

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

SHERLON EVANS,

Petitioner,

v.

CASE NO. 05-3304-RDR

E.J. GALLEGOS,

Respondent.

O R D E R

This matter is before the court on a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2241, filed by a prisoner while incarcerated in the United States Penitentiary in Leavenworth, Kansas.<sup>1</sup>

Petitioner was convicted in the United States District Court for the Southern District of Florida on 1993 criminal charges that included a violation of 18 U.S.C. § 924(c). Petitioner contends his conviction on that charge, and the resulting enhancement of his sentence, should be set aside pursuant to Castillo v. United States, 530 U.S. 120 (2000), a case decided after the conclusion of petitioner's unsuccessful motion under 28 U.S.C. § 2255 and appeal. In Castillo, the Court determined that convictions for offenses in 18 U.S.C. § 924(c)(1) required the government to charge the use of the specific firearm in the indictment, present evidence to the jury, and prove the commission of the particular crime beyond a reasonable doubt.

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<sup>1</sup>Petitioner has notified the court of his subsequent transfer to a federal facility in Coleman, Florida.

By an order dated July 20, 2005, the court found relief on petitioner's claims must be pursued through a motion filed under 28 U.S.C. § 2255 in the Southern District of Florida, and directed petitioner to show cause why this action should not be dismissed because this court lacked jurisdiction under 28 U.S.C. § 2241 to consider petitioner's claims. See Williams v. United States, 323 F.2d 672, 673 (10th Cir. 1963)(habeas corpus petition under 28 U.S.C. § 2241 is not intended as additional, alternative, or supplemental remedy to that afforded by 28 U.S.C. § 2255; § 2255 remedy "supplants habeas corpus, unless it is shown to be inadequate or ineffective to test the legality of the prisoner's detention"), *cert. denied*, 377 U.S. 980 (1964).

In response, petitioner contends the remedy under § 2255 is unequipped to address his legal claim of actual innocence, and he thus should be allowed to proceed under § 2241 because the Tenth Circuit has concluded Castillo may be applied retroactively.<sup>2</sup> The court rejects this contention.

A motion under § 2255 in the Southern District of Florida is petitioner's exclusive remedy to challenge the validity of his conviction and sentence unless there is a showing that the remedy under § 2255 is inadequate or ineffective. See Haugh v. Booker, 210 F.3d 1147, 1149 (10th Cir. 2000). Courts have found the remedy under § 2255 to be inadequate or ineffective only in "extremely limited circumstances." Carvalho v. Pugh, 177 F.3d 1177, 1178 (10th Cir. 1999). The fact that a petitioner is precluded from

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<sup>2</sup>See United States v. Wiseman, 297 F.3d 975, 981 (10th Cir. 2002)(finding retroactive application of Castillo on collateral review is available under the principles announced in Teague v. Lane, 489 U.S. 288 (1989)).

filing another § 2255 motion fails to establish that the remedy is inadequate. See id. at 1179. Although second or successive applications are restricted under the Antiterrorism and Effective Death Penalty Act (AEDPA), they are not prohibited. See 28 U.S.C. §§ 2244(b)(2), 2255; Felker v. Turpin, 518 U.S. 651, 664 (1996). Petitioner cannot use 28 U.S.C. § 2241 to circumvent section 2255 and restrictions imposed by AEDPA on the filing of a second or successive petition under 28 U.S.C. § 2255.

Accordingly, because petitioner has not established the inadequacy or ineffectiveness of a § 2255 motion, this court lacks subject matter jurisdiction to consider petitioner's claim under 28 U.S.C. § 2241. The court thus concludes the petition should be dismissed.

IT IS THEREFORE ORDERED that the petition for relief under 28 U.S.C. § 2241 is dismissed for lack of jurisdiction.

DATED: This 16th day of June 2006, at Topeka, Kansas.

s/ Richard D. Rogers  
RICHARD D. ROGERS  
United States District Judge