

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MICHAEL HILL,

Petitioner,

v.

C. HOLINKA,

Respondent.

OPINION AND ORDER

10-cv-65-bbc

This petition for a writ of habeas corpus under 28 U.S.C. § 2241 raises an increasingly common issue: whether prior convictions that are used to enhance sentences under the Armed Career Criminal Act, 18 U.S.C. § 924(e) were properly characterized as violent felonies. The issue arises out of the Supreme Court's holding in Begay v. United States, 553 U.S. 137 (2008), that only crimes involving purposeful, violent and aggressive acts creating a serious potential risk of physical injury to another may be so characterized. In his petition, Michael Hill argues that two of the three prior state court convictions used to enhance his 1999 federal sentence do not meet the Begay criteria and that he should not have been sentenced as an armed career criminal. (Petitioner adds that his guidelines sentence should not have been enhanced, but because this claim rises and falls with his armed career criminal

enhancement, it is unnecessary to discuss both. This is particularly when it is unlikely that any petitioner could succeed on a challenge to a guidelines sentence in a § 2241 petition. For the reasons explained in Phillips v. Holinka, 10-cv-439-bbc (W.D. Wis. Nov. 18, 2010) (copy attached), petitioner could not make the requisite showing for § 2241 relief, which is that his sentence is fundamentally defective and the failure to correct it would result in a miscarriage of justice.)

Petitioner has asked for appointment of counsel to represent him on his petition. As I have said in other cases, it would be a boon to the court as well as to litigants if lawyers were available to represent every pro se litigant who asks for one. Unfortunately, the demand so far exceeds the supply that appointments must be made sparingly. In this instance, all of the facts relevant to the petition motion are a matter of record, so no lawyer is necessary for the purpose of conducting discovery or for representing petitioner at an evidentiary hearing. Moreover, petitioner has shown himself to be an excellent advocate for his own position, with an impressive understanding of post conviction procedure. His motion will be denied.

In contesting his status as an armed career criminal, petitioner relies not only on Begay, but on two cases from the Seventh Circuit, United States v. Woods, 576 F.3d 400 (7th Cir. 2009), and United States v. Evans, 576 F.3d 766 (7th Cir. 2009), in which the court of appeals explained the way in which sentencing courts must analyze state court prior

convictions to determine whether they meet the Begay criteria. In brief, the court must be satisfied that the conviction was obtained under a statute that makes criminal the kind of act that qualifies as a violent felony. When the statute covers more than one kind of conduct and only some may meet the criteria or if it is not clear which section of the statute was used for the conviction, the court may consult documents such as the indictment or criminal complaint as well as transcripts of the plea colloquy or the jury verdict to determine which section of the statute was relied upon to convict the defendant. Some crimes are non-divisible, however, and do not distinguish between acts that may violate the statute but do not involve force or intent. In that instance, if the statute as a whole does not require proof of purpose, aggression and serious risk of physical injury, the court must assume that a defendant did not commit a violent felony for any conviction. Woods, at 407. Thus, a person convicted under a statute criminalizing drunken driving cannot be found to have committed a violent felony because he lacks the requisite mental state. Begay, 553 U.S. 137. Under Woods, this would be true even if the facts were that the drunken person had announced to credible witnesses as he climbed into his car that he was out to find a pedestrian and run over him, assuming that he was convicted under the same drunken driving statute and that the statute was non-divisible. The sentencing court may not consult additional materials to determine whether the particular acts for which this individual was convicted would qualify as an enhancing conviction under the Armed Career Criminal Act.

In Evans, 576 F.3d at 766, the court of appeals applied the holding in Woods in deciding that the sentencing court could not enhance a defendant's sentence on the basis of a prior conviction that was charged as an offensive battery. Although Evans had been charged with aggravated battery for pushing his girlfriend, knowing she was pregnant, he was charged under a statute that made it unlawful to make physical contact of an insulting or provoking nature with an individual and under a statute that made the battery aggravated if the defendant knew the victim to be pregnant. The court materials showed that defendant had pleaded guilty to grabbing his girlfriend by the face and pushing her down to the floor, then yelling for two female companions to come inside and "kick this bitch's ass." Id. at 767. Holding itself bound by the court's opinion in Woods, the panel deciding Evans concluded that the sentencing court had erred in using the prior conviction to find Evans a career offender. The prior conviction had been obtained under a statute that punished offensive battery. Even if the material documents showed that Evans had committed a purposeful and aggressive act that caused physical injury, the conviction could not be used to enhance his sentence because the offensive battery prohibited by the statute is not limited to violent acts. Id. at 769.

The two prior convictions that petitioner is challenging were brought under the same general statute as Evans's prior conviction. Petitioner seizes on that coincidence to argue that his own convictions should not have been used to make him an armed career criminal

under the Armed Career Criminal Act, § 924(c).

In fact, petitioner was charged under the forcible battery section of the statute at issue in Evans. (The statute defines battery in two separate sections: Evans was charged with insulting or provocative contact under what is now 720 ILCS 5/12-3(a)(2); petitioner was charged in both prosecutions against him with battery by “intentionally or knowingly without legal justification and by any means, causing bodily harm to an individual.” The charges were upgraded to for aggravated battery because petitioner was charged in one case with striking a woman in the back of her head in a public place and in the other with committing the battery with a deadly weapon.

Contrary to petitioner’s belief, Evans does not control the outcome of his petition. It will be dismissed because the federal court acted properly in 1999 when it relied on petitioner’s prior convictions in finding petitioner an armed career criminal.

BACKGROUND

Petitioner has a lengthy criminal record that includes the three state of Illinois convictions that are at issue in this case. In 1983, he was charged with attempted murder, case no. 83CF178, and later convicted of the charge. (He does not deny that this conviction is a predicate offense under the Armed Career Criminal Act.) In a 1986 case, no. 86-CF-1273, he pleaded guilty to an amended information charging him with aggravated battery

and alleging that he, “without legal justification and by use of a deadly weapon, a gun, intentionally caused bodily harm to Terry Taylor, in that he shot Terry Taylor in the abdomen,” “in violation of Paragraph 12-3, Chapter 38, Illinois Revised Statutes.” Dkt. #31-2. At the bottom of the information are the words “in violation of Paragraph 12-4(b)(1), Chapter 38, Illinois Revised Statutes.” Petitioner was convicted of aggravated battery in 1989 and sentenced to serve six years in the custody of the state of Illinois.

In January 1994, petitioner was sentenced in state court in Winnebago County, Illinois, in case no. 92 CF 2788, to four years for aggravated battery following a jury verdict of guilty. He was charged with having struck one Janet Glick “in the back of the head with his hand,” causing her bodily injury and doing so in a public place, in violation of Paragraph 12-4(8), Chapter 38, Illinois Revised Statutes. Dkt. #32-3

On January 13, 1999, petitioner was charged in the United States District Court for the Northern District of Illinois in a seven-count indictment, alleging three counts of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1); two counts of use of a firearm in relation to a drug trafficking crime, 18 U.S.C. § 924(c); and two counts of felon in possession of a firearm, 18 U.S.C. § 922(g)(1). The government also filed notice of its intent to seek an armed career criminal enhancement under 18 U.S.C. § 924(e), listing the prior conviction for attempted murder and the two aggravated batteries at issue. Petitioner entered pleas of guilty to three of the seven counts of the federal indictment: one

involving drug distribution, one for use of a firearm in relation to a drug trafficking crime and one for being a felon in possession of a firearm. He was sentenced on July 9, 1999 to a term of 276 months, which he says was divided into two sentences of 216 months on the one count of drug distribution and one count of felon in possession of a gun, with the terms to run concurrently, and a 60-month consecutive term for the use of a firearm in relation to a drug trafficking crime. Without access to the charging documents in the case, I cannot be certain about the statutory maximum sentences to which petitioner could have been sentenced for the three crimes to which he pleaded guilty, but it appears that his maximum sentence under the statutes would have been 660 months, without any enhancement as an armed career criminal. (This assumes that the § 841 drug charge was brought under subsection § (a)(1)(C) for possession of more than five grams of cocaine base but less than 50 grams, making his statutory maximum exposure on that charge 40 years, and that he was charged with possession of a firearm under 18 U.S.C. § 924(c), exposing him to no more than five years, as compared to the seven or ten years to which he would have been subject had he brandished or discharged the firearm. Under 18 U.S.C. § 922(g)(1), his maximum sentence was ten years without an armed career criminal enhancement.)

Petitioner did not take a direct appeal from his sentence but filed an unsuccessful motion for post conviction relief in 2000, alleging that his indictment was defective and that his trial counsel had been ineffective for not challenging the validity of the indictment. In

2008, he filed a motion to modify his sentence under 18 U.S.C. § 3582, arguing that he was entitled to a reduced sentence under the crack cocaine amendments to the Sentencing Guidelines. This motion was also unsuccessful.

Petitioner filed this petition under 28 U.S.C. § 2241 on February 11, 2010. (He did not mention in the petition that he had filed a previous motion for post conviction relief.) He alleged that he was serving an illegal sentence that had been enhanced on the basis of erroneous findings that he was both a career offender under U.S.S. G. §§ 4B1.1 and 4B1.4 and an armed career criminal under 18 U.S.C. § 924(c). Petitioner contended that he did not qualify for either enhancement because the two aggravated battery convictions could not be treated as violent felonies under § 924(c) because battery is a non-divisible offense under Woods, 576 F.3d 400, and Evans, 576 F.3d 766.

In an order entered on March 9, 2010, dkt. #4, I acknowledged that petitioner's claim was one of actual innocence. If he had been sentenced improperly as an armed career criminal under § 924(c), it would mean that he had been convicted of a status that had not been made criminal by the statute under which he was sentenced. I concluded however that he had not met the criteria for relief under § 2241, one prong of which is a showing that he could not have brought a timely motion for post conviction relief because the relief he is seeking under § 2241 was foreclosed to him at the time. To the contrary, I held, the rule on which petitioner was relying was established in United States v. Taylor, 495 U.S. 575, 602

(1990). In that case, the Supreme Court had held that the crimes listed in § 924(e), “serious drug offense” and “violent felony” were to be determined categorically, without inquiring into the specific conduct of the particular offender. As a general rule, courts were to determine the elements of the offense by looking only to the fact of conviction and the statutory definition of the prior offense. The Court elaborated on this approach in Shepard v. United States, 544 U.S. 13 (2003), but in my view, the basic framework for the analysis had been put in place by Taylor.

Petitioner took an appeal from the dismissal of his petition. In a one-paragraph ruling, the court of appeals found that petitioner had made “a substantial showing of the denial of a constitutional right as to whether he could be sentenced as an armed career criminal on the basis of his prior convictions for aggravated battery” and remanded the case to this court. The court wrote that petitioner had never filed a § 2255 motion in the district of conviction, the Northern District of Illinois, and it suggested that on remand, this court consider transferring the case to that court. Hill v. United States, 10-2043, slip op. (7th Cir. July 27, 2010).

After the case was remanded, I transferred it to the Northern District of Illinois, as the court of appeals had suggested, after construing petitioner’s original motion as one brought under § 2255. Dkt. #19. The transfer only delayed the disposition of petitioner’s motion, because it turned out that petitioner had filed a § 2255 motion in 2000 that was

denied. This meant that he was barred from proceeding under that statute unless he secured certification of his motion by a panel of the Court of Appeals for the Seventh Circuit.

Knowing that he had previously filed a § 2255 motion, petitioner took the logical step of filing a motion for certification of a second motion in the court of appeals under 28 U.S.C. § 2244(3). A different panel of the court of appeals concluded that his motion was “unsupported by any new rule of constitutional law made retroactive on collateral review by the Supreme Court” and dismissed it. Hill v. United States, 10-334, slip op. (7th Cir. Oct. 15, 2010).

Next, petitioner moved in this court for reconsideration of the order construing his § 2241 motion as a § 2255 motion and transferring the matter to the Northern District of Illinois. In an order entered on October 29, 2010, dkt. #22, I granted the motion for reconsideration after concluding that it was proper to continue to exercise jurisdiction over petitioner’s case. For the reasons explained in that order, I concluded that the court should take up petitioner’s challenge to the use of his previous convictions in the context of his § 2241 challenge and I explained why it was probably wrong to have dismissed the motion on the ground that petitioner had not shown why relief was foreclosed to him when he could have filed a § 2255 motion. In the same order, I directed respondent to show cause why the motion should not be granted. Respondent complied and petitioner filed a reply to her response. The motion is ready for decision.

OPINION

As I noted above, I am not persuaded that petitioner has any viable claim for relief under § 2241 on his contention that it was improper for the sentencing court to use his prior state court convictions to find him a career offender under the Sentencing Guidelines. If his sentence were overturned, he could be resentenced under the now advisory guidelines to any reasonable term at or below the statutory maximum of 55 years, or 660 months.

It is probable that this same analysis bars petitioner's § 924(e) claim as well. The total sentence imposed on petitioner in 1999 was 276 months, which was 384 months less than the statutory maximum without any enhancement. If petitioner were to prevail on this petition and obtain a remand for resentencing without the enhancement for being an armed career criminal, he could receive the same sentence as he did before if the sentencing judge believed that such a sentence was appropriate under 18 U.S. C. § 3553(a). In this situation, petitioner cannot make the necessary showing that his sentence is fundamentally defective and must be corrected to avoid a complete miscarriage of justice.

For the sake of completeness, however, I will consider petitioner's claim under Woods and Evans. Petitioner focuses his challenge on the decision in Evans, 576 F.3d 766, but that decision is best understood in light of the previous decision in Woods, 576 F.3d 400. In Woods, the defendant was convicted of a drug charge and of being a felon in possession of a firearm. The sentencing judge found that Woods was a career offender under the

Sentencing Guidelines because he had previously been convicted of two state offenses: one in 1993 for a drug charge (possession of cocaine with intent to distribute) and one in 2001 for involuntary manslaughter, arising out of the death of his infant son.

