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

BARON HOSKINS,
No. 10177-029,

Petitioner,

vs. **Case No. 17-cv-652-DRH**

T.G. WERLICH,

Respondent.

MEMORANDUM AND ORDER

HERNDON, District Judge:

Petitioner, currently incarcerated in the FCI-Greenville, brings this habeas corpus action pursuant to 28 U.S.C. § 2241 to challenge the constitutionality of his confinement. He asserts that in light of *Mathis v. United States*, — U.S. —, 136 S. Ct. 2243, 2250 (2016), his prior Iowa convictions for drug offenses and a Florida battery conviction should not have been used to impose an enhanced sentence under the career offender sentencing guidelines.

This case is now before the Court for a preliminary review of the Petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in United States District Courts. Rule 4 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, such as this action under 28 U.S.C. § 2241. Without commenting on the merits of Petitioner's claims, the Court concludes that the Petition survives preliminary review under Rule 4 and Rule 1(b).

Background

Petitioner pled guilty in the Northern District of Iowa to conspiracy to distribute cocaine base within 1,000 feet of a protected location, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846, 851, and 860. *United States v. Hoskins*, Case No. CR 08-1001-1-LRR (N.D. Iowa). In November 2008, Petitioner was originally sentenced to 262 months, but the sentence was reduced to 188 months in December 2010. (*See* Judgment in criminal case, Doc. 41; and Amended Judgment, Doc. 49); (Doc. 1, p. 10).

Petitioner did not appeal his sentence, nor did he challenge it through a motion brought under 28 U.S.C. § 2255. (Doc. 1, p. 4). In connection with his guilty plea, Petitioner executed a "Waiver of Appeal" (Doc. 33 in criminal case), in which he waived his rights to appeal and to collaterally attack his sentence. That waiver contained an exception in the event his sentence was "unconstitutionally defective." (Doc. 33, p. 2, in criminal case).

The Petition

Petitioner argues that under *Mathis v. United States*, 136 S. Ct. 2243 (2016), he should not have been subject to a career-offender sentence enhancement based on the 3 drug-related Iowa convictions and the Florida battery conviction. He asserts, based on a Florida district court decision, that his

1995 Florida conviction for battery on a police officer "no longer qualifies as a violent felony for ACCA [Armed Career Criminal Act] purposes." (Doc. 1, p. 7); *Lopez v. United States*, 2016 US DIST LEXIS 162636 (S.D. Fla.).

Petitioner also has two Iowa state convictions from 1999 for delivery of cocaine, and a 1998 Iowa state conviction for possession with intent to deliver cocaine. (Doc. 1, p. 7). He notes that the Iowa controlled substance statute in effect at the time of his convictions could have been violated in several distinct ways: manufacture, delivery, possession with intent to deliver, possession with intent to manufacture, and conspiracy. (Doc. 1, p. 8). He contrasts this statute with the United States Sentencing Guidelines (USSG) § 41.2, which states that a career offender enhancement may be applied where the defendant has a prior conviction for the "manufacture, import, export, distribution, or dispensing [of a] controlled substance . . . or the possession of a controlled substance with intent to manufacture, import, export, distribute, or dispense." (Doc. 1, p. 8). According to Petitioner, his convictions for "delivery" and "possession with intent to deliver" are not enumerated offenses within the USSG, and should not have been used to enhance his sentence.

Petitioner notes that absent the career-offender enhancement, he would have faced a minimum sentence of 10 years. However, after the application of the career-offender guidelines, he had a Base Offense Level of 31, and a Criminal History of VI, yielding a guideline range of 188-235 months. (Doc. 1, p. 10). He seeks to be resentenced without the career-offender enhancement. (Doc. 1, p. 12).

Discussion

As a general matter, "28 U.S.C. § 2241 and 28 U.S.C. § 2255 provide federal prisoners with distinct forms of collateral relief. Section 2255 applies to challenges to the validity of convictions and sentences, whereas § 2241 applies to challenges to the fact or duration of confinement." *Hill v. Werlinger*, 695 F.3d 644, 645 (7th Cir. 2012) (citing *Walker v. O'Brien*, 216 F.3d 626, 629 (7th Cir. 2000). *See also Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012); *Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998). Here, Petitioner is attacking his enhanced sentence, which points to § 2255 as the proper avenue for relief.

Under very limited circumstances, a prisoner may employ § 2241 to challenge his federal conviction or sentence. 28 U.S.C. § 2255(e) contains a "savings clause" which authorizes a federal prisoner to file a § 2241 petition where the remedy under § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). *See Hill*, 695 F.3d at 648 ("'Inadequate or ineffective' means that 'a legal theory that could not have been presented under § 2255 establishes the petitioner's actual innocence.'") (citing *Taylor v. Gilkey,* 314 F.3d 832, 835 (7th Cir. 2002). *See also United States v. Prevatte*, 300 F.3d 792, 798-99 (7th Cir. 2002). The fact that Petitioner may be barred from bringing a § 2255 petition at this time is not, in itself, sufficient to render it an inadequate remedy. *See In re Davenport*, 147 F.3d 605, 609-10 (7th Cir. 1998) (§ 2255 limitation on filing successive motions does not render it an inadequate remedy for a prisoner who had filed a prior § 2255 motion). Instead, a petitioner under

§ 2241 must demonstrate the inability of a § 2255 motion to cure the defect in the conviction. "A procedure for postconviction relief can be fairly termed inadequate when it is so configured as to deny a convicted defendant any opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense." *Davenport*, 147 F.3d at 611.

