IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

GREGORY J. PHILLIPS,

Petitioner,

v.

CAROL HOLINKA, Warden,
Oxford Federal Correctional Institution,

Respondent.

OPINION and ORDER

10-cv-439-bbc

- -

Petitioner Gregory Phillips pleaded guilty in 2003 in this court to one count of conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841 and 846. He received a sentence of 262 months. This court found that petitioner was a career offender under U.S.S.G. § 4B1.1 because he had two prior felony convictions for crimes of violence. One of the two predicate crimes was a conviction under Wisconsin law for first-degree reckless endangerment, Wis. Stat. § 941.30(1). Although petitioner challenged his conviction and sentence under § 2255 and on direct appeal, he did not argue that his prior conviction for recklessly endangering safety was not a violent felony. Now petitioner, an inmate at the Federal Correctional Institution in Oxford, Wisconsin, has filed a petition for

a writ of habeas corpus pursuant to 28 U.S.C. § 2241, contending that the sentence enhancement is unlawful because the Supreme Court's decision in Begay v. United States, 553 U.S. 137 (2008), and subsequent appellate decisions make clear that reckless endangerment is not a "crime of violence" within the meaning of § 4B1.1. He has paid the $5 filing fee.

The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases. (This rule may also be applied to habeas petitions not brought under § 2254, such as this petition pursuant to § 2241. Rule 1(b), Rules Governing § 2254 Cases; see also 28 U.S.C. § 2243 (habeas court must award the writ or order respondent to show cause why the writ should not be granted, unless the application makes it clear petitioner is not entitled to relief)). Under Rule 4, I must dismiss the petition if it plainly appears from the petition and any attached exhibits that petitioner is not entitled to relief; otherwise, I will order respondent to file an answer.

After examining the petition, I cannot conclude that it has no merit. Since petitioner filed his direct appeal and § 2255 post conviction motion, the Court of Appeals for the Seventh Circuit has held that Wisconsin's offense of recklessly endangering safety is not a crime of violence within the meaning of the career offender statute, invoking the rule in Begay. In addition, the court of appeals has held that the rule in Begay applies retroactively on collateral review. Finally, it appears that relief may be foreclosed under 28 U.S.C. § 2255, in which case § 2241 would be available to petitioner. Therefore, I will direct respondent to respond to the petition.

DISCUSSION

Petitioner contends that his sentence is unlawful because recent Supreme Court and circuit precedent establish that the offense of recklessly endangering safety cannot be used to enhance a criminal defendant's sentence under the career offender guidelines, U.S.S.G. § 41B.1. In particular, petitioner relies on Begay, 533 U.S. at 144, in which the Supreme Court decided that a violent felony must involve "purposeful" conduct, and United States v. Smith, 544 F.3d 781, 786 (7th Cir. 2008), in which the Court of Appeals for the Seventh Circuit held that a crime with a mens rea of recklessess cannot qualify as a violent felony. See also Welch v. United States, 604 F.3d 408, 418 (7th Cir. 2010). Ordinarily, a prisoner seeking to attack his conviction or sentence must do so on direct appeal or in a motion filed under 28 U.S.C. § 2255. Kramer v. Olson, 347 F.3d 214, 217 (7th Cir. 2003). Relief under § 2241 is available only when a motion under § 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. § 2255(e). This is so only if "a structural problem in § 2255 forecloses even one round of effective collateral review" and "the claim being foreclosed is one of actual innocence." Taylor v. Gilkey, 314 F.3d 832, 835 (7th Cir. 2002).

A. Actual Innocence

Petitioner's claim could be construed as one of "actual innocence." Although he is not claiming innocence for his crimes, he contends that he is innocent of his status as a career offender. In a recent decision, the Court of Appeals for the Eleventh Circuit held that a

petitioner asserting that he is innocent of the statutory "offense" of being a career offender is making a claim of "actual innocence" and is entitled to review of his sentence under § 2241. Gilbert v. United States, 609 F.3d 1159, 1166 (11th Cir. June 21, 2010). In addition, the Court of Appeals for the Seventh Circuit has held in at least two previous cases that challenges to the fundamental legality of a petitioner's sentence may, in certain circumstances, be cognizable under § 2241. Garza v. Lappin, 253 F.3d 918, 922-23 (7th Cir. 2001); In re Davenport, 147 F.3d 605, 609-10 (7th Cir. 1998).

