IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARK NEFF,

Petitioner,

v.

LOUIS WILLIAMS II,

Respondent.

ORDER

16-cv-749-bbc

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Petitioner Mark Neff is a federal prisoner who was convicted in 1994 in the United States District Court for the Central District of Illinois for being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), and sentenced as an armed career criminal under § 924(e)(1) based in part on a prior conviction for burglary in Illinois in 1984. Dkt. #1; Neff v. United States, 129 F.3d 119 (7th Cir. 1997). Now incarcerated in this district at the Federal Correctional Institution in Oxford, Wisconsin, petitioner has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241. He contends that the 1984 Illinois burglary conviction can no longer be used to enhance his sentence in light of the Supreme Court's recent decision in Mathis v. United States, __ U.S. __, 136 S. Ct. 2243, 2248-50 (2016). In Mathis, the Court held that a burglary counts as a predicate crime under the Armed Career Criminal Act only "if its elements are the same as, or narrower than, those of the generic offense," which requires unlawful entry into a "building or other structure." The

Court of Appeals for the Seventh Circuit has held that at least one version of the Illinois burglary statute does not satisfy the definition of burglary used in Mathis, and therefore would not qualify as a predicate crime under the Armed Career Criminal Act, because it included locations other than a "building or other structure." Holt v. United States, 843 F.3d 720, 721 (7th Cir. 2016); United States v. Haney, 840 F.3d 472, 475 (7th Cir. 2016).

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

Ordinarily, a federal prisoner challenging his conviction or sentence must do so on direct appeal or in a motion filed under 28 U.S.C. § 2255 in the district where he was convicted. Brown v. Caraway, 719 F.3d 583, 586 (7th Cir. 2013). However, there is a limit to the number of collateral challenges a prisoner may bring, and petitioner has filed several § 2255 motions regarding his sentence since 1996. Dkt. #1 at 3; Neff v. United States, 2008 WL 544928, at *1-2 (C.D. Ill. Feb. 27, 2008) (detailing petitioner's "long history of attempts to circumvent the procedural requirements concerning successive petitions"). In particular, a second or successive collateral challenge is permissible only if the court of

appeals certifies that the challenge rests on newly discovered evidence (which petitioner's does not) or on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). The Court of Appeals for the Seventh Circuit has held that Mathis is a new rule of statutory, not constitutional, law and that it has not been declared retroactive on collateral review by the Supreme Court. Holt, 843 F.3d at 722; Dawkins v. United States, 829 F.3d 549, 551 (7th Cir. 2016) (arguments resting on Mathis do not justify successive collateral challenges and "must be brought, if at all, in a petition under 28 U.S.C. § 2241").

Section 2255(e) allows a federal prisoner to file a "petition under section 2241 instead if his section 2255 remedy is 'inadequate or ineffective to test the legality of his detention.'" Brown v. Rios, 696 F.3d 638, 640 (7th Cir. 2012) (quoting 28 U.S.C. § 2255(e)). To satisfy § 2255(e), a prisoner must show three things: (1) his petition is based on a rule of statutory law, which means he could not have raised it on a second or successive petitioner under § 2255; (2) he is relying on a retroactive decision that he could not have invoked in his first § 2255 motion; and (3) the sentence enhancement must have been a sufficiently grave error to be deemed a miscarriage of justice. Light v. Caraway, 761 F.3d 809, 812-13 (7th Cir. 2014); In re Davenport, 147 F.3d 605, 610-12 (7th Cir. 1998). See also Webster v. Caraway, 761 F.3d 764, 767 (7th Cir. 2014) ("When a change of law, retroactively applicable, shows that the prisoner did not commit a crime or has received an illegally high sentence, § 2241 is available if it otherwise would be impossible to implement the Supreme Court's intervening decision."). As petitioner recognizes, a petition under §

2241 must be brought in the district in which he is confined rather than the district in which he was sentenced. Light, 761 F.3d at 812.

At this stage, it seems likely that the petition satisfies the requirements of § 2255(e). As discussed above, the Seventh Circuit has held that Mathis is based on a rule of statutory law. Although the Supreme Court has not held expressly that the decision in Mathis applies retroactively to cases on collateral review, several district courts in this circuit have held that it does because it announced a substantive rule of law. Staples v. True, 2017 WL 935895, at *3 (S.D. Ill. Mar. 8, 2017); Dobbs. V. Werlich, 2017 WL 888355, *2 (S.D. Ill. Mar. 6, 2017); Pulliam v. Krueger, 2017 WL 104184, at *2 (C.D. Ill. Jan. 10, 2017). See also Montana v. Cross, 829 F.3d 775, 783 (7th Cir. 2016) ("Teague v. Lane, 489 U.S. 288, 306-10 (1989), and Bousley v. United States, 523 U.S. 614, 619-21 (1998), teach that new rules are applied retroactively when they are substantive; procedural rules apply retroactively in much narrower circumstances."). These courts noted that the Seventh Circuit has held that a rule defining "the scope of a sentencing enhancement that increases the maximum allowable statutory sentence on the basis of a prior conviction is properly classified as substantive," Welch v. United States, 604 F.3d 408, 415 (7th Cir. 2010) (discussing Begay v. United States, 553 U.S. 137 (2008)), and has referred to Mathis as establishing a substantive rule. Jenkins v. United States, No. 16-3441 (7th Cir. Sept. 20, 2016) ("Mathis is not amenable to analysis under § 2244(b) because it announced a substantive rule, not a constitutional one."). Finally, with respect to the third requirement, petitioner states that he was sentenced to an additional two years of supervised release that he would not have

received if his 1984 burglary conviction had not qualified as a predicate crime under the Armed Career Criminal Act. Accordingly, I find that the petition is adequate to require a response from the government.

ORDER

IT IS ORDERED that

1. For the sake of expediency, I am directing the clerk of court to send the petition and supporting brief (dkt. #1) to respondent Louis Williams, 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.

2. Respondent has two options in responding to the petition:

Option 1: Within 30 days from the date of service of the petition, respondent may file a motion to dismiss the petition on procedural grounds. Petitioner shall have 20 days following service of any motion to dismiss within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

Option 2: If respondent does not wish to raise any procedural defenses, if he wishes to combine his procedural and substantive arguments or if he simply is unable to meet the 30-day deadline, he may have 60 days from the date of service of the petition and petitioner's brief to file one brief raising all arguments he wishes to raise, together with supporting materials. Respondent must show cause why petitioner is not entitled to a writ

of habeas corpus. Petitioner shall have 30 days after service of the response to file a reply.

3. Under both Option 1 and Option 2, respondent must comply with Rule 5 of the Rules Governing Section 2254 Cases. This includes providing the court and petitioner any portions of the record from the criminal or post conviction proceedings that he believes are necessary to deciding the petition.

4. If respondent chooses Option 1, but his motion to dismiss is denied, I will set a new briefing schedule on the merits of the petition.

5. Petitioner must serve by mail a copy of every document that he files with this court upon the Assistant United States Attorney who appears on respondent's behalf. The court will not consider any submission that has not been served upon the other party. Petitioner should note on each of his submissions whether he has served a copy of that document upon respondent's lawyer.

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.

7. If petitioner is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and respondent or the court is unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 20th day of March, 2017.

BY THE COURT:
/s/

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BARBARA B. CRABB
District Judge