No. 18-7581

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON ERWIN, PETITIONER

v.

FCC COLEMAN – LOW, WARDEN

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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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 show 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." 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 portion of Section 2255(e) beginning with "unless," known as the saving clause, allows a defendant who has been denied Section 2255 relief to later file a habeas petition that challenges his conviction or sentence based on an intervening change in the judicial interpretation of a statute. 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 the circumstances of petitioner's case would not lead to relief under any circuit's interpretation of the saving clause.

1. In 2007, petitioner was convicted of conspiring to distribute cocaine, MDMA, and methadone, in violation of 21 U.S.C. 846; three counts of distributing MDMA and methadone, in violation of 21 U.S.C. 841(a)(1); and distributing cocaine and methadone resulting in death, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1. He was sentenced to 20 years of imprisonment for distributing cocaine and methadone resulting in death, the minimum sentence required by statute. Judgment 2; see 21 U.S.C. 841(b)(1)(C) (establishing a 20-year minimum sentence for a defendant who unlawfully distributes a Schedule I or II drug, when "death or serious bodily injury results from the use of such substance"). Petitioner was also sentenced to concurrent terms of 20 years of imprisonment for the remaining four dug convictions.

Judgment 2. After petitioner's conviction and sentence were affirmed on direct appeal, see 345 Fed. Appx. 482, he filed a motion to vacate, correct, or set aside the sentence under 28 U.S.C. 2255, which the district court denied, 2011 WL 4345310.

In 2015, petitioner filed a habeas petition under 28 U.S.C. 2241, based on this Court's ruling in Burrage v. United States, 571 U.S. 204 (2014), which construed the death-resulting provision in 21 U.S.C. 841(b)(1)(C) and determined that it requires proof that drug use was "a but-for cause of the death or injury." 571 U.S. at 219. Petitioner argued that the government failed under Burrage to prove that his distribution of cocaine and methadone were the but-for cause of the victim's death. Habeas Pet. 15-17. The district court dismissed the petition for lack of jurisdiction, concluding that the petition was foreclosed by the saving clause of 28 U.S.C. 2255(e). Pet. App. B, at 1-2. The court of appeals affirmed. Pet. App. A, at 1-4.

2. Petitioner renews his contention (Pet. 6-8) that this Court's decision in Burrage, supra, establishes that his conviction is invalid. Petitioner also argues (Pet. 8-11) that this Court's intervention is necessary to resolve a dispute about the availability of habeas relief under the saving clause for statutory claims. As noted above, the United States continues to believe that this Court's review of the saving clause's scope is warranted in an appropriate case. But petitioner would not be

entitled to relief even in the courts of appeals that have given the saving clause the most prisoner-favorable interpretation.

Even circuits that construe the saving clause to permit relief based on an intervening decision of statutory interpretation 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., Hill v. Masters, 836 F.3d 591, 594-600 (6th Cir. 2016); Brown v. Rios, 696 F.3d 638, 640-641 (7th Cir. 2012).

On the first prerequisite, petitioner has not shown that his claim was foreclosed at the time of his first Section 2255 motion by any since-abrogated precedent. Even before Burrage, the Eleventh Circuit had held that "[t]he statutory term 'results from' [in 21 U.S.C. 841(b)(1)(C)] is a cause-in-fact requirement" that requires a showing of "but-for" causation. United States v. Webb, 655 F.3d 1238, 1255 (2011) (per curiam), cert. denied, 565 U.S. 1173 (2012); see United States v. Rodriguez, 279 F.3d 947, 951 (11th Cir. 2002) (upholding a mandatory sentence under 21 U.S.C. 841(b)(1)(C) where the district court found that, "but for"

ingesting the drugs provided by the defendant, the victim would not have died). Petitioner therefore had an unobstructed opportunity at the time of his trial, direct appeal, and first Section 2255 motion to assert that the evidence was insufficient because the government failed to prove that the drugs he distributed were the but-for cause of death.

On the second prerequisite, petitioner has not shown that he is "actually innocent" (Pet. 7) of the offense for which a 20-year sentence was imposed under 21 U.S.C. 841(b)(1)(C). See Bousley v. United States, 523 U.S. 614, 624 (1998). The government presented ample evidence at trial that petitioner's drug distribution in fact was the but-for cause of death. See 7/19/07 Trial Tr. 26 (government's closing argument that "[e]very single expert said that if Andrew Culver did not have cocaine and methadone in his system he'd be alive today," and that "[h]e died as a result of cocaine and methadone"). In this circumstance, no circuit would interpret the saving clause to permit petitioner to challenge the jury's verdict through a habeas petition.

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 statutory challenges to a conviction or sentence under the saving clause. See, e.g., Br. in Opp. at 24-27, Young v. Ocasio, 138 S. Ct. 2673 (2018) (No. 17-7141); Br. in Opp. at 21-22, Venta v. Jarvis, 138 S. Ct.

648 (2018) (No. 17-6099). The Court should follow the same course here.*

Respectfully submitted.

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Solicitor General

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* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.