No. 22A412

IN THE SUPREME COURT OF THE UNITED STATES

David W Linder,

Petitioner,

-vs-

B. Lammer, Warden

Respondent.

Appendix

David W Linder
25913-048
P O B 33
Federal Institute
Terre Haute, IN 47808

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 15, 2022
Decided June 17, 2022

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-2812

DAVID WILLIAM LINDER,
Petitioner-Appellant,

v.

BRIAN LAMMER,
Respondent-Appellee.

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

No. 1:15-cv-01055-SLD

Sara Darrow,
Chief Judge.

ORDER

David Linder appeals the district court's denial of his petition under 28 U.S.C. § 2241 and the saving clause of §2255(e). We summarily affirm the judgment.

Background

In 2005, a jury in the Eastern District of Virginia convicted Linder on 27 counts for his role in unlawful drug distribution. No. 2:04-CR-00191 (E.D. Va. Feb. 15, 2005). Relevant here, Linder was convicted of one count of conspiracy to distribute 5-MeO-DiPT (commonly called "Foxy"), and other controlled-substance analogues, 21 U.S.C. §§ 841(a)(1), (b)(1)(C), 802(32), 813, 846. The jury also found that a death resulted from

the drugs that Linder distributed or caused to be distributed. That finding, along with Linder's prior felony drug conviction, mandated a life sentence.

On direct appeal, the Fourth Circuit affirmed. *United States v. Linder*, 200 F. App'x 186 (4th Cir. 2006). Linder unsuccessfully moved to vacate his sentence under 28 U.S.C. § 2255. No. 2:07-cv-00581-JBF (E.D. Va. 2008) (denying motion); 329 F. App'x 489 (4th Cir. 2009) (denying certificate of appealability).

Today's Saving-Clause Petition

Linder now seeks a writ of habeas corpus under 28 U.S.C. §§ 2255(e) and 2241. No. 1:15-cv-01055-SLD (C.D. Ill. Nov. 2, 2017). (Currently, Linder is imprisoned at FCI Terre Haute, in Indiana. When he filed this petition, however, he was at FCI Pekin, in Illinois.) Linder raises two claims:

> (1) Given *McFadden v. United States*, 576 U.S. 186 (2015), the jury was improperly instructed on the knowledge necessary for a controlled-substance-analogue conviction under § 841(a)(1); and
>
> (2) under *Burrage v. United States*, 571 U.S. 204 (2014), the jury instructions improperly permitted a resulting-in-death enhancement even if jurors did not conclude that the distributed substances were a but-for cause of the victim's death.

a. The *McFadden* Claim

The Illinois-based district court concluded that Linder's *McFadden* claim necessarily fails because his jury instructions satisfy the rule later announced in *McFadden*. For a conviction under § 841(a)(1), the government must prove "that the defendant knew he was dealing with a 'controlled substance.'" *McFadden*, 576 U.S. at 188–89. For an analogue conviction, there are two available paths: "When the substance is an analogue, the knowledge requirement is met if the defendant knew that the substance was controlled under the CSA or the Analogue Act, even if he did not know its identity," *or else* "if the defendant knew the specific features of the substance that make it a 'controlled substance analogue.'" *Id.* at 189. Only if the defendant knows neither of those two things does the government fail to establish this element.

Under that rule, there is no debatable claim here. Linder's jury instructions required the government to prove beyond a reasonable doubt that (1) "the defendant did know that some type of controlled substance analogue was distributed," *and* (2) "at the time of such distribution the defendant was familiar with the nature of the substance." And the instructions further explained, using the language of § 802(32), the characteristics that make a substance an analogue under the Act—it has a chemical structure that is substantially similar to the chemical structure of a controlled substance in schedule I, and it has a hallucinogenic effect on the central nervous system that is substantially similar to or greater than the effect of a controlled substance in schedule I. These instructions comport with *McFadden*'s requirements. There are no grounds for further review of this claim.

b. The *Burrage* Claim

Linder's *Burrage* claim is more complicated—but in any event, he proposes no plausible argument that it qualifies for saving-clause review. Under *Burrage*, the government must prove beyond a reasonable doubt that the substances were a but-for (or sufficient) cause of the victim's death. 571 U.S. at 210-16. The Supreme Court concluded that this requirement of but-for causation is evident from the plain language of § 841, which requires that death "results from" the use of the substance. In *Burrage* the trial court had erred by giving jurors an extra instruction that the government need only prove that the distributed drug had merely *contributed to* the cause of death.

We have said that in most if not all cases, simply repeating the statute's "results from" language will adequately alert jurors that but-for or sufficient causation is needed. *See, e.g., Harden v. United States*, 986 F.3d 701, 705–07 (7th Cir. 2021). But here the instructions added a potentially problematic overlay: "a finding by you that, but for the victim Phillip Conklin ingesting the charged controlled substance analogues distributed or caused to be distributed by the defendant, if you find the analogues were intended for human consumption, the victims would not have died, *satisfies this standard*." (Emphasis added.) Linder contends that this language was too permissive; jurors, he worries, could take it to mean that there are other ways to satisfy the standard, ways not involving but-for or sufficient causation.

But we need not resolve the merits of this argument, because § 2255(e) does not permit the petition to be "entertained" if Linder cannot show that an ordinary § 2255 motion and direct appeal would have been inadequate vehicles to contest the jury instructions. Specifically, Linder has failed to meet his burden of establishing that

Fourth Circuit precedent had foreclosed a *Burrage*-like argument on direct appeal or in his § 2255 proceeding. *See Montana v. Cross*, 829 F.3d 775, 783 (7th Cir. 2016) (saving clause requires previous foreclosure of argument). *Cf. Jones v. Hendrix*, No. 21-857, 2022 WL 1528372 (May 16, 2022) (granting certiorari to evaluate Eighth Circuit's stricter saving-clause test, which does not permit a petition based on new arguments about the meaning of a statute, even if those arguments were previously foreclosed).

We ordered the parties to submit position statements on whether Fourth Circuit precedent foreclosed a *Burrage*-like argument at any earlier stage of the case in the Eastern District of Virginia. In response, the government explains that it could not find any such Fourth Circuit case. And in *this* circuit a *Burrage*-like argument was available as early as 1992. *See Prevatte v. Merlak*, 865 F.3d 894, 898–99 (7th Cir. 2017). Meanwhile, at least one unpublished case from the Fourth Circuit suggests that but-for causation was required in that circuit as early as 2010: *See United States v. Schnippel*, 371 F. App'x 418, 419 (4th Cir. 2010) ("In order to establish beyond a reasonable doubt the final element of the offense, the Government must show that the victim's use of the heroin received from Schnippel was a but for cause of her death."). And *Schnippel* did not say that it was overruling any prior precedent that enabled a conviction on a lesser finding.

Linder counters that *United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994), definitively foreclosed the *Burrage* argument he now seeks to make, but this is mistaken. In *Patterson*, the Fourth Circuit considered whether the government was required to prove that an overdose death was "the intended or foreseeable result" of the drugs at issue. *Id.* at 145. In other words, *Patterson* asked whether the resulting-in-death enhancement requires the drugs to be a *proximate* cause, which is measured by foreseeability or intent; but-for causation, a separate concept, was not at issue. The Fourth Circuit concluded that proximate causation is not an element of the crime, reasoning that § 841(b)(1)(C) does not require a finding "that death resulting from the use of a drug distributed by a defendant was a reasonably foreseeable event." *Id.* This holding says nothing about but-for causation.

More than that, this 1994 holding matches the law in the federal courts of appeals today: the government need not prove that the drugs were the proximate cause of the death. *See Burrage*, 571 U.S. at 210 (explaining difference between "actual" and "legal cause (often called the 'proximate cause') of the result," and declining to decide whether jury must be instructed as to proximate cause); *United States v. Harden*, 893 F.3d 434, 447–48 (7th Cir. 2018) (citing *Patterson* and agreeing with every circuit to have considered the issue that § 841(b) does not require proof of proximate causation);

United States v. Alvarado, 816 F.3d 242, 249 (4th Cir. 2016) (opining that Fourth Circuit's pre-*Burrage* precedent on proximate cause "remains good law"). Indeed, the *Patterson* court declined to address specifically whether § 841(b)(1)(C) requires but-for causation or whether "there is an intervening or superseding cause exception to [its] application." *Patterson*, 38 F.3d at 146. The court concluded that the facts did not support any intervening or superseding cause in Patterson's case. In short, there is no colorable argument that *Patterson*'s holding on foreseeability and proximate causation foreclosed a *Burrage*-like claim about but-for causation.

Because Linder has not identified any Fourth Circuit decision foreclosing the *Burrage* argument he now seeks to make, he has failed to satisfy § 2255(e)'s saving clause. Under that statute, then, his request for habeas review in this circuit "shall not be entertained." 28 U.S.C. § 2255(e).

Finally, to the extent that Linder means to contest the sufficiency of the evidence supporting his conviction and sentence, that claim does not rely on any new statutory interpretation by judges. Indeed, Linder was free to raise that challenge at the time of his direct appeal.

Accordingly, we summarily affirm the district court's judgment. Linder has filed a motion to stay an evidentiary hearing he says is scheduled in the district court. We do not see that any proceedings are ongoing in the district court. In any event, we deny Linder's motion.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 24, 2022

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-2812

DAVID WILLIAM LINDER.,
Petitioner-Appellant,

v.

BRIAN LAMMER.,
Respondent-Appellee.

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

No. 1:15-cv-01055-SLD

Sara Darrow,
Chief Judge.

ORDER

No judge of the court having called for a vote on the Petition for Rehearing and Rehearing En Banc, filed by Petitioner-Appellant on August 1, 2022, and all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition for Rehearing and Rehearing En Banc is **DENIED.**

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

November 8, 2022

Mr. David William Linder
Prisoner ID #25913-048
P.O. Box 33
Terre Haute, IN 47808

Re: David William Linder
v. Brian Lammer, Warden
Application No. 22A412

Dear Mr. Linder:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Barrett, who on November 8, 2022, extended the time to and including January 21, 2023.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Jacob A. Levitan
Case Analyst

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

January 27, 2023

David W. Linder
#25913-048
P.O. Box 33
Terre Haute, IN 47808-0033

RE: Linder v. Lammer, Warden
No: 22A412

Dear Mr. Linder:

The above-entitled petition for writ of certiorari was postmarked January 19, 2023 and received January 27, 2023. The papers are returned for the following reason(s):

The petition fails to comply with the content requirements of Rule 14. A guide for in forma pauperis petitioners and a copy of the Rules of this Court are enclosed. The guide includes a form petition that may be used.

No motion for leave to proceed in forma pauperis, signed by the petitioner or by counsel, is attached. Rules 33.2 and 39. The motion must be signed.

No notarized affidavit or declaration of indigency is attached. Rule 39. You may use the enclosed form.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

Please also be advised that, as the maximum extension of time allowed by statute and rule was already granted in this case, no application for further extension of time can be filed. The Rules of this Court also make no provision for the filing of an application to extend the time to file a corrected petition.

Sincerely,
Scott S. Harris, Clerk
By:

Jacob Levitan
(202) 479-3392

Enclosures

E-FILED
Tuesday, 14 August, 2018 03:29:13 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

DAVID WILLIAM LINDER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 1:15-cv-01055-SLD
	)	
STEVE KALLIS, Warden,	)	
	)	
Respondent.	)	

ORDER

1 Before the Court are Petitioner David Linder's two motions for a copy of this Court's November 2, 2017 Order, ECF Nos. 76 & 77; motion to amend judgment pursuant to Federal Rule of Civil Procedure 59(e), ECF No. 78; proposed order granting the motion to amend judgment, styled as a motion, ECF No. 79; motion for an evidentiary hearing, ECF No. 80; certification of the timeliness of the motion to amend judgment, styled as a motion, ECF No. 81; two motions to expedite, ECF Nos. 82 & 83; and what appears to be a petition for writ of mandamus improperly filed before this Court, ECF No. 86. The Court has also reviewed several other filings by Linder that contain additional argument. ECF Nos. 75, 84, 85, & 89. For the reasons that follow, the motion to amend judgment and the motion for an evidentiary hearing are DENIED and the remaining filings are MOOT.

BACKGROUND[1]

2 On February 15, 2005, following a jury trial, Linder was convicted of conspiracy to manufacture, distribute, or possess with intent to distribute controlled substances and controlled substance analogues in violation of § 846 of the Controlled Substances Act ("CSA"), 21 U.S.C.

[1] Unless otherwise noted, the facts recited here are repeated from this Court's previous Orders. *See* ECF Nos. 43 & 73.

§§ 801–904. The jury found that Linder distributed or caused to be distributed controlled substance analogues that resulted in a death. Linder was sentenced to a term of life imprisonment. *See* 21 U.S.C. § 841(b)(1)(C) (providing that where use of a controlled substance in schedules I or II that was distributed by the defendant results in death, he "shall be sentenced to a term of imprisonment of not less than twenty years or more than life" and if the defendant was previously convicted of a felony drug offense there is a mandatory sentence of life imprisonment) ("'death results' enhancement"). He was also convicted of eighteen counts of distributing controlled substance analogues (counts two through nineteen in the indictment), in violation of § 841(a)(1) of the CSA[2] and the Controlled Substance Analogue Enforcement Act of 1986 ("Analogue Act"), 21 U.S.C. §§ 802(32)(A), 813;[3] five counts of use of a communications facility to facilitate a drug crime, a money laundering count and a count of conspiracy to launder money, and a count of engaging in monetary transactions involving criminal derived property. *See United States v. Linder*, No. 2:04-CR-00191 (E.D. Va. 2005). These offenses all carried lesser sentences than life. Linder's convictions were affirmed on appeal. *United States v. Linder*, 200 F. App'x 186, 187 (4th Cir. 2006). Linder later sought postconviction relief under 28 U.S.C. § 2255. *See Linder v. United States*, No. 2:07-cv-00581-JBF (E.D. Va. 2008). The § 2255 motion was denied and the Fourth Circuit declined to consider his appeal. *United States v. Linder*, 329 F. App'x 489 (4th Cir. 2009).

[2] Section 841(a)(1) of the CSA makes it unlawful knowingly to manufacture, distribute, or possess with intent to distribute controlled substances. 21 U.S.C. § 841(a)(1).

[3] The Analogue Act "identifies a category of substances substantially similar to those listed on the federal controlled substance schedules, 21 U.S.C. § 802(32)(A), and then instructs courts to treat those analogues, if intended for human consumption, as controlled substances listed on schedule I for purposes of federal law, § 813." *McFadden v. United States*, 135 S. Ct. 2298, 2302 (2015).

3 On February 2, 2015, Linder, who is incarcerated in the Central District of Illinois, filed a petition pursuant to 28 U.S.C. § 2241. Pet., ECF No. 1.[4] Linder sought relief under *Burrage v. United States*, 134 S. Ct. 881, 892 (2014), which interpreted the "death results" enhancement in the CSA and held that "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death . . . a defendant cannot be liable under the ["death results" enhancement] unless such use is a but-for cause of the death or injury." Respondent argued the petition was meritless because *Burrage* was not retroactive to cases on collateral review and should be construed as a request for relief under § 2255 and dismissed for want of jurisdiction. Resp. 5–9, ECF No. 6.

4 Linder then sought leave to file a supplemental pleading pursuant to Federal Rule of Civil Procedure 15. ECF No. 15.[5] The basis for the amendment was the Supreme Court's decision, on June 18, 2015, in *McFadden v. United States*, 135 S. Ct. 2298 (2015), which interpreted the knowledge requirement of § 841(a) and explained what the government must prove where a defendant is charged with distributing controlled substance analogues. The Court allowed the amendment and granted Respondent the opportunity to respond. Mar. 20, 2016 Order. The one-page response stated the holding of *McFadden* and that it had no bearing on whether *Burrage* was retroactive to cases on collateral review. Resp. Suppl. Pleading, ECF No. 19.

5 On March 23, 2017, the Court ruled that *Burrage* was retroactive to cases on collateral review and directed Respondent to file an additional response on the merits of the *Burrage* claim. Mar. 23, 2017 Order, ECF No. 43. Respondent provided the Court with the jury instructions from Linder's trial and argued that the instructions relevant to the "death results" enhancement

[4] Unlike a § 2255 motion, which must be brought in the district of conviction, a § 2241 petition must be brought in the district of incarceration. *Light v. Caraway*, 761 F.3d 809, 812 (7th Cir. 2014).
[5] 28 U.S.C. § 2242 provides that a petition for a writ of habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions."

Burrage claims. In that case, Linder argues, the court's analysis of the § 2241 petition premised on *Burrage* "did not hinge on a jury instruction." Supp. Mem. Mot. Am. Judgment 2. The Court finds that *Terry*, 2017 WL 2240970, at *1–2, where the petitioner pleaded guilty to distributing heroin that resulted in death, is not instructive as to the resolution of Linder's petition.

b. *McFadden* Claim

Linder's other principal argument in his motion to amend judgment is that the Court permitted him to add a *McFadden* claim to his petition but did not address it thereafter. Mot. Am. Judgment 2. On this point, he is correct and the Court will address the *McFadden* claim now. Linder argues he was convicted on counts two through nineteen, which charged distribution of controlled substance analogues, on the basis of jury instructions deemed deficient in *McFadden*. *See* Mot. Am. Judgment 6; Suppl. Mem. Mot. Am. Judgment 4–5; Suppl. Pleading 1, 4–5, ECF No. 15-1.

When faced with a § 2241 petition from a federal prisoner, a court must first assess whether the prisoner is entitled to seek such relief. "Normally a federal prisoner is confined to his remedy under 28 U.S.C. § 2255 . . . ." *Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012). Only if § 2255 is "inadequate or ineffective to test the legality of his detention," may a federal prisoner petition for a writ of habeas corpus under 28 U.S.C. § 2241. *Prevatte v. Merlak*, 865 F.3d 894, 897 (7th Cir. 2017) (quoting 28 U.S.C. § 2255(e)). To seek relief under § 2241, a petitioner must satisfy a three-part test: (1) he relies on a statutory interpretation case; (2) "the new rule applies retroactively to cases on collateral review and could not have been invoked in his earlier proceeding"; and (3) the alleged "error is 'grave enough . . . to be deemed a miscarriage of justice corrigible therefore in a habeas corpus proceeding,' such as one resulting in 'a conviction for a crime of which he was innocent.'" *Montana v. Cross*, 829 F.3d 775, 783

(7th Cir. 2016) (quoting *Rios*, 696 F.3d at 640, for the third prong); *see also In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998) (describing habeas corpus as a procedure available only to correct "a fundamental defect in [the] conviction or sentence").

Linder has satisfied the first part of the test. In *McFadden*, 135 S. Ct. at 2305, the Supreme Court interpreted the knowledge requirement of § 841(a) and explained what the government must prove where a defendant is charged with distributing controlled substance analogues. Thus, *McFadden* is a statutory interpretation case.

The second part of the test has two components: "retroactivity and prior unavailability of the challenge." *Montana*, 829 F.3d at 783. The Court begins with the second component, prior unavailability of the challenge, and finds that Linder has satisfied it. At the time of his direct appeal and initial § 2255 motion, the argument he advances now was foreclosed by Fourth Circuit precedent. *See Prevatte*, 865 F.3d at 899 (explaining that a petitioner can satisfy this component if the argument in his § 2241 petition was "foreclosed by circuit precedent" at the time of his direct appeal and initial § 2255 motion); *see also Morales v. Bezy*, 499 F.3d 668, 672 (7th Cir. 2007) (explaining that "[o]nly if the position is foreclosed (as distinct from not being supported by—from being, in other words, novel) by precedent" is the second prong satisfied). That precedent was *United States v. Klecker*, 348 F.3d 69, 71 (4th Cir. 2003), which set forth the elements the government had to prove to obtain a conviction under the Analogue Act: (1) "substantial chemical similarity between the alleged analogue and a controlled substance"; (2) "actual, intended, or claimed physiological similarity"; and (3) "intent that the substance be consumed by humans." *Id.* (emphasis omitted). In *United States v. McFadden*, 753 F.3d 432, 443–44 (4th Cir. 2014), which the Supreme Court ultimately vacated, the Fourth Circuit rejected the defendant's argument that the government was required to prove that "he knew, had a strong

suspicion, or deliberately avoided knowledge that the alleged CSAs possessed the characteristics of controlled substance analogues." The Fourth Circuit rejected the defendant's argument, which was based on *United States v. Turcotte*, 405 F.3d 515, 527 (7th Cir. 2005), as out of step with the law of the Fourth Circuit, citing *Klecker*. *McFadden*, 753 F.3d at 444 ("[T]he [Analogue] Act may be applied to a defendant who lacks actual notice that the substance at issue could be a controlled substance analogue."). These cases show that if Linder had made the argument he now advances, "he would clearly have lost" under Fourth Circuit precedent. *See Brown v. Caraway*, 719 F.3d 583, 595 (7th Cir. 2013).

13 As to retroactivity, *McFadden* is silent as to whether its holding is retroactive to cases on collateral review. However, "if the Court's previous holdings '. . . logically permit no other conclusion than that the rule is retroactive,' the Supreme Court will have been deemed to have 'made' the rule retroactive." *Prevatte*, 865 F.3d at 898 (quoting *Price v. United States*, 795 F.3d 731, 733 (7th Cir. 2015)). A new rule announced by the Supreme Court applies to cases on collateral review if it is substantive. *Krieger v United States*, 842 F.3d 490, 497 (7th Cir. 2016). Substantive rules include those that "narrow the scope of a criminal statute by interpreting its terms." *See id.* (quotation marks omitted) (holding *Burrage* provided a new substantive rule that was retroactive to cases on collateral review); *see also Holt v. United States*, 843 F.3d 720, 722 (7th Cir. 2016) ("[S]ubstantive decisions . . . presumptively apply retroactively on collateral review."); *Montana*, 829 F.3d at 784 (explaining that *Rosemond v. United States*, 572 U.S. 65 (2014), "which addressed the requirements for criminal liability under [18 U.S.C.] § 924(c)," announced a substantive rule that applies retroactively to cases on collateral review). Like *Burrage* and *Rosemond*, *McFadden* is about the requirements for criminal liability—specifically, what the government must prove to satisfy the knowledge component of § 841(a) where the

defendant is charged with distributing controlled substance analogues. *See McFadden*, 135 S. Ct. at 2305. In other words, *McFadden* narrowed the scope of § 841(a), creating "a significant risk that a defendant stands convicted of an act that the law does not make criminal." *Krieger*, 842 F.3d at 500 (quotation marks omitted). The Court finds that *McFadden* is retroactive to cases on collateral review.

14 Linder has also satisfied the third prong—he alleged an error "grave enough . . . to be deemed a miscarriage of justice corrigible therefore in a habeas corpus proceeding." *Rios*, 696 F.3d at 640. The Seventh Circuit has permitted petitioners premising claims on Supreme Court statutory interpretation cases that narrow the elements of a crime to seek relief under § 2241. *Kramer v. Olson*, 347 F.3d 214, 218 (7th Cir. 2003). Were it otherwise, "the unavailability of § 2255 [would] effectively prevent[] [petitioners] from obtaining review of what may have been a fundamental flaw in their convictions—the possibility that the convictions hinged on conduct Congress never intended to criminalize." *Id.*; *see also Cooper v. United States*, 199 F.3d 898, 901 (7th Cir. 1999) (explaining that where a petitioner has been "convicted of a nonexistent crime" there is "in anyone's book . . . a clear miscarriage of justice"); *In re Davenport*, 147 F.3d at 611 ("A procedure for postconviction relief can fairly be termed inadequate when it is so configured as to deny a convicted defendant *any* opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense."). This is, in essence, what Linder alleges. Accordingly, he may seek relief under § 2241.

15 Linder's claim fails on the merits. The Court finds that Linder's jury was correctly instructed of what was required to convict him of distributing controlled substance analogues under *McFadden*. *McFadden*, 135 S. Ct. at 2305, held that "the [g]overnment must prove that a defendant knew that the substance with which he was dealing was 'a controlled substance,' even

in prosecutions involving an analogue." The government can prove knowledge in two ways. *Id.* First, the government may establish "that a defendant knew that the substance with which he was dealing is some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance." *Id.* Second, the government may establish "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id.* That is, the defendant knew the substance had a "chemical structure . . . substantially similar to [that] . . . of a controlled substance in schedule I or II" and "a stimulant, depressant, or hallucinogenic effect on the central nervous system . . . substantially similar to or greater than the effect of a controlled substance in schedule I or II." *Id.* (quotation marks omitted).

16 Linder's jury was given the following instructions relevant to counts two through nineteen, which charged knowing and intentional distribution of controlled substance analogues in violation of 21 U.S.C. § 841(a)(1). The jury was instructed how it was to determine whether the substances he distributed constituted controlled substance analogues. It had to find beyond a reasonable doubt that the substance:

> First: Has a chemical structure that is substantially similar to the chemical structure of a controlled substance in Schedule I; and
> Second: Has a hallucinogenic effect on the central nervous system that is substantially similar to or greater than the hallucinogenic effect on the central nervous system of a controlled substance in Schedule I.

Instruction No. 39, ECF No. 49-1 at 43–44 (capitalization altered). Next, the jury was instructed on the essential elements of distribution of controlled substance analogues.

> In order to sustain its burden of proof for the crime of distribution of controlled substance analogues as charged in counts two through nineteen of the indictment, the government must prove the following four (4) essential elements beyond a reasonable doubt:

> One: That the defendant knowingly and intentionally distributed the controlled substance analogue; and
> Two: *That at the time of such distribution the defendant was familiar with the nature of the substance*; and
> Three: That the substance is a controlled substance analogue as that term has been previously defined for you; and
> Four: That the defendant intended the substance for human consumption.

Instruction No. 43, ECF No. 49-1 at 55 (emphasis added) (capitalization altered). The jury was further instructed as to the knowledge requirement.

> It is not necessary for the government to prove that the defendant knew the precise nature of the controlled substance analogue that was distributed or the schedule I controlled substance that the analogue was most similar to in structure and effects. *The government must prove beyond a reasonable doubt, however, that the defendant did know that some type of controlled substance analogue was distributed.*

Instruction No. 44, ECF No. 49-1 at 56 (emphasis added) (capitalization altered).

17 These jury instructions comply with *McFadden*. To convict Linder on counts two through nineteen, the jury found beyond a reasonable doubt that he "kn[e]w that some type of controlled substance analogue was distributed," either because he knew that the substance with which he was dealing was a controlled substance analogue in terms of its legal status or because he knew that a substance with "a chemical structure" and "hallucinogenic effect on the central nervous system . . . substantially similar to [that] of a controlled substance in schedule I" was distributed. Instruction Nos. 39, 44. Because Linder's jury was correctly instructed as to the law, he is not entitled to habeas relief.

c. Request for Evidentiary Hearing

18 Finally, Linder argues the Court erred in denying his request for an evidentiary hearing. Mot. Am. Judgment 17. The Court denied the request in its discretion after finding, upon review of the record, that no hearing was necessary. Linder has not persuaded the Court that this was

manifest error and the Court again exercises its discretion in denying Linder's renewed request for an evidentiary hearing, ECF No. 80.

CONCLUSION

14 Accordingly, the motion to amend judgment, ECF No. 78, is DENIED. While Linder is correct that the Court permitted him to amend his petition to add a *McFadden* claim and then failed to address it before judgment was entered, he is not entitled to relief. Reopening the case "would serve no useful purpose." 11 Charles Alan Wright et al., *supra*, § 2810.1. The judgment, which reads "Petitioner Linder's motion for relief under 28 U.S.C. § 2241 is denied[,]" remains the same. Linder's motion for an evidentiary hearing, ECF No. 80, is also DENIED. His other motions, ECF Nos. 76, 77, 79, 81, 82, 83, & 86, are MOOT. "[T]he [certificate of appealability] requirement does not apply to appeals in § 2241 cases." *Walker v. O'Brien*, 216 F.3d 626, 638 (7th Cir. 2000). If Linder wishes to appeal, he must file a notice of appeal with the Clerk of this Court within thirty days of the entry of this Order. *See* Fed. R. App. P. 4(a)(4)(A).

Entered this 14th day of August, 2018.

s/ Sara Darrow
SARA DARROW
UNITED STATES DISTRICT JUDGE

DAVID WILLIAM LINDER, Petitioner, v. J E KREUGER, Warden, Respondent.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, PEORIA DIVISION
2017 U.S. Dist. LEXIS 42032
Case No. 1:15-cv-01055-SLD
March 23, 2017, Decided
March 23, 2017, E-Filed

Editorial Information: Subsequent History

Writ of habeas corpus denied, Motion granted by Linder v. Kreuger, 2017 U.S. Dist. LEXIS 182060 (C.D. Ill., Nov. 2, 2017)

Editorial Information: Prior History

United States v. Linder, 200 Fed. Appx. 186, 2006 U.S. App. LEXIS 23573 (4th Cir. Va., Sept. 15, 2006)

Counsel {2017 U.S. Dist. LEXIS 1}David William Linder, Petitioner, Pro se, PEKIN, IL.

For J E Kreuger, Warden, Respondent: Bradley W Murphy, LEAD ATTORNEY, Segev Phillips, US ATTY, Peoria, IL.

Judges: SARA DARROW, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: SARA DARROW

Opinion

ORDER

Before the Court is David Linder's Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, ECF No. 1. For the following reasons, the Court does not at this time rule on Linder's Petition, but requests further briefing from Respondent, as specified herein. Before the Court are also a number of motions **Linder** filed after the petition was fully briefed: a motion styling itself pursuant to Federal Rule of Appellate Procedure 23(b), but apparently consisting of additional argument, ECF No. 25; motions for subpoenas, ECF Nos. 26, 27, 31; a motion seeking an order to the same effect as a subpoena, ECF No. 32; miscellaneous inquiries of the Clerk, ECF Nos. 28, 29; more argument, ECF No. 30; a motion for bond, ECF No. 33; a motion for an evidentiary hearing, ECF No. 34; a motion for an expedited ruling, ECF No. 35; and still more argument, ECF No. 36. The motions for subpoenas, for order, for bond, and for an evidentiary hearing are DENIED; the others are MOOT. Respondent's motion to substitute attorney, ECF No. 40, is GRANTED.{2017 U.S. Dist. LEXIS 2}

BACKGROUND1

Linder is jailed at the Pekin Federal Correctional Institution in Pekin, Illinois. He was convicted on February 15, 2005 in the Eastern District of Virginia of several drug-related crimes, and sentenced on May 17, 2005, to life imprisonment for conspiracy to distribute and possession with intent to

distribute 5-Methoxy-N, N-Diisopropltryptamine (commonly called "foxy"2) resulting in death; 240 months of incarceration on each of eighteen counts of distribution of the drug; 240 months on two counts of money laundering; 48 months for five counts of illegal use of a communications facility, and 120 months for one count of engaging in monetary transactions involving criminally derived property. *See United States v. David William* ***Linder***, Case No. 2:04-CR-00191 (E.D. Va. 2005). The jury found as to the first count that a death resulted from the drugs **Linder** distributed or caused to be distributed for human consumption. He appealed the convictions to the Fourth Circuit Court of Appeals, which affirmed them all. *United States v.* ***Linder***, 200 F.App'x 186 (4th Cir. 2006). **Linder** then filed a petition for postconviction relief pursuant to 28 U.S.C. § 2255, which was considered on its merits and denied on December 4, 2008. His appeal of this denial was dismissed{**2017 U.S. Dist. LEXIS 3**} by the Fourth Circuit for want of a certificate of appealability on July 29, 2009.

He filed the instant petition for relief under 28 U.S.C. § 2241 on February 2, 2015.

DISCUSSION

I. Legal Standard on a Petition by a Federal Prisoner for Issuance of a Writ of Habeas Corpus

Ordinarily, prisoners seeking postconviction relief from a federal district court's judgment must do so via 28 U.S.C. § 2255, "the federal prisoner's substitute for habeas corpus." *Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012). However, under the "savings clause" of 28 U.S.C. § 2255(e), if a motion pursuant to the statute is "inadequate or ineffective to test the legality of [the petitioner's] detention," he may test it instead by seeking a writ of habeas corpus. *See* 28 U.S.C. § 2241.

To show that section 2255 is inadequate or ineffective, and that issuance of a writ of habeas corpus may be warranted, a petitioner must establish three threshold conditions. First, he must show that his claim "eludes the permission in section 2255 for successive motions; if it does not, if therefore the prisoner is not barred from filing a successive such motion, then his 2255 remedy is not inadequate and he cannot apply for habeas corpus." *In re Davenport*, 147 F.3d 605, 611-12 (7th Cir. 1998). Section 2255 permits successive motions only when they are based upon new information that would establish innocence by clear{**2017 U.S. Dist. LEXIS 4**} and convincing evidence, or upon a new and retroactive rule of constitutional law. 28 U.S.C. § 2255(h). The first condition, then, amounts to a requirement that the challenge depend on a new interpretation of statute, rather than of the Constitution. *See Brown*, 696 F.3d at 640. Second, the would-be petitioner must show that the case he seeks to rely on, although decided after his initial 2255 petition, was made retroactive in its effect. *Id.* Third, he must show that the defect of which he complains was "a grave enough error to be deemed a miscarriage of justice corrigible therefore in a habeas corpus proceeding." *Id.* When a sentence is mandatorily increased by operation of rule or statute later determined by the Supreme Court illegal, the error thereby produced is sufficiently grave to warrant a habeas corpus proceeding. *See Narvaez v. United States*, 674 F.3d 621, 623 (7th Cir. 2011) (reversing application of the then-mandatory career offender Sentencing Guideline as "constitut[ing] a miscarriage of justice").

Additionally, although petitions for habeas relief are filed in the federal judicial district where a prisoner is incarcerated, *United States v. Prevatte*, 300 F.3d 792, 799 (7th Cir. 2002), a petitioner who challenges his federal conviction via a petition for habeas corpus may not take advantage of a favorable difference in the interpretation of federal{**2017 U.S. Dist. LEXIS 5**} law between the circuit where he was sentenced and the circuit where he is now incarcerated. *See Davenport*, 147 F.3d at 612 ("When there is a circuit split, there is no presumption that the law in the circuit that favors the prisoner is correct, and hence there is no basis for supposing him unjustly convicted merely because he happens to have been convicted in the other circuit."). There is also a requirement, for section 2255 to be ineffective, that a defendant either have raised his legal argument on direct appeal and on any initial 2255 petition for postconviction relief, or that he have had "no reasonable opportunity"

to do so because the law was settled against him. *Davenport*, 147 F.3d at 610.

II. Analysis

Linder contends both that the evidence presented at his trial could not sustain a conclusion by the jury that the foxy he distributed or conspired to distribute was a but-for cause of death, and that, anyway the jury was not instructed that it had to find the drug was a but-for cause of death. Petition 7-9. He relies on ***Burrage*** *v. United States*, 134 S. Ct. 881, 892, 187 L. Ed. 2d 715 (2014), in which the Supreme Court held that "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under{2017 U.S. Dist. LEXIS 6} the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury." He argues that ***Burrage*** applies retroactively, and that therefore, the enhanced sentence imposed upon him for distribution of "foxy" resulting in death was illegal. Mem. Supp. Petition 2, 4-8, ECF No. 2. He also claims that he was not able to present this argument in his original section 2255 petition because ***Burrage*** was announced years later, and that because ***Burrage*** turned on statutory interpretation, he cannot bring his new challenge under section 2255, and a writ of habeas corpus is his only available means of relief. *Id.* 9-11. He also seeks a new trial on all the other counts of his original conviction. *Id.* 8-9.

Respondent argues only that ***Burrage*** has no retroactive effect, and that the Petition should be construed as a request for relief under section 2255 and dismissed for want of jurisdiction. Response 5-9, ECF No. 6. Neither argument is persuasive.

21 U.S.C. § 841(b)(1)(C), under which **Linder** was sentenced for distribution of foxy with death resulting, provides that the penalty for distribution of a schedule I drug, which foxy is, shall not be more than twenty years, but that "if death or serious bodily injury results from the use" of the substance, the{2017 U.S. Dist. LEXIS 7} sentence shall not be less than twenty years or more than life. If a defendant has sustained a prior conviction for a felony drug offense and death results, the minimum is life.3 In ***Burrage***, the Supreme Court considered whether a defendant could be convicted under the "death results" provision "when the use of the controlled substance was [merely] a 'contributing cause' of the death . . . ." ***Burrage***, 134 S. Ct. at 886. The Court determined that the ordinary meaning of "results from," a phrase section 841 uses without further explanation, "imposes a requirement of but-for causation." *Id.* at 889. This reading compelled the conclusion, quoted above, that, in cases where the drug in question was not an independently sufficient cause of death or injury, it must have been the but-for cause of death or injury for the sentencing enhancement to apply. *Id.* at 892. Because the defendant in ***Burrage*** had been convicted by a jury instructed that distributed heroin could have been just a "contributing cause" of death, the Supreme Court reversed and remanded. *Id.*

The first question for this Court is whether Linder's Petition, which squarely challenges his federal sentence, falls into the exception to the general rule that such attacks must be mounted under{2017 U.S. Dist. LEXIS 8} section 2255.

First, it is plain that ***Burrage*** rests on a statutory rather than constitutional interpretation. Justice Scalia determined that the "ordinary meaning," *id.* at 887, of the statutory phrase "results from" required but-for causation. *Id.* at 887-88. No constitutional interpretation was required. Thus, **Linder** would not be permitted to challenge the legality of his sentence under ***Burrage*** via a successive section 2255 petition because his challenge rests on neither newly discovered evidence, nor upon a "new rule of constitutional law," 28 U.S.C. § 2255(h)(2). Furthermore, he could not have sought this relief in his initial section 2255 motion because it was not then possible "to obtain relief on a basis not yet established by law." *Davenport*, 147 F.3d at 610. Given that section 2255 is therefore "inadequate or ineffective," 28 U.S.C. § 2255(e), to test the legality of Linder's sentence, the Court

must consider the other factors enumerated in *In re Davenport* to determine whether Linder's Petition meets the other requirements for filing of a habeas petition by a federal prisoner challenging his sentence.

Second, a misapplication of the law raising a statutory minimum either from zero to twenty years, or from zero to life, would constitute a "miscarriage of justice" sufficient to warrant relief via habeas corpus. *See{2017 U.S. Dist. LEXIS 9} Narvaez*, 674 F.3d at 623. Citing *Kramer v. Olson*, 347 F.3d 214, 218 (7th Cir. 2003), Respondent argues that because **Linder** is not raising a claim of actual innocence under the statute in question, and arguing that he deserves to bear no criminal liability for the conduct he was convicted of, he cannot challenge the legality of the mandatory minimum as applied to him. Resp. Petition 7-8. But Respondent misunderstands *Kramer* and the requirement of *Davenport* that a sentence have constituted "a grave enough error to be deemed a miscarriage of justice." *Brown*, 696 F.3d at 640. Kramer, who had been found guilty of engaging in a continuing criminal enterprise ("CCE") and conspiracy to distribute marijuana (or "marihuana," as the statute has it) could not challenge his CCE conviction be petitioning for habeas corpus, because the case he used to challenge it, *Richardson v. United States*, 526 U.S. 813, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999), "ha[d] no bearing on whether Kramer's conduct violated the CCE statute."4 *Kramer*, 347 F.3d at 218. **Linder** is not claiming that distribution of foxy would not have exposed him to criminal liability; rather, that the conduct that he engaged in, while criminal, did not fall within the ambit of section 841's harsher sentence for cases in which death results. It is not required, to seek the writ of habeas corpus, that a petitioner allege his conduct was not illegal; rather,**{2017 U.S. Dist. LEXIS 10}** that he allege the application of the law to him constituted a miscarriage of justice, which, the Seventh Circuit has made clear, includes the illegal application of mandatory sentence enhancements. *See Narvaez*, 674 F.3d at 623 ("Because Mr. Narvaez's career offender sentence was improper, his period of incarceration exceeds that permitted by law and constitutes a miscarriage of justice.").

