IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ARLEND E. STEWART,
 # 23551-045

Petitioner,

vs.

T.G. WERLICH,

Respondant. **No. 16-cv-1198-DRH**

MEMORANDUM and ORDER

HERNDON, District Judge:

INTRODUCTION

Petitioner Arlend E. Stewart, currently incarcerated in the Greenville Federal Correctional Institution, brings this habeas corpus action pursuant to 28 U.S.C. § 2241 to challenge his enhanced sentence following his guilty plea to unlawfully possessing a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Rule 4 of the Rules Governing § 2254 Cases in United States District Courts provides that upon preliminary consideration by the district court judge, "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner." Rule 1(b) of those Rules gives this Court the authority to apply the rules to other habeas corpus cases.

BACKGROUND

On January 25, 2012, after entering a plea of guilty, Stewart was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2).[1] (Criminal Case, Doc. 19 and Doc. 1, p. 3). There was no written plea agreement. *Id.*

The base offense level for a section 922(g)(1) offense is set by Sentencing Guidelines § 2K2.1(a). That section provides for a base offense level of 20 if the defendant had a single prior "felony conviction of either a crime of violence or a controlled substance offense." U.S.S.G. § 2k2.1(a)(4)(A). According to government pleadings filed in response to Stewart's request to file a successive § 2255 petition in the Eighth Circuit, the presentence investigation report ("PSR") calculated a base offense level of 20 under U.S.S.G. § 2K2.1(a)(4)(A) by virtue of Stewart's prior Missouri conviction for sale of a controlled substance. *See Stewart v. United States,* Case No. 16-2841, Doc. 4422798 (8th Cir. July 6, 2016). The PSR "also assessed a two-level enhancement under § 2K1.1(b)(4)(A) for possessing a firearm that was stolen, and an additional four-level enhancement under § 2K1.1(b)(6)(B) for possession of a firearm in connection with another felony offense – the possession of a distribution amount of cocaine – for a total offense level of 26." *Id.* at p. 4; *U.S. v. Stewart*, 500 Fed. Appx. 545, 546 (8th Cir. 2013)(unpublished).

[1] The underlying criminal case is from the United States District Court, Western District of Missouri, No. 5:11-cr-06010-GAF-1 (hereinafter, "Criminal Case").

At sentencing, the court adopted the recommendations in the PSR, including application of the recommended four-level enhancement under § 2K1.1(b)(6)(B). *U.S. v. Stewart,* 500 Fed. Appx. 545, 546 (8th Cir. 2013)(unpublished). With respect to the 2K1.1(b)(6)(B) enhancement, the court overruled Stewart's objections and credited the arresting officers' testimony that a white substance recovered during Stewart's arrest was 34.9 grams of crack cocaine. *Id.* The court sentenced Stewart to 90 months in prison, a sentence below the midpoint of the 86–to–105–month Guidelines range calculated in the PSR. *Id.*

Stewart filed a direct appeal of his conviction and sentence. *Id.* In his appeal, Stewart argued the court erred in finding by a preponderance of the evidence that the substance Stewart possessed at the time of his arrest was crack cocaine. *Id.* The Eighth Circuit rejected this argument and confirmed his conviction and sentence. *Id.*

On September 9, 2013, Stewart filed his initial § 2255 motion in the Western District of Missouri seeking to vacate his conviction and sentence. *Stewart v. United States*, No. 13-cv-06099-GAF. The district court denied that motion on March 18, 2014. *Id.* Doc. 10.) On May 12, 2013, Stewart filed an appeal of the Western District's decision. *Id.* Doc. 13. A final judgment denying his appeal by the court was entered on November 4, 2014. *Id.* Doc. 16).

On June 24, 2016, Stewart filed a request for permission to file a successive § 2255 petition. *Stewart v. United States*, Case No. 16-2841, Doc.

4417558 (8th Cir. June 24, 2016). In support of his request to file a successive petition, Stewart cited to *Johnson v. United States*, 576 U.S. —, 135 S.Ct. 2551 (2015), and *Welch v. United States*, 578 U.S. —, 136 S.Ct. 1257 (2016). In responding to Stewart's request, the government argued that *Johnson* was inapplicable because all of Stewart's predicate offenses which increased his base offense level were serious drug offenses. *Stewart v. United States*, Case No. 16-2841, Doc. 4422798 (8th Cir. July 6, 2016). The Eighth Circuit denied Stewart's request without giving the basis for its decision. *Stewart v. United States*, Case No. 16-2841, Doc. 4444407 (8th Cir. Sept. 1, 2016). The instant § 2241 petition followed.

THE PETITION

Distilled to its essence, Stewart's petition asserts three grounds for upsetting his sentence:

(1) As a result of the Supreme Court's decisions in *Johnson* and *Welch*, Stewart's enhanced sentence is unconstitutional;

(2) The sentencing court erred in applying the § 2K2.1(b)(6)(B) enhancement because the evidence was insufficient to support a finding that the substance recovered in connection with his arrest was, in fact, crack cocaine; an

(3) As a result of the Supreme Court's decision in *Mathis*, Stewart's enhanced sentence is unconstitutional.

DISCUSSION

28 U.S.C. § 2241

Ordinarily, a prisoner may challenge his federal conviction or sentence only by means of a § 2255 motion brought before the sentencing court, and this remedy typically supersedes the writ of habeas corpus. *Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013) (citing *Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012)). A writ of habeas corpus under § 2255 requires the petitioner to file his challenge in the district that imposed the criminal sentence on him. *See* 28 U.S.C. § 2255(a). In this case, Stewart is clearly attacking his sentence. However, he has already filed a motion pursuant to § 2255. Further, Stewart sought permission to file a second or successive § 2255 motion, but his request was denied by the Eighth Circuit.

The "savings clause" under § 2255(e) allows a federal prisoner to file a petition under § 2241, if the remedy provided by § 2255 is "inadequate or ineffective to test the legality of his detention." *See* 28 U.S.C. § 2255(e). In considering what it means to be "inadequate or ineffective," the Seventh Circuit has held that a federal prisoner should be permitted to seek relief under § 2241 "only 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." *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998). To proceed, three additional conditions must also be met: (1) the change of law has to have been made retroactive by the Supreme Court; (2) it must be a change that

eludes the permission in § 2255 for successive motions; and (3) "change in law" is not to be equated to a difference between the law in the circuit in which the prisoner was sentenced and the law in the circuit in which he is incarcerated." *Id*. at 611-12.

Ground 1 - *Johnson* and *Welch*

In his attempt to trigger application of the savings clause, petitioner relies on two decisions of the United States Supreme Court that have no relevance to his case. *See Johnson v. United States*, 135 S. Ct. 2551 (U.S. 2015); *Welch v. United States*, 136 S. Ct. 1257 (U.S. 2016). Both *Johnson* and *Welch* address the "residual clause" of the Armed Career Criminal Act ("the Act"), 18 U.S.C. § 924(e).

In *Johnson*, the Supreme Court struck down the "residual clause" as being unconstitutionally vague and held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." In *Welch*, the Supreme Court held that Johnson applies retroactively to cases on collateral review. See also *Price v. United States*, 795 F.3d 731 (7th Cir. 2015).

Stewart's argument fails for several reasons. First, Stewart's sentence was not enhanced based on the ACCA. Instead, his sentence was enhanced based on the Guidelines. The Supreme Court recently held that the Guidelines are not subject to due-process vagueness challenges. *Beckles v. United States*, 2017 WL 855781, No. 15-8544, slip op. at 5 (S. Ct. March 6, 2017). Second, even without *Beckles*, Stewart's *Johnson* argument is foreclosed by the Seventh Circuit's

decision in *Stanley v. United States*, 827 F.3d 562, 565 (7th Cir. 2016). This is because Stewart's predicate convictions were controlled substance offenses, which remain untouched by *Johnson*. *Id*. at 564. Third, even if *Johnson* and *Welch* were applicable in the instant case, § 2241 is not the appropriate vehicle for bringing such a claim. *See Montana v. Werlich,* 2016 WL 3746198, *2-3 (July 13, 2016) (Herndon, J.).

Ground 2 - Insufficient Evidence Regarding Substance Recovered During Arrest

Stewart repeatedly contends the evidence presented at sentencing regarding the substance recovered during his arrest was insufficient to establish that the substance was crack cocaine. This claim does not arise out of any change in the law and could have been brought on direct appeal and in Stewart's subsequent § 2255 petition. In fact, as noted above, Stewart raised this exact argument on direct appeal and raised a closely related argument in his § 2255 petition. As such, with respect to this claim, Stewart cannot establish that his § 2255 remedy is inadequate or ineffective. *See Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999) ("A reasonable opportunity to raise an issue on appeal or in a first § 2255 motion … is enough to serve that essential function and satisfy the Constitution.") (citing and expressing agreement with *Davenport*). Accordingly, Ground 2 is not a viable basis for relief.

Ground 3 – *Mathis*

Read liberally,[2] Stewart's petition argues that, under the recent decision of the Supreme Court in *Mathis v. United States*, 136 S. Ct. 2243 (2016), his enhanced sentence under the Guidelines is unconstitutional. Stewart seems to argue that, like in *United States v. Hinkle*, 832 F.3d 569, 574 (5th Cir. 2016) (applying *Mathis*), one or both of his drug-related convictions cannot be considered predicate offenses under the Guidelines.

With respect to this claim, there is insufficient information before the Court upon which to conclude that dismissal at this preliminary stage pursuant to Rule 4 is appropriate. Therefore, Werlich shall be directed to respond or otherwise plead as to Ground 3.

Disposition

IT IS HEREBY ORDERED that, for the reasons stated, **Grounds 1 and 2** of Stewart's Section 2241 petition are summarily **DISMISSED** with prejudice; **Ground 3** shall **PROCEED**.

IT IS FURTHER ORDERED that respondent **Werlich** shall answer the petition or otherwise plead within thirty days of the date this order is entered.[3] This preliminary order to respond does not, of course, preclude the government from raising any objection or defense it may wish to present. Service upon the

[2] Stewart does not cite to *Mathis*. Rather, he relies on *United States v. Hinkle*, 832 F.3d 569, 574 (5th Cir. 2016), a decision addressing *Mathis* and the modified categorical approach in the context of federal sentencing.

[3] The response date ordered herein is controlling. Any date that CM/ECF should generate in the course of this litigation is a guideline only. *See* SDIL–EFR 3.

United States Attorney for the Southern District of Illinois, 750 Missouri Avenue, East St. Louis, Illinois, shall constitute sufficient service.

IT IS FURTHER ORDERED that pursuant to Local Rule 72.1(a)(2), this cause is referred to **United States Magistrate Judge Clifford J. Proud** for further pre-trial proceedings.

IT IS FURTHER ORDERED that this entire matter be **REFERRED** to United States Magistrate Judge Proud for disposition, as contemplated by Local Rule 72.2(b)(2) and 28 U.S.C. § 636(c), should all the parties consent to such a referral.

Petitioner is **ADVISED** of his continuing obligation to keep the Clerk (and each opposing party) informed of any change in his whereabouts during the pendency of this action. This notification shall be done in writing and not later than seven days after a transfer or other change in address occurs.

IT IS SO ORDERED.

Signed this 4th day of April, 2017

David R Herndon

Judge Herndon
2017.04.04
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United States District Judge