IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

KENNETH RAY JOHNSON,	§	
Reg. No. 38827-177,	§	
Petitioner,	§	
	§	
v.	§	**EP-17-CV-182-FM**
	§	
SCOTT WILLIS, Warden,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Petitioner Kenneth Ray Johnson seeks relief from his sentence through a *pro se* "Petition for Writ of Habeas Corpus Under to 28 U.S.C. § 2241" (ECF No. 1). Johnson, a federal prisoner at the La Tuna Federal Correctional Institution in Anthony, Texas,[1] explains the United States District Court for the Northern District of Texas sentenced him under the United States Sentencing Guidelines ("USSG") as a career offender.[2] He adds his prior state-court convictions no longer qualify as predicate offenses for career offender enhancements.[3] Johnson argues "his sentence is therefore in excess of the maximum authorized by law"[4] He asks the Court to grant his petition, vacate his sentence, and resentence him.[5] After reviewing the record and for reasons discussed

[1] Anthony is located in El Paso County, Texas, which is within the territorial confines of the Western District of Texas. 28 U.S.C. § 124(d)(3) (2012).

[2] Mem. in Supp. 1, ECF No. 1-1.

[3] *Id.* at 7.

[4] *Id.* at 4.

[5] *Id.* at 10.

below, the Court will *sua sponte* dismiss Johnson's petition, pursuant to 28 U.S.C. § 2243.[6]

BACKGROUND AND PROCEDURAL HISTORY

According to court records in case number 5:09-CR-43-C-16 in the District Court for the Northern District of Texas,[7] on March 12, 2009, a cooperating individual ("CI") working with Texas Department of Public Safety ("DPS") officers in Lubbock, Texas, made arrangements to purchase approximately one ounce of methamphetamine from Johnson during a consensually-recorded telephone conversation. While under surveillance by DPS officers, the CI took $1,400 in cash from DPS funds to Johnson's house in Levelland, Texas. While at the house, the CI accepted what Johnson described as one ounce of methamphetamine in exchange for the cash. After the transfer, the CI turned the substance over to the DPS officers, who forwarded it to the South Central Laboratory in Dallas, Texas, for analysis. The analysis revealed the substance the CI purchased from Johnson had a gross weight of 26.8 grams and contained 5.68 grams of actual methamphetamine.

A grand jury returned a 117-count superseding indictment charging Johnson and twenty-eight other defendants with multiple drug-trafficking offenses.[8] Johnson elected to forgo trial and pleaded guilty, pursuant to a plea agreement, to count 18 of the indictment, which charged

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[6] *See* 28 U.S.C. § 2243 (2012) ("A court ... entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.").

[7] *See* Factual Resume 2-10, Nov. 12, 2009, ECF No. 768, *United States v. Johnson*, 5:09-CR-43-C-16 (N.D. Tex.).

[8] Superseding Indictment, Aug. 12, 2009, ECF No. 587, *United States v. Johnson*, 5:09-CR-43-C-16 (N.D. Tex.).

him with distributing methamphetamine and aiding and abetting.[9] As part of the plea agreement, Johnson waived his right, with limited exceptions, to attack his sentence in a direct appeal or collateral challenge:

> Johnson waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his conviction and sentence. He further waives his right to contest his conviction and sentence in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. Johnson, however, reserves the right: (a) to bring a direct appeal of a sentence exceeding the statutory maximum punishment, and (b) any claims of ineffective assistance of counsel.[10]

Johnson also agreed in the plea agreement he was a career offender and acknowledged the Court would sentence him, pursuant to USSG § 4B1.1, as a career offender:

> Additionally, the government agrees to forebear the filing of a 21 U.S.C. § 851 Enhancement Information predicated upon Johnson's five prior convictions for "felony drug offenses" which have become final. However, the defendant does understand and agree that these convictions, will be considered in the calculation of his USSG sentence computation. Specifically, defendant Kenneth Ray Johnson admits and acknowledges pursuant to USSG § 4B1.1 that (1) he was at least eighteen years old at the time he committed the instant offense of conviction; (2) the instant offense of conviction, Count 18 charging Distribution of Methamphetamine on March 12, 2009, is a felony that is a "controlled substance offense," that is, an offense under federal law, punishable by imprisonment for a term exceeding one year, that prohibits the distribution of a controlled substance, as defined in USSG § 4B1.2(b); and (3) the defendant has at least "two prior felony convictions" for controlled substance offenses, as that term is defined in USSG § 4B1.2(c). In this regard, the defendant admits and acknowledges that he is one and the same person who, under the name "Kenneth Ray Johnson," was on September 23, 2004, convicted of the First Degree felony controlled substance offense of Unlawful Possession With Intent to

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[9] Plea Agreement 1, Nov. 12, 2009, ECF No. 767, Nov. 12, 2009, *United States v. Johnson*, 5:09-CR-43-C-16 (N.D. Tex.).

