

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 23, 2016

**Elisabeth A. Shumaker
Clerk of Court**

JOSEPH MICHAEL MOONEY,

Petitioner-Appellant,

v.

DEBRA DUNHAM, Warden,
Englewood FCI,

Respondent-Appellee.

No. 16-1302
(D.C. No. 1:16-CV-01100-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **LUCERO, MATHESON, and BACHARACH**, Circuit Judges.

Mr. Joseph Michael Mooney is a federal prisoner who seeks habeas relief under 28 U.S.C. § 2241. The district court dismissed Mr. Mooney's claim, concluding that Mr. Mooney could not invoke § 2241 because he had an adequate and effective remedy under 28 U.S.C. § 2255. Mr. Mooney appeals, and we affirm.

* Oral argument would not be helpful in this appeal. As a result, we are deciding the appeal based on the briefs. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, *res judicata*, and collateral estoppel. But the order and judgment may be cited for its persuasive value under Fed. R. App. P. 32.1(a) and 10th Cir. R. 32.1(A).

Under § 2255(e), a federal prisoner can challenge the validity of a sentence under § 2241 only if § 2255 is “inadequate or ineffective to test the legality of his detention.” *Abernathy v. Wanders*, 713 F.3d 538, 547 (10th Cir. 2013) (citations omitted). Use of § 2241 is impermissible if the “petitioner’s argument challenging the legality of his detention could have been tested in an initial § 2255 motion.” *Prost v. Anderson*, 636 F.3d 578, 584 (10th Cir. 2011).

Mr. Mooney cannot use § 2241 because he had an adequate and effective remedy in § 2255. When Mr. Mooney invoked § 2255, he was unsuccessful, but his failure to obtain relief under § 2255 does not mean that the remedy is inadequate or ineffective. *See Bradshaw v. Story* 86 F.3d 164, 166 (10th Cir. 1996).

Mr. Mooney argues that *Prost v. Anderson* was incorrectly decided and leads to constitutional violations.¹ We reject this argument.

In *Prost*, we held that petitioners cannot invoke § 2241 if they could have tested their claims in an initial motion filed under § 2255. *Prost*, 636 F.3d at 584. Mr. Mooney argues that *Prost* was incorrectly decided and that this opinion leads to violations of the U.S. Constitution. But even if we disagreed with *Prost*, we would be bound to follow that opinion because

¹ Mr. Mooney also presses the merits of his underlying claims. But we do not reach the merits.

one panel cannot overrule another panel. *United States v. Killion*, 7 F.3d 927, 930 (10th Cir. 1993).

According to Mr. Mooney, the remedy under § 2255 is deficient because “it fails to allow for a ‘meaningful opportunity’ to raise a claim of factual innocence.” Appellant’s Br. at 15. But Mr. Mooney had the opportunity to urge actual innocence when he sought relief under § 2255. The Constitution does not entitle him to a second opportunity to convince the court of his actual innocence. *Hale v. Fox*, 829 F.3d 1162, 1171-72 (10th Cir. 2016), *petition for cert. filed* (U.S. Oct. 21, 2016) (No. 16-6511).

Mr. Mooney argues that denying a second chance at proving actual innocence would violate the Suspension Clause and the constitutional right to due process. But we recently rejected virtually identical arguments in *Hale v. Fox. Id.* at 1175-76.

* * *

We cannot grant relief under § 2241 because the § 2255 motion provided a remedy that was adequate and effective. Thus, we affirm the dismissal of the § 2241 habeas petition.

Entered for the Court

Robert E. Bacharach
Circuit Judge