The Seventh Circuit has explained that, in order to fit within the savings clause following *Davenport*, a petitioner must meet three conditions. First, he must show that he relies on a new statutory interpretation case rather than a constitutional case. Secondly, he must show that he relies on a decision that he could not have invoked in his first § 2255 motion, *and* that case must apply retroactively. Lastly, he must demonstrate that there has been a "fundamental defect" in his conviction or sentence that is grave enough to be deemed a miscarriage of justice. *Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013). *See also Brown v. Rios*, 696 F3d 638, 640 (7th Cir. 2012).

Petitioner invokes *Mathis v. United States*, — U.S. —, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016), as grounds for his argument that his previous Iowa drug convictions should not have been counted as "controlled substance offenses" under the definitions in the United States Sentencing Guidelines, and that his Florida battery conviction should not have been considered a "violent felony" for sentence-enhancement purposes. In *Mathis*, the Supreme Court held that an Iowa burglary statute which allowed for a conviction based on entry to a vehicle was too broad to qualify as a "generic burglary" statute. "Generic burglary" requires that

the unlawful entry must have been made to a building or other structure. Because the Iowa statute was not "divisible" into distinct elements according to where the crime occurred, the *Mathis* Court held that a conviction under that state law could not be used as a predicate offense to enhance a federal defendant's sentence under the burglary clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii). *Mathis*, 136 S. Ct. at 2250-51; *see also United States v. Haney*, 840 F.3d 472, 475-76 (7th Cir. 2016). *Mathis* is a statutory interpretation case rather than a constitutional case, thus it satisfies the first element of the savings clause. *See Dawkins v. United States*, 829 F.3d 549, 551 (7th Cir. 2016) (because *Mathis* "is a case of statutory interpretation," claims based on *Mathis* "must be brought, if at all, in a petition under 28 U.S.C. § 2241").

As to the second factor, the decision in *Mathis* was announced on June 23, 2016, long after Petitioner's time frame when he might have brought a § 2255 motion following his 2008 sentencing, so Petitioner could not have relied on *Mathis* at that time. (Whether or not Petitioner might have brought an *initial* § 2255 motion within the year following the announcement of the *Mathis* opinion is a matter not now before the Court.) Further, the Seventh Circuit has determined that "substantive decisions such as *Mathis* presumptively apply retroactively on collateral review." *Holt v. United States*, 843 F.3d 720, 721-22 (7th Cir. 2016) (citing *Davis v. United States*, 417 U.S. 333 (1974); *Montgomery v. Louisiana*, — U.S. —, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016)).

Finally, Petitioner asserts that the increase in the calculation of his guideline sentencing range based on the career-criminal enhancement resulted in a significantly higher range (and a higher sentence) than would have resulted without the enhancement. If so, this could be deemed a miscarriage of justice. The Petition thus facially satisfies the conditions to be considered in a § 2241 proceeding under the savings clause of § 2255(e).

It is notable, however, that "[t]he Supreme Court's decision in *Mathis* dealt with the Armed Career Criminal Act (ACCA), not the federal sentencing Guidelines." *United States v. Hinkle*, 832 F.3d 569, 574 (5th Cir. 2016). The *Mathis* decision thus may or may not be applicable to Petitioner's sentence, where the sentencing enhancement was determined based on the advisory sentencing guidelines, not the ACCA statute. The Supreme Court recently held that the residual clause in USSG § 4B1.2(a) was not subject to a vagueness challenge, distinguishing the situation where a sentence was based on the advisory guidelines from a sentence imposed under the residual clause of the ACCA statute. *Beckles v. United States*, No. 15-8544, 2017 WL 855781 (U.S. Mar. 6, 2017) (distiguishing *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551 (2015)).

Given the still-developing application of the *Mathis* decision, it is not plainly apparent that Petitioner is not entitled to habeas relief. *See* Rule 4 of the Rules Governing § 2254 Cases in United States District Courts. Therefore, the Court finds it appropriate to order a response to the Petition.

Pending Motion

Petitioner has filed a motion for leave to proceed *in forma pauperis* ("IFP") in this action. (Doc. 2). However, he did not provide a copy of his inmate trust fund statement with the motion, nor did he explain what income from "other sources" he had received over the 12 months prior to the filing of this action. (Doc. 2, p. 1). The Court ordered Petitioner to provide his inmate trust fund statement for the period of 12/1/2016 to 6/30/2017, no later than August 31, 2017, so that the Court could rule on his IFP motion. (Doc. 5). Petitioner was warned that failure to comply with that order would result in dismissal of the action for failure to prosecute. That Order still stands, so this action is subject to dismissal of Petitioner does not timely supply the requested financial information. The Court shall **DEFER** ruling on the pending motion for leave to proceed IFP (Doc. 2) until Petitioner's financial information is received.

Disposition

IT IS HEREBY ORDERED that Respondent shall answer or otherwise plead on or before August 29, 2017. 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 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 (7) days after a transfer or other change in address occurs. Failure to provide such notice may result in dismissal of this action. *See* FED. R. CIV. P. 41(b).

IT IS SO ORDERED.

Dated: July 28, 2017

Digitally signed by Judge David R. Herndon
Date: 2017.07.28 11:51:55 -05'00'

United States District Judge