

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>DAVID DUPEE,</b>	:	<b>CIVIL ACTION</b>
<b>Petitioner,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>UNITED STATES OF AMERICA,</b>	:	
<b>Respondent.</b>	:	<b>No. 02-7900</b>

**MEMORANDUM AND ORDER**

**SCHILLER, J.**

**December 11, 2002**

Petitioner David Dupee pled guilty to one count of conspiracy to commit bank robbery and one count of armed bank robbery. On September 4, 2001, I sentenced Petitioner to a term of imprisonment, and the sentence was not appealed. More than one year after the entry of his judgment of sentence, Petitioner sought a modification of his sentence. For the reasons set forth below, I dismiss Mr. Dupee's petition.

**I. BACKGROUND**

On February 21, 2001, the Government filed a two-count information against Mr. Dupee, charging him with conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371, and armed bank robbery in violation of 18 U.S.C. § 2113(d). Petitioner pled guilty to both counts. Additionally, as part of the plea agreement, Mr. Dupee agreed to provide certain information to the Government and to testify on the Government's behalf. Mr. Dupee cooperated with the Government, as he had done previously, and testified before a grand jury in support of the bank robbery indictment against his coconspirators. Pursuant to United States Sentencing Guideline

§ 5K1.1, the Government moved for a downward departure, stating that Mr. Dupee had provided substantial assistance in the investigation and prosecution of his coconspirators.

On September 4, 2001, I sentenced Petitioner to a term of thirty months imprisonment, departing downward from the guideline range of seventy to eighty-seven months. Neither Mr. Dupee nor the Government appealed his sentence. On October 11, 2002, Mr. Dupee filed a petition for a modification of his sentence that is the subject of this Memorandum.<sup>1</sup>

## **II. DISCUSSION**

In his petition, Mr. Dupee asks that the Court release him from prison and order that remainder of his sentence be served in a halfway house or under house arrest. His request raises several points. First, Petitioner asserts that after he was sentenced to imprisonment he continued to assist the Government in its efforts. Second, Mr. Dupee states that he has been a model inmate, and that he regrets the crimes he has committed. Third, Petitioner states that he wishes to assist his brother in the care of his elderly mother. Fourth, he asserts that he can resume regular employment.<sup>2</sup>

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<sup>1</sup> Petitioner's motion cites 28 U.S.C. § 2255 as the authority for his request. In an Order dated October 24, 2002, I directed the Clerk of Court to reclassify Mr. Dupee's filing as one brought pursuant to 28 U.S.C. § 2241. For the reasons discussed below, regardless of how Mr. Dupee's petition is classified, it is without merit.

<sup>2</sup> I note that the time period during which Mr. Dupee was entitled to appeal his sentence has long passed. *See* FED. R. APP. P. 4(b). In addition, I note that Petitioner's motion also states the following: "A review of the pertinent factors reveals that they constitute exceptional circumstances." This statement may be intended to invoke a provision in 18 U.S.C. § 3582, which authorizes courts to reduce a term of imprisonment under certain circumstances when warranted by "extraordinary and compelling reasons." 18 U.S.C. § 3582(c) (2002). However, the statute provides that in order for such a modification of a sentence to occur, an appropriate motion must be made by the Director of the Bureau of Prisons. 18 U.S.C. § 3582(c)(1)(A). No motion has been made by the Director of the Bureau of Prisons, and, as such, this provision does not apply to Mr. Dupee.

Except for an unexplained citation to 28 U.S.C. § 2255, Petitioner fails to provide any authority for modifying his sentence. Assuming that Mr. Dupee wishes to proceed under § 2255, his contentions are clearly unavailing. As an initial matter, his petition is time-barred under the statute's one-year limitations period. *See* 18 U.S.C. § 2255 (2002). Mr. Dupee's judgment of conviction became final on September 15, 2001 when the time for filing a notice of appeal expired, *Kapral v. United States*, 166 F.3d 565, 570-71 (3d Cir. 1999), but the instant motion was not filed until October 2002. Additionally, "[t]he question in [a § 2255] case is whether an error has occurred that is sufficiently fundamental. . . ." *United States v. Addonizio*, 442 U.S. 178, 184-85 (1979). Such errors include imposing sentences "in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence. . . ." 28 U.S.C. § 2255. Here, there is not even the allegation that any fundamental error has occurred with respect to Mr. Dupee's sentence. Thus, to the extent Petitioner seeks relief under § 2255, his claims are time-barred and without merit.

Additionally, I am precluded from granting Mr. Dupee relief under 28 U.S.C. § 2241. A habeas petition brought pursuant to § 2241 filed in a district court must be filed in the district with jurisdiction over the custodian of the prisoner. *See United States v. Jack*, 774 F.2d 605, 607 n.1 (3rd Cir. 1985); *Garcia v. Pugh*, 948 F. Supp. 20, 22-23 (E.D. Pa. 1996). Because Petitioner is incarcerated at a federal correctional institution in Raybrook, New York (Mot. for Modification of Sentence ¶ 8), this Court does not have jurisdiction over any claim by Petitioner under § 2241.<sup>3</sup>

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<sup>3</sup> In any event, even a cursory review of Petitioner's arguments reveals that he is not entitled to relief under § 2241. "[H]abeas corpus under § 2241 is now reserved for rare cases," *In re Dorsainvil*, 119 F.3d 245, 250 (3d Cir. 1997), such as challenges to convictions for crimes that an intervening change in the substantive law may negate. *Id.* This is not such a case.

### **III. CONCLUSION**

Mr. Dupee has not set forth any constitutional claim, assertion of a miscarriage of justice, or any other basis for post-conviction relief. In addition, Mr. Dupee cannot satisfy the procedural requirements of either § 2241 or § 2255. Accordingly, I dismiss Mr. Dupee's petition.

An appropriate order follows.

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<b>v.</b>	:	
	:	
<b>UNITED STATES OF AMERICA,</b>	:	
<b>Respondent.</b>	:	<b>No. 02-7900</b>

**ORDER**

**AND NOW**, this            day of **December, 2002**, upon consideration of Petitioner David Dupee's Motion for Modification of Sentence and the Government's response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1.     Petitioner's David Dupee's Petition/Application for Modification of Sentence (Document No. 1) is **DISMISSED**.
2.     The Clerk of Court is directed to close this case.

**BY THE COURT:**

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**Berle M. Schiller, J.**