

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

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ADALBERTO SUAREZ-FLORES,

Petitioner,

OPINION AND ORDER

v.

12-cv-65-wmc

R. WERLINGER, WARDEN,  
FCI-OXFORD,

Respondent.

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Adalberto Suarez-Flores has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging the validity of his conviction and sentence. He has filed a brief in support of his petition and he has paid the filing fee. For reasons set forth below, the petition will be dismissed because Suarez-Flores fails to demonstrate that this court has a valid jurisdictional basis to consider his claims for relief under § 2241.

FACTS

The following facts are taken from the pleadings and the electronic docket in Suarez-Flores's underlying criminal case:

Suarez-Flores is presently incarcerated at the Federal Correctional Institution in Oxford, Wisconsin (FCI-Oxford), as the result of a conviction from the United States District Court for the Southern District of Texas, Brownsville Division, in *United States v. Suarez-Flores*, Case No. 1:10-cr-00804-01 (S.D. Tex.). On August 4, 2010, Suarez-Flores pleaded guilty in that case to charges of illegal reentry into the United States following a prior deportation.<sup>1</sup> According to the written plea agreement, the government

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<sup>1</sup> Suarez-Flores was deported or removed from the United States previously on December 13, 2007, following his conviction for possession of a controlled substance.

recommended that Suarez-Flores receive credit for acceptance of responsibility and a reduction in sentence under U.S.S.G. § 5K3.1 for entering an early plea. Pursuant to the written plea agreement, the district court sentenced Suarez-Flores on February 8, 2011, to serve a 46-month term of imprisonment.

After sentence was imposed, Suarez-Flores filed an appeal from his illegal-reentry conviction. In that proceeding, the attorney who was appointed to represent Suarez-Flores filed a motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967), certifying that there was no non-frivolous issue for appellate review. The United States Court of Appeals for the Fifth Circuit agreed and summarily dismissed the appeal with an unpublished opinion. See *United States v. Suarez-Flores*, No. 11-40182 (5th Cir. Oct. 21, 2011). Suarez-Flores did not appeal further by pursuing certiorari review by the United States Supreme Court.

On November 25, 2011, Suarez-Flores filed a motion under 28 U.S.C. § 2255, asking the trial court to vacate, set aside, or correct his sentence. Suarez-Flores argued that he was entitled to relief for the following reasons: (1) he was denied effective assistance of counsel at sentencing; (2) as a citizen of Mexico, he was not advised upon his arrest of the right to contact the Mexican Consulate under Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820; (3) the district court failed to comply with Fed. R. Crim. P. 11; (4) his sentence was enhanced improperly under U.S.S.G. § 2L1.2 with a prior felony conviction for “aggravated assault” that did not constitute a “crime of violence”; and (5) his sentence was enhanced improperly under a mandatory Guideline scheme that was invalidated in *United States v.*

*Booker*, 543 U.S. 220 (2005). The sentencing court denied that motion on January 26, 2012. Suarez-Flores did not pursue an appeal from that decision.

Suarez-Flores now seeks relief under 28 U.S.C. § 2241, and he asks this court to vacate the sentence imposed by the Southern District of Texas in Case No. 1:10-cr-00804-01. Suarez-Flores argues that he is entitled to relief for the following reasons: (1) his term of imprisonment should be reduced under the “fast-track program” because he entered a prompt guilty plea; (2) he was denied his right to contact the Mexican Consulate in violation of Article 36 of the Vienna Convention on Consular Relations; (3) he was denied effective assistance of counsel on appeal; and (4) his sentence was enhanced improperly under U.S.S.G. § 2L1.2.

#### OPINION

Suarez-Flores seeks judicial review of his criminal conviction and sentence under 28 U.S.C. § 2241(c)(3), which authorizes a writ of habeas corpus where a prisoner can show that he is “in custody in violation of the Constitution or laws or treaties of the United States[.]” Review under § 2241 is usually reserved for attacking the execution, not the imposition, of a sentence. *See Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003). By contrast, “[28 U.S.C.] § 2255 is the exclusive means for a federal prisoner to attack his conviction [or sentence].” *Hill v. Werlinger*, 695 F.3d 644, 647 (7th Cir. 2012); *see also Carnine v. United States*, 974 F.2d 924, 927 (7th Cir. 1992) (comparing the remedies available under §§ 2241, 2255).

Because Suarez-Flores argues that his current sentence should be set aside or vacated, his petition is governed by § 2255. *See Hill*, 695 F.3d at 647. As a rule, motions of this kind must be filed with the sentencing court. See 28 U.S.C. § 2255(a); *Longbehn v. United States*, 169 F.3d 1082, 1083 (7th Cir. 1999). In a “narrow class of cases,” however, a federal prisoner may proceed under § 2241 if he can show that his claims fit within the “savings clause” found in 28 U.S.C. § 2255(e). *Hill*, 695 F.3d at 648; *Kramer*, 347 F.3d at 217 (citation omitted). To fit within that narrow exception, however, a prisoner must show that “the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of his detention.” *Id.* Suarez-Flores falls far short of that showing here.<sup>2</sup>

The Seventh Circuit has found that § 2255 is inadequate for purposes of the savings clause when the statutory prohibition on second or successive motions would otherwise “prevent a prisoner from obtaining review of a legal theory that ‘establishes the petitioner’s actual innocence.’” *Kramer*, 347 F.3d at 217 (quoting *Taylor v. Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002)). To make this showing, a prisoner must demonstrate that “the legal theory he advances relies on a change in law that both postdates his first § 2255 motion . . . and ‘eludes the permission in [§] 2255 for successive motions.’” *Kramer*,

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<sup>2</sup> It is also evident from the written plea agreement that Suarez-Flores received the benefit of the fast-track program. It also appears that his other claims were rejected by the sentencing court when it denied his initial motion to vacate under § 2255. As a result, a second attempt to challenge the conviction is subject to statutory restrictions on post-judgment review, including the prohibition on “second or successive” motions found in 28 U.S.C. § 2255(h). A federal prisoner who is barred from seeking relief under § 2255 may not circumvent the statutory restrictions on review by challenging his conviction or sentence under § 2241 unless his claims fit within the savings clause. *See United States v. Prevatte*, 300 F.3d 792, 799 (7th Cir. 2002) (quoting *Garza v. Lappin*, 253 F.3d 918, 921 (7th Cir. 2001)).

347 F.3d at 217 (quoting *Davenport*, 147 F.3d at 611). None of the claims raised by Suarez-Flores fit within that category. In that respect, all of the claims and legal theories presented in the pending § 2241 petition were available at the time Suarez-Flores filed his initial motion to vacate under § 2255. Under these circumstances, Suarez-Flores does not show that § 2255 was inadequate or ineffective to test the legality of his detention. *See Hill*, 695 F.3d at 649; *see also Taylor*, 314 F.3d at 835 (observing that a petitioner’s prior failure to present a constitutional claim or “theory that has long been appropriate for collateral review does not render § 2255 ‘inadequate or ineffective’”).

Accordingly, Suarez-Flores does not fit within the savings clause found in § 2255(e), he may not proceed under § 2241, and his petition for a writ of habeas corpus must be dismissed for lack of jurisdiction.

#### ORDER

IT IS ORDERED that the pending petition for a writ of habeas corpus under 28 U.S.C. § 2241 is DISMISSED for lack of jurisdiction because the petitioner does not fit within the savings clause found in 28 U.S.C. § 2255(e). The petitioner’s motions for a status conference and for appointment of counsel, dks. # 4, # 5, are DENIED as moot.

Entered this 14th day of January, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge