IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-10979-EE

WILLIAM CHARLES O'NEIL,

Petitioner-Appellant,

versus

FCC COLEMAN - MEDIUM WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before: WILLIAM PRYOR, JORDAN and ROSENBAUM, Circuit Judges.

BY THE COURT:

William O'Neil, a federal prisoner proceeding *pro se*, appeals from the denial of his Rule 60(b) motion for relief from judgment following the dismissal of his 28 U.S.C. § 2241 habeas petition. On appeal, he argues that the district court should have ruled on his petition, because § 2255 was inadequate and ineffective to test the legality of his total sentence that was enhanced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The government has moved to dismiss his appeal or, in the alternative, for summary affirmance and a stay of the briefing schedule.

We have jurisdiction over final orders of the district courts. 28 U.S.C. § 1291. We also have jurisdiction to review a district court's resolution of a § 2241 petition, even if the district court lacked jurisdiction to grant the relief the petitioner sought. *See McCarthan v. Director of*

Goodwill Indust.-Suncoast, Inc., 851 F.3d 1076, 1100 (11th Cir. 2017) (*en banc*) (affirming the dismissal of a § 2241 petition for lack of jurisdiction).

We may summarily dispose of an appeal where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Whether a prisoner may bring a petition for a writ of habeas corpus under the saving clause of section 2255(e) is a question of law we review *de novo*. *Williams v. Warden, Federal Bureau of Prisons*, 713 F.3d 1332, 1337 (11th Cir. 2013). The petitioner bears the burden of establishing that the remedy by motion was "inadequate or ineffective to test the legality of his detention." *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1333 (11th Cir. 2013) (quoting 28 U.S.C. § 2255(e)), *abrogated on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). We review the denial of post-judgment motions under Rule 60(b) for an abuse of discretion. *Bender v. Mazda Motor Corp.*, 657 F.3d 1200, 1202 (11th Cir. 2011). We may affirm on any ground supported by the record. *LeCroy v. United States*, 739 F.3d 1297, 1312 (11th Cir. 2014).

"*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Hughes v. Lott*, 350 F.3d 1157, 1160 (11th Cir. 2003) (quotation omitted).

Under Rule 60(b), a court may relieve a party of a final order or judgment for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that

could not previously have been discovered with reasonable diligence; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) a void judgment; (5) a judgment that has been satisfied, released, or discharged, that is based on an earlier judgment that has been reversed or vacated, or that it would no longer be equitable to apply prospectively; or (6) any other reason that justifies relief. Fed. R. Civ. P. 60(b).

Under § 2241, a district court has the power to grant a writ of habeas corpus to a prisoner in custody in that district. 28 U.S.C. § 2241(a), (d). This power is limited by § 2255(e), which states,

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by [a § 2255 motion], 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). The last 20 words of § 2255(e) are commonly referred to as the "saving clause." Unless a prisoner can satisfy the saving clause, then a motion to vacate under § 2255 is the exclusive mechanism through which he can seek collateral relief. *McCarthan*, 851 F.3d at 1081.

We recently held that, because a prisoner had an opportunity to challenge his ACCA sentence enhancement in a § 2255 motion, that remedy was not inadequate or ineffective to test the legality of his sentence, regardless of any later change in caselaw. *Id.* at 1080.

Under the ACCA, a defendant convicted of possession of a firearm by a convicted felon who has 3 or more prior felony convictions for a "serious drug offense" or "violent felony" faces a 15-year mandatory minimum. 18 U.S.C. §§ 922(g)(1), 924(e)(1). Without an ACCA enhancement, the maximum statutory penalty allowed following a conviction for being a felon in possession of a firearm is 10 years. 18 U.S.C. § 924(a)(2).

Here, as an initial matter, we decline to dismiss the appeal, because we have jurisdiction to review the district court's denial of O'Neil's Rule 60(b) motion. *See* 28 U.S.C. § 1291.

O'Neil has not established that he was entitled to relief under Rule 60(b) from the district court's ruling that it lacked jurisdiction to consider his § 2241 petition. *See* Fed. R. Civ. P. 60(b). In his petition, he sought to challenge the legality of his ACCA-enhanced total sentence pursuant to changes in the caselaw that he believed established that his prior convictions were not violent felonies. However, under our binding caselaw, a § 2241 petition was not the proper vehicle for challenging the legality of his total sentence. *See McCarthan*, 851 F.3d at 1085-95. In his first § 2255 proceeding, O'Neil had already challenged the legality of his sentence on the basis that his prior convictions were not violent felonies. Thus, under our binding precedent, a § 2255 motion was not inadequate or ineffective to test the legality of his sentence, regardless of any changes to the caselaw. *See McCarthan*, 851 F.3d at 1080. Finally, because his Rule 60(b) motion raised the same type of challenges to the legality of his ACCA-enhanced sentence, he did not establish any ground for relief from the court's ruling on his § 2241 petition, and the court correctly denied it. *See* Fed. R. Civ. P. 60(b); *see McCarthan*, 851 F.3d at 1080.

Accordingly, the government's motion to dismiss the appeal is DENIED, its motion for summary affirmance is GRANTED, the district court's denial of O'Neil's Rule 60(b) motion is AFFIRMED, and the motion to stay the briefing schedule is DENIED as moot.

ROSENBAUM, Circuit Judge, concurring:

I agree that *McCarthan v. Director of Goodwill Industries—Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc), requires us to dismiss William Charles O'Neil's appeal from the denial of his Rule 60(b) motion for relief from judgment following the dismissal of his 28 U.S.C. § 2241 habeas petition. I write separately, though, because I continue to believe that *McCarthan* is not correct. Its construction of the saving clause is not true to the statutory language of 28 U.S.C. § 2255, the requirements of the Constitution's Suspension Clause, or Supreme Court precedent interpreting the saving clause. *See id.* at 1121, 1147-56 (Rosenbaum, J., dissenting).

Rather, § 2255's statutory language, the Suspension Clause, and Supreme Court precedent all demand that the saving clause permits claims that satisfy § 2255(a) and that are based on a new, retroactively applicable rule of statutory law, to be brought under § 2241. *See id.* at 1123-47 (Rosenbaum, J., dissenting). And a growing group of jurists agrees. *See Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 177-83 (3d Cir. 2017)[1]; *see also United States v. Wheeler*, 886 F.3d 415, 429 (4th Cir. 2018).

[1] *Bruce* demonstrates how the inconsistencies between the Eleventh Circuit's rule and the rule § 2255(e) requires affect how cases are resolved. The case involved Gary Bruce, who, under § 2255(e), filed a § 2241 challenge to his convictions for witness tampering. 868 F.3d at 177. He asserted that *Fowler v. United States*, 563 U.S. 668 (2011), had created a retroactively applicable new rule of statutory law that rendered him actually innocent of witness tampering. *See Bruce*, 868 F.3d at 177. The Third Circuit concluded it had jurisdiction under § 2255(e) to consider that claim. *See id.* at 183. Meanwhile, Gary Bruce's brother Robert Bruce had also been convicted of witness tampering in the same case as Gary. Unlike Gary, though, Robert was imprisoned in the Eleventh Circuit, so we

Were we not bound by *McCarthan*, I would determine whether, in fact, O'Neil raises a claim based on a new, retroactively applicable rule of statutory construction, and if he does, I would find jurisdiction and remand to the district court for consideration of the merits of O'Neil's claim

considered his appeal from the district court's denial of his habeas petition that made the same claim as Gary's. *See Bruce v. Warden*, 658 F. App's 935, 935 (11th Cir. 2016). Unlike the Third Circuit, we concluded that we lacked jurisdiction over the claim, so we never considered it and instead remanded the case to the district court with instructions to dismiss Robert's petition.

WILLIAM CHARLES O'NEIL, Petitioner, v. WARDEN, FCC COLEMAN - MEDIUM, Respondent.
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, OCALA DIVISION
2014 U.S. Dist. LEXIS 83642
Case No: 5:11-cv-476-Oc-38PRL
June 19, 2014, Decided
June 19, 2014, Filed

Editorial Information: Subsequent History

Post-conviction proceeding at, Magistrate's recommendation at O'Neil v. United States, 2017 U.S. Dist. LEXIS 18647 (S.D. Fla., Feb. 6, 2017)

Editorial Information: Prior History

O'Neil v. United States, 566 U.S. 924, 132 S. Ct. 1856, 182 L. Ed. 2d 647, 2012 U.S. LEXIS 2679 (2012)

Counsel William Charles O'Neil, Petitioner, Pro se, COLEMAN, FL.
For Warden, FCC Coleman - Medium, Respondent: Roberta J. Bodnar, LEAD ATTORNEY, US Attorney's Office - FLM, Orlando, FL.

Judges: SHERI POLSTER CHAPPELL, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: SHERI POLSTER CHAPPELL

Opinion

OPINION AND ORDER 1

Petitioner William Charles O'Neil (hereinafter "Petitioner" or "O'Neil") initiated this action as a federal prisoner incarcerated at FCC-Coleman by filing a habeas corpus petition pursuant to 28 U.S.C. § 2241 (Doc. #1, Petition). Petitioner attaches a memorandum (Doc. #2) in support of his Petition. The Petition challenges Petitioner's plea-based conviction entered in the United States District Court in the Southern District of Florida. See Petition at 2. Specifically, Petitioner asserts that there was a "fundamental defect in his sentencing" because the prior convictions of battery on a law enforcement officer, which were used to enhance his sentence under the Armed Career Criminal Act, no longer qualify as a crime of violence under Begay v. United States, 553 U.S. 137, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2010), Johnson v. United States, 559 U.S. 133, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010), and Williams v. United States, 559 U.S. 989, 130 S. Ct. 1734, 176 L. Ed. 2d 209 (2010). Petition at 3; Memorandum at 2-4. As relief, Petitioner requests that the Court "immediately release" him. Petition at 10.

Respondent filed a Response (Doc. #11, Response) moving to dismiss the Petition for lack of jurisdiction, *inter alia,* and attached supporting exhibits (Doc. #11-1-#11-6, Exhs. 1-6). Petitioner filed a Reply (Doc. #13). Pursuant to the Court's Order (Doc. #26), Respondent filed a supplemental Response (Doc. #27) and filed the Presentence Investigation Report ("PSR") under seal (Doc. #28). Petitioner filed a supplemental Reply (Doc. #30). This matter is ripe for review.2

Procedural History

A. Conviction and Direct Appeal

Petitioner was indicted in the Southern District of Florida of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (count one); possession of a firearm by an unlawful user of a controlled substance, in violation of 18 U.S.C. §§ 922(g)(3) and 924(e) (count two); and, distribution of cocaine, the use of which resulted in death, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) (count three), in case number 04-cr-80040-KLR-1 (hereinafter "Crim. Case Doc."). Crim. Case Doc. #37. Pursuant to a negotiated plea agreement in which Petitioner waived his right to appeal, Petitioner pled guilty to the firearm charges. Crim. Case Doc. #75. Petitioner admitted to the facts concerning his unlawful firearm possession and his prior convictions in both the written plea agreement and orally at the change of plea hearing. See Exh. 3 at 9 (plea transcript); Exh. 4 at 4 (supplemental report from Magistrate Judge recommending denial of section 2255 motion). Petitioner's prior convictions arose in Miami-Dade County, Florida and include the following:

1. Case Number F89-10306, battery on a law enforcement officer and resisting an officer with violence;

2. Case Number F89-35679, resisting an officer with violence; battery on a law enforcement officer; and corruption by threat against a public servant;

3. Case Number F90-21935, felony possession of cocaine; battery on a law enforcement officer; and resisting an officer with violence;

4. Case Number F91-35817, aggravated battery with a deadly weapon; and

5. Case Number F91-42216, felony possession of cocaine.

Exh. 3 at 9; Exh. 4; See Doc. #29 at ¶28, ¶¶32-51 (copy of PSR filed under seal). Petitioner did not object to the PSR, which recommended Petitioner be sentenced pursuant to the ACCA. Exh. 5. At the sentencing hearing, the district court considered as relevant conduct, the facts and victim impact evidence related to the death of the young woman who died in Petitioner's company while using cocaine he had provided her. Id. at 7-22. The district court sentenced Petitioner to 240-months imprisonment. Id. at 29.

B. Collateral Relief

On January 13, 2009, Petitioner filed his first motion to vacate sentence pursuant to 28 U.S.C. § 2255 (assigned case number 9:09-cv-80048-KLR, hereinafter referred to as CV Doc.). See Exh. 2. Petitioner argued that his trial counsel rendered ineffective assistance for failing to file an appeal and for failing to challenge his designation as an Armed Career Criminal. See CV Doc. #30; Exh. 4 at 4. After full briefing and an evidentiary hearing, a magistrate judge issued a report and recommendation finding that all of Petitioner's claims should be denied as time-barred and/or on their merits. See CV Doc.; Exh. 4. Petitioner moved for reconsideration in light of Johnson v. United States, 559 U.S. 133, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010). CV Doc. #31, #32. After additional briefing, the magistrate judge issued a supplemental report and recommendation rejecting Petitioner's additional arguments and again recommending that Petitioner's § 2255 petition be denied. See generally CV Doc; Exh. 4 at 17-30. In pertinent part, the magistrate judge wrote:

> Nothwithstanding the movant's contentions, neither *Begay* nor its progeny, including *Johnson* are applicable to the movant's claim as he nevertheless has the prior qualifying convictions in which to substantiate his armed career criminal status. As may be recalled, in both the plea agreement (Cr-DE#73) and during the change of plea hearing (Cv-DE#8, Exh.2:9), the movant conceded

the following four convictions for purposes of U.S.S.G. § 4B1.4: (1) battery on a law enforcement officer in violation of Fla. Stat. § 784.03 & 784.07 and resisting an officer with violence to his person, in violation of Fla. Stat. § 843.01 (see docket no. F89-10306); (2) resisting an officer with violence to his person, in violation of Fla. Stat. § 843.01, two counts of battery on a law enforcement officer, in violation of Fla. Stat. §§ 784.03 & 784.07, corruption by threat against a public servant in violation of Fla. Stat. § 838.021 and criminal mischief, in violation of Fla. Stat. § 806.13 (see docket no. F89-35679); (3) possession of cocaine, in violation of Fla. Stat. § 893.13(1)(f), battery on a law enforcement officer, in violation of Fla. Stat. § 784.07(2)(b), and resisting an officer with violence to his person, in violation of Fla. Stat. § 843.01 (see docket no. F90-21935); and (4) aggravated battery, in violation of Fla. Stat. § 784.045(1)(a)(2) (see docket number F91-35817). (See PSI ¶28).

As is evident from the foregoing, in each of the cases where the movant was convicted of battery on a law enforcement officer, he was also convicted of resisting an officer with violence to his person, in violation of Fla. Stat. § 843.01, which despite the *Johnson* decision, continues to be a violent felony for ACCA purposes. *See United States v. Jackson,* 355 F. App'x 297 (11th Cir. 2009); *see also United States v. Venta,* 255 F. App'x 469 (11th Cir. 2007).Exh. 4 at 27-30. Petitioner objected to the magistrate judge's report and recommendation, arguing that the judge improperly relied on facts in the plea agreement and elsewhere rather than constraining himself to the PSR. CV Doc. #53. After additional briefing, the district court judge overruled Petitioner's objections and adopted the supplemental report and recommendation on December 1, 2010. CV Doc. #65. Petitioner filed a notice of appeal/motion for certificate of appealability, which the district court denied on December 1, 2010. CV Docs. #66-#67, #68. Petitioner then sought a certificate of appealability in the Eleventh Circuit, which was denied on April 21, 2011. CV Doc. #74. Petitioner also filed a petition for writ of certiorari with the United States Supreme Court on October 24, 2011.3 Exh. 6. The United States Supreme Court denied certiorari on April 2, 2012. See Case No. 11-7140.

C. Current § 2241 Petition

As set forth above, the instant Petition was filed on August 10, 2011. The Petition raises the following four grounds challenging his sentence under ACCA: (1) "fundamental defect in my sentence"; (2) "flat ineligibility of his ACCA enhancement"; (3) "illegal detention"; and, (4) "due process violation by imposition of a sentence above the otherwise applicable guidelines." See generally Petition.

In Response, Respondent argues that Petitioner raised these identical arguments in his § 2255 motion and the United States District Court in the Southern District of Florida rejected Petitioner's arguments on the merits. Response at 3. Respondent asserts that because Petitioner has already had the merits of these claims reviewed by a district court, it is improper for him to file the instant Petition under the saving's clause "simply in hope of finding a forum that is less likely to unearth his misrepresentations." Id. at 3. Respondent argues that § 2255 was not insufficient to test the legality of Petitioner's detention; and, therefore, the instant § 2241 Petition must be dismissed for lack of jurisdiction. Id.

In Reply, Petitioner asserts that his § 2255 was denied in part as time-barred, and only a portion denied on the merits. Supplemental Reply at 1. Petitioner argues that he was previously foreclosed from raising these arguments that battery on a law enforcement officer did not constitute a violent felony for purposes of the ACCA based on Glover v. United States, 431 F.3d 744 (2005), and that Johnson and Begay are retroactive, applicable cases. Id. at 3. Petitioner also asserts that the probation office only referred to battery on a law enforcement officer as his prior qualifying convictions to enhance under the ACCA and did not refer to any resisting arrest with violence

convictions, which happened in conjunction with his battery on a law enforcement convictions. Id. at 5-6. Thus, Petitioner argues that his resisting arrest with violence convictions now cannot be used to enhance his sentence under the ACCA. Id.

Analysis

"Typically collateral attacks on the validity of a federal sentence must be brought under § 2255." Darby v. Hawk-Sawyer, 405 F.3d 942, 944-45 (11th Cir. 2005)(*per curiam*). When a petitioner has previously filed a § 2255 petition, he must apply for and receive permission from the appropriate federal circuit court prior to filing a successive petition. Id. (citing In re Blackshire, 98 F.3d 1293, 1293 (11th Cir. 1996); see also 28 U.S.C. § 2244(b)(3)(A). Additionally, § 2255 motions must be brought in district court of conviction and are subject to a one-year statute of limitations. Sawyer v. Holder, 326 F.3d 1363, 1365 (11th Cir. 2003); 28 U.S.C. § 2255(f).

It is clear that Petitioner no longer has any remedies available under § 2255, so he files the Petition under § 2241.4 According to Eleventh Circuit precedent, the circumstances under which a federal prisoner may invoke relief pursuant to § 2241 are limited to specific instances set forth in the "savings clause" of § 2255. Wofford v. Scott, 177 F.3d 1236, 1245 (11th Cir. 1999); Williams v. Warden, Fed. Bureau of Prisons, 713 F.3d 1332, 1343 (11th Cir. 2013) (citing Wofford v. Scott, 177 F.3d 1236, 1245 (11th Cir. 1999)); Bryant v. Warden, FCC Coleman-Medium, 738 F.3d 1253, 1256 (11th Cir. 2013); Chester v. Warden, 552 Fed. Appx. 887, 2014 WL 104150 (11th Cir. 2014). A prisoner may not use the savings clause to circumvent the restrictions on filing a second or successive § 2255 motion. Wofford, 177 F.3d at 1245. Rather, where, as here, a petitioner challenges a "fundamental defect in sentencing," he must show the following to establish that § 2255 was inadequate or ineffective to test the legality of his detention: (1) throughout his sentencing, direct appeal, and first § 2255 proceeding, his claim was squarely foreclosed by circuit precedent; (2) subsequent to his first § 2255 proceeding, a United States Supreme Court decision overturned circuit precedent; (3) the new rule announced by the Supreme Court is retroactively applicable to cases on collateral review; (4) his enhanced sentence exceeds the authorized statutory maximum penalty for his offense. See Bryant, 738 F.3d at 1274 (synthesizing the saving's clause tests discussed in Wofford, 177 F.3d 1236; and Williams, 713 F.3d at 1343). This threshold showing is a jurisdictional requirement, and where it is absent, federal courts lack authority to consider the merits of a petitioner's § 2241 claims. Williams, 713 F.3d at 1338; Daniels v. Warden, FCC-Coleman, 538 F. App'x 850 (11th Cir. 2013)("[A] petitioner may not argue the merits of his claim until he has 'open[ed] the portal' to a § 2241 proceeding by demonstrating that the savings clause applies to his claim.").

Of significance in this case is the fact that the very arguments Petitioner raises *sub judice,* challenging the district court's use of his prior convictions for battery on a law enforcement officer to impose an enhanced sentence under the ACCA, were raised in Petitioner's untimely § 2255 and rejected on the merits by the district court that imposed Petitioner's sentence. See supra at pp. 4-5; see also Exh. 4. As noted by the Eleventh Circuit Court of Appeals in Williams,

> Congress expressed its clear intent to impose a jurisdictional limitation on a federal court's ability to grant a habeas petitioner what is effective a third bite at the apple after failing to obtain relief on direct appeal or in his first postconviction proceeding. The savings clause states that a § 2241 habeas petition "*shall not be entertained* . . . unless it . . . appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." § 2255(e)(emphasis added). Based on the text alone, which speaks in imperative terms of what class of cases the district court has *power* to hear, not what the petitioner himself must allege or prove in order to state a claim, we are compelled to conclude that the savings clause is a limitation on jurisdiction. It commands the district court not to "entertain[]" a § 2241 petition that raises a claim ordinarily cognizable in the

petitioner's first § 2255 motion except in exceptional circumstances where the petitioner's first motion was "inadequate" or "ineffective" to test his claim.Williams, 713 F.3d at 1338. Because Petitioner raised essentially the same claims *sub judice* in his § 2255 motion, Petitioner was not "squarely foreclosed" throughout his sentencing, direct appeal, and his first § 2255 proceeding. Bryant, 738 F.3d at 1274. To proceed under the saving's clause, "[t]he issue is whether the movant had a procedural opportunity to raise his § 924(e) claim in an "adequate and effective" fashion. Id. at 1282 (emphasis in original). Section 2255 is not "inadequate or ineffective" simply because a petitioner was unsuccessful when he first applied for relief or because another court later believes the first decision was wrong. Id. at 1289; Williams, 713 F.3d at 1348, n. 7. Therefore, because Petitioner had an adequate opportunity to raise his claims in his first § 2255 motion, the instant § 2241 Petition constitutes a successive petition and must be dismissed for lack of jurisdiction.

Even if the Court did have jurisdiction under the savings clause to address the merits of the instant Petition, Petitioner would fare no better for the reasons set forth in the district court's order denying the claim for relief on the merits in Petitioner's § 2255 motion. See Exh. 4 at 30-31 (finding that in addition to battery on a law enforcement officer, Petitioner was simultaneously convicted of resisting arrest with violence, which continues a violent felony for ACCA purposes citing United States v. Jackson, 355 F. App'x 297 (11th Cir. 2009); United States v. Venta, 255 F. App'x 469 (11th Cir. 2007)). Petitioner's contentions that the other convictions were not listed in the PSR is not accurate as evidenced by the record. See Doc. #28. Additionally, Petitioner's argument that the district court erred when relying on the resisting arrest with violence conviction to support the ACCA enhancement is unavailing. See Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328 (11th Cir. 2013)(noting that Johnson found battery on a law enforcement officer was not categorically a crime of violence under the "elements" clause of the ACCA, but found battery on a law enforcement officer did constitute a crime of violence under the ACCA using a "modified categorical approach," which involved looking at the undisputed facts in the PSR showing the convictions stemmed from the petitioner's fleeing from officers, resisting arrest, and pushed an officer against a wall, and under the residual clause.); see also James v. Warden, 550 F. App'x 835 (11th Cir. 2013)(affirming district court's denial of a § 2241 petition filed under the saving's clause when record revealed other prior violent felony convictions that could have properly enhanced the petitioner's sentence under the ACCA). Moreover, in the wake of Johnson, the Eleventh Circuit has held multiple times that § 843.01 falls squarely within the residual clause and constitutes a violent felony for purposes of the ACCA. See e.g., United States v. Nix, 628 F.3d 1341 (11th Cir. 2010), cert. denied, 565 U.S. 885, 132 S. Ct. 258, 181 L. Ed. 2d 150 (2011); United States v. Hayes, 409 F. App'x 277 (11th Cir. 2010), cert. denied, 565 U.S. 829, 132 S. Ct. 125, 181 L. Ed. 2d 47 (2011). Relying on both "common-sense analysis," and the "plain language of the statute," the court found that "[c]ommission of the crime requires . . . that the defendant have knowingly and willfully resisted, obstructed, or opposed an officer by offering or doing violence to the person of that officer." Hayes, 409 F. App'x at 279 (internal citations omitted) (emphasis in original). See also, United States v. Canty, 431 F. App'x 826 (11th Cir. 2011), cert. denied, 565 U.S. 991, 132 S. Ct. 532, 181 L. Ed. 2d 373 (2011)(finding that § 843.01 falls squarely within the ACCA's residual clause).

ACCORDINGLY, it is hereby

ORDERED:

1. The Petition (Doc. #1) is **DISMISSED** for lack of jurisdiction.

2. Petitioner's motion for reconsideration (Doc. #25) is **DENIED** as moot.

3. The Clerk of Court shall terminate any pending motions, enter judgment accordingly, and close

this case.

DONE and **ORDERED** in Fort Myers, Florida on this 19th day of June, 2014.

/s/ Sheri Polster Chappell

SHERI POLSTER CHAPPELL

UNITED STATES DISTRICT JUDGE

Footnotes

1

Disclaimer: Documents filed in CM/ECF may contain hyperlinks to other documents or Web sites. These hyperlinks are provided only for users' convenience. Users are cautioned that hyperlinked documents in CM/ECF are subject to PACER fees. By allowing hyperlinks to other Web sites, this court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their Web sites. Likewise, the court has no agreements with any of these third parties or their Web sites. The court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the court.

2

Also pending before the Court is Petitioner's motion for reconsideration of the Magistrate Judge's order denying his motion for bail (Doc. #25). Because the Court finds the Petition subject to dismissal for lack of jurisdiction, Petitioner is clearly not entitled to release. Petitioner's motion for reconsideration is due to be denied as moot.

3

Petitioner failed to mention that a petition for writ of certiorari was pending when he initiated the instant § 2241 Petition. See Petition.

4

Petitioner's previous § 2255 motion was denied by the district court that imposed his sentence. Thus, Petitioner may not file another § 2255 motion without first receiving permission from the appropriate United States Court of Appeals, which Petitioner has failed to do. 28 U.S.C. § 2255(h); Darby, 405 F.3d at 945 ("[w]hen a prisoner has previously filed a § 2255 motion to vacate, he must apply for and receive permission . . . before filing a successive § 2255 motion"). Thus, Petitioner's only available avenue for collateral relief in a § 2241 petition is through the savings clause.