

In the meantime, on October 16, 2008, Graves filed a motion in the Court of Appeals for the Sixth Circuit seeking permission to file a second or successive § 2255 motion to vacate sentence in the district court wherein he argued basically the same bases for relief he sets forth in his currently pending 2241 Petition. On August 24, 2009, the Sixth Circuit denied Graves’ motion to file a successive 2255 petition because it did not meet the gatekeeping requirements set forth therein.

On August 3, 2009, while his petition was pending in the Court of Appeals for the Sixth Circuit, Petitioner filed a Motion to Vacate and Set Aside the Conviction pursuant to 28 U.S.C. § 2255 in the District Court. *See* ECF No. 172 at Petitioner’s criminal docket number 1:05-433-JG-5.

On August 11, 2009, Judge Grim referred the matter to an United States Magistrate Judge. On September 10, 2009, the Magistrate Judge issued a Report and Recommendation recommending that the Court dismiss the pending 2255 motion because the Sixth Circuit had denied Petitioner permission to file a second or successive 2255 motion. *See* ECF No. 178 at Petitioner’s criminal docket number 1:05-433-JG-5. On October 27, 2010, Judge Grim adopted the Report and Recommendation and dismissed Graves’s motion under 28 U.S.C. § 2255. *See* ECF No. 184 at Petitioner’s criminal docket number 1:05-433-JG-5.

#### **B. Applicable Legal Standards - § 2241 v. § 2255**

Through the instant action, Petitioner is attempting to collaterally attack his federal sentence via a petition for a writ habeas corpus under 28 U.S.C. § 2241. However, a motion under 28 U.S.C. § 2255 is the proper procedure for a federal prisoner to raise a collateral attack on his or her federal sentence for any error that occurred at or prior to sentencing. *See In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997); *Cox v. Warden, Federal Detention Center*, 911 F.2d 1111, 1113 (5th Cir. 1990).

28 U.S.C. § 2255, in relevant part, provides as follows.

2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under [a federal] sentence claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

...

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

28 U.S.C. § 2255.

Petitioner brings this Petition under 28 U.S.C. § 2241 seeking to invalidate his guilty pleas. As stated above, a challenge to a federal sentence *as imposed*, must be made under 28 U.S.C. § 2255; a claim concerning *execution* of a sentence may be brought under 28 U.S.C. § 2241. *See Gomori v. Arnold*, 533 F.2d 871 (3d Cir.), *cert. denied*, 429 U.S. 851 (1976); *Bennett v. Soto*, 850 F.2d 161 (3d Cir. 1988). Notwithstanding, Petitioner asserts that he is entitled to bring this action under 28 U.S.C. § 2241 because a motion under 28 U.S.C. § 2255 is inadequate or ineffective to test the legality of his detention. In this regard, Petitioner points to the following statutory language in 28 U.S.C. § 2255.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255 (emphasis added).

However, the remedy available under 28 U.S.C. § 2241 for a federal prisoner to raise a collateral attack on his or her sentence is strictly limited to situations where a petitioner is completely barred from seeking any collateral review under the new provisions of the AEDPA.

The Court of Appeals for the Third Circuit explained the limited nature of § 2241 relief in In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997). In that case, the Petitioner, Dorsainvil, had been convicted of a violation of 18 U.S.C. § 924(c)(1), which imposes punishment upon a person who "during and in relation to any ... drug trafficking crime ... uses or carries a firearm." At his trial, Dorsainvil testified that he possessed the gun but denied that the gun was related in any way to the drug transaction, stating that he bought it for protection while living in Florida. The jury convicted him on all counts. Thereafter in 1993, Dorsainvil unsuccessfully sought collateral relief from his sentence under 28 U.S.C. § 2255 on the grounds of ineffective assistance of counsel and double jeopardy. In December of 1995, the Supreme Court decided Bailey v. United States, 516 U.S. 137, 150 (1995), wherein it held that the "use" language in 21 U.S.C. § 924 required the government to prove that the defendant "actively employed the firearm during and in relation to the predicate crime." Sometime in the summer of 1996, Dorsainvil filed a second § 2255 petition in the district court. In his second § 2255 motion, Dorsainvil asserted that there was insufficient evidence to show that he actively employed a firearm in relation to a drug trafficking crime and, as a consequence, his conviction under 21 U.S.C. § 924 was unlawful.

