No. 18-7115

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD CLARK, PETITIONER

v.

D. J. HARMON, WARDEN

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

BRIEF FOR THE UNITED STATES IN OPPPOSITION

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QUESTIONS PRESENTED

1. Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground, with "second or successive" attacks limited to certain claims that suggest factual innocence or that rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. 2255(h). Under 28 U.S.C. 2255(e), an "application for a writ of habeas corpus [under 28 U.S.C. 2241] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained * * * unless it * * * appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

The first question presented is whether petitioner may seek habeas relief under Section 2241 based on a claim that the courts reviewing his Section 2255 motions erred by considering only one of his two claims of ineffective assistance of counsel.

2. Whether the Federal Magistrates Act, 28 U.S.C. 631 et. seq., violates the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is reprinted at 732 Fed. Appx. 309. A prior opinion of the court of appeals is published at 717 F.3d 790.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2018. A petition for rehearing was denied on September 19, 2018 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on December 13, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371; wire fraud, in violation of 18 U.S.C. 1343 and 18 U.S.C. 2(a); securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff and 18 U.S.C. 2(a); and money laundering, in violation of 18 U.S.C. 1957(a). He was sentenced to 151 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. 717 F.3d 790.

Petitioner thereafter filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. The district court denied the motion, and the court of appeals denied petitioner's request for a certificate of appealability (COA). See Pet. App. E3-E4. The district court denied petitioner's subsequent request for reconsideration under Federal Rule of Civil Procedure 60(b), Pet. App. E4-E5, and the court of appeals denied petitioner's request for a COA, id. at E11. Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. 2241. The district court denied the petition, Pet. App. C1-C2, and the court of appeals affirmed, id. at A1-A3.

1. Petitioner helped orchestrate a series of "pump and dump" stock schemes that netted him and his conspirators tens of millions of dollars. The schemes involved creating the false

appearance of an active market for a company's stock, the promotion of that stock to unwitting investors, and the sale of conspirators' holdings of stock after the price was inflated. U.S. Br. at 2-3, Clark v. United States, 571 U.S. 1126 (2014) (No. 13-358).

In 2007, more than a year before the criminal proceedings against petitioner began, the government placed a "caveat" (a warning or proviso that restricts property based on an asserted interest) on his residence. U.S. Br. at 3-4, Clark, supra. On January 15, 2009, a grand jury sitting in the Northern District of Oklahoma returned an indictment against petitioner and his co-conspirators. Id. at 4. Afterwards, the government temporarily lifted the caveat to allow petitioner to renew a lien on his home, reimposed the caveat in July 2009, and then lifted it permanently in October 2009. Ibid. At no point did petitioner, who was represented by counsel of choice during the trial that occurred during that period, seek a hearing on the propriety of the caveat. Ibid.

On direct appeal, the Tenth Circuit rejected petitioner's argument that the government violated due process by placing the caveat on his residence without notice. 717 F.3d at 798-803. The court also rejected petitioner's claim that the government's conduct infringed his Sixth Amendment right to counsel of his choice. Reviewing petitioner's claim for plain error, the court found no error, inter alia, because petitioner's trial counsel had

been a thorough and vigorous advocate. Id. at 803-804. This Court denied a petition for a writ of certiorari. 571 U.S. 1126.

2. In 2014, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 on the grounds that his attorney was ineffective in (1) failing to properly protect petitioner's constitutional rights when the government placed a caveat on his residence and (2) failing to seek a due process hearing to challenge the government's continued restraint of his residence without probable cause or a grand jury finding that it was forfeitable. Pet. App. E3. The district court denied the motion. The court explained that petitioner had raised a single ineffective-assistance claim -- namely, that his attorney failed to contest the alleged pretrial restraint on his residence -- which it rejected on the ground that the right to counsel does not extend to forfeiture matters. Id. at E4. The Tenth Circuit denied petitioner's motion for a COA, stating that "reasonable jurists could not disagree with the district court's conclusion that [petitioner] had no right to have counsel assist him in disputing the government's placement of a caveat on his residence." Ibid. Petitioner then filed a motion for authorization to file a second or successive Section 2255 motion, which the Tenth Circuit denied, No. 16-5081 (July 29, 2016), along with a petition for rehearing, 837 F.3d 1080.

Petitioner returned to the district court and filed a motion under Federal Rule of Civil Procedure 60(b) in which he alleged that the court's orders denying him relief were invalid because he had raised two independent ineffective-assistance claims, but the court had addressed only one claim. Pet. App. E4-E5. The court denied the motion. Id. at E5.

Petitioner sought a certificate of appealability in the Tenth Circuit, which construed his request as an application to file a second or successive Section 2255 motion. Pet. App. E7-E9. The court denied that motion. The court determined that both of petitioner's ineffective-assistance claims were inextricably linked with the merits of his first Section 2255 motion, such that his request for relief under Rule 60(b) was a successive Section 2255 motion, which petitioner had not received permission to file. Id. at E9-E10. The court explained that under 28 U.S.C. 2255(h), a court of appeals may authorize a second or successive Section 2255 motion only if it contains either "(1) newly discovered evidence" or "(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." See Pet. App. E9-E10. The Tenth Circuit determined that because petitioner's ineffective-assistance claim did not meet either requirement, petitioner could not file a second or successive Section 2255 motion. Ibid.

3. In March 2017, 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 Texas, the jurisdiction in which he was then confined. A magistrate judge recommended denial of petitioner's motion on the ground that petitioner's claims were not cognizable under Section 2241. Pet. App. D2-D4. The district court adopted the magistrate judge's report and recommendation and denied petitioner a COA. Id. at C1-C2.

The court of appeals affirmed. Pet. App. A1-A3. The court stated that a prisoner may seek habeas relief under Section 2241 where the remedy under Section 2255 is "inadequate or ineffective," within the meaning of the habeas saving clause, 28 U.S.C. 2255(e), to challenge the legality of his detention. Pet. App. A2. Citing circuit precedent, the court further stated that a prisoner may pursue relief under the saving clause only if he seeks to raise a claim based on a "retroactively applicable Supreme Court decision that supports that he may have been convicted of a nonexistent offense and that the claim was foreclosed when it should have been raised in his trial, direct appeal, or original § 2255 motion." Ibid. The court of appeals determined that because petitioner "does not rely on a retroactively applicable Supreme Court decision implicating his criminal conviction," he is ineligible for habeas relief. Ibid. The court explained that, although petitioner argued that his Section 2255 motion had not been fully adjudicated,

"[t]he inability of [petitioner] to obtain relief or the alleged failure of the courts to consider the merits of a claim does not, by itself, demonstrate the inadequacy or ineffectiveness of § 2255." Ibid.; see ibid. ("[A]n alleged defect in a previous § 2255 proceeding does not implicate the savings clause.").

The court of appeals also rejected petitioner's claim that the district court had violated the Constitution's Appointments Clause, Art. II, § 2, Cl. 2, when it adopted the magistrate judge's report recommending denial of his Section 2241 petition. Pet. App. A3. The court of appeals explained that Congress, in accordance with the Appointments Clause, had provided for judicial control over the appointment and administration of magistrate judges under the Federal Magistrates Act, 28 U.S.C. 631 et seq. Pet. App. A3. That statute authorizes district judges to appoint magistrate judges in such numbers and to serve at such locations as decided by the Judicial Conference of the United States, and it also identifies the process and standards by which magistrate judges are to be supervised and paid. Ibid. (citing 28 U.S.C. 631 and 633). The court of appeals thus found that the magistrate judge had the legal authority to evaluate petitioner's Section 2241 petition and to issue a recommendation to the district court. Ibid.

ARGUMENT

Petitioner argues (Pet. 8-17) that the court of appeals erred in denying his request for habeas relief under the saving clause, 28 U.S.C. 2255(e). Although the courts of appeals disagree about the circumstances in which relief under the saving clause is available, petitioner's claims could not be raised in a habeas petition in any circuit. Petitioner also argues (Pet. 17-24) that the appointment of a magistrate judge to review his habeas petition violated the U.S. Constitution's Appointments Clause, Art. II, § 2, Cl. 2. That argument lacks merit, and no court has accepted it. Further review is unwarranted.

1. a. Under the saving clause, an inmate serving a sentence of imprisonment imposed by a federal court may file an application for a writ of habeas corpus only if "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). This Court has not addressed the circumstances under which prisoners may seek habeas relief under the saving clause. Of the courts of appeals that have addressed the issue, nine have held that such relief is available, in at least some circumstances, to raise a claim challenging a conviction or sentence based on a retroactive decision of statutory construction.* Although those courts have

* See United States v. Barrett, 178 F.3d 34, 50-53 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); Triestman v. United States, 124 F.3d 361, 375-378 (2d Cir. 1997); In re Dorsainvil,

offered varying rationales and have adopted somewhat different formulations (of somewhat varying scope), they generally agree that the remedy provided by Section 2255 is "inadequate or ineffective to test the legality of [a prisoner's] detention," 28 U.S.C. 2255(e), if (1) an intervening decision of this Court has narrowed the reach of a federal criminal statute, such that the prisoner now stands convicted of conduct that is not criminal; and (2) controlling circuit precedent squarely foreclosed the prisoner's claim at the time of his trial (or plea), appeal, and first motion under Section 2255. See, e.g., Reyes-Requena v. United States, 243 F.3d 893, 902-904 (5th Cir. 2001); In re Jones, 226 F.3d 328, 333-334 (4th Cir. 2000); In re Davenport, 147 F.3d 605, 600-612 (7th Cir. 1998).

In contrast, two courts of appeals have determined that Section 2255(e) categorically does not permit habeas relief from a conviction or sentence based on an intervening decision of statutory interpretation. McCarthan v. Director of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017); Prost v. Anderson, 636 F.3d 578,

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119 F.3d 245, 251-252 (3d Cir. 1997); In re Jones, 226 F.3d 328, 333-334 (4th Cir. 2000); Reyes-Requena v. United States, 243 F.3d 893, 902-904 (5th Cir. 2001); Wooten v. Cauley, 677 F.3d 303, 306-307 (6th Cir. 2012); In re Davenport, 147 F.3d 605, 609-612 (7th Cir. 1998); Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006), cert. denied, 549 U.S. 1313 (2007); In re Smith, 285 F.3d 6, 7-8 (D.C. Cir. 2002); see also Abdullah v. Hedrick, 392 F.3d 957, 960-964 (8th Cir. 2004) (discussing majority rule without expressly adopting it), cert. denied, 545 U.S. 1147 (2005).

584, 590 (10th Cir. 2011), cert. denied, 565 U.S. 1111 (2012). In Prost, the Tenth Circuit denied habeas relief on the ground that Section 2255 was not inadequate or ineffective even though circuit precedent likely would have foreclosed the prisoner's claim in his initial Section 2255 motion. 636 F.3d at 584-585, 590. The Eleventh Circuit's en banc decision in McCarthan reached a similar conclusion. See 851 F.3d at 1079-1080.

The circuit conflict is well-developed, involves a question of substantial importance, and will not be resolved without this Court's intervention. See Camacho v. English, 872 F.3d 811, 815 (7th Cir. 2017) (Easterbrook, J., concurring), cert. denied, 138 S. Ct. 1028 (2018) ("[T]he Supreme Court needs to decide whether § 2255(e) permits litigation of this kind."); United States v. Wheeler, 734 Fed. Appx. 892, 894 (4th Cir. 2018) (Agee, J., respecting denial of petition for rehearing en banc) ("The Supreme Court should hear this case in a timely fashion to resolve the conflict separating the circuit courts of appeal nationwide on the proper scope of the § 2255(e) saving clause so that the federal courts, Congress, the Bar, and the public will have the benefit of clear guidance and consistent results in this important area of law."). The government accordingly continues to believe that this Court's review would be warranted in an appropriate case.

b. The Court's review is not warranted in this case, however, which does not implicate any division in the courts of

appeals about the scope of relief authorized by Section 2255(e). As noted, even circuits that construe the saving clause broadly generally have required a prisoner to show (1) that the prisoner's claim was foreclosed by (erroneous) precedent at the time of the prisoner's first motion under Section 2255; and (2) that an intervening decision of statutory interpretation, made retroactive on collateral review, has since established that the prisoner is in custody for an act that the law does not make criminal, has been sentenced in excess of an applicable maximum under a statute or under a mandatory Sentencing Guidelines regime, or has received an erroneous statutory minimum sentence. See, e.g., United States v. Wheeler, 886 F.3d 415, 429-434 (4th Cir. 2018), cert. denied, 2019 WL 1231947 (Mar. 18, 2019) (No. 18-420); Hill v. Masters, 836 F.3d 591, 594-600 (6th Cir. 2016); Brown v. Rios, 696 F.3d 638, 640-641 (7th Cir. 2012). Petitioner cannot satisfy those requirements.

First, petitioner has not identified any intervening decision of statutory interpretation that would invalidate his conviction or sentence. Rather, petitioner contends that the courts evaluating his Section 2255 motion erred because they addressed only one of his two ineffective-assistance claims. But the Section 2255 remedy is not inadequate or ineffective merely because relief has been denied. See, e.g., In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997); Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir.

1996); Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir.), cert. denied, 488 U.S. 982 (1988); McGhee v. Hanberry, 604 F.2d 9, 10 (5th Cir. 1979) (per curiam); Zvonaric v. Mustain, 562 F.2d 570, 572 n. 1 (8th Cir. 1977). Nor is the remedy inadequate or ineffective merely because the prisoner is procedurally barred from pursuing relief, see In re Vial, 115 F.3d 1192, 1194 n. 5 (4th Cir. 1997); Garris v. Lindsay, 794 F.2d 722, 726-727 (D.C. Cir.), cert. denied, 479 U.S. 993 (1986), or because the prisoner has been denied authorization to file a second or successive Section 2225 motion, see Davenport, 147 F.3d at 608.

Second, petitioner had an unobstructed opportunity at the time of his first Section 2255 motion to argue that he was denied the effective assistance of counsel at trial. For that reason as well, no circuit would conclude under the circumstances that Section 2255 was "inadequate or ineffective to test the legality of [petitioner's] detention." 28 U.S.C. 2255(e); see Davenport, 147 F.3d at 609 (denying habeas relief where prisoner "had an unobstructed procedural shot at getting his sentence vacated" in his initial Section 2255 motion); see also Ivy v. Pontesso, 328 F.3d 1057, 1060 (9th Cir.) ("[I]t is not enough that the petitioner is presently barred from raising his claim of innocence by motion under § 2255. He must never have had the opportunity to raise it by motion."), cert. denied, 540 U.S. 1051 (2003).

2. Petitioner further contends (Pet. 17-24) that the habeas court erred by assigning his Section 2241 motion to a magistrate judge for a report and recommendation because the Federal Magistrates Act (FMA), 28 U.S.C. 631 et seq., violates the Appointments Clause. But the district court reviewed de novo the relevant portions of the magistrate judge's report and recommendation, see Pet. App. C1, and petitioner does not explain how the asserted Appointments Clause error would entitle him to the habeas relief he seeks here. To the contrary, the court of appeals' determination that petitioner's ineffective-assistance claims are not cognizable under the habeas saving clause, see id. at A2-A3, would preclude relief even if petitioner's Appointments Clause objection to a magistrate judge's consideration of those claims had merit. In any event, the court of appeals correctly rejected petitioner's argument, and its unpublished decision does not conflict with any decision of this Court or another court of appeals.

The FMA provides for the appointment, tenure, compensation, and duties of federal magistrates. Under the FMA, judges of the district courts appoint magistrate judges in such numbers and to serve at such locations as the Judicial Conference shall determine. See 28 U.S.C. 631(a) and 633. The primary purpose of the FMA is to reduce the heavy workload of Article III judges by allowing magistrate judges to hear certain matters while keeping district

judges in full control over their cases. See Gomez v. United States, 490 U.S. 858, 865-872 (1989); United States v. Raddatz, 447 U.S. 667, 681-683 (1980); see also Pacemaker Diagnostic Clinic of Am. v. Instromedix, 725 F.2d 537, 540 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984).

The Appointments Clause of the U.S. Constitution, Art. II, § 2, Cl. 2, provides that the President, by and with the advice and consent of the Senate, may appoint principal officers of the United States to fill offices "established by law." It further specifies that inferior officers may be appointed by the President alone, by Heads of Departments, or by "Courts of Law." Ibid. The Appointments Clause thus reinforces the "structural integrity" of the Constitution by preventing the encroachment of one branch of government upon another and "by preventing the diffusion of the appointment power." Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 878 (1991); see Edmond v. United States, 520 U.S. 651, 659 (1997). In Freytag, the Court held that Congress complied with the Appointments Clause when it enacted a statute authorizing the chief judge of the Tax Court to appoint special trial judges and assign them to certain tax proceedings. 501 U.S. at 891. Although the Tax Court was established within the Executive Branch, the Court explained, "[t]he Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are 'Courts of Law.'" Ibid.

Freytag confirms that the FMA comports with the Appointments Clause. Indeed, this Court stated in Freytag that "federal district courts," which are vested by the FMA with authority to appoint magistrate judges, "indisputably are 'Courts of Law'" within the meaning of the Appointments Clause. Ibid.

Petitioner nonetheless argues (Pet. 18-19) that the FMA fails to "establish by Law" the office of the magistrate judge, U.S. Const. Art. II, § 2, Cl. 2, because it authorizes the Judicial Conference to determine the number of such judges and their salaries. See 28 U.S.C. 631 and 633. Petitioner offers no authority for his apparent view that the appointment of inferior officers can be proper under Appointments Clause only if the number of officers and their precise salaries have been fixed by statute. In any event, the FMA specifies that "[t]he judges of each United States district court shall appoint United States magistrate judges in such numbers and to serve at such locations within the judicial districts as the Judicial Conference may determine," 28 U.S.C. 631(a), and it further provides for the compensation of magistrate judges to be set by the Judicial Conference within specified statutory parameters, see 28 U.S.C. 634(a) (salary for full-time magistrate judge is "to be fixed" at "up to an annual rate equal to 92 percent of the salary of" a district judge); see also 28 U.S.C. 634(b) and (c). Finally, the Judicial Conference is itself composed of judges of the United States courts. See

28 U.S.C. 331 ("The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate."). No court has accepted petitioner's argument that the appointment of magistrate judges under the FMA violates the Appointments Clause. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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