The third question, and the main one upon which the parties disagree (although not the only question for the Court) is whether ***Burrage*** has a retroactive effect, requiring but-for causation of death for the enhancements of section 841(b)(1)(C) to apply, not only after ***Burrage*** was announced, but before. Only under certain circumstances do new rules announced by the Supreme Court affect cases in which final judgment has already issued. One of these circumstances is when the new rule announced is substantive. *Welch v. United States*, 136 S. Ct. 1257, 1264, 194 L. Ed. 2d 387 (2016). Rules that "narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish" are substantive and thus apply retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 351-52, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (internal citation omitted). "Such rules**{2017 U.S. Dist. LEXIS 11}** apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 352 (internal quotation marks omitted). While the Supreme Court has not yet decided whether ***Burrage*** is retroactive, more than one circuit has, including the Seventh. *See Santillana v. Upton*, 846 F.3d 779, 784 (5th Cir. 2017) (holding that ***Burrage*** applies retroactively to cases on collateral review); *Krieger v. United States*, 842 F.3d 490, 499-500 (7th Cir. 2016) (holding that ***Burrage*** is a retroactively applicable, substantive decision); *cf. Ragland v. United States*, 784 F.3d 1213, 1214 (8th Cir. 2015) (per curiam) (concluding that ***Burrage*** challenges are cognizable under § 2255). Although these holdings do not have the same force that the Supreme Court's determination on retroactivity would, "[d]istrict and appellate courts, no less than the Supreme Court, may issue opinions 'holding' that a decision applies retroactively to cases on collateral review. The jurisdictional (and precedential) scope of that holding differs, but it is a holding nonetheless." *Krieger*, 842 F.3d at 499 (quoting *Ashley v. United States*, 266 F.3d 671, 673 (7th Cir.

2001)).

Respondent's argument that ***Burrage*** ought not to be construed retroactively consists of observing that counsel has not been able to find cases holding that ***Burrage*** was retroactive and citing some district court{2017 U.S. Dist. LEXIS 12} cases holding without argument that it was not. Resp. Petition 6-7; *cf. Krieger*, 842 F.3d at 498 n.1 ("It is also true that a number of district courts have issued opinions holding that ***Burrage*** does not apply retroactively, although none with any significant analysis."). Respondent has not addressed the Seventh Circuit's holding in *Krieger*; presumably, if he were to do so, it would be in order to withdraw his objection to the Court's construal of ***Burrage*** as retroactive, at least under precedent in this circuit.

However, it is not only the law in the Seventh Circuit that the Court must consider, but the Fourth. For if the Fourth Circuit had construed ***Burrage*** as non-retroactive, and thus as providing no succor to prisoners who, like **Linder**, were sentenced earlier, **Linder** would not be entitled to relief available only in a circuit which both happened to have a more favorable interpretation of the law and to contain the prison where he was incarcerated (at least in the absence of any word from the Supreme Court on the matter). *Davenport*, 147 F.3d at 612. However, the Court has been unable to discover any Fourth Circuit opinions deeming ***Burrage*** either retroactive or not, and while the Court has discovered some district court cases in the Fourth{2017 U.S. Dist. LEXIS 13} Circuit stating without analysis that ***Burrage*** is not retroactive, and that retroactivity cannot be determined by any court other than the Supreme Court, this Court declines to follow their lead, for the reasons stated above. *See, e.g., United States v. Grady*, No. 5:10CR0002, 2015 U.S. Dist. LEXIS 106374, 2015 WL 4773236, at *4 (W.D. Va. Aug. 12, 2015), appeal dismissed, 627 F. App'x 193 (4th Cir. 2015). Whether the Seventh Circuit's holding in *Krieger* is deemed binding precedent on this Court or merely persuasive, the Court is compelled or chooses to follow it. Linder's Petition qualifies for section 2255's savings clause, and the Court has jurisdiction to entertain it as an application for relief via the writ of habeas corpus.

Finally, the Court rejects Respondent's argument, Resp. Petition 8-9, that Linder's claim "must be brought, if at all, pursuant to 28 U.S.C. § 2255 . . . ." As explained above, Linder's claim as alleged qualifies for section 2255's savings clause, and may be brought as a petition for writ of habeas corpus. The Court reserves ruling at this time on Respondent's additional argument that Linder's request for a new trial on the other 26 counts of his conviction is unsupported by argument.

Linder's ***Burrage*** claim may have merit, but it is not possible to evaluate it completely at present. While **Linder** has included{2017 U.S. Dist. LEXIS 14} a copy of what appears to be the government's proposed jury instruction on "death resulting" from his original criminal trial, Mem. Supp. Petition Attachment 1, it is unclear whether this is the text of the instruction as offered to the jury. Much turns on this jury instruction (and other relevant instructions given to the jury5), and upon whether the instructions permitted the jury impermissibly to convict **Linder** for something other than but-for causation of death. For if the jury instructions erroneously authorized the jury to convict **Linder** for something other than but-for causation, and there is grave doubt whether the instructions had a substantial and injurious effect on the jury's verdict, reversal will be warranted.6 *See Sorich v. United States*, 709 F.3d 670, 674 (7th Cir. 2013) (articulating this standard for determining whether reversal is warranted on collateral review of erroneous jury instructions). The rules governing section 2254 and 2255 proceedings provide that "[i]f [an] answer [to a Petition] refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to furnish them within a reasonable time that will not unduly delay the proceedings." Section 2255 Rule 5(c). Respondent is therefore directed{2017 U.S. Dist. LEXIS 15} to respond to Linder's claim that he was convicted under a jury instruction that impermissibly directed the jury that but-for causation was not required to be shown. This response should support its assertions with

citations to the relevant portions of the trial record, which shall be included with the response. Respondent must do so by April 13, 2017.

III. Linder's Other Motions

Linder has moved for issuance of subpoenas. ECF Nos. 26, 27, 31, and 32. The Court may order discovery during postconviction review for good cause shown. Section 2254 Rule 6(a), Section 2255 Rule 6(a). The Court denies Linder's motions at this time, in light of its order that Respondent produce relevant material from the trial record in his forthcoming Response. If **Linder** seeks subpoenas after this filing, the Court will consider his requests at that time. For the same reason, Linder's request for an evidentiary hearing, ECF No. 34, is denied.

Linder requests that he be released on bond during the pendency of these proceedings. ECF No. 33. "[F]ederal district judges in habeas corpus and section 2255 proceedings have inherent power to admit applicants to bail pending the decision of their case . . . ." *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985). The standard for granting release during postconviction{**2017 U.S. Dist. LEXIS 16**} proceedings is unclear, but it is clear that it should "be exercised very sparingly." *Id.* Courts have looked to probability of success and exceptional circumstances. *See Jordan v. United States*, No. 15-02294, 2016 U.S. Dist. LEXIS 155342, at *5 (C.D. Ill. Nov. 9, 2016); *Douglas v. United States*, No. 06-CV-2113, 2006 U.S. Dist. LEXIS 89318, 2006 WL 3627071, at *1 (C.D. Ill. Dec. 11, 2006). The Court cannot at this time determine Linder's probability of success, and the circumstances do not appear to be exceptional. The request is denied.

Linder's various motions and memoranda containing additional argument, ECF Nos. 25, 30, and 36, have been reviewed by the Court; insofar as they constitute motions in their own right, they are moot, as are his various requests to the Clerk, ECF Nos. 28, 29, and his request for expedited ruling, ECF No. 35.

CONCLUSION

Accordingly, Respondent is directed to file another Response, as detailed herein, no later than April 13, 2017. Some of Linder's motions, ECF Nos. 26, 27, 31, 32, 33, 34 are DENIED, and the others, ECF Nos. 25, 28, 29, 30, 35, and 36 are MOOT. Respondent's motion to substitute attorney, ECF No. 40, is GRANTED.

Entered this 23rd day of March 2017.

/s/ Sara Darrow

SARA DARROW

UNITED STATES DISTRICT JUDGE

Footnotes

1

As dictated by the analogous federal habeas corpus rules for proceedings under 28 U.S.C. § 2254 and § 2255, the facts recounted here are taken from Respondent's Response to the Petition, ECF No. 6, unless otherwise noted. *See* 28 U.S.C. § 2248.

2

Foxy is a hallucinogenic tryptamine in the same category as psilocybin. *Foxy - Fast Facts*, National Drug Intelligence Center, (visited on March 15, 2017). According to the Department of Justice, it is

often used "at raves, nightclubs, and other venues where the use of club drugs, particularly MDMA (ecstasy), is well-established." *Id.*

3

Neither party indicates whether **Linder** had previously sustained a felony drug conviction, and so it is not clear whether Linder's life sentence was mandated by statute, or an exercise of the sentencing court's discretion.

4

Richardson held that each underlying violation in the continuing series of violations that makes up a criminal enterprise is itself an element of the CCE offense. *Richardson*, 526 U.S. at 817-18, 824. *Richardson* requires jury unanimity as to which offenses counted as the predicate violations on CCE counts, which had not been the rule in the Seventh Circuit. *See Kramer*, 347 F.3d at 216. Thus, even though Kramer would, tried after *Richardson*, have had a right to jury unanimity as to which of the "seven massive boatloads of marijuana (weighing from 14,000 to 152,000 pounds)" he helped move into the United States, his admission to the conduct charged in the indictment would still have exposed him to the same criminal liability. *Id.* at 218.

5

Jury instructions are to be construed with a view to their effect as a whole in informing the jury of the applicable law. *United States v. DiSantis*, 565 F.3d 354, 359 (7th Cir. 2009).

6

The adequacy or inadequacy of the jury instructions will decide the matter, even though **Linder** also argues that the evidence presented at trial was insufficient to show but-for causation. For if the jury instructions were erroneous and prejudicial, it does not matter whether sufficient evidence was presented or not. *See Sorich*, 709 F.3d at 674 ("This inquiry does not ask whether the jurors were . . . right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.'" (quoting *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946))). Conversely, if the jury instructions were adequate under ***Burrage***, the time has passed for **Linder** to argue that his conviction under lawfully given instructions was unsupported by sufficient evidence. *See Hill v. Werlinger*, 695 F.3d 644, 648-49 (7th Cir. 2012) (explaining that a petitioner's section 2255 remedy can only have been inadequate or ineffective if he was foreclosed from presenting his claim in his original section 2255 petition).

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Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

DAVID WILLIAM LINDER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 1:15-cv-01055-SLD
	)	
J E KREUGER, Warden,	)	
	)	
Respondent.	)	
	)	

ORDER

Before the Court are Petitioner Linder's motion for relief from his sentence pursuant to 28 U.S.C. § 2241, ECF No. 1; Linder's motion for additional copies of a docket item, ECF No. 51; Linder's renewed motion for bond, ECF No. 57; Linder's motion for an evidentiary hearing, ECF No. 58; his motion asking the court to take judicial notice of certain records, ECF No. 60; what appears to be a petition for writ of mandamus improperly filed before this Court, ECF No. 61; a premature motion for leave to appeal in forma pauperis, ECF No. 66; Linder's motion to expand the record, ECF No. 67; his motion to expedite consideration of his petition, ECF No. 68; another request for copies of the docket, ECF No. 71; and Respondent's motion to substitute Steve Kallis for Jeffrey Krueger as Respondent, ECF No. 72. For the following reasons, the Court DENIES Linder's request for relief from his sentence, finds his many other motions MOOT, and GRANTS Respondent's motion.

BACKGROUND[1]

[1] As dictated by the analogous federal habeas corpus rules for proceedings under 28 U.S.C. § 2254 and § 2255, the facts recounted here are taken from Respondent's original Response to the Petition, ECF No. 6, unless otherwise noted. *See* 28 U.S.C. § 2248.

As detailed in the Court's March 23, 2017 Order, ECF No. 43, Linder was convicted by a jury on February 15, 2005 of conspiracy to distribute and possession with intent to distribute a club drug called "foxy." The jury found that a death resulted from this distribution. He received a life sentence for this conduct pursuant to the Controlled Substances Act, 21 U.S.C. § 841(b)(1)(C), which requires a life sentence for a defendant who has previously sustained a felony drug conviction and who then distributes certain substances that result in the death of another. Linder was also convicted of 18 counts of distributing the drug, five counts of use of a communications facility to facilitate a drug crime, a money laundering count and a count of conspiracy to launder money, and a count of engaging in monetary transactions involving criminally derived property, all of which carried lesser sentences than life. *See United States v. Linder*, Case No. 2:04-CR-00191 (E.D. Va. 2005). Linder appealed; his attorney filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), asserting that there were no meritorious issues for appeal. The Fourth Circuit agreed, affirming the conviction. *See United States v. Linder*, 200 F. App'x 186, 187 (4th Cir. 2006). Linder sought postconviction relief under 28 U.S.C. § 2255. *See Linder v. United States*, No. 2:07-cv-00581-JBF (E.D. Va. 2008). His petition was denied on December 4, 2008, and the Fourth Circuit declined to consider his appeal of the denial for want of a certificate of appealiability. *United States v. Linder*, 329 F. App'x 489 (4th Cir. 2009).

Linder, who is incarcerated in the Central District of Illinois, sought review of his conviction before this Court pursuant to 28 U.S.C. § 2241 on February 2, 2015. ECF No. 1; *see Light v. Caraway*, 761 F.3d 809, 812 (7th Cir. 2014) ("The venue requirement in § 2241 is different from the venue requirement in § 2255: while an action under the latter must be brought in the district of conviction, a petition under § 2241 must be brought in the district of

incarceration."). Linder argued that the Supreme Court's decision in *Burrage v. United States*, 134 S. Ct. 881 (2014), had made unlawful the sentencing enhancement he had received for the death that resulted from his distribution of drugs. Mem. Supp. Pet. 2, ECF No. 2. Respondent sought dismissal of Linder's motion on the ground that *Burrage* was not retroactive, First Resp. 5–7, ECF No. 6, and that the motion was actually a successive § 2255 petition, *id.* at 8–9. The Court disagreed, ruling that *Burrage* was retroactive and that the petition could proceed under § 2241. Mar. 23, 2017 Order 4–11, ECF No. 43. Because Respondent had not addressed the substance of Linder's argument, the Court directed him to do so. Respondent complied on May 4, 2017, ECF No. 49. Linder also filed a by-now-familiar deluge of follow-on motions.

DISCUSSION

I. Legal Standard on a Motion for Relief under 28 U.S.C. § 2241

A prisoner seeking to set aside a federal sentence usually must rely on 28 U.S.C. § 2255. *See Collins v. Holinka*, 510 F.3d 666, 666–67 (7th Cir. 2007). An older statute, 28 U.S.C. § 2241, codifies the constitutional guarantee of the writ of habeas corpus, giving federal courts broad authority to grant the writ. *See* U.S. Const., art. 1, § 9, cl. 2; 28 U.S.C. § 2241(a). Section 2255, enacted in 1948, largely supplanted the older § 2241 as the exclusive means for federal prisoners to challenge the legality of their incarceration. *See Collins*, 510 F.3d at 667; *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003) ("Ordinarily § 2255 is the exclusive means for a federal prisoner to attack his conviction."). However, § 2255 has a "savings clause," which allows a prisoner to proceed under § 2241 in cases where § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). While § 2255 permits second or successive petitions based on new retroactive rules of constitutional law, it contains no such provision for prisoners seeking relief based on new and retroactive interpretations of statute. *See* 28 U.S.C.

§ 2255(h)(2). For this reason, § 2255 may be "inadequate or ineffective" when a second or successive petition is brought based on retroactive changes in or interpretations of a statute. *See Kramer*, 347 F.3d at 217.

