IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL HILL,

OPINION AND ORDER

Petitioner,

10-cv-65-bbc

v.

C. HOLINKA,

Respondent.

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Michael Hill has filed a timely motion for reconsideration of the order entered in this case on January 7, 2011. He contends that the court erred in finding that he was properly sentenced as an armed career criminal in 1999, and thus that he had no claim for relief under 28 U.S.C. § 2241.

This case has an extensive and convoluted history. For the purpose of deciding the present motion, the relevant facts can be summarized briefly. In 1992, petitioner was charged with committing the offense of aggravated battery "in that the defendant in committing a battery, in violation of Illinois Revised Statutes, Chapter 3, Section 12-3, [now 720 ILCS 5/12-3] without legal justification and wile [sic] Janet Glick was at the Winnebago County Courthouse, a public property, caused bodily harm to Janet Glick in that he struck

Janet Glick in the back of her head with his hand, in violation of Paragraph 12-4(b)(8), Chapter 38, Illinois Revised Statutes [now 720 ILCS 5/12-4(b)(8)]." Dkt. #31-5. He was convicted of the offense by a jury and sentenced to a term of four years. In 1999, a federal court relied on the prior conviction and two others not at issue to find that petitioner was an armed career criminal under 18 U.S.C. § 924(e)(1) and subject to enhanced penalties.

In an order entered on January 10, 2010, I found that it was proper for the sentencing judge to count the contested Illinois aggravated battery conviction when he sentenced defendant in 1999 on charges including violation of 18 U.S.C. § 922(g)(1) (being a felon in possession of a firearm). Petitioner had argued that the charging documents did not show the necessary three predicate crimes, which can be either violent felonies or serious drug offenses. "Violent felony" is defined as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B).

As he has done from the beginning, petitioner contends that a person found guilty under subsection (2) of 5/12-3(a) of the Illinois statutes cannot be considered to have committed a violent felony because that part of the statute applies to batteries that consist merely of making "physical contact of an insulting or provoking nature with an individual." He relies for this proposition on the holding in United States v. Evans, 576 F.3d 766 (7th Cir. 2009), in which the court of appeals held that violation of this subsection did not

constitute a violent felony. However, petitioner was charged under subsection (1) of 5/12-3(a), which applies to "intentionally or knowingly without legal justification and by any means," causing bodily harm to an individual. Dkt. #31-5. The charging document does not charge petitioner with making physical contact of an insulting or provoking nature," but with "causing bodily harm." Although the document does not specify subsection (1), the use of the words "causing bodily harm" resolves any confusion about which subsection is invoked.

Three additional points. First, petitioner complains about the dismissal of his § 2241 motion, saying that this court stated in an order entered on March 30, 2010, that there was no question but that petitioner would not be determined to be an armed career criminal under current law. That statement was an error resulting from a lack of understanding at the time that petitioner had been convicted of violating subsection (1) of 5/12-3(a) and not subsection (2). When a subsection (1) offense is charged as an aggravated battery, as it was in petitioner's case, it constitutes a crime of violence that can be used as a predicate offense for § 924(e).

Second, it remains unclear whether petitioner's challenge to his sentencing as an armed career criminal is cognizable under § 2241. In In re Davenport,147 F.3d 605, 609-10 (7th Cir. 1998)), the court rejected the idea that a person who is attacking only his status as an "'armed career criminal' offense" should be able to use § 2241 to challenge the

sentence.

Three, even if petitioner had been convicted under subsection (2) of the statute, so that he would be situated similarly to the defendant in Evans, 576 F.3d 766, and even if a person can use § 2241 to attack just his sentence, he would be unable to prevail on his motion. The Supreme Court has not adopted the holding in Evans and made it retroactive, which is a necessary precondition to relief.

I conclude that petitioner has shown no reason why his motion for relief under § 2241 should be granted.

ORDER

IT IS ORDERED that petitioner Michael Hill's motion for reconsideration of the January 7, 2011 order denying his motion for relief under 28 U.S.C. § 2241 is DENIED.

Entered this 18th day of February, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge