

25-5674

No. 25-

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SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

ORIGINAL

BYRON NEAL,

Petitioner-Appellant,

v.

WARDEN, FCI TERMINAL ISLAND,

Plaintiff-Appellee.

*On Petition for a Writ of Certiorari to the United States
Court of Appeals For The Ninth Circuit*

PETITION FOR A WRIT OF CERTIORARI

BYRON NEAL
REG. NO. 30456-034
FCI TERMINAL ISLAND
FEDERAL CORR. INSTITUTION
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APPEARING *PRO SE*

QUESTIONS PRESENTED

- I. Whether the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) erred in construing Neal’s Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2241 (“§ 2241 Petition”) as a Second or Successive Motion under 28 U.S.C. § 2255, despite its proper invocation of the § 2255(e) savings clause.
- II. Whether the denial of a certificate of appealability (COA) was improper where Neal was not required to obtain a COA for a § 2241 Petition, and where the petition raised a substantial constitutional question regarding the legality of detention.

PARTIES TO THE PROCEEDINGS

Petitioner-Appellant, BYRON NEAL (“Neal”), was a criminal defendant in the United States District Court for the Eastern District of Louisiana, New Orleans Division, in USDC Criminal No. 2:07-cr-00425-CJB-ALC-1; and as Appellant in the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) in USCA No. 24-5317. Respondent, WARDEN, FCI Terminal Island, was the Plaintiff in the District Court and Appellee in the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

ORDER BELOW

The Order of the United States Court of Appeals for the Ninth Circuit is non-published, *WARDEN, FCI Terminal Island v. BYRON NEAL*, No. 24-5317 (9th Cir. 2025), is attached in the Appendix at 1A.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 31, 2025. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254, in its pertinent part, provides:

“(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

STATEMENT OF THE CASE

A. Procedural Background

On February 5, 2009, a grand jury sitting in the United States District Court for the Eastern District of Louisiana, returned a five (5) count Superseding Indictment charging Neal and a co-defendant, Shad Neal. See Doc. 52.¹ Counts 1s -2s charged Neal with Distribution of Fifty Grams or More of Cocaine Base, in violation of 21 U.S.C. §§ 841 (a)(1) and (b)(1)(A). *Id.* Count 3s charged Neal with Possession with Intent to Distribute a Quantity of Cocaine Base, in violation of 21 U.S.C. §§ 841 (a)(1) and (b)(1)(C). *Id.* Count 4s charged Neal with Conspiracy to Murder CS-07-126261, a Person Assisting the United States Drug Enforcement Administration, in violation of 18 U.S.C. §§ 1111, 1114, and 1117. *Id.* Count 5s charged Neal with Tampering with a Witness or Informant, in violation of 18 U.S.C. § 1512(a)(1)(A). *Id.* Neal was also mentioned in a Notice of Forfeiture, in violation of 21 U.S.C. § 853. *Id.*

On July 11, 2011, the government filed a

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“Doc.” refers to the Docket Report in the United States District Court for the Eastern District of Louisiana in Criminal No. 2:07-cr-00425-CJB-ALC-1, which is immediately followed by the Docket Entry Number. “PSR” refers to the Presentence Report in this case, which is immediately followed by the paragraph (“¶”) number.

Superseding Bill of Information to establish prior conviction pursuant to 21 U.S.C. § 851. See Doc. 193.

On July 18, 2011, a Re-arraignment was held and Neal pleaded guilty as to Counts 1s through 5s of the Superseding Indictment without a written Plea Agreement. See Doc. 196.

On July 19, 2011, Neal filed a Motion to Withdraw Plea of Guilty. See Doc. 204.

On October 27, 2011, Neal was sentenced to a total term of 360 months of Imprisonment, 5 years Supervised Release, no Fine or Restitution, and a Mandatory Special Assessment Fee of \$500. See Docs. 219 & 223.

On October 29, 2011, Neal timely filed a Notice to Appeal. See Doc. 221.

On January 28, 2013, the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”) affirmed Neal’s sentence and conviction. See Doc. 249.

On May 21, 2013, Neal filed a Petition for Writ of Certiorari. No Doc. Entry.

On October 7, 2013, the Supreme Court denied Neal’s Petition for Writ of Certiorari. See Doc. 256.

On October 8, 2014, Neal filed a Motion to Vacate, Set Aside, or Correct Sentence under U.S.C. § 2255 (“§ 2255 Motion”). See Doc. 259.

On March 6, 2015, the government dismissed Neal’s § 2255 Motion. See Doc. 268.

On March 31, 2015, Neal filed a Notice of Appeal with regard to the dismissal of his § 2255 Motion. See Doc. 269.

On March 8, 2016, the Fifth Circuit denied Neal’s Certificate of Appealability. See Doc. 280.