A prisoner who has already filed a § 2255 petition who then seeks retroactive statutory relief from a federal sentence under § 2241 must make three core showings. First, he must show that his legal theory relies on a change of law that has been made retroactive. *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998). Second, he must show that the change he relies on came after his most recent § 2255 petition, and that his new petition "eludes the permission in section 2255 for successive motions." *Id.* Third, the "change in law" upon which he relies cannot just be a difference between the law of the circuit in which he is incarcerated and the law of the circuit in which he was sentenced. *Id.* at 612.

In addition, § 2255 is inadequate or ineffective, and § 2241 is available, only if a petitioner had "no reasonable opportunity to obtain earlier judicial correction" of the defect in his sentence he now seeks to challenge. *Montana v. Cross*, 829 F.3d 775, 783 (7th Cir. 2016) (quoting *Davenport*, 147 F.3d at 611). This amounts to a fairly ordinary rule of forfeiture with a fairly large exception. It is a requirement that either (1) the petitioner have made and preserved his newly-valid statutory argument in his earlier § 2255 petitions, even before the change in law or statutory interpretation that ultimately validated the argument, or (2) "[t]he law of the circuit was so firmly against" a petitioner's new § 2241 argument at the time of his original petition(s) that it would just have "clog[ged] the judicial pipes" to raise it at the time. *Davenport*, 147 F.3d at 610. *But see Camacho v. English*, 872 F.3d 811, 815 (7th Cir. 2017) (Easterbrook, J., dissenting) (taking the position that the Seventh Circuit erroneously permits forfeited arguments to be raised via § 2241 after a favorable change in law). The rule in the Seventh Circuit, at any

rate, is one of lenity, permitting petitioners sometimes to get relief when the Supreme Court narrows the scope of the criminal law in a way that could have benefitted them at their trials, but that they and their attorneys might have had no reason to hope for or, more relevantly, argue for at the time. *Cf. Prost v. Anderson*, 636 F.3d 578, 592–93 (10th Cir. 2011) (declining to follow the "erroneous circuit foreclosure test" applied by *In re Davenport*).

II. Discussion

Petitioner's core contention is that the jury that convicted him of distributing "foxy" resulting in death, 21 U.S.C. § 841(b)(1)(C), was improperly instructed under *Burrage*. Pet. 8. That is, he argues that the jury was not instructed that the "foxy" he distributed must have been the but-for cause of the decedent's death. *Id.*

The Court held in *Burrage* that "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury." 134 S. Ct. at 892. The Court reached this conclusion, and rejected the government's idea that drugs which were just a "contributing cause" of death could also count, largely on the basis of a plain-language reading of the statute's use of the phrase "results from." *See id.* at 887–88 (producing the dictionary definition of "results" in support of the holding). The Seventh Circuit has emphasized that "*Burrage* . . . 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." *Krieger v. United States*, 842 F.3d 490, 499–500 (7th Cir. 2016). The Seventh Circuit has also deemed *Burrage* retroactive. *Prevatte v. Merlak*, 865 F.3d 894, 898 (7th Cir. 2017) (citing *Krieger*, 842 F.3d at 497).

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Since *Burrage* was decided years after Linder's § 2255 petition was denied by the district court in Virginia, there's no question that he seeks relief from a change in the law that postdates his last petition. *See Davenport*, 147 F.3d at 611. There may well, however, be a question as to whether Linder adequately preserved the argument by making it in his earlier petition. Although Respondent addressed that question in neither his original response, ECF No. 6, nor his amended one, ECF No. 49, this Court stated that Linder could not, and therefore, need not have made a *Burrage*-type argument in his initial § 2255 petition in order to bring it now. Mar. 23, 2017 Order 6. That determination was likely incorrect. *See Prevatte*, 865 F.3d at 898–99 (rejecting petitioner's § 2241 *Burrage* argument because he hadn't made it before and hadn't been foreclosed from doing so by circuit precedent). On the record before the Court, the Court cannot now determine whether Linder sufficiently preserved the argument; however, the Court need not decide the question, because it is plain enough that Linder's current argument fails on its merits.

Linder's jury was given this instruction about how it was to determine whether death resulted from Linder's distribution of the drug:

> In Count One of the indictment, overt act numbers 83 and 84, [sic] charge that Phillip Conklin's death resulted from the use of the controlled substance analogues distributed, or caused to be distributed, by the defendant. If you find the defendant guilty on Count One, you will then have to determine beyond a reasonable doubt if death resulted from the use of the controlled substance analogue. . . .
>
> The law provides that whenever death or serious injury is a consequence of the victim's use of a controlled substance that has been distributed by the defendant, a more serious offense is committed, regardless of whether the defendant knew or should have known that death would result. There is no requirement that the death resulting from the use of the controlled substance distributed was a reasonably foreseeable event, or that the controlled substance was the proximate cause of the death.
>
> A finding by you that, but for the victim Phillip Conklin ingesting the charged controlled substance analogues distributed or caused to be distributed by the defendant, if you find that analogues were intended for human consumption,

the victim would not have died, satisfies this standard.

> Therefore, you are to determine in Count One if the death of Phillip Conklin on or about April 14, 2002, resulted from the use of controlled substance analogues that the defendant distributed, or caused to be distributed, with the intent of human consumption.

Jury Instruction No. 40, Am. Resp. Ex. 1 46–47, ECF No. 49-1 (block capitals changed to lowercase lettering for readability).

The challenged jury instruction complies with the statute in light of *Burrage*. First, the plain language of the instruction matches exactly the language of the Controlled Substances Act whose plain meaning Justice Scalia interpreted in *Burrage*. That is, 21 U.S.C. § 841(b)(1)(A) attaches a stiffer penalty to drug distribution when death "results from" the use of the drug, and the instruction charges the jury that they must find beyond a reasonable doubt whether death "resulted from" the distribution. As *Burrage* held, the ordinary meaning of the phrase "results from" requires but-for causation. 134 S. Ct. at 887–88. And second, the instruction emphasizes and amplifies the requirement of but-for causation by explaining that a finding of but-for causation satisfies the requirements of the law. While the instruction does not explicitly spell out the holding of *Burrage*—that in the absence of a showing the drug was the independently sufficient cause of death, only a showing of but-for causation is sufficient—it is not required that the instruction have perfectly predicted the substance and language of later cases interpreting the Controlled Substances Act. A district court "is afforded substantial discretion with respect to the precise wording of instructions so long as the final result, read as a whole, completely and correctly states the law." *United States v. Gibson*, 530 F.3d 606, 609 (7th Cir. 2008) (quoting *United States v. Lee*, 439 F.3d 381, 387 (7th Cir.2006)), *cert. denied*, 129 S.Ct. 1386 (2009). Here, there need be no question of the appropriate standard of review; even were the decision to give the instruction reviewed de novo, it would be appropriate. *See United States v. DiSantis*,

565 F.3d 354, 359 (7th Cir. 2009) ("[G]eneral attacks on the jury instructions are reviewed for an abuse of discretion." (quoting *United States v. Macedo*, 406 F.3d 778, 787 (7th Cir. 2005)); *Sorich v. United States*, 709 F.3d 670, 674 (7th Cir. 2013) (explaining that a jury verdict should only be reversed on collateral review to the extent that a challenged and incorrect instruction had a "substantial and injurious effect or influence in determining the jury's verdict"). Because the jury instruction accurately stated the law in light of *Burrage*, Linder is entitled to no relief.

Although a certificate of appealability must ordinarily be granted or denied in a petition brought under 28 U.S.C. §§ 2254 or 2255, *see* 28 U.S.C. § 2253(c), no certificate of appealability is required, or required to be granted or denied, in a petition properly brought under 28 U.S.C. § 2241. *Behr v. Ramsey*, 230 F.3d 268, 270 (7th Cir. 2000).

None of Linder's many other filings affect the resolution of his petition as explained above, and so they are all moot.

CONCLUSION

Accordingly, Petitioner Linder's motion for relief under 28 U.S.C. § 2241, ECF No. 1, is DENIED. His other motions, ECF Nos. 51, 57, 58, 60, 61, 66, 67, 68, and 71 are MOOT. Respondent's motion to substitute party, ECF No. 72, is GRANTED. The Clerk is directed to enter judgment and close the case.

Entered this 2nd day of November, 2017.

s/ Sara Darrow
SARA DARROW
UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.