

No. 17-8292

IN THE SUPREME COURT OF THE UNITED STATES

DAVID VELASCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly denied petitioner a certificate of appealability, where his motion for collateral relief under 28 U.S.C. 2255 -- which challenged only the calculation of his advisory Sentencing Guidelines range -- had been dismissed as untimely.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. B1-B2) is unreported.¹ The order of the district court (Pet. App. D1-D2) is unreported. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 323 Fed. Appx. 380.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2017. A petition for rehearing was denied on December 14,

¹ This brief refers to the petition appendices as if they were consecutively paginated.

2017 (Pet. App. A1-A3). The petition for a writ of certiorari was filed on March 14, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to possess with intent to distribute more than 1000 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), and 846. Judgment 1. He was sentenced to 262 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals dismissed his appeal. 323 Fed. Appx. 380. Seven years after his conviction became final, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, which the district court dismissed as untimely. Pet. App. D1-D2. The court denied petitioner a certificate of appealability (COA). Id. at D2. The court of appeals likewise denied a COA. Id. at B1-B2.

1. In 2005 and 2006, petitioner was part of a large-scale marijuana importation and distribution ring linked to the Texas Mexican Mafia. Presentence Investigation Report (PSR) ¶¶ 4-45. He was indicted on conspiracy and distribution charges and pleaded guilty to the conspiracy charge, pursuant to a written plea agreement. PSR ¶¶ 1-2.

Petitioner had two prior convictions for drug offenses in Texas state court, one each for delivery of cocaine and marijuana,

both in violation of Texas Health & Safety Code Ann. § 481.112(a) (West 1989). PSR ¶¶ 61, 65, 67. The district court accordingly determined that petitioner qualified as a career offender under Section 4B1.1 of the advisory Sentencing Guidelines, which prescribed a higher advisory sentencing range for defendants who, inter alia, are convicted of a felony "controlled substance offense" after two prior convictions for such offenses. Sentencing Guidelines § 4B1.2(b) (2007); PSR ¶ 60. Application of Section 4B1.2 raised petitioner's total offense level from 26 to 34, and his criminal history category from IV to VI. PSR ¶¶ 60, 61, 63, 70. That, in turn, raised his advisory Guidelines range from 120-155 months to 262-327 months of imprisonment.² The district court imposed a low-end Guidelines sentence of 262 months.

Petitioner's counsel filed a brief with the court of appeals pursuant to Anders v. California, 386 U.S. 738 (1967). Finding "no nonfrivolous issue for appeal," the court granted counsel's motion to withdraw and dismissed the appeal. 323 Fed. Appx. 380. Petitioner did not file a petition for a writ of certiorari, and his conviction became final on July 29, 2009.

2. On November 14, 2016, more than seven years after his conviction became final, petitioner filed a pro se motion under 28 U.S.C. 2255 seeking to reduce his sentence. D. Ct. Doc. 415. Petitioner contended that the Fifth Circuit's August 2016 decision

² Petitioner's offense of conviction carried a ten-year statutory minimum sentence.

in United States v. Hinkle, 832 F.3d 569, rendered his career-offender enhancement inappropriate. D. Ct. Doc. 415, at 4. In Hinkle, the Fifth Circuit held -- in a case on direct review -- that Texas Health & Safety Code Ann. § 481.112(a) (West 2009) is too broad to categorically qualify as a "controlled substance offense," is not divisible into separate offenses that might individually qualify, and therefore "cannot serve as a predicate offense under the Career Offender Guideline." 832 F.3d at 577.

The district court dismissed petitioner's motion. Pet. App. D1-D2. The court found the motion untimely under 28 U.S.C. 2255(f). Id. at D1. Petitioner acknowledged that he was "well past the one-year limitation set forth in section 2255(f)(1)," which begins to run when the conviction becomes final. Ibid. And the court determined that Section 2255(f)(3) -- which allows a motion to be filed within one year from "the date on which the right asserted was initially recognized by the Supreme Court * * * and made retroactively applicable to cases on collateral review" -- did not apply because petitioner relied only on Hinkle, which is not a decision of this Court. Ibid. The district court also denied a COA. Id. at D2.

3. The court of appeals similarly denied a COA. Pet. App. B1-B2. The court explained that, in order to receive a COA, a movant must show the denial of a constitutional right. Id. at B2. The court further explained that where the district court denies relief on a procedural ground, the movant must show that "jurists

of reason would find * * * debatable" both the procedural ruling and the underlying claim of the denial of a constitutional right. Ibid. (citation omitted) And the court determined, citing Section 2255(f) and circuit precedent applying it, that petitioner "ha[d] not made the requisite showing." Ibid.