[10] *Id.* at 6-7.

> Deliver a Controlled Substance, to wit: Methamphetamine, in Criminal District Court of Dallas County, Texas, in Cause Number F0434640HL (date offense committed, March 11, 2004). Further, the defendant admits and acknowledges that he is one and the same person who, under the name "Kenneth R. Johnson," was on September 13, 2005, convicted of the First Degree felony controlled substance offense of Possession of a Controlled Substance With Intent to Deliver PG1 Methamphetamine Less Than 200 Grams But At Least 4 Grams, in the 364th District Court of Lubbock County, Texas, in Cause Number 2000-435202 (date offense committed, September 17, 2000). Thus the defendant agrees and stipulates that he is a "Career Offender" and will be sentenced pursuant to the provisions of USSG § 4Bl.l as a "Career Offender," with a Base Offense Level of 32, Criminal History Category VI, since the statutory maximum sentence for the offense of conviction is 20 years or more, but less than 25 years. See 4B1.1(b)(C).[11]

In exchange, the Government agreed it would not bring additional charges against Johnson and it would move to dismiss the remaining counts against him.[12]

At Johnson's re-arraignment, the Court found that Johnson was "fully competent and capable of entering an informed plea and that his plea of guilty [was] a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense charged in Count 18."[13] The Court accepted Johnson's plea and sentenced him to 160 months' imprisonment followed by ten years' supervised release.[14] Johnson did not appeal.

Johnson filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct a sentence in

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[11] *Id.* at 4-5.

[12] *Id.* at 4.

[13] Plea Tr. 7, Mar. 11, 2011, ECF No. 1052, *United States v. Johnson*, 5:09-CR-43-C-16 (N.D. Tex.).

[14] J., Mar. 5, 2010, ECF No. 988, *United States v. Johnson*, 5:09-CR-43-C-16 (N.D. Tex.).

the Northern District of Texas.[15] Johnson asserted the Court violated the Double Jeopardy Clause by awarding him nine criminal history points and punishing him twice for the same conduct. He also challenged the 160-month sentence as improperly disparate from that of his co-defendants. The Government countered that Johnson waived his right to challenge his conviction on these grounds as part of the plea agreement.[16] The Court agreed that—because Johnson knowingly and voluntarily waived his right to seek post-conviction relief except on limited grounds which were not implicated by his double jeopardy or disparate sentence claims—those grounds were barred from collateral review.[17] Johnson also argued that he received ineffective assistance of counsel because his attorney (1) failed to raise a double jeopardy defense against the application of the USSG, (2) neglected to challenge his conviction for both the substantive methamphetamine offense and aiding and abetting, and (3) did not argue that Johnson's sentence was disparate from that of his co-defendants.[18] The Court found that it would have been futile for Johnson's attorney to have raised these objections, and concluded that his attorney was not ineffective. Accordingly, the Court denied Johnson § 2255 relief.[19]

Johnson claimed in a subsequent § 2255 motion filed in the Northern District of Texas that

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[15] Mot. Vacate, Mar. 9, 2011, ECF No. 1049, *United States v. Johnson*, 5:09-CR-43-C-16 (N.D. Tex.).

[16] Gov't's Resp. 1, Apr. 26, 2011, ECF No. 4, *Johnson v. United States*, 5:11-CV-49-C (N.D. Tex.).

[17] Order 3, Sept. 23, 2012, ECF No. 7, *Johnson v. United States*, 5:11-CV-49-C (N.D. Tex.).

[18] Mot. Vacate 4, Mar. 9, 2011, ECF No. 1049, *United States v. Johnson*, 5:09-CR-43-C-16 (N.D. Tex.).

[19] Order 7, Sept. 23, 2012, ECF No. 7, *Johnson v. United States*, 5:11-CV-49-C (N.D. Tex.).

he did not qualify as a career offender.[20] The Court immediately transferred the motion to the Fifth Circuit Court of Appeals for its consideration as a second or successive petition for relief.[21] The Fifth Circuit denied Johnson authorization to proceed with a successive § 2255 motion.[22]

In his instant § 2241 petition, Johnson claims that, 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), the Court should resentence him because his prior convictions for possession of methamphetamine with the intent to deliver "under Texas Health & Safety Code 481.112(a) ... do not qualify as predicate offenses to qualify him as a career offender under 4B1.1, thus his sentence is in excess of the maximum authorized by law."[23] He asks the Court to resentence him without an enhancement.[24]

APPLICABLE LAW

"A section 2241 petition for habeas corpus on behalf of a sentenced prisoner attacks the manner in which his sentence is carried out or the prison authorities' determination of its duration."[25] To prevail, a § 2241 petitioner must show that he is "in custody in violation of the Constitution or laws or treaties of the United States."[26] A § 2241 petitioner may make this attack

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[20] Mot. Vacate, June 25, 2014, ECF No. 1092, *United States v. Johnson*, 5:09-CR-43-C-16 (N.D. Tex.).

[21] Order, June 26, 2014, ECF No. 3, *Johnson v. United States*, 5:14-CV-101-C (N.D. Tex.).

[22] Order, Jan. 15, 2015, No. 14-10703, (5th Cir.).

[23] Mem. in Supp. 10.

[24] *Id.*

[25] *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000) (citations omitted).

[26] 28 U.S.C. § 2241(c) (2012).

only in the district court with jurisdiction over his custodian.[27]

By contrast, a motion to vacate or correct a sentence pursuant to 28 U.S.C. § 2255 "'provides the primary means of collateral attack on a federal sentence.'"[28] Relief under § 2255 is warranted for errors that occurred at trial or sentencing.[29] A § 2255 petitioner may only bring his motion in the district of conviction and sentence.[30]

Section 2255 does contain a "savings clause" which acts as a limited exception to these general rules. It provides that a court may entertain a petition for writ of habeas corpus challenging a federal criminal conviction if it concludes that filing a motion to vacate, set aside or correct sentence pursuant to § 2255 is inadequate to challenge a prisoner's detention.[31] However, a petitioner must satisfy a two-prong test before he may invoke the "savings clause" to address errors occurring at trial or sentencing in a petition filed pursuant to § 2241:

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[27] *United States v. Cleto*, 956 F.2d 83, 84 (5th Cir. 1992).

[28] *Pack*, 218 F.3d at 451 (quoting *Cox v. Warden*, 911 F.2d 1111, 1113 (5th Cir. 1990)).

[29] *See Cox,* 911 F.2d at 1114 (5th Cir. 1990) ("The district court's dismissal of these grounds clearly was proper because they concerned alleged errors that occurred at sentencing and, therefore, may be remedied under section 2255."); *Ojo v. INS*, 106 F.3d 680, 683 (5th Cir. 1997) ("Because all of the errors Ojo alleges [occurred before or during sentencing], they must be addressed in a § 2255 petition, and the only court with jurisdiction to hear that is the court that sentenced him."); *Solsona v. Warden, F.C.I.,* 821 F.2d 1129, 1131 (5th Cir. 1987) (explaining that, because defendant's claims attacked the constitutionality of his conviction and proof of his claims would undermine the validity of his conviction, his exclusive initial remedy was a motion under§ 2255).

[30] *Pack*, 218 F.3d at 452.

[31] *See* 28 U.S.C. 2255(e) ("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.*") (emphasis added).

> [T]he savings clause of § 2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion.[32]

A petitioner must prove both prongs to successfully invoke the "savings clause."[33] Section 2241 is not a mere substitute for § 2255, and a petitioner bears the burden of showing that the § 2255 remedy is inadequate.[34]

With these principles in mind, the Court turns to Johnson's claims.

