FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DUSTIN SHEPHERD, *Petitioner-Appellant*, v. UNKNOWN PARTY, Warden, FCI Tucson, *Respondent-Appellee.*	No. 19-15834 D.C. No. 4:18-cv-00104-DCB-BGM OPINION

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Argued and Submitted June 16, 2021
San Francisco, California

Filed July 22, 2021

Before: Mary M. Schroeder, Milan D. Smith, Jr., and Lawrence VanDyke, Circuit Judges.

Per Curiam Opinion

SUMMARY*

Habeas Corpus

The panel affirmed the district court's denial of a 28 U.S.C. § 2241 petition in which federal prisoner Dustin Shepherd sought to challenge his 2014 career offender sentence.

Shepherd previously filed a 28 U.S.C. § 2255 motion that was denied. In his § 2241 petition, he maintained that in light of intervening Supreme Court decisions, *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Decamps v. United States*, 570 U.S. 254 (2013), his previous convictions do not qualify him for career offender status.

Generally, a federal prisoner who seeks to challenge the legality of confinement must utilize a § 2255 motion. Under the "escape hatch" provision of 28 U.S.C. § 2255(e), a federal prisoner may file a § 2241 petition only when the prisoner makes a claim of actual innocence and has not had an unobstructed procedural shot at presenting that claim. The district court held that Shepherd failed to meet either of these requirements.

Shepherd's approach to actual innocence is founded on the decision in *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020). There, the defendant, who was sentenced in 1997 when the sentencing guidelines were mandatory, filed a § 2241 petition relying on *Mathis* and *Decamps* to challenge his

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

sentence as a career offender. This court held in *Allen* that the defendant could establish actual innocence of the mandatory sentencing enhancement.

In this case, the panel held that *Allen* is limited to petitioners who received a mandatory sentence under a mandatory sentencing scheme. Applying that rule to Shepherd, who was sentenced after the guidelines became advisory, the panel held that Shepherd cannot show that he was actually innocent of the career offender enhancement utilized during sentencing. The panel noted that the fact that the district court imposed a sentence below the guidelines range that would have applied even if the career offender enhancement had not been imposed only confirms that Shepherd is not entitled to relief. The panel concluded that the district court therefore properly dismissed his § 2241 petition.

COUNSEL

Keith J. Hilzendeger (argued), Assistant Federal Public Defender; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Phoenix, Arizona; for Petitioner-Appellant.

Robert L. Miskell (argued), Assistant United States Attorney; Christina M. Cabanillas, Deputy Appellate Chief; Michael Bailey, United States Attorney; United States Attorney's Office, Tucson, Arizona; for Respondent-Appellee.

OPINION

PER CURIAM:

Dustin Shepherd is a federal prisoner with a lengthy criminal history who was sentenced as a career offender in the Northern District of Ohio in 2014 after being convicted of multiple counts of drug and firearm-related offenses. He is now incarcerated in Arizona. By means of a 28 U.S.C. § 2241 petition, he seeks to challenge his career offender sentence. He had previously filed a 28 U.S.C. § 2255 motion in Ohio that was denied. He now maintains that, in light of intervening Supreme Court decisions, his previous convictions do not qualify him for career offender status. *See Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013).

Generally, a federal prisoner who seeks to challenge the legality of confinement must utilize a § 2255 motion. *Marrero v. Ives,* 682 F.3d 1190, 1192 (9th Cir. 2012). Under the "escape hatch" provision of § 2255(e), however, a federal prisoner may file a § 2241 petition, but only if the § 2255 remedy is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e); *see also Marrero*, 682 F.3d at 1192. This is not easy to establish, since we have held that the escape hatch is available when the prisoner "(1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." *Marrero*, 682 F.3d at 1192 (citation omitted).

The district court held that Shepherd had failed to meet either of these requirements. We affirm the district court and

hold that Shepherd has not established a claim of actual innocence.[1]

Shepherd was not "actually innocent" within the conventional understanding of innocence. He does not dispute the validity of the conviction or that he committed the drug and firearm crimes leading to his sentence.

Instead, Shepherd's approach to actual innocence is founded on our decision in *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020). There, the defendant filed a § 2241 petition, relying on *Mathis* and *Descamps*, to challenge his sentence as a career offender. *Id.* at 1188–89. We held that the defendant could establish actual innocence of the mandatory sentencing enhancement. *Id.* at 1189–90.

There is a conspicuous difference between Shepherd's case and Allen's. Allen was sentenced in 1997, when the sentencing guidelines were mandatory. *See id.* at 1186. In *Allen*, we found the mandatory nature of the guidelines important when deciding that case. *See id.* at 1186, 1189. We additionally noted that a fact increasing a mandatory minimum sentence is analogous to an "element of the offense." *Id.* at 1189 (citation and internal quotation marks omitted).

