

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARK SANDERS,

ORDER

Petitioner,

12-cv-801-bbc

v.

ROBERT WERLINGER,

Respondent.

Petitioner Mark Sanders, a prisoner at the Federal Correctional Institution in Oxford, Wisconsin, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. He has paid the \$5 filing fee.

Petitioner's petition and brief are somewhat difficult to follow, but from his submissions and the record of his criminal proceedings, United States v. Sanders, Case No. 98-cr-56-cb (S.D. Ala.), the picture becomes clearer. Petitioner was indicted in the Southern District of Alabama for his involvement in a drug conspiracy. He was acquitted of those charges in April 1998. Shortly thereafter, petitioner was again charged regarding a drug conspiracy. Petitioner's codefendants were convicted on some counts but the jury could not reach a verdict on any of the charges against petitioner. The court declared a mistrial and set the case for retrial. In the new case, petitioner pleaded guilty to conspiracy to possess with intent to distribute cocaine and was sentenced to ten years in prison on December 15, 2000. (Also in case no. 98-cr-56-cb, petitioner was convicted of two murder charges for

killing a codefendant poised to testify against him. However, petitioner does not challenge those convictions in this action.)

In 2004, petitioner filed a motion under 28 U.S.C. § 2255 arguing that his trial counsel was ineffective. That motion was denied in 2007.

Petitioner brings this petition arguing that his right to be free from double jeopardy was violated when he was prosecuted for a drug conspiracy following his 1998 acquittal on similar charges. He argues also that his trial counsel was ineffective.

DISCUSSION

Petitioner brings this action under 28 U.S.C. § 2241, which allows a court to grant a writ of habeas corpus for a prisoner who is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3). Ordinarily, a federal prisoner seeking to attack his conviction or sentence must do so on direct appeal or in a motion filed under 28 U.S.C. § 2255. Unthank v. Jett, 549 F.3d 534, 534-35 (7th Cir. 2008); Kramer v. Olson, 347 F.3d 214, 217 (7th Cir. 2003) (per curiam). A prisoner like petitioner who has filed one § 2255 motion may pursue relief under § 2241 only if he can satisfy the mandates of § 2255's so-called “savings clause,” which provides that a prisoner can use § 2241 if he can show that “the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e); Kramer, 347 F.3d at 217; Taylor v. Gilkey, 314 F.3d 832, 835 (7th Cir. 2002). To demonstrate that § 2255 is inadequate or ineffective to test the legality of his detention, a prisoner must show three things: that

he is seeking correction of a fundamental defect in his conviction or sentence; his petition is based on a rule of law not yet established at the time he filed his first § 2255 motion; and that he is barred from bringing a successive § 2255 motion. United States v. Prevatte, 300 F.3d 792, 799-800 (7th Cir. 2002); In re Davenport, 147 F.3d 605, 610-11 (7th Cir. 1998).

Petitioner cannot show that § 2255 is inadequate or ineffective to challenge the legality of his detention. In particular, he does not raise a claim that is based on a legal theory or rule of law that was not yet established at the time he filed his § 2255 motion or that he could not have raised in his § 2255 motion. He was not prevented from making his double jeopardy or ineffective assistance of counsel arguments in his initial § 2255 motion, and indeed, it appears that he made the ineffective assistance of counsel arguments at that time. Thus, petitioner does not fit within the savings clause found in § 2255(e) and may not proceed under § 2241.

ORDER

IT IS ORDERED that petitioner Mark Sanders's petition for a writ of habeas corpus under 28 U.S.C. § 2241 is DENIED for his failure to show that his petition satisfies the

standard under 28 U.S.C. § 2255(e).

Entered this 7th day of January, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge