21-7284

APPLICATION No. 21A297

IN THE
Supreme Court of the United States

JESUS RUIZ,
Petitioner,

v.

LOUIS WILLIAMS, WARDEN,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether a new statutory interpretation from this Court allows a federal prisoner to redress the legality of his conviction or sentence pursuant to 28 U.S.C. Section 2241 via Section 2255(e), if Section 2255 is inadequate or ineffective to seek relief?

2. Whether a new statutory interpretation from this Court allows a federal prisoner to bring an actual innocence claim pursuant to 28 U.S.C. Section 2241 via Section 2255(e), if Section 2255 is inadequate or ineffective to present his claim?

RELATED PROCEEDINGS

United States District Court (N.D. III).

United States v. Ruiz, No. 96-CR-407 (Sept. 1998)

Ruiz v. United States, No. 01-CV-1191 (Aug. 30, 2006)

Ruiz v. United States, No. 16-CV-2521 (May 8, 2020)

United States District Court (W.D. Wis.)

Ruiz v. Williams, No. 15-cv-372 (Jan. 16, 2018)

United States Court of Appeals (7th Cir.)

United States v. Ruiz, No. 98-3357 (1999)

Ruiz v. United States, No. 06-4024 (Jan. 29, 2007)

Ruiz v. United States, No. 14-2127 (Nov. 7, 2014)

Ruiz v. United States, No. 14-2258 (Jun. 12, 2014)

Ruiz v. United States, No. 16-1193 (Feb. 19, 2016)

Ruiz v. United States, No. 17-1928 (pending)

Ruiz v. United States, No. 18-1114 (Aug. 4, 2021)

Ruiz v. United States, No. 19-1697 (Apr. 22, 2019)

Ruiz v. United States, No. 19-1919 (May 16, 2019)

Ruiz v. United States, No. 20-2161 (Jul. 29, 2020)

Supreme Court of the United States

Torres v. United States, No. 99-7852 (Feb. 22, 2000)

Ruiz v. United States, No. 06-11047 (Jun. 4, 2007)

Ruiz v. United States, No. 21-6200 (pending)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jesus Ruiz (herinafter "Petitioner"), hereby through pro se respectfully submits this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion and order of the Seventh Circuit (Appendix 1a-3a) is unreported. The order of the district court (Appendix 4a-10) is available at **Ruiz v. Williams**, 2018 U.S. Dist. LEXIS 6515 (W.D. Wis. 2018).

JURISDICTION

The court of appeals entered judgment on September 28, 2021. App. 1a. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides;

> No person shall be... deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the U.S. Constitution provides;

> In all criminal prosecutions, the accused shall be . . . informed of the nature and cause of the accusation.

Relevant statutory provisions of 18 U.S.C. Sections 2255(e), 2255(h)(2), and 2241 are reprinted and included as Appendix 11a-15a.

STATEMENT OF INTRODUCTION

This case presents an issue of national importance and the opportunity for this Court to resolve an entrenched and expanding circuit split over whether a new statutory interpretation from this Court allows a federal prisoner to redress the legality of his conviction or sentence pursuant to 28 U.S.C. §2241

via §2255(e), when §2255 is inadequate or ineffective to seek relief. Though the vast majority of the courts of appeals permits a federal prisoner to challenge the legality of his detention under §2241 via §2255(e), the lack of clarity regarding what renders §2255 inadequate or ineffective has created not only a split among the circuits, but also internal inconsistencies within circuits. The Seventh Circuit alone has established at least three different standards that allow a federal prisoner to proceed pursuant to §2241 via §2255(e). Nonetheless, in applying these standards the Seventh Circuit and its lower courts routinely reject §2241 habeas petitions that clearly satisfy any of them. Petitioner's case illustrates this unfortunate practice.

The split among the circuits and the lack of guidance from this Court has led the government to previously recognize that the question presented divides the circuits and warrants this Court's review. See United States v. Wheeler, No. 18-420 (Oct. 3, 2018). Indeed, several courts and judges (including now-Justice Barrett) have likewise bemoaned the lack of clarity in this area, and some, including judges Easterbrook from the Seventh, Thapar from the Sixth, and Agee from the Fourth, have openly called upon this Court to resolve the conflict.

After rightly characterizing the circuit conflict as "intolerable" in its own petition (U.S. v. Wheeler) and having that petition denied by the Court, the government subsequently has opposed a number of petitons raising similar versions of the same question, suggesting that the denial of its own petition indicates that the Court is not interested in resolving the conflict, and arguing that the particular cases offer poor vehicles for deciding this question and resolving the circuit split. The government's suggestion regarding the Court's disinterest is implausible. Its argument that prior cases are poor

vehicles for resolving this entrenched conflict are inapplicable to Petitioner's circumstances. This case presents the rare and exact issues that the government itself has previously recognized as cognizable under §2241 via §2255(e). The petition should be granted.

STATEMENT OF THE CASE

A. Statement Of Relevant Facts And The Government's Official Version Of Jaime Estrada's Kidnapping, Confinement, And Death.

On or about June 27, 1996, around 8:30pm, Jaime Estrada was kidnapped from a parking lot in Milwaukee Wisconsin by Luis Alberto Carreno-Duarte, Mirna Lechuga, and two other individuals. Subsequently, Estrada was transported to the Northside of Chicago to an apartment located on Moody Street.

Jaime Estrada's shooting

On or about the morning of June 28, 1996, Blanca Irene Carreno-Duarte ("Blanca"), sister of Luis Alberto Carreno-Duarte ("Beto"), and Beto's girl-friend Estela Barraza-Nevarez ("Estela"), arrived at the apartment at 2342 Moody Street, in Chcago. In the apartment, Blanca observed Beto on a bed in the living room with a gun. Blanca also observed a male individual who was on a sofa in the living room with his hands bound. Blanca understood that the bound individual was being held captive by Beto and others, and later acknowledged that she understood, based on the circumstances, that the individual was being held captive for ransom of some kind.

After observing the kidnapped individual and Beto in the living room, Blanca and Estela went into a bedroom in the Moody apartment. A short time after entering the bedroom, Blanca heard a loud noise. Blanca (and Estela) returned to the living room where she observed Beto standing with the gun. Blanca observed Estrada with his hands still bound, sitting on the sofa holding his

stomach and moaning. Beto indicated to Blanca (and Estela) that he (accidentally) shot Estrada and instructed her and Estela to leave the apartment.

On a later date, Blanca returned to the apartment at 2342 N. Moody Street. While at the apartment, Blanca observed various bloodstains from the June, 28, 1996 shooting of Estrada. Knowing that the bloodstains were evidence of Estrada's kidnapping and shooting, and with the intent to conceal the evidence, Blanca attempted to clean the blood from the aparment and sofa in the living room where Estrada had been sitting with his hands bound.

The morning of June 29, 1996, Luis Alberto Carreno-Duarte released Jaime Estrada. Seventeen (17) days later (on July 16, 1996), Jaime Estrada died from pneumonia, a complication resulting from an infection due to the gun wound (inflicted by Beto) and subsequent thirty-hour delay in receiving treatment.

Petitioner was arrested the night of June 28, 1996, while accompanying his cousins Miguel Torres and Salome Varela on what Petitioner believed to be a short trip to pick up a car.

B. Factual Statement

In 1996, Petitioner and three codefendants were charged in an eleven count superseding indictment with conspiracy to commit racketeering, in violation of 18 U.S.C. §1962(d) (count one); hostage taking, in violation of 18 U.S.C. §1203(a), and §2 (counts two through five); conspiracy to commit kidnapping, in violation of 18 U.S.C. §1201(c) (count six); kidnapping in violation of 18 U.S.C. §1201(a), and §2 (count seven); simple assault on an agent, in violation of 18 U.S.C. §111(a), and §2 (count eight); and three counts of carrying or using a firearm during or in relation to the now-nonexistent "crimes of violence" charged on counts six, seven, and eight, in violation of 18 U.S.C. §924(c)(3)(A), and §2 (counts nine through eleven). Petitioner and codefendants were convicted on all

counts after a jury trial.

Though none of Petitioner's offenses of conviction required the imposition of a mandatory minimum of life imprisonment, then-existing precedent allowed the sentencing court to find, over Petitioner's objection, that the only punishment available for counts five and seven was a "death or life" sentence as mandated by Sections 1201(a) and 1203(a) when the defendant's offense of conviction resulted in death. Based on the above finding, the sentencing court held that under relevant conduct it was also required to impose life sentences on counts 1, 2, 3, 4, and 6. Thus, Petitioner was sentenced to seven terms of life imprisonment for counts one through seven; ten years for count eight, also to be served concurrently with the life sentences; and forty-five years for counts nine through eleven, to be served consecutively to the life sentences.

The Seventh Circuit affirmed petitioner's convictions and sentence. **Torres v. United States**, 191 F.3d 799 (7th Cir. 1999), and this Court denied certiorari. **Torres v. United States**, 120 S.Ct. 1218 (2000). Subsequently, an initial petition for relief under 28 U.S.C. §2255 was denied by the district court. **Ruiz v. United States**, 447 F.Supp.2d 921 (N.D. Ill. 2006). The Seventh Circuit denied COA. This Court denied certiorari on June 4, 2007.

C. Petitioner's 28 U.S.C. §2241.

Petitioner filed his present pro se habeas corpus petition under 28 U.S.C. §2241 via §2255(e) seeking to challenge the validity of his convictions, and erroneous mandatory sentence of life plus forty-five consecutive years, under this Court's intervening statutory-interpretation decisions in **Burrage v. United States**, 134 S.Ct. 881 (2014), and **Rosemond v. United States**, 134 S.Ct. 1240 (2014).

D. Petitioner's 28 U.S.C.§2255(h)(2), Johnson/Davis Claims.

Contemporaneous with Petitioner's §2241 petition, the Seventh Circuit granted Petitioner permission to file a successive §2255 petition to challenge his §924(c) convictions under this Court's intervening constitutional decision in **Johnson v. United States**, 576 U.S. 591 (2015). See **Ruiz v. United States**, 2016 U.S. App. LEXIS 12413 (7th Cir. 2016).

The district court declined to review Petitioner's Johnson claim on the merits and denied that petition, holding that:

> even if Petitioners were correct as to the application of the Supreme Court's holding in Johnson, any resulting constitutional change in the law pertaining to their sentences pursuant to section 924(c) would have no effect on their ultimate sentences, as they do not contest their life sentences under the other statutory provisions. Accordingly, . . . any error would be harmless.

See, **Ruiz v. United States**, 2017 U.S. Dist. LEXIS 215527 at *9 (N.D. 2017).

The Seventh Circuit granted a certificate of appealability. See, **Ruiz v. United States**, No. 18-1114, Order of August 23, 2018 (7th Cir.). Subsequently, a divided panel from the Seventh Circuit affirmed the district court's judgment and also declined to review Petitioner's Johnson/Davis claim on the merits, stating that;

> Absent some extraordinary and unexpected change in the law with retroactive application, Ruiz's seven life sentences will remain in place. Vacating Ruiz's §924(c) convictions (assuming that his Davis claim has merit) does nothing to change that unfortunate reality for Ruiz.

See, **Ruiz, 990 F.3d at 1035.**

A petition for rehearing and rehearing en banc was filed and the majority of the circuit judges voted to deny rehearing en banc. Circuit Judge Wood wrote a dissenting opinion which was joined by Judges Rovner and Hamilton. See **Ruiz v. United States**, 5 F.4th 839 (7th Cir. 2021).

A petition for a writ of certiorari regarding this case is currently pending before this Court. See, **Ruiz v. United States**, No. 21-6200 (Oct. 29, 2021).

I. Petitioner's Claims Under Burrage

1. In **Burrage** this Court held that "[b]ecause the 'death results' enhancement increased the minimum and maximum sentences to which Burrage was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt." The Court further held that the phrase "'[r]esults from' imposes, in other words, a requirement of actual causality. 'In the usual course,' this requires proof 'that the harm would not have occurred' in the absence of --that is, but-for --the defendant's conduct." **Burrage**, 134 S.Ct. at 887-88 (quoting **University of Tex. Southern Medical Center v. Nassar**, 133 S.Ct. 2217 (2013)).

2. In his 28 U.S.C. §2241 petition, Petitioner was arguing that; (1) Under **Burrage**, the resultant-death enhancement of Sections 1201(a) and 1203(a) is an element of an aggravated offense that; (2) requires proof of but-for causation and must be proven beyond a reasonable doubt, and submitted to a jury for its verdict; and (3) consistent with **Burrage**, but-for causation is an essential element of felony murder under Illinois law.

3. The district court rejected Petitioner's argument and denied his §2241 petition. Yet, it acknowledged that Seventh Circuit precedent allows a federal prisoner to proceed under §2241 when the remedy under §2255 is "inadequate or ineffective to test the legality of his detention." Pet. App. at 6a (quoting §2255(e)). The court explained that;

> To satisfy §2255(e), a prisoner must show the following things; (1) he is seeking correction of a fundamental defect in his conviction or sentence (such as a claim of actual innocence); (2) his petition is based on a new rule of statutory law not yet established at the time he filed his first §2255 motion; (3) the new rule applies retroactively; and (4) he either raised the issue on direct appeal or in a §2255 motion or the issue was foreclosed by controlling precedent at the time.

Pet. App. at 6a.

4. Nonetheless, the district court disregarded Petitioner's reliance on this Court's holding in **Burrage**, as well as Seventh Circuit binding precedent in **Krieger v. United States**, 842 F.3d 490 (7th Cir. 2016), to support his claims. In **Krieger**, the Seventh Circuit held that "[t]he **Burrage** holding is not about who decides a given question (judge or jury) or what the burden of proof is (preponderance versus proof beyond a reasonable doubt). It is rather about what must be proved." **Id.** at 499-500. It further held that "the **Burrage** decision narrowed the scope of the behavior subject to punishment for 'death resulting' by requiring that the [crime] at issue was the but-for cause of the victim's death rather than merely a contributing cause of death," and thus "the law supports a finding that **Burrage** applied a new substantive rule that must be applied on collateral review." Id. at 500.

5. However, rather than relying on the Seventh Circuit's binding precedent in **Krieger**, the district court concluded that the Seventh Circuit dicta in **Camacho v. English**, 872 F.3d 611, 614(7th Cir. 2017) was dispositive on both of Petitioner's issues under **Burrage** because "the court of appeals recognized in **Camacho** that **Burrage** did not create a new rule of statutory interpretation that a jury must decide any fact that increases the minimum and maximum sentences. Rather, that'concept . . . flows from **Apprendi** . . ., and **Alleyne**; . . . **Burrage** merely applied it to the Controlled Substances Act.'" Id. Pet. App. at 7a (quoting **Camacho**, at 614)(internal citations omitted).

6. Therefore, relying on **Camacho's** dicta rather than binding circuit precedent, the district court rejected Petitioner's argument that, under **Burrage**, the resultant death enhancement of 18 U.S.C. §1201(a) and §1203(a) establishes a seperate element that differentiates the offenses of simple kidnapping and

aggravated kidnapping resulting in death under §1201(a), as well as simple hostage taking and aggravated hostage taking resulting in death under §1203(a).

7. Regarding this Court's holding in Burrage that death "results from" language in §841 requires proof of but-for causation, the district court acknowledged it applies retroactively but rejected Petitioner's claim that this holding equally applies to the "if the death of any person results" language in 18 U.S.C. Sections 1201(a) and 1203(a). In rejecting his claim, the court gave three reasons. First, it stated that Petitioner "does not cite any portion of the sentencing transcript in which the sentencing court rejected a view that §1201(a) and §1203(a) require proof of 'but-for' causation." Pet. App. at 7a. Second, he "identifies no reason why he could not have raised a sufficiency of the evidence challenge to the court's finding on direct appeal or in a motion under §2255." Id. And third, "[h]e cited no authority that would have foreclosed such a claim at the time." Id.

8. First, the district court failed to note that in his §2241 petition, Petitioner did cite, and included as an attachment, a portion of the sentencing transcripts showing that he objected to the applicability of the resultant death enhancement. See, Ruiz v. Williams, No. 16-cr-372, Amended Petition at pages 18-24 (W.D. Wis.), and Ruiz v. Williams, Appeal No. 18-1202 at pages 11-15 (quoting sentencing transcripts at pages 3679-3686). It further failed to note that Petitioner's objection was based on the death "results from" language in Sections 1201(a) and 1203(a), and that this Court's holding in Burrage, and the Seventh Circuit holding in Krieger, establishes that; (1) death "resulting from" either of Sections 1201(a) or 1203(a) is an element of an aggravated offense that; (2) requires proof of but-for causation and must be proven beyond a reasonable doubt, and submitted to a jury for its verdict.

9. Consistent with Petitioner's argument, the government has acknowledged that §1201(a) (which is analogous to §1203(a)), is a divisible statute that proscribes two different crimes, simple kidnapping and kidnapping resulting in death. The government also acknowledged that post-Burrage, a death "resulting from" a kidnapping is an element of the aggravated offense that must be proven beyond a reasonable doubt, and submitted to a jury for its verdict. See **Ruiz v. United States**, No. 18-1114 (7th Cir.), Government's Brief ("Gv. Br.") at *15 (citing **Burrage**, 571 U.S. at 210).

10. The government also explained that, "Congress's use of the term 'results' in §1201(a) requires causal connection between the kidnapping and the death. The Supreme Court in **Burrage** defined 'results' as something that '[a]rise[s] as an effect, issue, or outcome from some action, process, or design.'"Gv. Br., at *19 (quoting **Burrage**, 571 U.S. at 210-11), See also footnote 10, "The Eighth Circuit held in **United States v. Ross**, No. 18-2800, 2020 WL 4590124 at *4-5 (8th Cir. 2020), that aggravated kidnapping resulting in death . . . [under] §1201(a) requires a but-for connection between the kidnapping and death." Id. at *19.

11. Second, the district court erroneously claimed that Petitioner "identifies no reason why he could not have raised a sufficiency of the evidence challenge to the court's finding on direct appeal or in a motion under 28 U.S.C. §2255." Pet. App. at 7a. In making this claim, the district court disregarded that at the outset of its opinion it acknowledged that in his first §2255, Petitioner did argue that "the evidence against [him] was insufficient on all counts." Pet. App. at 5a. See also, **Ruiz v. United States**, 447 F.Supp.2d 921, 928 (N.D. Ill. 2006)("Ruiz first asserts that the evidence presented against him at trial is as a general matter insufficient as to all counts.").

12. And third, the district court disregarded Petitioner's reliance on Krieger v. United States, 842 F.3d 490, 504-05 (7th Cir. 2016), to establish that when he was sentenced (in 1998), and subsequently on direct review, neither Supreme Court nor then-existing circuit precedent even suggested that the death "results from" language of Section 1201(a) and 1203(a) require proof of but-for cousation. In fact, the Krieger court made clear that "[b]efore Burrage, the [sentencing] court had no reason to place 'but-for causation' under a magnifying glass and see it as the linguistic key to a determination of criminal liability for a death." Id., at 504. Thus, at the time of sentencing, the sentencing court"had no reason to know that it must make a finding of but-for causation, because it had neither the guidance of [Krieger] nor Burrage. Id., at 505.

13. Most importantly, the district court failed to note that Petitioner was neither charged nor convicted of the aggravated offenses of kidnapping and/or hostage taking resulting in death. Though the language in counts 5 and 7 (same language used on count 6) of Petitioner's superseding indictment did mention that the death of Jaime Estrada resulted, it did not establish the substantive offenses of kidnapping and/or hostage taking resulting in death. In fact, just a month after the superseding indictment was filed (several months before Petitioner's trial), the government withdrew (BY MOTION) its intent to pursue the capital offenses of kidnapping and/or hostage taking resulting in death and their attendant mandatory "death or life" sentences. See, Varela etc., v. United States, No 96-CR-407, motion filed on or about May 23, 1997. Significantly, a "death or life" is mandated under 18 U.S.C. §3591(a)(2)(A)-(D) if, and only if, the defendant was prosecuted and convicted of the aggravated offenses of kidnapping and/or hostage taking resulting in death. Of course, that did not occur here.

14. Furthermore, both the government and the Seventh Circuit Court of Appeals has acknowledged that the jury did not find Petitioner guilty of the aggravated offenses of kidnapping resulting in death. See, **Ruiz v. United States**, No. 18-1114, Gv. Br. at *16 ("As defendant notes . . ., his trial occurred prior to **Alleyne v. United States**, --- U.S. ---, 133 S.Ct. 2151 (2013), meaning that the jury was not instructed on the death-results element of §1201(A).") And at *17 ("the jury was not instructed on the aggravated offense" of kidnapping resulting in death)(emphasis added). See also, **Ruiz v. United States**, 990 F.3d 1025, 1040-41 (7th Cir. 2021)(Wood, J., dissenting)("as the majority acknowledges, . . . the jury expressly found only the predicate elements of simple kidnapping beyond a reasonable doubt in its verdict . . . ").

15. In rejecting Petitioner's claims, the district court failed to recognize that even assuming that there were some kind of procedural default precluding Petitioner from bringing his claims under **Burrage** (as well as under **Rosemond**), this Court's precedent dictates that "[w]here a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' . . . or that he is 'actually innocent.'" **Bousley v. United States**, 523 U.S. 614, 622 (1998)(internal citations omitted).

16. In **Bousley**, this Court considered whether **Teague** precluded a habeas petitioner from seeking relief under **Bailey v. United States**, 516 U.S. 137 (1995), which held that §924(c)(1)'s "use" prong requires the government to show "active employment of the firearm." The Court held that the claim was not "Teague-barred" because **Teague** is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress." Id., at 620. Thus, **Bousley** made clear that "decisions from this Court holding that a

substantive federal criminal statute does not reach certain conduct, like decisions placing conduct 'beyond the power of the criminal law-making authority to proscribe,' . . . necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" Id., at 620 (quoting **Davis v. United States**, 417 U.S. 333, 346 (1974))(internal citations omitted).

17. Additionally, this Court has considered it "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application of relevant law." See, **Boumediene v. Bush**, 553 U.S. 723, 779 (2008)(citation and internal marks omitted), and **Montgomery v. Louisiana**, 136 S.Ct. 718, 730-31 (2016)("A conviction or sentence in violation of a substantive rule [as here, Burrage and Rosemond] is not just erroneous but contrary to law, and as a result, void."); see also **Cross v. United States**, 892 F.3d 288, 294-95 (7th Cir, 2018)("failure to consider [a] defaulted claim will result in a miscarriage of justice.")(quoting **Johnson v. Loftus**, 518 F.3d 453, 455-56 (7th Cir. 2008)). A "miscarriage of justice," of course, is what a section 2241 petitioner must show in order to satisfy the third **Davenport** factor. See **Chazen v. Marske**, 938 F.3d 851, 856 (7th Cir. 2019)("we have held that a defendant sentenced in error as an armed career criminal satisfies the 'miscarriage of justice' requirement.") (quoting **Light**, 761 F.3d at 813).

18. In sum, the district court disregarded all of the above and further held that, even "assum[ing] that [Petitioner] could not have raised this issue before, the court of appeals stated in **Camacho** that it was 'not persuaded that Burrage's 'but-for' causation requirement applies to 18 U.S.C. §1201(a).' . . . That is because §841 applies to a death that results from a crime, but §1201(a)

applies "if the death of any person results.' Because 'the specific cause of death is immaterial [under §1201(a)] . . . , but-for causation is incompatible with the statutory goal of §1201(a).'" Pet. App. at 7a (quoting Camacho at 614) (internal citation omitted).

Without any consideration of Petitioner's claim on the merits, the court below summarily affirmed. Pet. App. at 2a.

B. Felony Murder And Burrage's But-For Causation Standard.

In reference to Petitioner's claim that "but-for" causation is an essential element of felony murder under Illinois law, the district court held that Burrage "has nothing to do with the elements of any crime under Illinois law." According to the district court, "[i]f the trial court erred in instructing the jury regarding the elements of a state law crime, that was an issue that [Petitioner] could have raised at the time. Burrage did not and could not have changed the scope of a state law crime. Thus, this claim fails, both because it is not based on a new rule of federal statutory law and because [Petitioner] could have raised the claim on direct appeal." Pet. App. at 8a.

The court below agreed with its lower court and without consideration of Petitioner's claims on the merits, summarily affirmed its judgment. Pet. App. at 2a-3a.

II. Petitioner's Claims Under Rosemond

1. In his §2241 petition, Petitioner was arguing that this Court's intervening statutory interpretation in Rosemond v. United States, 134 S.Ct. 1240 (2014), establishes that; (1) he is actually innocent of aiding and abetting Jaime Estrada's kidnapping and/or hostage taking; and; (2) he is actually innocent of aiding and abetting the use or carry of a firearm during or in relation

to three now-nonexistent crimes of violence (conspiracy to commit kidnapping, kidnapping, and misdemeanor simple assault on an agent).