The district court ruled that it did not have jurisdiction to address Dorsainvil's second § 2255 motion due to the new "gate-keeping" provisions enacted in the AEDPA. In this regard, Congress enacted "gatekeeping" provisions in the AEDPA to prohibit prisoners from filing successive actions in federal court for collateral relief. The new provisions require a prisoner to obtain a certification from a three judge panel of the appropriate court of appeals before a successive motion for collateral relief may be considered by a federal district court.

With respect to federal prisoners such as Petitioner, Congress amended 28 U.S.C. § 2255, in pertinent part, as follows.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) 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.

28 U.S.C. § 2244 provides, in relevant part, as follows.

- (3)
  - (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
  - (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
  - (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
  - (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
  - (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.
- (4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. § 2244(b)(3),(4).

The Court of Appeals for the Third Circuit concluded that Dorsainvil could not file a second § 2255 motion under the gate-keeping provisions because his claim did not rely on newly-discovered evidence and the Bailey decision did not establish a new rule of constitutional law; rather, it merely interpreted existing law. Because Dorsainvil was precluded from raising his Bailey claim in a second 2255 motion, his remedy under § 2255 was "ineffective or inadequate." Accordingly, the court of appeals concluded that a petitioner in Dorsainvil's uncommon situation

may resort to the writ of habeas corpus under 28 U.S.C. § 2241. Dorsainvil, 119 F.3d at 248. The court noted that relief under § 2241 was proper in this situation to avoid a miscarriage of justice because otherwise a prisoner would not have an opportunity to challenge his conviction and, as a result, would be punished "for an act that the law does not make criminal." *Id.* at 251.

Petitioner, however, has not presented any basis that would allow him to proceed under 28 U.S.C. § 2241. Although a petitioner may challenge a conviction pursuant to § 2241 where a § 2255 motion would be "inadequate or ineffective," a § 2255 motion is not inadequate or ineffective because the sentencing court denies relief, the one-year statute of limitations has expired, or the petitioner is unable to meet § 2255's gatekeeping requirements. Cradle v. United States, 290 F.3d 536, 538-39 (3d Cir. 2002). Rather, a § 2255 motion is inadequate or ineffective "only where the petitioner demonstrates that some limitation of scope or procedure would prevent a § 2255 proceeding from affording him a full hearing and adjudication of his wrongful detention claim." *Id.* at 538.

Graves has not made such a showing. The fact that he did not meet the stringent gatekeeping requirements for filing a second § 2255 motion does not mean that a § 2255 motion is "inadequate or ineffective" such that Graves may proceed via § 2241. Cradle, 290 F.3d at 539; Rosario v. Holt, Civil No. 10-2054, 2010 WL 3965857 (3d Cir. Oct. 12, 2010). As such, this Court is without jurisdiction to review Petitioner's claim via his pending 2241 Petition. *Accord* Mejia v. Yost, Civil No. 10-1401, 2010 WL 2893612 (3d Cir. July 26, 2010). An appropriate order follows.

### **C. Certificate of Appealability**

Section 102 of the Antiterrorism and Effective Death Penalty Act (28 U.S.C. § 2253 (as amended)) codified standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. Federal prisoner appeals from the denial of a § 2241 habeas corpus proceeding are not governed by the certificate of appealability requirement. United States v. Cepero, 224 F.3d 256, 264-65 (3d Cir. 2000); 28 U.S.C. § 2253(c)(1)(B). Thus, the Court need not address this issue in the current action.

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**HUGH GRAVES,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

)  
) **Civil Action No. 08 - 152 Erie**  
)  
)

) **Magistrate Judge Susan Paradise**  
) **Baxter**  
)  
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**ORDER**

**AND NOW**, this 22nd day of November, 2010;

**IT IS HEREBY ORDERED** that the Petition for Writ of Habeas Corpus is **DISMISSED** for lack of subject matter jurisdiction.

**IT IS FURTHER ORDERED** that the Clerk of Court mark this case **CLOSED**.

**AND IT IS FURTHER ORDERED** that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, Petitioner has thirty (30) days to file a notice of appeal as provided by Rule 3 of the Federal Rules of Appellate Procedure.

/s/ Susan Paradise Baxter  
Susan Paradise Baxter  
United States Magistrate Judge

cc: Hugh Graves, 30247-160  
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