

IN THE SUPREME COURT  
OF THE UNITED STATES

**ORIGINAL**

**22-7655**

IN RE: BENJAMIN EDWARD BRADLEY,

CASE NO: tbd

Petitioner.

Supreme Court, U.S.  
FILED

FEB - 8 2023

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On Petition For A Writ Of Certiorari To  
The Sixth Circuit Court of Appeals  
Case No. 22-5580

PETITION FOR WRIT OF CERTIORARI

Benjamin Bradley  
pro se  
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QUESTION PRESENTED

1. Did the Court below err in determining that the petitioner's second-in-time §2255 motion was "second or successive?"

ANSWER: YES.

## JURISDICTION

The statutory preclusion of certiorari review of a "denial of an authorization by a court of appeals to file a second or successive application" under 28 U.S.C. §2244(b)(3)(E) applies only to an actual "denial," not some other type of ruling that might have "the effect of denying 'authorization ... to file a second ... application.'" Castro v. United States, 540 U.S. 375, 380 (2003) (emphasis and alterations in the original). Thus, for example, a circuit court's denial of a habeas corpus petitioner's or §2255 movant's argument that an application is not in fact "successive" is reviewable on certiorari, even though the circuit court's ruling "had the effect of denying 'authorization ... to file a second ... application.'" Id. As this Court explained in Castro, "[t]he 'subject' of ... [a certiorari] petition [in such a case] is not the Court of Appeals' 'denial of an authorization'" but rather the "very different question" of "the lower court's refusal to recognize that ... [the current] §2255 motion is [the movant]'s first, not his second." Id.

Castro applies here. Bradley does not contest the lower court's denial of authorization of a "second or successive petition." Bradley contests the lower court's finding that his petition was "second or successive, and not "second-in-time," the later being a classification that would have allowed him to proceed on the merits of his §2255 application in the district court.

Bradley filed a separate Motion for Remand with the Court of Appeals arguing that his §2255 application was "second-in-time," not "second or successive," a finding that would have precluded review under §2255(h), and required the district court to review his application in its merits. But the Court of Appeals denied Bradley's motion, spending the bulk of its decision analyzing "whether Bradley's proposed §2255 motion is second or successive," In re: Benjamin Henry Bradley, 2022 U.S. App. LEXIS 31531, at \*4 (6th Cir. 2022). See APPENDIX A.

Thus, Bradley's question is reviewable on certiorari.

### REASONS FOR GRANTING THE PETITION

Plainly stated, the petitioner argued that his second in time §2255 petition was not "second or successive" and, consequently, not subject to authorization by the Court of Appeals under §2255(h) because (1) it was filed in a timely manner under §2255(f)(1), and (2) because, had the district court properly dismissed his first §2255 motion, the §2255 motion here would have never been his "second."

The Court of Appeals denied the petitioner's claims, reasoning that (1) the petitioner was required to file his §2255 motion within one year of the factual basis of his claims, specifically the alleged deficient actions of his attorneys, and (2) the petitioner failed to cite authority that required the district court to dismiss his first §2255 motion. However, the petitioner contends that both of the lower court's reasons used to determine that his second-in-time §2255 motion was a "second or successive motion" subject to §2255(h) were in error.

#### I. THE CIRCUIT COURT ERRED WHEN IT DETERMINED THE PETITIONER'S SECOND-IN-TIME §2255 PETITION WAS "SECOND OR SUCCESSIVE"

##### A. The determination of ripeness by the court below was a prejudicial error

The court below actually began its analysis with an authority that supported Bradley's claim: "A claim is not second or successive 'where ripeness prevented, or would have prevented, a court from adjudicating the claim in an earlier petition.'" In re: Benjamin Henry Bradley, 2022 U.S. App. LEXIS 31531, at \*4 (6th Cir. 2022) (APPENDIX A) (citing In re: Coley, 871 F.3d 455, 457 (6th Cir. 2017)).

However, the lower court then incorrectly determined that "Bradley's proposed claims were ripe for adjudication in his first §2255 motion ... giving him an adequate opportunity to raise his claims in his first §2255 motion." Id.

This conclusion by the lower court constitutes an erroneous and prejudicial finding of fact. In order for an ineffective assistance of counsel claim in a §2255 motion to be successful, the movant must show deficient performance of counsel

and that said deficient performance caused prejudice. Strickland v. Washington, 466 U.S. 668, 669 (1984). Thus, a §2255 ineffective assistance of counsel claim, such as those made by Bradley in his second §2255 motion can not be "ripe" until the Judgment has been finalized.

While it is true that the facts underlying the ineffective assistance of counsel claims in Bradley's second §2255 motion (ie: the deficient performance of counsel) occurred before he filed his first §2255 motion on July 29, 2019, the new ineffective of assistance of counsel claims in his second §2255 motion related only to the forfeiture portion of his sentence which wasn't finalized until the Supreme Court denied certiorari in 2021. Bradley v. United States, 141 S. Ct. 2763, 210 L. Ed. 2d 909 (2021).

Fundamentally, counsel can only be shown to be ineffective if the outcome of the disputed legal performance was adverse to the defendant. At the time he filed his first §2255 motion, the outcome of the forfeiture portion of his sentence was still under review, and thus, Bradley had no reason to challenge the forfeiture order in his first §2255. Moreover, his first §2255 motion was disposed of on March 17, 2020, over a year before the forfeiture judgment became final, and therefore Bradley not only had no "adequate opportunity to raise his claims in his first §2255 motion," he had no opportunity to raise these claims in the first §2255 motion because it was decided well before there was a controversy.

Said another way, had Bradley included his ineffective assistance of counsel regarding forfeiture claims in his first §2255 motion, the district court would have dismissed them because he would not have been able to show prejudice until the forfeiture judgment was final. Moreover, had Bradley ultimately won any of his appellate or Supreme Court challenges to his forfeiture judgment, there simply would have been no prejudice resulting from his attorneys' earlier performances.

So, in fact, Bradley's claims were "not second or successive" because "ripeness prevented a court from adjudicating the claim[s] in an earlier petition." Coley, supra.

B. The use of "ripeness" to determine the timeliness of Bradley's §2255 petition was an error of law by the lower court

According to statutory law, Bradley's second §2255 motion was timely because it was filed within one year of the judgment becoming final. Adopting the government's opposition argument, the court below determined that Bradley's second §2255 motion was "second or successive" because it was filed over a year after its "factual basis," in other words a year after the alleged deficient performance of counsel. But this conclusion, although supported by circuit authority cited by the lower court, is in direct contradiction to the statute.

28 U.S.C. §2255(f) controls the timeliness of §2255 motions, and states in relevant part:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final,  
[or]

[...]

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Notably, this statute makes no distinction between first and second §2255 motions. Thus, the plain language of this controlling federal statute has equal force whether applied to a "first" §2255 motion or a "second" §2255 motion. As a result, a second-in-time §2255 motion is not "second or successive" based on its timing if it fulfills the latest of any of the four enumerated conditions. While the government and the lower court are correct that Bradley filed his second §2255 motion well over a year after the asserted factual basis of his claims, it is undisputed that he filed his second §2255 motion within 365 days of "the date on which the judgment of conviction bec[ame] final," which came later.

Ultimately, because Bradley asserted ineffective assistance of counsel regarding

forfeiture claims in his second §2255 that were not available to him in his first §2255 (because he had not yet been prejudiced), and because he filed his second §2255 motion in a timely fashion under controlling statute (§2255(f)), Bradley's second in-time §2255 motion was not "second or successive" and thus not subject to authorization by the Court of Appeals under §2255(h).

Thus, the lower court's determination that his second §2255 motion was "second or successive" must be VACATED, and his §2255 motion must be REMANDED to the district court for consideration on its merits.

## II. THE CIRCUIT COURT ERRED IN DETERMINING THE THE DISTRICT COURT WAS NOT REQUIRED TO DISMISS HIS FIRST §2255 AS PREMATURE

In his Motion to Remand before the circuit court, Bradley also argued that the district court should have dismissed his first §2255 motion as premature, and but for the district court's error, the acceptance of Bradley's instant §2255 motion would have never been in question.

The court below seems to dismiss this argument based only on the fact that Bradley did not "identify any authority" supporting his assertion. In total:

Bradley also argues that the district court was required to dismiss his first §2255 motion as premature, rather than deciding it on the merits, because direct review of the amended judgment was not yet complete. But Bradley has not identified any authority establishing that the district court was required to dismiss his motion or that the district court's order was otherwise invalid.

In re: Bradley, supra at \*5

Bradley concedes that he failed to include the well-established circuit authority underlying his claim. See, Capaldi v. Pontesso, 135 F.3d 1122 (6th Cir. 1998):

[T]he district court is precluded from considering a §2255 motion during the pendency of a direct appeal unless extraordinary circumstances exist.

This holding remains binding on the district court to this day. Yet, the district court did exactly that-- considered Bradley's first §2255 motion while his direct

appeal was pending, without citing an "extraordinary circumstances."

The circuit court's stance on this question is puzzling, and risks setting a dangerous, if not perverse, precedent. Certainly, a movant, particularly a movant proceeding pro se, cannot be required to identify the proper authority to have his argument considered on the merits. And even more certainly, a court cannot rule contrary to its own authority simply because a litigant failed to cite the underlying case. As here, either scenario constitutes a manifest injustice.

Had the district court followed circuit authority, it would have dismissed the first §2255 motion, and there would be no controversy regarding the filing of this "second" motion, because it would now be "first." Had the circuit court properly identified the district court's error and the resulting prejudice to Bradley, it should have remedied the error by remanding his §2255 to the district court because it was not truly "second ☐ or successive."

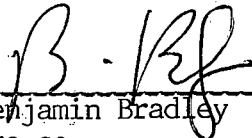
#### CONCLUSION

The circuit court's determination that Bradley's second-in-time §2255 motion was "second or successive" was marred by errors in fact-finding and application of the law resulting in prejudice against the defendant-- the dismissal of his motion.

WHEREFORE, Benjamin Bradley, pro se petitioner, respectfully requests that this Honorable Court GRANT this petition, VACATE the circuit court's determination that his instant §2255 motion is "second or successive," and REMAND the instant §2255 motion/proceeding back to the district court for consideration on the merits.

Respectfully Submitted,

Date: 2-11-23

  
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pro se