No. _____

IN THE

Supreme Court of the United States

Frank Louis Amodeo,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. A Federal Court may only entertain a federal prisoner's habeas corpus petition when a "remedy by motion [to vacate] is inadequate or ineffective to test the legality of [the prisoner's] detention". 28 U.S.C. §2255(e). Amodeo presented a presumptively-true well-documented actual-innocence claim. The Eleventh Circuit held that §2255 is adequate and effective to test the legality of his detention, even though its binding precedent forecloses relief should Amodeo prove his claim.

   Is §2255 inadequate or ineffective when binding precedent forbids relief even when a meritorious claim is proven?

2. This Court's jurisprudence leaves unanswered whether the Constitution provides habeas corpus for a free-standing claim of actual innocence. *Mcquiggin v. Perkins*, 568 U.S. 977 (2012). Amodeo presents a presumptively true, well-documented claim of factual innocence (not merely legal) innocence. The Eleventh Circuit does not allow relief, under either §2241 or §2255, for a claim of factual innocence.

   Does the Constitution recognize a right to habeas corpus relief based on a freestanding claim of actual innocence?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceedings. Petitioner is not a corporation.

RELATED PROCEEDINGS

No related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Frank Louis Amodeo requests this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Therein directing the Eleventh Circuit to transfer the cause identified in Eleventh Circuit Number, 17-15456 to this Court in order that this Court can resolve the conflict between the Eleventh Circuit and ten other circuit courts of appeals on the correct meaning of the 28 U.S.C § 2255(e) savings clause. Plus, resolve the long outstanding question of whether the Constitution prohibits the conviction and punishment of an innocent person such that habeas corpus is available to ensure the innocent person's liberty.

OPINION BELOW

The Eleventh Circuit's opinion under review is published at *Amodeo v. Warden*, 984 F. 3d 992 (11th Cir. 2021) and is reproduced in Appendix 1. The Eleventh Circuit denial of Applicant's motion for rehearing is reproduced as Appendix 3. The district court's opinion dismissing Mr. Amodeo's 28 U.S.C. §2241 petition for a writ of habeas corpus is reproduced in Appendix 2.

JURISDICTION

This Court has jurisdiction under 28 U.S.C § 1254(1). The Eleventh Circuit denied a timely motion for rehearing (App. 27) on July 7th, 2021. Under this Court's March 19, 2020 (App. 43) and July 19th, 2021, order (App. 45), the petition for a writ of certiorari is due to be filed on or before December 5th, 2021.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2255(e) provide in relevant part that:

(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 §2241 provides in relevant part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
(c) The writ of habeas corpus shall not extend to a prisoner unless—
(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
(5) It is necessary to bring him into court to testify or for trial.
to have been properly detained as an enemy combatant or is awaiting such determination.

Article 1, Section 9, Clause 2 of our Constitution provides:

"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."

STATEMENT OF THE CASE

In June 2008, the State of Florida declared Frank Amodeo incompetent. (App. 31). In August 2008, the United States indicted Mr. Amodeo for tax-related crimes. (App. 2). In May 2009, the district court sentenced, Mr. Amodeo to 270 months in prison. (App. 3). After which Mr. Amodeo filed a direct appeal, a §2255 motion, and a plethora of related motions. (App. 34). Despite the extensive litigation, no court ever addressed the merits of Mr. Amodeo's freestanding, actual innocence claims. (App. 5).

In 2017, under 28 U.S.C. §2241, Mr. Amodeo filed, a petition for a writ of habeas Corpus. (App. 47). Mr. Amodeo claimed that he lacked the specific intent to commit the crime, which makes him innocent and his imprisonment illegal. (App. 52-54). Mr. Amodeo supported the claim with substantial evidence: 2 medical opinions, 8 eyewitness statement, numerous business documents, 4 polygraph examination results, and 300 hours of audio - video recordings including the IRS undercover recordings. (App. 28 at Docket Entry 1 & 3).

The district court, however, did not consider either the evidence at that stage in the proceedings or that Mr. Amodeo's allegations were presumptively-true. (App. 25). Instead, the district court concluded that the Eleventh Circuit's decision in *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.,* 851 F.3d 1076 (11th Cir. 2017), foreclosed it taking jurisdiction of the habeas corpus petition. (App. 24-25). Accordingly, the district court dismissed the petition for lack of subject-matter jurisdiction (App. 25).

Mr. Amodeo appealed, (App. 6). The Eleventh Circuit appointed Rachel Kummer of Morgan, Lewis and Brockius, LLP to represent Mr. Amodeo. (App. 61). After oral arguments, the Eleventh Circuit affirmed the district court opinion, finding its *McCarthan,* precedent governed. (App. 23). The appellate court's holding, however, illuminates the mature and settled conflict between the federal circuit courts of appeals regarding the construction of 28 U.S.C. § 2255(e):

> "Amodeo's actual innocence claim does not fit within the narrow confines of the saving clause because he could have presented it in his first §2255 and that motion would have been an adequate and effective mechanism to test his claim. That is so even though binding precedent prohibits granting, post-conviction relief in a non-capital case based on a claim of actual innocence." (App. 23). *Amodeo v. Warden*, 984 F.3d 992, 1003 (11th Cir. 2021).

Amodeo scratched his head on how §2255 could be adequate and effective when even if Amodeo proved his claim to an absolute certainty, the §2255 court could not have given relief. Amodeo petitioned this Court for certiorari review.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit rule tortures the ordinary meaning of the English language: The Eleventh states that §2255 is effective to test Amodeo's detention even though if Amodeo proved that he was factually innocent, then the §2255 court could not grant relief. *Id* at 1003 ("even though binding precedent prohibits granting, post-conviction relief").

One must wonder what ineffective means: ordinary folks would think it is effective to play a baseball game because if you hit the ball over the fence and touch all the bases, then you score a run, but if it does not count, then hitting a home run is ineffective to score runs. The Eleventh Circuit held that Amodeo could raise the innocence claim under §2255 and provide substantial proof of innocence, yet that makes no difference because under Eleventh Circuit precedent the district court cannot grant relief. *Id*. Thus like the score not counting when you hit a homerun, in common parlance, §2255 is ineffective and inadequate to test Amodeo's freestanding factual innocence challenge to his detention, because even if proven it does not count.

The Third Circuit holds where "no other avenue of judicial review [is] available for a party who claim that's he is factually or legally innocent" then to avoid "a constitutional issue", (the suspension of habeas corpus) §2255(e), the so-called saving clause, permits the "innocent" prisoner to use §2241 to bring a petition for a writ of habeas corpus. *Bruce v. Warden* 868 F. 3d 170 (3d Cir. 2017) (*quoting In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997*)* (articulated in the context of an intervening change in the substantive law).

A position that nine other circuits agree with:

1. *Trenkler v. United State*, 536 F.3d 85, 99 (1st Cir. 2008)
2. *Poindexter v. Nash*, 333 F.3d 372, 328 (2d Cir. 2003)
3. *In re Dorsainvil,* 119 F.3d 245 (3d Cir. 1997)
4. *Wheeler v. United States,* 886 F.3d 415, 433-34 (4th Cir. 2018)
5. *Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir. 2001)
6. *Wooten v. Cauley* ,677 F.3d 303, 307-08 (6th Cir. 2012)
7. *Brown v. Caraway*, 719 F.3d 583, 586-87 (7th Cir. 2013)
8. *Abdullah v. Hedrick*, 392 F.3d 957 (8th Cir. 2004)
9. *Marrerra v. Ires,* 682 F.3d 1190,1992 (9th Cir. 2012)
10. *In re Smith*, 285 F.3d 6, 8 (DC Cir.2002)

Two circuits disagree:

11. *Prost v. Anderson*, 636 F.3d 578, 588 (10th Cir. 2008)
12. *McCarthan,* 851 F.3d at 1099-1100 (11th Cir. 2017)

The Federal circuits have settled into a deep divide over the meaning of §2255(e)'s savings clause. The Eleventh Circuit's definition heralds an unconstitutional suspension of the Great Writ, since it is never available to test the detention of an actually innocent prisoner. *See generally U.S. Cons. Art. 1, § 2, cl. 2*. Moreover, the Eleventh Circuit construction effectively permits the imprisonment of the factually innocent a concept anathema to American tradition. The circuit split and the miscarriage of justice provide compelling reasons to grant certiorari.

1. **For 25 years, the federal courts of appeals have struggled over the proper construction of 28 U.S.C § 2255(e)'s term "inadequate or ineffective." That elusive definition has resulted in a mature conflict between the Eleventh Circuit and the Tenth Circuit, and the other federal circuits. Amodeo's case perfectly poises the crux of the conflict: Can §2255 be an adequate and effective mechanism to test a movant's detention when binding circuit precedent forecloses relief, even if movant proves the claim. This Court should grant the writ and resolve the circuit conflict.**

Amodeo presented a freestanding claim of actual innocence. (App. 6). Although, at this stage of habeas proceeding, the petitioner's claims are presumptively true, *see Schriro v. Landrigan*, 550 U.S. 465 (2007), Amodeo nonetheless presented a substantial amount of supporting evidence including 2 medical opinions, 4 polygraph examination results, 12 business documents, 8 eyewitness statements, and 300 hours of audio-video recording. (App. 28 at Docket Entry 1 and 3). The district court did not adjudicate the presumptively-true, well-documented claim, because the district court concluded that it lacked subject-matter jurisdiction over the habeas corpus petition itself. (App. 3-4). The district court founded its opinion on the Eleventh Circuit's en banc decision in *McCarthan,* 851 F. 3d at 1076.

After oral arguments, the Eleventh Circuit published its opinion finding that § 2255 was "adequate and effective," even though binding Eleventh Circuit precedent prevented a §2255 court from granting relief even if Amodeo proved his innocence claim to an absolute certainty. *Amodeo,* 984 F. 3d at 1003; (App. 23).

In sum, the Eleventh Circuit concluded that §2255 is an adequate and effective mechanism for a federal prisoner to test the legality of the prisoner's detention despite governing circuit precedent foreclosing relief even if the prisoner's claim is

proven substantively meritorious (App. 23), *McCarthan,* 851 F.3d at 1076. A position the Tenth Circuit agrees with. *Prost* 636 F.3d at 588.

On the other hand, ten other federal circuits disagree. These circuits believe where circuit precedent forecloses relief, then, habeas corpus is effectively suspended unless §2241 is available to test the detention of an allegedly innocent prisoner. That is, those circuits concluded that when governing precedent prohibits relief of an arguable claim of actual innocence, then §2255 is inadequate or ineffective. *See Trenkler v. United States*, 536 F.3d 88, 99 (1st Cir. 2008); *Poindexter V. Nash*, 333 F.3d 372, 328 (2d Cir. 2003); In re Dorsainvil, 119 F.3d 245, 448 (3d Cir. 1997); *In re Jones*, 226 F.3d 328 (4th Cir. 2000); *Reyes-Requena v. United States*, 243 F.3d 893, 903-04 (5th Cir. 2001*); Wooten v. Cauley*, 677 F.3d 303, 307-08 (6th Cir.2012); *Brown v. Caraway,* 719 F.3d 583, 586-87 (7th Cir 2013); *Abdullah v. Hedrick*, 392 F.3d 957, 963-64 (8th Cir 2004); *Marrerra v. Ires,* 682 F.3d 1190, 1992 (9th Cir. 2012); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002). It is noteworthy that several of these circuit have slightly different tests, yet all rest on the lynchpin of "actual innocence".

The Fourth Circuit explicitly questioned the validity of the Eleventh Circuit's *McCarthan* rule. *Wheeler,* 886 F.3d at 433-34. The Third Circuit illuminated the circuit conflict and its injustice when it permitted a brother and co-defendant to test the legality of his detention, while the Eleventh Circuit refused to hear the other brother's §2241 petition. *Compare Bruce*, 868 F.3d at 181-182 (3rd Cir.2017*)* (while differences in the law amongst the circuits is a feature, not a bug, of our federal

judicial system, the disparate treatment of Gary and Robert Bruce should not be overlooked.") with *Bruce v. Warden*, 658 Fed. Appx 935 (11th Cir. 2016) (per curiam).

Here the Eleventh Circuit declared that §2255 remained adequate and effective despite its binding precedent foreclosing relief even if Amodeo proved he was factually innocent. (App. 23) (*Amodeo,* 984 F. 3d at 1003). An atrocious result that violates every ordinary American's concept of fairness and justice.

But even a (more jaded) reasonable jurist would find it absurd that the law requires Amodeo to raise a claim and demonstrate its merit by substantial evidence, only to have the court say "great job; but this court cannot grant relief under §2255" -- innocence is irrelevant. This cannot be a principled definition of "adequate and effective." The sounder view is that when binding circuit precedent forecloses relief in §2255 despite a prisoner's actual innocence, then, §2255 was inadequate or ineffective (at the time it was available) to test the legality of the §2255 movant's detention; therefrom §2255(e) animates a district court's jurisdiction under 28 U.S.C. §2241, and makes the traditional writ of habeas corpus available to test the prisoner's detention.

This Court should grant the writ, resolve the circuit conflict, and put the law right -- solidly on the side of giving a potentially innocent prisoner a habeas corpus day in court.

2. American tradition and this Court's miscarriage-of-justice jurisprudence indicate that the Constitution protects the innocent from criminal punishment. Yet, this Court has avoided the question of whether habeas corpus relief is available for innocence only. *Mcquiggin v. Perkins*, 569 U.S. 383 (2013). Amodeo presents a well-documented, presumptively-true claim of factual (not merely legal) innocence. Hence, an excellent vehicle for this Court to decide whether habeas corpus relief is available for a freestanding claim of actual innocence.

Amodeo presents a well-supported and presumptively-true freestanding claim of factual innocence. (App. 53) Significantly, Amodeo pleads and proves a claim of factual innocence, not merely legal innocence (App. 28, 52-53); *see generally Bousley v. United States,* 523 U.S. 614, 623 (1998). That is, Amodeo shows that at the relevant time he lacked willfulness.[1] The Eleventh Circuit provides that although his claim may be cognizable under §2255, its binding precedent prevents any habeas court from granting relief predicated on a claim of actual innocence, which is untethered to constitutional or jurisdictional error. *Amodeo,* 984 F.3d at 1002,1003 (reproduced at App. 1). This Court, however, expressly has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim a factual innocence." *McQuiggin* 569 U.S. at 540; *House v. Bell,* 126 S. Ct. 2064, 2087 (2006); *Herrera v. Collins*, 506 U.S. 390,404-05 (1993).

This Court should resolve that issue of national importance. The lower courts need guidance on whether innocence matters, as does Congress and the public. The ordinary citizen cannot comprehend how the Constitution permits the government

[1] Amodeo's evidence and arguments are voluminous and are available on YouTube at Frank's Proof and online at www.thefrankamodeostory.com, as well as Docket Entry #2 in the district court case no. 5:17-cv-0284-Oc-10PRC (M.D. Fla. 2017).

(federal, state, or other) to deprive an innocent individual of life and liberty. Should this Court find that loss of liberty permissible, then Congress and the public need to know, in order that the Constitution and the law can be altered.

"Society views the conviction of an innocent person as perhaps the most grievous mistake our judicial system can commit". *Satterfield v. Dist. Atty. Phila, et. al.*, 872 F3d 152, 154 (3d Cir 2017). By limiting that outrage to the capital context, *Amodeo* at 1003, the Eleventh Circuit offends the Constitution's concepts of limited government, Due Process of Law, and the Bill of Rights, all of which were meant to ensure that the individual receives protection from the collective.

The Eleventh Circuit rule denigrates the Constitution's protection of individual liberty; and the appellate court's §2255(e) interpretation effectively suspends the Great Writ for actually innocent prisoners like Amodeo. He cannot obtain relief under §2255 and he cannot obtain relief through Habeas Corpus. *Amodeo,* 984 F.3d at 1003. (App. 23). Only if the prisoner faces execution would the Eleventh Circuit permit habeas corpus relief. *Id*. That limitation cannot be squared with either Justice or common sense.

At one level of generality this rule produces an absurdity; that it is better for the innocent prisoner to face death in a gas chamber, than life in prison, since imminent death rather than prolonged death, provides access to the Great Writ. Amodeo does not believe this can be the correct rule. And, fortunately, most of the circuit courts of appeals agree. *Wheeler*, 886 F. 3d. at 439, n.7. Most circuits find repugnant the idea that the government may punish the innocent and that innocent have no recourse.

The Eleventh Circuit foreclosing habeas relief for a freestanding claim of actual innocence effectively condemns the innocent, like Amodeo, to cruel and unusual punishment. *See, e.g, Arnold v. Pittman*,901 F.3d 830 (7th Cir. 2017); *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir.2014); *Han Tak Lee v. Glunt*, 667 F.3d 397 (3rd Cir. 2012); see also *Dist. Attorney's Office for the Third Judicial Circuit v. Osborne,* 129 S. Ct. 2308, 2335 (2009*)* (even a prosecutor is ethically bound to inform appropriate authority of after-acquired information that casts doubt on the correctness of a conviction).

Amodeo presented a mountain of evidence that shows his lack of willfulness, the requisite mens rea, to have violated any of the counts of indictment, let alone the counts of conviction. Yet, the Eleventh Circuit refuses to permit any court to examine the constitutionality of his conviction. It is worth noting that the Constitution requires the government's punishment be proportionate to the severity of the crime; otherwise, the punishment is cruel and unusual. *Coker v. Georgin*, 455 U.S. 584,592 (1977); *cf. also Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016) ("a court has no authority to leave in a place a conviction" of an innocent, i.e., one that "violates a substantive rule").

This Court should grant the writ and make it certain that the United States Constitution considers even one hour of imprisonment grossly out of proportion to the severity of non-criminal conduct. And that the Great Writ of habeas corpus always stands ready to free the innocent.

CONCLUSION

This Court recognizes that a fundamental constitutional question exists as to whether the constitution requires the government to release an individual who demonstrates actual innocence. And whether habeas corpus is available to effectuate that release. This Court should address that question because it is so fundamental that no other court can. Moreover, this Court should value the deep divide among the federal circuits on the definition of 28 U.S.C §2255(e). It creates anomalies and paradoxes in the law which tarnish the public's perception of the law.

This Court should grant the writ to resolve the conflicts between the Eleventh Circuit and ten of its sister circuits on the construction of the §2255(e) saving clause, and further this Court should resolve the often-avoided question of whether the Constitution provides habeas corpus to provide relief for an innocent prisoner.

Respectfully submitted this 3rd day of December 2021.

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