

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 02-2976

NICHOLAS MPOUNAS,

Appellant
v.

SUSAN GERLINSKI, Warden, LSCI Allenwood

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 01-cv-1076)
District Judge: Honorable James M. Munley

Submitted For Possible Dismissal Under 28 U.S.C. § 1915(e)(2)(B) or Summary Action
Under Third Circuit LAR 27.4 and I.O.P. 10.6
April 24, 2003

Before: NYGAARD, FUENTES and GREENBERG, Circuit Judges.

(Filed: May 9, 2003)

OPINION

PER CURIAM

Pro se appellant Nicholas Mpounas appeals the denial of his petition for a writ of

habeas corpus filed pursuant to 28 U.S.C. § 2241 in the United States District Court for the Middle District of Pennsylvania. For the reasons that follow, we will affirm.

Mpounas was convicted in the United States District Court for the Southern District of New York of conspiracy to distribute cocaine, possession with intent to distribute cocaine, and using and carrying firearms during and in relation to drug trafficking crimes, in violation of 18 U.S.C. § 924(c). He was sentenced to four concurrent 188¹ month terms of imprisonment to be followed by a consecutive five-year term of imprisonment on the firearms charge and to five years of supervised release. The United States Court of Appeals for the Second Circuit affirmed the conviction.

Mpounas filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, alleging, *inter alia*, that his conviction for using a firearm in relation to drug trafficking should be vacated pursuant to the Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995). The District Court vacated Mpounas' sentence under § 924(c) because he did not actively use a firearm in furtherance of his drug trafficking crime. He was then ordered to appear for resentencing.

He was resentenced on his remaining four narcotics convictions to concurrent

¹In his 2241 petition, Mpounas states that he received a sentence of 248 months; however, a review of published opinions regarding this criminal conviction indicates that the original sentence was 188 months. See United States v. Gordils, 982 F.2d 64 (2nd Cir. 1992), *cert. denied*, 507 U.S. 1054 (1993); Mpounas v. United States, 28 F.Supp.2d 856, 857-58 (S.D.N.Y. 1998), *affirmed by United States v. Gordils*, 117 F.3d 99 (2nd Cir. 1997).

prison terms of 235 months less time served. The fine was also reduced to reflect the Court's decision to vacate the § 924(c) conviction. Mpounas appealed his re-sentence and the Second Circuit affirmed. Mpounas filed a motion pursuant to 28 U.S.C. § 2255. This motion was denied as all claims raised were found to be not cognizable or procedurally barred. *See Mpounas v. U.S.*, 28 F. Supp. 2d 856 (S.D.N.Y. 1998).

On June 18, 2001, Mpounas, who is incarcerated at the Low Security Correctional Institution at Allenwood in White Deer, Pennsylvania, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Middle District of Pennsylvania challenging the legality of his conviction and sentence. He asked the District Court to “remove a 2-Level enhancement under 2D1(b)(1) for possession of a dangerous weapon,” pursuant to Appendi v. New Jersey, 530 U.S. 466 (2000); he also complains that “the jury never made a quantity determination on the weight of narcotics in Counts I thru IV of the indictment, and there was no special verdict form for quantity of narcotics.” Habeas Petition, at 3. In June 2001, the District Court gave Mpounas Miller notice, after which he elected to have the District Court rule on the motion as filed. The District Court dismissed the petition on July 2, 2002. Mpounas timely filed a notice of appeal. Respondent has submitted a motion for summary affirmance, and Mpounas has responded.

A motion under 28 U.S.C. § 2255, and not a habeas corpus petition under 28 U.S.C. § 2241, generally is the exclusive means to challenge a federal conviction or sentence. The

“safety valve” provision of § 2255, which allows the pursuit of relief under § 2241 only under a narrow set of circumstances, certainly is inapplicable when, as in this case, the petitioner seeks to bring claims that could have been raised earlier, on direct appeal or in a § 2255 motion. Section 2255 is not rendered inadequate or ineffective merely because Mpounas is unable to meet the stringent gatekeeping requirements for second or successive section 2255 motions. In re: Dorsainvil, 119 F.3d 245 (3d Cir. 1997). In Dorsainvil, we held that a petitioner who asserted that his conviction was rendered invalid by Bailey v. United States, 516 U.S. 137 (1995), could seek relief under 28 U.S.C. § 2241 because the remedy by motion to vacate sentence was inadequate and ineffective. The Dorsainvil exception is a very narrow one, however, which does not extend to Apprendi claims. Okereke v. United States, 307 F.3d 117, 120-21 (3d Cir.), *cert. denied*, 123 S.Ct. 572 (U.S. 2002).

Accordingly, we will affirm the District Court’s order dismissing Mpounas’ habeas petition.