B. Section 2255 as Inadequate or Ineffective to Test the Legality of Petitioner's Sentence

In this case, 28 U.S.C. § 2255 appears to be "inadequate or ineffective to test the legality of [petitioner's] detention." As an initial matter, petitioner cannot bring his challenge as a second or successive motion under § 2255(h), because such successive petitions can be brought only if the petitioner is relying on "newly discovered evidence" or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." The rule announced in Begay, 533 U.S. at 143, and applied by the court of appeals in subsequent cases, is a rule of statutory interpretation that could potentially affect petitioner's sentence, but it is not a new rule of constitutional law. Thus, petitioner could not raise a Begay challenge in a successive § 2255 motion.

Petitioner contends that because he cannot file a successive motion under § 2255 and because the law of the circuit was against him when he filed his initial § 2255 motion and appeal,

§ 2241 should be available to him. The Court of Appeals for the Seventh Circuit has held that § 2241 may be available to a petitioner who had "no reasonable opportunity" to challenge his conviction or sentence because the law of the circuit was "firmly against him" when he filed his direct appeal and post conviction motion. In re Davenport, 147 F.3d at 610. Thus, the question is whether petitioner had a reasonable opportunity to challenge the legality of his sentence under § 2255 or on direct appeal.

Criminal defendants who have at least two prior felony convictions for crimes of violence may be deemed career offenders and receive enhanced sentenced under section 4B1.1 of the sentencing guidelines. Section 4B1.2 defines "crime of violence" as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that– (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) . . . otherwise involves conduct that presents a serious potential risk of physical injury to another." Petitioner challenges his sentence enhancement under 4B1.1 because he believes one of his two prior felonies was misclassified as a "crime of violence."

In particular, one of petitioner's two convictions was for "recklessly endangering safety." Wisconsin's "recklessly endangering safety" statute, Wis. Stat. 941.30(1), provides that "[w]hoever recklessly endangers another's safety under circumstances which show utter disregard for human life is guilty of a Class F felony." This court relied on this conviction to enhance petitioner's offense level as a career offender pursuant to U.S.S.G. § 41B.1. At the time petitioner filed his § 2255 motion and direct appeal in 2004 and 2005, the Court of Appeals for

the Seventh Circuit had held on multiple occasions that offenses requiring only a mens rea of recklessness were crimes of violence for purposes of sentencing an offender as a career criminal. so long as the conduct at issue presented a "serious potential risk of physical injury to another," as required by § 4B1.1. E.g., United States v. Cole, 298 F.3d 659, 662 (7th Cir. 2002) ("§ 4B1.2(a)(2) includes crimes of recklessness where the crime, by its nature, presents a substantial risk of harm to others"); United States v. Jackson, 177 F.3d 628, 633 (7th Cir. 1999) (holding that a defendant convicted under Indiana's criminal recklessness statute for "recklessly, knowingly, or intentionally inflicting serious bodily injury on another person, Ind. Code § 35-42-2-2(c)," had been convicted of a crime of violence because the offense involves conduct that "presents a serious potential risk of physical injury to another"); United States v. Rutherford, 54 F.3d 370, 374-77 (7th Cir. 1995) (rejecting argument that crimes of recklessness cannot be crimes of violence and holding that conviction for driving under the influence of alcohol and causing serious injury is a crime of violence) (citing United States v. Rutledge, 33 F.3d 671, 674 (6th Cir. 1994) (conviction for reckless endangerment held to be "crime of violence" under § 4B1.2), and United States v. Parson, 955 F.2d 858, 861, 873 (3d Cir. 1992) (defendant's prior conviction for first-degree reckless endangering, where, "while shoplifting meat from a store . . . [defendant] 'pushed and slapped' a store clerk," constituted a crime of violence under § 4B1.2)); see also United States v. Newbern, 479 F.3d 506, 509-10 (7th Cir. 2007) (Illinois's statutory definition of criminal recklessness describes a "crime of violence" by requiring "a conscious disregard of a substantial and unjustifiable risk" of "the bodily safety of an

individual"). Thus, it is arguable that at the time petitioner was sentenced, circuit precedent supported the conclusion that defendant's conviction for recklessly endangering safety qualified as a crime of violence under § 41B.2 because it necessarily "presents a serious potential risk of physical injury to another."

