

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

**No. 20-7650**

---

BRIAN D. ABERNATHY,

Petitioner - Appellant,

v.

ROBERT HUDGINS,

Respondent - Appellee.

---

Appeal from the United States District Court for the Northern District of West Virginia, at  
Wheeling. John Preston Bailey, District Judge. (5:20-cv-00194-JPB)

---

Submitted: April 27, 2021

Decided: April 30, 2021

---

Before KEENAN, WYNN, and FLOYD, Circuit Judges.

---

Affirmed by unpublished per curiam opinion.

---

Brian D. Abernathy, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Brian D. Abernathy, a federal prisoner, appeals the district court's order accepting the recommendation of the magistrate judge and denying relief on Abernathy's 28 U.S.C. § 2241 petition in which Abernathy sought to challenge his sentence by way of the savings clause in 28 U.S.C. § 2255. Pursuant to § 2255(e), a prisoner may challenge his conviction or sentence in a traditional writ of habeas corpus pursuant to § 2241 if a § 2255 motion would be inadequate or ineffective to test the legality of his detention.

[Section] 2255 is inadequate and ineffective to test the legality of a sentence when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.

*United States v. Wheeler*, 886 F.3d 415, 429 (4th Cir. 2018).

Because Abernathy was sentenced under the advisory Sentencing Guidelines, we agree with the district court's conclusion that he fails to meet the fourth prong under *Wheeler*. See *United States v. Foote*, 784 F.3d 931 (4th Cir. 2015). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Abernathy v. Hudgins*, No. 5:20-cv-00194-JPB (N.D.W. Va. Oct. 23, 2020). We deny Abernathy's motion for appointment of counsel and we dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*