IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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JESUS RUIZ,

Petitioner,

v.

L. WILLIAMS,[1]

Respondent.

OPINION & ORDER

15-cv-372-jdp

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Pro se petitioner Jesus Ruiz is a prisoner in the custody of the Federal Bureau of Prisons, currently housed at the Oxford Federal Correctional Institution. Petitioner has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, which under certain circumstances allows a collateral attack on a federal conviction via the "savings clause," 28 U.S.C. § 2255(e).

Petitioner has filed an amended brief in support of his petition, Dkt. 4, and I will accept it as the operative petition, replacing Dkt. 1 and Dkt. 2. Now the operative petition is before the court for preliminary review, pursuant to Rule 4 of the Rules Governing Section 2254 Cases. (Courts may apply this rule to habeas petitions not brought pursuant to § 2254, including § 2241 petitions. Rule 1(b), Rules Governing Section 2254 Cases; *see also* 28 U.S.C. § 2243.) Under Rule 4, I will dismiss the petition only if it plainly appears that petitioner is not entitled to relief. Because it does not, I will direct respondent to show cause as to why I should not grant the petition.

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[1] L. Williams has replaced L.C. Ward as warden at Oxford Federal Correctional Institution, and I have updated the caption accordingly.

## BACKGROUND

I draw the following background information from the amended petition, petitioner's amended brief in support of the petition, and publicly available case records.

Petitioner is currently serving two concurrent life sentences and one 45-year sentence (to be served consecutively) for conspiracy to commit racketeering, hostage taking, conspiracy to commit kidnapping, kidnapping in interstate commerce, assaulting a federal agent, and three counts of use of a firearm during and in relation to a crime of violence. Petitioner and several other individuals "enforced" a cocaine trafficking operation by kidnapping several individuals to collect on drug debts. The scheme ultimately resulted in the murder of one of the kidnapping victims, Jaime Estrada. A jury found petitioner guilty on all counts. At sentencing, petitioner claims that the judge determined that the kidnapping had caused the victim's death, and, pursuant to 18 U.S.C. §§ 1201(a) and 1203, the court sentenced petitioner to a mandatory minimum of life imprisonment. Petitioner appealed, and the Seventh Circuit affirmed. *United States v. Torres*, 191 F.3d 799 (7th Cir. 1999). The United States Supreme Court denied the petition for a writ of certiorari on February 22, 2000. *Torres v. United States*, 528 U.S. 1180 (2000).

In February 2001, petitioner filed a motion for postconviction relief pursuant to 28 U.S.C. § 2255 with his sentencing court. On August 30, 2006, the district court denied the motion. *Ruiz v. United States*, 447 F. Supp. 2d 921 (N.D. Ill. 2006). The Seventh Circuit denied petitioner's application for a certificate of appealability on March 23, 2007, and the United States Supreme Court denied his petition for writ of certiorari on June 4, 2007.

On February 11, 2014, petitioner filed a Rule 60(b)(6) motion for relief from the district court's order denying his § 2255 petition. The district court denied the motion on

March 23, 2014, and the Seventh Circuit denied petitioner's application for a certificate of appealability on November 7, 2014.

On June 6, 2014, petitioner filed an application for an order authorizing the district court to consider a second or successive § 2255 petition on substantially the same grounds presented here. The Seventh Circuit denied the application on June 12, 2014.

Petitioner filed a § 2241 petition with his court on June 16, 2015.

## ANALYSIS

Petitioner contends that two recent United States Supreme Court decisions—*Burrage v. United States*, 134 S. Ct. 881 (2014), and *Rosemond v. United States*, 134 S. Ct. 1240 (2014)—establish new rules of statutory interpretation, are retroactive on collateral review, and, as a result, undermine his convictions. Petitioner contends that *Burrage* requires that certain fact questions concerning the "death results" enhancement go to the jury; the jury—not the sentencing judge—should have determined whether the kidnapping caused Jaime Estrada's murder. And under *Rosemond*, the jury should have had to find that petitioner *knew* that his associates intended to use firearms before they convicted him of aiding and abetting the offense of using a firearm during the commission of a violent crime. Petitioner contends that the jury instructions in his case were deficient because they did not require the jury to find that petitioner knew in advance that someone, in the course of the underlying violent events, would be armed.

To collaterally attack a conviction or sentence, a federal prisoner must ordinarily file a petition pursuant to 28 U.S.C. § 2255. *Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013). But a federal prisoner "may petition under section 2241 instead if his section 2255 remedy is

'inadequate or ineffective to test the legality of his detention.'" *Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012) (quoting 28 U.S.C. § 2255(e)). Subsection (e) is known as § 2255's savings clause. "Inadequate or ineffective means that a legal theory that could not have been presented under § 2255 establishes the petitioner's actual innocence." *Hill v. Werlinger*, 695 F.3d 644, 648 (7th Cir. 2012) (citation and internal quotation marks omitted). The Seventh Circuit has established that three conditions must be present before a petitioner can proceed under § 2241 pursuant to the "inadequate or ineffective" exception. First, the petitioner must be relying on a new statutory interpretation case—rather than on a constitutional case—because § 2255 offers relief to prisoners who rely on new constitutional cases. Second, the petitioner must be relying on a decision that is retroactive on collateral review and that he could not have invoked in his first § 2255 petition. Third, the error that the petitioner identifies must be grave enough to be deemed a miscarriage of justice. *Light v. Caraway*, 761 F.3d 809, 812 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 970 (2015); *In re Davenport*, 147 F.3d 605, 611-12 (7th Cir. 1998).

Here, I am skeptical that petitioner can demonstrate that all three *Davenport* conditions are present. *Burrage* and *Rosemond* both appear to be statutory interpretation cases. *See Montana v. Cross*, No. 14-cv-1019, 2014 WL 5091708, at *3 (S.D. Ill. Oct. 10, 2014) ("*Rosemond* is indeed a statutory interpretation case."); *Rutledge v. Cross*, No. 14-cv-539, 2014 WL 2535160, at *3 (S.D. Ill. June 5, 2014) ("*Burrage* is a statutory interpretation case . . . holding that a factor which *increases the minimum or maximum possible sentence* must be submitted to a jury and found beyond a reasonable doubt."). But it is unlikely that petitioner is able to satisfy the remaining two conditions.

Neither *Burrage* nor *Rosemond* appear to be retroactive on collateral review. In *Burrage*, the Supreme Court held that "[b]ecause the 'death results' enhancement increase[s] the minimum and maximum sentences to which [a criminal defendant is] exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt." 134 S. Ct. at 887. The case extends from the Court's holdings in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Supreme Court has not made *Burrage* retroactive on collateral review. In fact, the Court has indicated that "rules based on *Apprendi* do not apply retroactively on collateral review." *Simpson v. United States*, 721 F.3d 875, 876 (7th Cir. 2013) (citing *Schriro v. Summerlin*, 542 U.S. 348 (2004)). And lower courts that have considered whether *Burrage* is retroactive on collateral review—usually in the context of evaluating initial § 2255 petitions—have determined that it is not. *See Krieger v. United States*, No. 14-cv-749, 2015 WL 3623482, at *3 (S.D. Ill. June 10, 2015) ("[T]here is nothing to indicate that *Burrage* applies retroactively on collateral review. *Burrage* was also decided on direct and not on collateral review. . . . [T]he Supreme Court did not declare that *Burrage* applied retroactively on collateral attack[.]"); *Stewart v. United States*, 89 F. Supp. 3d 993, 996 (E.D. Wis. 2015) (citing cases).