Our court denied rehearing en banc in *Allen*. *See Allen v. Ives*, 976 F.3d 863, 864 (9th Cir. 2020). The author of the initial opinion in *Allen*, joined by the other judge from the *Allen* majority, wrote that *Allen* should be limited to petitioners who "received a mandatory sentence under a

[1] Because we affirm on the actual innocence prong of the escape hatch test, we do not reach any of the other possible grounds for denying the petition.

mandatory sentencing scheme." *Id.* at 869 (W. Fletcher, J., concurring in the denial of the petition for rehearing en banc); *see also id.* ("Allen's actual innocence claim was cognizable under § 2241 because he was sentenced before the Court decided [*United States v. Booker*, 543 U.S. 220 (2005)], which rendered the Sentencing Guidelines advisory rather than mandatory.").

Although an opinion concurring in the denial of rehearing en banc is not binding, we take this opportunity to hold that *Allen* is limited to petitioners who "received a mandatory sentence under a mandatory sentencing scheme." *Id.* Since our decision in *Allen*, district courts and magistrate judges in our circuit have limited *Allen*'s holding in such a manner. *See, e.g.*, *McKenzie v. Martinez*, No. EDCV 20-1419-VAP (KK), 2021 WL 971067, at *3 (C.D. Cal. Jan. 12, 2021) (Kato, M.J.), report and recommendation adopted, No. EDCV201419VAPKK, 2021 WL 1269111 (C.D. Cal. Apr. 5, 2021); *Jaramillo v. United States*, No. CR-15-8236-PCT-SPL, No. CV-19-8017-PCT-SPL (JFM), 2020 WL 3001783, at *11–12 (D. Ariz. May 11, 2020) (Metcalf, M.J.), report and recommendation adopted, No. CR-15-8236-PCT-SPL, No. CV-19-08017-PCT-SPL (JFM), 2020 WL 2991584 (D. Ariz. filed June 4, 2020); *Saelua v. Ciolli*, No. 1:20-CV-01312-SKO (HC), 2020 WL 5548317, at *3–4 (E.D. Cal. Sept. 16, 2020) (Oberto, MJ); *cf. Gonzalez v. Ciolli*, No. 1:20-CV-00724-DAD-SKO (HC), 2021 WL 1016387, at *3 (E.D. Cal. filed Mar. 17, 2021) (applying *Allen* to a petitioner who "was sentenced to the statutory mandatory sentence of life imprisonment," even though the case was decided after *Booker*, when the guidelines were advisory).

Furthermore, our opinion in *Allen* relied on authorities that had recognized actual innocence in mandatory sentencing contexts. 950 F.3d at 1189–90. For example, in

Gibbs v. United States, 655 F.3d 473 (6th Cir. 2011), the Sixth Circuit explained that "sentencing guidelines calculations do not affect a defendant's eligibility for a sentence" and distinguished Supreme Court precedent in which it was determined that the defendant was not eligible for the sentence given. *Id.* at 478–79 (citing *Sawyer v. Whitley*, 505 U.S. 333 (1992)). Instead, as the Sixth Circuit noted, "[a] challenge to the sentencing court's guidelines calculation . . . only challenges the legal process used to sentence a defendant and does not raise an argument that the defendant is ineligible for the sentence she received." *Id.* at 479.

Similarly, the Eleventh Circuit has reasoned that "any miscalculation of the guideline[s] range cannot be a complete miscarriage of justice because the guidelines are advisory. If the district court were to resentence [such a defendant], the district court could impose the same sentence again." *Spencer v. United States*, 773 F.3d 1132, 1140 (11th Cir. 2014) (en banc). *Spencer* dealt with the scenario we counter here: a defendant designated as a career offender pursuant to the advisory sentencing guidelines. *See id.* at 1136, 1140.

Thus, based on our reasoning in *Allen*, the concurrence to the denial of rehearing en banc in that case, and persuasive precedent from other circuits and district courts within our own circuit, we limit *Allen*'s application to petitioners who "received a mandatory sentence under a mandatory sentencing scheme." *Allen*, 976 F.3d at 869 (W. Fletcher, J, concurring in the denial of the petition for rehearing en banc).

Applying that rule to Shepherd's case, we hold that he cannot show that he was actually innocent of the career offender enhancement utilized during sentencing. In 2005,

the Supreme Court held that constitutional constraints rendered the guidelines advisory only. *See Booker*, 543 U.S. 245. Shepherd was sentenced after the guidelines became advisory. And "the specific facts of this case only confirm to us that [Shepherd] is not entitled to relief." *Gibbs*, 655 F.3d at 479. Shepherd's guidelines range with the career offender enhancement was 248–295 months' imprisonment. Had the district court not imposed that enhancement, the range would have been 228–270 months. The district court imposed a below-the-(either)-guidelines-range sentence of 190 months, belying Shepherd's claim of actual innocence. Therefore, Shepherd has failed to make a claim of actual innocence, and the district court properly dismissed his § 2241 petition.

AFFIRMED.