On June 27, 2016, Neal filed a § 2255 Motion, which was denied on May 24, 2017. See Docs. 281, 300, 302.

On June 13, 2017, Neal filed a Notice of Appeal re: Denial of his § 2255 Motion. See Doc. 303.

On September 6, 2017, the Fifth Circuit denied Neal a Certificate of Appealability since he has not made the requisite showing. See Docs. 310, 313.

On August 6, 2018, Neal filed a Motion to Reduce Sentence re: USSC Amendment, which was denied on March 11, 2020. See Docs. 314, 317, 327. Neal appealed the Order, however, the Fifth Circuit further affirmed this Court's Judgment. See Docs. 328, 396.

B. Statement of the Relevant Facts

1. Offense Conduct

Beginning in July 2007, law enforcement officials (“LEO”), with the cooperation of a confidential source (“CS”), began an investigation into the suspected cocaine base distribution activities of Byron Neal. LEO assigned the CS a registration number of CS-07-126261. During the investigation, the CS conducted two purchases of cocaine base from the defendant. The purchases of cocaine base were conducted by the CS on July 18, 2007, and October 29, 2007. See PSR ¶ 15.

On July 18, 2007, the CS spoke with the defendant in a recorded telephone conversation, in which the defendant agreed to sell the CS two and one-half ounces of cocaine base for \$1,700. The CS arranged to meet with the defendant at a Circle K store in Hammond, Louisiana, to complete the transaction. Later on the same date, the CS was given \$1,700 in government funds, and was equipped with a recording device. LEO conducted surveillance as the CS drove to the Circle K store, and parked at a car wash behind the store. LEO observed the defendant, driving a Chevrolet Malibu automobile, arrive at the location. The CS entered the passenger side of the defendant's vehicle, and purchased cocaine base with a net weight of 55.2 grams from him for \$1,700. 55.2 grams of cocaine base (Byron Neal). See PSR ¶ 16.

On October 29, 2007, the CS again spoke with the defendant in a recorded telephone conversation, in which the defendant agreed to sell the CS two and one-fourth ounces of cocaine base for \$1,700. The CS arranged to meet with the defendant at a Chevron gas station on Wardline Road in Hammond, Louisiana, to complete the transaction. Later on the same date, the CS was given \$1,700 in government funds, and was equipped with a recording device. LEO conducted surveillance as the CS drove to the Chevron Station. LEO observed the defendant, driving a Mazda 626 automobile, arrive at the location. The CS entered the passenger side of the defendant's vehicle, and purchased cocaine base with a net weight of 51.2 grams from him for \$1,700. * 51.2 grams of cocaine base (Byron Neal). See PSR ¶ 17.

LEO continued their surveillance on the defendant as he returned to his residence, an apartment in a complex on West Lee Hughes Road, in Hammond, Louisiana. Later on October 29, 2007, LEO obtained and executed a search warrant for the residence, and any vehicles located at the residence. During the search of the apartment, LEO recovered \$1,769 from the defendant's pants pocket, of which \$1,700 was identified as the government funds used by the CS to purchase cocaine base from the defendant. LEO also searched the Mazda automobile driven by the defendant, and found a plastic bag in the armrest, which contained cocaine base with a net weight of 2.3 grams. * 2.3 grams of cocaine base (Byron Neal). See PSR ¶ 18.

Byron Neal was arrested in Hammond, Louisiana, on a federal warrant on December 13, 2007. See PSR ¶ 19.

Following the arrest of Byron Neal, it became clear that the defendant was unwilling to enter into a plea agreement with the government, whereupon the government and the defense began preparing for trial, which was set for February 17, 2009. In the days leading up to February 17, 2009, LEO received information from a confidential source (hereinafter described as CS-1), that

Byron Neal was seeking to have CS-07-12626 (hereinafter described as CS-2), killed prior to February 17, 2009, in order to prevent CS-2 from testifying against the defendant at trial. LEO learned of the defendant's plan on January 26, 2009. See PSR ¶ 20.

LEO spoke with CS-I, and learned that Byron Neal was negotiating with a cooperating defendant to hire a hit man to kill CS-2. LEO spoke with the cooperating defendant regarding the threat and the plan being formulated by Byron Neal to kill CS-2 prior to the trial date. According to the cooperating defendant, Byron Neal contacted his brother Shad Neal on January 25, 2009, to enlist Shad Neal's assistance in the murder plot. LEO obtained a copy of the recorded telephone call from the Orleans Parish Prison between Byron Neal and Shad Neal on January 25, 2009. The recorded conversations corroborated the information provided by the cooperating defendant regarding Byron Neal's desire to have CS-2 killed before the trial date. See PSR ¶ 21.

The following telephone conversations involving Shad Neal, Byron Neal, and an unidentified female were recorded by LEO on January 25, 2009. See PSR ¶ 22.

Byron Neal discussed his plan to murder CS-2 with an unknown female and Shad Neal. During this recorded conversation Bryon Neal, who was incarcerated in the Orleans Parish Prison, asked the female: "Is Boogie over there? ... I need to talk to him about something very important." In explaining why he needed to speak to Shad Neal, Byron Neal further stated to the female, "you want me to come home? ... That little problem, you know, ...somebody, my peeps, got to take care of it. That's the only way." Byron Neal further inquired about his ability to borrow two to three thousand dollars from the female when he asked "you gonna lend me two or three? ... I just want to make sure before I lock the deal." Finally, Byron Neal told the female "I got to do, what I got to do" and that he "can't take no chances." See PSR ¶ 23.

During the same recorded conversation involving Byron Neal after the female handed the telephone to Shad Neal, Byron Neal asked Shad Neal: "What's his name still running around?" To which Shad Neal replied "Yeah," Later in the conversation, Byron Neal stated to Shad Neal, "I got someone to holler at you." and "it's gonna be three (referring to the price to have CS-2 killed.)" When Shad Neal inquired "When you going back to court?" Byron Neal replied, "My trial is February 17th. Yeah, see what I am saying?" During this conversation with Shad Neal, Byron Neal added "I got to do something." "Thirty years I am looking at." This conversation also included a discussion contemplating Byron Neal providing a third party Shad Neal's cellular telephone number to arrange a future meeting between Shad Neal and a third party Byron Neal and Shad Neal believed would kill C-2 for payment. See PSR ¶ 24.

On January 26, 2009, LEO told the cooperating defendant to introduce a Task Force Agent ("TFA") as a hit man willing to carry out the contract to kill CS-2. The TFA was contacted by the cooperating defendant from the Orleans Parish Jail. The cooperating defendant, as instructed by LEO, allowed Byron Neal to talk to the TFA regarding the murder for hire plot. During this recorded conversation, Byron Neal provided the TFA with a contact number for Shad Neal. The TFA contacted Shad Neal, and arranged for a meeting on January 27, 2009 to negotiate the terms of the murder for hire plot. See PSR ¶ 25.

On January 27, 2009, the TFA made arrangements to meet Shad Neal in Hammond, Louisiana. The purpose of this meeting was to further negotiate the terms of the murder for hire contract. The telephone calls between the TFA and Shad Neal were recorded by LEO. See PSR ¶ 26.

Later on January 27, 2009, Shad Neal and the TFA met at the Race Trac Gas Station located on Highway 51 in Hammond, Louisiana. The TFA was equipped with an audio and video recording device during the meeting. Shad Neal was observed by surveilling LEO as he entered the

TFA's vehicle. While inside the vehicle, Shad Neal discussed the murder of CS-2. Shad Neal provided the name of CS-2 to the TFA and told him they needed CS-2 "taken care of." Shad Neal agreed to provide the TFA with \$5,000 in United States currency as a down-payment for carrying out the killing of CS-2. He agreed to provide down-payment on January 30, 2009. Shad Neal then showed the TFA several locations that CS-2 frequented in Ponchatoula, Louisiana. See PSR ¶ 27.

On the same date, the TFA and Shad Neal traveled to a residence on Lavigne Drive in Ponchatoula, Louisiana. While at this residence, Darryl Neal (true name, Darrell White), Shad Neal's brother, entered the TFA's vehicle, along with Shad Neal. At that time, Darryl Neal directed Shad Neal and the TFA to CS-2's residence. Darryl Neal pointed the residence at 193 Bernice Drive in Ponchatoula, Louisiana to the TFA. Darryl Neal also told the TFA that CS-2 was employed as a security guard at the bowling alley in Hammond, Louisiana. The TFA then drove Darryl Neal back to his (Darryl Neal's) residence. The TFA and Shad Neal returned to the Race- Trac Gas Station in Hammond, Louisiana, where Shad Neal instructed the TFA to follow him (Shad Neal) to the bowling alley in Hammond, Louisiana. While at the bowling alley, Shad Neal and the TFA were unable to locate CS-2. The negotiations for the murder of CS-2 continued, and Shad Neal made arrangements to meet with the TFA on January 30, 2009, to provide the down-payment. The TFA and Shad Neal then left the bowling alley. See PSR ¶ 28.

Shortly after leaving the bowling alley on January 27, 2009, Shad Neal was stopped by the Hammond Police Department for a traffic violation. During the traffic stop, LEO arrived and placed Shad Neal under arrest for conspiracy to murder a person assisting the United States Drug Enforcement Administration. See PSR ¶ 29.

After he arrived at the Tangipahoa Parish Sheriffs Office, Shad Neal was interviewed by LEO. Shad Neal voluntarily stated that he was contacted by his brother,

Byron Neal, who asked him to assist in the killing of CS-2. According to Shad Neal, he received a three way call from an individual identified as Jessica, whose last name was unknown to him ("LNU"), Byron Neal's girlfriend. During the three way call, Byron Neal told Shad Neal to "come to the house" so he (Byron) could talk to him. Once Shad got on the phone, Byron told Shad he needed Shad to do something for him. Byron told Shad that Jessica would give him (Shad) the money. It was during this conversation that Shad stated that he and Byron first discussed having CS-2 killed. Shad Neal indicated that he and Byron had several subsequent conversations regarding the killing of the CS-2, in which Byron told Shad that it (the killing) was urgent and time was of the essence. Shad Neal stated that he was told by Byron to show the TFA where CS-2 resided, and then provide the TFA with the downpayment for the murder of CS-2. See PSR ¶ 30.

According to Shad Neal, Byron wanted to murder CS-2 in order to prevent CS-2 from testifying against him (Byron) on February 17, 2009. Shad Neal provided written and verbal statements to LEO admitting his involvement in the plot to kill CS-2. LEO asked Shad Neal if Darryl Neal and Jessica LNU were aware of the plot to kill CS-2. Shad stated, "Everyone knew what the deal was." Shad further advised LEO that he (Shad) did not know where CS-2 lived; therefore, Darryl Neal had to show him how to locate CS-2. Additional investigation by LEO determined that there was insufficient evidence to charge Darryl Neal and Jessica LNU in connection with the instant offense. See PSR ¶ 31.

2. Plea Proceedings

On July 18, 2011, a Re-arraignment was held and Neal entered a guilty plea on Counts 1s through 5s of the Superseding Indictment without a written Plea Agreement. See Doc. 196.

The change of plea transcript, read in its entirety, shows that the district court did a thorough job confirming that Neal understood the consequences of his guilty plea,

the rights he was waiving by pleading guilty and that his guilty plea was free and voluntary. See Doc. 206. The district court addressed all the relevant subsections of Rule 11(b) before accepting Neal's guilty plea. In accepting Neal's guilty plea, the district court complied with Federal Rule of Criminal Procedure 11(b). Before accepting the guilty plea, the district court placed Neal under oath as required by Rule 11(b)(1). *Id.* The district court informed Neal that his answers should be truthful or he could face prosecution for perjury or making false statements as required by Rule 11(b)(1)(A), and that Neal could ask questions or confer with counsel at any time. *Id.* On multiple occasions, the district court confirmed Neal understood he had the right to plead not guilty and continue with his trial as required by Rule 11(b)(1)(B) and (C) and on each occasion Neal replied, "Yes sir," or that it was his desire to go forward with the guilty plea. *Id.* The district court confirmed with Neal that he understood his right to counsel and that he was satisfied with the representation he received as required by Rule 11(b)(1)(D). *Id.* The district court also confirmed that Neal understood his right to confront and cross examine witnesses, his right to remain silent, his right to subpoena witnesses and testify on his own behalf and that he was waiving those rights by pleading guilty as required by Rule 11(b)(1)(E) and (F) and Neal repeatedly acknowledged that he understood these rights. *Id.*

The district court also explained the nature of each charge in the superseding indictment as required by Rule 11(b)(1)(G). The minimum and maximum penalties as well as special assessments were explained to Neal as required by Rule 11(b)(1)(H) (I) and (L). *Id.* The role of the sentencing guidelines in the district court's sentencing decision was discussed with Neal as well as required by Rule 11(b)(1)(M). *Id.* The district court also confirmed that Neal was pleading guilty freely and voluntarily as required by Rule 11(b)(2). *Id.* Finally, Neal swore to the accuracy of a factual basis which set forth his criminal conduct for the guilty plea to Counts 1-5 of the superseding indictment as

required by Rule 11(b)(3). *Id.* Finally, on five separate occasions after his inquiry regarding the possibility of going to trial as to the conspiracy count, Neal affirmed his guilt as to all the counts, including Counts Four and Five, in the superseding indictment. *Id.*

On July 19, 2011, Neal filed a Motion to Withdraw Plea of Guilty. See Doc. 204.

3. Presentence Report Calculations

On October 8, 2008, the U. S. Probation Department issued a PSR, which counted the offense conduct from the government's case files and agents. See PSR ¶¶ 38-69. The PSR recommended a Base Offense Level of 26 on Counts 1s-3s of the Superseding Indictment pursuant to U.S.S.G. § 2D1.1. See PSR ¶ 40. However, the PSR recommended a Base Offense Level of 33 on Counts 4s-5s of the Superseding Indictment pursuant to U.S.S.G. § 2A1.5. See PSR ¶ 46. The offense level is enhanced four (4) levels because the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, pursuant to U.S.S.G. §2A1.5(b)(1). See PSR ¶ 47. The base offense level is increased by two (2) levels as Neal was a leader in criminal activity that involved fewer than five participants, pursuant to U.S.S.G. §3B 1.1(c). See PSR ¶ 49. Neal is considered a "career offender" because the instant offense is a felony involving a crime of violence, and Neal has at least two prior felony convictions of a controlled substance offense. In accordance with U.S.S.G. §4B1.1(b), the offense level is 37. However, the offense level computations for the counts of conviction result in a higher offense level of 39. See PSR ¶ 58. Neal's offense level was reduced by two (2) levels for the acceptance of responsibility. See PSR ¶ 59. Neal has a total of fourteen (14) criminal history points and a Criminal History Category of VI because he's a career criminal. See PSR ¶ 70. His Total Offense Level is 37 in Criminal History Category VI, which yielded an advisory Guideline range of 360 months to Life imprisonment. See PSR ¶ 117.

4. Sentencing Proceedings

At sentencing, on October 27, 2011, Neal was sentenced to a total term of 360 months of imprisonment as to counts 1s, 2s, 4s and 5s to be served concurrently with each other; and 240 months as to count 3s to be served concurrently with counts 1s, 2s, 4s and 5s. See Doc. 223. The Court ordered that Neal be placed in the following programs: 1) substance abuse treatment program; 2) mental health treatment program; and 3) vocational training program. *Id.*

Upon release from imprisonment, Neal shall be placed on supervised release for a term of 5 years as to counts 1s, 2s, 4s and 5s and 3 years as to count 3; all such terms to be served concurrently with each other. *Id.* The court imposed the mandatory and standard conditions of supervision with the additional special conditions that he participate satisfactorily in a treatment program relating to substance and/or alcohol abuse; mental health; and life skills. *Id.* Neal does not have the resources with which to pay a fine. Therefore, the Court waived the fine. The Court ordered payment of a mandatory special assessment fee of \$500. *Id.* at 23. A notice of appeal was filed on October 29, 2011. See Doc. 221.

5. Appellate Proceedings

On December 24, 2009, Neal argued the following on appeal: (1) whether the District Court violated Rule 11 of the Federal Rules of Criminal Procedure in accepting Neal's Guilty Plea to Counts 4s and 5s of the Superseding Indictment; (2) whether the District Court abused its discretion in denying Neal's Motion to Withdraw his Guilty Plea ; and (3) whether this Court's precedent in *United States v. Tickles*, 661 F.3d 212 (5th Cir. 2011), is binding in the absence of any Supreme Court opinion overruling it.

The Fifth Circuit affirmed the district court's denial of Neal's Motion to Withdraw his Guilty Pleas and affirmed the sentences imposed on Counts 1s, 2s, and 3s of the Superseding Indictment on January 28, 2013. See Doc.

249.

On May 21, 2013, Neal filed a Petition for Writ of Certiorari. No Doc. Entry.

On October 7, 2013, the Supreme Court denied Neal's Petition for Writ of Certiorari. See Doc. 256.

5. Postconviction Proceedings

On October 8, 2014, Neal filed a § 2255 Motion. See Doc. 259. In his motion, Neal asserts ineffective assistance of counsel led him to involuntarily and unknowingly plead guilty (Ground Two) and that his counsel ignored his desire for trial, misrepresented the consequences of his guilty plea and failed to argue Neal's claimed mental health issues. (Ground One). Finally, Neal urges that his 360 month sentence was grossly disproportionate to the crimes he was convicted of and did not take into account his mental health issues. (Ground Three). The government dismissed Neal's § 2255 Motion on March 6, 2015. See Doc. 268.

On March 31, 2015, Neal has moved for a certificate of appealability (COA) to appeal the denial of his § 2255 motion. Because Neal has failed to make the requisite showing, his motion for a COA was denied on March 8, 2016. See Doc. 280.

REASONS FOR GRANTING THE PETITION

As a preliminary matter, Neal respectfully requests that this Honorable Court be mindful that *pro se* litigants are entitled to liberal construction of their pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); and *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

I-II. The Ninth Circuit Erred in Construing Neal's § 2241 Petition as a Second or Successive Motion under 28 U.S.C. § 2255, Despite its Proper Invocation of the § 2255(e) Savings Clause; and the Denial of a COA Was Improper Where Neal Was Not Required to Obtain a COA for a § 2241 Petition, and Where the Petition Raised a Substantial Constitutional Question Regarding the Legality of Detention.

Neal contends that the Ninth Circuit abused its discretion when it denied his Motion for COA, for the following facts and reasons:

The Ninth Circuit's Order dated March 31, 2025, denying Neal's Motion for COA reads:

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and 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); see also 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Porter v. Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001) (order) (holding that a successive 28 U.S.C. § 2255 motion disguised as a 28 U.S.C. § 2241 petition requires a certificate of appealability). Any pending motions are denied as moot. DENIED. See Appendix at 1A.