ARGUMENT

Petitioner renews his claim (Pet. 8-19) that United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016), requires a reduction in his sentence. The district court correctly found petitioner's Section 2255 motion untimely, and the court of appeals correctly denied him a COA. The decision below does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals properly denied petitioner a COA. To obtain a COA, a movant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). When the district court denies the motion on procedural grounds, the movant must also show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). The court of appeals correctly identified that standard, Pet. App. B2, and petitioner cannot satisfy either element of it.

a. Petitioner's motion was not timely under 28 U.S.C. 2255(f)(3) because it did not rely on a retroactive right "initially recognized by the Supreme Court" within one year of his

filing. Petitioner's motion cited only Hinkle. D. Ct. Doc. 415, at 4. In his memorandum in support of the Section 2255 motion, petitioner contended that "Hinkle establishe[d] a new substantive rule [of] controlling Fifth Circuit law that was previously unavailable." D. Ct. Doc. 416, at 4-5 (Nov. 14, 2016). As the district court correctly observed, Hinkle is not a decision of this Court and thus petitioner's reliance on it does not satisfy Section 2255(f)(3). Pet. App. D2.

Hinkle applied this Court's then-recent decision in Mathis v. United States, 136 S. Ct. 2243 (2016), to the Texas drug-delivery statute. But even construing petitioner's motion as based on Mathis, rather than Hinkle, it would still be untimely. Mathis, although a decision of this Court, did not "initially recognize[]" any right, Dodd v. United States, 545 U.S. 353, 358-359 (2005), but merely clarified an old rule. The Court in Mathis was clear that its approach to the classification of prior convictions as predicates for a sentence enhancement was compelled by longstanding precedent. See 136 S. Ct. at 2247 ("For more than 25 years, our decisions have held that the prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense."); id. at 2251 (concluding that, "[u]nder our precedents," the admitted overbreadth of the Iowa burglary statute at issue "resolves this case"); ibid. ("Taylor v. United States, 495 U.S. 575 (1990)) set out the essential rule governing ACCA cases more than a quarter

century ago. * * * That simple point became a mantra in our subsequent ACCA decisions."); id. at 2257 ("Our precedents make this a straightforward case.").

In particular, Mathis relied heavily on the reasoning of this Court's 2013 decision in Descamps v. United States, 570 U.S. 254. See Mathis, 136 S. Ct. at 2253-2257. Indeed, the appellant in Hinkle initially challenged his sentence by "[c]iting the Supreme Court's decision in Descamps," as opposed to Mathis. See Hinkle, 832 F.3d at 571-574. Petitioner here has not attempted to show that he was unable to bring a similar challenge to his sentence, at the latest, within one year of Descamps. Because petitioner accordingly did not identify any new right initially recognized by this Court within one year of filing his petition, the petition was untimely. The district court thus correctly denied the petition, and the court of appeals correctly denied a COA.

b. In addition, petitioner also has not met the separate requirement of a "substantial showing of the denial of a constitutional right" to obtain a COA under 28 U.S.C. 2253(c)(2). His underlying claim does not assert a constitutional violation, but instead asserts that his advisory Sentencing Guidelines range was inappropriately enhanced -- a claim that is not even cognizable under Section 2255.

To the extent that a claim of error not premised on the Constitution itself may present constitutional concerns, that is not the case here. Rather, this case involves a type of claim

that cannot provide the basis for collateral relief. To obtain relief on a claim that a sentence “was imposed in violation of the * * * laws of the United States,” 28 U.S.C. 2255(a), a movant asserting a non-constitutional error must show “a fundamental defect which inherently results in a complete miscarriage of justice.” United States v. Timmreck, 441 U.S. 780, 783 (1979) (citation omitted); see Hill v. United States, 368 U.S. 424, 428 (1962). Every court to have considered the issue agrees that misapplication of the advisory career-offender Guidelines does not satisfy that demanding standard. See United States v. Foote, 784 F.3d 931 (4th Cir.), cert. denied, 135 S. Ct. 2850 (2015); Spencer v. United States, 773 F.3d 1132, 1138-1144 (11th Cir. 2014) (en banc), cert. denied, 135 S. Ct. 2836 (2015); Hawkins v. United States, 706 F.3d 820 (7th Cir. 2013), opinion supplemented by 724 F.3d 915 (7th Cir. 2013), cert. denied, 571 U.S. 1197 (2014); cf., e.g., Sun Bear v. United States, 644 F.3d 700, 704-706 (8th Cir. 2011) (en banc) (reaching the same conclusion regarding the mandatory Guidelines); United States v. Mulay, 642 Fed. Appx. 853, 855 (10th Cir.), cert. denied, 137 S. Ct. 371 (2016) (same).

Although the applicable Guidelines range provides direction for the sentencing court, the court is bound not by the Sentencing Commission’s range, but by the statutory obligation to impose a sentence that falls within the statutory limits and is sufficient but not greater than necessary to achieve the purposes of sentencing. See 18 U.S.C. 3553(a); see also Mistretta v. United

States, 488 U.S. 361, 396 (1989) (explaining that the Guidelines do not usurp "the legislative responsibility for establishing minimum and maximum penalties for every crime," but instead operate "within the broad limits established by Congress"). An error in applying the Guidelines -- whether in the career-offender context or in the context of any other Guidelines enhancement -- is therefore not a fundamental defect that results in a complete miscarriage of justice warranting collateral relief. The finality of sentences would be substantially undermined if every defendant asserting any Guidelines error could claim that his sentence is fundamentally defective and warrants reopening.³

The advisory nature of the Guidelines reinforces the conclusion that challenges to their application do not result in a complete miscarriage of justice. See United States v. Booker, 543 U.S. 220, 245 (2005). While the sentencing court must give "respectful consideration to the Guidelines," Kimbrough v. United

³ This Court's decision in United States v. Addonizio, 442 U.S. 178 (1979), is instructive. There, the Court held that a claim of sentencing error based on the Parole Commission's post-sentencing adoption of its release guidelines, which did not comport with the sentencing court's prior expectation about how long the defendant would actually serve in custody, did not present a fundamental error cognizable under Section 2255. Id. at 186-187. The Court explained that the actual sentence imposed was "within the statutory limits" and that the error "did not affect the lawfulness of the judgment itself." Ibid. Although Addonizio predates the Sentencing Guidelines, its reliance on the fact that the actual sentence was "within the statutory limits" supports the conclusion that an error in applying the advisory Guidelines does not result in a complete miscarriage of justice cognizable under Section 2255.

States, 552 U.S. 85, 101 (2007), a sentencing court “may not presume that the Guidelines range is reasonable,” Gall v. United States, 552 U.S. 38, 50 (2007); it may vary from the advisory range “based on appropriate consideration of all of the factors listed in [Section] 3553(a), subject to appellate review for ‘reasonableness,’” Pepper v. United States, 562 U.S. 476, 490 (2011) (quoting Gall, 552 U.S. at 51); and “[it] may in appropriate cases” vary from the advisory range “based on a disagreement with the [Sentencing] Commission’s views,” id. at 501. Although an error in the court’s calculation of the Guidelines range may affect the sentencing court’s exercise of its discretion, it does not alter the statutory limits within which the discretion exists or the court’s basic obligation under Section 3553(a).

Here, the sentencing court possessed the statutory authority and the legal discretion to impose the sentence it did. It accordingly did not commit any error cognizable on collateral review, or any constitutional error that could provide the predicate for a COA.

2. Petitioner asserts (Pet. 20-22) that this Court should grant certiorari to make clear that Mathis applies to cases on collateral review. But as explained above, the correctness of the decision below does not depend on any determination about that issue. And petitioner identifies no decision suggesting that any circuit would grant collateral relief, or a COA, in the circumstances of this case. None of the cases cited by petitioner

involved either a timeliness question under 28 U.S.C. 2255(f)(3) or a challenge to the application of the advisory sentencing Guidelines on collateral review. See Holt v. United States, 843 F.3d 720 (7th Cir. 2016) (considering the standard to file a second or successive motion for collateral review under 28 U.S.C. 2255(h)(2)); In re Rice, No. 16-16668 (11th Cir. Nov. 16, 2016) (same); In re Conzelmann, 872 F.3d 375 (6th Cir. 2017) (considering a challenge to application of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), not the Sentencing Guidelines); Box v. Krueger, No. 16-cv-1299, 2016 WL 6651282, at *2-*3 (C.D. Ill. Nov. 10, 2016) (same); United States v. Tanksley, 848 F.3d 347 (5th Cir. 2017) (considering application of the career-offender Guideline on direct review, not collateral review).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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