On appeal of his sentence, the court used the case to explain how the “categorical approach” works when a court is deciding whether a particular crime fits the definition of “violent felony” under the Armed Career Criminal Act. In most instances, the court of appeals said, the proper inquiry is whether in the ordinary case, the conduct encompassed by the elements of the offense “presents a serious risk of potential serious injury to another.” Woods, 576 F3d at 404 (quoting James v. United States, 550 U.S. 192, 208 (2007)). When the statute covers more than one offense, the sentencing court may consult the charging documents from the prior convictions, the terms of the plea agreement or transcript of a plea colloquy with the judge and defendant or some comparable judicial record, in order to determine what the prior conviction was for. It may not look at the particular facts underlying the defendant’s conviction.

In a third situation that exists when the statute covers more than one offense and only some parts of the statute would qualify as a crime of violence, the sentencing court may consult additional material to determine whether the defendant was actually convicted of the portion of the statute that constituted a violent felony. What it may not do is consult other materials to determine whether “the actual conduct of the individual defendant constituted

a purposeful, violent and aggressive act” if it cannot determine which part of a divisible statute the defendant violated. Id. (citing Shepard v. United States, 544 U.S. 13, 25 (2005)). The court used the example of burglary statutes that prohibit in one statute different kinds of breaking and entering at night, such as breaking into a building, or into a vessel, or into a vehicle. The sentencing court may examine records to determine whether the defendant was convicted of breaking into a building, which is a crime of violence, or whether he was convicted of breaking into a vessel, which is not, but it may not examine records to determine whether the particular break in by the defendant created a substantial risk of injury. Id. at 406.

Holding that in the general run of cases, the offense at issue must describe behavior that poses a sufficiently great risk of physical injury to another and is purposeful, the court determined that the statute criminalizing Woods’s behavior was not directed to intentional behavior. Instead, it penalized involuntary manslaughter, which Illinois law defines as an unintentional killing without lawful justification whether the causative acts are lawful or unlawful, so long as they are likely to cause death or great bodily harm to another and the person performs them recklessly. Because Woods had not been convicted of purposeful behavior, his prior conviction was not a crime of violence under the Sentencing Guidelines. The court of appeals vacated the judgment against Woods and remanded his case for further proceedings.

The court of appeals returned to these sentencing issues in Evans, 576 F.3d at 766. Evans was convicted in federal court of armed bank robbery and related crimes. His guidelines were enhanced because he had been previously convicted under Illinois law of having “knowingly and without legal justification, made contact of an insulting or provoking nature with April Lauderdale, knowing April Lauderdale to be pregnant.” This offense was charged under subsection (2) of 720 ILCS 5/12-3(a), which provides that “a person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual,” and under 720 ILCS 5/12-4(b)(11), which makes a battery aggravated if the defendant “[k]nows the individual harmed is pregnant.”

When Evans appealed his sentence, the court of appeals found that his previous conviction did not constitute a crime of violence because 5/12-3(a)(2) does not have as elements the use of force against another and conduct posing a serious risk of physical injury to another. Moreover, although the conduct prohibited was intentional in nature, it was not similar to the offenses listed in U.S.S.G. § 4B1.2(a), burglary of a dwelling, arson, extortion, a crime using explosives, or any other crime that presents a serious risk of physical injury. Id. at 768 (citing Begay v. United States, 553 U.S. 137, 142 (2008)), and noting that definitions in § 4B1.2 are identical to those found in the Armed Career Criminal Act. The court pointed out that the Illinois courts have held that the words in the statute, “makes

physical contact of an insulting or provoking nature with an individual” “embraces more forceful blows as well,” id., and that the statute could be read as incorporating two crimes: offensive battery and forcible battery. It observed that “[i]f the two offenses were in separate sections of the battery statute or within the same section but listed separately . . . and the defendant had been convicted of violating the section punishing forcible battery, the fact that another section punished a battery that was not forcible and therefore not a crime of violence under federal law would be irrelevant,” id. at 769. However, because the statute was not so divided and included merely offensive battery, the court concluded that it was required by Woods to hold that the prior conviction could not be used to make Evans a career offender.

This brings us at last to petitioner’s claim, based on Evans, that his two prior convictions under the predecessors to 720 ILCS 5/12-3 and 4 could not be used to enhance his sentence under § 924(e). The first of these is the 1986 conviction of aggravated battery to which petitioner pleaded guilty. Section 5/12-3 defines battery as either intentionally or knowingly “(1) caus[ing] bodily harm to an individual or (2) mak[ing] physical contact of an insulting or provoking nature with an individual.” Because this includes both a forcible offense and an offensive one, it is appropriate to look at the charging documents to determine which section was charged. The documents do not specify the subsection, but it is apparent that it is subsection (1). The amended information, dkt. #31-2, charges petitioner with committing a battery without legal justification and with use of a deadly

weapon, “intentionally caus[ing] bodily harm” to Terry Taylor by shooting him in the abdomen. This language tracks subdivision (1) [intentionally] “causing bodily harm.” to an individual.” The offense is upgraded to aggravated battery by the information’s citation of what is now 720 ILCS 5/12-4(b)(1), which provides that a battery is aggravated if the person committing it uses a deadly weapon other than by the discharge of a firearm. (The predecessor statutes under which petitioner was charged used identical language.)

Much as petitioner would like to use the decision in Evans to show that the federal court enhanced his sentence improperly by the use of his 1989 conviction, he cannot. Unlike Evans, petitioner was charged under subsection (a)(1) of the battery statute which incorporates the necessary factors of intent and serious risk of injury to another. The reference to “use of a deadly weapon” in the charging document lends further support to a conclusion that the sentencing judge was justified in using petitioner’s 1989 conviction to enhance his sentence.

The basis for petitioner’s 1993 conviction was another battery charge against petitioner under 720 ILCS 5/12-3. As with the 1989 conviction, the language in the charging document charge tracked the language in subdivision (1) of 5/12-3 and not that in subdivision (2). The misdemeanor was a felony because the state added the additional charge under 5/12-4(b)(8) that the battery (striking the victim in the back of her head) occurred while the victim was on public property. As Judge Posner has observed, “[i]t may

seem odd that committing a battery on a street or a sidewalk rather than on private property should make it a felony; but a battery that occurs in private is less worrisome to the public at large because more likely to arise from a private quarrel than from a mugging—or so at least the Illinois legislature seems to have believed. See People v. Cole, 47 Ill. App. 3d 775, (1977).” United States v. Aviles-Solarzano, 623 F.3d 470, 472 (7th Cir. 2010).

The 1993 conviction is sufficient to meet the § 924(e) criteria of purposeful intent, violence and aggression and posing a serious risk of physical injury to another. I find therefore that petitioner has failed to show that his federal sentence was enhanced improperly under the Armed Career Criminal Act by the use of this prior conviction.

I note one additional wrinkle, which is of only theoretical interest. If petitioner had shown that the rulings in Woods and Evans meant that it was error for the sentencing judge to use them in 1999, it is questionable whether he would be entitled to a new sentencing. In In re Davenport, 147 F.3d 605, 612 (7th Cir. 1998), the court of appeals allowed a prisoner, Nichols, to pursue a § 2241 petition in which he contended that he was no longer validly convicted of using a firearm in connection with a drug offense because the Supreme Court had ruled in Bailey v. United States, 516 U.S. 137 (1995), that “use” of a firearm in § 924(c) did not include mere possession, which was the basis for the charge against Nichols. (The statute was amended in 1998 to make it explicit that mere possession will support an enhancement. Pub.L. 105-386, § 1(a)(1).) The court found that a § 2241 petition was the

proper way to proceed. Nichols was barred from using § 2255 because he had filed one § 2255 motion and could not qualify for a second one since the ruling in Bailey was not a constitutional one. Moreover, the court found, he had had no reasonable opportunity to challenge his conviction immediately after he was convicted or when he filed his § 2255, when the law in the circuit was firmly against him. In these circumstances, the § 2255 remedy was inadequate to enable Nichols to test the legality of his detention.

The court of appeals placed three qualifications on seeking federal habeas relief under § 2241 by a prisoner like Nichols who has not had a prior opportunity to test his detention. The relevant one for this case is that the change of law has to have been made retroactive by the Supreme Court. To date, the Supreme Court has not adopted the holding of the court of appeals in Woods. Accordingly, the Davenport qualification would preclude petitioner from taking advantage of the holding.

ORDER

IT IS ORDERED that petitioner Michael Hill's petition for a writ of habeas corpus

under 28 U.S.C. § 2241 is DENIED, as is his motion for appointment of counsel.

Entered this 10th day of January, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GREGORY J. PHILLIPS,

OPINION and ORDER

Petitioner,

10-cv-439-bbc
03-cr-40-bbc-01

v.

CAROL HOLINKA, Warden,
Oxford Federal Correctional Institution,

Respondent.

In 2003, petitioner Gregory Phillips pleaded guilty in this court to one count of conspiracy and one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841 and 846. He received a sentence of 262 months after he was found to be a career offender under U.S.S.G. § 4B1.1, because he had two prior felony convictions for crimes of violence, one of which was a conviction under Wisconsin law for first-degree reckless endangerment. Wis. Stat. § 941.30(1).

Petitioner is now an inmate at the Federal Correctional Institution in Oxford, Wisconsin. He has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241, contending that his 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

it clear that reckless endangerment is not a “crime of violence” within the meaning of § 4B1.1.

I conclude that petitioner may not challenge his sentence enhancement under § 2241 because he cannot show a fundamental defect in his sentence that would lead to a miscarriage of justice if not corrected. Therefore, I will deny his petition and close this case.

BACKGROUND

Petitioner Gregory Phillips was indicted in April 2003 on one count of conspiracy to possess with intent to distribute 50 grams or more of cocaine base and one count of possession with intent to distribute 50 grams or more of cocaine base. John Smerlinski was appointed to represent him. Petitioner entered a plea of guilty to both counts on May 20, 2003. On June 24, 2003, the probation office filed a presentence report, in which it recommended that petitioner be sentenced as a career offender under the sentencing guidelines because he had two prior Wisconsin convictions, one of recklessly endangering safety and one of battery by a prisoner. The resulting sentencing guidelines range was 262 to 327 months.

Subsequently, Smerlinski withdrew as petitioner’s attorney and petitioner was appointed new counsel, Jonas Bednarek. At sentencing, neither petitioner or Bednarek objected to the presentence report’s classification of petitioner as a career offender. On

August 20, 2003, petitioner was sentenced to 262 months in prison.

Petitioner did not file a direct appeal of his conviction and sentence, but on August 11, 2004, he filed a § 2255 motion in which he claimed, in part, that Smerlinksy and Bednarek were ineffective. With respect to Bednarek, petitioner argued that Bednarek had failed to file an appeal after being instructed to do so. In an order dated August 19, 2004, I denied most of petitioner's claims, but set an evidentiary hearing on his ineffective assistance claims. The one evidentiary hearing became two; at the second one, I denied petitioner's claims against Smerlinksy but found that Bednarek had rendered ineffective assistance of counsel by failing to file a notice of appeal. Petitioner's appeal rights were restored so that he could take an immediate appeal of the criminal judgment. Petitioner's conviction and sentence were affirmed by the Court of Appeals for the Seventh Circuit, following a limited post-Booker remand in which I informed the court of appeals that I would impose the same sentence under the now-advisory guidelines.

In 2008, the Supreme Court decided in Begay, 553 U.S. 137, that the offense of drunk driving was not a violent felony 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 crimes that are "violent felonies" or "serious drug offenses." (The Act's definition of "violent felony," 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 as requiring “purposeful, violent and aggressive conduct” and held that drunk driving lacked those characteristics. Id. at 144-45,

Following Begay, the Court of Appeals for the Seventh Circuit has held that a crime with a mens rea of recklessness cannot qualify as a violent felony. E.g., Welch v. United States, 604 F.3d 408, 418 (7th Cir. 2010); United States v. Smith, 544 F.3d 781, 786 (7th Cir. 2008). In 2009, 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).

On July 26, 2010, petitioner filed a second § 2255 motion, arguing that he should not be classified as a career offender in light of Begay. I dismissed the motion, concluding that because it was a second or successive § 2255 motion, petitioner could not file it unless and until he obtained prior appellate approval for doing so. 28 U.S.C. § 2255(h). Petitioner then filed this motion for a writ of habeas corpus under 28 U.S.C. § 2241, still contending

that his sentence is unlawful under Begay.

OPINION

The threshold question is whether petitioner may bring a challenge to his career offender enhancement under § 2241. The Court of Appeals for the Seventh Circuit has held recently that Begay “is retroactively applicable on collateral review” to cases in which the defendant’s sentence has been enhanced under the Armed Career Criminal Act. Welch, 604 F.3d at 415 (applying Begay rule to offender challenging his sentencing as armed career criminal in § 2255 case). Ordinarily, a prisoner seeking to attack his conviction or sentence must do so on direct appeal or by way of a motion filed under 28 U.S.C. § 2255. Unthank v. Jett, 549 F.3d 534, 534-35 (7th Cir. 2008); Kramer v. Olson, 347 F.3d 214, 217 (7th Cir. 2003) (per curiam). A prisoner like petitioner who has filed one § 2255 motion may pursue relief under § 2241 only if he can satisfy the mandates of § 2255’s so-called “savings clause,” which provides that a prisoner can use § 2241 if he can show that “the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e); Kramer, 347 F.3d at 217.

In In re Davenport, 147 F.3d 605, 610-11 (7th Cir. 1998), the Court of Appeals for the Seventh Circuit held that a prisoner seeking to show that § 2255 is inadequate or ineffective to test the legality of his detention must show that he is barred under § 2255(h)

from raising his claim in a second or successive § 2255 motion. In addition, the prisoner must show that his petition is based on a rule of law not yet established at the time he filed his first § 2255 motion and that the law has retroactive effect on collateral review. Davenport, 147 F.3d at 611; Unthank, 549 F.3d at 536; United States v. Prevatte, 300 F.3d 792, 800 (7th Cir. 2002). Finally, the prisoner must seek correction of a fundamental defect in his conviction or sentence. Davenport, 147 F.3d at 609, 611 (explaining that “Congress created a safety hatch” to permit a prisoner to use § 2241 “if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion”); see also Reed v. Farley, 512 U.S. 339 (1994) (habeas review is available to check violations of federal laws when error “qualifies as ‘a fundamental defect which inherently results in a complete miscarriage of justice’”) (citing Hill v. United States, 368 U.S. 424, 428 (1962)); Cooper v. United States, 199 F.3d 898, 901 (7th Cir. 1999).

Respondent does not contest petitioner’s ability to show that he is barred from raising his claim in a second § 2255 motion or contend that he cannot show that his claim is based on a rule of law that was not yet established when he filed his first § 2255 motion or that the law has retroactive effect. She argues only that petitioner cannot show a fundamental defect in his sentence that would result in a complete miscarriage of justice if it is not corrected.

The court of appeals has made it clear that a prisoner “must establish that his theory

supports a non-frivolous claim of actual innocence” if he is to show a fundamental defect in his conviction, Kramer, 347 F.3d at 217; Davenport, 147 F.3d at 610 (finding prisoner’s claim that he was “being held in prison for a nonexistent crime” cognizable under § 2241). In other words, when a prisoner is attempting to use § 2241 to challenge his conviction, he must show that “the Supreme Court [has] interpret[ed] the statute underlying the conviction in a way that shows that the defendant did not commit a crime.” Unthank, 549 F.3d at 536; see also Kramer, 347 F.3d at 218; Cooper, 199 F.3d at 901.

There are fewer opinions in which the court of appeals has analyzed the “fundamental defect” requirement in the context of a prisoner’s challenge to his sentence only. In fact, language in several appellate decisions could be read narrowly to support the conclusion that § 2255 can be “inadequate or ineffective” only if it deprives the prisoner of an opportunity to present a claim that he is “actually innocent” of the underlying offense of conviction. E.g., Collins v. Holinka, 510 F.3d 666, 667-68 (7th Cir. 2007) (“[I]f for some reason § 2255 did not offer [defendant] an opportunity to test the validity of his conviction, and he presents a claim of actual innocence, then the district court must entertain this § 2241 action on the merits.”); Kramer, 347 F.3d at 218 (denying motion because defendant not contending that he was “actually innocent of conducting a criminal enterprise”); Cooper, 199 F.3d at 901 (“It is only when a fundamental defect exists in the criminal conviction—a defect which cannot be corrected under § 2255—that we turn to §2241.”); see also Unthank, 549 F.3d at 535-36

(petitioner's claim "that his sentence is too high . . . differs from a claim that he was innocent of the crime of which he was convicted.")

However, in other opinions, and even in other passages in the opinions cited above, the court of appeals has stated that a prisoner can use § 2241, via § 2255's savings clause, to obtain "judicial correction of a fundamental defect in his conviction *or sentence*," emphasizing that the "fundamental defect" standard remains the controlling inquiry under § 2241. Davenport, 147 F.3d at 609 (emphasis added); Unthank, 549 F.3d at 535 ("According to § 2255(e), a federal prisoner may use § 2241 to contest his conviction *or sentence*" in limited circumstances.) (emphasis added); see also Taylor v. Gilkey, 314 F.3d 832, 836 (7th Cir. 2002) (rejecting prisoner's attempt to use § 2241 via § 2255(e) because he failed to "present any fundamental error *equivalent to* actual innocence" or "*on a par with* the one that Davenport . . . flagged") (emphasis added); Cooper, 199 F.3d at 901 ("fundamental errors in the criminal process"; "fundamental legality of their sentences"). Moreover, in Garza v. Lappin, 253 F.3d 918, 920 (7th Cir. 2001), the court of appeals permitted a prisoner to use § 2241 to challenge his sentencing under the Armed Career Criminal Act. The court held that the prisoner was "entitled to raise his argument in a habeas corpus petition under § 2241" because "Section 2255 [did] not . . . and ha[d] never provided an adequate avenue for testing [the prisoner's] present challenge to the legality of his sentence." Id. at 923.

Respondent concedes that in some cases, a prisoner may challenge his sentence through a § 2241 petition. Specifically, respondent says if a prisoner shows that an improper recidivist enhancement increased his term of incarceration beyond the otherwise applicable legal maximum and also prevented the district court from exercising its discretion to impose a lesser sentence, the prisoner may have a viable claim under § 2241. In such circumstances, the federal court would have exceeded its authority by imposing a sentence unauthorized by Congress, with the result that the prisoner has been subjected to a fundamentally defective sentence. Whalen v. United States, 445 U.S. 684, 689 and n.4 (1980) (explaining that federal court violates constitutional principle of separation of powers by imposing punishment not authorized by Congress); see also United States v. DiFrancesco, 449 U.S. 117, 139 (1980) (“A defendant may not receive a greater sentence than the legislature had authorized.”) Under respondent’s reasoning, a prisoner who receives an improper enhancement under the Armed Career Criminal Act may have a cognizable habeas claim because that statute imposes a mandatory minimum 15-year prison term that exceeds the statutory maximum to which the prisoner would have otherwise been subject. E.g., Sperberg v. Marberry, 09-cv-22-WTL-DML (S.D. Ind. Oct. 26, 2010) (granting petition under § 2241 after finding that prisoner was serving sentence enhanced erroneously under the Armed Career Criminal Act that exceeded otherwise applicable statutory maximum for his crime). In such a case, the prisoner’s claim is based on misapplication of a statute, satisfying the

requirement in § 2241 that the prisoner establish that is “in custody in violation of the laws of the United States.”

