No. 19-5241

IN THE SUPREME COURT OF THE UNITED STATES

ZACK ZAFER DYAB, PETITIONER

v.

NICOLE ENGLISH, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH 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 he was convicted of conduct that is not criminal under this Court's decision in United States v. Santos, 553 U.S. 507 (2008), which was decided before petitioner pleaded guilty.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Minn.):

United States v. Dyab, No. 09-cr-364 (June 9, 2018)

United States Court of Appeals (8th Cir.):

Dyab v. United States, No. 13-1437 (Dec. 5, 2013)

Dyab v. United States, No. 16-1296 (May 4, 2017)

United States v. Dyab, No. 18-2456 (Sept. 12, 2018)

Supreme Court of the United States:

Dyab v. United States, No. 13-9307 (Apr. 21, 2014)

Dyab v. United States, No. 15-5499 (Oct. 5, 2015)

Dyab v. United States, No. 17-5268 (Oct. 2, 2017)

Dyab v. United States, No. 18-8996 (May 28, 2019)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A6) is not published in the Federal Reporter but is reprinted at 769 Fed. Appx. 552. The order of the district court (Pet. App. C1-C7) is unreported but is available at 2018 WL 6830100.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2019. A petition for rehearing was denied on June 4, 2019 (Pet. App. B1). The petition for a writ of certiorari was filed on June 12, 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 District of Minnesota, petitioner was convicted of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371, and engaging in a monetary transaction in criminally derived property, in violation of 18 U.S.C. 1957 (2000). Judgment 1. He was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The district court subsequently denied a motion to vacate, set aside, or correct petitioner's sentence under 28 U.S.C. 2255, and the court of appeals affirmed. Dyab v. United States, 546 Fed. Appx. 601, 602 (8th Cir. 2013) (unpublished), cert. denied, 572 U.S. 1077 (2014). The district court dismissed two additional motions for relief under 28 U.S.C. 2255 for lack of jurisdiction, and the court of appeals affirmed both dismissals. Dyab v. United States, 855 F.3d 919, 921-924 (8th Cir.), cert. denied, 138 S. Ct 239 (2017). Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, which the district court dismissed for lack of jurisdiction. Pet. App. C1-C7. The court of appeals affirmed. Pet. App. A1-A6.

1. Between 2003 and 2006, petitioner and co-defendant Julia Rozhansky operated a mortgage brokerage business and arranged for Rozhansky's parents to obtain mortgages to purchase homes in the Twin Cities area in Minnesota through loan applications that

contained false information. 09-cr-364 Plea Tr. 21-29 (Oct. 26, 2010) (Tr.). For example, the loan applications falsely inflated the income and assets of Rozhansky's parents. Id. at 24-26. Petitioner pocketed a portion of the loans that the lenders paid out at the closings on each of the transactions. Id. at 27.

As particularly relevant here, on one occasion petitioner and Rozhansky arranged for Rozhansky's father to purchase a home with a mortgage obtained on the basis of a loan application that falsely inflated his income. Tr. 30-31. At the closing, petitioner obtained two checks for $33,731.60 and $30,207.34 made payable to the seller. Tr. 31. He endorsed the checks and deposited them in a bank account he controlled, then withdrew $15,000 of that money by purchasing a cashier's check in that amount. Tr. 31-32.

2. On September 15, 2010, a federal grand jury returned an indictment charging petitioner on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371; nine counts of wire fraud, in violation of 18 U.S.C. 1343 (2006); and one count of engaging in a monetary transaction in criminally derived property, in violation of 18 U.S.C. 1957 (2000). Second Superseding Indictment 1-28 (Indictment). Petitioner pleaded guilty, pursuant to a plea agreement, to one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371 (Count 1), and one count of engaging in a monetary transaction in criminally derived property, in violation of 18 U.S.C. 1957 (2000) (Count 11). Tr. 2, 34-35.

The $15,000 cashier's check that petitioner purchased using the proceeds from the above-described fraudulent loan provided the basis for petitioner's Section 1957 conviction. See Indictment 13-14, 28; Tr. 29-32. Petitioner was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.[1]

Petitioner later filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, arguing that he received ineffective assistance of counsel because his lawyer failed to file a notice of appeal. The district court denied the motion but granted a certificate of appealability, and the court of appeals affirmed. Dyab v. United States, 546 Fed. Appx. 601, 601-602 (8th Cir. 2013) (unpublished). This Court denied a petition for a writ of certiorari. See Dyab v. United States, 572 U.S. 1077 (2014).

Petitioner sought postconviction review again in August 2014, this time "under the guise of Federal Rule of Civil Procedure 60(b)." Dyab v. United States, 855 F.3d 919, 921 (8th Cir. 2017) (describing earlier proceedings); see also Order, United States v. Dyab, No. 0:09-cr-00364-JNE-JJK (D. Minn. Sept. 10, 2014). The district court denied the motion on the ground that it was a second or successive Section 2255 motion that lacked the precertification

[1] After petitioner failed to self-surrender to serve his sentence, he was convicted of failing to appear and sentenced to an additional 12 months of imprisonment. See Dyab v. United States, 546 Fed. Appx. 601, 601 (8th Cir. 2013) (unpublished).

required by 28 U.S.C. 2255(h), and the court of appeals summarily affirmed. See Dyab, 855 F.3d at 921 (describing earlier summary affirmance). This Court again denied a petition for a writ of certiorari. See Dyab v. United States, 136 S. Ct. 254 (2015).

In November 2014, the district court, on motion of the government, amended the judgment against petitioner to reflect that one of petitioner's coconspirators was jointly and severally liable for a portion of petitioner's restitution obligation and also to update the identities and addresses of certain restitution payees. See Dyab, 855 F.3d at 921. Petitioner again filed a motion for relief under 28 U.S.C. 2255, claiming that the court's entry of the amended judgment violated his right to due process under the Fifth Amendment because he received no notice or opportunity to be heard. See 855 F.3d at 921. Petitioner also claimed that he was actually innocent of his money-laundering conviction. See ibid. The court denied the motion, determining, as relevant here, that insofar as petitioner challenged his money-laundering conviction, it constituted an unauthorized second or successive Section 2255 motion. See ibid. The court of appeals affirmed on May 4, 2017. Id. at 924. This Court again denied a petition for a writ of certiorari. See Dyab v. United States, 138 S. Ct. 239 (2017).[2]

[2] Petitioner also sought relief related to the change of his restitution judgment under the All Writs Act, 28 U.S.C. 1651. The district court denied relief in 2018, and the court of appeals

3. On November 30, 2018, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the District of Kansas, the district in which he was confined, asserting that his conviction for violating 18 U.S.C. 1957 (2000) was invalid under United States v. Santos, 553 U.S. 507 (2008). See Pet. App. C1-C2.

In Santos, this Court construed the term "proceeds" in 18 U.S.C. 1956(a)(1)(A)(i) (1994), which prohibits certain financial transactions involving the "proceeds" of specified unlawful activity that are intended to promote that unlawful activity. 553 U.S. at 511-512 (plurality opinion). The statute did not define "proceeds" at the time, and the Court held that the reference to "proceeds" should be interpreted as referring to "profits" rather than "receipts," at least when the predicate "specified unlawful activity" is an illegal gambling business in violation of 18 U.S.C. 1955. Santos, 553 U.S. at 513-514; id. at 528 (Stevens, J., concurring in the judgment). Courts subsequently concluded that the interpretation of the term "proceeds" in 18 U.S.C. 1956(a)(1)(A)(i) (1994) in Santos also applied to the undefined term "proceeds" in 18 U.S.C. 1957 (1994). See United States v. Phillips, 704 F.3d 754, 763-764 (9th Cir. 2012), cert. denied, 569

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summarily affirmed. See United States v. Dyab, No. 18-2456, 2018 WL 6978571 (8th Cir. Sept. 12, 2018). This Court again denied a petition for a writ of certiorari. See Dyab v. United States, 139 S. Ct. 2658 (2019).

U.S. 1031 (2013); Jamieson v. United States, 692 F.3d 435, 440 (6th Cir. 2012) (per curiam).[3]

In his November 2018 habeas petition, petitioner argued that Santos established that he had been convicted for conduct that is not criminal. The district court dismissed the petition for lack of statutory jurisdiction. Pet. App. C1. The court explained that this result followed from Prost v. Anderson, 636 F.3d 578 (2011) (Gorsuch, J.), cert. denied, 565 U.S. 1111 (2012), in which the Tenth Circuit had determined "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," Pet. App. C5 (quoting Prost, 636 F.3d at 584) (brackets and ellipses in original). The district court observed that "[n]othing about the procedure of Petitioner's prior § 2255 motions prevented him from making this same argument despite

[3] In 2009, Congress enacted the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f)(1)(B), 123 Stat. 1618 (capitalization omitted), which defined the term "proceeds" in both statutes to mean "gross receipts," 18 U.S.C. 1956(c)(9) (Supp. III 2009) (defining "proceeds"); 18 U.S.C. 1957(f)(3) (1994) (incorporating by reference the definition of proceeds from 18 U.S.C. 1956). Courts have concluded that these amendments do not apply retroactively, see, e.g., United States v. Bueno, 585 F.3d 847, 853 n.4 (5th Cir. 2009) (DeMoss, J., specially concurring) ("The bill is silent on retroactivity; therefore, it only applies to conduct which occurs post-amendment."), cert. denied, 559 U.S. 1049 (2010), and petitioner's conduct occurred between 2003 and 2006, before the amendments.

his claim that the Supreme Court decision he seeks to rely on [(Santos)] was still evolving." Ibid.

4. The court of appeals affirmed. Pet. App. A1-A6. Citing Prost, the court explained that "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, 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." Pet. App. A5-A6 (quoting Prost, 636 F.3d at 588) (citation and emphasis omitted). "Even if Petitioner's Santos argument would have failed at the time he filed his initial § 2255 motion," the court observed, "the fact remains that he could have raised that argument when filing his initial motion." Id. at A5.

ARGUMENT

Petitioner contends (Pet. 7-19) that the saving clause in 28 U.S.C. 2255(e) permits a federal prisoner to challenge his conviction in an application for a writ of habeas corpus under 28 U.S.C. 2241 based on an intervening decision of statutory interpretation. This Court recently denied a petition for a writ of certiorari filed by the government seeking review of that issue, as to which the circuits are in conflict. See United States v.

Wheeler, 139 S. Ct. 1318 (2019) (No. 18-420).[4] The same considerations that would have supported denial of the petition in Wheeler would apply here as well. Furthermore, unlike in Wheeler, the court of appeals' decision here is correct. And the petition here would be a poor vehicle in which to address the issue, because petitioner's habeas application does not challenge his conviction based on an intervening decision of statutory interpretation, and therefore his application would not lead to relief even in the courts of appeals that have given the saving clause the most prisoner-favorable interpretation.

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. 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-

[4] The pending petitions for writs of certiorari in Jones v. Underwood, No. 18-9495 (filed May 21, 2019), and Walker v. English, No. 19-52 (filed July 8, 2019), also raise a similar issue.

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, 960-964 (8th Cir. 2004) (discussing majority rule without expressly adopting it), cert. denied, 545 U.S. 1147 (2005).

Although those 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, 243 F.3d at 902-904; In re Jones, 226 F.3d at 333-334; In re Davenport, 147 F.3d at 609-612.

In contrast, two courts of appeals, including the Tenth Circuit, 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 Industries-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) (Gorsuch, J.), 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 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) ("[T]he Supreme Court needs to decide whether § 2255(e) permits litigation of this kind."), cert. denied, 138 S. Ct. 1028 (2018); 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 continues to believe that this Court's review would be warranted in an appropriate case.

2. The Court's review is not warranted in this case, however, because it does not implicate the division in the courts of appeals about the scope of relief authorized by Section 2255(e). 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 trial (or plea), appeal, and 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). Petitioner's claim here -- which relies on United States v. Santos, 553 U.S. 507 (2008) -- cannot satisfy those requirements.

Santos was decided in 2008, before petitioner pleaded guilty, was sentenced, or filed his first motion for collateral relief under Section 2255. As a result, petitioner had ample opportunity

to raise a claim based on Santos at his plea hearing, on direct appeal, or in his first Section 2255 motion. Santos is therefore not an "intervening" decision that overturned or abrogated precedent that was binding at the time of petitioner's conviction, appeal, and Section 2255 motion and that might therefore provide the basis for a habeas petition in the courts of appeals that have adopted the most prisoner-favorable interpretation of the saving clause.

Petitioner suggests (Pet. 8) that binding precedent foreclosed him from raising his Santos-based claim at the time of his first Section 2255 motion because at that time, Santos "was still evolving between the Circuit Courts." Petitioner points (Pet. 8-9) to the Eighth Circuit's statement in United States v. Spencer, 592 F.3d 866 (2010) that "Santos does not establish a binding precedent that the term 'proceeds' means 'profits,' except regarding an illegal gambling charge." Id. at 879-880 (quoting United States v. Howard, 309 Fed. Appx. 760, 771 (4th Cir.) (per curiam) (unpublished), cert. denied, 558 U.S. 830 (2009)). After Spencer, however, and before petitioner filed his first Section 2255 motion, the Eighth Circuit concluded that Santos applied to more than illegal gambling cases and specifically applied Santos in a fraud case. See United States v. Rubashkin, 655 F.3d 849, 865-867 (2011), cert. denied, 568 U.S. 927 (2012). Petitioner thus has no support for the contention that, at the time of

petitioner's first Section 2255 motion, Eighth Circuit precedent foreclosed him from challenging his money laundering conviction on the basis of Santos. It is therefore apparent that, even in the courts of appeals that have given the saving clause the most prisoner-favorable interpretation, petitioner would not be entitled to relief through a habeas petition raising Santos.[5]

This Court has denied petitions for writs of certiorari in cases in which the petitioners would not have been eligible for relief even in circuits that have allowed some statutory challenges to a conviction or sentence under the saving clause. See, e.g., Gov't Br. in Opp. at 21-22, Venta v. Jarvis, 138 S. Ct. 648 (2018) (No. 17-6099); Gov't Br. in Opp. at 24-27, Young v. Ocasio, 138 S. Ct. 2673 (2018) (No. 17-7141). The Court should follow the same course here.

[5] It is moreover far from clear that petitioner's Santos-based actual innocence claim (Pet. 16-18) has merit. He presents little basis to conclude the $15,000 used to purchase a cashier's check for himself were the gross receipts, rather than the profits, of his fraudulent scheme. See Tr. 29-32.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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