

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**HAGI SCOTT,
#38055-044,**

Petitioner,

vs.

T. WERLICH,

Respondent.

Case No. 17-cv-128-DRH

MEMORANDUM AND ORDER

HERNDON, District Judge:

Petitioner Hagi Scott is currently incarcerated in the Federal Correctional Institution located in Greenville, Illinois (“FCI-Greenville”). Scott filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, in order to challenge his conviction and sentence in *United States v. Scott*, Case No. 10-cr-496-JCH-TCM (E.D. Mo. 2010) (“criminal case”).

This matter is now before the Court for preliminary review of the habeas petition. Rule 4 of the Federal Rules Governing Section 2254 Cases in United States District Courts provides that upon preliminary consideration by the district judge, “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified.” Rule 1(b) of those Rules gives this Court the authority to apply the rules to other habeas corpus cases.

I. Background

On September 23, 2010, Scott was charged with knowingly or intentionally distributing a mixture or substance containing heroin that resulted in the death of another in violation of 21 U.S.C. §§ 841(a) and (b)(1)(C) (Count 1), knowingly or intentionally distributing a mixture or substance containing heroin in violation of 21 U.S.C. § 841(a) (Count 2), and knowingly or intentionally distributing a mixture or substance containing cocaine base (crack cocaine) in violation of 21 U.S.C. § 841(a) (Count 3).¹ (Doc. 1-1, p. 2). On January 19, 2011, Scott entered into a written plea agreement in which he agreed to plead guilty to Count 1. (Doc. 28, criminal case; Doc. 1-2, pp. 4-14). In exchange, the government agreed to dismiss the remaining counts of the indictment at the time of sentencing. *Id.* On April 21, 2011, Scott received a sentence of 240 months and 36 months of supervised release following his entry of a guilty plea as to Count 1. (Doc. 39, criminal case). The government dismissed all other counts against him. *Id.* Judgment was entered the same day. *Id.* Scott did not file a direct appeal.

On September 2, 2014, Scott filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. *Scott v. United States*, Case No. 14-cv-1512-JCH (E.D. Mo. 2014) (“§ 2255 Motion”). (Doc. 1-1, p. 2). He challenged his conviction and sentence based on the United States Supreme Court’s decision in

¹ To determine Scott’s criminal and litigation history, the Court reviewed the Public Access to Court Electronic Records (“PACER”) website (www.pacer.gov). *See Bova v. U.S. Bank, N.A.*, 446 F. Supp. 2d 926, 930 n. 2 (S.D. Ill. 2006) (a court may judicially notice public records available on government websites) (collecting cases). Court documents are, of course, public records of which the Court can take judicial notice. *See Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994).

Burrage v. United States, -- U.S. --, 134 S. Ct. 881, 887 (2014). At issue in *Burrage* was whether a defendant may be sentenced under the enhanced penalty provision in § 841(b)(1)(C), which results in the imposition of a 20-year mandatory minimum sentence when death “results from” the use of the unlawfully distributed drug, if the use of the drug “contributes to, but is not a but-for cause of, the victim’s death.” *Burrage*, 134 S. Ct. at 885. The Supreme Court held that “but for” causation is required. *Id.* at 892. The “death results” enhancement has two elements: (1) knowing or intentional distribution of the controlled substance under § 841(a)(1); and (2) death resulting from the use of the drug under § 841(b)(1)(C). *Id.* at 887. Scott argued that the “death results” enhancement no longer applied to him under *Burrage*. (Doc. 1, p. 4).

The United States District Court for the Eastern District of Missouri denied the § 2255 Motion on May 23, 2016. *Id.* The District Court reasoned that Scott waived the right to bring a collateral attack in his written plea agreement.² That aside, even if *Burrage* announced a new rule of law made retroactively applicable to cases on collateral review, Scott’s challenge also lacked merit. (Doc. 1-1, p. 2). The District Court denied the § 2255 Motion and declined to issue a certificate of appealability.

² While his initial § 2255 Motion was pending, Scott attempted to bring a second § 2255 Motion to challenge the validity of his written plea agreement, to assert a claim of prosecutorial misconduct, and to bring a claim based on the ineffective assistance of his counsel. *Scott v. United States*, App. No. 15-1687 (8th Cir. 2015). He withdrew the Application for Permission to File a Successive Habeas Petition after deciding to incorporate the challenge into his pending § 2255 Motion. The District Court ultimately declined to address Scott’s challenges after finding that they were untimely. *Scott v. United States*, Case No. 14-cv-1512-JCH (E.D. Mo.) (Doc. 10, pp. 5-7 n. 1) (finding that Petitioner is barred from raising his claims for the first time in a reply brief and his claims are also time-barred).

Scott nevertheless filed an application for a certificate of appealability with the Eighth Circuit Court of Appeals. *See Scott v. United States*, App. No. 16-3051 (8th Cir. 2016). The Eighth Circuit denied his application and dismissed the appeal on January 18, 2017. (Doc. 1, p. 4). The instant habeas petition followed. (Doc. 1, 1-1).

II. Habeas Petition

Scott now challenges his conviction and sentence under the penalty enhancement provision, referred to herein as the “death results” enhancement, of the Controlled Substances Act. (Doc. 1, pp. 4, 6). The “death results” enhancement is applicable where death or serious bodily injury results from the use of a distributed substance. *See Burrage v. United States*, -- U.S. --, 134 S. Ct. 881 (Jan. 27, 2014). Scott contends that *Burrage* requires the government to prove beyond a reasonable doubt that his “knowing or intentional” distribution of heroin was the “but for” cause of death of the victim at issue. (Doc. 1, p. 6). At the time he entered into a written plea agreement in his criminal case, the government was only required to prove that the distribution of heroin was a contributing factor in the death of another. *Id.* Scott maintains that heroin was merely a “contributing factor” and not the “but for” cause of the death at issue in his underlying criminal case. *Id.* Therefore, the death results enhancement no longer applied to his sentence. *Id.*

According to Scott, the remedy under 28 U.S.C. § 2255 is inadequate or ineffective to challenge his conviction and sentence because *Burrage* is a statutory interpretation case that was decided after the time expired for filing a collateral

attack under § 2255. (Doc. 1, p. 4). He asks this Court to grant his Petition, vacate his sentence, and resentence him without the “death results” enhancement under 21 U.S.C. § 841(b)(1)(C). (Doc. 1, p. 8).

III. Discussion

Generally, a federally convicted person may challenge his conviction and sentence by bringing a motion pursuant to 28 U.S.C. § 2255 in the court that sentenced him. *Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012); *Hill v. Werlinger*, 695 F.3d 644, 645 (7th Cir. 2012); *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003); *Walker v. O'Brien*, 216 F.3d 626, 629 (7th Cir. 2000). A § 2255 motion is ordinarily the “exclusive means for a federal prisoner to attack his conviction.” *Kramer*, 347 F.3d at 217. However, § 2255 generally limits a prisoner to *one* challenge of his conviction and sentence.

A prisoner may not file a “second or successive” motion unless a panel of the appropriate court of appeals certifies that such motion contains either: (1) newly discovered evidence “sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense;” or (2) “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h).

The Seventh Circuit has recognized that it is possible, under very limited circumstances, for a prisoner to challenge a federal conviction or sentence under § 2241. Section 2255(e) contains a “savings clause,” which authorizes a federal prisoner to file a § 2241 petition where the remedy under § 2255 is “inadequate

or ineffective to test the legality of his detention.” See 28 U.S.C. § 2255(e); see also *United States v. Prevatte*, 300 F.3d 792, 798-99 (7th Cir. 2002). Section 2255 is considered to be inadequate or ineffective when three requirements are met. *Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013). First, the prisoner must demonstrate that he relies on a “statutory-interpretation case” and not a constitutional case. *Id.* (citing *Rios*, 696 F.3d at 640). Second, the prisoner must establish that he relies on a retroactive decision that he could not have invoked in his first § 2255 motion. *Id.* Third, the sentence enhancement must have been a “grave enough error to be deemed a miscarriage of justice corrigible therefore in a habeas corpus proceeding.” *Id.* (citing *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998) (a prisoner must show a “fundamental defect in his conviction or sentence”). In *Hill*, the Seventh Circuit reiterated that “[i]nadequate or ineffective” means that a “legal theory that could not have been presented under § 2255 establishes the petitioner’s actual innocence.” *Hill*, 695 F.3d at 648 (citing *Taylor v. Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002); *Davenport*, 147 F.3d at 608).

Scott’s Petition does not trigger application of the “savings clause” under § 2255(e). For one thing, Scott does not rely on a decision that he could not have invoked in his first § 2255 Motion. He filed his § 2255 Motion after the Supreme Court issued its decision in *Burrage*. In fact, *Burrage* was the focus of Scott’s initial § 2255 Motion. Even so, the United States District Court for the Eastern District of Missouri denied the § 2255 Motion on numerous grounds.

The most significant hurdle Scott faced then and now is the fact that he explicitly waived his right to challenge his conviction or sentence in his written

plea agreement. (Doc. 1-2, pp. 4-14). Scott submitted a signed copy of the agreement as an exhibit to his Petition. *Id.* It states, in pertinent part:

b. Habeas Corpus: The defendant agrees to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to Title 28, United States Code, Section 2255, except for claims of prosecutorial misconduct or ineffective assistance of counsel.

(Doc. 1-2, p. 10). In an exhibit to his Petition, Scott asserts that the Court, the government, and his defense attorney failed to explain that he would be foreclosed from challenging his conviction or sentence based on a subsequent change in the law. (Doc. 1-1, p. 6) (claiming they “never mentioned in the guilty plea, that in case the law changes in the future, that the petitioner gives up his rights to the new changes”).

Where a guilty plea is entered knowingly and voluntarily, appeal waivers are enforceable. *Solano v. United States*, 812 F.3d 573, 577 (7th Cir. 2016) (citing *United States v. Behrman*, 235 F.3d 1049, 1051 (7th Cir. 2000)). “The appeal waiver stands or falls with the plea agreement.” *Id.* Further, a waiver of the right to challenge a conviction or sentence under § 2255 also bars a petition under § 2241 because the waiver does not render the remedy under § 2255 inadequate or ineffective. *Muse v. Daniels*, 815 F.3d 265 (7th Cir. 2016) (§ 2241 is a “form of collateral attack”). Moreover, a subsequent change in the law does not make an appeal waiver involuntary. *United States v. Vela*, 740 F.3d 1150, 1151 (7th Cir. 2014).

Scott does not assert that his appeal waiver was involuntary or invalid in the Petition. In any event, a § 2241 petition is not the appropriate vehicle for

raising this argument when Scott could have instead brought the argument in a timely § 2255 Motion. The fact that he belatedly raised a related argument in his reply brief does not trigger application of the “savings clause” here.

Finally, the Court notes that Scott’s argument fails on the merits. In his plea agreement, Scott explicitly conceded that he “knowingly” violated 21 U.S.C. § 841(a), which includes the following element, among others: “(3) that the death of [another] resulted from the use of heroin, so distributed by the defendant.” (Doc. 1-2, p. 5). Scott’s written plea agreement goes on to waive “the right to require the government to provide the elements of the offenses charged against the defendant beyond a reasonable doubt.” (Doc. 1-2, p. 12). Given these provisions and Scott’s failure to challenge the voluntary nature of his plea agreement, the Court finds no merit to his challenge or his Petition.

IV. Disposition

IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (Doc. 1) is summarily **DISMISSED** on the merits with prejudice. Respondent **T. WERLICH** is also **DISMISSED** with prejudice.

If petitioner wishes to appeal this dismissal, his notice of appeal must be filed with this court within thirty days of the entry of judgment. FED. R. APP. P. 4(a)(1)(A). A motion for leave to appeal *in forma pauperis* (“IFP”) should set forth the issues petitioner plans to present on appeal. See FED. R. APP. P. 24(a)(1)(C). If petitioner does choose to appeal and is allowed to proceed IFP, he will be liable for a portion of the \$505.00 appellate filing fee (the amount to be determined based on his prison trust fund account records for the past six months)

irrespective of the outcome of the appeal. See FED. R. APP. P. 3(e); 28 U.S.C. § 1915(e)(2); *Ammons v. Gerlinger*, 547 F.3d 724, 725-26 (7th Cir. 2008); *Sloan v. Lesza*, 181 F.3d 857, 858-59 (7th Cir. 1999); *Lucien v. Jockisch*, 133 F.3d 464, 467 (7th Cir. 1998). A proper and timely motion filed pursuant to Federal Rule of Civil Procedure 59(e) tolls the 30-day appeal deadline. FED. R. APP. P. 4(a)(4). A Rule 59(e) motion must be filed no more than twenty-eight (28) days after the entry of the judgment, and this 28-day deadline cannot be extended. It is not necessary for petitioner to obtain a certificate of appealability in an appeal from this petition brought under Section 2241. *Walker v. O'Brien*, 216 F.3d 626, 638 (7th Cir. 2000).

The Clerk is **DIRECTED** to close this case and enter judgment accordingly.

IT IS SO ORDERED.

Signed this 5th day of April, 2017.

 Digitally signed by
Judge David R. Herndon
Date: 2017.04.05
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United States District Judge