

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

WALTER HERNANDEZ, SR., # 47996-004

PETITIONER

V.

CIVIL ACTION NO. 3:19-CV-266-KHJ-FKB

WARDEN, UNITED STATES
PENITENTIARY YAZOO CITY

RESPONDENT

ORDER ADOPTING REPORT AND RECOMMENDATION

Before the Court is the Report and Recommendation of United States Magistrate Judge F. Keith Ball. [21]. That Report recommends that Petitioner Walter Hernandez, Sr.'s Petition for Writ of Habeas Corpus [1] be dismissed. Written objections to the Report were due by June 30, 2022. Hernandez moved for an extension of time to file objections, which this Court granted, giving him until July 28, 2022 to do so. Hernandez, however, has filed no objections to the Report, and the time to do so has passed.

When no party has objected to a magistrate judge's report and recommendation, the Court need not review it de novo. 28 U.S.C. § 636(b)(1). In such cases, the Court can apply the clearly erroneous, abuse of discretion, and contrary to law standards of review. *See United States v. Brigham*, 569 F.3d 220, 228 (5th Cir. 2009) (citation omitted).

In 1995, Hernandez was convicted in the United States District Court for the Southern District of Florida for various charges related to conspiracy to commit

murder-for-hire, arson, and mail fraud. [21] at 2. He was convicted on all counts and received multiple life sentences along with a consecutive 60-month term of imprisonment. *Id.* The Eleventh Circuit affirmed his convictions in May 1998. *Id.*

Later, Hernandez pursued various challenges to his convictions and filed his first § 2241 petition in 2011, which was dismissed for failure to meet the requirements of the savings clause of § 2255(e). *Id.* On January 24, 2017, Hernandez filed a § 2241 petition in a district court for the Northern District of Florida, arguing that he is “actually innocent” of the convictions dating back to 1995 based on *Rosemond v. United States*, 572 U.S. 65 (2014). [21] at 3. The district court concluded that Hernandez could not use the savings clause to pursue his claims in a § 2241 habeas petition. *Id.* The Eleventh Circuit concluded that an appeal of the district court’s decision would be frivolous and dismissed the appeal for want of prosecution. *Id.* at 3–4.

Hernandez filed another § 2241 petition in this Court, arguing again that *Rosemond* retroactively applies and has rendered him “actually innocent” of the offenses committed in 1995. Pet. for Habeas Corpus [1]; Memo. in Support of Pet. [2] at 1. He also argues that the Eleventh Circuit has taken a narrower approach than the Fifth Circuit in similar cases and would be eligible for § 2241 relief under this circuit’s § 2255(e)’s savings clause jurisprudence. [2] at 10.

The Magistrate Judge found that Hernandez already raised his *Rosemond* claim in a § 2241 petition filed in 2017 in the Northern District of Florida. [21] at 5. Again, that court denied the petition, and the Eleventh Circuit concluded that the

appeal was frivolous and dismissed it. *Id.* As a result, the Magistrate Judge found that the petition should be dismissed as an “abuse of the writ” because Hernandez has raised the same claim a second time. *Id.*

The Court finds that the Report and Recommendation is neither clearly erroneous nor contrary to law and should be adopted as the opinion of this Court.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Report and Recommendation [21] of United States Magistrate Judge F. Keith Ball, entered in this cause should be, and the same is, adopted as the finding of this Court.

IT IS, FURTHER, ORDERED AND ADJUDGED that this case is
DISMISSED.

A separate Final Judgment will issue this day.

SO ORDERED, this the 2nd day of August, 2022.

s/ Kristi H. Johnson
UNITED STATES DISTRICT JUDGE