In 2008, however, the Supreme Court issued its decision in Begay, 553 U.S. 137 discussing what sort of prior convictions permit enhancement under the Armed Career Criminal Act. 18 U.S.C. § 924(e)(B)(ii). Like § 4B1.1 of the sentencing guidelines, the Act permits enhancement of the underlying sentence where the defendant has prior convictions for a "violent felony." (The statutory definition of "violent felony," as found in the Act, 18 U.S.C. § 924(e)(2)(B)(ii), is the same as the one used in U.S.S.G. § 4B1.2(a)(2) for "crime of violence." Thus, cases addressing the Armed Career Criminal Act's "violent felony" definition are precedential for cases involving the definition of "crime of violence" for career offenders. United States v. Woods, 576 F.3d 400, 404 (7th Cir. 2009)). In Begay, the Court interpreted the definition of "violent felony" under the Armed Career Criminal Act to require "purposeful, violent and aggressive conduct," id. at 144-45, and, applying that definition, held that drunk driving is not a "violent felony."

"Begay [has] called into question many of [the court of appeals'] decisions interpreting U.S.S.G. § 4B1.2 and similar recidivism provisions, such as 18 U.S.C. § 16(b) and 18 U.S.C. § 924(e)(2)(B)(ii)." United States v. Woods, 576 F.3d 400, 413 (7th Cir. 2009) (Easterbrook, C.J., dissenting). The Begay-induced ripple effect has caused the court of appeals to overturn

several of its previous decisions, including Newbern, 479 F.3d 506, and Jackson, 177 F.3d 628, and to hold explicitly that crimes with a mens rea of negligence or recklessness do not trigger the enhanced penalties mandated by the Armed Career Criminal Act. United States v. Smith, 544 F.3d 781, 786 (7th Cir. 2008) (holding that Indiana offense of criminal recklessness not violent felony). Relevant to this case, the court of appeals held that under Begay, convictions for recklessly endangering safety under Wisconsin law are not crimes of violence because the offense requires only a mental state of recklessness. United States v. High, 576 F.3d 429, 430-31 (7th Cir. 2009); See also United States v. McDonald, 592 F.3d 808, 812 (7th Cir. 2010) (same). In addition, the court of appeals held recently that Begay applies retroactively on collateral review. Welch v. United States, 604 F.3d 408, 415 (7th Cir. 2010).

Petitioner contends that under the rules announced in Begay, Smith, High, Welch and similar cases, he should be resentenced absent the career offender enhancement. Given the fact that circuit precedent was arguably against petitioner at the time he filed his post conviction motion and direct appeal, it appears that § 2255 was "inadequate or ineffective" to test the legality of his sentence. Gilbert, 609 F.3d at 1168 (holding that habeas petitioner challenging application of career-offender guideline based on Begay and post-Begay circuit precedent was entitled to relief under § 2241; vacating sentence and remanding for resentencing without career offender enhancement). Thus, under Rule 4 of the Rules Governing Section 2254 Cases, I cannot determine that petitioner's claim has no merit. Accordingly, petitioner will be allowed to proceed on his § 2241 petition and respondent will be directed to respond to the petition.

ORDER

IT IS ORDERED that

1. No later than 20 days from the service of this petition, respondent Carol Holinka is to file a response showing cause, if any, why this writ should not issue with respect to petitioner Gregory Phillips's claim that his sentenced was enhanced unlawfully under the career-offender guidelines.

2. Petitioner may have 10 days from the service of the response in which to file a traverse to the allegations of the response submitted by respondent.

3. For the sake of expediency, I will send the petition to Warden Holinka, the local United States Attorney and the United States Attorney General via certified mail in accordance with Fed. R. Civ. P. 4(i), along with a copy of this order.

Entered this 25th day of August, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge