

IN THE SUPREME COURT OF THE UNITED STATES

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JASON M. LUND, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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# QUESTION PRESENTED

Whether petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 was cognizable notwithstanding its failure to comply with the time limits prescribed in 28 U.S.C. 2255(f).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Wis.):

United States v. Johnson, No. 08-197 (May 6, 2010)

United States Court of Appeals (7th Cir.):

United States v. Walker, No. 10-2173 (July 3, 2013)

United States v. Gladney, No. 10-2176 (July 3, 2013)

United States v. Lund, No. 10-2355 (July 3, 2013)

United States v. Stewart, No. 11-1510 (July 3, 2013)

United States v. Lawler, No. 11-1024 (July 29, 2014)

Supreme Court of the United States:

Lawler v. United States, cert. granted, 572 U.S. 1111,  
No. 13-7557 (May 19, 2014)

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No. 18-9719

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 913 F.3d 665. A prior opinion of the court of appeals (Pet. App. 26a-54a) is reported at 721 F.3d 828. The order of the district court (Pet. App. 10a-24a) is unreported but is available at 2016 WL 3034322.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2019. A petition for rehearing was denied on March 19, 2019. The petition for a writ of certiorari was filed on June 14, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of conspiring to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Judgment 1. The district court sentenced petitioner to 175 months of imprisonment, to be followed by eight years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 26a-54a. More than three years later, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 10a. The district court denied the motion as untimely. Id. at 10a-24a. The court of appeals affirmed. Id. at 1a-9a.

1. Petitioner worked as a drug dealer for a large-scale drug trafficking organization in Milwaukee. Pet. App. 27a-28a. While doing so, he coordinated the sales of heroin that killed two victims. Id. at 29a. One night in June 2008, he provided heroin to Andrew Goetzke, who was found dead the next morning from an overdose. Id. at 29a, 46a. A month later, petitioner provided heroin to David Knuth; after injecting the heroin, Knuth "stopped breathing almost immediately," "lapsed into unconsciousness," "began bleeding from the nose," and died. Pet. App. 29a-30a.

In 2008, a grand jury in the United States District Court for the Eastern District of Wisconsin indicted petitioner and 30 others for conspiring to distribute heroin and to possess heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet.

App. 2a. The indictment also alleged that the offense involved one kilogram or more of heroin and that "[d]eath and serious bodily injury resulted from the use of the heroin distributed in furtherance of the conspiracy," Indictment 2-3 -- facts that qualify petitioner for an enhanced sentencing range under 21 U.S.C. 841(b)(1)(A). Under that provision, a person like petitioner who has been convicted of certain drug offenses is subject to a sentencing range of 10 years to life in prison if the offense involved more than one kilogram of heroin, and a sentencing range of 20 years to life in prison if the offense involved more than one kilogram of heroin and "death or serious bodily injury results from the use of such substance." 21 U.S.C. 841(b)(1)(A) (2006).

Petitioner pleaded guilty. 08-cr-197 D. Ct. Doc. 534, at 1-13 (June 3, 2009) (Plea Agreement). He admitted in the plea agreement that "[d]eath and serious bodily injury resulted" from the use of the heroin distributed in furtherance of the conspiracy, identifying in particular the "heroin overdose deaths" of Goetzke and Knuth. Id. at 3 (emphasis omitted). The district court exercised its authority to impose a sentence below the statutory minimum "so as to reflect [petitioner's] substantial assistance in the investigation or prosecution" of others. 18 U.S.C. 3553(e); see Pet. App. 32a. Thus, although petitioner faced a minimum of 20 years of imprisonment under Section 841(b)(1)(A), the district court sentenced him to 175 months of imprisonment. Judgment 2-3.

The court of appeals affirmed. Pet. App. 26a-54a.

2. In 2016, more than three years after his conviction became final, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 2a-3a. Petitioner requested correction of his sentence in light of this Court's determination two years earlier in Burrage v. United States, 571 U.S. 204 (2014), that, as a general matter, a defendant is liable under Section 841(b)(1)'s "death results" enhancement only if the use of the controlled substance "is a but-for cause of the death or injury." Id. at 218-219. Petitioner argued that Goetzke and Knuth's use of the heroin he provided was not the but-for cause of their deaths, and that he was therefore "actually innocent of the 'death results' enhancement." Pet. App. 3a; see id. at 10a-24a.

The district court dismissed the motion as untimely under the statute of limitations in 28 U.S.C. 2255(f). Pet. App. 3a. The court rejected petitioner's contention that, under McQuiggin v. Perkins, 569 U.S. 383 (2013), petitioner's asserted "actual innocence" would justify an equitable exception to the applicable statute of limitations. Pet. App. 16a. The court stated that "an intervening change in law" -- such as the rule announced in Burrage -- cannot "support[] a claim of actual innocence" under Perkins. Id. at 19a.

3. The court of appeals affirmed. Pet. App. 1a-9a. The court declined to decide the issue addressed by the district court -- namely, whether an intervening change in the law can support an

invocation of the actual-innocence exception. The court of appeals instead determined that, "even assuming that actual innocence could be predicated on a case substantively interpreting the law under which a petitioner was convicted, it would not extend to this case." Id. at 5a. The court observed that petitioner sought "to use Burrage as his claim for actual innocence and his claim for relief on the merits." Ibid.

In the court's view, "[t]his [wa]s a problem for two reasons." First, the court considered it "'doubtful' that a petitioner's actual innocence claim and claim for relief on the merits can be the same." Ibid. Second, the court noted that the statute of limitations "prohibits petitioners from bringing habeas claims based on rights recognized by the Supreme Court, and made retroactively applicable to cases on collateral review, more than one year after the right was recognized by the Court." Id. at 8a (citing 28 U.S.C. 2255(f)(3)). The court reasoned that "[a]llowing a claim like Burrage to serve as both the basis for actual innocence and the basis for relief would render this statute of limitations superfluous, at least as it applies to newly recognized statutory rights," because "[e]very time there is a retroactive interpretation of a criminal law, petitioners convicted under it would have an initial § 2255 claim based on the new interpretation indefinitely." Id. at 8a-9a.



## ARGUMENT

Petitioner asks this Court (Pet. 10-18) to summarily reverse the court of appeals' determination that his Section 2255 motion was untimely. The court of appeals' judgment is correct and does not conflict with any decision of this Court or another court of appeals. Neither summary reversal nor plenary review is warranted.

1. Under 28 U.S.C. 2255, federal prisoners may file a motion to vacate, set aside, or correct their sentences on certain grounds, including, as relevant here, "the ground that the sentence was imposed in violation of the Constitution or laws of the United States," or "was in excess of the maximum authorized by law." 28 U.S.C. 2255(a). Motions under Section 2255 are subject to a one-year statute of limitations. 28 U.S.C. 2255(f). That one-year period runs from the latest of (1) "the date on which the judgment of conviction becomes final," (2) "the date on which [an] impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed," (3) "the date on which [a] right" that "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review" was "initially recognized by the Supreme Court," and (4) "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." Ibid.

Federal habeas corpus petitions filed by state prisoners are subject to a similar, although not identical, one-year statute of

limitations. See 28 U.S.C. 2244(d)(1). In McQuiggin v. Perkins, 569 U.S. 383 (2013), this Court concluded, in the context of a habeas corpus petition filed by a state prisoner, that the statute of limitations for such petitions is subject to an "equitable exception" for prisoners who prove "actual innocence." Id. at 386, 394. That exception is limited to a "severely confined category" of cases. Id. at 395. In order to prove "actual innocence" as that term is used in this Court's decisions, a prisoner must demonstrate innocence, "not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998). Specifically, he must show that it "is more likely than not that no reasonable juror would have convicted him." Schlup v. Delo, 513 U.S. 298, 327 (1995).

The government has acknowledged that the "actual innocence" exception applies to Section 2255 motions and has not viewed it to be limited to cases in which the prisoner did not actually engage in the conduct with which he was charged. In particular, it has recognized the exception in cases where the prisoner's conduct does not fit within the statutory definition of the criminal offense. This Court has observed that convicting and punishing a person "for an act that the law does not make criminal" "'inherently results in a complete miscarriage of justice' and 'presents exceptional circumstances' that justify collateral relief under § 2255." Davis v. United States, 417 U.S. 333, 346 (1974) (brackets omitted). The government has also acknowledged

that a prisoner who shows that he is serving a sentence that exceeds the statutory maximum (and that he is therefore not legally eligible for his sentence) may also have a cognizable actual-innocence claim. See, e.g., U.S. Br. at 8-10, Watts v. United States, 558 U.S. 1143 (2010) (No. 08-7757) (noting, in context of eligibility for a certificate of appealability, that a substantial constitutional question arises when a defendant receives an enhanced sentence under the Armed Criminal Career Act (ACCA) based on a previous conviction later deemed not to qualify as an ACCA predicate); U.S. Br. at 24, Hunter v. United States, 558 U.S. 1143 (2010) (No. 09-122) (same).

2. In this case, petitioner does not dispute (Pet. 6) that his Section 2255 motion was untimely because "it came more than a year after the conviction was final, §2255(f)(1), and more than a year after the Court decided Burrage [v. United States, 571 U.S. 204 (2014)], §2255(f)(3)." Petitioner contends (Pet. 6-7, 10-11), however, that this violation of the statute of limitations should be excused under Perkins because he was actually innocent of Section 841(b)(1)(A)'s "death results" enhancement. But even if the actual-innocence exception is applicable in this context, petitioner has not demonstrated that he qualifies for that exception. The court of appeals' judgment affirming the rejection of petitioner's motion as untimely was therefore correct.

a. As an initial matter, petitioner has failed to show that he was actually innocent of Section 841(b)(1)(A)'s "death results"

enhancement. Under Burrage, a defendant is subject to that enhancement if the use of the drug distributed by the defendant "is a but-for cause of the death or injury." 571 U.S. at 218-219. In order to demonstrate actual innocence, therefore, petitioner must show that "no reasonable juror," Schlup, 513 U.S. at 327, could have found that the heroin that petitioner distributed was the but-for cause of the deaths in this case. And because even a single death suffices to trigger the "death results" enhancement, see 21 U.S.C. 841(b)(1)(A), petitioner must make that showing with respect to both Goetzke and Knuth.

Petitioner cannot satisfy that standard. First, petitioner's plea agreement refers to Goetzke's and Knuth's deaths as "heroin overdose deaths." Plea Agreement 3. As the district court explained in the course of rejecting a Burrage claim brought by one of petitioner's co-defendants, "[t]he fact that [the defendant's] charge involved 'heroin overdose deaths' is more than sufficient \* \* \* to establish that the heroin sold by [the defendant] was a but-for cause of the deaths, as required by Burrage." Stewart v. United States, 89 F. Supp. 3d 993, 998 (E.D. Wisc. 2015). Second, in an attachment to his plea agreement, petitioner agreed that the government could prove beyond a reasonable doubt that Goetzke suffered an "overdose death," Gov't C.A. Br. App. 28-29, and that, after petitioner provided Knuth with heroin, "Knuth injected the heroin," "almost immediately stopped breathing," and then died. Id. at 29. Third, autopsy

reports listed Goetzke's cause of death as "opiate intoxication," and the accompanying toxicology report was positive for the presence of opiates but negative for the presence of alcohol, cannabinoids, and other drugs. Gov't C.A. Br. 30 (citation omitted); see Bousley, 523 U.S. at 624 (explaining that the government can rebut a claim of actual innocence through "any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy"). Petitioner thus cannot show that "no reasonable juror," Schlup, 513 U.S. at 327, could have found that the heroin that petitioner distributed caused Goetzke's and Knuth's deaths.

b. Even if petitioner could show actual innocence of Section 841(b)(1)(A)'s "death results" enhancement, petitioner's invocation of the actual-innocence exception would still fail. The district court departed from the statutory minimum set out in Section 841(b)(1)(A), and, as a result, petitioner could not be viewed as "innocent" of that sentence.

Under Section 841(b)(1)(A), a defendant like petitioner who conspires to distribute one kilogram or more of heroin is subject to a term of imprisonment of 10 years to life -- or, if death results, to a term of 20 years to life. In this case, petitioner received a sentence of 175 months (less than 15 years). Judgment 2-3. That term is within the 10-years-to-life statutory range that applies to his offense without the "death results" enhancement. That term is also less than the 20-year statutory

minimum that applies with that enhancement. Put simply, it makes no difference whether petitioner was actually innocent of the "death results" enhancement, because petitioner would have been eligible to receive the same sentence even without that enhancement. The court of appeals' judgment that petitioner's motion was untimely was therefore correct.

3. The court of appeals rested its judgment on a different rationale, reasoning that the actual-innocence exception is inapplicable where a prisoner "rests both his actual innocence claim and his claim for relief" on the same "change in the law." Pet. App. 2a. Regardless of whether that rationale is ultimately correct, petitioner errs in contending (Pet. 12) that the rationale "plainly contradicts this Court's settled precedent [in Perkins]" and that, as a result, "[s]ummary reversal is appropriate." The court of appeals acknowledged that, in Perkins, this Court determined that a state prisoner may overcome the statute of limitations for federal habeas corpus petitions filed by such persons through proof of actual innocence. Pet. App. 4a (citing Perkins, 569 U.S. at 386). The court of appeals determined only that the exception is inapplicable in the specific situation where a federal prisoner proceeding under Section 2255 "rests both his actual innocence claim and his claim for relief" on the same change in law. Pet. App. 2a. That circumstance was not presented in Perkins. The decision below therefore does not "plainly contradict[]" this Court's settled precedent," Pet. 12. And

petitioner does not claim that it conflicts with the decision of any other court of appeals.

In any event, "this Court reviews judgments, not opinions." Chevron U. S. A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984). For the reasons discussed above, see pp. 8-11, supra, the judgment of the court of appeals was correct irrespective of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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