No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHAD TALADA,
Petitioner

v.

DAVID V. COLE,
Sheriff, Steuben County Jail
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Under 28 U.S.C. § 2255, a prisoner seeking to collaterally attack the legality of his sentence is required to do so in the district where the prisoner was convicted. However, by way of § 2255(e)'s saving clause, a district court is permitted to entertain an application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, if the remedy provided in § 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention."

The first question presented here is as follows: Whether § 2255(e)'s saving clause permits a criminal defendant to pursue a claim of actual innocence in the district where he is detained when binding precedent in the district where the defendant was convicted precluded him from adequately or effectively challenging his conviction.

The second question is whether the Attorney General had good cause for not complying with the Administrative Procedures Act's notice and comment requirements when he promulgated regulations making the criminal provisions of the Sexual Offender Registration and

Notification Act retroactive to sex offenders whose qualifying sex offenses pre-dated the Act's enactment.

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PETITION FOR WRIT OF CERTIORARI

Chad Talada respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 739 F.App'x 73 (2d Cir. 2018) (*see* App. at A-4). The District Court's decision and order

denying Mr. Talada's petition for a writ of habeas corpus available at 2017 WL 5194115, 2017 U.S.Dist.Lexis 186170 (W.D.N.Y. Nov. 9, 2017) (App. at A-1).

JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 2018 (App. at A-4). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are codified at 18 U.S.C. § 2250(a), 28 U.S.C. § 2241, 28 U.S.C. § 2255, 42 U.S.C. § 16901 *et seq*., in particular 42 U.S.C. § 16913.[1]

The Administrative Procedures Act provides, in pertinent part, the following:

5 U.S.C. § 553. Rule making

. . .

[1] On September 1, 2017, 42 U.S.C. § 16913 was transferred to 34 U.S.C. § 20913.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of the public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except –

. . .

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

5 U.S.C. §§ 553(b)(1)-(3) (1) and (d)(2)- (3).

Title 18 U.S.C. § 2250(a) provides, in relevant part,

(a) In general. — Whoever —

(1) is required to register under the Sex Offender Registration and Notification Act; . . .

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

Title 28 U.S.C. § 2241 provides:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district

court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in

the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Title 28 U.S.C. § 2255 provides:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral

attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no

reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Title 42 U.S.C. § 16913 provides:

(a) In general. A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration. The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current. A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

> (d) Initial registration of sex offenders unable to comply with subsection (b) of this section. The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.
>
> (e) State penalty for failure to comply. Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

STATEMENT

Chad Talada was charged by indictment with failing to update his registration as a sex offender, in violation of 18 U.S.C. § 2250 ("SORNA"), in the United States District Court for the Southern District of West Virginia on December 10, 2008. The district court (Johnson, J.) entered a judgment on October 21, 2009 reflecting Mr. Talada's sentence of 24 months imprisonment and a 70-years term of supervised release. Mr. Talada pleaded guilty to the indictment pursuant to a plea agreement in which he maintained his right to

appeal the denial of a motion to dismiss the indictment alleging several defects with the application of SORNA's criminal penalty against him.

Mr. Talada timely appealed his conviction and, as relevant to this Petition, argued that the interim regulation promulgated by the Attorney General making SORNA retroactive ("interim rule") was invalid because it was not enacted pursuant to the notice and comment requirements of the Administrative Procedures Act ("APA"). A Fourth Circuit panel (King, Shedd, & Agee, JJ.) affirmed the District Court's judgment based on Circuit precedent that the Attorney General had good cause to invoke the exception to providing the 30-day notice, as required under the APA, when issuing regulations making § 2250 retroactive. *United States v. Talada*, 380 F.App'x 255 (4th Cir. 2010). Mr. Talada's subsequent petition for a writ of certiorari in which he raised the challenge to the promulgation of the interim rule was denied. *Talada v. United States*, 562 U.S. 1111 (2010) (No. 10-6268). Mr. Talada did not bring a collateral attack to his judgment of conviction pursuant to 28 U.SC. § 2255.

In August of 2014, Mr. Talada was charged in the Western District of New York, where his supervised release jurisdiction had been transferred in 2010, with violating a condition of supervised release stemming from his 2009 conviction. He was also charged in a new criminal matter and, on September 2, 2015, Mr. Talada entered a conditional plea in the District Court (Siragusa, J.) to knowingly receiving child pornography, in violation of 18 U.S.C. §§ 2252A(a)(2)(A) & (b)(1). Under the terms of the plea agreement Mr. Talada reserved the right to collaterally attack his 2009 SORNA conviction in the Western District of New York. The SORNA conviction exposes Mr. Talada to punishment for the violation of supervised release along with increased punishment for the new criminal matter under the sentencing guidelines in light of the prior SORNA conviction.

Mr. Talada filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, arguing that he was actually innocent of the 2009 SORNA conviction because the Attorney General failed to properly promulgate the interim rule which was to apply SORNA to those whose qualifying sex offense convictions pre-dated SORNA's enactment ("pre-

SORNA offenders;"). Mr. Talada argued that § 2255's saving clause permitted him to bring his challenge under § 2241 because he was actually innocent and authorized relief was unavailable him – and therefore inadequate and ineffective in Southern West Virginia – because the issue was foreclosed by binding Fourth Circuit precedent. Finally, Mr. Talada maintained that, if the District Court determined that it lacked jurisdiction to rule on the merits of his § 2241 claim, the Court should hold that, as applied, § 2255 unconstitutionally suspends the writ of habeas corpus. The District Court rejected Mr. Talada's claims. *See Talada v. Cole*, No. 16-cv-6185(CJS), 2017 WL 5194115 (W.D.N.Y. Nov. 9, 2017).

Mr. Talada appealed the District Court's denial of his § 2241 petition to the Second Circuit Court of Appeals and again raised the issues of whether he is actually innocent of his 2009 SORNA conviction because the Attorney General failed to validly specify that SORNA applied to pre-SORNA offenders, like him; whether the saving clause is available to him where binding contrary Fourth Circuit precedent rendered a § 2255 challenge in the Southern District of West Virginia

futile and, thereby, inadequate or ineffective to raise his claim of innocence; and finally, if § 2255's saving clause is unavailable, whether the Antiterrorism and Effective Death Penalty Act and § 2255 create an unconstitutional suspension of the writ of habeas corpus where an actually innocent prisoner is denied an opportunity for meaningful review because he is limited to a § 2255 challenge in the district where the issue is foreclosed by binding contrary Circuit precedent.

The Second Circuit panel (Cabranes, Sack, C.JJ., Koeltl, D.J.) filed a summary order denying Mr. Talada relief under § 2241. Relying on *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997), the panel concluded that the remedy afforded by § 2255 is not rendered inadequate or ineffective because he has not been able to obtain relief. 739 F.App'x at 75.

REASONS FOR GRANTING THE PETITION

It has been recognized that the Circuit Courts of Appeals are split in how they address the savings clause. *See generally*, *e.g., United States v. Wheeler*, 734 F.App'x 892, 893-894 (4th Cir. 2018) (statement

of Judge Agee respecting the denial of petition for *en banc* rehearing); *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1084-1086 (11th Cir. 2017) (*en banc*), *cert. denied*, ___ U.S. ___, 138 S.Ct. 502, 199 L.Ed.2d 385 (2017) (No. 17-85) (discussing six-way split). In *McCarthan*, the Court overturned existing Circuit precedent and held that the savings clause was not available to petitioners who were foreclosed by binding circuit precedent. 851 F.3d at 1086-10877; see *Prost v. Anderson*, 636 F.3d 578, 590 (10th Cir. 2011). Likewise, the Tenth and Eleventh Circuit Courts of Appeal interpret the saving clause so narrowly that the clause may be satisfied only where "practical considerations" such as when the sentencing court is not available, prevent the prisoner from filing a motion to vacate. *McCarthan*, 851 at 1092-93, *Prost*, 636 F.3d at 588.

The majority of the other circuits interpret the scope of the saving clause more broadly. For example, the Second Circuit Court of Appeals has held that "inadequate or ineffective does not refer solely to practical limitations on the petitioner's ability to obtain relief under § 2255" but, instead, extends to situations where a petitioner is actually innocent

and "could not have effectively raised [his] claim of innocence at an earlier time." *Triestman*, 124 F.3d at 363, 376. Similarly, the Seventh Circuit has recognized that the saving clause should give the petitioner "a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998).

Reviewing courts are empowered to correct even forfeited errors where those errors "seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1905 (2018) (*citing Molina-Martinez v. United States*, 578 U.S. ___, 136 S.Ct. 1338, 1340 (2016), and *United States v. Olano*, 507 U.S. 725, 732-33 (1993)). "[T]he public legitimacy of our justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and that provide opportunities for error correction." *Rosales-Mireles*, 138 S.Ct. at 1908 (citation and internal quotation omitted).

The Court should also grant certiorari to offer uniformity with respect to the application of a criminal statute. Due to the long-standing disagreement between the Circuit Courts of Appeal as to the validity of the interim rule, pre-SORNA offenders whose conduct was governed by the interim rule, a regulation enacted by the Attorney General without the required notice and comment period required by the Administrative Procedures Act, are viewed as alternately innocent or guilty based purely upon the district of prosecution.

This Court should offer guidance to the Circuit Courts of Appeal on the scope of the saving clause of § 2255 to ensure that prisoners are uniformly provided "a reasonable opportunity to obtain a reliable judicial determination of the [ ] legality of [their] conviction[s] and sentence[s]," *Davenport*, 147 F.3d at 609. Until this disagreement is reconciled, federal prisoners seeking collateral review in the Tenth and Eleventh Circuits will receive dramatically different treatment than those in other Circuits. In addition, the Court should resolve the disagreement between the Circuits as to the validity of the interim rule. Until these disagreements are resolved, prisoners will have inconsistent

relief available to them nationwide and, accordingly, will receive inconsistent results. The result will affect the public's perception of the apparent fairness and public reputation of the courts.

I. The Court should offer needed clarity on the scope of "inadequate or ineffective" within section 2255's saving clause.

By the time Mr. Talada briefed his appeal to the Fourth Circuit, raising his challenge to the promulgation of SORNA's interim rule on the ground that it violated the APA, the Fourth Circuit handed down its decision in *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009), holding, in pertinent part, that the Attorney General had validly enacted the interim rule thereby applying SORNA's registration requirements to pre-SORNA offenders. As a result, the panel addressing Mr. Talada's appeal concluded that his "argument is foreclosed by our holding in *Gould*." *Talada*, 380 F.App'x at 257. The Fourth Circuit's reliance on *Gould* raises the question of whether the remedy in § 2255 is inadequate or ineffective to test the legality of Mr. Talada's conviction. The Second Circuit panel, in denying Mr. Talada's petition, held that § 2255 was not "'rendered inadequate or ineffective

merely because he was unable to obtain relief under that that provision.'" 739 F.App'x at 75 (quoting *Triestman*, 124 F.3d at 376). The panel's holding raises the question as to § 2255's meaning of "inadequate or ineffective."

The saving clause of § 2255 provides the following:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e). The purpose of this clause is to save § 2255 from unconstitutionally suspending habeas corpus. *See Reyes-Requena v. United States*, 243 F.3d 893, 901 n.19 (5th Cir. 2001) (citing *Swain v. Pressley*, 430 U.S. 372, 381 (1977)). The question, as presented in Mr. Talada's petition, is whether the saving clause is available when circuit precedent precludes relief.

The Circuit Courts of Appeal are split as to whether § 2255's "inadequate or ineffective" requirement may be based on issue

foreclosure by prior Circuit precedent. Both the Tenth and Eleventh Circuits have held that prior circuit court precedent does not foreclose a petitioner from meaningfully testing his conviction under § 2255. *McCarthan*, 851 F.3d at 1085, 1087; *See Prost*, 636 F.3d at 590. While the Second Circuit panel in Mr. Talada's case did not hold that prior circuit precedent does not foreclose a petitioner from meaningfully testing his conviction under § 2255, it did note that "the remedy afforded by section 2255 is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provision." 739 F.App'x at 75 (quoting *Triestman*, 124 F.3d at 376).

Other Circuit Courts have held that § 2255's saving clause requirement that the remedy be "inadequate or ineffective" can be met by the claim being closed off by prior circuit precedent. *See In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002) (adopting the 7th Circuit's holding in *Davenport*); *Reyes-Requena*, 243 F.3d at 904; *In re Jones*, 226 F.3d 328, 333-334 (4th Cir. 2000); *In re Davenport*, 147 F.3d at 610-611.

Underlying this question is the meaning of "inadequate or ineffective." *See Triestman*, 124 F.3d at 376-377; *McCarthan*, 851 F.3d at 1130-1134 (Rosenbaum, J., dissenting). As Judge Calabresi notes in *Triestman*, "[w]hile there have been hundreds of cases reciting this statutory provision, courts have yet to articulate its scope and meaning." 124 F.3d at 377. Nonetheless, other than "encourag[ing] districts courts to continue to find that habeas corpus may be sought whenever situations arise in which a petitioner's inability to obtain collateral relief would raise serious questions as to § 2255's constitutionality," the panel in *Triestman* did not adequately answer the question. *See id.* at 377.

Dissenting in *McCarthan*, Judge Rosenbaum attempted to clarify what is meant by "inadequate or ineffective to test." She began by noting that "the words "inadequate" and "ineffective" have different and distinct meanings. And further noted that, because these words are joined by the disjunctive "or," a prisoner must demonstrate that the claim satisfies only one of these standards." *McCarthan*, 851 F.3d at 1130. Section 2255 is inadequate to test, Judge Rosenbaum explained,

"if practical considerations effectively or actually render the procedures § 2255 established unavailable for testing the legality of a prisoner's detention." *Id*. at 1131. In contrast, § 2255 is ineffective to test "when it fails to allow for consideration of any claims authorized by § 2255(a) that the minimum constitutional requirements of habeas corpus that the Suspension Clause of the Constitution imposes." *Id*. at 1132-1133. Thus, Judge Rosenbaum provides a starting point to consider whether prior circuit precedent precludes a defendant from raising a claim under § 2255.

Underlying the issue presented in Mr. Talada's case is the question of whether § 2255's saving clause allows a district court to entertain an actual innocence claim. The Tenth and Eleventh Circuits have ruled that it does not. *See Prost*, 636 F.3d at 578; *McCarthan*, 851 F.3d at 1084-1085. In *Prost*, the panel concluded that, if the petition could have challenged the legality of his detention in an initial § 2255 petition, then the petitioner is precluded from resorting to the saving clause and § 2241. 636 F.3d at 584. This is because the saving clause is only "concerned with process—ensuring the petitioner an *opportunity* to

bring his argument—not with substance—guaranteeing nothing about what the *opportunity* promised will ultimately yield in terms of relief." *Id*. At 584

The Eleventh Circuit, following *Prost* and overturning Circuit precedent, held that the saving clause was not available to petitioners who were foreclosed by binding circuit precedent. *McCarthan*, 851 F.3d at 1080, 1087. According to the majority of the Court, the petitioner "could have tested the legality of his detention by requesting that we reconsider our precedent *en banc* or by petitioning the Supreme Court for a writ of certiorari." *Id*. at 1087. The Court went on to conclude that adverse circuit precedent "did not make [petitioner's] first motion to vacate his sentence 'inadequate or ineffective' to challenge his sentence." *Id*.

Other Circuit Courts of Appeals have gone the other way, holding that § 2255's saving clause allows courts to entertain an actual innocence claim. *See Trenkler v. United States*, 536 F.3d 85, 99 (1st Cir. 2008) (noting that most courts require a credible allegation of actual

innocence to access the saving clause); *Stephens v Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (noting that the saving clause is available when a petitioner makes a claim of actual innocence and has not has an unobstructed procedural shot at presenting that claim); *Poindexter v. Nash*, 333 F.3d 372, 378 (2d Cir. 2003) (explaining that, along with showing that relief is unavailable, petitioner must assert a claim of actual innocence); *Reyes-Requena*, 243 F.3d at 902 - 903 (explaining that the basic features evidence in most formulations of the saving clause are actual innocence and retroactivity); *United States v. Peterman*, 249 F.3d 458, 462 (6th Cir. 2001) (holding that petitioners' claims fail to show an intervening change in the law establishing their actual innocence); *Jones*, 226 F.3d at 333; *see also United States v. Wheeler*, 886 F.3d 415, 426-427 (4th Cir. 2018) (discussing *Jones*); *In re Dorsainvil*, 119 F.3d 245, 252 (3d Cir. 1997) (permitting the petitioner to raise a petition under § 2241 in the District Court based on a change in the law after the filing of petitioner's first motion to vacate).

Questions regarding the scope of the saving clause's requirement of "inadequate or ineffective to test" frequently arise. Due to the deep

divisions between the minority and majority views on this issue, prisoners within the Tenth and Eleventh Circuits must clear a much higher hurdle to obtain relief as compared to those in circuits holding the majority view.

Questions surrounding the saving clause are ripe for review, and several certiorari petitions are currently before this Court. In *Wheeler*, the United States asks "whether a prisoner whose Section 2255 motion challenging the applicability of a statutory minimum was denied based on circuit precedent may later seek habeas relief on the ground that the circuit's interpretation of the relevant statutes has changed." Petition for a Writ of Certiorari at I, *Wheeler v. United States*, 886 F.3d 415 (4th Cir. 2018), *petition for certiorari filed* (U.S. Oct. 4, 2018) (No. 18-420). In *Lewis,* the petitioner raises the following question:

> May a federal prisoner file a petition for habeas corpus under 28 U.S.C. § 2241 in order to raise arguments that were foreclosed by binding (but erroneous) circuit precedent at the time of his direct appeal and original application for post-conviction relief under 28 U.S.C. § 2255, but which are meritorious in light of a subsequent decision overturning that erroneous precedent?

Petition for a Writ of Certiorari at I, *Lewis v. English*, 736 F.App'x 749 (10th Cir. 2018), *petition for certiorari filed* (U.S. Sept. 7, 2018) (No. 18-292).

If the Court is disinclined to grant certiorari in this case, it should consider holding the petition in abeyance pending the disposition of the petitions in *Wheeler* and *Lewis*.

II. The Court should settle the disagreement between the Circuit Courts of Appeal regarding the application of SORNA to pre-SORNA offenders in light of the Attorney General's failure to provide a notice and comment period when he promulgated the interim rule.

This Court should grant Mr. Talada's Petition to resolve a split between the Circuit Courts of Appeal as to whether the Attorney General's enactment of regulations making SORNA's criminal provisions retroactive without the notice and comment period violated the requirements of the Administrative Procedures Act thereby rendering the regulations invalid. *Compare Gould*, 568 F.3d at 470 (no APA violation, regulations are valid), *United States v. Dixon*, 551 F.3d

578, 583 (7th Cir. 2008), *overturned on other grounds*, *Carr v. United States*, 560 U.S. 438 (2010) (APA claim "frivolous"), *and United States v. Dean*, 604 F.3d 1275, 1281-1282 (11th Cir. 2010) (no APA violation, regulations valid), *with United States v. Reynolds*, 710 F.3d 498, 509, 524 (3d Cir. 2013) (APA violation, regulations invalid), *United States v. Cain*, 583 F.3d 408, 421-24 (6th Cir. 2009) (same), *United States v. Brewer*, 766 F.3d 884, 889-92 (8th Cir. 2014) (same), *United States v. Valverde*, 628 F.3d 1159, 1168-69 (9th Cir. 2010) (same), *United States v. Ross*, 848 F.3d 1129, 1133 (D.C. Cir. 2017) (same), *and with United States v. Johnson*, 632 F.3d 912, 930-933 (5th Cir. 2011) (APA violated, but violation harmless). Resolution of this long-standing disagreement by this Court would provide consistent nationwide treatment to those pre-SORNA offenders subject to the interim rule who, at present, are viewed as alternately innocent or culpable based upon the fortuity of their district of conviction.

A. Under the APA, executive agencies must provide a notice and comment period for proposed regulations before those regulations are effective. The Attorney General failed to provide that notice here when he retroactively applied SORNA's criminal provisions to sex offenders whose qualifying convictions pre-dated Congress's creation of SORNA.

When Congress enacted SORNA, it delegated the authority to the Attorney General "to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006."[2] 42 U.S.C. §16913(d). On February 28, 2007, the Attorney General issued, with immediate effect, an interim rule applying SORNA retroactively to sex offenders whose qualifying convictions occurred before SORNA's enactment ("pre-SORNA offenders"). 72 Fed.Reg 8894, 8897; codified at 28 C.F.R. § 72.3. In doing so, the Attorney General did not provide a notice and comment period of at least 30 days. Instead, SORNA's criminal sanctions were immediately applied retroactively to pre-

[2] Last year, the Court granted a petition for certiorari on the question of whether SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine. *Gundy v. United States*, 695 Fed.Appx. 639 (2d Cir. 2017), *cert. granted*, ___ U.S. ___, 138 S.Ct. 1260, 200 L.Ed.2d 416 (2018). The merits of the argument was heard by the Court on October 2, 2018.

SORNA offenders. The interim rule is the only purported basis for subjecting Mr. Talada to SORNA's penalties at the time of his unregistered travel in this case.

The APA requires executive agencies to provide notice of proposed rulemaking to include, in part, the nature of the proposed rule and the authority under which it is to be enacted. 5 U.S.C. § 553(b). Following notice, the public must be provided the opportunity to comment and their comments must be considered prior to the enactment of the final rule. 5 U.S.C. § 553(c). Absent good cause, agencies must provide notice at least 30 days prior to the regulation's effective date. 5 U.S.C. § 553(d)(3). Courts reviewing an agency's rulemaking "shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2)(D), *see also Mendoza v. Perez*, 754 F.3d 1002, 1022 (D.C. Cir. 2014), quoting *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 169–70 (7th Cir.1996) ("a binding rule promulgated pursuant to a delegation of legislative authority is 'the clearest possible example of a legislative rule, as to which the notice and comment procedure . . . is mandatory'").

Rather than provide the required notice and comment period when he enacted the interim rule following Congress' delegation of legislative authority to him to criminalize the conduct of pre-SORNA offenders, the Attorney General invoked the "good cause" exception. He explained that the "immediate effectiveness" of the rule was necessary "to eliminate any possible uncertainty about the applicability of the Act's requirements – and related means of enforcement, including criminal liability under 28 U.S.C. § 2250" for pre-SORNA offenders. 72 Fed.Reg. 8894, 8896. The Attorney General claimed that to delay the effective date of the rule would cause "practical dangers" such as the commission of new sexual assaults and the continuing evasion of registration requirements by a "substantial class of sex offenders," would "impair immediate efforts to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions," and would "thwart [SORNA's] legislative objective." *Id*. at 8894, 8896-8897.

B. The majority of the Circuit Courts of Appeal have concluded that the Attorney General failed to comply with the APA when he enacted the interim rule without a notice and comment period.

By a margin of six to two, the Circuit Courts of Appeal have rejected the Attorney General's assertion of good cause to override the APA's notice and comment requirements when he enacted the interim rule.[3] A panel of the Sixth Circuit Court of Appeals, applying a *de novo* standard of review, observed that "the Attorney General gave no specific evidence of actual harm." *Cain*, 583 F.3d at 422. A panel of the Eighth Circuit Court of Appeals, applying a deferential standard with an eye toward whether the Attorney General complied with Congressional intent, concluded that "[t]h[e] level of uncertainty inherent in the Congressional directive itself cannot constitute an emergency or public necessity." *Brewer*, 766 F.3d at 890 (8th Cir. 2014).

[3] A Seventh Circuit Court of Appeals panel summarily rejected the APA claim regarding the validity of the interim rule without discussion or analysis. *United States v. Dixon*, 551 F.3d 578, 583 (7th Cir. 2008).

In 2017, the Court of Appeals for the District of Columbia concluded that the Attorney General's claim that the delay occasioned by a notice and comment period would "impede the protection of the public" was not credible where "[t]he Attorney General's own behavior [ ] undercuts the current claim of urgency. . . he waited over half a year – 217 days – after the effective date of the act to publish the Interim Rule." *Ross*, 848 F.3d at 1133. In a similar vein, a Third Circuit panel opined that "[u]rgency for urgency's sake, or 'an agency's perception of urgency,' without any supporting evidence, is not among those situations [triggering good cause]." *Reynolds*, 710 F.3d at 512.

A Ninth Circuit panel concluded the rule was invalid and warned that there was no "rational connections between the facts found and the choice made to promulgate the interim rule on an emergency basis." *Valverde*, 628 F.3d at 1168. Likewise, the *Reynolds* panel held that to accept the Attorney General's reasons as constituting good cause would "eviscerate the APA's notice and comment requirements." 710 F.3d at 509.

In contrast to the holdings of the Third, Fifth, Sixth, Eighth, Ninth and District of Columbia Circuit Courts of Appeal, a divided panel of the Fourth Circuit Court of Appeals, applying *de novo* review, held that the Attorney General's stated justifications for dispensing with a notice and comment period constituted good cause. *Gould*, 568 F.3d at 469-470. Judge Michael, dissenting, commented that, "I believe holding the [interim] rule invalid and reversing Gould's conviction is warranted because allowing the Attorney General to sidestep the requirements of the APA here establishes a dangerous precedent. . . Here, where the adversely affected group – sex offenders – is a despised and marginalized one, the public interest is invoked to exclude them from the rulemaking process. The APA does not draw such a distinction." *Id*. at 482 (Michael, J., dissenting) (internal citation and quotations omitted).

In *United States v. Dean*, a majority of the Eleventh Circuit panel, applying a deferential arbitrary and capricious standard of review, held that the Attorney General's public safety justification for not providing a notice and comment period yielded good cause, noting

that his justification based upon uncertainty "alone may not have established [good cause]." *Dean* 604 F.3d at 1278, 1280-81. In his concurring opinion, Judge Wilson agreed that the interim rule was valid, however, he determined that the Attorney General had failed to demonstrate good cause but the error was harmless. *Id*. at 1289-90 (Wilson, J., dissenting). Regarding the Attorney General's claim of good cause, Judge Wilson commented that

> [the seven months] time-span is absent from the Attorney General's claims of emergency timing. What's more, Congress's allocation of three years, plus extensions, to the states to comply with SORNA means Congress did not perceive an emergency. In short, the intent of Congress . . . was *not* to relieve the Attorney General of the requirement for notice and comment.

Id. at 1287 (emphasis in original).

In a holding that mirrored Judge Wilson's dissent in *Dean*, a Fifth Circuit panel, applying an arbitrary and capricious standard of review, concluded that the Attorney General's justifications for bypassing a notice and comment period did not constitute good cause. *Johnson*, 632 F.3d at 928, 930. The panel upheld the regulation as to Johnson, however, because it found the error was harmless. *Id*. at 933. The panel

reached this determination after considering, among other things, the fact that Johnson took no part in the post-interim rule promulgation process nor did he identify any comment – different than those considered by the Attorney General – that he would have made had a notice and comment period been provided prior to the rule's effective date. *Id.*

C. This Court should grant the Petition and simultaneously resolve two splits amongst the Circuit Courts of Appeal: one regarding the validity of the interim rule and the second providing clarity as to the correct standard of review to be applied to an agency's claim of good cause to bypass the APA's notice and comment requirements.

The conflict on the validity of the interim rule has produced, and will continue to produce, wildly different outcomes for litigants within different jurisdictions on a fundamentally important issue: whether pre-SORNA offenders whose convictions were subject to the interim rule are actually innocent of a SORNA violation.

For example, district courts adjudicating collateral attacks in jurisdictions that have found the interim rule to be invalid conclude

that pre-SORNA offenders who were adjudicated under that rule are actually innocent. *See Pendleton v. United States*, Nos. 08-cr-59(GMS), 13-cv-127(GMS), 2016 WL 402857, 2016 U.S. Dist. LEXIS 11857 (D. Del. Feb. 1, 2016), *United States v. Dayman*, No. 07-cr-27 (D. Mont. Feb. 29 2012) (granting § 2255 motion and vacating conviction); *United States v. Anderson*, No. 07-cr-168, 2010 WL 3000165 (S.D. OH 2010) (adopting report and Recommendations and granting the motion to vacate and dismissing the indictment); *Logel v. United States*, Nos. 08-cr-83, 0-cv-224, 2010 WL 3843729, 2010 U.S. Dist. LEXIS 101963 (E.D. TN Sept. 27, 2010) (granting petitioner's motion to vacate); *Sipple v. United States*, 726 F.Supp.2d 813 (S.D. OH 2010) (granting motion to vacate).

In addition, the decisions of the Fourth and Eleventh Circuits convey an alarming signal to agencies that, even in the context of the application of a criminal statute, the APA's procedural requirements can be easily bypassed. This Court should grant this Petition and make clear that agencies must strictly adhere to the APA's notice and comment procedures.

Should this Court grant certiorari on this issue, it will simultaneously be able to address another existing disagreement between the Circuit Courts of Appeal regarding the correct standard of review to be employed where an agency asserts good cause under § 553(b), as the Attorney General did here. The Fourth and Sixth Circuits appear to apply a *de novo* review, *Gould*, 568 F.3d at 469-70, *Cain*, 583 F.3d at 420-21, while the Fifth, Eighth and Eleventh Circuits apply a deferential standard broadly deferring to the agency's determination.

In *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414 (1945), and *Auer v. Robbins*, 519 U.S. 452, 462 (1997), this Court created jurisprudence that afforded broad deference to an agency's interpretation of its own ambiguous regulation. Recently, this Court has granted certiorari in *Kisor v. Wilkie*, No. 18-15, 2018 WL 6439837, 2018 U.S. Lexis 7219 (U.S. Dec. 10, 2018) to consider whether this principle of deference should be overruled. Accordingly, in light of the disagreement between the Circuit Courts of Appeals as to the correct standard of review to be applied to an agency's claim of good cause to

dispense with a notice and comment period there is even more reason to grant certiorari here or, at the very least, to hold this case pending the resolution of *Kisor*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Marianne Mariano
Federal Public Defender

/s/Anne Burger
By: Anne Burger
Assistant Federal Public Defender
Counsel of Record

Jay S. Ovsiovitch
Assistant Federal Public Defender

January 10, 2019

Appendix

2017 WL 5194115
Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

Chad TALADA, Petitioner,
v.
David V. COLE, Sheriff, Steuben County Jail, Respondent.

16-CV-6185 CJS
|
Signed 11/09/2017

Attorneys and Law Firms

Anne M. Burger, Federal Public Defender, Rochester, NY, for Petitioner.

Tiffany H. Lee, U.S. Attorney's Office, Rochester, NY, for Respondent.

DECISION AND ORDER

CHARLES J. SIRAGUSA, United States District Judge

INTRODUCTION

***1** This is an action pursuant to 28 U.S.C. § 2241 in which Petitioner seeks an order vacating his conviction and sentence pursuant to the Sex Offender Registration and Notification Act, 18 U.S.C. § 2250 ("SORNA"). Because the Court finds that Petitioner fails to satisfy the requirements for a § 2241 challenge, the motion is denied and this action is dismissed.

BACKGROUND

Petitioner Chad Talada ("Petitioner") is a prisoner at the Steuben County Jail in Bath, New York. Petitioner was convicted of Attempted Sexual Abuse in the First Degree in New York in 2002 and was required to register as a sex offender. On December 9, 2008, Petitioner was charged in a one-count indictment in the Southern District of West Virginia for failing to register as a sex offender after having moved from New York to West Virginia sometime after April 18, 2007, and having been employed in West Virginia beginning on June 26, 2007. In 2009, Petitioner entered into a plea agreement with the government and pled guilty to the indictment. Pursuant to a plea agreement, Petitioner was sentenced to 24 months in prison and 70 months of supervised release.

Petitioner filed a Notice of Appeal with the Court of Appeals for the Fourth Circuit. Petitioner contended that the United States Attorney General's issuance of the Interim Rule that made the Sex Offender Registration and Notification Act, 18 U.S.C. § 2250 ("SORNA") retroactive to existing sex offenders was improperly promulgated pursuant to the Administrative Procedures Act ("APA"). Petitioner's conviction was affirmed by the Fourth Circuit Court of Appeals on the basis of precedent stemming from *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009), which affirmed the Attorney General's promulgation of the Interim Rule as valid under the APA. On August 31, 2010, Petitioner appealed for a Writ of Certiorari. The Supreme Court denied Petitioner's Writ of Certiorari on December 13, 2010. Petitioner subsequently failed to bring a challenge pursuant to 28 U.S.C. § 2255 prior to the expiration of the statute of limitations or December 12, 2011. Petitioner completed his sentence of imprisonment on March 23, 2010. The Western District of New York received a transfer of jurisdiction for Petitioner's supervised release on June 10, 2010.

On September 3, 2015, in the Western District of New York, Petitioner pled guilty to charges of Knowing Receipt of Child Pornography. On March 21, 2016, Petitioner filed the subject petition, pursuant to 28 U.S.C. § 2241, requesting a writ of habeas corpus to vacate his prior SORNA conviction. Vacating the SORNA conviction can have implications regarding Petitioner's pending sentence in the case regarding receipt of child pornography.

DISCUSSION

Petitioner brings this action pursuant to 28 U.S.C. §

2241(a) & (c)(3), which authorizes a district court to grant a writ of habeas corpus whenever a petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." Petitioner's motion is precarious under Second Circuit precedent, which generally requires petitioners to use § 2255 to challenge convictions and sentences.

> ***2** A motion pursuant to § 2241 generally challenges the execution of a federal prisoner's sentence, including such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions ... In contrast, § 2255 is generally the proper vehicle for a federal prisoner's challenge to his conviction and sentence, as it encompasses claims that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255, ¶ 1

Jiminian v. Nash, 245 F.3d 144, 146–47 (2d Cir. 2001). Petitioner failed to challenge his conviction and sentence using § 2255 in the court where he was sentenced in a timely fashion upon the Supreme Court's denial of a writ of certiorari in 2010. The statute of limitations in § 2255 mandates that any challenge to the conviction must occur within one year upon the finality of the judgment of the conviction, which means that Petitioner had until December 12, 2011, to file the appropriate challenge. Therefore, Petitioner is out of time to file a § 2255 challenge to his conviction.

Despite the expiration of the statute of limitations, the Court may permit § 2241 challenges in certain extraordinary conditions as described in the "savings clause" of § 2255(e). The savings clause provides that:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e). Petitioner contends that this clause permits the Court to rule on the merits of the § 2241 challenge. In the Second Circuit, governing precedent allows the savings clause of § 2255 to be invoked to allow § 2241 relief in "cases involving prisoners who (l) can prove actual innocence on the existing record, and (2) 'could not have effectively raised [their] claim[s] of innocence at an earlier time.' " See *Cephas v. Nash*, 328 F.3d 98, 104 (2d Cir. 2003) (quoting *Triestman*, l24 F.3d at 363).

In proving actual innocence on the existing record, Petitioner maintains that the Attorney General failed to promulgate SORNA in accordance with the Administrative Procedures Act. Petitioner further contends that the sharp divide in Circuit Court decisions regarding the constitutionality of the "Interim Rule" constitutes the basis for this Court to lend credence to his argument. As indicated above, the Fourth Circuit previously ruled on the validity of SORNA under the Administrative Procedure Act ("APA") in *United States v. Gould*, 526 F. Supp. 2d 538, 546 (D. Md. 2007), *aff'd*, 568 F.3d 459 (4th Cir. 2009). The APA requires a public notice for any proposed rule change prior to the effective date unless "good cause" exists. "Good cause" exists when public notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(3)(B). In *Gould*, the Fourth Circuit held that the "good cause" exception had been satisfied by the Attorney General in bypassing certain procedural roadblocks with SORNA's promulgation. Petitioner's conviction was upheld on this precedent in the Fourth Circuit. Although there has been division among the Circuits on this particular issue, no subsequent development in the Second Circuit, Fourth Circuit, or the Supreme Court merit deviation from the precedent as applied to Petitioner's original conviction. As such, Petitioner fails to prove actual innocence on the existing record.[1]

***3** In arguing the inability to effectively raise claims of innocence at an earlier time, Petitioner is not claiming innocence per se. Petitioner instead contends that failing to register as a sex offender pursuant to SORNA was not a crime at the time of his indictment. Petitioner argues that any attempt to raise a § 2255 challenge in the Fourth Circuit would have been futile due to binding contrary precedent. Petitioner failed to file a challenge in the Fourth Circuit pursuant to a § 2255 before the one-year statute of limitations expired. Because of Petitioner's failure to do so, there is no possible way of knowing how effective or adequate a § 2255 motion would have been. The Supreme Court has previously held that, "futility cannot constitute cause [for procedural relief] if it means simply that a claim was 'unacceptable to that particular court at that particular time' " *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Engle v. Isaac*, 456

U.S. 107, 102 S.Ct. 1558 (1982)). It would be unwarranted to say that a § 2255 could not have been effectively raised in the Fourth Circuit simply because Petitioner disagreed with the precedents in the Fourth Circuit. As such, Petitioner fails to prove that he could not have effectively raised claims of innocence at an earlier time.

As an alternative argument, Petitioner also challenges the constitutionality of Antiterrorism and Effective Death Penalty Act ("AEDPA") pursuant to Art. I, Sect. 9, Cl. 2 of the U.S. Constitution. Petitioner contends that § 2255, which was enacted by AEDPA, violates the Suspension Clause for the writ of habeas corpus. AEDPA does not violate Suspension Clause because it was enacted to "provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." *Hill v. United States*, 368 U.S. 424, 471 (1962). Petitioner does not have access to § 2255 due to the statute of limitations for challenges pursuant to habeas corpus. This limit is not necessarily absolute. As is obvious by the present motion, it is not impossible to challenge convictions after the statute of limitations expires. The Petitioner has utilized a § 2241 motion in the present case, but simply fails to meet the jurisdictional requirements necessary for a successful motion. As such, AEDPA does not violate Petitioner's right to habeas corpus.

CONCLUSION

For the forgoing reasons, Petitioner's Petition for relief under 28 U.S.C. § 2241 is denied, and this action is dismissed.

All Citations

Not Reported in Fed. Supp., 2017 WL 5194115

Footnotes

1 Petitioner does not deny the facts surrounding his original conviction. Petitioner contends that what he did was not illegal at the time due to the failure of the Attorney General to properly promulgate the Interim Rule.

739 Fed.Appx. 73 (Mem)

United States Court of Appeals, Second Circuit.

Chad TALADA, Petitioner-Appellant,

v.

David V. COLE, Sheriff, Steuben County Jail, Respondent-Appellee.

17-3773-pr

|

October 12, 2018

Appeal from a November 13, 2017 judgment of the United States District Court for the Western District of New York (Charles J. Siragusa, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and hereby is **AFFIRMED**.

Attorneys and Law Firms

FOR PETITIONER-APPELLANT: Anne M. Burger, Assistant Federal Public Defender, Federal Public Defender's Office, Western District of New York, Rochester, NY.

FOR RESPONDENT-APPELLEE: Tiffany H. Lee, Assistant United States Attorney, for James P. Kennedy, Jr., United States Attorney for the Western District of New York, Rochester, NY.

PRESENT: José A. Cabranes, Robert D. Sack, Circuit Judges, John G. Koeltl, District Judge.*

***74 SUMMARY ORDER**

Petitioner-Appellant Chad Talada ("Talada") appeals the District Court's judgment denying his application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. We affirm the judgment of the District Court; Talada is ineligible for relief under section 2241 because a remedy under the related provision 28 U.S.C. § 2255 would not have been "inadequate or ineffective" within the meaning of that section.

I.

In 2009, the U.S. District Court for the Southern District of West Virginia convicted Talada of one count of failure to register as a sex offender in violation of the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250. SORNA as originally enacted in 2006 did not apply to Talada because the statute was not retroactive and Talada had been convicted of an arguably applicable sex offense several years before. But after enactment the Attorney General promulgated a rule that made SORNA apply retroactively, requiring even sex offenders such as Talada, who had been convicted of a sex offense before SORNA became law, to register under the terms of the statute. Talada argued both in the Southern District of West Virginia and on appeal in the Fourth Circuit that the Attorney General had promulgated the retroactivity rule in violation of the Administrative Procedure Act and that his conviction was therefore invalid. Both courts rejected that argument; controlling Fourth Circuit precedent already held that the retroactivity rule did not violate the Administrative Procedure Act. *United States v. Talada*, 631 F.Supp.2d
797, 812–15 (S.D.W. Va. 2009), *aff'd*, 380 F. App'x 255, 257 (4th Cir. 2010) (citing *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009)). The Supreme Court also denied his petition for certiorari. *Talada v. United States*, 562 U.S. 1111, 131 S.Ct. 821, 178 L.Ed.2d 561 (2010).

After his direct appeals failed, Talada brought a collateral attack on his conviction seven years later, in 2016. At this point he was in New York and had pleaded guilty in the

U.S. District Court for the Western District of New York to a new charge, one count of knowingly receiving child pornography following a prior conviction in violation of 18 U.S.C. §§ 2252(a)(2)(A) and 2252A(b)(1). Talada had not brought a collateral attack on his SORNA conviction within the one-year time limit set by 28 U.S.C. § 2255. But having pleaded guilty to the new charge, and now being in confinement, he instead applied to the Western District of New York for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. The District Court denied his application, and Talada now appeals that decision.

II.

We review de novo the denial of an application for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. *Adams v. United States*, 372 F.3d 132, 134 (2d Cir. 2004).

Usually a prisoner's only means of collateral attack on a conviction is to file a motion pursuant to 28 U.S.C. § 2255. *See Triestman v. United States*, 124 F.3d 361, 373 (2d Cir. 1997). The prisoner may instead ***75** apply for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 if and only if "the remedy by motion [pursuant to 28 U.S.C. § 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e); *see also Triestman*, 124 F.3d at 373–74. We have held that the remedy by motion under section 2255 is "inadequate or ineffective" in, at a minimum, any case in which the prisoner is not eligible to file a motion under section 2255 "and in which the failure to allow for collateral review would raise serious constitutional questions." *Triestman*, 124 F.3d at 377.[1]

We conclude that the District Court did not err by denying the writ in the circumstances presented here.

Footnotes

Talada concedes that he is not eligible for relief under section 2255 because he failed to file a motion within the specified one-year time limit. But he argues that relief under section 2255 would have been "inadequate or ineffective" because Fourth Circuit precedent already foreclosed the argument he would have made in a collateral attack—namely, that his conviction is invalid because it rested on an interpretation of SORNA that violated the Administrative Procedure Act and was therefore itself invalid. For this reason he argues that he is entitled to a writ under section 2241.

We do not see why section 2255 relief was "inadequate or ineffective" in Talada's case. Talada was certainly able to test the legality of his detention under section 2255. The problem for him was that such testing would have served no purpose, since his detention was in fact legal under the applicable law of the Fourth Circuit. "[T]he remedy afforded by [section] 2255 is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provision." *Id.* at 376 (quoting *In re Vial*, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997)). We see no serious constitutional question—including, contrary to Talada's argument in his opening brief, no question under the Suspension Clause of the Constitution—posed by denying him a writ of habeas corpus pursuant to section 2241 under these circumstances.

CONCLUSION

We have reviewed all of the arguments raised by Talada on appeal and find them to be without merit. We **AFFIRM** the November 13, 2017 judgment of the District Court.

All Citations

739 Fed.Appx. 73 (Mem)

* Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

1 For explanation of the history of and differences between applications for writs under section 2241 and applications for writs under section 2255, see *Triestman v. United States*, 124 F.3d 361, 373–74 (2d Cir. 1997).