No. 19-5784

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL VILLECCO, PETITIONER

v.

DANIEL W. STARK, ET AL.

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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOSEPH H. HUNT
Assistant Attorney General

BARBARA L. HERWIG
DANA KAERSVANG
Attorneys

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

QUESTION PRESENTED

Whether a district court order that denied a request for appointment of counsel is appealable on an interlocutory basis under the collateral-order doctrine.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Wyo.):

Villecco v. Vail Resorts, Inc., No. 16-cv-9 (Dec. 2, 2016)

Villecco v. Klein, No. 18-cv-100 (June 28, 2019)

United States v. Villecco, No. 14-po-587 (Nov. 18, 2014)

United States Court of Appeals (10th Cir.):

Villecco v. Vail Resorts, Inc. (Aug. 30, 2017)

Villecco v. Stark, No. 18-8085 (Mar. 7, 2019)

Villecco v. Stark, No. 19-8032 (May 15, 2019)

Villecco v. Bock, No. 19-8049 (Sept. 27, 2019)

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. A1-A2, B1-B2) are not reported. The order of the district court (Pet. App. C1-C2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2019. The petition for a writ of certiorari was filed on August 13, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal in forma pauperis statute, 28 U.S.C. 1915, "ensure[s] that indigent litigants have meaningful access to the federal courts." Bruce v. Samuels, 136 S. Ct. 627, 629 (2016) (citation omitted). Section 1915(a)(1) "permits an individual to litigate a federal action in forma pauperis," and to proceed without paying otherwise-applicable court fees, "if the individual files an affidavit stating, among other things, that he or she is unable to prepay fees 'or give security therefor.'" Coleman v. Tollefson, 135 S. Ct. 1759, 1762 (2015) (citation omitted). Under Section 1915(e)(1), a court may also appoint "an attorney to represent any person unable to afford counsel."

2. Petitioner filed this suit against National Park Service employees after he was allegedly arrested and barred from Grand Teton National Park, ending his brief employment there. D. Ct. Doc. 1 (June 26, 2018). Petitioner alleges that the conduct of the Park employees that led to these sanctions constituted unlawful search, seizure, arrest, detention, battery, and malicious prosecution in violation of state law and the First, Fourth, and Fourteenth Amendments. Ibid. The district court granted petitioner's motion to proceed in forma pauperis. D. Ct. Doc. 4 (July 5, 2018). It then dismissed most of petitioner's claims because he failed to respond to a motion to dismiss and because the claims were meritless or unexhausted. D. Ct. Doc. 43 (Feb. 8, 2019).

With only his Fourth Amendment claims remaining, petitioner requested that the district court appoint pro bono counsel. D. Ct. Doc. 51 (Apr. 19, 2019). The court denied the motion, concluding that "[t]here are no unusual or exceptional circumstances that would warrant the appointment of counsel" because "the instant matter is not so factually or legally complex as to demand a request for counsel" and the "totality of the circumstances here do not support" appointing counsel. D. Ct. Doc. 52, at 2 (Apr. 19, 2019).

Petitioner filed a notice of appeal. D. Ct. Doc. 55 (Apr. 25, 2019). The court of appeals issued an order stating that the appeal would be dismissed unless petitioner filed "a memorandum brief describing any legal basis for asserting appellate jurisdiction over the order being appealed." Pet. App. B2.

After considering petitioner's response, the court of appeals issued an unpublished order dismissing the interlocutory appeal for lack of appellate jurisdiction. Pet. App. A1-A2. The court explained that the result was dictated by circuit precedent establishing that "an order denying a civil litigant's motion for appointed counsel is not appropriate for interlocutory appeal" in the absence of "extraordinary circumstances." Id. at A2 (citing Cotner v. Mason, 657 F.2d 1390, 1392 (10th Cir. 1981) (per curiam)).

Meanwhile, litigation continued in the district court. After petitioner twice failed to appear telephonically for pre-trial conferences and otherwise failed to respond or participate in the proceedings, respondents filed a motion to dismiss for failure to prosecute. D. Ct. Docs. 58, 59 (May 7, 2019). Petitioner did not respond to that motion, or to the district court's order to show cause, or to the magistrate judge's order recommending dismissal. D. Ct. Doc. 72 (June 28, 2019). Accordingly, the district court dismissed the action with prejudice for failure to prosecute. Id. at 8.

Petitioner filed a notice of appeal from the final judgment. D. Ct. Doc. 74 (Aug. 19, 2019). Petitioner did not file anything further in that appeal, however, and it was subsequently dismissed for failure to prosecute. 19-8049 C.A. Order (Sept. 17, 2019).

ARGUMENT

The court of appeals correctly held that an order denying the appointment of counsel is not immediately appealable under the collateral-order doctrine. That decision is consistent with the view of the great majority of the courts of appeals. Although some courts of appeals have reached a contrary conclusion, intervening precedents of this Court may cause them to reconsider -- and two circuits have already demonstrated their willingness to do so. Finally, to the extent that any genuine disagreement on the issue persists, that conflict is best addressed through this Court's rulemaking authority.

This Court has repeatedly denied review on the question of whether orders denying the appointment of counsel are immediately appealable. See Sai v. TSA, 137 S. Ct. 2234 (2017) (No. 16-1065); Sai v. TSA, 137 S. Ct. 711 (2017) (No. 16-287); Wilson v. Johnson, 562 U.S. 828 (2010) (No. 09-1143); Welch v. Smith, 484 U.S. 903 (1987) (No. 86-6884); Henry v. City of Detroit Manpower Dep't, 474 U.S. 1036 (1985) (No. 85-237). The same result is warranted here.

1. Under 28 U.S.C. 1291, federal courts of appeals have jurisdiction over "final decisions of the district courts." This final-judgment rule prevents litigants from engaging in "piecemeal, prejudgment appeals," conduct that "undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges." Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009) (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981)).

Notwithstanding the final judgment rule, this Court has permitted litigants to appeal a "small class" of collateral rulings that may be treated as final even though they do not end the proceedings in the district court. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). For a trial-court order to come within this narrow exception, referred to as the collateral-order doctrine, "the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Puerto Rico

Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)). This Court has repeatedly stressed that the collateral-order doctrine is a "'narrow' exception," and that it "should stay that way and never be allowed to swallow the general rule." Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (citation omitted); see Mohawk Indus., 558 U.S. at 113 ("[T]he class of collaterally appealable orders must remain 'narrow and selective in its membership.'") (quoting Will v. Hallock, 546 U.S. 345, 350 (2006)); Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42 (1995) ("small category").

In this case, the court of appeals correctly determined that the district court's denial of petitioner's request for appointed counsel was not immediately appealable under the collateral-order doctrine. Petitioner can satisfy none of the three criteria necessary to successfully invoke that doctrine.

First, "a denial of appointed counsel at the outset" of a case does not "necessarily 'conclusively determine[] the disputed question.'" Appleby v. Meachum, 696 F.2d 145, 147 (1st Cir. 1983) (per curiam) (quoting Coopers & Lybrand, 437 U.S. at 468); see Firestone Tire & Rubber, 449 U.S. at 376 ("[T]he challenged order must constitute 'a complete, formal and, in the trial court, final rejection.'") (quoting Abney v. United States, 431 U.S. 651, 659 (1977)). Rather, a district court may revisit the issue as the litigation progresses. Appleby, 696 F.2d at 147. The

considerations used to determine whether counsel should be appointed -- such as the merits of the case, the "litigant's additional efforts to obtain counsel," and the "litigant's pro se capabilities" -- may all change as the case progresses and are thus subject to reevaluation. Sai v. TSA, 843 F.3d 33, 36 (1st Cir. 2016) (per curiam), cert. denied, 137 S. Ct. 2234 (2017); see Appleby, 696 F.2d at 147 ("We would expect the district court to leave the order 'subject to revision.'") (citation omitted).

Petitioner acknowledges (Pet. 4) that the district court may "revisit" an order denying counsel. He contends (ibid.) that the first requirement is nonetheless met because, "by the time" the district court does so, "the petitioner already will have waived arguments, confused the record, and provided binding discovery responses without the aid of counsel." But petitioner offers no reason why a court revisiting an order could not also excuse a waiver or reopen discovery as necessary. And even if those remedies are not always available, the potential "[t]hat a ruling may burden litigants in ways that are only imperfectly reparable * * * has never sufficed" to make an order immediately appealable. Mohawk Indus., 558 U.S. at 107 (citation and internal quotation marks omitted). To satisfy the first criterion for a collateral appeal, the order must "conclusively determine[]" the question. Coopers & Lybrand, 437 U.S. at 468. Orders denying the appointment of counsel do not.

Second, the decision whether to appoint counsel is not "completely separate from the merits of the action." Coopers & Lybrand, 437 U.S. at 468. In evaluating a plaintiff's request for the appointment of counsel, courts typically consider a number of factors, including the merits of the plaintiff's case. Castner v. Colorado Springs Cablevision, 979 F.2d 1417, 1420-1421 (10th Cir. 1992) (holding that "a plaintiff must make [an] affirmative showing[] of * * * meritorious allegations" before "counsel may be appointed"); see id. at 1420 (collecting cases that evaluate the merits of plaintiff's case when appointing counsel); Cooper v. A. Sargenti Co., 877 F.2d 170, 172 (2d Cir. 1989) (per curiam). Petitioner correctly does not contend that the merits of a plaintiff's case should be irrelevant to the decision whether to appoint counsel.

Third, a district court's order denying appointment of counsel is not "effectively unreviewable on appeal from a final judgment." Coopers & Lybrand, 437 U.S. at 468. To satisfy this criterion, it is not enough to show that waiting to appeal the order would cause practical difficulties; rather, "denial of immediate review [must] render impossible any review whatsoever." Firestone Tire & Rubber, 449 U.S. at 376 (citation omitted). An order denying appointment of counsel does not meet that standard: If the district court abuses its discretion in denying counsel, the court of appeals can remedy that error by vacating the final order and remanding the case for further proceedings. See, e.g.,

Pruitt v. Mote, 503 F.3d 647, 660-661 (7th Cir. 2007) (en banc) (reversing jury verdict against petitioner because the district court applied the wrong legal standard in denying petitioner's request for counsel); Abdullah v. Gunter, 949 F.2d 1032, 1038 (8th Cir. 1991) (reversing jury verdict against petitioner and remanding with instructions to appoint counsel), cert. denied, 504 U.S. 930 (1992). "That remedy [is] plainly adequate should petitioner's concerns of possible injury ultimately prove well founded." Firestone Tire & Rubber, 449 U.S. at 378.

Further, this Court has already held that an order disqualifying a criminal defendant's chosen counsel "lacks the critical characteristics that make orders * * * immediately appealable." Flanagan v. United States, 465 U.S. 259, 269 (1984). And it has similarly held that an order disqualifying counsel in a civil case "cannot satisfy either the second or the third parts of the Coopers & Lybrand test." Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 436 (1985). As the Richardson-Merrell Court explained, orders denying a litigant her chosen counsel are "inextricably tied up in the merits" and "can be reviewed as effectively on appeal of a final judgment as on an interlocutory appeal." Id. at 438-439. There is no reason for a different rule with respect to orders denying a request for appointed counsel, which share the same features.

2. As petitioner concedes (Pet. 9), most courts of appeals have held that an order denying appointment of counsel is not

immediately appealable as a final order. That is the rule in nine circuits. See Appleby, 696 F.2d at 146 (1st Cir.) (motion for appointment of counsel under Section 1915(d)); Miller v. Pleasure, 425 F.2d 1205, 1205-1206 (2d Cir.) (per curiam) (same), cert. denied, 400 U.S. 880 (1970); Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984) (same); Miller v. Simmons, 814 F.2d 962, 963-964 (4th Cir.) (motion for appointment of counsel under 28 U.S.C. 1915(d) and 18 U.S.C. 3006A(g)), cert. denied, 484 U.S. 903 (1987); Henry v. City of Detroit Manpower Dep't, 763 F.2d 757, 759 (6th Cir.) (en banc) (holding that order denying counsel under either 28 U.S.C. 1915(d) or 42 U.S.C. 2000e-5(f)(1)(B) would not be immediately appealable), cert. denied, 474 U.S. 1036 (1985); Randle v. Victor Welding Supply Co., 664 F.2d 1064, 1064-1065 (7th Cir. 1981) (per curiam) (motion for appointment of counsel under 28 U.S.C. 1915(d); expressly overruling Jones v. WFYR Radio/RKO Gen., 626 F.2d 576 (1980) (per curiam), which held that an order denying appointment of counsel under 42 U.S.C. 2000e-5(f)(1) was immediately appealable); Cotner v. Mason, 657 F.2d 1390, 1391-1392 (10th Cir. 1981) (per curiam) (motion for appointment of counsel under Section 1915(d)); Holt v. Ford, 862 F.2d 850, 853-854 (11th Cir. 1989) (en banc) (same); Hodges v. Department of Corr., 895 F.2d 1360, 1361 n.1 (11th Cir. 1990) (per curiam) (motion for appointment of counsel under 2000e-5(f)(1)); Ficken v. Alvarez, 146 F.3d 978, 980 (D.C. Cir. 1998) (same).

Petitioner counts the Third Circuit as adopting his position (Pet. 8), but that is incorrect. In Spanos v. Penn Cent. Transp. Co., 470 F.2d 806, 807 n.3 (1972) (per curiam), the Third Circuit held, without briefing by the parties, that orders denying appointment of counsel under 42 U.S.C. 2000e-5 were immediately appealable. The Third Circuit later relied on Spanos to hold that orders denying appointment of counsel under 28 U.S.C. 1915 were immediately appealable as well. Ray v. Robinson, 640 F.2d 474, 477 (1981). But the Third Circuit reversed course three years later, concluding that this Court's decision in Flanagan had "effectively overruled" Ray's holding. Smith-Bey, 741 F.2d at 26. Although petitioner claims (Pet. 8) that the Third Circuit "did not explicitly overturn its prior holding in Spanos," he offers no grounds to distinguish Spanos from Ray, which was explicitly overruled. Ibid. And he cites no cases in which the Third Circuit has relied on Spanos to grant interlocutory review of an order denying the appointment of counsel. Cf. Wesley v. Secretary Pa. Dep't of Corr., 569 Fed. Appx. 123, 125 (3d Cir. 2014) (per curiam) (applying Smith-Bey).

Petitioner is correct that the Ninth Circuit has permitted immediate appeals from orders denying the appointment of counsel under Title VII. See Pet. 7-8 (citing Bradshaw v. Zoological Soc'y, 662 F.2d 1301 (1981)). But the Ninth Circuit does not permit immediate appeals from orders denying appointment of counsel under Section 1915(e). See Kuster v. Block, 773 F.2d 1048,

1049 (9th Cir. 1985) ("[B]ecause the order of the district court denying appointment of counsel does not resolve an important issue entirely separate from the merits of appellant's case, we must dismiss for lack of jurisdiction."); see also Wilborn v. Escalderon, 789 F.2d 1328, 1330 n.2 (9th Cir. 1986) (explaining that "Kuster does not conflict with Bradshaw," which was based on considerations distinct to "Title VII litigants"). Moreover, to our knowledge, no litigant has yet asked the Ninth Circuit to reconsider its position with respect to Title VII orders en banc, and there is no sign that the court of appeals would refuse do so in light of this Court's more recent precedents emphasizing the modest and narrow scope of the collateral-order doctrine.

Indeed, the Fifth Circuit -- which has long held the same position as the Ninth, see Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1308 (5th Cir. 1977) -- recently went en banc to consider this question. Williams v. Catoe, No. 18-40825 (5th Cir.). The Eighth Circuit may eventually do the same. In the past, it has held that orders denying appointment of counsel are immediately appealable. See, e.g., Nelson v. Shuffman, 476 F.3d 635, 636 (2007) (per curiam). But more recently it has expressed a willingness to reconsider that holding en banc. See Ward v. Smith, 721 F.3d 940, 942 (2013) (per curiam) ("A majority of this panel would revisit Nelson, but only the court en banc may overrule panel precedents."); see also Nelson, 476 F.3d at 637 (Colloton, J., dissenting) (arguing that panel should have declined

jurisdiction over order denying appointment of counsel under the rule that "a panel of the court of appeals may depart from circuit precedent based on an intervening opinion of the Supreme Court that undermines the prior precedent").

Finally, the Federal Circuit long ago issued a decision holding that an order denying appointment of counsel under Section 1915 is immediately appealable as a collateral order. Lariscey v. United States, 861 F.2d 1267, 1270 (1988). But we are unaware of any published or unpublished decisions in the 32 years since Lariscey was decided in which the Federal Circuit has, under the collateral-order doctrine, considered an interlocutory appeal from an order denying the appointment of counsel. Should a case raising the issue arise in the Federal Circuit in the future, it is likely that the court would reconsider its position in light of intervening decisions of this Court and the overwhelming consensus of the other courts of appeals.

3. Even if a meaningful circuit conflict existed, that conflict should be resolved through rulemaking rather than adjudication. In 1990, Congress amended the Rules Enabling Act, 28 U.S.C. 2071 et seq., to allow this Court to define, in its rulemaking capacity, which district court orders qualify as "final for the purposes of appeal under section 1291 of this title." Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, Tit. III, § 315, 104 Stat. 5115 (28 U.S.C. 2072(c)). In the collateral-order context, the Court has pointed to its

rulemaking authority as "counsel[ing] resistance to expansion of appellate jurisdiction." Swint, 514 U.S. at 48; see ibid. ("Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect."); see also H.R. Rep. No. 734, 101st Cong., 2d Sess. 18 (1990) (This Court's rulemaking authority is designed to "reduce[], if not eliminate[]," the "continuing spate of procedural litigation" regarding whether a trial-court order is final for purposes of appeal.).

Notably, the Court has stated that "rulemaking, not expansion by court decision, [is] the preferred means for determining whether and when prejudgment orders should be immediately appealable." Mohawk Indus., 558 U.S. at 113 (citation and internal quotation marks omitted); see Adler v. Elk Glenn, LLC, 758 F.3d 737, 741 (6th Cir. 2014) (per curiam) (Sutton, J., concurring) ("[R]ulemaking [is] a more reliable vehicle than appellate decisionmaking for assessing the pros and cons."). Therefore, even if a substantial question existed regarding the appealability of district court orders denying the appointment of counsel, "[a]ny further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking." Mohawk Indus., 558 U.S. at 114.

Finally, this case is a poor vehicle for considering the question presented. Petitioner's underlying action has now been

dismissed. D. Ct. Doc. 72. Petitioner could have raised the appointment-of-counsel question on appeal from that final order, but he did not. Instead, petitioner failed to file anything beyond the notice of appeal, leading to a dismissal for failure to prosecute. 19-8049 C.A. Order (Sept. 17, 2019). Thus, there is no longer an underlying suit in which counsel could be appointed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOSEPH H. HUNT
Assistant Attorney General

BARBARA L. HERWIG
DANA KAERSVANG
Attorneys

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