ANALYSIS

In his petition, Johnson challenges the enhancements used to determine his sentence after he pleaded guilty to one count of distributing methamphetamine and aiding and abetting in the Northern District of Texas.[35] Johnson claims that, in light of *Mathis, Hinkle*, and *Tanksley*, the Court erred when it enhanced his punishment based on his prior state–court felony convictions for violations of Texas Health & Safety Code 481.112(a).[36] He asks the Court to resentence him without an enhancement.[37] Notably, Johnson does not suggest he did not commit the federal offense. He also does not suggest he did not commit the state offenses relied on by the Court to

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[32] *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001).

[33] *Padilla v. United States*, 416 F.3d 424, 426 (5th Cir. 2005).

[34] *Reyes-Requena*, 243 F.3d at 901 (citing *Pack*, 218 F.3d at 452; *Kinder v. Purdy*, 222 F.3d 209, 214 (5th Cir. 2000)).

[35] Pet'r's Pet. 6-7, ECF No. 1.

[36] Mem. in Supp. 10.

[37] *Id.*

enhance his sentence.

In *Mathis*, the Supreme Court outlined the process by which a district court should determine, for the purposes of the Armed Career Criminal Act, if a defendant's prior state-court conviction was one of the enumerated violent felonies listed in 18 U.S.C. § 924(e)(2)(B)(ii).[38] Prior to *Mathis*, the Supreme Court required a district court to compare the elements of the state crime with the generic version of the enumerated federal offense. If the state crime was "the same as, or narrower than, the relevant generic offense," then the state crime qualified as an enumerated offense.[39] The Court reaffirmed this approach in *Mathis*, but added that, because the inquiry focused on the generic offense, a court "may not ask whether the defendant's conduct—his particular means of committing the crime—falls within the generic definition."[40] Accordingly, the Supreme Court concluded that if the elements of the state law crime were broader than the generic version of an enumerated federal offense, then the state law conviction could not serve as a predicate for career offender status under the Armed Career Criminal Act.

In *Hinkle*, the Fifth Circuit held that a prior conviction for delivery of a controlled substance, in violation of Texas Health & Safety Code § 481.112(a),[41] could not "serve as a predicate offense under the Career Offender Guideline provision, which is [Sentencing Guideline]

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[38] *Mathis*, 136 S. Ct. at 2247–57.

[39] *Id.* at 2257. *See also Taylor v. United States*, 495 U.S. 575, 599 (1990).

[40] *Mathis*, 136 S. Ct. at 2257.

[41] See Tex. Health & Safety Code Ann. § 481.112 (West) ("a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1").

§ 4B1.1."[42] The Court of Appeals reasoned that "[t]he 'delivery' element of Hinkle's crime of conviction criminalize[d] a 'greater swath of conduct than the elements of the relevant [Guidelines] offense.'"[43] The Fifth Circuit further explained that although the law of the Circuit previously permitted sentencing courts to use a "modified categorical approach"—and ascertain from state-court records whether the actual method of delivery constituted a controlled substance offense under the Sentencing Guidelines—"*Mathis* makes clear that sentencing courts may no longer do so."[44]

Finally, in *Tanksley*, the Fifth Circuit held that Texas Health & Safety Code "[s]ection 481.112(a) is an indivisible statute to which the modified categorical approach does not apply" because it '"criminalizes a greater swath of conduct than the elements of the relevant [Guidelines] offense.'"[45] Thus, the offense of possession with the intent to deliver a controlled substance under § 481.112(a) did not qualify as a "controlled substance offense under the Sentencing Guidelines."[46]

Johnson may proceed with an attack on the validity of his sentence in a § 2241 petition only if he can meet both prongs of the stringent test for the § 2255 "savings clause."[47] He "must establish that his claim (1) is based on a retroactively applicable Supreme Court decision which

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[42] *Hinkle*, 832 F.3d at 576–77.

[43] *Id.* at 576 (quoting *Mathis*, 136 S.Ct. at 2251) (some alterations in original).

[44] *Id.* at 574–75.

[45] *Tanksley,* 848 F.3d at 352 (quoting *Mathis*, 136 S.Ct. at 2251).