2. Though the district court acknowledged that Rosemond applies retroactively on collateral review, it failed to review whether, in light of Rosemond, Petitioner can show that he is actually innocent of the above crimes. Relying on Montana v. Cross, 829 F.3d 775, 783-84 (7th Cir. 2016), and United States v. Woods, 148 F.3d 843 (7th Cir. 1998), the lower court rejected Petitioner's argument that his Rosemond claims were not available on direct review. It further rejected Petitioner's argument that this Court's holding in Bousley v. United States, 523 U.S. 614, 622 (1998), establishes that his claims of actual (factual) innocence under Rosemond were not subject to procedural default.

2. In rejecting his claim, the lower court held that "there is no 'actual innocence' exception in the context of a §2241 petitioner's failure to raise an available claim earlier." Pet. App. at 9a. According to the lower court, "a §2241 petitioner must show both actual innocence (or some other 'fundamental defect') and that he was unable to bring his claim on a §2255 motion." Id., (citations omitted). It further held that this Court's holding in "Bousley v. United States, 523 U.S. 614, 622 (1998), relates to a §2254 petition, which has a different standard." Id.

4. The court below agreed with its lower court's judgement and concluded that Petitioner "was not foreclosed from raising a Rosemond-type argument at the time of his direct appeal or first §2255 motion." Pet. App. at 3a. Thus, without any consideration of Petitioner's Rosemond claims on the merits, the court below summarily affirmed. Id.

5. Both the district and circuit courts' reliance on Montana and Woods to

"establish" prior availability of a Rosemond-type argument in the Seventh Circuit is totally misplaced. The Woods holding not only fails to make a Rosemond-type argument available, the Woods court itself points to the disagreement among the circuits regarding the degree or type of knowledge necessary to find a defendant guilty of aiding and abetting the use of a firearm during the commission of a violent felony.

6. In affirming Woods' conviction, the appellate court noted that, "Woods concede[d] that based on [his codefendant's] testimony the jury could have concluded that [he] knew a gun would be carried into the bank, but contends that he had no knowledge that it would be 'used' e.g. brandish[ed] or display[ed] by [his codefendants]. See, Woods, 148 F.3d at 846. The court also noted that "Woods also argue[d] that the govenment had to prove that he had 'actual' knowledge that the gun would be brandished, and failed to do so." Id. And further, it noted that the "government suggest[ed] that constructive knowledge [was] sufficient to convict, but that in any event, it proved [that] Woods had actual knowledge." Id. (citing United States v. Spinney, 65 F.3d 231, 237 (1st Cir. 1995)(stating that "constructive knowledge that weapon would be used could be sufficient" to support an aiding and abetting conviction)(emphasis added); and United States v. Dinkane, 17 F.3d 1192, 1197 (9th Cir. 1992)(stating that "government must prove that defendant had actual knowledge prior to robbery that weapon would be used in robbery")(emphasis added)).

7. The Woods' court then firmly stated, "[w]e need not take a position on either of these legal disputes because the government presented evidence that Woods had actual knowledge that [his codefendant] would brandish a gun. Thus, even conceding the defendant's view of the law, Woods has not met his 'heavy burden' of showing insufficiency of the evidence." Id. (citing United States v.

Alexander, 135 F.3d 470, 474 (7th Cir. 1998)).

8. Therefore, even if there were an "opening" for Petitioner to make a "Rosemond-like argument" under Woods at the time he was on direct review, it is indisputable that the Woods holding did not establish (as this Court did in Rosemond) that in order to satisfy the "intent to facilitate" element of aiding and abetting, the government must prove that the defendant actively participated in the underlying crime with full knowledge of the circumstances constituting the charged offense. Rosemond, 134 S.Ct. at

9. In fact, the Woods holding establishes that Petitioner's Rosemond claims were foreclosed by Seventh Circuit precedent in United States v. Petty, 132 F.3d 373, 377 (7th Cir. 1997)(holding that to convict a defendant of aiding and abetting, "'the Government must prove the essential elements of aiding and abetting: [1] knowledge of the crime, [2] intent to further the crime, and [3] some act of help by the defendant.'" Woods, 148 F.3d at 846 (quoting Petty, 132 F.3d at 377).

10. Indeed, neither Woods nor Petty established (as this Court did in Rosemond) that in order to satisfy the "intent to facilitate" element of aiding and abetting a crime's commission, the government must prove that the defendant actively participated in the underlying crime with advance knowledge extending to the entire charged offense. Rosemond 134 S.Ct. at

The court below erroneously affirmed the district court's denial of Petitioner's §2241 petition, without reviewing his Rosemond claims on the merits.

REASONS FOR GRANTING THE WRIT

III. The Courts of Appeals Are Deeply Divided Over The Question Presented

1. Review is merited to resolve the question presented here, put an end to the deeply entrenched circuit conflict, and provide the lower courts with guidance to determine in which circumstances a federal prisoner who previously filed an unsuccessful collateral attack under §2255, is entitled to redress the legality of his conviction or sentence under 28 U.S.C. §2241 via §2255(e) saving clause.

2. As the Solicitor General has explained, an "entrenched conflict exists in the courts of appeals on whether the saving clause allows a defendant who has been denied Section 2255 relief to challenge his conviction or sentence based on an intervening decision of statutory interpretation." U.S. Pet. at 23, United States v. Wheeler, 18-420 (Oct. 3, 2018).

