

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

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MARCELO SANDOVAL,

Petitioner,

v.

CAROL HOLINKA,

Respondent.

OPINION and ORDER

11-cv-255-bbc

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Petitioner Marcelo Sandoval, a prisoner at the Oxford Federal Correctional Institution in Oxford, Wisconsin, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner asserts that he was erroneously sentenced to ten extra years of prison under 18 U.S.C.A. § 924(c), which provides longer penalties for carrying or using a firearm in the furtherance of certain crimes, because the district court incorrectly considered the possession of a firearm as a sentencing factor rather than as an element of the crime. I will allow petitioner to proceed on this claim, but only after he advises the court and government which of his criminal cases is the subject of this petition.

OPINION

At the outset, I note that petitioner does not state explicitly which of his criminal convictions is the subject of this petition. Judging from the federal judiciary's electronic docketing system (PACER), it appears that petitioner is referring to Central District of

Illinois case no. 99-cr-40019-JBM-1. Although most details of that case are unclear because the full docket is not currently available on the electronic docketing system, the record shows that petitioner was sentenced to 120 months for violation of 18 U.S.C. § 924(c), consecutive to the concurrently-running 262-month sentence for conspiracy to distribute a controlled substance and 240-month sentence for kidnapping. However, without confirmation from petitioner that this is the relevant case, there is no point in asking respondent to respond to the petition. Accordingly, I will give petitioner until June 24, 2011 to inform the court and respondent whether this case is the subject of his petition. Should petitioner fail to respond by the deadline, I will dismiss his petition.

Assuming that this is the correct case, I turn to the merits of the petition. Petitioner argues that a recent decision, United States v. O'Brien, 130 S. Ct. 2169 (2010), now makes clear that a defendant can be sentenced under § 924(c) only if that violation is considered as an element of the crime by the jury rather than included as a sentencing factor by the court. In O'Brien, the United States Supreme Court concluded that the “machinegun provision” in § 924(c)(1)(B)(ii) (possession of a machine gun, destructive device, firearm silencer or firearm muffler) is an element of an offense that must be proven to the jury rather than used as a sentencing factor. O'Brien, 130 S.Ct. at 2180. Petitioner states that he was sentenced to an extra ten years for “possession of an automatic weapon” although the prosecutor had not proven that charge to the jury. Accordingly, at this point I will allow petitioner to proceed against respondent Holinka, provided that he properly informs the court and respondent which of his convictions is the subject of his petition.

In responding to the petition, respondent should address petitioner's assertion that he may bring this challenge under § 2241 because O'Brien has retroactively changed the law. 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.

One of the requirements petitioner must fulfill in order to make this showing is to 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. In re Davenport, 147 F.3d 605, 610-11 (7th Cir. 1998), 147 F.3d at 611; Unthank, 549 F.3d at 536; United States v. Prevatte, 300 F.3d 792, 800 (7th Cir. 2002). Because the record of petitioner's criminal proceeding in case no. 99-cr-40019-JBM-1 is not available on the electronic docketing system, it is difficult to ascertain whether petitioner meets these standards. Therefore, in addition to any other arguments respondent wishes to raise in her response, she should address the following questions: (1) whether O'Brien truly created a rule of law not yet established at the time petitioner filed his § 2255 motion, in light of the unreported decision in Patterson v. Rios, 2011 WL 1458164 (C.D. Ill. Apr. 15, 2011),

suggesting that O'Brien merely confirmed an earlier similar ruling in Castillo v. United States, 530 U.S. 120 (2000); and (2) even if O'Brien did create a new rule of law, whether that ruling applies retroactively to petitioner's case.

## ORDER

IT IS ORDERED that

1. Petitioner Marcelo Sandoval has until June 24, 2011 to inform the court and respondent Carol Holinka whether Central District of Illinois case no. 99-cr-40019-JBM-1 is the subject of his petition. Should petitioner fail to respond by the deadline, the petition will be dismissed.

2. No later than 20 days from the date of service of the petition, respondent Holinka is to file a response showing cause, if any, why this writ should not issue with respect to petitioner's claim that his sentence for violation of 18 U.S.C. § 924(c) violated his federal rights because that violation was not proven to the jury.

3. Petitioner may have 20 days from the service of the response in which to file a traverse to the allegations of the response submitted by respondent.

4. For the sake of expediency, I will send the petition to the bureau, 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.

5. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will

be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

6. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 17th day of June, 2011.

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