In his Motion for a COA, Neal raises the issue: Whether jurists of reason could debate that the district court erred in summarily dismissing Neal's § 2241 Petition for lack of jurisdiction.

COA: Standard of Review

A COA will issue only if the requirements of 28 U.S.C. § 2253 have been satisfied. "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack, v. McDaniel*, 529 U.S. 473, 482 (2000); *Hohn v. United States*, 524 U.S. 236, 248 (1998). This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. Under the controlling standard, the Court must make a gateway examination of the district court's application of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), to Neal's constitutional claims, and, ask whether that resolution was debatable among jurists of reason or, for that matter, wrong.

When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. In other words, Neal must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n. 4 (1983)). Further, the decision whether to issue a COA calls for "an overview of the claims in the habeas petition and a general assessment of their merits". Neal need not prove that some jurists would ultimately grant the petition. Only that the question is debatable on his underlying claim(s) not the resolution of the debate. *Id.*

When a district court has dismissed a petition on procedural grounds, the reviewing court should apply a two-step analysis, and a COA should issue if Neal can show both: (1) “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling[;]” and (2) “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right[.]” *Slack*, 529 U.S. at 478.

The Question Presented by Neal Make a Substantial Showing of the Denial of Constitutional Rights as to Which Reasonable Jurists Can Differ. Thus, COA Under 28 U. S. C. § 2253 Must Be Issued.

A federal prisoner may attack the validity of his sentence in a § 2241 petition if he can meet the requirements of § 2255(e)’s savings clause. A petition for habeas corpus under 28 U.S.C. § 2241 must be filed in the district of confinement. See *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013). The District Court of Arizona has jurisdiction to hear a habeas corpus petition under 28 U.S.C. § 2241 because it is the closest U. S. District Court to where Neal is incarcerated.

In *United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018), the Fourth Circuit concluded that § 2255 is inadequate and ineffective to test the legality of a sentence when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner’s direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be

deemed a fundamental defect. See *Wheeler*, 886 F.3d at 429.

The Solicitor General, on behalf of the United States, filed a petition for a writ of certiorari challenging the holding in *Wheeler*. In the government's petition, the Solicitor General wrote that “[t]he government recognizes that adherence to the statutory text [of § 2255(h)] may lead to harsh results in some cases[,]” and explained that “[t]he Department of Justice is working on efforts to introduce legislation that would enable some prisoners to benefit from the later-issued, non-constitutional rules announced by [the Supreme] Court. See Gov't. Petition For a Writ of Certiorari at 22-23, *United States v. Wheeler*, (No. 18-420) (Oct. 3, 2018). On March 18, 2019, the U. S. Supreme Court in an Order denied certiorari in *Wheeler*. As such, the high Court denied the Solicitor General's challenge to *Wheeler* and *Wheeler* is now final.

Here, Neal raised legitimate arguments that § 2255 was “inadequate or ineffective” to test the legality of his detention, as permitted under the savings clause of § 2255(e). Jurists of reason could—and indeed, in other circuits, have—debated the district court's summary dismissal of such claims for lack of jurisdiction. See, e.g., *In re Davenport*, 147 F.3d 605 (7th Cir. 1998); *Jones v. Hendrix*, 143 S. Ct. 1857 (2023) (clarifying but not eliminating availability of § 2241 in limited contexts).

The Ninth Circuit improperly recast the § 2241 Petition as a Successive § 2255 Motion despite being clearly framed under § 2241 and citing the savings clause, the lower courts construed Neal's filing as a second or successive § 2255 motion, requiring preauthorization. This procedural recharacterization ignored the substantive basis of the claim and deprived Neal of access to any forum for judicial review.

A COA is not required to appeal denial of a § 2241 Petition Under 28 U.S.C. § 2253(c)(1), a COA is only required when appealing a final order in a proceeding under § 2255 or § 2254. It is not required for § 2241 petitions, as numerous circuits have held. See *Forde v. U.S. Parole Comm'n*, 114 F.3d 878, 879 (9th Cir. 1997); *Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir. 1997). The lower courts' denial of a COA in this case was procedurally and legally incorrect.

In Neal's § 2241 Petition, he argued the following:

Whether, Neal's sentence is unconstitutional because he is actually innocent of the conspiracy or solicitation to murder offense, which the court used to calculate his sentence guidelines range.

See CvDoc. 1.

However, the Court dismissed Neal's § 2241 petition for lack of subject-matter jurisdiction. See CvDoc. 20.

Furthermore, the unlawfully sentence to years of additional prison time is remediable under this Court's broad equitable jurisdiction to grant habeas relief as law and justice require. See 28 U.S.C. § 2243. The "savings clause" or "escape hatch" of 28 U.S.C. § 2255(e) ensures that a remedy exists for federal prisoners to "test the legality of their detention" when § 2255 "is inadequate or ineffective" for that purpose. Neal's claim that he is actually innocent of the conspiracy or solicitation to murder offense, which the court used to calculate his sentence guidelines range, is precisely the type of error that the savings clause exists to remedy.

The Supreme Court has “consider[ed] it uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.” *INS v. St. Cyr*, 533 U.S. 289, 302 (2001). Accordingly, suspension of the writ of habeas corpus is constitutionally prohibited. U.S. Const. art. I, § 9, cl. 2. The initial codification of post-conviction remedies in § 2255 was intended not as a limitation on habeas review, but as a means to improve its administration. See *United States v. Hayman*, 342 U.S. 205, 219 (1452) (“Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners’ rights of collateral attack upon their convictions.”). The “savings clause” or “escape hatch” of § 2255(e) protects against unconstitutional suspension of the Great Writ by allowing federal prisoners to bring a petition for habeas corpus relief under 28 U.S.C. § 2241 when the remedy by § 2255 motion “is inadequate or ineffective to test the legality of his detention.” The savings clause applies when the petitioner “(1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim.” *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011) (citing *Stephens v. Herrera*, 464 F.3d 895, 989 (9th Cir. 2006)). This Court should follow persuasive precedent from the Sixth and Seventh Circuits and hold that savings clause jurisdiction encompasses actual innocence of a sentencing enhancement. See *Hall v. Masters*, 836 9 F.3d 591 (6th Cir. 2016); *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013). Following those opinions would promote a cohesive scheme for collateral review of sentencing innocence claims under § 2255 and § 2241, because errors under the sentencing guidelines have already been deemed cognizable under the “miscarriage of justice” standard for collateral review. Further, *Marrero* is not on point and specifically reserved the question of whether a claim of sentencing innocence is cognizable under the savings

clause. See *Marrero*, 682 F.3d at 1193, 1195.

By permitting sentencing errors that meet the miscarriage of justice standard to be raised under the savings clause through § 2241, the opinions in *Brown* and *Hill* promote a cohesive scheme of collateral review for sentencing errors and avoid unconstitutional suspension of the writ. A contrary conclusion would serve no purpose other than to insulate fundamentally unjust sentences from review based solely on the fact that the Supreme Court decision clarifying the correct application of the law was issued after the defendant's first § 2255 motion became final. The "lone peril" in this avenue for relief is "the possibility that we might permit the government to deny someone his liberty longer than the law permits only because we refuse to correct an obvious judicial error." *Hicks v. United States*, 137 S. Ct. 2000 (2017).

In light of the above, this Court has jurisdiction in the case to hear Neal's claim.

In *USA v. Cerdas*, No. 23-30141 (5th Cir. 2023), the Fifth Circuit addressed a complex case involving Jose Cerdas, who challenged his prior drug conviction through a petition for a writ of *coram nobis*. Initially, Cerdas pleaded guilty to conspiracy to distribute marijuana after a plea agreement that required him to waive various rights, including his right to appeal and to pursue claims of misconduct against DEA agent Chad Scott. Cerdas later alleged that Scott had planted evidence, including marijuana in his vehicle, and coerced his guilty plea through threats and manipulation, which included intimidating tactics against his family and the falsification of evidence.

The situation took a turn when Scott himself was convicted in 2019 and 2021 for numerous crimes, including falsifying records and obstructing justice, which

lent credibility to Cerdies's claims of Scott's misconduct. The Fifth Circuit ultimately reviewed whether the district court erred in denying Cerdies's petition, as he argued that Scott's conviction constituted new evidence justifying relief. The district court denied Cerdies' petition for *coram nobis* relief, after determining that Cerdies did not meet his burden of establishing sound reasons for his failure to seek relief earlier. Cerdies timely filed a notice of appeal.

Cerdies argues that the district court erred in finding that he did not demonstrate sound reasons for failing to seek appropriate earlier relief. He asserts that the Government's investigation and prosecution of Scott presented a "changed circumstance" justifying his filing for *coram nobis* relief when he did. The Government acknowledges that Scott's convictions represent new evidence previously unavailable to Cerdies, but argues that Cerdies knew about Scott's misconduct from the beginning and could have moved to invalidate his guilty plea earlier, by way of direct appeal or habeas petition.

