CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October 2019 Term

PHILLIP AUSTON CARRIER

Petitioner,

v.

WARDEN, TALLADEGA FCI, B. Romero

Respondent.

Appendices to Petition for Writ of Certiorari

INDEX TO APPENDICES

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11637-GG

PHILLIP AUSTON CARRIER,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before: WILSON, JORDAN and NEWSOM, Circuit Judges.

BY THE COURT:

Phillip Auston Carrier, a federal prisoner proceeding *pro se*, appeals the district court's dismissal of his 28 U.S.C. § 2241 habeas corpus petition with prejudice. The government has moved for summary affirmance and to stay the briefing schedule.

Summary disposition is appropriate either 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).

Appendix A

We review *de novo* the availability of habeas relief under § 2241. *Dohrmann v. United States*, 442 F.3d 1279, 1280 (11th Cir. 2006). Generally, a federal prisoner collaterally attacks the validity of his federal conviction and sentence by filing a motion to vacate under § 2255. *See Sawyer v. Holder*, 326 F.3d 1363, 1365 (11th Cir. 2003). However, § 2255(e), known as the "saving clause," permits a federal prisoner, under limited circumstances, to file a habeas petition pursuant to § 2241. *See* 28 U.S.C. §§ 2241(a), 2255(e). We have held that "[a] prisoner in custody pursuant to a federal court judgment may proceed under § 2241 only when he raises claims outside the scope of § 2255(a)." *Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1351 n.1 (11th Cir. 2008). Thus, "challenges to the execution of a sentence, rather than the validity of the sentence itself, are properly brought under § 2241." *Id.* at 1352.

Under the saving clause of § 2255(e), a prisoner may bring a habeas petition under § 2241 if "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). We have held that the saving clause permits federal prisoners to proceed under § 2241 when: (1) "challeng[ing] the execution of his sentence, such as the deprivation of good-time credits or parole determinations"; (2) "the sentencing court [was] unavailable," such as when the sentencing court itself has been dissolved; or (3) "practical considerations (such as multiple sentencing courts) might prevent a petitioner from filing a motion to vacate." *McCarthan*, 851 F.3d at 1092-93. We further held that, where the petitioner's motion attacked his sentence based on a cognizable claim that could have been brought in a § 2255 motion to vacate, the § 2255 remedial vehicle was adequate and effective to test his claim, even if Circuit precedent or a procedural bar would have foreclosed it. *Id.* at 1089-90, 1099.

When a prisoner has previously filed a § 2255 motion to vacate, he must apply for and receive our permission before filing a second or successive § 2255 motion. 28 U.S.C. §§ 2244(b),

2255(h). We have stated that "[a]llowing a prisoner to use the saving clause to bring a statutory claim in a habeas petition circumvents the bar on successive petitions." *McCarthan*, 851 F.3d at 1091. We determined that "[t]he saving clause does not allow access to section 2241 whenever a claim is untimely or procedurally defaulted otherwise the statute would render itself inadequate or ineffective," and that, specifically, "[t]he same must be true for the bar on second or successive motions." *Id.* at 1092. We also determined that § 2255 was not an inadequate remedy to test the legality of a prisoner's detention even if it limited him to one § 2255 motion. *See id.*

Here, construing the district court's order as a dismissal without prejudice, the government is clearly right as a matter of law that the district court properly dismissed Carrier's § 2241 petition. *See Davis*, 406 F.2d at 1162. Carrier's challenge to his enhanced sentence under the Armed Career Criminal Act in his § 2241 petition was cognizable in a § 2255 motion, as it directly challenged the legality of his sentence and did not address the execution of his sentence. *See Antonelli*, 542 F.3d at 1351 n.1, 1352. Specifically, even though the Eighth Circuit has rejected Carrier's request to bring his claim in a successive § 2255 motion, the failure of his argument does not entitle him to bring his § 2241 petition under the saving clause, even if he asserts that the process was unfair or inconsistently applied to him. *See McCarthan*, 851 F.3d at 1085, 1089-90, 1099. Carrier cannot use § 2241 as an attempt to circumvent the requirements to bring second or successive § 2255 motions, even though his applications were unsuccessful. *See id.* at 1091-92. The procedural bars on second § 2255 motions cannot be overcome by the saving clause, even if Carrier cannot meet them. *Id.* at 1092.

Accordingly, the government's motion for summary affirmance is GRANTED, and its motion to stay the briefing schedule is DENIED as moot.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11637-GG

PHILLIP AUSTON CARRIER,

Petitioner - Appellant,

versus

WARDEN,

Respondent - Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, JORDAN and NEWSOM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-46

Appendix B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

PHILLIP AUSTON CARRIER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**CASE NO.: 1:17-cv–1898-VEH-JHE**
	)	
WARDEN B. ROMERO,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

On February 20, 2018, the Magistrate issued a Report and Recommendation which, in pertinent part, stated:

> the undersigned **RECOMMENDS** the respondent's motion for summary dismissal be **GRANTED**, and the petition for a writ of habeas corpus be **DISMISSED WITH PREJUDICE**.

(Doc. 11 at 7). On March 16, 2018, the Petitioner filed an Objection to the Magistrate's recommendation. (Doc. 14). Having carefully considered, *de novo*, all of the materials in the Court file, including the Report and Recommendation, and the objections thereto, the Court is of the opinion that the Magistrates Report and Recommendation ought to be, and hereby is, **ACCEPTED** and **ADOPTED** as the opinion of this Court. The Court **EXPRESSLY HOLDS** that the Respondent's motion for summary dismissal should be **GRANTED** and the petition for a writ of habeas corpus should be

Appendix C

DISMISSED WITH PREJUDICE. An appropriate Final Order will be entered.

DONE this 19th day of March, 2018.

VIRGINIA EMERSON HOPKINS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

PHILLIP AUSTON CARRIER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No.: 1:17-cv-01898-VEH-JHE
	)	
WARDEN B. ROMERO,	)	
	)	
Respondent.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Petitioner Phillip Auston Carrier ("Petitioner" or "Carrier"), a federal inmate, is currently incarcerated at the Federal Correctional Institute in Talladega, Alabama. (Doc. 1). The petition was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b) for preliminary review. Upon consideration, the undersigned finds the petition is due to be dismissed because this Court lacks jurisdiction over this habeas corpus petition pursuant to the § 2255(e) savings clause.

I. Procedural History

A. Conviction and Sentence

On January 23, 2009, Carrier pleaded guilty to one count of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). *See Carrier v. United States*, No. 4:10-cv-1151-CDP (E.D. Mo. March 3, 2011) ("*Carrier* § 2255") at doc. 8. He admitted that he had been convicted of three prior felonies and that he knowingly possessed an operational .45 caliber pistol that had been transported across a state line. *Id.* The felony convictions admitted were second-degree assault, second-degree burglary, and first-degree assault and armed criminal action. *Id.*

The presentence report concluded that carrier qualified as a Career Offender under the

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Sentencing Guidelines because he had three prior violent felonies. *Id.* Carrier was credited with acceptance of responsibility. *Id.* Based on his criminal history points and career offender status, his sentencing guidelines range was 188 to 235 months. *Id.* The presentence report also concluded that the Armed Career Criminal Act applied, 18 U.S.C. § 924(e)(1), so there was a mandatory minimum sentence of 180 months. *Id.*

At the guilty plea hearing, the court explained to Carrier that if he qualified under the Armed Career Criminal Act he would be facing a fifteen-year mandatory minimum sentence. *Carrier* §2255 at doc. 8. Carrier indicated he understood. *Id.* Carrier affirmed he had read the Presentence Report and did not object to the characterization of his prior felonies, which qualified under the Armed Carrier Criminal Act. *Id.* The court adopted the Presentence Report and varied downward from the sentencing guideline range, sentencing Carrier to the mandatory minimum sentence of 180 months. *Id.* He did not appeal. *Id.*

B. First § 2255 in Sentencing Court

In June 2010, Carrier filed a motion pursuant to 28 U.S.C. § 2255 in his sentencing court. *Carrier* § 2255 at doc. 1. He raised several grounds for relief, including that the sentencing court should not have calculated his sentence under the career offender section of the Sentencing Guidelines, which generated a range between 188 and 234 months. *Id.* The court denied this claim, noting that Carrier was not sentenced based on the advisory guidelines, but rather it varied downward and sentenced him to 180 months, the lowest sentence permissible under 18 U.S.C. § 924(e)(1). *Id.*

Carrier also argued the sentencing court incorrectly deemed his prior second-degree burglary conviction to be a crime of violence when determining whether § 924(e)(1) applied. *Id.* The court noted that it was "well-settled that, although Missouri's second degree burglary statute

is over-inclusive based on this definition of generic burglary, a conviction under the statute is properly viewed as a violent felony under § 924(e), if the conviction satisfies all of the elements of generic burglary, that is, if it involved burglary of a building." *Id.* at doc. 8. Further, the court found it "undisputed that his prior conviction for second degree burglary includes all elements of generic burglary and qualifies as a violent felony under § 924(e)." *Id.* The court noted that *Begay* and *Chambers*, the cases upon which Carrier relief, did not undermine is burglary precedents. *Id.*

C. May 2016 Petition to the Eight Circuit

In May 2016, Carrier petitioned the Eighth Circuit for authorization to file a successive petition under 28 U.S.C. § 2255 based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson,* Supreme Court determined that the ACCA's residual clause (18 U.S.C. § 924(e)(2)(B)(ii)) was unconstitutionally vague. The United States opposed Carrier's petition, stating, *inter alia*: "In light of the fact that the convictions Petitioner challenges here are violent felonies under the 'elements' and 'enumerated offenses' clauses of the ACCA, the fact that *Johnson* rendered the "residual" clause unconstitutional simply has no bearing on Petitioner's sentence under the ACCA." *Carrier v. United States*, No. 16-2339 (8th Cir. May 25, 2016). The Eighth Circuit denied Carrier's petition on September 6, 2016. *See id.*

D. Second § 2255 in Sentencing Court

In June 2016, Carrier filed a second motion under § 2255 with his sentencing court based on *Johnson*. The court dismissed the motion without prejudice, ruling that it was successive and that his application for permission to file a successive motion was then pending before the Eighth Circuit. *See Carrier v. United States*, No. 4:16-CF-957-CDP (E.D. Mo. July 8, 2016).

E. November 2016 Petition to the Eight Circuit

In November 2016, Carrier again petitioned the Eighth Circuit for authorization to file a

successive habeas application in the district court based on *Johnson*. *Carrier v. United States*, No. 16-4262 (8th Cir.). The United States' response was substantively the same as its previous response. *See id.* (Dec. 2, 2016).

The Eighth Circuit denied Carrier's petition. *Id.* (June 12, 2017). In its Judgment, the court stated: "Judge Wollman and Judge Kelly concur in the decision to deny the request for authorization to file a successive § 2255 motion only because this court has previously denied Carrier's request raising the same *Johnson*-based claim as he raises in this request. *See* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). Otherwise, they would vote to grant the request for authorization." *Id.*

F. The Current § 2241 Habeas Petition

Carrier filed his current petition, along with a memorandum in support, with this Court on or about October 26, 2017. (Docs. 1 at 9 & 2). After the court received Carrier's filing fee, the undersigned ordered Respondent to show cause why the petition should not be granted. (Doc. 4). Respondent filed an Answer contending Carrier's petition was due to be dismissed. (Doc. 6). On December 27, 2017, the undersigned entered an order informing Carrier his petition was ripe for summary disposition and provided Carrier twenty-one days to provide additional argument and evidence in support of his petition. (Doc. 7). After being afforded an extension, Carrier filed a traverse on January 30, 2018. (Doc. 10). The petition is now ripe for review.

II. Claims

Carrier contends his sentence violates the Fifth Amendment's Due Process Clause because it exceeds the statutory maximum of ten years in 18 U.S.C. § 924(a)(2). (Doc. 1 at 7). He further states that burglary of an inhabitable structure under Missouri law does not qualify as a violent

felony since *Johnson* struck down the residual clause his convictions for assault do not qualify as violent felonies under § 924(e)(2)(B)(i)-(ii). (*Id.*).**III. Analysis**

Pursuant to the "savings clause" of § 2255(e), a federal court may entertain "an application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to [§ 2255]," if it "appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Until recently, Eleventh Circuit law provided that, for this Court to have jurisdiction to entertain Carrier's habeas corpus petition under the savings clause of § 2255(e), he had to establish the following five elements: (1) binding precedent foreclosed a claim at the time of his first motion to vacate; (2) the Supreme Court overturned our binding precedent that foreclosed that claim; (3) the new decision of the Supreme Court applies retroactively on collateral review; (4) as a result of this retroactive decision, the prisoner's sentence is not contrary to the law; and (5) this kind of claim can be brought under the savings clause. *Bryant v. Warden, FCC Coleman*, 738 F.3d 1253 (11th Cir. 2013), *overruled by McCarthan v. Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017).

The Eleventh Circuit recently readdressed the scope of habeas corpus jurisdiction under the § 2255(e) savings clause in *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, significantly limiting its scope. 851 F.3d 1076 (11th Cir. 2017) (en banc). Overruling ruling prior precedents, the Eleventh Circuit held:

> A motion to vacate is inadequate or ineffective to test the legality of a prisoner's detention only when it cannot remedy a particular kind of claim. Even if a prisoner's claim fails under circuit precedent, a motion to vacate remains an adequate and effective remedy for a prisoner to raise the claim and attempt to persuade the court to change its precedent, and failing that, to seek certiorari in the Supreme Court.

McCarthan, 851 F.3d 1076. Applying that narrow conception of the savings clause, the Eleventh Circuit concluded that the petitioner in that case could not seek further collateral review by way of

a habeas petition to raise a claim alleging that he was erroneously sentenced under the ACCA because, in light of a change in Supreme Court caselaw, one of his prior convictions could not be counted as a violent felony. *Id.* The court explained, because the petitioner "was free to bring" his claim about the interpretation of the sentencing law in his initial motion to vacate, the remedy by motion was an "adequate and effective means for testing such an argument," and he could not then use the savings clause to make that claim in a petition for a writ of habeas corpus. *Id.* (quoting *Prost v. Anderson*, 636 F.3d 578, 580 (10th Cir. 2011).

Carrier argues that a § 2255 motion is not adequate for effective challenge to his sentence because the way successive claims under *Johnson* are being addressed in the Eight Circuit is seemingly determined solely by whether the Government concedes or refuses to concede the petitioner's entitlement to file a successive § 2255. (Doc. 1 at 10-18). He lists numerous cases where the Government has conceded that petitioners are entitled to file successive motions and a much shorter list where they have not. *Id.* Carrier also asserts that the different standards among the circuits used to analyze savings clause cases, particularly the Eight Circuit's handling of savings clause cases post-*Johnson*, provides some basis for relief for him. (*Id.*at 19-22).

Despite Carrier's arguments, under the Eleventh Circuit's *en banc* decision in *McCarthan*, this Court lacks jurisdiction to hear Carrier's habeas corpus petition pursuant to the § 2255(e) savings clause because his claims attack his conviction and/or sentence, and he was free to bring those claims in a § 2255 proceeding. Furthermore, it would be inconceivable to find that Carrier could get review of his *Johnson* claim in a court other than his sentencing court when that court specifically refused to consider his *Johnson* claim absent permission to file a successive § 2255 motion from the Eighth Circuit and the Eighth Circuit has already denied permission twice.

As to Carrier's claims that the Government's consent or refusal to consent to petitions

seeking leave to file a successive petition somehow makes § 2255 inadequate or unavailable to him, he fails to acknowledge that (1) the Government concedes such claims only when they involve the ACCA's residual clause and (2) it is the court, not the Government that ultimately decides whether to grant the petitions. The Government opposed Carrier's Eighth Circuit petitions because he raised no claim under the ACCA's residual clause. That continues to be true. Carrier's habeas petition is due to be dismissed for lack of jurisdiction.

IV. Recommendation

Based on the foregoing, the undersigned **RECOMMENDS** the respondent's motion for summary dismissal be **GRANTED**, and the petition for a writ of habeas corpus be **DISMISSED WITH PREJUDICE.**

V. Notice of Right to Object

Any party may file specific written objections to this report and recommendation. Any objections must be filed with the Clerk of Court within fourteen (14) calendar days from the date the report and recommendation is entered. Objections should specifically identify all findings of fact and recommendations to which objection is made and the specific basis for objection. Failure to object to factual findings will bar later review of those findings, except for plain error. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986); *Dupree v. Warden*, 715 F.3d 1295, 1300 (11th Cir. 2013). Objections also should specifically identify all claims contained in the petition which the report and recommendation fails to address. Objections should not contain new allegations, present additional evidence, or repeat legal arguments. An objecting party must serve a copy of its objections on each other party to this action.

On receipt of objections, a United States District Judge will make a *de novo* determination

of those portions of the report and recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings of fact and recommendations made by the magistrate judge. The district judge must conduct a hearing if required by law. Otherwise, the district judge may exercise discretion to conduct a hearing or otherwise receive additional evidence. Alternately, the district judge may consider the record developed before the magistrate judge, making an independent determination on the basis of that record. The district judge also may refer this action back to the magistrate judge with instructions for further proceedings.

A party may not appeal the magistrate judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. A party may only appeal from a final judgment entered by a district judge.

DONE this 20th day of February, 2018.

JOHN H. ENGLAND, III
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.