A. Courts Of Appeals Judges Have Called For This Court's Review.

1. Courts of appeals judges have repeatedly called attention to the importance of this question and asked this Court's guidance on the scope of available relief. Judge Easterbrook of the Seventh Circuit has called into question whether his own circuit's interpretation of §2255(e) is appropriate by making the following statement: "I believe that in re Davenport, 147 F.3d 605 (7th Cir. 1998), misunderstands 28 U.S.C. §2255(e). Davenport and its successors such as Brown and Webster have not persuaded other circuits, . . . and the Supreme Court needs to decide whether §2255(e) permits litigation of this kind." Camacho v. English, 872 F.3d 811, 815 (7th Cir. 2017)(Easterbrook J., concuring)(internal citations omitted).

2. Judge Agee, dissenting from the Fourth Circuit's denial of rehearing in **Wheeler**, urged that questions regarding the scope of the saving clause are of "significant national importance and are best considered by the Supreme Court at the earliest possible date." **United States v. Wheeler**, 834 F.App'x 892, 893 (4th Cir. 2018). The action of this Court, he said, could "resolve the conflict separating the circuit[s] . . . nationwide" so that "federal courts, Congress, the Bar, and the public will have benefit of clear guidance and consistent results in this important area of law." **Id.**, at 894.

3. Judge Thapar of the Sixth Circuit urged this Court to "step in," noting that "sooner may be better than later" because the "circuits are already split" and the "rift is unlikely to close on its own." **Wright v. Spaulding**, 939 F.3d 695, 710 (6th Cir. 2019). He emphasized that "so long as [the split] lasts, the vagaries of the prison lottery will dictate how much post-conviction review a prisoner gets," because, for example, a "federal inmate in Tennessee can bring claims" under the saving clause "that would be thrown out were he assigned to neighboring Alabama." **Id.** As a result, he said, "[l]ike cases are not treated alike" under the status quo. **Id.**

4. Most recently, concurring in the denial of a petition for rehearing en banc, Judge Fletcher of the Ninth Circuit made the following statement; "We agree with our dissenting colleague's implicit argument that the Supreme Court should grant certiorari in this or in some other case to resolve the circuit split." **Allen v. Ives**, 976 F.3d 863, 868 (9th Cir. 2020)(Fletcher, J., concurring in denial of a petition for rehearing en banc).

B. The Government Has Repeatedly Recognized The Appropriateness Of This Court's Review.

1. The government has also recognized that this issue calls for this Court's review--even after the government changed its position and adopted the narrow Tenth and Eleventh Circut approach as its own. See, e.g., BIO, **McCarthan v. Collins**, 138 S.Ct. 502 (2017)(No. 17-85), 2017 WL 4947338, at *25 ("[G]iven the significance of the issue . . . this Court's review would be warranted in an appropreate case."). In opposing petitions for certiorari, the government consistently has limited itself to arguments that particular cases offer poor vehicles for the resolution of this question. See, e.g., BIO, **Walker v. English**, 140 S.Ct. 910 (2020)(No. 19-52), 2019 WL 4750035, at *14 ("[N]otwithstanding that circuit conflict and its importance . . ."); accord BIO, **Higgs v. Wilson**, 140 S.Ct. 934 (2020)(No.19-401), 2019 WL 6910416; BIO, **Jones v. Underwood**, 140 S.Ct. 859 (2020)(No. 18-9495).

2. In asking for this Court's review in **Wheeler**, the government highlighted how the disarray among the circuits harms its own interest in uniform sentencing, calling this "an issue of great significance." **Wheeler** Pet. at *13. As the government specifically explained, "[t]he disparate treatment of identical claims is particularly problematic because habeas petitions are filed in a prisoner's district of confinement." Id. at *25. This means that "the cognizability of the same prisoner's claim may depend on where he is housed by the Bureau of Prisons and may change if the prisoner is transferred." Id. See also **Jennifer L. Case, Kaleidoscopic Chaos: Understanding the Circuit's Various Interpretations of §2255's Saving Clause**, 45 Mem. L. Rev. at 15; **Brandon Hasbrouck, Saving Justice: Why Sentencing Errors Fall Within the Saving Clause, 28 U.S.C. §2255(e)**, 108 Geo. L.J. 287, 293 (2019).

IV. This Case Provides An Excellent Vehicle For Resolving This Recurring Question.

1. The circuit split is particularly problematic. Most importantly, it concerns whether an individual may remain in prison for years, decades, or potentially even his natural life because of a concededly incorrect interpretation of the law. These are the circumstances that Petitioner is facing here. Without this Court's intervention, he will spend the rest of his natural life in prison for two crimes for which he was never convicted, even though recent statutory-interpretation cases from this Court clearly establish that; (1) he is actually innocent of those crimes for which he was erroneously sentenced to a mandatory minimum of life imprisonment; (2) he was erroneously sentenced to life in prison on one count for which the statutory maximum was twenty-years; and (3) in addition to the erroneous mandatory and non-mandatory life sentences, he was convicted and sentenced to another mandatory and consecutive forty-five years in prison for three now-nonexistent "crimes of violence."