In *Rosemond*, the Supreme Court held that to "aid and abet" the offense of using a firearm during a drug trafficking offense, the defendant must have known ahead of time that one of his confederates would carry a gun: "[a]n active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun." 134 S. Ct. at 1249. The Supreme Court has not made *Rosemond* retroactive on collateral review. *See Montana*, 2014 WL 5091708, at *3 ("The Supreme Court gave no indication that its decision in *Rosemond* should be given retroactive

application to a case on collateral review, such as the instant action. Furthermore, this Court could find no decision either from the Seventh Circuit or its sister Courts of Appeal in which *Rosemond* was applied retroactively." (citing cases)). Petitioner points to *United States v. Greene,* No. 14-cv-431, 2015 WL 347833, at *1 (E.D. Wis. Jan. 23, 2015), for its holding that *Rosemond* should apply retroactively on collateral review. But *Greene* is the exception to a more general trend. And in *Greene*, the district court considered whether *Rosemond* should apply retroactively when reviewing an *initial* § 2255 petition.[2]

Regardless, I am skeptical that either case even applies to petitioner's circumstances. The Seventh Circuit has already decided that petitioner will lose on the merits of his claims. In June 2014, petitioner filed an application for an order authorizing the district court to consider a second or successive § 2255 petition, asserting claims under *Burrage* and *Rosemond*. The Seventh Circuit denied petitioner's application, explicitly stating that petitioner was not entitled to relief under those decisions. The district court's order denying petitioner's first § 2255 petition established that he *personally* used a gun during the kidnappings, making *Rosemond* inapplicable—"Ruiz was not convicted of violating § 924(c) under an accountability theory." *Ruiz v. United States*, No. 14-2258, at 2 (7th Cir. June 12, 2014) (order denying authorization for a second or successive petition). And the Seventh Circuit determined that the jury *did* find that the kidnapping scheme caused Estrada's murder, consistent with *Burrage*, because the felony murder of Estrada was the predicate offense to the RICO charge. *Id.*

[2] I will point out, however, that the Seventh Circuit is currently considering whether *Rosemond* applies retroactively on collateral review. *Montana v. Cross*, No. 14-3313 (7th Cir., filed Oct. 20, 2014).

The foregoing aside, petitioner's allegations give me pause. Without a more complete record, I cannot determine with certainty that petitioner did not experience some miscarriage of justice. My consideration of the petition will benefit from briefing both on the merits of the petition and on the *Davenport* conditions and whether petitioner may proceed under § 2241 and § 2255(e). Thus, I will direct respondent to show cause as to why I should not grant the petition.

ORDER

IT IS ORDERED that:

1. Petitioner Jesus Ruiz's amended petition and amended brief in support of the petition, Dkt. 4, is accepted as the operative pleading.

2. The clerk of court is directed to send copies of this order and of petitioner's amended petition for a writ of habeas corpus, Dkt. 4, to respondent at FCI-Oxford, the local United States Attorney, and the United States Attorney General by certified mail, in accordance with Federal Rule of Civil Procedure 4(i).

3. Within 60 days from the date of service of the petition, respondent must file an answer to the petition, showing cause, if any, why this writ should not issue.

4. If respondent contends that the petition is subject to dismissal on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion, or procedural default, then respondent may file a motion to dismiss, a supporting brief, and any documents relevant to the motion, within 30 days of service of this order, either with or in lieu of an answer. Petitioner may have 20 days following service of any motion to dismiss within which to file and serve his responsive brief and any supporting documents. Respondent may have 10 days following service of the response within which to file a reply.

   If the court denies the motion to dismiss in whole or in part, then it will set a deadline within which respondent must file an answer, if necessary, and establish a briefing schedule regarding any claims that have not been dismissed.

5. If respondent does not file a dispositive motion, then the parties must adhere to the following briefing schedule regarding the merits of petitioner's claim:

   a. Respondent must file a brief in opposition with his answer.

b. Once respondent files a brief in opposition, petitioner may have 20 days to file a reply if he wishes to do so.

Entered July 8, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge