APPENDIX A

Tenth Circuit's Order and Judgment

FILED
United States Court of Appe
Tenth Circuit

April 17, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ZACK ZAFER DYAB,

Petitioner - Appellant,

v.

NICOLE ENGLISH, Warden,

Respondent - Appellee.

No. 19-3010
(D.C. No. 5:18-CV-03290-JWL)
(D. Kan.)

ORDER AND JUDGMENT*

Before **CARSON**, **BALDOCK**, and **MURPHY**, Circuit Judges.**

In 2010, Petitioner Zack Zafer Dyab, a federal prisoner proceeding *pro se*, pleaded guilty to money laundering in violation of 18 U.S.C. § 1957 and conspiracy to commit wire fraud in violation of 18 U.S.C. § 371. He has since filed three unsuccessful motions for post-conviction relief under 28 U.S.C. § 2255. Undeterred, he now turns to another statute—28 U.S.C. § 2241—in an effort to seek post-conviction relief a fourth time. But unfortunately for Petitioner, the district court

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

correctly determined that it lacked statutory jurisdiction to adjudicate his § 2241 petition, and so we must affirm its order dismissing his petition on that basis.

To understand why, first consider that federal prisoners like Petitioner can't simply turn to § 2241 as a matter of choice when collaterally attacking their convictions or sentences. That statute is "generally reserved for complaints about the *nature* of a prisoner's confinement"—i.e., the conditions of his confinement—"not the *fact* of his confinement." Prost v. Anderson, 636 F.3d 578, 581 (10th Cir. 2011) (emphases in original). For that reason, federal prisoners must generally utilize § 2255 if they hope "to attack the legality of [their] conviction[s] or sentence[s]." Id. Indeed, through § 2255, "Congress has chosen to afford every federal prisoner the opportunity to launch at least one collateral attack to any aspect of his conviction or sentence." Id. at 583.

The problem many of those prisoners face, however, is that § 2255 heavily constrains the instances in which they can file "second or successive" collateral attacks on their convictions or sentences. 28 U.S.C. § 2255(h). To get that extra bite at the apple, a federal prisoner's claim must involve "either newly discovered evidence strongly suggestive of innocence or new rules of constitutional law made retroactive by the Supreme Court." Prost, 636 F.3d at 581; see also 28 U.S.C. § 2255(h). Absent one of those two narrow circumstances, the federal prisoner is almost always unable to move forward on his or her additional request for relief.

"Yet, even here Congress has provided an out." Prost, 636 F.3d at 584. A federal prisoner can bypass the stringent requirements on second or successive

motions if he can establish that § 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Under this "savings clause," which applies in only "extremely limited circumstances," Caravalho v. Pugh, 177 F.3d 1177, 1178 (10th Cir. 1999), "a prisoner may bring a second or successive attack on his conviction or sentence under 28 U.S.C. § 2241, without reference to § 2255(h)'s restrictions." Prost, 636 F.3d at 584. In such a scenario, § 2241 shifts gears from its usual function and "allows a federal prisoner . . . to challenge the legality of his detention, not just the conditions of his confinement." Id. at 581.

Petitioner's desire to utilize § 2241 this fourth time around stems from this savings clause. Specifically, Petitioner claims that his conviction and sentence for money laundering -- ten years' imprisonment and a hefty $6.4 million restitution payment -- are invalid under the Supreme Court's decision in United States v. Santos, 553 U.S. 507 (2008).[1] The Santos decision, however, did not announce a new rule of constitutional law, much less one that the Supreme Court made retroactive; rather, Santos only interpreted a statute similar to the one under which Petitioner was convicted for money laundering. See Prost, 636 F.3d at 581 (observing that Santos announced "a new statutory interpretation" and not a new, retroactive rule of constitutional law); see also Santos, 553 U.S. at 514 (plurality opinion) (announcing the holding of Santos). Thus, because Petitioner has not directed us to any new

[1] Petitioner's reasons for believing that Santos invalidates his conviction and sentence for money laundering are not relevant to our disposition of his appeal, so we refrain from discussing them and pass no judgment upon them.

evidence strongly suggestive of innocence, he cannot bring his Santos-based argument in a successive § 2255 motion. But that doesn't mark the end of the road for him, he argues, because § 2255 is inadequate or ineffective to test his detention, conviction, and sentence on the basis of Santos. Indeed, although the Supreme Court issued that decision two years before Petitioner pleaded guilty, Petitioner contends that governing circuit law *interpreting* Santos "was evolving" from the time his case began. He thus seems to be claiming that he was unequivocally barred from prevailing on his Santos-based argument until circuit law interpreting that decision developed in his favor, which was at some point after he filed his first § 2255 motion. And as a result, he maintains that he should be able to utilize the savings clause and § 2241 to launch a fourth collateral attack on his conviction by relying on Santos and its progeny.

Even assuming *arguendo* Petitioner is correct that Santos and its progeny invalidated his conviction and sentence for money laundering only after he filed his first § 2255 motion, our decision in Prost nonetheless forces us to conclude that Petitioner cannot now pursue this argument through a § 2241 petition. In Prost, we held that "[t]he relevant metric or measure" for determining whether § 2255 is adequate or effective is "whether a petitioner's argument challenging the legality of his detention could have been *tested* in an initial § 2255 motion." Prost, 636 F.3d at 584 (emphasis added). "If the answer is yes, then the petitioner may not resort to the savings clause and § 2241." Id. And significantly, an argument could have been "tested" if "the petitioner had an *opportunity* to bring" it, and that remains true *even*

if the argument "would have been rejected on the merits at the district court and circuit panel levels because of adverse circuit precedent." Id. at 584, 590 (emphasis in original). Thus,

> it is the infirmity of the § 2255 remedy itself, not the failure to use it or to prevail under it, that is determinative. To invoke the savings clause, there must be something about the initial § 2255 procedure that *itself* is inadequate or ineffective for *testing* a challenge to detention.

Id. at 589 (emphases in original).

Coincidentally, the Prost court then held that the petitioner in that case could not pursue a Santos-based argument in a § 2241 petition even though adverse circuit precedent would have prevented him from prevailing on it in his earlier § 2255 motion. See id. at 590–93. In so holding, the Court explained that the petitioner was "entirely free to raise and test a Santos-type argument in his initial § 2255 motion" even though that argument likely would have failed at the time. Id. at 590.

Prost controls here. Even if Petitioner's Santos argument would have failed at the time he filed his initial § 2255 motion, the fact remains that he could have *raised* that argument when filing his initial motion. Petitioner thus fails to direct us to any evidence that § 2255 served as an "inadequate or ineffective *remedial vehicle* for *testing*" the merits of his argument. Id. at 590 (emphases in original). Put differently, the savings clause ensures that federal prisoners who can't comply with § 2255 are "provided with at least *one* opportunity to challenge their detentions" via a collateral attack, id. at 588 (emphasis added), and since § 2255 provided Petitioner with such an opportunity, he cannot now rely on the savings clause to pursue a

statutory-interpretation argument that he could have raised in a previous § 2255 motion.[2]

Accordingly, Petitioner cannot pursue his Santos-based argument in a § 2241 petition, which means that the district court correctly determined that it lacked statutory jurisdiction to reach the merits of that motion. See Abernathy v. Wandes, 713 F.3d 538, 557 (10th Cir. 2013) ("[W]hen a federal petitioner fails to establish that he has satisfied § 2255(e)'s savings clause test—thus, precluding him from proceeding under § 2241—the court lacks statutory jurisdiction to hear his habeas claims.").

AFFIRMED.

Entered for the Court

Joel M. Carson III
Circuit Judge

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[2] In arguing to the contrary, Petitioner cites myriad cases from our sister circuits that purportedly differ from our holding in Prost and *would* allow him to use the savings clause to bring his argument under Santos. He thus argues that we should follow the holdings from those cases instead. But even assuming that Petitioner correctly describes the holdings of these out-of-circuit cases, we remain bound by Prost "barring en banc reconsideration, a superseding contrary Supreme Court decision, or authorization of all currently active judges on the court." United States v. Fager, 811 F.3d 381, 388 n.5 (10th Cir. 2016) (quoting United States v. Edward J., 224 F.3d 1216, 1220 (10th Cir. 2000)). Because none of those three circumstances exist here, we must dutifully follow Prost.

APPENDIX B

Tenth Circuit denial of the rehearing *en banc*

FILED
United States Court of Appea
Tenth Circuit

June 4, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ZACK ZAFER DYAB,

Petitioner - Appellant,

v.

NICOLE ENGLISH, Warden,

Respondent - Appellee.

No. 19-3010

ORDER

Before **CARSON**, **BALDOCK**, and **MURPHY**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Finally, appellant's *Motion Seeking Permission to Include an Attachment* is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

APPENDIX C

District Court Memorandum and Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ZACK ZAFER DYAB,

Petitioner,

v. **CASE NO. 18-3290-JWL**

NICOLE C. ENGLISH, Warden,
USP-Leavenworth,

Respondent.

MEMORANDUM AND ORDER

This matter is a petition for habeas corpus filed under 28 U.S.C. § 2241. Petitioner, a prisoner in federal custody at USP-Leavenworth, proceeds pro se. Petitioner challenges his conviction and sentence for money laundering. The Court has screened his Petition (Docs. 1, 2) under Rule 4 of the Rules Governing Habeas Corpus Cases, foll. 28 U.S.C. § 2254, and dismisses this action without prejudice for lack of statutory jurisdiction.

Background

Petitioner pleaded guilty in 2010 to conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371, and money laundering, in violation of 18 U.S.C. § 1957. The court sentenced him to concurrent terms of five years' imprisonment and ten years' imprisonment, respectively. The court also ordered Petitioner to pay approximately $6.4 million in restitution. Petitioner did not appeal. In 2012, Petitioner sought relief under 28 U.S.C. § 2255. The district court denied his motion, and the Eighth Circuit Court of Appeals affirmed. *Dyab v. United States*, 546 F. App'x 601 (8th Cir. 2013) (per curiam). Petitioner sought to bring a second § 2255 motion under the guise of Federal Rule of Civil Procedure 60(b). The district court denied the motion on the ground that it was a second or successive § 2255 motion that was not authorized by the court of

appeals, and the Eighth Circuit Court of Appeals summarily affirmed.

In October 2014, the government moved to amend the restitution portion of Petitioner's judgment, and Petitioner filed his third § 2255 motion attacking the new judgment. Petitioner claimed that the court's entry of an amended judgment violated his right to due process, and that he is actually innocent of money laundering. The district court denied the motion. The court granted a certificate of appealability, Petitioner appealed, and the Eighth Circuit Court of Appeals denied the appeal on May 4, 2017. *Dyab v. United States*, 855 F.3d 919 (8th Cir. 2017). The Eighth Circuit found that the district court's order amending Petitioner's judgment did not result in a new sentence or judgment that would permit Petitioner to file a successive § 2255 motion. *Id.* at 923–24. Petitioner filed a petition for writ of certiorari which was denied on October 2, 2017. *Dyab v. United States*, 138 S. Ct. 239 (2017).

On November 30, 2018, Petitioner filed the instant petition under 28 U.S.C. § 2241, arguing that his conviction and sentence for money laundering in violation of 18 U.S.C. § 1957 is invalid under *United States v. Santos*, 553 U.S. 507 (2008). Petitioner invokes the savings clause of § 2255(e), arguing that § 2255 is inadequate or ineffective to test the legality of his detention.

Analysis

The Court must first determine whether § 2241 was the proper vehicle to bring Petitioner's claims. Because "that issue impacts the court's statutory jurisdiction, it is a threshold matter." *Sandlain v. English*, 2017 WL 4479370 (10th Cir. Oct. 5, 2017) (unpublished) (finding that whether *Mathis* is retroactive goes to the merits and the court must first decide whether § 2241 is the proper vehicle to bring the claim) (citing *Abernathy v. Wandes*, 713 F.3d 538, 557 (10th Cir. 2013)).

A federal prisoner seeking release from allegedly illegal confinement may file a motion to

"vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). A motion under § 2255 must be filed in the district where the petitioner was convicted and sentence imposed. *Sines v. Wilner*, 609 F.3d 1070, 1073 (10th Cir. 2010). Generally, the motion remedy under 28 U.S.C. § 2255 provides "the only means to challenge the validity of a federal conviction following the conclusion of direct appeal." *Hale v. Fox*, 829 F.3d 1162, 1165 (10th Cir. 2016), *cert. denied sub nom. Hale v. Julian*, 137 S. Ct. 641 (2017). However, under the "savings clause" in § 2255(e), a federal prisoner may file an application for habeas corpus under 28 U.S.C. § 2241 in the district of confinement if the petitioner demonstrates that the remedy provided by § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

When a petitioner is denied relief on his first motion under § 2255, he cannot file a second § 2255 motion unless he can point to either "newly discovered evidence" or "a new rule of constitutional law," as those terms are defined in § 2255(h). *Haskell v. Daniels*, 510 F. App'x 742, 744 (10th Cir. 2013) (unpublished) (citing *Prost v. Anderson*, 636 F.3d 578, 581 (10th Cir. 2011)). Preclusion from bringing a second motion under § 2255(h) does not establish that the remedy in § 2255 is inadequate or ineffective. Changes in relevant law were anticipated by Congress and are grounds for successive collateral review only under the carefully-circumscribed conditions set forth in § 2255(h).

The Tenth Circuit has rejected an argument that the "current inability to assert the claims in a successive § 2255 motion—due to the one-year time-bar and the restrictions identified in § 2255(h)—demonstrates that the § 2255 remedial regime is inadequate and ineffective to test the legality of his detention." *Jones v. Goetz*, No. 17-1256, 2017 WL 4534760, at *5 (10th Cir. 2017) (unpublished) (citations omitted); *see also Brown v. Berkebile*, 572 F. App'x 605, 608 (10th Cir. 2014) (unpublished) (finding that petitioner has not attempted to bring a second § 2255 motion,

and even if he were precluded from doing so under § 2255(h), that "does not establish the remedy in § 2255 is inadequate") (citing *Caravalho v. Pugh*, 177 F.3d 1177, 1179 (10th Cir. 1999) and *Prost*, 636 F.3d at 586). If § 2255 could be deemed "inadequate or ineffective" "any time a petitioner is barred from raising a meritorious second or successive challenge to his conviction—subsection (h) would become a nullity, a 'meaningless gesture.'" *Prost*, 636 F.3d at 586; *see also Hale*, 829 F.3d at 1174 ("Because Mr. Hale cannot satisfy § 2255(h), he cannot, under *Prost*, satisfy § 2255(e), and § 2241 review must be denied.").

The AEDPA "did not provide a remedy for second or successive § 2255 motions based on intervening judicial interpretations of statutes." *Abernathy v. Wandes*, 713 F.3d 538, 547 (10th Cir. 2013), *cert. denied* 134 S. Ct. 1874 (2014). However, prisoners who are barred from bringing second or successive § 2255 motions may still be able to petition for habeas relief under the savings clause in § 2255(e). *Id.* However, § 2255 has been found to be "inadequate or ineffective" only in "extremely limited circumstances." *Id.* (citations omitted).

Petitioner argues that § 2255 is inadequate or ineffective to test the legality of his detention, conviction and sentence on the basis of *Santos*, "because the argument was unavailable to his crime of conviction." (Doc. 2, at 8.) Although *Santos* was decided in 2008 and Petitioner was sentenced in 2011, Petitioner claims that he was "completely and utterly precluded from prevailing on an argument" based on *Santos* because "[f]rom the moment [his] criminal case began, Eighth Circuit precedent foreclosed his claims as well as its sister circuit's because the Santos interpretation was evolving." *Id.* at 9. Petitioner also acknowledges that he raised the *Santos* argument in the § 2255 motion he filed in 2014. *Id.*

The Tenth Circuit has held that "it is the infirmity of the § 2255 remedy itself, not the failure to use it or to prevail under it, that is determinative. To invoke the savings clause, there

must be something about the initial § 2255 procedure that *itself* is inadequate or ineffective for *testing* a challenge to detention." *Prost*, 636 F.3d at 589 (stating that "the fact that Mr. Prost or his counsel may not have *thought* of a *Santos*-type argument earlier doesn't speak to the relevant question whether § 2255 *itself* provided him with an adequate and effective remedial mechanism for testing such an argument"). "The savings clause doesn't guarantee results, only process," and "the possibility of an erroneous result—the denial of relief that should have been granted—does not render the procedural mechanism Congress provided for bringing that claim (whether it be 28 U.S.C. §§ 1331, 1332, 2201, 2255, or otherwise) an inadequate or ineffective *remedial vehicle* for *testing* its merits within the plain meaning of the savings clause." *Id.* (emphasis in original).

This Court is bound by Tenth Circuit precedent which addresses the question of "whether a new Supreme Court decision interpreting a statute that may undo a prisoner's conviction renders the prisoner's initial § 2255 motion 'inadequate or ineffective.'" *Haskell*, 510 F. App'x at 744. The Tenth Circuit answered the question in the negative in *Prost*, holding that if "a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion[,] . . . then the petitioner may not resort to . . . § 2241." *Prost*, 636 F.3d at 584.

Nothing about the procedure of Petitioner's prior § 2255 motions prevented him from making this same argument despite his claim that the Supreme Court decision he seeks to rely on was still evolving.[1] The Tenth Circuit has concluded that although a petitioner may have benefitted from a cite to a Supreme Court decision announced after his § 2255 motion, this is not reason enough to find the original § 2255 motion "inadequate or ineffective." *See Prost*, 636 F.3d at 589; *Haskell*, 510 F. App'x at 745; *Sandlain*, 2017 WL 4479370, at *3 ("Nor does it matter that *Mathis* was not in existence at the time he filed his initial § 2255 motion").

[1] The Court expresses no opinion on the applicability of *Santos* to Petitioner's claim. *See Haskell*, 510 F. App'x at 745, n.4; *see also Sandlain v. English*, No. 17-3152, 2017 WL 4479370, at n.8 (10th Cir. 2017).

The Tenth Circuit's new test in *Prost* also provides that § 2255 is not "inadequate or ineffective" merely because adverse circuit precedent existed at the time. *Abernathy*, 713 F.3d at 548 (citing *Prost*, 636 F.3d at 590–93); *Sandlain*, 2017 WL 4479370, at *3 ("[E]ven assuming there was contrary circuit precedent, nothing prevented him from raising the argument in his initial § 2255 motion and then challenging any contrary precedent via en banc or certiorari review."); *see also Lewis v. English*, 736 F. App'x 749, 752 (10th Cir. June 5, 2018) (unpublished) (noting that anticipating *Mathis* and arguing it in the face of conflicting circuit precedent would be an "uphill battle," but petitioner "at least had the *opportunity* to take this path").

The Tenth Circuit has also rejected the argument that the decision in *Prost*—rejecting the erroneous circuit foreclosure test—violates equal protection. *Brown*, 572 F. App'x at 608 ("We reject this argument because a circuit split does not deny Mr. Brown equal protection.") (citations omitted). Petitioner *could* have made his argument, regardless of the likelihood of success on such an argument, even if it was foreclosed by then-controlling circuit precedent. *Abernathy*, 713 F.3d at 548. "The savings clause doesn't guarantee results, only process." *Id.* (quoting *Prost*, 636 F.3d at 590).

In *Abernathy*, the Tenth Circuit noted that although other circuits "have adopted somewhat disparate savings clause tests, most requir[ing] a showing of 'actual innocence' before a petitioner can proceed under § 2241. . . . Under the *Prost* framework, a showing of actual innocence is irrelevant." *Abernathy*, 713 F.3d at n.7 (citations omitted); *see also Sandlain*, 2017 WL 4479370, at *4 (finding that petitioner's claim that § 2255 is inadequate or ineffective because he is actually innocent of the career offender enhancement under *Mathis*, merely restates the argument he could have brought in his initial § 2255 motion, and possible misuse of a prior conviction as a predicate offense under the sentencing guidelines does not demonstrate actual innocence); *see also Brown*,

572 F. App'x at 608–09 (rejecting argument that petitioner is actually innocent and that the court's failure to follow the other circuits in *Prost* violated the Supreme Court's "fundamental miscarriage of justice" exception).

The petitioner has the burden to show that the remedy under §2255 is inadequate or ineffective. *Hale*, 829 F.3d at 1179. Petitioner has failed to meet that burden. The Court finds that the savings clause of § 2255(e) does not apply and therefore the Court lacks statutory jurisdiction. Accordingly,

IT IS THEREFORE ORDERED BY THE COURT that the petition is **dismissed without prejudice.**

IT IS SO ORDERED.

Dated in Kansas City, Kansas, on this 28th day of December, 2018.

S/ John W. Lungstrum
JOHN W. LUNGSTRUM
UNITED STATES DISTRICT JUDGE