2. Indeed, this case presents a far better vehicle for review than other cases that have been brought to the Court. While the Court has denied certiorari in cases where significant mootness and waiver issues were present, none exist here. Particularly in light of the calls for intervention from all sides, and the growing disagreement, the court should grant certiorari in this case.

V. The Decision Below Conflicts With Both This Court and Seventh Circuit Precedents.

1. Originally, under Seventh Circuit law, a federal prisoner was entitled to relief pursuant to 28 U.S.C. §2241 via §2255(e) when he was able to satisfy the following three-part test; (1) that he was not relying on a constitutional case, but a new statutory interpretation from this Court that he could not have invoked by means of a second or successive §2255 motion; (2) that the new case

applied retroactively on collateral review and could not have been invoked in his first §2255 proceedings; and (3) that the alleged error was grave enough to be deemed a miscarriage of justice. See **Brown v. Rios**, 696 F.3d 638, 640 (7th Cir. 2012), and in re **Davenport**, 147 F.3d 605, 610-12 (7th Cir. 1998).

2. However, the lack of guidance from this Court has permitted the Seventh Circuit to drift from their original standard set forth in **Davenport** regarding §2255(e) and its requirements. This problem was recently articulated by then-Judge Barrett in her concurring opinion in **Chazen v. Marske**, 938 F.3d 851, 863-66 (7th Cir. 2019)(Barrett, J., concurring). In **Chazen**, Judge Barrett explained that:

> **Davenport** holds that §2255's failure to provide a federal prisoner "any opportunity for judicial rectification of so fundamental a defect renders §2255 "inadequate" or "ineffective" for purposes of §2255(e)'s saving clause. 147 F.3d at 611. Thus a prisoner in that situation can seek a writ of habeas corpus under §2255. **Id.**
>
> **Davenport**'s test for "inadequacy" and "ineffectiveness" largely tracks §2255(h)(2). That makes sense. The "structural problem" in §2255 is that §2255(h)(2) doesn't authorize second or successive motions based on statutory claims. See **Poe v. LaRiva**, 834 F.3d 707, 773 (7th Cir. 2016)("Where **Davenport** recognized a structural problem in §2255(h) is in the fact that it did not permit a successive petition for new rules of statutory law made retroactive by the Supreme Court."). **Davenport** fixes that problem by effectively giving such prisoner the relief that they would have had if §2255(h)(2) had included them.

Id., at 938 F.3d at 864.

3. Most recently, in **Guenther v. Marske**, 997 F.3d 335, 341 n.3 (7th Cir. 2021), another panel from the Seventh Circuit also recognized that their case-law "ha[s] not been consistent about whether the change in the law must come from the Supreme Court or can come from a court of appeals. . . . We have used at least three different standards, asking whether the petitioner relies on (1) a 'new rule' that 'could not have been invoked' in earlier proceedings; (2) a

new decision that could not be invoked at the §2255 stage; or (3) a 'newly decided case of statutory interpretation' and the claim was 'foreclosed by binding precedent' in the circuit of conviction on direct appeal and previously on collateral review." **Id.**, at 341 n.3 (quoting **Chazen**, 938 F.3d at 861-62).

4. It is indisputable that the first two standards are clearly met by Petitioner. It is also undeniable that he satifies the third and most demanding of these three standards. In Petitioner's §2241 petiton; (1) he was relying on two new rules (cases) of statutory interpretation, **Burrage** and **Rosemond**, so he could not have invoked them by means of second or successive §2255(h)(2); (2) **Burrage** and **Rosemond** were decided by this Court thirteen years after Petitioner filed his first §2255 motion, so he could not have invoked them in his initial §2255 proceedings, and both cases apply retroactively on collateral review. Additionally, Seventh Circuit precedent establishes that Peititoner's claims under **Burrage** and **Rosemond** were not available for him on direct review. See Pet. Part I, at 6-17, and Part II, at 2-10 above.

Indeed, the court below failed to obey both its own and this Court's precedent and summarily affirmed an erroneous judgment without reviewing Petitioner's claims on the merits.

A. Petitoner's Mandatory and Non-Mandatory Life, Plus Forty-Five Years Consecutive Sentences, Constitute A Miscarriage Of Justice.

Without the erroneous imposition of the "mandatory" and "non-mandatory" life sentences, which were previously imposed based upon two crimes for which Petitoner was neither charged nor convicted, if he were resentenced today, Petitioner could receive a maximum sentence of 210 months of imprisonment. Petitioner has been in prison for the past 307 months, almost 100 months over his 210 month maximum recommended by the applicable guidelines for his offense of

conviction.

The additional sentence of forty-five years to be served consecutively for three now-nonexistent crimes, is another violation of the most valuable principals under the Fifth and Sixth Amendments of the United States Constitution. The Fifth Amendment establishes that "No person shall be . . . deprived of life, liberty, or property without due process of law." Id. The Sixth Amendment establishes that "in all criminal prosecutions, the accused shall be . . . informed of the nature and cause of the accusation." Id.

Therefore, leaving in place Petitioner's "living death" sentence (life without any possibility of parole), based upon crimes for which this Court's holdings in **Burrage** and **Rosemond** clearly establish that he is actually innocent, cannot, and should not, be considered anything other than a complete miscarriage of justice.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted

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