

No. 21A _____

IN THE
Supreme Court of the United States

PAUL E. PAVULAK,

Petitioner,

vs.

WARDEN OF FMC-BUTNER,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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APPLICATION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), applicant Paul Pavulak respectfully asks for a 32-day extension of time, to and including January 31, 2022, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

1. The Ninth Circuit entered judgment on August 4, 2021. *See Pavulak v. von Blanckensee*, 7 F.4th 871 (9th Cir. 2021) (per curiam).^{*} Mr. Pavulak filed a petition for rehearing, and the Ninth Circuit issued an amended opinion on October 1, 2021. *See Pavulak v. von Blanckensee*, 14 F.4th 895 (9th Cir. 2021) (per curiam). Unless extended, the time to file a petition for certiorari on December 30, 2021. This application is being filed more than ten days before the petition is currently due. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. In 2011, Mr. Pavulak was convicted in the United States District Court for the District of Delaware on four counts involving sex with a minor and one count of failing to register as a sex offender; he was sentenced to mandatory life in prison plus 10 years because of two prior convictions under Del. Code tit. 11, § 768, which punishes certain sexual conduct with minors. *See* 18 U.S.C. § 3559(e); *United States v. Pavulak*, 819 F. Supp. 2d 386 (D. Del. 2011). The Third Circuit affirmed his convictions on direct appeal. *See United States v. Pavulak*, 700 F.3d 651 (3d Cir. 2012). The convicting court denied Mr.

^{*} After the Ninth Circuit entered judgment in this matter, Mr. Pavulak was moved to FMC-Butner. Accordingly, the unknown warden of that facility is substituted in the caption of this document for Barbara von Blanckensee, former warden of USP-Tucson, where Mr. Pavulak was incarcerated when he filed the habeas petition that is the subject of the petition for certiorari that he intends to file. *See* Sup. Ct. R. 35.3; *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004).

Pavulak’s motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. *See United States v. Pavulak*, 248 F. Supp. 3d 546 (D. Del. 2017).

3. In 2019, Mr. Pavulak filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2241 with the United States District Court for the District of Arizona, where he was then incarcerated. *See generally Hernandez v. Campbell*, 204 F.3d 861, 864–65 (9th Cir. 2000) (per curiam). In his petition, he contended that the mandatory life sentence was illegal because his prior Delaware convictions did not qualify as “prior sex convictions” under 18 U.S.C. § 3559(e). *See generally Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020) (allowing a federal prisoner to use § 2241 to seek relief from an illegal sentence). Nearly three weeks later, without calling for a response from the warden, the district court dismissed his petition. It ruled that he had had an unobstructed procedural shot at raising his sentencing challenge before the sentencing court, inasmuch as the legal basis for his claim was, in the habeas court’s view, available during his first § 2255 proceedings.

4. Mr. Pavulak filed a *pro se* notice of appeal. The Ninth Circuit granted a certificate of appealability on the question whether Mr. Pavulak’s § 2241 petition is a “legitimate 28 U.S.C. § 2241 petition brought pursuant to the escape hatch of 28 U.S.C. § 2255(e) and, if so, whether” he is entitled to relief. The court later appointed counsel to assist Mr. Pavulak in his appeal, and Assistant Federal Public Defender Keith Hilzendeger was assigned to handle it.

5. Under the so-called escape hatch of § 2255(e), a federal prisoner may not seek postconviction relief under § 2241 unless the postconviction remedy under § 2255 is “inadequate or ineffective to test the legality of his detention.” Before the Ninth Circuit, Mr. Pavulak contended that he could make this showing because the sentencing court failed to appoint counsel to assist him in raising his sentencing challenge. In *Martinez v. Ryan*, this Court held that the failure to appoint postconviction counsel to a state prisoner could qualify as cause and prejudice for a federal habeas court to excuse a state

procedural default of a claim of ineffective assistance of trial counsel. *See* 566 U.S. 1, 12, 14 (2012). Mr. Pavulak contended that the “inadequate or ineffective” language in § 2255(e) could be construed to make a similar excuse available to federal prisoners if the sentencing court similarly fails to appoint postconviction counsel to raise a substantial claim of trial-level ineffectiveness in § 2255 proceedings.

6. The Ninth Circuit rejected this contention in a *per curiam* opinion. “Practically speaking,” the court said, “an extension of *Martinez*... makes little sense. It would open the door for virtually every unsuccessful pro se petitioner under § 2255 to argue that his lack of counsel in his original § 2255 petition meant that he did not have an unobstructed procedural shot at presenting his claim and is therefore entitled to bring an escape hatch petition under § 2241. Such practice would effectively override our precedent that there is no right to counsel in federal post-conviction proceedings.” *Pavulak v. von Blanckensee*, 14 F.4th 895, 897 (9th Cir. 2021) (per curiam).

7. This case thus presents an important question about the administration of postconviction proceedings for federal prisoners. While *Martinez* reaffirmed the long-standing rule that there is no Sixth Amendment right to counsel in postconviction proceedings, it also recognized a need to “protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel” from being denied review of such claims through no fault of their own. 566 U.S. at 9. “Most jurisdictions have in place procedures to ensure counsel is appointed for substantial ineffective-assistance claims.” *Id.* at 14. Under the Ninth Circuit’s reasoning, the federal system is not of those jurisdictions. The Criminal Justice Act gives district courts discretion to appoint counsel for federal prisoners seeking postconviction relief. *See* 18 U.S.C. § 3006A(a)(2)(B). But without applying *Martinez*’s reasoning to federal prisoners, there is no meaningful check on the failure to exercise that discretion in a manner that protects a federal prisoner’s right to review of a substantial trial-level ineffective-assistance claim. *Cf. Weygandt v. Look*, 718

F.2d 952 (9th Cir. 1983) (per curiam) (holding that the denial of a motion for appointment of counsel is not an appealable order).

8. Assistant Federal Public Defender Keith Hilzendeger was assigned to represent Mr. Pavulak on appeal, including certiorari proceedings in this Court. *See* 9th Cir. R. 4-1(e). Over the next several weeks, counsel is occupied with briefing deadlines and arguments in the following matters: (1) oral argument in *United States v. Aaron Wright*, No. 20-10403, in the Ninth Circuit, set for December 10; (2) an opening brief due in *United States v. Luis Galaviz-Valenzuela*, No. 21-10195, in the Ninth Circuit, on December 13; (3) an opening brief due in *William Meyer v. Attorney General*, No. 21-15374, in the Ninth Circuit, on December 21; (4) an opening brief due in *Eulandas Flowers v. James Kimble*, No. 19-15116, in the Ninth Circuit, on December 27; and (5) an opening brief due in *United States v. Carlton Franklin*, No. 21-7051, in the Tenth Circuit, on December 29. Mr. Pavulak requests this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions described in this application.

9. For these reasons, Mr. Pavulak respectfully asks that an order be entered extending the time for filing a petition for certiorari to and including January 31, 2022.

Respectfully submitted:

December 2, 2021.

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