

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN SHELTON :
 :
 v. : CIVIL ACTION
 :
 UNITED STATES OF AMERICA : NO. 05-CV-6682

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 92-CR-590
 :
 NORMAN SHELTON :

MEMORANDUM ORDER

AND NOW, this ___ day of April, 2006, upon consideration of Petitioner Norman Shelton's pro se Petition for Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 And/Or 1656 (Doc. No. 1, 05-CV-6682), his Memorandum Of Law in support thereof (Doc. No. 2, 05-CV-6682), the Government's Motion To Dismiss (Doc. No. 191),¹ and Petitioner's Reply To The Government's Response (Doc. No. 192), the Court finds as follows:

1. After a trial by jury, Petitioner was convicted of conspiracy, bank robbery, armed bank robbery, and carrying a firearm during a crime of violence. (Doc. No. 88.)
On July 13, 1993, Petitioner was sentenced to term of imprisonment of 322 months. (Doc. No. 96.) The conviction was affirmed by the Court of Appeals for the Third Circuit. (Doc. No. 117.) On August 16, 1996, Petitioner filed a pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 130). This motion was denied on March 26, 1997. (Doc. No. 142.)
Again, on May 10, 2001, Petitioner filed a pro se motion to vacate, set aside, or

¹ Unless otherwise indicated, all document numbers refer to the Docket for 92-CR-590.

correct his sentence pursuant to 28 U.S.C. § 2255.² (Doc. No. 179.) On August 23, 2001, Petitioner's second motion was dismissed. (Doc. No. 181.)

2. Petitioner has filed the instant Motion seeking habeas relief pursuant to 28 U.S.C. § 2241, based on a claim that he was denied effective assistance of counsel. (Doc. No. 2 at 2, 05-CV-6682.) Petitioner claims his counsel failed to raise a double jeopardy argument with regard to his convictions for bank robbery and armed bank robbery, which arose from the same occurrence. (*Id.*) Section 2241 provides federal courts with the power to grant habeas corpus relief.³ However, “[m]otions pursuant to 28 U.S.C. § 2255, are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution.” *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002). Federal prisoners must proceed under § 2255 to collaterally attack a sentence or conviction, except in rare instances when the use of this section would be inadequate or ineffective. *Id.* (citing *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997)).⁴ The fact that a petitioner is precluded from bringing a successive § 2255 petition does not enable that petitioner to use § 2241 instead. *United States*

² Petitioner's second motion was originally filed under 28 U.S.C. § 2241. The motion was re-classified, as one brought pursuant to § 2255. (Doc. No. 178.)

³ “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.” 28 U.S.C. § 2241(a).

⁴ Such rare circumstances have been found where a petitioner “was in the ‘unusual position’ of a prisoner with no prior opportunity to challenge his conviction for a crime that an intervening change in substantive law could negate with retroactive application.” *Okereke*, 307 F. 3d at 120 (citing *Dorsainvil*, 119 F.3d at 251). In *Dorsainvil*, the Third Circuit permitted the petitioner to proceed under § 2241 where he “may have been convicted for conduct the Supreme Court [later] deemed not to be criminal.” *Okereke*, 307 F.3d at 120 (citing *Dorsainvil*, 119 F.3d at 251).

v. Brooks, 230 F.3d 643, 648 (3d Cir. 2000) (citing *Dorsainvil*, 119 F. 3d at 251).

In this case, Petitioner has previously filed § 2255 petitions and does not allege any circumstances which would permit reliance on § 2241. Accordingly, we will construe this Motion as one brought under § 2255.

3. “When a second or successive habeas petition is filed in a district court without the permission of a court of appeals, the district court’s only option is to dismiss the petition or transfer it to the court of appeals pursuant to 28 U.S.C. § 1631.” *Robinson v. Johnson*, 313 F.3d 128, 139 (3d Cir. 2002); *see also Trader v. United States*, Civ. A. No. 05-6290, 2006 U.S. Dist. LEXIS 6436, at *5 (E.D. Pa. Jan. 30, 2006) (“[D]istrict courts lack authority to consider second or successive petitions without an order of the court of appeals.”). In the instant case, Petitioner did not seek permission from the Third Circuit to bring this successive habeas petition. Accordingly, Petitioner’s Motion will be dismissed.⁵
4. Alternatively, Petitioner argues that in light of the Supreme Court’s holding in *United States v. Booker*, 543 U.S. 220 (2005), he is entitled to post-conviction relief under the All Writs Act, 28 U.S.C. § 1651, through the writ of *audita querela*.⁶ Petitioner contends that because *Booker* is not retroactively available on

⁵ Petitioner concedes that he has no newly discovered evidence and that no new rule of constitutional law, made retroactive and previously unavailable to him, has been implicated. (Doc. No. 2 at 1, 05-CV-6682.) Even if Petitioner had sought permission from the Third Circuit to bring this, his third petition for habeas corpus relief under § 2255, no basis exists to grant such permission.

⁶ In *Booker*, the Supreme Court held that an enhanced sentence imposed under the United States Sentencing Guidelines violated the Sixth Amendment where it was “based on the sentencing judge’s determination of fact (other than prior conviction).” *Booker*, 543 U.S. at 245. “The Sixth Amendment requires juries, not judges, to find facts relevant to sentencing.” *Id.* In addition, the Court held that those provisions of the Federal Sentencing Act that made the

collateral review, a gap has been created in his post-conviction relief remedies, and therefore, the use of the writ of audita querela is warranted. (Doc. No. 2 at 7, 9-10, 05-CV-6682.) However, a petitioner cannot “resort to . . . § 1651, specifically the writ of audita querela, merely because he previously suffered an adverse decision in a Section 2255 proceeding.” *United States v. Coleman*, Civ. A. No. 05-4639, 2006 U.S. App. LEXIS 639, at *3 (3d Cir. Jan. 10, 2006). Moreover, the Third Circuit has determined that “[t]he fact that *Booker* cannot be applied retroactively does not create . . . a gap” in post-conviction relief remedies. *United States v. Hannah*, Civ. A. No. 05-4863, 2006 U.S. App. LEXIS 6517, at *6 (3d Cir. Mar. 15, 2006). Accordingly, Petitioner’s contentions are without merit, and he is not entitled to post-conviction relief through §1651.

Accordingly, it is ORDERED that Petitioner’s Motion for relief pursuant to 28 U.S.C. §§ 2241 and 1651 is DENIED.

IT IS SO ORDERED.

BY THE COURT:

R. Barclay Surrick, Judge

Sentencing Guidelines mandatory, 18 U.S.C. §§ 3553(b)(1) and 3742(e), were unconstitutional. *Id.* In so holding, the Court rendered “the Guidelines effectively advisory.” *Id.* However, “*Booker* does not apply retroactively to cases on collateral review.” *Lloyd v. United States*, 407 F.3d 608, 614 (3d Cir. 2005).