19-7640

CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October 2019 Term

PHILLIP AUSTON CARRIER

Petitioner,

v.

WARDEN, TALLADEGA FCI, B. Romero

Respondent.

ORIGINAL

On Petition for a Writ of Certiorari

To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether "the remedy by motion" authorized by 28 U.S.C. §2255(h)(2) is rendered "inadequate or ineffective" under §2255(e) when a federal appellate court makes the primary criterion for authorizing a second §2255 petition the federal prosecutor's consent to it?

2. Whether a Circuit Court of Appeals requirement that a prisoner asking to file a second §2255 petition must show a new rule of Constitutional law is sufficient to provide relief exceeds the gatekeeping role Congress intended in §2255(h)(2)?

LIST OF PARTIES

Petitioner Phillip Auston Carrier appeared pro se in the lower court proceedings in the Northern District Court of Alabama and in the United States Court of Appeals for the Eleventh Circuit. B. Romero, Warden of Talladega FCI, was represented in the Eleventh Circuit Court of Appeals by Assistant United States Attorney, Elizabeth Holt, 1801 4th Avenue N, Birmingham, Alabama, 35203. The Bureau of Prisons transferred Petitioner's custody to USP Marion, Box 1000, Marion, Illinois 62959, in September of 2018, while this case was pending in the Eleventh Circuit Court of Appeals.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears in Appendix A to the petition and is not published.

JURISDICTION

The date on which the United States Court of Appeals decided my case was June 25, 2016. I filed a timely petition for rehearing, which the United States Court of Appeals for the Eleventh Circuit denied on November 5, 2019. Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Art. I, §9, cl. 2, U.S. Const.

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

18 U.S.C. §924(e)(2)(B)

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

28 U.S.C § 2255(e)

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(h)(2)

> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2244(b)(3)(A)

> The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

STATEMENT OF THE CASE

On January 23, 2009, Mr. Carrier pled guilty to an indictment that he unlawfully possessed a gun as a felon, 18 U.S.C. §922(g)(1), in United States v. Phillip Carrier, No. 4:08CR464 (E.D. MO). The offense normally carries a maximum prison term of 10 years. The Presentence Investigation Report ("PSR") alleged that he qualified for a mandatory minimum 15 year prison term under the Armed Career Criminal Act ("ACCA") based on a record of three convictions satisfying a definition of "violent felony," 18 U.S.C. § 924(e)(2). The PSR calculation depended on a Missouri conviction for second-degree burglary. On June 16, 2009, the Eastern District of Missouri sentenced him under ACCA to the mandatory minimum 180 months (15 years). At the time of his sentencing, the Eighth Circuit extensively relied on the residual definition for crimes of violence in Section 924(e)(2)(B)(ii) to qualify Missouri burglary as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Mr. Carrier did not file a direct appeal.

Mr. Carrier filed a petition for habeas corpus under 28 U.S.C. §2255, in the United States District Court for the Eastern District of Missouri on June 24, 2010, No. 4:10-CV-01151 (E.D. Mo). He alleged ineffective assistance by his attorney and alleged that his burglary convictions did not qualify as ACCA violent felonies. On March 3, 2011, the district court denied the motion and declined to issue a certificate of appealability. He did not appeal.

On May 25, 2016, Mr. Carrier filed a petition seeking permission to file a second or successive habeas corpus petition ("SOS petition") to pursue a claim that his ACCA sentence had become invalid under the new Constitutional rule in Johnson v. United States, 135 S. Ct. 2251 (2015), made retroactive by Welch v. United States, 136 S. Ct. 1257 (2016). Phillip

Carrier v. United States, No. 16-2339, Petition to file SOS motion (8th Cir., May 25, 2016). On September 6, 2016, a three-judge panel issued an order summarily denying the petition without explanation, although one judge would have granted it. Judgment Denying SOS petition (8th Cir., Sept. 6, 2016).

Two months later, Mr. Carrier filed a second SOS petition in the Eighth Circuit again seeking to pursue the same Johnson due process challenge to his ACCA sentence, Phillip Carrier v. United States, No. 15-4262, Petition to file SOS motion (8th Cir. November 22, 2016). He cited multiple orders the Eighth Circuit had already issued granting identical SOS motions by prisoners seeking to raise Johnson challenges to ACCA sentences based on Missouri burglary statutes and others, including orders granting a renewed SOS motion after a different panel had denied a prior identical SOS petition. Id., pp. 17-18. The Eighth Circuit denied appellant's renewed request on June 12, 2017, although two judges noted they would have granted his First SOS Motion:

> "Judge Wollman and Judge Kelly concur in the decision to deny the request for authorization . . .only because this court has previously denied Carrier's request raising the same Johnson-based claim as he raises in this request...Otherwise, they would vote to to grant the request for authorization..."

Carrier v United States, No. 15-4262, Order Denying SOS motion (8th Cir., June 12, 2017).

On November 13, 2017, Mr. Carrier filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2241, along with a Memorandum of Law in the Northern District of Alabama, where he was then imprisoned at Talladega FCI in the Northern District of Alabama. He invoked jurisdiction based on the savings clause of 28 U.S.C. §2255(e), arguing that because his Missouri burglary convictions no longer qualified as a "violent felony" predicate for the ACCA, he was entitled to both review of and relief from his sentence pursuant to 28 U.S.C. §2241. He cited the 2015 Johnson decision striking down the "residual clause" definition for

violent felony, under which the Eighth Circuit qualified any crime arguably posing a "substantial risk of physical harm to another."

Petitioner argued that the savings clause of 28 U.S.C. §Section 2255(e) established jurisdiction to proceed with a §2241 petition because, as applied in the Eighth Circuit, the remedy by a successive Section 2255 motion based on a new constitutional rule made retroactive by the Supreme Court was ineffective and adequate, and amounted to a suspension of the writ of habeas corpus in violation of Article I, Section 9 of the Constitution. Petitioner explained that the Eighth Circuit rendered the remedy by an SOS 2255 petition inadequate and ineffective by making a primary criterion the willingness of the federal prosecutor in the case to consent to the SOS motion. He argued that this negated the habeas corpus role § 2255 serves as a bulwark against government overreach. Petitioner asked the Court to judicially notice numerous SOS petitions the Eighth Circuit granted when prosecutors agreed, and the denial of identical claims when (as in petitioner's case) a prosecutor objected. See Appendix F. He explained that the Eighth Circuit's approach to SOS motions raising Johnson claim rendered the remedy by 2255 motion "ineffective and inadequate," because deferring to the government's choice of who may pursue relief made the remedy unfit to its intended purpose as a check on the executive. Petitioner pointed to the circumstance that in his own case the prosecutor's veto stopped his effort despite the views of judges that he had satisfied the criteria to litigate an SOS motion. The Assistant United States Attorney for the Eastern District of Missouri opposed each of his requests to pursue a Johnson challenge to his Missouri burglary conviction even though other prosecutors regularly consented to identical requests, and proceeded to secure relief in the district courts upon findings that the Missouri burglary convictions could not count as predicate offenses supporting an ACCA sentence.

Petitioner cited several instances in which the Eighth Circuit granted a second request upon the prosecutor's consent to relief going forward.

Petitioner also explained that the Eighth Circuit modified the "prima facie" showing for SOS applications citing the new constitutional rule in Johnson to require a further showing that the new due process "vagueness" rule was sufficient to bring relief to the petitioner, exceeding the tentative inquiry Congress established in Sections 2241(b)(3)(C) and 2255(h)(2). Petitioner argued that the Eleventh Circuit's decision in McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076 (2017) (en banc), did not consider the distinct circumstances and constitutional problems posed by the standards the Eighth Circuit applied to gatekeeping SOS motions based on the new Constitutional Rule of Johnson under §2244(b)(3)(C) and §2255(h)(2).

Hon. Magistrate Judge John H. England, II issued a report and recommendation that the proceeding be dismissed. Petitioner filed objections to each of the Magistrate's reasons. On March 19, 2018, Hon. Virginia Emerson Hopkins overruled petitioner's objections and adopted the Magistrate's Report and Recommendation, without embellishment. The magistrate concluded that the McCarthan decision eliminated jurisdiction for the district court to hear Carrier's habeas corpus petition. The District Court, Hon overruled petitioner's timely objections to the Magistrate's Report and Recommendation and adopted it on March 19, 2018.

Petitioner timely appealed to the Eleventh Circuit Court of Appeals. The government asked for an extension of time to file its brief and then moved for summary dismissal based on the McCarthan case. It ignored petitioner's argument that McCarthan did not address or even conceive of a scenario whereby a Circuit Court of Appeals made the primary criterion the willingness of the federal prosecutor to consent. On June 25, 2019, the Eleventh Circuit

issued a per curiam order granting the government's motion for summary disposition, and citing the McCarthan to affirm. Appendix A, 1-3. Petitioner timely requested rehearing and rehearing en banc, which was denied by order of the Eleventh Circuit dated November 5, 2019. Appendix B.

REASONS FOR GRANTING CERTIORARI

1 The Court should grant certiorari to establish what circumstances render "the remedy by [§2255] motion inadequate or ineffective"

This case squarely presents the opportunity to address the urgent and recurrent issue of when the "savings clause" of 28 U.S.C. § 2255(e) authorizes federal prisoners to pursue relief from imprisonment contrary to federal law by a habeas corpus petition under 28 U.S.C. § 2241 because "the remedy b [§2255] petition" is "inadequate or ineffective." Petitioner's case provides a unique opportunity to address what makes "the remedy by [§2255] motion" inadequate or ineffective within the meaning of Section 2255(e). Petitioner's case plainly demonstrates that the Eighth Circuit negated §2255's "habeas corpus" function by making the primary criterion of whether a prisoner's SOS motion was granted the willingness of the federal prosecutor in the case being challenged to consent to the prisoners request. That negates the core purpose of habeas corpus as a bulwark against oppressive and unauthorized prosecution and punishment and amounts to a suspension of habeas corpus contrary to Article I, Section 9 of the Constitution. The Eleventh Circuit's decision in McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076 (2017) (en banc) did not contemplate or address this issue. A prior decision's implicit resolution of an issue neither "raised in briefs or argument nor discussed in the opinion of the Court" is not binding precedent. See United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952).

The Eighth Circuit's requirement that a defendant must go beyond a prima facie showing that his proposed SOS motion relies on a new constitutional rule to show that he will succeed on the ultimate merits violates the chief Justice's admonitions about basing tentative gatekeeping decisions under the AEDAPA restrictions on the appellate court's view of the ultimate merits. Buck v. Davis, 137 S. Ct. 759, 744 (2017).

Petitioner has now served more than eleven years under an erroneous ACCA sentence imposed upon him based on Missouri burglary, which the Eighth Circuit now recognizes not to qualify as generic burglary. See United States v. Naylor, 887 F.3d 397, 406 (8th Cir. 2018) (en banc). Had the Eighth Circuit granted his request as it granted many other SOS-petitions seeking to challenge burglary predicates in which the prosecutor was of a mood to consent to the request, petitioner would have been released from prison more than a year ago. This has cost him more than his right to liberty; it cost him the sight of his left eye from an attack by another prisoner on April 22, 2019.

A. Petitioner's case raises a problem not envisioned by McCarthan or any other Precedent, consisting of a Circuit's making the right to file an SOS-motion primarily dependent on the prosecutor's consent, contrary to the core role of habeas corpus as a bulwark against prosecutorial excess.

Petitioner's pleadings illustrated that the "remedy by motion" under § 2255 was rendered "ineffective [and] inadequate" because the Eighth Circuit explicitly made the primary gatekeeping criterion under §2255(h)(2) the federal prosecutor's willingness to consent to the filing of an SOS motion based on the 2015 Johnson case. His briefs and pleadings set out starkly conflicting decisions according to the willingness of individual prosecutors to consent to an SOS motion. See Appendices E and F.

Article I, § 9 guarantees that the right to pursue habeas corpus shall not be suspended, except in cases of war. Its Constitutional purpose is to provide a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law. See Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004), citing INS v. St. Cyr, 533 U.S. 289, 301 (2001). Dating back to the "formative years of our Government, . . . the issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on

errors of law, including the erroneous application or interpretation of statutes." Id. at 301-302 and n. 18 (citing cases therein). It has remained since the founding of this nation, "the stable bulwark of our liberties." Boumediene v. Bush, 553 U.S. 723, 742 (2008). It serves to protect the separation of powers on which the Framer's centrally depended to ensure liberty and remedy its wrongful denial. Id. at 743. Section 2255 was "designed to strengthen, rather than dilute, the writ's protections." Id. at 776. See also Hill v. United States, 368 U.S. 424, 427 (1962) (Section 2255 "was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district court where the prisoner was confined."). Congress inserted the savings clause to preserve the habeas remedy for those instances wherein "it also appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [a prisoners] detention." 28 U.S.C. § 2255(e).

