UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ELLIS McHENRY, Petitioner, v. DAVID SHINN, Warden, Respondent.	NO. ED CV 16-1758-FMO(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Fernando M. Olguin, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On August 17, 2016, Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in Federal Custody." On October 11, 2016, Respondent filed "Respondent's Motion to Dismiss or Transfer Petition for Writ of Habeas Corpus, etc." ("Motion to Dismiss"). On

October 12, 2016, the Magistrate Judge ordered Petitioner to file an opposition to the Motion to Dismiss within thirty days of October 12, 2016, and warned that failure to file timely opposition could result in the denial and dismissal of the Petition.

The Magistrate Judge did not receive any opposition to the Motion to Dismiss before, on, or days after the deadline for opposition. Accordingly, on November 17, 2016, the Magistrate Judge issued a Report and Recommendation recommending denial and dismissal of the Petition without prejudice for failure to prosecute.

On November 21, 2016, however, the Magistrate Judge received "Petitioner's Reply Opposing Defendants [sic] Motion to Dismiss" ("Opposition"). On November 21, 2016, the Magistrate Judge sua sponte withdrew the November 17, 2016 Report and Recommendation.

BACKGROUND

In 1993, in the United States District Court for the Northern District of Ohio, a jury found Petitioner guilty of three counts of carjacking in violation of 18 U.S.C. section 2119, three counts of using or carrying a firearm in relation to a crime of violence (carjacking) in violation of 18 U.S.C. section 924(c) and one count of receipt and possession of a firearm by an illegal alien in violation of 18 U.S.C. section 922(g)(5) (Petition, second page 1; Respondent's Lodgment 3, p. 3; see United States v. McHenry, 38 F.3d 1217, at *1-2 (1994) (unpublished), cert. denied, 514 U.S. 1179 (1995). After the verdict, the trial court vacated the section 924(c) counts. See

United States v. McHenry, 38 F.3d 1217, at *1; United States v. McHenry, 830 F. Supp. 1025 (N.D. Ohio 1993). Petitioner appealed, challenging the sufficiency of the evidence, and the Government also appealed. See United States v. McHenry, 38 F.3d 1217, at *1. The United States Court of Appeals for the Sixth Circuit reversed the order vacating the section 924(c) counts and remanded for resentencing on those counts, but otherwise affirmed the judgment. See id. at 2-3. The United States Supreme Court denied certiorari. McHenry v. United States, 514 U.S. 1179 (1995).

Following resentencing, Petitioner appealed, challenging the constitutionality of the federal carjacking statute. See United States v. McHenry, 97 F.3d 125 (6th Cir. 1996), cert. denied, 519 U.S. 1131 (1997). The United States Court of Appeals for the Sixth Circuit affirmed the judgment. See id. The United States Supreme Court denied certiorari. See McHenry v. United States, 519 U.S. 1131 (1997).

In 1998, Petitioner filed in the sentencing court a petition for writ of coram nobis, a motion to correct an allegedly excessive sentence and a petition for writ of prohibition. See Docket in United States v. McHenry, United States District Court for the Northern District of Ohio case number 1:93-cr-00084-DDD.[1/] The sentencing court denied Petitioner's motion and petitions. See id.

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[1] The Court takes judicial notice of Petitioner's criminal case and related proceedings, described herein, available on the PACER database at www.pacer.gov. See Mir v. Little Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice of court records).

In 2001, Petitioner filed in the sentencing court a motion to vacate pursuant to 28 U.S.C. section 2255. See id.; see also Docket in McHenry v. United States, United States District Court for the Northern District of Ohio case number 1:01-cv-01607-DDD; Respondent's Exhibit 7. On March 15, 2002, the sentencing court denied the motion. See Docket in McHenry v. United States, United States District Court for the Northern District of Ohio case number 1:01-cv-01607-DDD.

On August 25, 2008, Petitioner filed in the sentencing court a "Motion to Modify the Term of Imprisonment" pursuant to 18 U.S.C. section 3582(c), which the sentencing court denied on August 28, 2008. See Docket in United States v. McHenry, United States District Court for the Northern District of Ohio case number 1:93-cr-00084-DDD. The United States Court of Appeals for the Sixth Circuit affirmed in 2010. See id. (see also Respondent's Lodgment 12). The sentencing court denied a second section 3582 motion and a motion for reconsideration on September 23, 2008. See id. (see also Respondent's Lodgment 11).

On June 26, 2015, the United States Supreme Court issued its decision in Johnson v. United States, 135 S. Ct. 2551 (2015) ("Johnson"). The Johnson decision held unconstitutional the "residual clause" of the federal Armed Career Criminal Act, 18 U.S.C. section 924(e)(2)(B). That clause had defined "violent felony" for purposes of 18 U.S.C. section 924(e)(1) to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." On April 18, 2016, the United States Supreme Court held that Johnson announced a substantive rule of law which applies retroactively on collateral review. Welch v. United States, 136 S.

Ct. 1257 (2016).

PETITIONER'S CONTENTIONS

Petitioner seeks to challenge the three firearm enhancements that were imposed pursuant to 18 U.S.C. section 924(c). Section 924(c) authorizes the imposition of a sentence enhancement where any person "during and in relation to any crime of violence" uses or carries a firearm, or possesses a firearm in furtherance of any such crime. Section 924(c)(3) defines a "crime of violence" as a felony that: (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"; or (B) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The first clause is commonly known as the "force clause" and the second clause is commonly known as the "residual clause." See United States v. Baires-Reyes, ___ F. Supp. 3d ___, 2016 WL 3163049, at *1 (N.D. Cal. June 7, 2016).

Petitioner contends that the "force clause" did not apply in his case because, under the definition of carjacking in effect at the time of Petitioner's conviction,[2/] carjacking assertedly did not necessarily involve the "use, attempted use, or threatened use of

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[2] See former 28 U.S.C. § 2119, Title I, § 101(a), 106 Stat. 3384 (Oct. 25, 1992). The statute was amended, effective September 13, 1994, to add the element that the carjacking be committed "with the intent to cause death or serious bodily harm." See Pub.L. 103-322, Title VI, § 600003(a)(14), 108 Stat. 1796, (Sept. 13, 1994).

physical force against the person or property of another" within the meaning of section 924(c)(3)(A) (see Opposition, ECF Dkt. No. 17, pp. 13-16). Petitioner also challenges the constitutionality of the "residual clause" of section 924(c)(3)(B) on the ground that the clause allegedly is materially indistinguishable from the clause held unconstitutional in Johnson.

DISCUSSION

A federal prisoner who contends that his or her conviction or sentence is subject to collateral attack "may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. A prisoner must bring a section 2255 motion in the sentencing court. Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir. 2000); 28 U.S.C. § 2255(a). A prisoner generally may not substitute a habeas petition under 28 U.S.C. section 2241 for a section 2255 motion. See 28 U.S.C. § 2255; see Stephens v. Herrera, 464 F.3d 895, 897-99 (9th Cir. 2006), cert. denied, 549 U.S. 1313 (2007); Hernandez v. Campbell, 204 F.3d at 864.

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e); see Stephens v. Herrera, 464 F.3d at 897-99; Hernandez v. Campbell, 204 F.3d at 864. Here, Petitioner has applied for, and has been denied, section 2255 relief in the sentencing court.

"Under the savings clause of § 2255, however, a federal prisoner may file a habeas corpus petition pursuant to § 2241 to contest the legality of a sentence where his remedy under section 2255 is 'inadequate or ineffective to test the legality of his detention.'" Hernandez v. Campbell, 204 F.3d at 864-65; see also Stephens v. Herrera, 464 F.3d at 897. This "savings clause" exception to section 2255 exclusivity is a "narrow" exception. Ivy v. Pontesso, 328 F.3d 1057, 1059-60 (9th Cir.), cert. denied, 540 U.S. 1051 (2003); United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997). Mere lack of success in the sentencing court does not render the section 2255 remedy "inadequate or ineffective." Boyden v. United States, 463 F.2d 229, 230 (9th Cir. 1972), cert. denied, 410 U.S. 912 (1973); see Tripati v. Henman, 843 F.2d 1160, 1162-63 (9th Cir.), cert. denied, 488 U.S. 982 (1988). If the rule were otherwise, every disappointed prisoner/movant incarcerated in a district different from the sentencing district could pursue a repetitive section 2241 petition in the district of incarceration. Petitioner bears the burden of proving the inadequacy or ineffectiveness of the Section 2255 remedy. See Gholston v. Adams, 26 Fed. App'x 767, 768 (9th Cir. 2002); Redfield v. United States, 315 F.2d 76, 83 (9th Cir. 1963).

Under the savings clause, a federal prisoner may file a section 2241 petition under the savings clause only if the prisoner "(1) makes a claim of actual innocence, and (2) has not had an unobstructed

procedural shot at presenting that claim." Marrero v. Ives, 682 F.3d 1190, 1192 (9th Cir. 2012), cert. denied, 133 S. Ct. 1264 (2013) (citation and internal quotations omitted).

For the reasons discussed below, Petitioner has not shown he lacked an "unobstructed procedural shot" at presenting his claims. Therefore, the Court need not and does not determine whether Petitioner has shown "actual innocence" of his sentence. See generally Marrero v. Ives, 682 F.3d at 1193-95 (claim that petitioner was wrongly classified as a career offender did not entail a claim of actual innocence; noting cases in other circuits holding that a petitioner generally cannot assert a cognizable claim of actual innocence of a noncapital sentencing enhancement).

First, with respect to Petitioner's "force clause" claim, Petitioner could have asserted this claim on appeal or in his prior section 2255 petition. See United States v. Johnson, 22 F.3d 106, 108 (6th Cir. 1994) ("Armed carjacking is a specific crime of violence carrying a nonmandatory sentence."); see also United States v. Mohammed, 27 F.3d 815, 819 (2d Cir.), cert. denied, 513 U.S. 975 (1994) ("It is clear that a violation of section 2119, the carjacking statute, is a crime of violence within the meaning of section 924(c)."); United States v. Singleton, 16 F.3d 1419, 1423 (5th Cir. 1994) ("Carjacking is always and without exception a "crime of violence" as that term is defined in 18 U.S.C. § 924(c)(3)."); United States v. Jones, 34 F.3d 596, 601-02 (8th Cir. 1994), cert. denied, 514 U.S. 1067 (1995) ("Carjacking . . . is a crime of violence") (citations omitted). Indeed, Petitioner made a related argument in

his second appeal, contending that the Double Jeopardy Clause barred the imposition of punishment both for the carjacking convictions and for the section 924(c) enhancements. The Sixth Circuit rejected this argument, citing, inter alia, United States v. Johnson, 22 F.3d 106 (6th Cir. 1994). See United States v. McHenry, 38 F.3d 1217 (6th Cir. 1994) (unpublished), cert. denied, 514 U.S. 1179 (1995).

Second, with respect to Petitioner's "residual clause" claim, as discussed below, even assuming arguendo Petitioner's claim was unavailable for assertion in a section 2255 petition prior to the issuance of Johnson, the argument is now available to Petitioner by means of a second section 2255 motion.

"Second or successive section 2255 motions are subject to the gatekeeping procedures 'provided in [28 U.S.C. section] 2244.'" Ezell v. United States, 778 F.3d 762, 764 (9th Cir.), cert. denied, 136 S. Ct. 256 (2015). Section 2244(b)(3)(A) requires that a petitioner seeking to file a "second or successive" habeas petition first obtain authorization from the Court of Appeals. Hughes v. United States, 770 F.3d 814, 817 (9th Cir. 2014); 28 U.S.C. § 2244(b)(3)(C). "[A] federal prisoner may not file a second or successive § 2255 petition unless he or she makes a prima facie showing to the appropriate court of appeals that the petition is based on: (1) 'a new rule,' (2) 'of constitutional law,' (3) 'made retroactive to cases on collateral review by the Supreme Court,' (4) 'that was previously unavailable.'" Ezell v. United States, 778 F.3d at 765 (citations and footnote omitted); 28 U.S.C. § 2244(b)(3)(C); 28 U.S.C. § 2255(h)(2).

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The Supreme Court recently deemed Johnson to be a new rule of substantive constitutional law retroactively applicable on collateral review. See Welch v. United States, 136 S. Ct. 1257 (2016). Therefore, Petitioner may now file an application in the United States Court of Appeals for the Sixth Circuit seeking authorization to bring his Johnson claim in a second or successive section 2255 motion in the sentencing court. See, e.g., Orona v. United States, 826 F.3d 1196 (9th Cir. 2016) (granting application to file second or successive section 2255 motion based on Johnson); In re Pinder, 824 F.3d 977 (11th Cir. 2016) (granting application to file second or successive section 2255 motion based on claim that Johnson invalidated section 924(c)(3)(B) residual clause; noting that three other circuits had granted applications in such cases); In re Patrick, 833 F.3d 584 (6th Cir. 2016) (granting application to file second or successive section 2255 motion based on claim that Johnson invalidated federal Sentencing Guidelines' residual clause); In re Watkins, 810 F.3d 375 (6th Cir. 2015) (pre-Welch grant of application to file second or successive section 2255 motion based on Johnson claim); but see In re Fields, 826 F.3d 785 (5th Cir. 2016) (denying application to file second or successive section 2255 motion asserting claim that Johnson invalidated section 924(c)(3)(B)).

The Sixth Circuit recently rejected on the merits a Johnson challenge to the constitutionality of section 924(c)(3)(B). See United States v. Taylor, 814 F.3d 340, 376-79 (6th Cir. 2016), pet. for cert. filed (No. 16-6392) (Oct. 6, 2016). However, "[s]uccess is irrelevant to a consideration of whether [a petitioner's] procedural shot was unobstructed." Hinkson v. Copenhaver, 2013 WL 5719520, at *4

(E.D. Cal. Oct. 21, 2013) (emphasis added). Furthermore, on June 27, 2016, the United States Supreme Court granted certiorari in Beckles v. United States, 136 S. Ct. 2510 (2016), which presents the question whether Johnson's holding applies to the residual clause in the federal career offender Sentencing Guidelines. Even more recently, the Supreme Court granted certiorari in Dimaya v. Lynch, 803 F.3d 1110, 1112 (9th Cir. 2015), cert. granted, 137 S. Ct. 31 (Sept. 29, 2016), in which the Ninth Circuit struck down the residual clause of 18 U.S.C. section 16, a clause identical to that of Section 924(c)(3). Hence, the ultimate fate of Petitioner's Johnson claim remains uncertain.

In these circumstances, Petitioner has failed to show he lacked an "unobstructed procedural shot" at presenting his claims in a second or successive section 2255 motion. See In re Embry, 831 F.3d 377, 378 (6th Cir. 2016) (granting application to file second or successive section 2255 motion where applicant claimed Johnson invalidated Sentencing Guidelines' residual clause; observing that, although there are "respectable constitutional arguments" that Johnson did not apply, "[n]ow is not the time to decide the question, and this is not the venue for resolving it").

Accordingly, because the savings clause does not apply in the present case, the Petition is a section 2255 motion over which this Court lacks jurisdiction.

A court lacking jurisdiction of a civil action may transfer the action to a court in which the action could have been brought,

provided the transfer is "in the interest of justice." 28 U.S.C. § 1631; see Cruz-Aguilera v. I.N.S., 245 F.3d 1070, 1074 (9th Cir. 2001). "Normally transfer will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is time consuming and justice-defeating." Id. at 1074 (citations and quotations omitted). Here, however, a transfer to the sentencing court would be an idle act. As in Crosby v. Ives, 2014 WL 6884017 (C.D. Cal. Dec. 3, 2014), and Scott v. Ives, 2009 WL 2051432 (E.D. Cal. July 10, 2009), transfer to the sentencing court would not benefit the Petitioner because the sentencing court would be unable to entertain the matter, absent Circuit authorization. See 28 U.S.C. § 2244, 2255(h).

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition without prejudice.

DATED: December 6, 2016.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.