No. 18-7378

IN THE SUPREME COURT OF THE UNITED STATES

NATHAN HILL, PETITIONER

v.

CHARLES A. DANIELS, WARDEN

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground cognizable on collateral review, with "second or successive" attacks limited to certain claims that indicate 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 question presented is whether petitioner is entitled to seek federal habeas corpus relief under Section 2241 based on his claim that judicial factfinding at his sentencing violated his Sixth Amendment rights under Alleyne v. United States, 570 U.S. 99 (2013).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2, at 1-7) is not published in the Federal Reporter but is reprinted at 695 Fed. Appx. 353. The order of the district court (Pet. App. 1, at 1-3) is not published in the Federal Supplement.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2017. The petition for a writ of certiorari was filed on August 28, 2017. 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 Illinois, petitioner was convicted of conspiracy to distribute a controlled substance, in violation of 21 U.S.C. 846; money laundering, in violation of 18 U.S.C. 1956; and operating a continuing criminal enterprise, in violation of 21 U.S.C. 848. See Pet. App. 1, at 1; 504 Fed. Appx. 683, 684-685. He was sentenced to a life term of imprisonment, and the court of appeals affirmed. 252 F.3d 919. Petitioner subsequently filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, which the district court denied. 2004 WL 2064622. Several years later, the court of appeals denied petitioner's application for permission to file a second or successive motion for relief under Section 2255. See 14-2319 C.A. Doc. 4 (July 8, 2014) (C.A. Order). Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, which the district court denied. Pet. App. 1, at 1-3. The court also denied his request for a certificate of appealability. Id. at 3. The court of appeals reversed and remanded to the district court with instructions to dismiss the petition for lack of jurisdiction. Pet. App. 2, at 7.

1. Following a jury trial in 1999, petitioner was convicted of, inter alia, operating a continuing criminal enterprise, in violation of 21 U.S.C. 848. Pet. App. 2, at 2. In the absence of

any additional factual findings, a violation of Section 848 is punishable by a term of imprisonment of 20 years to life. See 18 U.S.C. 848(a). Here, the district court found at sentencing that petitioner was the principal leader of the continuing criminal enterprise and that the enterprise was responsible for at least 4000 kilograms of cocaine. Pet. App. 2, at 2. The court then imposed the mandatory term of life imprisonment that the statute requires in cases that involve such circumstances. See 18 U.S.C. 848(b); Pet. App. 2, at 2.

The court of appeals affirmed on direct appeal, rejecting petitioner's argument that his sentencing "violate[d] the due process clause because the jury did not conclude that the evidence establishes beyond a reasonable doubt the events that led to the life term[]." 252 F.3d at 921. Petitioner based his argument on Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. But the court of appeals reasoned that Apprendi did not assist petitioner "because the maximum sentence for every person convicted of violating § 848 is life." 252 F.3d at 921. And the court concluded that petitioner's sentence was permissible under McMillan v. Pennsylvania, 477 U.S. 79 (1986), which "held that

judges may find, by a preponderance, facts that trigger mandatory minimum penalties." 252 F.3d at 921.

2. Petitioner later filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, raising "ten grounds for relief, none of which were a renewal of his Apprendi argument." Pet. App. 2, at 2. The district court denied the motion. 2004 WL 2064622.

In 2014, petitioner filed in the court of appeals an application for permission to file a second or successive motion for relief under 28 U.S.C. 2255 based on this Court's decision in Alleyne v. United States, 570 U.S. 99 (2013). Alleyne held that any fact, other than a prior conviction, that increases a defendant's statutory minimum sentence must be submitted to the jury and proven beyond a reasonable doubt. The court of appeals denied petitioner's application, observing that his "proposed § 2255 motion would * * * be untimely" in light of the one-year statute of limitations for motions under Section 2255, see 28 U.S.C. 2255(f), because "Alleyne was decided more than one year ago." C.A. Order 1. The court also observed that this Court "ha[d] not made the new rule [in Alleyne] retroactive to final convictions." Ibid.

3. Petitioner filed a habeas petition under 28 U.S.C. 2241 in the United States District Court for the District of Colorado, the district in which he was confined, "asserting that his

sentencing was unlawful under Alleyne because it was the judge, not the jury, who had found the facts that increased his mandatory minimum." Pet. App. 2, at 3. The district court denied the motion, on the ground that Alleyne does not apply retroactively on collateral review. Pet. App. 1, at 2-3.

The court of appeals reversed the district court's judgment and remanded with instructions to dismiss the case for lack of jurisdiction. Pet. App. 2, at 7. The court of appeals applied its decision in Prost v. Anderson, 636 F.3d 578 (10th Cir. 2011), cert. denied, 565 U.S. 1111 (2012), which had determined that habeas relief is unavailable under the "habeas saving clause" of 28 U.S.C. 2255(e) for a prisoner who previously has filed an unsuccessful Section 2255 motion if the prisoner seeks relief on any basis that could have been asserted in the Section 2255 motion. The court explained that, "[a]s [petitioner] himself concedes, his challenge to the use of judge-found facts to increase his mandatory-minimum sentence fails under Prost because it could have been raised in his § 2255 motion." Pet. App. 2, at 4; see id. at 3-6.

ARGUMENT

Petitioner contends (Pet. 13-16) that he should be permitted under the habeas saving clause of 28 U.S.C. 2255(e) to file a habeas petition asserting that his mandatory life sentence was unlawful under Alleyne v. United States, 570 U.S. 99 (2013). This

Court recently denied a petition for a writ of certiorari filed by the government asking this Court to resolve a circuit conflict regarding whether the saving clause allows a defendant who has been denied Section 2255 relief to challenge his conviction or sentence based on an intervening, retroactively applicable decision of statutory interpretation. United States v. Wheeler, No. 18-420 (Mar. 18, 2019). Although the government continues to believe that the issue presented in Wheeler merits this Court's consideration in an appropriate case, review is not warranted here because petitioner's habeas petition raises a constitutional (not statutory) claim that would not lead to relief even in the courts of appeals that have given the saving clause the most prisoner-favorable interpretation.

1. 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 based on a

retroactive decision of statutory construction.* Although those courts have offered varying rationales and have adopted somewhat different formulations, they generally agree that the remedy provided by 28 U.S.C. 2255(e) is "inadequate or ineffective to test the legality of [a prisoner's] detention" 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, including the Tenth Circuit, have determined that Section 2255(e) categorically does not permit habeas relief based on an intervening decision of statutory interpretation. McCarthan v. Director of Goodwill

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* 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, 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).

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, 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.

2. 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's habeas petition does not rely on an intervening decision of statutory interpretation; instead, it raises a claim of constitutional error based on this Court's decision in Alleyne. A federal prisoner attacking his conviction on constitutional grounds following the denial of a first Section 2255 motion must satisfy the gatekeeping provisions of 28 U.S.C.

2255(h), which limits constitutional challenges in second or successive Section 2255 motions to those relying on "a new rule of constitutional law" that this Court has "made retroactive to cases on collateral review." 28 U.S.C. 2255(h)(2). No court of appeals has construed the saving clause to permit a federal prisoner raising a constitutional claim in a habeas petition to bypass those gatekeeping limitations. See, e.g., Camacho, 872 F.3d at 813 ("[A] petitioner who seeks to invoke the Savings Clause of § 2255(e) to proceed under § 2241 must demonstrate * * * that he relies on not a constitutional case, but a statutory-interpretation case, so that he could not have invoked it by means of a second or successive section 2255 motion.") (brackets, citation, and internal quotation marks omitted). The saving clause therefore does not permit a habeas petition raising a claim of Alleyne error under any circuit's approach. See Poe v. LaRiva, 834 F.3d 770, 773 (7th Cir. 2016) (defendant could not file a habeas petition to contest his detention "because Alleyne is a constitutional case, not a statutory-interpretation case"); see also Gardner v. Warden Lewisburg USP, 845 F.3d 99, 103 (3d Cir. 2017) (saving clause does not permit a defendant "to raise an Alleyne argument").

Second, petitioner cannot seek habeas relief under the saving clause based on Alleyne because Alleyne does not apply retroactively on collateral review, as every court of appeals to consider the question has recognized. See Camacho, 872 F.3d at

814 (reasoning that because Alleyne has not "been found to be retroactive on collateral review, [petitioner] may not advance this claim in his § 2241 petition); Arnold v. United States, 598 Fed. Appx. 298, 299 (5th Cir. 2015) (per curiam) (defendant may not seek habeas relief under Alleyne because "[t]his court has held that Alleyne does not apply retroactively to cases on collateral review"); see also Butterworth v. United States, 775 F.3d 459, 465-468 & n.4 (1st Cir.), cert. denied, 135 S. Ct. 1517 (2015) (Alleyne not retroactive); United States v. Redd, 735 F.3d 88, 91-92 (2d Cir. 2013) (per curiam) (same); United States v. Reyes, 755 F.3d 210, 212-213 (3d Cir.), cert. denied, 135 S. Ct. 695 (2014) (same); United States v. Stewart, 540 Fed. Appx. 171, 172 (4th Cir. 2013) (per curiam) (same); In re Kemper, 735 F.3d 211, 212 (5th Cir. 2013) (per curiam) (same); In re Mazzio, 756 F.3d 487, 489-491 (6th Cir. 2014) (same); Simpson v. United States, 721 F.3d 875, 876 (7th Cir. 2013) (same); Hughes v. United States, 770 F.3d 814, 817-819 (9th Cir. 2014) (same); In re Payne, 733 F.3d 1027, 1029-1030 (10th Cir. 2013) (same); United States v. Harris, 741 F.3d 1245, 1250 n.3 (11th Cir. 2014) (same).

This Court has denied petitions for writs of certiorari in cases in which the petitioners would not have been eligible for relief even in circuits that have allowed some challenges to a conviction or sentence under the saving clause. See, e.g., U.S. Br. in Opp. at 21-22, Venta v. Jarvis, 138 S. Ct. 648 (2018) (No.

17-6099); Br. in Opp. at 24-27, Young v. Ocasio, 138 S. Ct. 2673 (2018) (No. 17-7141). The Court should follow the same course here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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