

No. 18-6481

IN THE SUPREME COURT OF THE UNITED STATES

JEREMY FONTANEZ, PETITIONER

v.

JOSEPH COAKLEY, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

STRATTON C. STRAND
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's appeal of the district court's decision in his favor presents any live case or controversy given that petitioner received the relief that he requested in his petition under 28 U.S.C. 2241.

2. Whether the Due Process Clause requires that petitioner be permitted to withdraw from participation in the Federal Bureau of Prisons' Inmate Financial Responsibility Program while retaining the privileges of participation in that program.

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-6481

JEREMY FONTANEZ, PETITIONER

v.

JOSEPH COAKLEY, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3)¹ is not published in the Federal Reporter but is reprinted at 698 Fed. Appx. 150. The order of the district court (Pet. App. B1-B11) is not published in the Federal Supplement but is available at 2017 WL 405150. A prior opinion of the court of appeals is reported at 807 F.3d 84.

¹ The appendix to the petition for a writ of certiorari is not sequentially paginated. This brief identifies the separate items within that appendix as Pet. App. A, B, and C, respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2017. The petition for a writ of certiorari was filed on December 14, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted in 2004 of multiple offenses related to a series of armed robberies. See 807 F.3d 84, 85 (4th Cir. 2015). He was sentenced to 420 months of imprisonment, to be followed by five years of supervised release. 02-cr-813 Am. Judgment 3-4 (Judgment) (E.D. Pa. Aug. 12, 2005). The district court ordered petitioner to pay \$27,972.61 in restitution and a \$1400 special assessment. Judgment 5-7. The Third Circuit dismissed his appeal. See Order, No. 05-1516 (Aug. 25, 2005). Petitioner later filed a petition under 28 U.S.C. 2241 in the United States District Court for the Northern District of West Virginia, challenging the Federal Bureau of Prisons' (BOP) refusal to release him from participation in the Inmate Financial Responsibility Program (IFRP). See 807 F.3d at 86. The court dismissed his motion. See ibid. The Fourth Circuit reversed and remanded. Id. at 87. On remand, the district court granted relief to petitioner, Pet. App. B1-B11, and then denied his motion for "clarification," which the court construed as a

motion to amend the judgment, D. Ct. Doc. 56, at 1-4 (Apr. 18, 2017). The Fourth Circuit affirmed. Pet. App. A1-A3.

1. In 2001 and 2002, petitioner participated in multiple armed robberies of commercial establishments. See 02-cr-813 Presentence Investigation Report (PSR) ¶¶ 14-32 (E.D. Pa.). A federal grand jury in the Eastern District of Pennsylvania indicted petitioner on one count of conspiracy to interfere with interstate commerce by robbery, in violation of 18 U.S.C. 1951; 12 counts of interfering with interstate commerce by robbery, in violation of 18 U.S.C. 1951; and 12 counts of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). See PSR ¶ 1. In 2004, pursuant to an agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), petitioner pleaded guilty to the conspiracy charge, 11 of the robbery charges, and two of the Section 924(c) charges. PSR ¶¶ 2-3, 5. As part of the agreement, petitioner waived his right to appeal or collaterally attack his conviction and sentence. Id. ¶ 6(g). The district court accepted the plea, found petitioner guilty, and sentenced him to 420 months of imprisonment, which was consistent with the parties' agreement regarding an appropriate sentence. Judgment 1-4; see PSR ¶ 5.²

² Also in 2004, petitioner was convicted in state court of first-degree murder and related charges in connection with a botched robbery of yet another commercial establishment. PSR ¶ 125. He was sentenced to life imprisonment plus 24 to 48 years, without the possibility of parole. Ibid.

Pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132; Tit. II; Subtit. A (§ 201 et seq.), 110 Stat. 1227, the district court ordered restitution for the full amount of the losses suffered by petitioner's victims. Judgment 5-6; see 18 U.S.C. 3664(f)(1)(A). The MVRA provides that, "[u]pon determination of the amount of restitution owed to each victim, the court shall, pursuant to [18 U.S.C.] 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid," after considering the defendant's assets, projected income, and financial obligations. 18 U.S.C. 3664(f)(2). Here, the court determined that petitioner owed \$27,972.61 in restitution, jointly and severally with his co-conspirators, as well as a special assessment of \$1400. Judgment 5-7. The court ordered that restitution was "due immediately," Judgment 7, and explained at sentencing that it made restitution due immediately so that petitioner would "be able to find some work in the Bureau of Prisons," 02-cr-813 Sent. Tr. (Sent. Tr.), at 13 (E.D. Pa. Dec. 7, 2004).

The district court further ordered that petitioner "shall make restitution payments from any wages he may earn in prison in accordance with the Inmate Financial Responsibility Program" and that "[a]ny balance remaining upon release from custody shall be paid at a rate determined by the United States Probation Office." Judgment 7. The IFRP gives inmates an incentive to pay a portion

of their prisoner earnings to reduce their debts. See 807 F.3d at 85. It does so by conditioning certain prison benefits -- such as an increased rate of pay, the opportunity for work detail outside the prison, and a higher commissary limit -- on inmates' adherence to payment plans developed by Bureau staff. See 28 C.F.R. 545.11(d). Petitioner did not object to any aspect of the restitution order. See Sent. Tr., at 13-14.

2. Petitioner filed a notice of appeal to the Third Circuit on grounds unrelated to the restitution order. See 14-7607 Gov't C.A. Br. 2 (4th Cir.) (describing procedural history). The court of appeals dismissed the appeal based on the appeal waiver in petitioner's plea agreement. See Order, No. 05-1516 (3d Cir. Aug. 25, 2005).

In 2006, petitioner filed a motion under 28 U.S.C. 2255 in the Eastern District of Pennsylvania to vacate his sentence on grounds unrelated to restitution. See 02-cr-813 D. Ct. Doc. 155, at 6-7 (October 12, 2006). The court denied the motion, finding it foreclosed by petitioner's collateral-attack waiver and substantively meritless. 02-cr-813 D. Ct. Doc. 162, at 1-7 (March 14, 2007).

3. In 2013, petitioner was moved to the United States Penitentiary-Hazelton in Bruceton Mills, West Virginia. 807 F.3d at 85. He signed an Inmate Financial Plan, agreeing to pay \$25 per quarter through the IFRP to satisfy his outstanding restitution obligation. Ibid.; see 14-7607 C.A. App. 64 (4th Cir.) (noting

prior completed payment of petitioner's special assessment). About a year later, however, petitioner filed a written request to be released from the IFRP. 807 F.3d at 85. The request was denied by a unit manager and then by the warden. Id. at 86. The warden understood the sentencing court to have ordered that petitioner was required to make restitution payments through the IFRP, and the warden stated that "the BOP does not have the authority to overrule the decision set forth by the Court." Ibid. (brackets and citation omitted).

In 2014, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Northern District of West Virginia. D. Ct. Doc. 1, at 1 (June 4, 2014). He argued that the Bureau lacked authority to require him to make restitution payments through the IFRP because the MVRA required the sentencing court, not the Bureau, to establish a payment schedule. Id. at 1-2, 6-8. He asked that the Bureau be enjoined from "further obligating [him] to participate in the IFRP." Id. at 8. The district court dismissed the petition, reasoning that petitioner's claim was not cognizable under Section 2241 because he sought to challenge the validity of the sentencing court's restitution order, as opposed to the execution of his sentence. D. Ct. Doc. 16, at 1-7 (October 20, 2014); see 807 F.3d at 86 ("As a general matter, a federal prisoner must challenge the execution of a sentence under 28 U.S.C. § 2241, and the sentence itself under 28 U.S.C. § 2255.").

The court of appeals reversed. 807 F.3d 84. The court found that, "as [petitioner's] arguments have been clarified on appeal, it is now apparent that he is indeed challenging the execution of his sentence by the BOP." Id. at 87. Specifically, the court found that petitioner "[sought] relief from 'the decision of the [BOP] to force him into the IFRP and its accompanying refusal to release him from it,'" ibid. (quoting 14-7607 Pet. C.A. Reply Br., at 8 (4th Cir.)), by arguing that the BOP had "exceeded its authority and usurped a 'core judicial function' by setting 'the basic terms of his restitution,' in contravention of both the MVRA and the constitutional separation of powers," ibid. (quoting 14-7607 Pet. C.A. Opening Br., at 10 (4th Cir.)). Thus, although one premise of petitioner's argument was "that the sentencing order is invalid," the court observed that petitioner "[did] not seek to have that order set aside." Ibid. The court therefore determined that petitioner's "challenge to the BOP's administration of the IFRP is a challenge to the 'execution' of a sentence that is cognizable under 28 U.S.C. § 2241." Ibid.

The court of appeals remanded the case to the district court but observed that it may not be "necessary to reach the merits of this case" because "the distance between the parties appears to have narrowed as the issues have been refined on appeal." 807 F.3d at 87. The court noted that petitioner "challenges the Warden's refusal to let him stop making payments through the IFRP," but "[t]he Warden now takes the position that 'the IFRP is a purely

voluntary program' and that [petitioner] 'is entitled to stop participating at any time.'" Ibid. (quoting 14-7607 Gov't C.A. Br., at 13).

4. The district court ultimately granted petitioner's Section 2241 petition. Pet. App. B1-B11.

Following the remand, the government moved for dismissal of petitioner's Section 2241 petition or alternatively for summary judgment, arguing that the petition was moot and that, in any event, it failed on the merits because the sentencing court's restitution order had not required petitioner to participate in the IFRP. D. Ct. Doc. 37, at 1-19 (July 6, 2016). The district court referred the motion to a magistrate judge, who recommended that it be granted and the petition dismissed, reasoning that the sentencing court's restitution order had merely permitted petitioner to make restitution payments through the IFRP, as opposed to improperly delegating any authority to the Bureau. Pet. App. C1-C7.

The district court adopted the magistrate judge's recommendation in part. The court found that the petition continued to present a "live issue" because, despite the warden's concession that petitioner was permitted to withdraw from the IFRP, the court did not find "evidence in the record" showing that he had already been withdrawn. Pet. App. B8. The court agreed with petitioner's general premise that a sentencing court "lacks authority to delegate to the probation officer [or the BOP] the

final authority to determine the amount of restitutionary installment payments, without retaining ultimate authority over such decisions.” Id. at B9 (quoting United States v. Miller, 77 F.3d 71, 77 (4th Cir. 1996)) (brackets in original). But the court determined that the sentencing court’s order here, which directed that petitioner pay restitution “from any wages” he “may earn in prison in accordance with the [IFRP],” had simply permitted petitioner to make payments through the IFRP while incarcerated, as opposed to mandating that he participate or delegating to the BOP authority to determine the amount or timing of restitution. Id. at B9-B10 (brackets in original; citation omitted). The court accordingly granted petitioner’s Section 2241 petition and “affirm[ed] [petitioner’s] right to withdraw from the IFRP at any time.” Id. at B10.

After his petition was granted, petitioner filed a motion in the district court to “clarify” whether “the IFRP [is] really voluntary” given that a decision not to participate results in the loss of certain privileges. D. Ct. Doc. 47, at 1-2 (February 13, 2017). The district court construed the filing as a motion to amend the judgment under Federal Rule of Civil Procedure 59(e) and denied it, “reaffirm[ing] its implicit conclusion that the IFRP is a purely voluntary program.” D. Ct. Doc. 56, at 3. The court explained that the program imposes no “sanctions” for refusal to participate but instead merely conditions “the privileges the inmate would receive by participating in the program” -- privileges

to which inmates are "'not entitled, constitutionally or otherwise,'" -- on continued participation. Id. at 2-3 (quoting Jordan v. Holt, 488 Fed. Appx. 587, 588 (3d Cir. 2012) (per curiam)).

The court of appeals affirmed both of the district court's orders in an unpublished per curiam decision, finding "no reversible error." Pet. App. A3.

ARGUMENT

Petitioner contends (Pet. 6-11) that his sentencing order improperly delegated to the Bureau of Prisons the court's duty under the MVRA to set the payment schedule for restitution during his period of imprisonment. But petitioner presents no live case or controversy over that question because he received all the relief that he requested in his petition under 28 U.S.C. 2241 when the district court ordered the BOP to allow him to withdraw from the IFRP. Even if his claim were not moot, it was waived below and in any event is not cognizable through a petition under 28 U.S.C. 2241. Petitioner also contends (Pet. 11-20) that participation in the IFRP is not truly voluntary because declining to participate comes with the loss of certain privileges, but the lower courts correctly rejected his claim. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner principally contends (Pet. 6-11) that his original sentencing order was unlawful because it required him to

comply with the IFRP, thereby delegating the court's authority to set the restitution schedule in violation of the MVRA and the Constitution. That claim is not properly presented for this Court's review.

a. In the first place, petitioner presents no live case or controversy because he has received all the relief that he requested in his petition under 28 U.S.C. 2241. "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)). Thus, "[t]o qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review." Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) (citations and internal quotation marks omitted). "[T]hroughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." Spencer v. Kemna, 523 U.S. 1, 7 (1998) (citation and internal quotation marks omitted).

Petitioner's Section 2241 petition sought only an order under which the warden would be required to allow him to stop making payments through the IFRP. D. Ct. Doc. 1, at 8 (requesting that the Bureau be "enjoin[ed] permanently * * * from further

obligating [him] to participate in the IFRP"). In his initial appeal, in arguing that his claim was properly within the scope of habeas relief, petitioner (with counsel) clarified that his claim was limited to "the Warden's refusal to let him stop making payments through the IFRP." 807 F.3d at 87; see id. at 86; 14-7607 Pet. C.A. Opening Br. at ii (4th Cir.) ("This Court should * * * release [petitioner] from the IFRP"). Petitioner explicitly "[did] not seek" to have his restitution order "set aside." 807 F.3d at 87.

The district court ultimately granted petitioner's Section 2241 petition and determined that he is entitled "to withdraw from the IFRP at any time." Pet. App. B10. The court of appeals affirmed, id. at A3, and the warden does not contest that ruling. The district court's judgment in petitioner's favor leaves no relief for a court to award on petitioner's Section 2241 motion, and as a result his petition for a writ of certiorari is no longer cognizable under Article III. Cf. Weinstein v. Bradford, 423 U.S. 147, 148-149 (1975) (per curiam); St. Pierre v. United States, 319 U.S. 41, 42-43 (1943) (per curiam).³

³ For similar reasons, petitioner presents no live case or controversy on the question whether his claim seeking to be released from the IFRP was properly brought under 28 U.S.C. 2241. See Pet. 19. The court of appeals ruled in petitioner's favor on that issue at an earlier stage of the case after petitioner clarified his argument, 807 F.3d at 87, and on remand the district court addressed the merits of petitioner's request to be released from the IFRP, Pet. App. B8-B10.

The lower courts' determination that petitioner is entitled to withdraw from the IFRP at any time necessarily rejected his contention that the sentencing court had required him to participate in the IFRP. See Pet. App. B10 (finding that the sentencing court "did not mandate that [petitioner] participate in the [IFRP] program"). Whether or not the courts' determination of that issue was correct as an original matter, the determination itself is favorable to petitioner and permits him the relief he sought. That determination obviates any need to consider the counterfactual question whether, if the sentencing court's order were construed to require petitioner to participate in the IFRP, the restitution order would have violated the MVRA or the Constitution.

b. Certiorari is unwarranted on petitioner's argument that the district court improperly delegated authority to the BOP for the additional reasons that his claim was waived below and is not cognizable under 28 U.S.C. 2241. Petitioner made clear in his initial appeal, which addressed whether his claim was properly brought in a habeas petition against the warden, that he did not seek to have his restitution order set aside. See 807 F.3d at 87. Petitioner's claim has accordingly been waived here. In any event, Section 2241 does not permit petitioner to attack his original sentencing order as a violation of the MVRA or the Due Process Clause. See, e.g., Arnaiz v. Warden, 594 F.3d 1326, 1329 (11th Cir. 2010). To the extent that the petition for a writ of

certiorari attempts to go beyond petitioner's request to be released from the IFRP, his claim is not a challenge to the execution of his sentence under Section 2241.

2. Petitioner also contends (Pet. 12-18) that he should be permitted to withdraw from the IFRP without any loss of the privileges that come with participation. In his view, loss of those privileges upon withdrawal would constitute "sanctions," D. Ct. Doc. 56, at 2, and violate the Due Process Clause. The lower courts correctly rejected petitioner's argument (Pet. 12-13) that he has a constitutionally protected property interest in the privileges described in 28 C.F.R. 545.11(d) for inmates who elect to participate in the IFRP. As every court of appeals to consider the question has recognized, offering privileges to inmates who accept the IFRP's obligations does not affect the inmates' free choice whether to participate in the program, because inmates lack a "preexisting right to receive any of th[ose] benefits." United States v. Lemoine, 546 F.3d 1042, 1046 (9th Cir. 2008); see, e.g., Driggers v. Cruz, 740 F.3d 333, 338 (5th Cir. 2014) ("An inmate has no entitlement to 'any of the benefits agreeing to participate in the IFRP would provide,'" so "[t]he conditions in § 545.11(d) amount to the loss of privileges, not the imposition of hardships.") (citation omitted); United States v. Boyd, 608 F.3d 331, 334 (7th Cir. 2010) (although "an inmate in the Bureau of Prisons' custody may lose certain privileges by not participating

in the IFRP," "participation in the program is voluntary"), cert. denied, 562 U.S. 1067 (2010).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

STRATTON C. STRAND
Attorney

FEBRUARY 2019