

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-30466
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
December 12, 2018

Lyle W. Cayce
Clerk

EUGENE ATKINS,

Petitioner-Appellant

v.

M. STANCIL, Warden, United States Penitentiary, Pollock,

Respondent-Appellee

Appeals from the United States District Court
for the Western District of Louisiana
USDC No. 1:17-CV-992

Before DAVIS, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:*

Eugene Atkins, federal prisoner # 12102-040, was convicted of, *inter alia*, distributing heroin that resulted in death from the use of the heroin, in violation of 21 U.S.C. § 841(b)(1)(C), and was sentenced to life imprisonment on that count. *See United States v. Atkins*, 289 F. App'x 872, 873 (6th Cir. 2008). He now appeals the district court's dismissal of his 28 U.S.C. § 2241 petition, arguing that *Burrage v. United States*, 571 U.S. 204 (2014),

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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establishes that he was convicted of a nonexistent offense. He also seeks appointment of counsel and leave to file a supplemental brief. We review the district court's legal determinations de novo and its factual findings for clear error. *Padilla v. United States*, 416 F.3d 424, 425 (5th Cir. 2005).

Generally, a federal prisoner must seek relief under 28 U.S.C. § 2255 if he wishes to challenge his conviction or sentence. *Id.* at 426. However, he may raise claims in a § 2241 petition where the remedy under § 2255 is inadequate or ineffective and thus the claims fall within the savings clause of § 2255(e). *Id.* He must establish that his claims (1) are based on a retroactively applicable Supreme Court decision that establishes that he may have been convicted of a nonexistent offense and (2) were foreclosed by circuit law at the time of his trial, direct appeal, or first § 2255 motion. *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001). To meet the first prong, he must show “that based on a retroactively applicable Supreme Court decision, he was convicted for conduct that did not constitute a crime.” *Jeffers v. Chandler*, 253 F.3d 827, 831 (5th Cir. 2001).

In addition to *Burrage*, Atkins relies on *Santillana v. Upton*, 846 F.3d 779 (5th Cir. 2017). In *Santillana*, the indictment alleged that the victim's cause of death was “acute mixed drug intoxication,” specifically a combination of methadone and benzodiazepine. 846 F.3d at 785. Based on this language and the jury instructions, we concluded that we could not determine on the record before us that the jury necessarily decided that drugs sold by the defendant to the victim were the but-for cause of the victim's death. *Id.* However, in this case, the only evidence of causation was that the victim died from “acute heroin toxicity.” Indeed, the district court noted, and Atkins does not refute, that Atkins stipulated with the Government that the medical examiner determined that the victim died “from acute heroin toxicity otherwise

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known as heroin overdose.” Thus, the jury, in deciding that the death resulted from the heroin supplied by Atkins, necessarily found “but for” causation given the absence of any other claimed cause. *See Atkins*, 289 F. App’x at 873-74. Atkins thus has not demonstrated that *Burrage* establishes that he “may have been convicted of a nonexistent offense.” *See Reyes-Requena*, 243 F.3d at 901. Accordingly, the district court’s dismissal of his petition is affirmed, and his motions for leave to file a supplemental brief and appointment of counsel are denied.

AFFIRMED; MOTIONS DENIED.