IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GREGORY J. PHILLIPS,

Petitioner,

v.

CAROL HOLINKA, Warden,
Oxford Federal Correctional Institution,

Respondent.

OPINION and ORDER

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

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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 § 2241because 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, Smerlinksi 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 Smerlinksi 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 Smerlinksi 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 fundament 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 § 2241that 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 injustice. 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