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Christmas Comes Early in the Eleventh Circuit: Using *Bryant* and 28 U.S.C. § 2241 When Section 2255 Is Inadequate to Challenge Illegally Enhanced Sentences

By Gray Proctor

On Dec. 24, the U.S. Court of Appeals for the Eleventh Circuit decided *Bryant v. Warden*.[1] Dudley Bryant Jr. had challenged his enhanced sentence on the basis that his state-court conviction for illegally carrying a concealed firearm was not a violent felony for the purposes of 18 U.S.C. § 924(e). Until the U.S. Supreme Court decided *Begay v. United States*[2] in 2008, the Eleventh Circuit's controlling precedent foreclosed Bryant's claim. At that point, due to the age of his federal conviction and the fact that he had already filed a post-conviction motion, Bryant could not proceed under 28 U.S.C. § 2255, the usual vehicle for post-conviction relief. He therefore invoked 28 U.S.C. § 2241, arguing that Section 2255 was not adequate to test his continued detention. Reversing the district court, the Eleventh Circuit held that Bryant's claims could proceed and granted relief.

Although its holding is limited to sentences above the statutory maximum and does not extend to U.S. Sentencing Guidelines errors, the Eleventh Circuit's decision is important because the circuits have split on whether Section 2241 is available to challenge a sentence or is limited to convictions for acts that are no longer criminal. However, because Section 2241 convictions are filed in the district of incarceration (rather than the district of conviction), *Bryant*'s availability depends on whether the defendant is *incarcerated* in a facility in the Eleventh Circuit (Florida, Georgia or Alabama), not whether he was *convicted* in those states.

In this article, I explain why defendants like Bryant must resort to Section 2241 rather than Section 2255 to obtain relief for certain claims. I briefly survey the law in other circuits before focusing on the decision in *Bryant* and the Eleventh Circuit's four-element test for whether a claim may proceed under Section 2241.

The Need for Section 2241: The Limits of Review Under Section 2255

After the amendments in the Antiterrorism and Effective Death Penalty Act in 1996[3], inflexible limitations on the scope of Section 2255 relief can leave defendants with no procedural vehicle to bring claims based on a new, authoritative interpretation of a criminal statute that renders their detention contrary to law. Federal defendants seeking to challenge their conviction in a Section 2255 motion are subject to a one-year statute of limitations, generally measured from the date the judgment becomes final, with exceptions for governmental impediments to filing such a motion and newly discovered evidence.[4] An exception also exists for certain changes in the law, allowing the limitations period to run from ''the date on which the right asserted was ini-

[1] No. 12-11212, 2013 BL 355128, 2013 WL 6768086, 2013 U.S. App. LEXIS 25606, 94 CrL 419 (11th Cir. 2013).
[2] 553 U.S. 137, 83 CrL 76 (2008).

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[3] Pub. L. No. 104-132, 110 Stat 1214 (1996).
[4] Section 2255(f)(1)-(2), (4).

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tially recognized by the Supreme Court and made retroactively applicable to cases on collateral review.''[5] However, for new rights based on interpretations of a statute, the petitioner will be barred by the prohibition on second or successive petitions if the prisoner has already filed a Section 2255 motion.[6] Federal district courts lack jurisdiction to entertain second or successive petitions unless the relevant court of appeals certifies that the motion contains either newly discovered evidence ''sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense'' or ''a new rule of *constitutional* law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.''[7] This led the Eleventh Circuit to explain in *Bryant*: ''The purpose behind § 2255(h) . . . is to make sure that two kinds, and only two kinds, of very serious, substantive claims will receive review on the merits regardless of the posture of the prisoner's case.''

AEDPA's newer barriers to relief exist alongside an older subsection of Section 2255 known as the ''savings clause:

> An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, 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.[8]

The reference to ''a writ of habeas corpus'' refers to the general authorization in Section 2241 to grant habeas relief. Unlike a Section 2255 motion, a Section 2241 motion or ''core habeas petition'' is to be filed in the district of incarceration rather than in the sentencing court.[9]

Given the relatively recent addition of the limitations period and the bar on successive petitions, federal courts have held that Section 2255 is not ''inadequate or ineffective to test the legality'' of incarceration merely because a Section 2255 motion would be untimely or successive. However, as ''Section 2255(h) is by far the clearer of the two sections,''[10] courts seeking to interpret the savings clause have diverged on the criteria for invoking Section 2255(e). A recent article illustrates the differences in circuit law by tracing the ultimate result of hypothetical defendants attempting to invoke the savings clause to bring various challenges to convictions and sentences.[11] A complete review of the intercircuit differences is beyond the scope of this article; to understand *Bryant*, the key issue is whether one can be ''innocent'' of a sentence.

Innocence of a Conviction Versus Innocence of a Sentence

The circuit courts generally have recognized that innocence is important enough to render the savings clause available. Except for the Tenth Circuit, which appears to recognize only the constitutional prohibition against suspending the writ,[12] the circuit courts have agreed that application of the savings clause is appropriate when a movant is innocent of an offense on the basis of a new statutory interpretation under which no conviction could have occurred.[13] The Seventh Circuit has gone so far as to apply the savings clause to claims based on erroneous U.S. Sentencing Guidelines calculations, at least for those defendants sentenced during the pre-*Booker* mandatory guidelines regime.[14] The Second, Fourth and Fifth circuits, however, restrict the savings clause to challenges to the conviction; they reject the idea that Section 2241 is appropriate to correct actual innocence of a *sentence* resulting in a term of incarceration greater than the statutory maximum.[15] The remaining circuits have not yet passed on the issue of whether the savings clause can apply to a sentence in excess of the statutory maximum.

''Innocence'' is, in this author's opinion, a poor label for the actual inquiry. It seems clear that a defendant who is not legally eligible for an enhanced sentence is ''innocent'' of that sentence. Moreover, the Supreme Court has recognized that one can be ''actually innocent'' of the death penalty.[16] To say that one cannot be innocent of a sentencing enhancement is without any real meaning. Instead, innocence is a code word for the value judgments that led specific jurists to conclude

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[5] Section 2255(f)(3).

[6] Section 2255(h).

[7] Section 2255(h)(1) and (2) (emphasis added). Note that although the statute of limitations for claims involving a new, retroactive rule of constitutional law begins to run on the date that the new rule was announced, the prisoner cannot satisfy the successive-petition requirement until the Supreme Court actually declares the right to be retroactive to cases on collateral review. *Dodd v. United States*, 545 U.S. 353, 77 CrL 321 (2005).

[8] Section 2255(e).

[9] *Rumsfeld v. Padilla*, 542 U.S. 426, 443, 75 CrL 291 (2004).

[10] *Bryant*, Slip op. at 78.

[11] Case, Jennifer L., ''Kaleidoscopic Chaos: Understanding the Circuit Courts' Various Interpretations of § 2255's Savings Clause'' (Jan. 7, 2014). Available at SSRN: http://ssrn.com/abstract=2375960 or http://dx.doi.org/10.2139/ssrn.2375960.

[12] See *Prost v. Anderson,* 636 F.3d 578, 583 & n.4, 88 CrL 686 (10th Cir. 2011).

[13] *United States v. Peterman*, 249 F.3d 458, 462 (6th Cir. 2001); *Marrero v. Ives,* 682 F.3d 1190, 1192, 1194-95 (9th Cir. 2012), cert. denied, 133 S. Ct. 1264, 185 L. Ed. 2d 206, 92 CrL 600 (2013); see also *Trenkler v. United States,* 536 F.3d 85, 99, 70 CrL 110 (1st Cir. 2008).

[14] *Brown v. Caraway*, 719 F.3d 583, 588 (7th Cir. 2013).

[15] *In re Jones*, 226 F.3d 328, 333-34, 67 CrL 647 (4th Cir. 2000); *Reyes-Requena v. United States*, 243 F.3d 893, 903-04, 68 CrL 502 (5th Cir. 2001); *Poindexter v. Nash*, 333 F.3d 372, 378 (2d Cir. 2003).

[16] *Sawyer v. Whitley*, 505 U.S. 333 (1992).

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that illegal sentences are not errors worth correcting.[17] Nevertheless, it is accurate to say that the Eleventh Circuit's opinion in *Bryant* is important because it held that one may be innocent of a sentencing enhancement.

Bryant's Four-Factor Test

The Eleventh Circuit articulated four requirements for potential Section 2241 claims:

> (1) mandatory circuit precedent precluding relief on the merits of the claim during the time for filing a Section 2255 motion;
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> (2) overturning of that circuit precedent after Section 2255 is no longer available;
>
> (3) retroactivity of the new, more favorable rule; and
>
> (4) a sentence in excess of the statutory maximum as determined under the new rule.

The first factor exists when ''circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal, or first § 2255 motion.''[18] Previous opinions made clear that the circuit precedent must have addressed the precise claim at issue—most often whether a specific conviction qualifies as a predicate for an enhancement.[19] Thus, if the Eleventh Circuit has not definitely held that a given offense *does* qualify as a predicate, defendants are expected to argue that the offense does *not* so qualify at the first opportunity.[20] The second factor simply requires that the law change, rendering the defendant's challenge meritorious. The *Bryant* opinion describes the first two elements as requiring a ''circuit law busting'' decision from the Supreme Court.

The third requirement, retroactivity, is likely to be present whenever a sentence is in excess of the statutory maximum allowed under the new rule. Substantive rules generally apply retroactively, while new procedural rules apply retroactively only when they are vital to the fundamental fairness and accuracy of criminal proceedings.[21] The Eleventh Circuit concluded in *Bryant* that *Begay* was a substantive rule because it narrowed the scope of Section 924(e). The court also explained that, unlike the exception for second or successive Section 2255 motions, there is no requirement that the Supreme Court itself declare that a decision applies retroactively.

Finally, *Bryant* does not apply unless the defendant's sentence is in excess of the statutory maximum. ''There are serious, constitutional, separation-of-powers concerns that attach to sentences above the statutory maximum penalty authorized by Congress.''[22] Challenges to the guidelines calculations are not cognizable; the finality interests weigh more heavily when the legislature authorizes a given sentence for an offense. Additionally, courts are empowered to exceed the guidelines, which could result in the same sentence after resentencing if the court decides to depart upwardly.[23]

Conclusion

Because Section 2241 petitions are filed in the district of incarceration, federal prisoners imprisoned in facilities within the Eleventh Circuit's geographic boundaries receive the benefit of *Bryant*. Regardless of the district of conviction, those prisoners can bring claims under Section 2241 if they would be ineligible for a statutory sentence enhancement today, but only if their claim would have been without merit under mandatory precedent in the sentencing circuit during the period of time they could have filed a Section 2255 motion.

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[17] See *Collins v. Ledezma*, 724 F. Supp. 2d 1173, 1177-82 (W.D. Okla. 2010) (listing cases). One observer has argued that the proper interpretation of the savings clause would allow claims to proceed whenever the law of the circuit did not affirmatively recognize the basis for relief, without regard to innocence. Nicholas Matteson, Note: ''Feeling Inadequate? The Struggle to Define the Savings Clause in 28 U.S.C. § 2255,'' 54 B.C. L. Rev. 353.

[18] *Wofford v. Scott,* 177 F.3d 1236, 1244, 65 CrL 415 (11th Cir. 1999).

[19] *Williams v. Warden*, 713 F.3d 1332, 1349, 93 CrL 62 (11th Cir. 2013).

[20] For an insightful analysis of the problems with this element (and many other difficulties in harmonizing relief under Section 2241 with AEDPA's limitations on Section 2255 relief), see Chief Judge Frank Easterbrook's statements regarding his decision to vote against rehearing en banc in *Brown*, 719 F.3d at 596-601.

[21] *Schriro v. Summerlin*, 542 U.S. 348, 352-53, 75 CrL 307 (2004).

[22] *Bryant* at 81.

[23] *Bryant* at 82-83.