[46] *Id.*

[47] *Kinder*, 222 F.3d at 212.

establishes that he might have been convicted of a nonexistent offense and (2) was foreclosed by circuit law at the time of his trial, direct appeal, or first § 2255 motion."[48]

The first prong of the test is, essentially, an "actual innocence" requirement whose "core idea is that the petitioner may be have been imprisoned for conduct which was not prohibited by law."[49] Johnson's claim challenging the enhancement of his sentence under Sentencing Guidelines §§ 4B1.1 and 4B1.2—based on his prior state-court convictions for "felony drug offenses" which have become final—fails to satisfy the first prong. He has not alleged or shown that he "*was convicted of a nonexistent offense*," and his claim "has no effect on whether the facts of his case would support his conviction for the substantive offense."[50]

Further, *Mathis*, which the Supreme Court decided on June 23, 2016, did not announce a new rule made retroactively applicable to cases on collateral review.[51] In *Mathis*, the Supreme Court held that a modified categorical approach was not appropriate for indivisible statutes.[52] Thus, *Mathis* "provided helpful guidance for determining whether a predicate statute of conviction is divisible."[53] The Supreme Court further explained in *Mathis* that its decision was dictated by

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[48] *Strother v. Blackmon*, No. 16-60539, 2017 WL 2870993, at *1 (5th Cir. July 5, 2017).

[49] *Reyes-Requena*, 243 F.3d at 903.

[50] *Padilla*, 416 F.3d at 427 (emphasis added).

[51] *See Mathis*, 136 S. Ct. at 2257 ("Our precedents make this a straightforward case."); *see also Teague v. Lane*, 489 U.S. 288, 301 (1989) ("[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.").

[52] *Mathis*, 136 S. Ct. at 2257.

[53] *United States v. Uribe*, 838 F.3d 667, 670 (5th Cir. 2016).

prior precedent and that it was *not* announcing a new rule.[54] Multiple courts have subsequently concluded that "*Mathis* did *not* set forth a new rule of constitutional law that has been made retroactive to cases on collateral review."[55]

Finally, in both *Hinkle* and *Tanksley*, the Fifth Circuit applied *Mathis* on direct appeal, not on collateral review.[56] Moreover, *Hinkle* and *Tanksley* were not retroactively applicable Supreme Court decisions.

The Court finds Johnson's claim does not meet the stringent requirements of the § 2255 "savings clause." The Court will not allow Johnson to proceed under § 2241.

CONCLUSION AND ORDERS

As stated above, 28 U.S.C. §§ 2241 and 2255 do not provide authority for the Court to address Johnson's claim. The Court will, therefore, dismiss his § 2241petition as frivolous, and, to the extent his petition may be construed as a § 2255 motion, the Court will dismiss his motion for lack of jurisdiction.[57] Accordingly, the Court enters the following orders:

IT IS ORDERED that Petitioner Kenneth Ray Johnson's *pro se* petition under 28 U.S.C. §

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[54] *Mathis*, 136 S. Ct. at 2257; *see also Teague v. Lane*, 489 U.S. 288, 301 (1989) ("[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.").

[55] *Milan v. United States*, No. 3:16:CV-1850-D-BK, 2017 WL 535599, at *2 (N.D. Tex. Jan. 18, 2017); *see also In re Lott*, 838 F.3d at 523 (denying authorization to file a successive § 2255 motion because defendant failed to make the requisite showing that *Mathis* created "new rules of constitutional law that have been made retroactive to cases on collateral review"); *United States v. Taylor*, 672 F. App'x 860, 864 (10th Cir. 2016) (concluding "*Mathis* did not announce a new rule."); *Dawkins v. United States*, 829 F.3d 549, 551 (7th Cir. 2016) (concluding *Mathis* did not announce a new rule that would allow a second or successive habeas petition).

[56] *Hinkle*, 832 F.3d at 574–77; *Tanksley*, 848 F.3d at 352.

[57] *Ojo*, 106 F.3d at 683.

2241 (ECF No. 1) is **DISMISSED WITHOUT PREJUDICE.**

IT IS FURTHER ORDERED that all pending motions in this cause, if any, are **DENIED AS MOOT.**

IT IS ALSO ORDERED that to the extent Petitioner Kenneth Ray Johnson's § 2241petition is construed as a successive § 2255 motion, he is denied a **CERTIFICATE OF APPEALABILITY.**[58]

IT IS FINALLY ORDERED that the Clerk shall **CLOSE** this case.

SO ORDERED.

SIGNED this 19 day of July, 2017.

FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

[58] *See* 28 U.S.C. foll. § 2255 R. 11(a) ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.").