The court of appeals’ recent decision in Welch, 604 F.3d 408, supports respondent’s view that a prisoner whose enhanced sentence exceeds the statutory maximum may have a claim that his sentence is fundamentally defective. Although the issue in Welch was whether a prisoner may assert a Begay claim in a § 2255 motion, the court’s discussion is useful in determining the types of claims in which a prisoner is asserting a claim of a miscarriage of justice. The court of appeals explained that although errors in applying the sentencing guidelines are not generally cognizable in a § 2255 motion, claims arising out of circumstances in which “a change in law reduces the defendant’s statutory maximum sentence below the imposed sentence,” may be brought under § 2255. Welch, 604 F.3d at 412-13 (citing Scott v. United States, 997 F.2d 340, 342 (7th Cir. 1993) (holding that claims alleging misapplication of then-mandatory federal sentencing guidelines may not be brought under § 2255(a) absent showing of “fundamental defect which inherently results in a complete miscarriage of justice”)).

In this case, petitioner was not sentenced under the Armed Career Criminal Act and is not arguing that his sentence exceeds the statutory maximum. At all times, his sentence has been within the statutory maximum set by Congress for his crime, which is life. The misapplication of the career offender guideline increased his guideline range within the

authorized statutory range (ten years to life) but did not elevate the available range of statutory penalties. This court would still have discretion to sentence him to the same 262-month sentence. Therefore, Welch does not help him.

Petitioner cites two decisions in other circuits that he thinks support his claim for resentencing to correct the misapplication of the career offender guidelines. In Gilbert v. United States, 609 F.3d 1159, 1166 (11th Cir. 2010), a panel of the court of appeals held that a prisoner is asserting a claim of “actual innocence” when he contends that he is innocent of a statutory offense of being a career offender under the sentencing guidelines. The court characterized the prisoner as challenging a fundamental defect in his sentence that is cognizable under § 2241. In another recent decision, the Court of Appeals for the Eighth Circuit held that a prisoner challenging his career offender sentence under the guidelines on Begay grounds had asserted a claim cognizable under § 2255 because the misapplication of the guidelines had resulted in a miscarriage of justice. Sun Bear v. United States, 611 F.3d 925, 929-32 (8th Cir. 2010). However, both Sun Bear and Gilbert have been vacated and scheduled for en banc rehearing. Gilbert v. United States, —F.3d—, 2010 WL 4340970 (11th Cir. Nov. 3, 2010) (vacating opinion); Sun Bear v. United States, 611 F.3d 925 (8th Cir. Sept. 27, 2010) (vacating opinion).

It may be that the decisions in Sun Bear and Gilbert will be upheld. Even if they are, the holdings would not be binding in this circuit. To date, the Court of Appeals for the

Seventh Circuit does not recognize the types of claims allowed in Gilbert and Sun Bear. Instead, the court has held that a prisoner cannot bring a claim under § 2241 contending merely that his sentence is too high under the guidelines. Unthank, 549 F.3d at 535; see also Taylor, 314 F.3d at 835-36 (holding that claim involving erroneous application of guidelines did not present defect cognizable under § 2241). Nothing in Welch, 604 F.3d at 412, changes this conclusion. Another recent unpublished opinion by the court of appeals supports the view that this is still the rule in the Seventh Circuit. Harvey v. Sherrod, No. 09-3407 (7th Cir. Mar. 8, 2010) (affirming district court's denial of § 2241 petition on ground that petitioner did not satisfy § 2255(e)'s savings clause requirement because he was challenging "only his sentence" as career offender under the sentencing guidelines). In sum, although there may be circumstances in which a prisoner has a cognizable § 2241 claim arising out of a fundamental defect in his sentence, the court of appeals has concluded that claims based on erroneous applications of the sentencing guidelines are not fundamental defects that would result in a miscarriage of justice if not corrected. Under the law as it stands, petitioner's claim is not cognizable under § 2241 and must be dismissed.

ORDER

IT IS ORDERED that

1. Gregory Phillips's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 is DENIED for petitioner's failure to show that he is in custody in violation of the Constitution or laws of the United States.

2. The clerk of court is directed to enter judgment for respondent Carol Holinka and close this case.

Entered this 18th day of November, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge