

United States Court of Appeals

**For the Seventh Circuit
Chicago, Illinois 60604**

Submitted June 9, 2005*
Decided June 30, 2005

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 04-3497

OLANDO K. CHAFF,
Petitioner-Appellant,

v.

RICK V. VEACH,
Respondent-Appellee.

Appeal from the United States
District Court for the Central
District of Illinois

No. 04-1278

Joe Billy McDade,
Judge.

ORDER

In 1992 Orlando Chaff and two other men invaded a home in the Southern District of Florida, kidnapped the homeowners and their child at gunpoint, and robbed the house of cash and jewelry. A plan to hold the family for ransom was thwarted, and the three were arrested. Chaff later pleaded guilty to conspiracy to commit kidnapping, 18 U.S.C. § 1201(c); attempted obstruction of commerce by robbery, *id.* § 1951(a); use of a firearm during and in relation to a crime of violence, *id.* § 924(c); and possession of a firearm by a felon, *id.* § 922(g)(1). He was sentenced to a total of 240 months' imprisonment derived principally from a 180-month term on the § 922(g)(1) count and a consecutive 60-month term on the

*After examining the briefs and record, we have concluded that oral argument is unnecessary. Accordingly, this appeal is submitted on the briefs and record. *See* Fed. R. App. P. 34(a)(2).

§ 924(c) count. Chaff also received 150-month terms on the kidnapping and robbery charge to run concurrently with each other and with the longer term imposed on the § 922(g)(1) count. Chaff appealed, and in March 1997 the Eleventh Circuit affirmed in all respects. *United States v. Chaff*, 108 F.3d 342 (11th Cir. 1997). Chaff then filed a motion to vacate under 28 U.S.C. § 2255, which the Florida district court denied. In June 1999 the Eleventh Circuit denied Chaff's application for a certificate of appealability.

Five years later, in August 2004, Chaff petitioned for habeas corpus under 28 U.S.C. § 2241 in the Central District of Illinois where he is serving his federal sentences. Chaff claimed that his conviction under § 1951 (commonly known as the Hobbs Act) must be vacated because, in his view, the government's factual basis did not establish that the home he robbed affected commerce, as was necessary to convict. Chaff relied on *Jones v. United States*, 529 U.S. 848 (2000), which holds that the arson of an owner-occupied home that is not used for any commercial purpose cannot be prosecuted under 18 U.S.C. § 844(i) because a home is not "property 'used' in interstate commerce or commerce-affecting activity" and thus does not satisfy the commerce element of the statute, *id.* at 850-51. In a memorandum submitted with his petition, Chaff contended that § 2241 is the appropriate means to attack his Hobbs Act conviction because § 2255 was "inadequate or ineffective to test the legality of his detention." See 28 U.S.C. § 2255 ¶ 5; *United States v. Prevatte*, 300 F.3d 792, 798-99 (7th Cir. 2002); *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998). It was inadequate, he contended, because a successive motion under § 2255 is limited to claims based on newly discovered evidence or a new rule of constitutional law. *Prevatte*, 300 F.3d at 797. His claim, in contrast, is that the Supreme Court's interpretation of § 844(i) in *Jones* establishes that he is actually innocent of the Hobbs Act charge.

The district court concluded that § 2255 was not inadequate because Chaff could have challenged the commerce element on direct appeal by relying on "respectable authority" from other circuits, *e.g.* *United States v. Menutti*, 639 F.2d 107, 110-12 (2d Cir. 1981) (holding in prosecution under § 844(i) that residence was not "used" in commerce despite being advertised for rental and receiving natural gas, electricity, and insurance from out-of-state companies); *United States v. Pappadopoulos*, 64 F.3d 522, 528 (9th Cir. 1995) (holding in prosecution under § 844(i) that residence lacked commerce nexus despite receiving natural gas from out-of-state sources), or in his § 2255 motion by relying on an Eleventh Circuit case decided while his appeal was pending, *see United States v. Denalli*, 73 F.3d 328, 329-31 (11th Cir. 1996) (holding in prosecution under § 844(i) that residence lacked commerce nexus despite owner-occupant's use of home computer for international business).

Had Chaff been prosecuted in this circuit, he might have a better argument that § 2255 is ineffectual, assuming, as the district court did, that *Jones* even affects the “concept of ‘commerce’” in the Hobbs Act. *Cf. United States v. Marrero*, 299 F.3d 635, 655-56 (7th Cir. 2002) (expressing concern that, despite recent decisions including *Jones*, government was unwilling to recognize limits to reach of Hobbs Act); *but see Wilkerson v. United States*, 361 F.3d 717, 732 n.8 (2d Cir. 2004) (labeling as “significant” that Supreme Court, despite *Jones*, has declined to review sufficiency of commerce nexus under Hobbs Act). When circuit law is “so firmly against” a petitioner, he need not raise the issue to preserve it for later collateral attack should the law change. *Davenport*, 147 F.3d at 610. Chaff’s claim, to the extent it rests on analogy to 844(i), would have been foreclosed by our caselaw until it was overruled in *Jones*. *See United States v. Stillwell*, 900 F.2d 1104, 1107-08 (7th Cir. 1990) (holding in prosecution under § 844(i) that commerce nexus is satisfied where private residence serves no business purpose but receives natural gas from out of state); *see also United States v. Martin*, 63 F.3d 1422, 1426-27 (7th Cir. 1995) (holding in prosecution under § 844(i) that vacant apartment building withdrawn from rental market was still “used” in interstate commerce).

But when Chaff filed his § 2255 motion in the district of conviction, he had the benefit of the Eleventh Circuit’s recent decision in *Denalli*, and therefore had a reasonable opportunity to raise the legal theory he advances in his § 2241 petition. And because when he litigated his § 2255 motion Chaff had an “unobstructed procedural shot at getting his sentence vacated,” he cannot argue that § 2255 provided an inadequate remedy. *See Davenport*, 147 F.3d at 609-10; *see also Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999) (§ 2241 unavailable for claim that was not “squarely foreclosed” by circuit law at the time of direct appeal or § 2255); *United States v. Barrett*, 178 F.3d 34, 53 (1st Cir. 1999) (“[W]here a prisoner had an opportunity to present his claim properly in his first § 2255 petition, but failed to do so, any ‘ineffectiveness’ of his current § 2255 petition is due to him and not to § 2255.”); *Abdullah v. Hendrick*, 392 F.2d 957, 963 (8th Cir. 2004) (§ 2255 does not free inmate from failure to raise available claim in earlier § 2255 motion). Accordingly, the district court correctly held that § 2241 is not a remedy available to Chaff.

AFFIRMED.