After the Supreme Court struck the residual clause definition for predicate violent felonies in 18 U.S.C. § 924(e)(2)(B)(ii) in Johnson, the Eighth Circuit issued a decision declaring that the prima facie showing that would satisfy § 2255(h)(2) could be made "[b]ased on the government's concession" of the retroactivity of a new Supreme Court rule. Woods v. United States, 805 F.3d 1152, 1154 (8th Cir. 2015). The Eighth Circuit in "Woods relied entirely on a concession by the government and conducted no analysis of whether the Supreme Court's recent decision in Johnson announced a new rule of Constitutional law that has been [made retroactive to cases on collateral review]." Menteer v. United States, 806 F.3d 1156 (8th Cir. 2015). See also Richardson v. United States, No. 15-3188, 2015 WL 8956210 (8th Cir., Dec. 16, 2015) (unpublished) (granting SOS petition to challenge ACCA predicate because

government agreed to it, but denying SOS petition to extent it challenged a residual clause Guidelines enhancement because the government opposed it).

Under the standards the Eighth Circuit applied to prisoners' requests to file SOS-petitions based on Johnson, the Circuit Freely granted requests on little more than the federal prosecutor's "say-so", while denying requests to challenge identical predicates when prosecutors opposed them. See Appendix, citing cases listed in Petitioner's Brief in the 11th Circuit. This amounts to a suspension of the writ, in violation of Art. I, §9, U.S. Const.

The Eighth Circuit's approach to the "gatekeeping" under 28 U.S.C. §§2255(h)(2) & 2244(b)(3) as to requests based on Johnson, rendered the remedy of § 2255 petitions subject to a roll of the dice, instead of an adequate and effective legal vehicle serving the Constitutional function the Founders and Congress intended it to ensure. A remedy that measures a prisoner's ability to challenge the constitutionality of his imprisonment on the willingness of the government to "agree" to the challenge reduces the remedy to a "crap shot" depending on "little more than the government's say-so," see Hamdi v. Rumsfeld, 542 U.S. at 513.

B. The 8th Circuit's rule that SOS-motions must show a new rule is adequate to win relief exceeds the limited § 2255(h)(2) inquiry, contrary to Buck v. Davis

The Eighth Circuit's application of 28 U.S.C. § 2255(h)(2) further conflicts with the limited preliminary inquiry as to the "potential merit" in an SOS applicant's proposed claim. Congress authorized the Circuit Courts of Appeal to make only a tentative determination of whether a prima facie showing that the applicant satisfies the criteria of Section 2255(h)(2), see 28 U.S.C. § 2244(b)(3)(C). Prior to the 2015 Johnson decision, the Eighth Circuit recognized that "a prima facie showing in this context is 'simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." Kamil Johnson v. United States, 720

F.3d 720, 721 (8th Cir. 2013). However with reference to petitions based on the 20115 Johnson decision, the Eighth Circuit declared that "a 'new rule of constitutional law' that warrants authorization under § 2255 under §2255(h)(2) likewise must be sufficient to justify a grant of relief." Donnell v. United States, 826 F.3d 1014, 1016-17 (8th Cir. 2016) (emphasis in original).

Congress did not authorize the Circuit Courts of Appeal to grant requests to file SOS petitions according to the appellate court's view of the applicant's ultimate right to relief on the merits. In Buck v. Davis, this Court held that the Fifth Circuit similarly exceeded the limited scope of analysis governing a habeas petitioner's right to a "certificate of appealability" ("COA") under 28 U.S.C. § 2253. 137 S. Ct. at 774. That statute limited habeas corpus appeals to those in which a district court or the Court of Appeals find a claim that is "reasonably debatable" by jurists of reason. The Fifth Circuit used terminology that granted lip service to the "reasonably debatable" standard, yet this Court found that the Fifth Circuit "reached [its] conclusion [denying the COA] only after essentially deciding the case on the merits." Id. at 773. At the COA phase, the Chief Justice wrote for the Court, the only question is whether the applicant showed that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issue presented are adequate to deserve encouragement to proceed further." Id. This Court explained,

> "[t]hat a prisoner has failed to make the ultimate showing that his claim is meritorious dos not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and 'first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner at the COA stage..."

The "reasonably debatable issue" standard for COAs resembles the "tentative" prima facie threshold applicants seeking to file an SOS petition must satisfy. The new heightened

threshold the Eighth Circuit adopted for Johnson-based petitions clearly violates SOS applicants' rights to procedural due process by exceeding the limited inquiry to which Congress limited the Courts of Appeals in Sections 2255(h)(2) and 2244(b)(3)(C). This additional burden rendered "the remedy by [§2255(h)(2)] remedy" both inadequate and ineffective.

CONCLUSION

Wherefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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