

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
)
v.) Criminal No. 96-14-B-W
)
)
MARK WAYNE AMES,)
)
)
)

**RECOMMENDED DECISION ON 18 U.S.C. § 3742 AND/OR FEDERAL RULE
OF CRIMINAL PROCEDURE 52(b) MOTION**

Mark Wayne Ames was convicted in January 1997 of federal firearm charges. The docket indicates that Ames did not take a direct appeal or file a 28 U.S.C. § 2255 motion. Nine years after his judgment of conviction Ames has filed a motion to correct his sentence, citing 18 U.S.C. § 3742 and Federal Rule of Criminal Procedure 52(b) as his preferred vehicles for advancing a claim that his Armed Career Criminal sentence runs afoul of Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254 (2005), which held,

that enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

125 S.Ct at 1263. I now recommend that the Court deny Ames the relief he seeks for the following reasons.

Discussion

Section 3742 of title 18 provides as relevant:

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

18 U.S.C. § 3742(a). This statute pertains to appeals to the First Circuit Court of Appeals and Ames's time for filing such an appeal lapsed long ago.

Federal Rule of Criminal Procedure 52(b) provides:

(b) Amendment. On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

Federal Rules of Civil Procedure Rule 52(b). Once again, Ames's current motion was filed well outside the period for seeking relief under this provision.

I note that Ames also attempts to forward his cause by stating that his motion is pursuant to any other pertinent or applicable statute or rule. With respect to the availability of 28 U.S.C. § 2255 relief for Ames on his Shepard claim, despite Ames's general invitation to call upon any other statute or rule, it would be inappropriate to sua sponte recharacterize Ames's current motion as one brought pursuant to 28 U.S.C.

§ 2255. Shepard is, in a fashion, a descendant of the Apprendi v. New Jersey, 530 U.S.

466 (2000), Blakely v. Washington, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005) lineage.¹ (Indeed, Ames relies on Booker in arguing that his sentence was improperly enhanced.) There is uniform consensus among the Circuits that Booker, like Apprendi and Blakely, does not apply retroactively to cases on collateral review. See United States v. Gentry, 432 F.3d 600, 605-06 & n.4 (5th Cir. 2005); United States v. Morris, 429 F.3d 65 (4th Cir. 2005); United States v. Cruz, 423 F.3d 1119 (9th Cir. 2005); Never Misses a Shot v. United States, 413 F.3d 781 (8th Cir. 2005); United States v. Bellamy, 411 F.3d 1182, 1188 (10th Cir.2005); Lloyd v. United States, 407 F.3d 608, 610 (3d Cir.2005); United States v. Fraser, 407 F.3d 9, 11 (1st Cir.2005); Guzman v. United States, 404 F.3d 139, 142 (2d Cir.2005); Varela v. United States, 400 F.3d 864, 868 (11th Cir.2005)(per curiam); Humphress v. United States, 398 F.3d 855, 860 (6th Cir.2005); McReynolds v. United States, 397 F.3d 479, 481 (7th Cir.2005).

Although the Circuits have yet to directly weigh in on the question, the First Circuit has described Shepard's holding as "'a new rule for the conduct of criminal prosecutions'" United States v. Mastera, ___ F.3d ___, ___ n.6, 2006 WL 146615, *6 n.6 (1st Cir. Jan. 20, 2006) (quoting Griffith v. Kentucky, 479 U.S. 314, 328 (1987)). A few District Courts have considered the Shepard retroactivity question for cases on collateral review and not one has concluded that Shepard relief is available vis-à-vis a first-time § 2255 motion brought pursuant to § 2255 ¶ 6(3).² See, e.g., Morales v. United States,

¹ I say "in a fashion" because the real nexus between Shepard and the Apprendi line of cases is Shepard's kinship with Almendarez –Torres v. United States, 523 U.S. 224 (1998), a case that is an exception to the Apprendi rule. See *infra* note 3. It does not seem to me that the retroactivity concerns apropos the Shepard rule, which leaves Almendarez –Torres intact, are in the same league as those that arose from Apprendi, Blakely, and Booker.

² This subsection provides that the one-year § 2255 limitation period runs from, "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255 ¶ 6(3).

Crim. No. 99-229(3), 2005 WL 807051, *7 (D. Minn. Apr. 7, 2005) ("Finally, and perhaps most importantly, the Supreme Court has given no indication that Shepard applies retroactively to cases on collateral review. As Shepard, like Booker and Blakely, was based on Apprendi, the retroactivity analysis set forth above applies with equal force to Shepard."); Darco v. United States, No. CV-04-1378 (CPS), 2005 WL 1804475, *4 (E.D.N.Y. Jul 28, 2005) (collecting District Court cases); see also e.g., Caballero-Banda v. United States, No. EP-05-CA-0330-DB, EP-01-CR-1404-DB, 2005 WL 2240226, *5 (Sept. 13, 2005, W.D.Tex.) (W.D.Tex.2005) (Briones, J.); McCleskey v. United States, No. EP-05-CA-0272-PRM, EP-03-CR-1038-PRM, 2005 WL 1958407, *6 (W.D.Tex. Aug. 15, 2005) (Martinez, Dist. J.).

Given the state of this law it would not benefit Ames to characterize this motion as one brought under 28 U.S.C. § 2255 ¶6(3). See Castro v. United States, 540 U.S. 375, 387-88 (2003) (Scalia, J., concurring in part and concurring in judgment) ("[E]ven fully informed district courts that try their best not to harm pro se litigants by recharacterizing may nonetheless end up doing so because they cannot predict and protect against every possible adverse effect that may flow from recharacterization. But if district courts are unable to provide this sort of protection, they should not recharacterize into first § 2255 motions at all.").

Finally, with respect to the tenability of pressing this claim pursuant to 18 U.S.C. 3582(c), this subsection provides:

Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or

without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction;

or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c) (emphasis added).

Apropos the two subdivisions of (c)(1), Ames cannot press an argument that Shepard warrants resentencing under the "extraordinary circumstance" provision of (c)(1)(A); that subsection contemplates relief only upon motion of the Bureau of Prisons. See United States v. Blackwell, 81 F.3d 945, 947 (10th Cir. 1996); United States v. Willis, Crim. No. 20028, 2004 WL 1918893, *1 (N.D. Ill. July 12, 2004) (unpublished memorandum opinion and order); see also United States v. Cabrera-Polo, 376 F.3d 29,

31 (1st Cir. 2004) (noting the "extraordinary circumstances" provision of § 3582(c), without discussing the necessity of the motion being brought by the Bureau of Prisons). Ames's Shepard challenge clearly does not fall within subsection (c)(1)(B). See Fed. R. Crim. P. 35.

And with respect to Subsection (c)(2), Shepard is unquestionably a pronouncement by the United States Supreme Court and not the United States Sentencing Commission so subsection (2) is inapposite. See United States v. Shaw, 30 F.3d 26, 29 (5th Cir. 1994) (noting that § 3582(c)(2) only applies to retroactive guideline amendments); see cf. United States v. McBride, 283 F.3d 612, 615 -16 (3d Cir. 2002) (no Apprendi-premiered § 3582(c)(2) relief); United States v. Yett, 04-50598, 2004 WL 2368216, *1 (5th Cir. Oct. 21, 2004) (unpublished, per curiam decision) (no Blakely relief under § 3582(c)(2)); United States v. Chappell, Crim. No. 02-20046-JWL, 2005 WL 806702, *1 n.1 (D. Kan. Apr. 7, 2005) (concluding that there could be no Booker relief under 18 U.S.C. § 3582(c)); Cook v. United States, No. 95-10012-01, 2004 WL 2782634, *1 -2 (D. Kan. Nov. 5, 2004) (unpublished memorandum and order) (observing that a Blakely challenge was "outside the scope of § 3582(c)(2)," and noting that "petitioner's claim is more appropriately raised in a § 2255 motion.").

I also note that giving Ames § 3582(c) relief from his sentence based on Shepard would be, in essence, giving Shepard retroactive effect to a case that is no longer in the direct appeal pipeline. See United States v. Mitchell, No. 04-3367, 2005 WL 387974, *1 (2nd Cir. Feb. 18, 2005) (unpublished summary order) ("At best, [the movant's] effort somehow to import Blakely and, by extension, Booker into a recalculation of his sentence under 18 U.S.C. § 3582(c)(2) is a collateral attack on the original judgment. This court

has held, however, that Booker does not apply retroactively to cases on collateral review. Green v. United States, 397 F.3d 101 (2d Cir.2005)."); see cf. United States v. Smith, 241 F.3d 546, 548 (7th Cir. 2001) (viewing an Apprendi challenge raised for the first time at resentencing after direct appeal as "a new issue, one not authorized by § 3582(c), for it is unrelated to any change in the Sentencing Guidelines. It is instead the sort of contention usually raised by motion under 28 U.S.C. § 2255").³

Conclusion

For the reasons above I recommend that the Court refrain from recharacterizing this motion as one brought pursuant to 28 U.S.C. § 2255 and deny Ames's relief based on any other of the provisions discussed above.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

February 8, 2006.

Margaret J. Kravchuk
U.S. Magistrate Judge

³ Even if Ames could use this motion as a vehicle to press his claim, it is not at all clear that Ames really has a Shepard claim. For a good discussion of the limitation of the Shepard holding see United States v. Browning, ___ F.3d ___, 2006 WL 266508 (7th Cir. Feb. 6, 2006) (Posner, Cir. J.).

Case title: USA v. AMES
Magistrate judge case number: 1:96-mj-00024

Date Filed: 03/20/1996

Assigned to: JUDGE JOHN A.
WOODCOCK, JR

Defendant

MARK WAYNE AMES (1)
TERMINATED: 01/03/1997

represented by **PERRY H. O'BRIAN**
42 COLUMBIA STREET
BANGOR, ME 04401
(207) 942-4697
Email: obrianpa@adelphia.net
TERMINATED: 01/03/1997
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Pending Counts

18:924E.F FELON IN
POSSESSION OF A FIREARM -
ARMED CAREER CRIMINAL in
violation of 18 USC 922(g)(1),
924(a)(2) and 924(e)
(1)

Disposition

Defendant imprisoned for 180
months, 5 years supervised release
with conditions, \$100.00 special
assessment

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

None

Complaints

None

Disposition

Plaintiff

USA

represented by **JAMES L. MCCARTHY**
OFFICE OF THE U.S.
ATTORNEY
DISTRICT OF MAINE
202 HARLOW STREET, ROOM
111
BANGOR, ME 04401
945-0344
Email: james.mccarthy@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED