IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Pedro R. Caraballo Martinez, #60136-004, Petitioner, v. Warden Andrew Mansukhani, Respondent.	)	Civil Action No.: 6:15-cv-01331-JMC **ORDER AND OPINION**

This matter is before the court pursuant to the Magistrate Judge's Report and Recommendation recommending that Petitioner's 28 U.S.C. § 2241 Petition (ECF No. 1-1) be dismissed without prejudice and without requiring Respondent to file an answer. (ECF No. 12.) The Magistrate Judge further recommends that the district court deny the certificate of appealability. (ECF No. 12.) Petitioner timely objects. (ECF No. 21.)

For the following reasons, the Magistrate Judge's Report and Recommendation is **ADOPTED**, and Petitioner's § 2241 Petition is **DISMISSED** *without prejudice* after *de novo* review.

I. PROCEDURAL HISTORY

Petitioner Pedro Carballo Martinez, 20, is a foreign-born federal inmate currently serving a life sentence at FCI-Estill for carjacking, hostage taking, conspiracy to commit both, and using a firearm during a crime of violence. (ECF No. 12 at 1–3 (citing *United States v. Ferreira*, 285 F.3d 1020, 1022–23 (11th Cir. 2009)).) Petitioner is proceeding *pro se* and is therefore entitled to liberal construction of his filings. *See Erickson v. Pardus*, 551 U.S. 89 (2007) (*per curiam*).

Petitioner alleges that on June 2, 2000, he, along with Ewin Oscar Martinez, 47, and Jean

Carlo Ferreira, (age unknown), were found guilty in the Southern District of Florida for violating 18 U.S.C. § 1203 (the Hostage Taking Act), carjacking, conspiracy, and use of a firearm during a crime of violence. (ECF No. 21.) On December 11, 2001, Petitioner and Co-Defendants' guilt was affirmed on appeal by the Eleventh Circuit. *Ferreira*, 285 F.3d at 1022.

Petitioner alleges that in 2003 he filed a motion to vacate under § 2255 in the Southern District of Florida which was denied as untimely and was accompanied by a denial of a Certificate of Appealability. (ECF Nos. 1 at 2 and 1-1 at 3). On March 25, 2015, Petitioner filed a Petition seeking *habeas* relief pursuant to 28 U.S.C. § 2241 based on developments in *Bond v. United States*, 134 S. Ct. 2077 (2014). Petitioner believes *Bond* invalidates his original conviction under 18 U.S.C. §1203(a) on the grounds he should have been tried under Florida state law for kidnapping and not a federal law governing hostage taking. (ECF Nos. 1, 1-1, 12.) Petitioner's rationale relies on the alleged fact that the explicit congressional intended purpose of § 1203 is to target extranational terrorism and that using the act to go after what he alleges is a purely "intrastate kidnapping" is unconstitutional as *Bond* requires that courts determine whether Congress clearly intended for the act to reach "purely local crimes" before interpreting expansive language as intruding upon a State's police power. 134 S. Ct. at 2081-82.

On April 9, 2015, Magistrate Judge Kevin F. McDonald issued his Report and Recommendation (ECF No. 12), recommending dismissal of the Petition. The parties were advised of their right to file objections to the Report. (ECF No. 12.) Petitioner filed timely and specific objections on June 22, 2015. (ECF No. 21.)

II. ANALYSIS OF RECOMMENDATION AND OBJECTIONS

The Magistrate Judge's Report is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina. The Magistrate Judge makes only a

recommendation to this court, which has no presumptive weight. The responsibility to make a final determination remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The court is charged with making a *de novo* determination of those portions of the Report to which specific objections are made. *Diamond v. Colonial Life and Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005).

The incident in question is the kidnapping and imprisonment of Christina Aragao and her two children, one an infant, in a home for four days by Petitioner and two others. (ECF No. 12.) The Magistrate Judge, according to his reading of the current standing conviction from *United States v. Ferreira*, cites Petitioner as the "leader of the conspiracy." (ECF No. 12, p. 1 (*citing to* 275 F.3d 1020, 1022 (11th Cir. 2001)).) The Magistrate Judge's liberal construction of Petitioner's claim (ECF No. 12 at 3-4) can be summarized in the following arguments: (1) that Petitioner and Co-Defendants planned to kidnap Alceu Aragao for ransom; (2) if Mr. Aragao did not comply they planned on kidnapping his family for the same purpose; (3) Co-Defendants never formally requested a ransom, although a destroyed ransom note was found in a trash bin by the FBI after the incident; (4) Petitioner alleges there was never an actual threat to detain Christina or the children with the express purpose of compelling Mr. Aragao or the U.S. Government to perform or abstain from any action as a condition of release; (5) Petitioner admits involvement in the offense, and characterizes it now as unacceptable, serious, and against the laws of the State of Florida; (6) the actions of Petitioner and his Co-Defendants constituted an intrastate kidnapping and is already covered by a Florida statute; (7) that a person must be transported across state lines to bring federal prosecution for kidnapping and that therefore the crime was not federal 'hostage-taking'; (8) the holding in *Bond* is substantive, not procedural, and is therefore retroactive on collateral review because the new rule from *Bond* restricts the

scope of punishable conduct covered by federal statutes implemented through treaties; (9) although the crime was violent, it did not incur death, nor could the actions of Petitioner be construed as international terrorism and since the Second Circuit has held that the Hostage Taking Act applies to international terrorism, Petitioner's federal conviction is invalid due to the decision in *Bond*, 134 S. Ct. 2077; (10) the gate-keeping provision of 28 U.S.C. § 2255 prevents Petitioner from bringing a second or successive § 2255 action, and he has already filed a §2255 petition, which has been denied as untimely and the change or clarification of law, although substantive, is not constitutional; (11) The Antiterrorism and Effective Death Penalty Act does not normally provide for second or successive § 2255 motions based on new judicial interpretations of statutes, however, the Petitioner meets the *In Re Jones* test allowing collateral attack through a § 2241 motion; (12) Petitioner has therefore shown a fundamental error to his case and the Federal Government overreached by using an international treaty to prosecute a purely local crime traditionally under State jurisdiction.

After considering the foregoing, the Magistrate Judge recommends that Petitioner's § 2241 Petition be given summary dismissal.

28 U.S.C. § 2241 is narrowly applied, whether for state or federal prisoners, to those prisoners and pre-trial detainees challenging administration of parole, computation of good time, prison discipline, or imprisonment beyond expiration of their sentence. *See Barber v. Rivera*, Civil Action No. 4:11-2579-TMC-TER, 2011 WL 6982074, at *2 (D.S.C. Dec. 13, 2011) (collecting cases), *adopted by* 2012 WL 80250 (D.S.C. Jan. 11, 2012). A prisoner who challenges his federal conviction or sentence, rather than challenging the legality or length of his detainment or imprisonment, must usually bring his claim under § 2255 and not § 2241. *Waletzki v. Keohane*, 13 F.3d 1079, 1080 (7th Cir. 1994). Under § 2255 and the holding from *In*

Re Jones, to test the legality of one's conviction collaterally through a § 2241 petition, one must show (1) that at the time of conviction, settled law of this circuit and of the Supreme Court established that petitioner's conviction was legal; (2) subsequent to the prisoner's direct appeal and first § 2255 motion the substantive law changed such that the initial conduct for which the petitioner was convicted is no longer deemed criminal; and (3) the prisoner cannot satisfy the gate-keeping provisions preventing the direct filing of a subsequent § 2255 motion because the new rule is not one of constitutional law. 226 F.3d 328, 333-334 (4th Cir. 2000).

Here, Petitioner fulfills the first and third prongs of the test, as, at the time of conviction, settled law of the Fourth Circuit and the Supreme Court allowed for Petitioner's conviction for hostage taking under 18 U.S.C. § 1203, and conviction under § 1203 is not directly challengeable through a second § 2255 motion to vacate since it does not involve a constitutional right. (ECF No. 12, p. 6.) It is the Magistrate Judge's view that Petitioner fails on the second prong of the test, as he interprets *Bond* to strictly invalidate a single conviction under 18 U.S.C. § 229(a)(1) governing chemical weapons charges and here Petitioner is challenging his conviction for hostage taking under § 1203. The Magistrate Judge further cites *United States v. Shibin*, 722 F.3d 233 (4th Cir. 2013) as evidence that the Fourth Circuit has already ruled against Petitioner on the question of whether Petitioner can bring a jurisdictional challenge against the Hostage Taking Act in this circuit. The Magistrate Judge recommends dismissal *without prejudice* and without requiring Respondent to file an answer or return. The Magistrate Judge also recommends that the court deny a certificate of appealability.

Petitioner objects, alleging he fulfills the second prong of the *In Re Jones* test through the recent holding in *Bond*. (ECF No. 21.) Petitioner cites in his favor *United States v. Toviave*, in which the Sixth Circuit relied on similarities between the prosecution's overbroad application of

chemical warfare statutes to simple assault in *Bond* to overturn a lower court conviction of Defendant under forced labor statutes where the individual likely committed child abuse, a state crime, but did not fulfill other necessary elements, including congressional intent for the forced-labor statute to abrogate state police power in this instance. 731 F.3d 623 (6th Cir. 2014); *Bond*, 134 S. Ct. at 2090. Petitioner then turns to the initial treaty upon which § 1203 relies, and precedent from fellow circuits which state that *a* purpose of the Hostage Taking Act is extraterritorial crimes and international terrorism. (ECF No. 21 at 6 (citing *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1998); *United States v. Rodriguez*, 587 F.3d 573 (2d Cir. 2009)).) In answer to the Magistrate Judge's use of *Shibin*, Petitioner argues that the case can be distinguished from his own as *Shibin* is a proper application of § 1203 governing "international terrorism", and Petitioner's own case does not touch upon the jurisdictional challenges raised and answered in *Shibin*. (ECF No. 21.) In *Shibin*, the defendant challenged his personal jurisdiction on the grounds that he was a forcibly captured foreign national who was known to have committed piracy and kidnapping of American and German ships and crew off the coast of Somalia, before being tried in the United States. 733 F.3d at 233. *Shibin* never touches on the issues raised in *Bond* with regard to the breadth of the scope of activity which Congress intends § 1203 to cover. *Id.* Here, Petitioner is not challenging jurisdiction, but the applicability of the statute, for which Congress allegedly has only given clear intent to cover international terrorism, and not his actions, which he describes as the purely intrastate abduction and violence against a woman and her children. Petitioner is accurate as to the distinction between the two cases and is accurate as to his point that the Fourth Circuit has yet to address his allegation that § 1203 should not be read as expansively as to generally apply to "purely local crimes."[1]

[1] However, the court need not reach this issue, as Petitioner falls within the clear congressional intent of 18 U.S.C. § 1203 as shown in the *de novo* review of Petitioner's claim.

The end result of these discrepancies, according to Petitioner, is the attachment of federal crimes, usually brought about by international treaty, to intrastate offenses that should be adjudicated as such. *See Bond*, 135 S. Ct. at 2092 (holding the application of state laws governing simple assault, reckless endangerment, and harassment were more appropriate than federal chemical weapons statutes formed as a result of international treaty); *Toviave* 761 F.3d at 623 (holding available state laws governing child abuse were more appropriate than using federal charges governing forced labor, which is meant to target those who are bringing non-relatives in from overseas and often involves deprivation of education, false imprisonment, and other aspects absent in this case); *Rodriguez*, 587 F.3d at 573 (holding that 18 U.S.C. § 1203 governs hostage taking as a method of conducting international terrorism and kidnapping of and by foreign nationals, not street altercations and temporary deprivation of movement).

While the three cases cited above involve greater separation from the congressional intent of the act and its application than the case before this court, Petitioner has given sufficiently specific objections against the Magistrate Judge's determination regarding whether he can fulfill the second prong of the *In Re Jones* test to warrant *de novo* review. Fed. R. Civ. P. 72(b)(3). Petitioner has also given some evidence that it is possible there is a broader reading to *Bond* than a single strictly narrow invalidation of 18 U.S.C. § 229(a)(1) governing chemical weapons for low-level harassment and assault. *See Toviave*, 761 F.3d at 627 ("The Supreme Court has recently reemphasized we should be cautious in inferring Congressional intent to criminalize activity traditionally regulated by the states." and citing to *Bond*, 134 S. Ct. 2077.) Petitioner also provides sufficiently specific distinctions between his case and *Shibin*, and protests that the case does not apply here as jurisdiction of the party is not in question, but the applicability of the law to the crime committed. (ECF No. 21 at 7.)

Petitioner also objects to the Magistrate Judge's reading of *Ferreira* as naming Petitioner as the "ringleader." (ECF Nos. 12, 21.) Petitioner is accurate here, the ringleader was Ewin Martinez of the same last name, and while it may not have direct bearing on this Petition, Ewin's list of crimes committed during the attack are more extensive and aggravating than Petitioner's, and should not be incorrectly attributed to him so as to avoid any potential bias. *Ferreira*, 275 F.3d at 1024 (naming Martinez as the ringleader and increasing severity of sentence for enhancing factors including sexual exploitation of the 9-year old victim and additional charges for possession of child pornography). Therefore, under Rule 72(b)(3) of the Federal Rules of Civil Procedure, this court must review this case *de novo*.

III. *DE NOVO* REVIEW OF § 2241 PETITION

Petitioner has successfully shown both to the Magistrate Judge and this court that he has fulfilled the first and third prong of the *In Re Jones* test for determining whether a § 2241 test is appropriate. 226 F.3d at 328. The test requires that (1) at the time of conviction, settled law established the legality of his conviction, (2) there has been a subsequent substantive law change which would make his conduct not criminal under the law with which he was charged, and (3) the prisoner cannot satisfy the gate-keeping provisions as the change in law is not a constitutional one. *Id.* Petitioner has shown (1) that at the time of conviction, settled law of the Fourth Circuit and of the Supreme Court established the legality of his conviction under 18 U.S.C. § 1203 governing Hostage Taking. Petitioner has also shown, through the failure of his untimely § 2255 motion, that (3) any future § 2255 motions could not be heard since his first was denied as untimely and he was denied a certificate of appealability. (ECF Nos. 12, 21.)

In order to prove the second prong, Petitioner must show that the holding in *Bond* would make it so that the conduct of which he has been convicted (the attack on Christina Aragao and

her children) would no longer be seen as a violation of § 1203. Petitioner is correct that *Bond* need not be read so strictly as to exclusively prevent the application of 18 U.S.C. 229(a), which is meant to target those who store, manufacture, and use chemical weapons, to civil disturbances, and that it may have narrow implications for federalism and intrusion into the state police power for those statutes implemented through international treaty and the Necessary and Proper Clause alone which are later applied to circumstances where no clear intent on the part of Congress exists. *Toviave*, 134 S. Ct. at 627 (citing to *Bond* as emphasizing a caution against inferring intent to criminalize areas traditionally regulated by states).

Here, there is a clear intent on the part of Congress and case law to apply the Hostage Taking Act to at least two activities, regardless of if they are intrastate, interstate, or international. The first, as Petitioner accurately points out, is international terrorism and piracy. *See Shibin*, 722 F.3d at 233 (high seas piracy and ship seizure); *Yunis*, 924 F.2d 1086 (hijacking an airplane which included American passengers);*United States v. Said*, 798 F.3d 182 (4th Cir. 2015) (piracy, kidnapping, and ship seizure); *United States v. Haipe*, 769 F.3d 1189 (D.C. Cir. 2014) (Filipine national taking both Filipine and American citizens hostage in the Philippines); *United States v. Straker*, 800 F.3d 570 (D.C. Cir. 2015) (abduction of a naturalized American in Trinidad for the purpose of ransom). The second, which Petitioner conveniently does not mention, involves cases where violators or victims are undocumented foreign nationals residing within the borders of the United States. *Rodriguez*, 587 F.3d at 579 (citing to numerous cases, including Petitioner's own direct appeal to the Eleventh Circuit). Furthermore, *Rodriguez* clearly turns on its case being a unique exception to the foreign non-resident national provision due to the minimal nature of the crime, and does not attempt to abrogate the already clear and narrow intent of the statute to regulate participation in the terror, ransom, and containment of both

American citizens abroad and of *foreign nationals within American borders*. 587 F.3d at 580 ("A Hostage Act violation does not require a link to international terrorism."). Therefore, Petitioner, who, along with Co-Defendants abducted the family of a foreign national, falls squarely within the limited clear intent of § 1203 formulated by Congress and decades of precedent, and is not eligible for relief under the second prong of the *In Re Jones* test, as any change in or clarification of law that may be inferred from *Bond* would in no way lessen Petitioner's guilt under the Hostage Taking Act.

IV. CONCLUSION

Based on the aforementioned reasons, the Magistrate Judge's Report and Recommendation is **ADOPTED**, and Petitioner's Petition for § 2241 relief is **DISMISSED** *without prejudice*.

The law governing certificates of appealability provides that: 28 U.S.C. § 2253(c)(2) A certificate of appealability may issue… only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(3). The certificate of appealability…shall indicate which specific issue or issues satisfy the showing required by paragraph (2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find this court's assessment of his constitutional claims is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, the legal standard for the issuance of a certificate of appealability has not been met.

IT IS SO ORDERED.

J. Michelle Childs

United States District Judge

July 26, 2017
Columbia, South Carolina