No. 18-9360

IN THE SUPREME COURT OF THE UNITED STATES

LAZARO VELIZ, PETITIONER

v.

JOHN V. FLOURNOY, WARDEN

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DANIEL J. KANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner is entitled to habeas relief under 28 U.S.C. 2241 on his constitutional challenge to his convictions under 18 U.S.C. 924(c) (1994).

2. Whether petitioner, who was originally sentenced in 1996, is entitled to resentencing under a provision of the First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, § 403, 132 Stat. 5221-5222, that applies only "if a sentence for the offense has not been imposed as of" December 21, 2018. § 403(b), 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Veliz, No. 95-cr-114 (June 29, 2001)

Veliz v. United States, No. 03-cv-21024 (Jan. 10, 2005)

Veliz v. United States, No. 16-cv-22834 (July 6, 2016)

United States District Court (S.D. Ga.):

Veliz v. Flournoy, No. 16-cv-152 (Oct. 26, 2017)

United States Court of Appeals (11th Cir.):

United States v. Rosello, No. 96-5130 (Feb. 14, 2001)

United States v. Veliz, No. 01-13952 (May 31, 2002)

Rosello v. United States, No. 03-12585 (Sep. 23, 2003) (appeal of codefendant)

United States v. Rosello, No. 03-15791 (Apr. 13, 2004) (appeal of codefendant)

Veliz v. United States, No. 05-10317 (May 19, 2005)

Rosello v. FCI Jesup Warden, No. 14-13981 (Dec. 9, 2014) (denial of codefendant's appeal)

In re Antonio Rosello, No. 16-13529 (June 29, 2016) (denial of codefendant's appeal)

In re Lazaro Veliz, No. 16-13566 (June 27, 2016)

In re Lazaro Veliz, No. 16-16110 (Oct. 12, 2016)

United States v. Rosello, No. 17-14049 (June 4, 2018) (affirm denial of codefendant's motion)

Veliz v. Warden, No. 17-15134 (Apr. 8, 2019)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A11) is not published in the Federal Reporter. The order of the district court (Pet. App. B1-B2) is not published in the Federal Supplement but is available at 2017 WL 4855411.

JURISDICTION

The order of the court of appeals was entered on February 13, 2019. The petition for a writ of certiorari was filed on May 13, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiracy to commit racketeering, in violation of 18 U.S.C. 1962(d); five counts of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951; five counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951; one count of conspiracy to use and carry firearms during and in relation to a crime of violence, in violation of 18 U.S.C. 924(n) (1994); five counts of using and carrying firearms during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (1994); and one count of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(ii) (1994). Judgment 1-2; Pet. App. A1-A2. The district court sentenced petitioner to 105 years of imprisonment, to be followed by three years of supervised release. Judgment 3-4; 95-cr-114 D. Ct. Doc. 506, at 1 (July 2, 2001); Pet. App. A1-A2 & n.1. The court of appeals affirmed petitioner's convictions and, following a remand on certain sentencing issues, affirmed petitioner's sentence. Pet. App. A2 & n.1.

The district court denied petitioner's initial motion to vacate his sentence under 28 U.S.C. 2255, and the court of appeals denied a certificate of appealability (COA). Pet. App. A2. The court of appeals also denied petitioner's subsequent application for leave to file a second or successive Section 2255 motion. Ibid. Thereafter, petitioner filed a second Section 2255 motion

in the district court, and the district court dismissed the motion. Id. at A2-A3. Petitioner filed a second application in the court of appeals for leave to file a second or successive Section 2255 motion, and the court of appeals denied the application. Id. at A3. Petitioner then filed a habeas petition under 28 U.S.C. 2241, and the district court dismissed the petition and denied petitioner leave to proceed in forma pauperis on appeal. Id. at A3-A4, B1-B2. The court of appeals also denied petitioner's motion to proceed in forma pauperis, id. at A1-A11, and subsequently dismissed petitioner's appeal because petitioner had failed to pay the required filing and docketing fees, 2019 WL 2177090, at *1.

1. Between 1992 and 1994, petitioner participated in a string of armed robberies in Miami, Florida. Presentence Investigation Report (PSR) ¶¶ 6-17. Most of these robberies targeted armored cars, PSR ¶¶ 6-12, 15-17, and most or all involved the use of firearms, PSR ¶¶ 8-17. During one of the robberies, petitioner and a co-conspirator exchanged fire with the driver of an armored car, and a bullet struck the driver in the arm. PSR ¶ 17. Petitioner and his co-conspirators laundered the proceeds of the robberies through the purchase and sale of vehicles, structuring the transactions to avoid reporting requirements. PSR ¶¶ 32-34.

A grand jury in the Southern District of Florida charged petitioner with one count of conspiracy to commit racketeering, in violation of 18 U.S.C. 1962(d); five counts of conspiracy to commit

Hobbs Act robbery, in violation of 18 U.S.C. 1951; five counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951; one count of conspiracy to use and carry firearms during and in relation to a crime of violence, in violation of 18 U.S.C. 924(n) (1994); five counts of using and carrying firearms during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (1994); and one count of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(ii) (1994). Second Superseding Indictment 1-6, 9-18, 26. The indictment specified that the underlying crimes of violence for each Section 924(c) count were Hobbs Act robbery and conspiracy to commit Hobbs Act robbery, as charged in corresponding counts in the indictment. Id. at 11-18.

A jury found petitioner guilty on all counts, Judgment 1-2, and in 1996, the district court sentenced petitioner to 105 years of imprisonment, to be followed by three years of supervised release. 95-cr-114 D. Ct. Doc. 504, at 23 (Mar. 22, 2001); Judgment 3-4. The court of appeals affirmed petitioner's convictions but remanded the case to allow the district court to conform petitioner's written judgment to the oral pronouncement at sentencing. 95-cr-114 D. Ct. Doc. 504, at 23-24; Pet. App. A1-A2 & n.1. On remand, the district court amended the written judgment to clarify that petitioner was sentenced to 105 years of imprisonment, 95-cr-114 D. Ct. Doc. 506, at 1, and the court of appeals affirmed. Pet. App. A2 & n.1.

2. Petitioner subsequently filed a motion to vacate, set aside, or correct his sentence on grounds not relevant here. 95-cr-114 D. Ct. Doc. 522 (Apr. 29, 2003). The district court denied the motion, and the court of appeals denied a COA. Pet. App. A2.

Following denial of his initial Section 2255 motion, petitioner applied for authorization from the court of appeals to file a second or successive motion for relief under Section 2255. 16-13566 C.A. Order 1 (June 27, 2016). Under 28 U.S.C. 2255(h), a movant may file a successive Section 2255 motion only if the court of appeals finds that the movant has made a prima facie showing that the motion contains either (1) "newly discovered evidence" that strongly indicates that the movant was not guilty of the crime, or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

Petitioner sought to raise a constitutional challenge to his convictions under Section 924(c), which imposes criminal liability on a person who uses or carries a firearm "during and in relation to any crime of violence." 18 U.S.C. 924(c)(1) (1994); see 16-13566 C.A. Order 2-3. For purposes of Section 924(c), the term "crime of violence" is defined as a felony that:

> (A) has as an element the use, attempted use or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. 924(c)(3)(A) and (B). Petitioner challenged the validity of his Section 924(c) convictions on the ground that Section 924(c)(3)(B) is unconstitutionally vague in light of this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which invalidated the similarly worded "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). 16-13566 C.A. Order 2-3

In June 2016, the court of appeals denied petitioner's request to file a second or successive motion under Section 2255. 16-13566 C.A. Order 2-3. The court determined that each of petitioner's Section 924(c) convictions "relied on both a conviction for Hobbs Act robbery * * * and a conviction for conspiracy to commit Hobbs Act robbery." Id. at 3. The court explained that it had previously determined that Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A), and observed that "Johnson provides no basis to question the constitutionality of" Section 924(c)(3)(A). Ibid. Because each of petitioner's Section 924(c) convictions thus had "at least one valid crime of violence" to sustain it, the court found it "clear that Johnson would not help" petitioner. Ibid. The court therefore determined that petitioner had failed to make the showing required by Section 2255(h).

Three days after the court of appeals denied his application for leave to file a second or successive Section 2255 motion, petitioner filed a second Section 2255 motion in district court.

95-cr-114 D. Ct. Doc. 540 (June 30, 2016). In the motion, petitioner renewed his claim that, in light of Johnson, Hobbs Act robbery and conspiracy to commit Hobbs Act robbery are no longer crimes of violence for purposes of Section 924(c). Id. at 4. The district court denied the motion as an unauthorized second or successive motion under Section 2255, 95-cr-114 D. Ct. Doc. 541 (July 6, 2016), and petitioner did not appeal that decision. Pet. App. A3. Instead, petitioner filed another application in the court of appeals for leave to file a second or successive Section 2255 motion, again raising the same claim under Johnson. Ibid. The court of appeals denied that application as procedurally barred. Ibid.; see 16-16110 C.A. Order.

3. In November 2016, petitioner filed a habeas petition under 28 U.S.C. 2241 in the United States District Court for the Southern District of Georgia, the district in which he is confined. 16-cv-152 D. Ct. Doc. 1 (Nov. 14, 2016). Under Section 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 [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). In the habeas petition, petitioner again argued that his Section 924(c) convictions are invalid on the theory that Section 924(c)(3)(B) is unconstitutionally vague and that Hobbs Act robbery and conspiracy to commit Hobbs Act

robbery do not qualify as crimes of violence under Section 924(c)(3)(A). 16-cv-152 D. Ct. Doc. 1, at 14-34.

The magistrate judge recommended dismissal of the habeas petition for lack of jurisdiction. Pet. App. C4-C10. Relying on McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017), the magistrate judge explained that petitioner's claim could have been raised in a Section 2255 motion, and therefore petitioner could not show that he satisfied the so-called saving clause in 28 U.S.C. 2255(e), which permits a prisoner like petitioner to seek relief through a habeas petition only if "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." Pet. App. C5 (citation and emphasis omitted); see id. at C8-C10. The magistrate judge also recommended that the district court deny petitioner leave to proceed in forma pauperis on appeal because the habeas petition presented "no non-frivolous issues to raise on appeal" and thus "an appeal would not be taken in good faith." Id. at C11; see id. at C10-C11.

The district court adopted the magistrate judge's analysis and dismissed the habeas petition. Pet. App. B1. The court also denied petitioner leave to proceed in forma pauperis on appeal. Id. at B2.

4. Petitioner appealed, and the court of appeals denied his request to proceed in forma pauperis because it determined that

"any appeal in the instant case would be frivolous." Pet. App. A11; see id. at A1-A11. After observing that it had recently determined that Section 924(c)(3)(B) was not unconstitutionally vague, the court determined that, "[i]n any event," the claims in petitioner's habeas petition "challenged the validity of his sentence" and thus "should have been brought" in a Section 2255 motion. Id. at A10. The court found that petitioner had failed to satisfy the requirements of Section 2255(e)'s saving clause and explained that the "[Section] 2255 remedy is not inadequate merely because [petitioner] cannot overcome procedural requirements for relief." Id. at A11. The court later dismissed the appeal after petitioner failed to pay the required docketing and filing fees. 2019 WL 2177090, at *1.

ARGUMENT

Petitioner renews his contention (Pet. 5-14) that Section 924(c)(3)(B) is unconstitutionally vague and that his Section 924(c) convictions are therefore invalid. He further contends (Pet. 14-19) that the saving clause of 28 U.S.C. 2255(e) permits him to raise that claim in a habeas petition under 28 U.S.C. 2241. This Court recently denied a petition for a writ of certiorari filed by the government asking this Court to resolve a circuit conflict regarding whether the saving clause allows a defendant who has been denied Section 2255 relief to challenge his conviction or sentence based on an intervening, retroactively applicable decision of statutory interpretation. United States v. Wheeler,

No. 18-420 (Mar. 18, 2019). Review of that issue is not warranted here, however, because petitioner's constitutional claim would not provide the basis for a habeas petition under any circuit's interpretation of the saving clause and is in any event meritless.

Petitioner additionally contends (Pet. 19-27) that he is entitled to resentencing under a provision of the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, Tit. IV, § 403, 132 Stat. 5221-5222, that limits the applicability of certain enhanced minimum penalties under Section 924(c). He correctly recognizes, however, that "Congress did not make this section retroactively applicable to defendants like [petitioner]." Pet. 4; see also Pet. 22. Accordingly, no legal basis exists for resentencing under that provision. The petition for a writ of certiorari should be denied.

1. Under Section 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 [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). A circuit conflict exists regarding whether the saving clause allows a defendant who has been denied Section 2255 relief to challenge his conviction or sentence based on an intervening decision that changes the governing law on an issue of statutory interpretation. See U.S. Pet. 23-25, United States v. Wheeler,

No. 18-420 (filed Oct. 3, 2018), cert. denied, 139 S. Ct. 1318 (2019).

Here, however, petitioner's habeas petition does not rely on an intervening decision of statutory interpretation, but instead raises a claim of constitutional error. The habeas petition asserted that Section 924(c)(3)(B) is unconstitutionally vague and that petitioner's convictions for violating Section 924(c) are therefore invalid. See 16-cv-152 D. Ct. Doc. 1, at 14-23. Although this Court has since held that Section 924(c)(3)(B) is unconstitutionally vague, see United States v. Davis, 139 S. Ct. 2319, 2336 (2019), no circuit would allow a federal prisoner to collaterally attack his conviction on that ground through a habeas petition under Section 2241.

Instead, a federal prisoner attacking his conviction on constitutional grounds after 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 who is raising a constitutional claim in a habeas petition to bypass those gatekeeping limitations. See, e.g., Poe v. LaRiva, 834 F.3d 770, 773 (7th Cir. 2016) ("Because § 2255(h) already provides a remedy for new constitutional cases, these types of cases would

not fall under the Savings Clause, which is available only if the remedy under § 2255 is 'inadequate or ineffective.'").

In any event, even if the saving clause permitted constitutional claims, petitioner's constitutional claim lacks merit. One of the crimes of violence underlying each of petitioner's Section 924(c) convictions was one of the five Hobbs Act robberies that the jury found that he committed. See 16-13566 C.A. Order 2-3. For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Garcia v. United States, cert. denied, 138 S. Ct. 641 (2018) (No. 17-5704), Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A) because the offense "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A). See Br. in Opp. at 7-10, Garcia, supra (No. 17-5704).[1] Every court of appeals to consider the issue has so held, see id. at 8, and this Court has repeatedly denied review of that issue, see, e.g., Ragland v. United States, cert. denied, No. 17-7248 (May 14, 2018); Chandler v. United States, cert. denied, No. 17-6415 (Mar. 19, 2018); Middleton v. United States, cert. denied, No. 17-6343 (Mar. 19, 2018); Jackson v. United States, cert. denied, No. 17-6247 (Feb. 20, 2018).

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[1] We have served petitioner with a copy of the government's brief in opposition in Garcia.

Because Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A), each of petitioner's Section 924(c) convictions is supported by "at least one valid crime of violence." 16-13566 C.A. Order 3. Petitioner's Section 924(c) convictions would thus remain even if petitioner were permitted to seek habeas relief based on his claim that Section 924(c)(3)(B) is unconstitutionally vague.

2. Petitioner separately contends (Pet. 19-27) that he is entitled to a resentencing under the First Step Act. That contention lacks merit.

At the time of petitioner's sentencing in August 1996, and when his amended judgment issued in June 2001, Section 924(c) provided for enhanced minimum penalties for defendants convicted of multiple violations in a single proceeding. See 18 U.S.C. 924(c)(1)(C)(i) (2012); Deal v. United States, 508 U.S. 129, 132-137 (1993). In Section 403(a) of the First Step Act, Congress limited the applicability of the enhanced minimum penalties to violations of Section 924(c) that "occur[] after a prior conviction under [Section 924(c)] has become final." § 403(a), 132 Stat. 5221-5222. But in Section 403(b), titled "Applicability to Pending Cases," Congress specified that "the amendments made by [Section 403] shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222 (emphasis added; capitalization altered).

Here, petitioner's sentence was imposed in 1996, long before the First Step Act was enacted on December 21, 2018. See 18 U.S.C. 3553(a) (sentencing court "shall impose a sentence" after considering various factors); 18 U.S.C. 3584(a) and (b) (multiple terms of imprisonment may be "imposed on a defendant" concurrently or consecutively, and the choice of how to "impose[]" them involves consideration of the Section 3553(a) factors); Fed. R. Crim. P. 32(b)(1) ("The court must impose sentence without unnecessary delay."). The amendments made by Section 403 thus do not apply to petitioner's offense.

This Court recently granted two petitions for writs of certiorari, vacated the respective judgments, and remanded to the courts of appeals to consider the application of the First Step Act on direct appeal, notwithstanding the government's contention that the defendants' sentences had been imposed before the enactment of the statute. See Richardson v. United States, 139 S. Ct. 2713 (2019) (No. 18-7036); Wheeler v. United States, 139 S. Ct. 2664 (2019) (No. 18-7187).[2] A similar disposition would not be warranted in petitioner's case, however. The defendants in Richardson and Wheeler argued that the relevant provisions of the First Step Act apply to all cases pending on direct review, see

[2] Wheeler concerned Section 401(c) of the First Step Act, governing the applicability of Section 401, whereas Richardson concerned Section 403(b), the same provision at issue here. See U.S. Br. in Opp. at 22-25, Wheeler, supra (No. 18-7187); U.S. Br. in Opp. at 12-16, Richardson, supra (No. 18-7036). The two provisions have the same wording.

U.S. Br. in Opp. at 14, Richardson, supra (No. 18-7036); U.S. Br. in Opp. at 23, Wheeler, supra (No. 18-7187), but petitioner seeks application of Section 403 on collateral review.

Petitioner acknowledges that "Congress * * * did not make [Section 403] retroactive to defendants like [petitioner]" whose sentences were "imposed" long before enactment of the First Step Act, Pet. 22-23. He argues (Pet. 20-27), however, that Congress's enactment of Section 403 indicates that, even before the First Step Act, Section 924(c)(1)(C)(i) did not apply to defendants convicted of multiple violations in a single proceeding. But he recognizes (Pet. 21-23) that this Court determined otherwise in Deal, supra, and Congress's later decision to revise the penalties under Section 924(c) does not undermine this Court's definitive construction of the version in effect at the time of his offense. And although petitioner contends (Pet. 24-27) that Teague v. Lane, 489 U.S. 288 (1989), and its progeny require that Section 403 apply retroactively, those cases concern the retroactivity of judicial decisions, not congressional enactments. See Welch v. United States, 136 S. Ct. 1257, 1264 (2016); Teague, 489 U.S. at 300-305. Petitioner's position is also inconsistent with the "ordinary practice" in federal sentencing "to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." Dorsey v. United States, 567 U.S. 260, 280 (2012). That practice is codified in the saving statute, 1 U.S.C. 109, which specifies that the repeal of any statute will

not have the effect "to release or extinguish any penalty, forfeiture, or liability incurred under such statute" unless the repealing act so provides.

Petitioner suggests in passing (Pet. 23) that Congress's decision not to apply Section 403 retroactively violates constitutional equal-protection principles. Petitioner does not develop that argument, however, and does not suggest that Congress acted with an improper discriminatory purpose when it declined to apply Section 403 to all defendants with sentences imposed before the First Step Act's enactment. See, e.g., United States v. Blewett, 746 F.3d 647, 658 (6th Cir. 2013) (en banc) (rejecting equal protection challenge to Fair Sentencing Act because "[n]o evidence shows that Congress acted with the purpose to discriminate when it refused to apply the Fair Sentencing Act to defendants -- all defendants, white or black -- sentenced before the Act took effect"), cert. denied, 572 U.S. 1041 (2014).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DANIEL J. KANE
Attorney

SEPTEMBER 2019