Docket No.

In The
United States District Court
For the Southern District of Mississippi
Northern Division

Micheal Bowe
Petitioner
v
Warden Boulett
FCI Yazoo

Petiton For Relief pursuant to 28 U.S.C. §2241

Petitioners Opening Brief

originating in
The United States District Court
For the Southern District of Florida
Docket NO.

Pro-Se
Litigant

Michael Bowe

Michael Bowe
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Petitioner
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Comes now the petitioner, Michael Bowe, Pro-Se, in the above captioned matter respectfully moving this court for relief of a previously entered judgment[1] pursuant to this instant motion under 28 U.S.C. § 2241 otherwise the Savings clause of 28 U.S.C. § 2255(e).

It is the petitioners contention that pursuant to well established precedent of this circuit, stemming from the fifth circuits holding in United States v Reyes-Requena[2] the petitioner has satisfied the standard set forth by this circuit and may therefore proceed to the merits of his contentions.

In any event this petition is being presented to this Court as a result of the Supreme Courts holdings and subsequent retroactive application of Davis v United States 588 US ____ (2019) and more recently, Taylor v United States 896 US ____ (2022).

In support of his contentions the petitioner offers the following for the Courts review.

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[1] Doc. No. 9:08-CR-80089-DMM

[2] 243 F.3d 893 (5th cir 2001)

I Procedural Posture

A Federal grand jury, seated at the Southern District of Florida issued a three (3) count indictment against the petitioner alleging a violation of the following offenses . . . to wit;

- Count one - Conspiracy to commit Hobbs Act Robbery in violation of 18 U.S.C. § 371 [18 U.S.C. § 1951(a)],
- Count Two - attempt to commit Hobbs act Robbery in violation of 18 U.S.C. § 1951(a), and
- Count three - the discharging of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A).

The petitioner pleaded guilty to all three counts and was imposed a sentence of 168 months with respect to counts one and two to be served Concurrent To each other, and 120 months with respect To count three To be served consecutive to counts one and Two for a Total effective sentence of 288 months.

A Direct appeal was not effectuated.

In 2016, the petitioner filed, with the District court, a motion pursuant to 28 U.S.C § 2255(f)(3) in Light of the Supreme Court holding in Johnson v United States 576 US 591 (2015) which excised the "residual clause" of 18 U.S.C. § 924(e).[3]

3 See No. 16-cv-81002

The district court denied the motion contending that, assuming arguendo, Johnson invalidated the residual clause of 18 U.S.C. §924(e)(B)(ii), it left standing that of 18 U.S.C. § 924(c)(3)(B) therefore not affecting the petitioner.

Subsequent to the Supreme Court's decision in Johnson, however, the Court announced Davis, which indeed invalidated 18 U.S.C. § 924(c)(3)(B).

The petitioner then sought authorization to file a second or successive § 2255 from the eleventh circuit court of Appeals as a result of Davis, and more specifically, resulting from count one (1) of the indictment which alleged a "Conspiracy" To Commit Hobbs Act.

The Eleventh circuit Court of appeals refused to grant the petitioner authorization holding that although Davis affected Count one of the petitioners indictment, otherwise the conspiracy to commit Hobbs Act, this of course, according to the Court, left the attempt charge, otherwise count Two and as a result the § 924 enhancement applied To count Two . . . even if it did not apply to count one . . . Count Two could Sustain a 924 enhancement.

Recently, the United States Supreme Court issued an opinion in Taylor. Essentially, the Court held that an "attempt" does not fall within the reach of the force clause and as a result, an "attempt" can not constitute a crime of violence

As a result of Taylor, the petitioner once again sought reauthorization from the eleventh Circuit Court of Appeals to file a second or successive § 2255 with the district Court.[4]

The Court denied the petitioners request stating among other things that the Supreme Courts decision in Taylor was not a new rule of Constitutional law but rather a new rule of Statutory Construction.

The petitioner therefore Submits this instant writ to this Court for its Review.

II 28 U.S.C. § 2241

A Federal prisoner may challenge his sentence under either a 28 U.S.C. §§ 2241 or 2255. Though closely related, these two provisions are "distinct mechanisms" for seeking post-conviction relief, Tack v Yusuff 218 F.3d 448 (5th Cir 2000)

Section 2255 provides the primary means of collaterally attacking a federal Sentence and Conviction, Tolliver v Dobre 211 F.3d 876 (5th Cir 2000) Section 2241 is generally used to attack the manner in which a sentence is executed. A petition under § 2241 That attacks errors that occurred at trial or sentencing

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4 please See 22-12278

should generally be dismissed or construed as a 2255 motion.[5]

As, however, is the case with every rule, there exists an exception: A prisoner may proceed to challenge his conviction or sentence under § 2241 if he can show or otherwise satisfy the mandates of the savings clause of 2255(e), Wilson v Roy 643 F.3d 433 (5th cir 2001)[6] The Savings clause allows a prisoner to rely on § 2241 if the remedy under § 2255 would be "inadequate or ineffective", to test the legality of the sentence, [28 U.S.C. § 2255(e)].

This circuit has identified the limited circumstances under which the Savings clause of § 2255(e) applies.

To qualify for the Savings clause, a petitioner must demonstrate that...

(1) his claim is based on a retroactively applicable Supreme Court decision,

(2) The Supreme Court decision establishes that he is actually innocent of the charges against him because the decision "decriminalized" the conduct for

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5 Tolliver 311 F.3d at 877-78

6 citing Kinder v Purdy 222 F.3d 209 (5th cir 2000) Christopher v Miles 242 F.3d 378 (5th cir 2000) citing Reyes-Requena v United States 243 F.3d 893 (5th cir 2001)

which he was convicted, and

(2) his claim would have been foreclosed by existing precedent had he raised it on trial, on direct appeal or in his original § 2255 petition.

(See Reyes-Requena, Supra) When a petitioner cannot satisfy the savings clause, the proper disposition is dismissal of the § 2241 petition for want of jurisdiction Christopher, supra, See also Nel v Cole 2020 WL 6935789 at *6 (W.D. Tex. 2020)

This instant petitioner can show that a § 2255 is inadequate to challenge his sentence because the eleventh circuit denied his request To So File a § 2255

III Legal Summary

1. The petitioners sentence, as imposed is Unlawful as there are no predicate offenses that can support a § 924(c) enhancement.

As an initial matter, the petitioners indictment, to which the petitioner Subsequently pleaded guilty to, contained three counts.

Count one alleged a conspiracy to Commit Hobbs act Robbery. As it is Well established by Now, Conspiracy cannot Constitute a crime of violence as it does not Satisfy the elements clause of § 924(c)(3)(A) and as a result, cannot Support a § 924(c) enhancement, See Davis, Supra

despite the fact that this petitioner made such a challenge to the eleventh circuit court of appeals, the Court denied authorization To file a second or successive § 2255 alleging that the remaining cont, "attempt" could nontheless sppart the enhancement.

It is now rather academic that cont one connot support a 924 enhancement.

This, of course, leaves one remaining cont, cont two, otherwise the attempt to commit Hobbs act. The issue befor this court therefor is can cont Two sustain a firearm enhancement and if it connot, then Count three must be dismissed and the petitioners Sentence reduced by 120 months.

In Taylor supra, the United states Supreme Court held that an attempted Hobbs act does not satisfy the elements clause. The ostensible rationale is that to Secure a conviction for attempted Hobbs act robbery the Government must prove that the defendant intended to complete the offense and that the defendant took a substantial step towards that end, United States v Resendiz-Ponce 549 US 102 (2008)

An intinton, the Supreme Court held is just that, no more. And whatever a substantial step requires, it does not require the Government to prove that the defendant

used, attempted to use or even threatened to use force against another person or his property, even if the facts would allow the Government to do so in many cases.

In order for a predicate offense to qualify under the Force clause of §924(c)(3)(A) the predicate offense, "must" have as it elements . . .

> " . . . the use, attempted use or threatened use of physical force against the person or property of another."

An "attempt" does not qualify under that definition, because no element of the offense of attempt requires the Government to prove that this petitioner used, attempted to use or threatened to use physical force against the person or property of another.

The Supreme Court was very specific . . . in answering whether an "attempt" meets the definition, the Government is precluded from inquiring how a particular defendant committed the crime.

This petitioner has been subjected to an additional ten (10) years in federal prison for an enhancement that does not have a supporting predicate.

IV Conclusion

This petitioner requests that the Court order the Government to show cause as to why this court should not grant this petition and otherwise Vacate count three (3) of the indictment thereby reducing the petitioners sentence by ten (10) years.

This Petitioner should be immediately released From custody of the Bureau of prisons.

Respectfully Submitted

Michael Bowe

Michael Bowe
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