No. 18-7725

IN THE SUPREME COURT OF THE UNITED STATES

RALPH FRANCIS DELEO, PETITIONER

v.

FRANCISCO J. QUINTANA, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH 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 the government infringed his constitutional right to counsel of choice under Luis v. United States, 136 S. Ct. 1083 (2016).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4[1]) is unreported. The order of the district court (Pet. App. A5-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2018. The petition for a writ of certiorari was filed on August 31, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Citations in this brief refer to Appendix A of the petition for a writ of certiorari as if it were consecutively paginated.

STATEMENT

In 2010, following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) and 846; using a communication device to facilitate a felony drug transaction, in violation of 21 U.S.C. 843(b); and aiding and abetting the possession with intent to distribute cocaine, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1) and (b)(1)(B). 09-cr-305 Judgment 1. The court sentenced petitioner to 144 months of imprisonment, to be followed by four years of supervised release. Id. at 2-3.[2] The court of appeals affirmed, 690 F.3d 977, and this Court denied a petition for a writ of certiorari, 568 U.S 1240.

In 2012, following a guilty plea in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiracy under the Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. 1962(d); and possession of firearms and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1). 09-cr-10391 Judgment 1. The court sentenced petitioner to 199 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The

[2] Petitioner's sentence was later reduced to 124 months of imprisonment based on a retroactive lowering of his recommended Sentencing Guidelines range. See 09-cr-305 D. Ct. Doc. 261 (May 26, 2015).

court of appeals affirmed, 12-2440 Judgment 1, and this Court denied a petition for a writ of certiorari, 135 S. Ct. 422.

In 2013, petitioner filed a motion under 28 U.S.C. 2255 in the Eastern District of Arkansas to vacate his convictions in the Arkansas case. 09-cr-305 D. Ct. Doc. 198 (May 21, 2013), Doc. 202 (June 6, 2013), Doc. 203 (June 14, 2013). The district court denied the motion and declined to issue a certificate of appealability (COA), Doc. 220 (Jan. 6, 2014), and the court of appeals denied petitioner's request for a COA, 14-1209 Judgment.

In 2017, petitioner filed in the Eastern District of Kentucky a petition for a writ of habeas corpus under 28 U.S.C. 2241. 17-cv-294 D. Ct. Doc. 1 (July 17, 2017). The district court denied the petition, Pet. App. A5-A6, and the court of appeals affirmed, id. at A1-A4.

1. In December 2008, the Federal Bureau of Investigation began court-authorized wiretap surveillance of George Thompson to investigate an illegal gambling business. 690 F.3d at 982; 09-cr-305 D. Ct. Doc. 220, at 1-2. Through the wiretap, agents overheard information about illegal drug trafficking across state lines and the sale of firearms to Thompson, who was a convicted felon. 690 F.3d at 983. The district court reauthorized the wiretap twice and expanded its scope to include calls relating to possible firearms, drugs, extortion, visa fraud, and immigration offenses. Ibid.

In November 2009, an Arkansas State Police trooper stopped Tri Cam Le and found a significant amount of cocaine in his possession. 690 F.3d at 983. After being arrested, Le called Thompson, and Thompson then called petitioner to discuss Le's arrest. Ibid. Based on Thompson's call to petitioner and a further investigation into petitioner's activities, the FBI obtained a search warrant for petitioner's apartment. Ibid. During the search, agents found a large amount of cocaine in a storage room, and petitioner was arrested. Ibid.

2. A federal grand jury in the Eastern District of Arkansas returned a superseding indictment charging petitioner with conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846; using a communication device to facilitate a felony drug transaction, in violation of 21 U.S.C. 843(b); and aiding and abetting the possession with intent to distribute cocaine, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1). 09-cr-305 Superseding Indictment 1-2. Following trial, a jury found petitioner guilty on all counts. 09-cr-305 Judgment 1. The district court sentenced petitioner to 144 months of imprisonment (later reduced to 124 months, see p. 2 n.2, supra), to be followed by four years of supervised release. 09-cr-305 Judgment 2-3.

The Eighth Circuit affirmed petitioner's convictions and sentence. 690 F.3d 977. As relevant here, petitioner raised a claim of ineffective assistance of trial counsel. Id. at 992-993.

The court observed that ineffective-assistance claims are "generally best litigated in collateral proceedings," id. at 992 (citation omitted), and determined that petitioner's case did not warrant a departure from that general rule, id. at 993. This Court denied a petition for a writ of certiorari. 568 U.S 1240 (No. 12-8641).

3. The investigation into petitioner resulted in further charges against him in the District of Massachusetts. The investigation revealed that petitioner was the leader of the "DeLeo Crew," "a criminal organization whose members and associates engaged in the importation, trafficking, and distribution of narcotics and controlled substances, extortion, loan sharking, and interstate and foreign travel in aid of racketeering." 09-cr-10391 Superseding Information 1. Petitioner also occupied the senior leadership position of "street boss" in the Colombo family -- one of five entities through which the mafia operates in the United States and Canada. Id. at 2-3. The DeLeo Crew "buil[t] up a cache of firearms, weapons, ammunition, and disguises" to be used in support of its criminal activities. Id. at 5. Petitioner in particular "maintained in a hidden location a cache of at least eleven firearms, together with a silencer, ammunition, masks, and patches from different police departments and other entities." Id. at 12.

Petitioner was charged in a superseding information with RICO conspiracy, in violation of 18 U.S.C. 1962(d); and possession of

firearms and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1). 09-cr-10391 Superseding Information 1-16. Petitioner's conspiracy with Thompson and Le to possess with intent to distribute cocaine -- the episode underlying the charges in the Arkansas case -- was alleged in the Massachusetts case as an overt act in furtherance of the RICO conspiracy. Id. at 9; see 09-cr-305 D. Ct. Doc. 220, at 15 n.8.

Petitioner pleaded guilty to both charges in the Massachusetts case. 09-cr-10391 D. Ct. Doc. 107 (May 24, 2012); 5/24/12 Plea Hr'g Tr. 15-21. Petitioner's plea agreement described in detail items that would be forfeited upon the acceptance of the plea. 09-cr-10391 D. Ct. Doc. 107, at ¶ 10. The parties further agreed that the government would not seek forfeiture of certain funds that had been seized from petitioner, which would instead be used to pay fines and penalties owed by petitioner to the Arkansas and Massachusetts courts. Ibid. Petitioner also agreed to "waive[] any and all claims arising from or relating to the seizure, detention, and return of" those funds. Ibid.

The district court sentenced petitioner to 199 months of imprisonment, to be followed by three years of supervised release. 09-cr-10391 Judgment 2-3. The First Circuit affirmed. 12-2440 Judgment 1. This Court denied a petition for a writ of certiorari. 135 S. Ct. 422 (No. 14-6374).

4. In 2013, petitioner filed a motion under 28 U.S.C. 2255 in the Eastern District of Arkansas seeking to vacate his

convictions in the Arkansas case. 09-cr-305 D. Ct. Docs. 198, 202, 203. The court denied petitioner's motion. Doc. 220.

As relevant here, the district court rejected petitioner's claim that he had received ineffective assistance of counsel at trial. 09-cr-305 D. Ct. Doc. 220, at 2-15. The court reviewed petitioner's numerous complaints about his attorney, Dale West, and determined, based on a review of the trial transcript, that "all of the lawyers, including West, did an excellent job in representing their clients." Id. at 8. The court explained that aside from one error, West in particular "appeared to be thoroughly prepared to defend [petitioner] and represented him zealously and intelligently throughout the trial." Id. at 7-8.

The district court found that West had made one serious error: He had briefly allowed petitioner to take the witness stand, although petitioner stepped down from the stand without testifying. 09-cr-305 D. Ct. Doc. 220, at 10-11. When petitioner took the stand, the trial judge called a bench conference and warned West that petitioner's testimony could open the door to cross-examination about his mafia ties -- information that the defense had otherwise successfully prevented from being introduced at trial pursuant to a motion in limine. Ibid. West then discussed the judge's warning with petitioner, who decided not to testify. Id. at 11. West later admitted in an affidavit that he should not have called petitioner to the stand "without first ascertaining

whether information that had been excluded pursuant to his motion in limine could be grounds for cross-examination." Ibid.

The district court determined that West's error was sufficiently serious to satisfy the deficient-performance prong of Strickland v. Washington, 466 U.S. 668 (1984). 09-cr-305 D. Ct. Doc. 220, at 11. The court further determined, however, that petitioner could not show that West's error prejudiced his defense. Id. at 12-15. The court explained that no record evidence supported petitioner's assertion that the error caused the jury to believe that petitioner "had something to hide"; that the jury had specifically been instructed that petitioner's decision not to testify should have no bearing on the jury's deliberation; and that, "[m]ost importantly, the evidence against [petitioner] was sufficiently compelling that [petitioner] cannot meet the prejudice element of the Strickland standard." Id. at 12; see id. at 12-15 (discussing trial evidence that "conclusively" showed that petitioner had committed each of the charged offenses). The court declined to issue a COA. Id. at 20. The court of appeals similarly declined to issue a COA. 14-1209 Judgment.

5. In 2016, this Court held in Luis v. United States, 136 S. Ct. 1083, that "the pretrial restraint of legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice" in a criminal case violates the Sixth Amendment. Id. at 1088 (plurality opinion) (citation omitted); see id. at 1096 (Thomas, J., concurring in the judgment). In 2017,

petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Eastern District of Kentucky, the district in which he was then confined. 17-cv-294 D. Ct. Doc. 1. In it, petitioner renewed his argument that West had provided ineffective assistance at trial and contended that the Section 2255 proceedings in Arkansas were procedurally flawed because the district court failed to conduct an evidentiary hearing on his ineffective-assistance claim. Id. at 3-29. He also contended, based on Luis, that the government violated his right to counsel of choice by seizing or freezing his "untainted assets," thereby preventing him from hiring a lawyer other than West. Id. at 29; see id. at 29-31.

The district court denied the habeas petition. Pet. App. A5-A6. The court observed that a petition for a writ of habeas corpus under Section 2241 was not an appropriate vehicle for petitioner to raise procedural challenges to his Section 2255 proceedings, which would instead be properly raised in an appeal from the denial of that motion. Ibid. The court also explained that a Section 2241 petition was not an appropriate vehicle for petitioner to raise a claim that he is entitled to relief under Luis. The court accepted that a federal prisoner might be permitted to challenge the validity of his conviction or sentence under Section 2241 "when the prisoner is trying to rely on an intervening change in statutory law." Id. at A6 (citing Wooten v. Cauley, 677 F.3d 303 (6th Cir. 2012)). The court observed, however, that petitioner's

Luis claim was a constitutional claim, rather than a statutory claim. Ibid.

The court of appeals affirmed. Pet. App. A1-A4. The court emphasized that "[t]he 'primary avenue' for a prisoner to protest the legality of a sentence is § 2255." Id. at A2 (citing United States v. Peterman, 249 F.3d 458, 461 (6th Cir.), cert. denied, 534 U.S. 1008 (2001)). The court noted that relief under Section 2241 remains available under the habeas saving clause, 28 U.S.C. 2255(e), when Section 2255 "is inadequate or ineffective to test the legality of the prisoner's detention." Pet. App. A3 (quoting 28 U.S.C. 2255(e)) (brackets and internal quotation marks omitted). But although the court accepted that such relief would be available in narrow circumstances, such as where a prisoner can establish actual innocence based on an intervening change in law, it determined that Luis was not an intervening change in the law that would establish petitioner's actual innocence of his convictions. Ibid. The court further determined that "to the extent that [petitioner] raises arguments for ineffective assistance independent of his Luis claim, these claims were rejected by the Arkansas district court" in petitioner's Section 2255 proceedings. Id. at A4.

ARGUMENT

Petitioner contends (Pet. 6-11) that the court of appeals erred by failing to address the merits of his claim that Luis v. United States, 136 S. Ct. 1083 (2016), announced a watershed rule

of criminal procedure that should be applied retroactively to cases on collateral review. The court of appeals correctly determined that petitioner's Luis claim was not properly raised in a petition for a writ of habeas corpus under 28 U.S.C. 2241, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioner has also failed to establish a basis for his Luis claim, and he waived in his plea agreement all potential claims arising from the seizure of his funds. Further review is unwarranted.

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.[3] Although those

[3] 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-

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 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 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

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964 (8th Cir. 2004) (discussing majority rule without expressly adopting it), cert. denied, 545 U.S. 1147 (2005).

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 believes 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).

a. 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, 139 S. Ct. 1318 (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). For several independent reasons, 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 Luis. 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 and internal quotation marks omitted). The saving clause therefore does not permit a habeas petition raising a claim of Luis error under any circuit's approach.

Second, petitioner cannot seek habeas relief under the saving clause based on Luis because Luis does not apply retroactively to cases on collateral review, as every court to have considered the question has recognized. See United States v. Patel, No. 11-cr-31, 2018 WL 6579989, at *5-*6 (W.D. Va. Dec. 13, 2018) (citing cases). Under the normal framework for collateral review, a new rule of constitutional law applies retroactively only if it is substantive (i.e., if it places primary conduct outside the reach of criminal sanction) or is a "'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion)); see Welch v. United States, 136 S. Ct. 1257, 1264 (2016). Petitioner contends (Pet. 5-8) that the Luis rule fits into the second category, but Luis is not a "watershed" rule on par with the right to appointed counsel recognized in Gideon v. Wainwright, 372 U.S. 335 (1963). See, e.g., Saffle, 494 U.S. at 495 (citing Gideon "to illustrate the type of rule coming within the exception"). This Court has explained that violation of the

right to counsel of choice undermines an autonomy interest, but it does not undermine the fundamental fairness or accuracy of a criminal proceeding. See United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) ("The right to select counsel of one's choice * * * has never been derived from the Sixth Amendment's purpose of ensuring a fair trial.").

Third, petitioner has not shown that Luis removed a preexisting barrier to the assertion of his Sixth Amendment claim by abrogating contrary precedent. Petitioner had an unobstructed opportunity at the time of his conviction, direct appeal, and first Section 2255 motion to argue that his convictions were invalid based on a violation of his right to counsel of choice. 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).

b. Furthermore, even assuming a habeas petition were an appropriate procedural mechanism, petitioner has not established

a basis for any claim he seeks to raise. He offers no evidence that his funds were either untainted or frozen. To the extent that petitioner raises claims independent of Luis, they are likewise not cognizable under any circuit's approach to the saving clause.[4] And in any event, petitioner expressly "waive[d] any and all claims arising from or relating to the seizure, detention, and return of" his funds. 09-cr-10391 D. Ct. Doc. 107, at ¶ 10. Even if it were available, further review of those claims is not warranted.

[4] His contention (Pet. 4-5) that he was in pretrial lockdown from the time of his arrest through his sentencing hearing, which he claims infringed his right to counsel of choice, is a constitutional (not statutory) claim. And insofar as petitioner claims (Pet. 8) that West provided ineffective assistance of counsel at trial, that claim is also constitutional, and it was already raised in petitioner's Section 2255 motion and was thoroughly analyzed and rejected by the Arkansas district court and the Eighth Circuit. See pp. 7-8, supra. That petitioner did not prevail on his ineffective-assistance claim does not mean that Section 2255 was inadequate or ineffective. In re Jones, 226 F.3d at 333 ("It is beyond question that § 2255 is not inadequate or ineffective merely because an individual is unable to obtain relief under that provision."); see Taylor v. Gilkey, 314 F.3d 832, 835 (7th Cir. 2002) (Section 2255(e) focuses on the prisoner's ability to "test" the legality of detention, which "implies a focus on procedures rather than outcomes").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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