Although the Government is correct that Cerdies knew of Scott's misconduct early on, we determine that Cerdies nonetheless has demonstrated sound reasons for filing his petition when he did. Cerdies contends that he had every reason to believe that if he took some action contrary to the plea agreement, such as filing a direct appeal or habeas petition based on Scott's misconduct, then there would be adverse consequences or reprisals against him by Scott. He asserts that reasonable fear and apprehension on his part persisted until it became clear that the Government had finally come to recognize Scott as a bad actor. The evidence adduced at Scott's trial and the testimony offered at Scott's sentencing hearing in particular demonstrated just how powerful and dangerous Scott was as a rogue DEA agent. See *United States v. Scott*, 70 F.4th 846, 852-54 (5th Cir. 2023). Scott planted evidence to fabricate a charge against Cerdies that carried a minimum five-year

prison term; he stole money and property from Cerdes; he tricked Cerdes into falsely admitting that he sold cocaine; and he sent a team to harass Cerdes' 79-year old mother.

The alleged discovery of drugs in Cerdes' vehicle allowed Scott to make his claim that Cerdes' presence in the vehicle, while in possession of a firearm, supported a § 924(c) weapon charge. This count in the indictment, which carried a mandatory five-year sentence, was the principal hammer Scott used to manipulate and coerce Cerdes to enter a guilty plea to the drug trafficking offense. At Scott's sentencing hearing, the Government argued that Scott "repeatedly victimized people and subverted the rule of law." With respect to Cerdes specifically, the Government asserted that Scott "exploited [Cerdes's] vulnerability, put marijuana in his truck to ratchet up a sentence to hurt [Cerdes] in ways that he did not deserve."

Furthermore, the fact that the written plea agreement required Cerdes not only to waive his appellate and habeas rights, but also withdraw his internal affairs complaint describing Scott's misconduct and refrain from filing any other complaint against any law enforcement officer for actions taken by them in the investigation of his case indicated that until the Government discovered Scott's misconduct, the Government would continue to protect him. In light of Cerdes' testimony and the unusual terms of his plea agreement, it was reasonable for Cerdes to be fearful of what would happen if he sought relief from his guilty plea prior to the Government's discovery of Scott's misconduct. Under the unique and extraordinary circumstances of this case, we conclude that Cerdes met his burden of establishing sound reasons for not seeking appropriate relief earlier and that the district court thus erred in finding otherwise. The determination of whether a petitioner for *coram nobis* relief has sound reasons for not seeking appropriate earlier relief is a factual finding; therefore, we review for clear error. See *Gonzalez v. United*

States, 981 F.3d 845, 851 (11th Cir. 2020). Accordingly, the Fifth Circuit vacated and remanded *Cerde's* case for further proceedings.

In Neal's case, he initially pleaded guilty to all counts in the Superseding Indictment, including conspiracy to commit murder. Later, Neal attempted to withdraw his guilty plea, claiming on appeal that the District Court violated Rule 11 of the Federal Rules of Criminal Procedure. Rule 11 requires that guilty pleas be made knowingly, voluntarily, and with full awareness of the consequences. Neal argued that this standard was not met, especially regarding the serious charge of conspiracy to murder.

The Fifth Circuit reviewed Neal's appeal but upheld the District Court's decision, determining that his guilty plea was valid and constituted his final stance, particularly since his motion to withdraw the plea was neither granted nor denied. This procedural outcome effectively eliminated the need for a jury trial, leaving Neal's guilty plea as the basis for sentencing. Consequently, the conspiracy to commit murder charge, which did not undergo the rigorous proof standards of a jury trial, led to a 360-month sentence.

Neal contended that this outcome was erroneous, arguing that he was actually innocent of the conspiracy to murder charge, and since it was not proven beyond a reasonable doubt, the charge should be dismissed. His appeal did not result in this dismissal, however, as the court treated his guilty plea as conclusive, affirming his conviction and sentencing based on the plea and the upheld procedural decisions.

Here, the Court erred in dismissing Neal's § 2241 petition for lack of jurisdiction because the Fifth Circuit's handling of Neal's motion to withdraw his guilty plea could be further examined in light of *Cerde's*, where the

court reviewed the legitimacy of Cerdes' claims in his post-conviction motions. Neal argues that his right to withdraw his plea, given his subsequent assertions of actual innocence regarding the conspiracy charge, was a critical factor that the District Court overlooked. Thus, *Cerdes* indirectly touches on the issue of proving charges beyond a reasonable doubt, especially when coercion or misconduct is alleged. In Neal's case, he argues that his conspiracy to murder charge, which carried a significant sentence, was not substantiated through a jury trial.

Finally, the improper application of successive motion standards to § 2241 petitions raises serious concerns about access to post-conviction relief and violates the clear statutory framework Congress provided. The Supreme Court's intervention is warranted to ensure uniformity and to correct misapplications that deny federal prisoners meaningful judicial review. Furthermore, Neal asserts that the increase in the calculation of his sentencing range based on the murder conspiracy, resulted in a longer sentence. If so, this could be deemed a miscarriage of justice. The Petition thus facially satisfies the conditions to be considered in a § 2241 proceeding under the savings clause of § 2255(e).

CONCLUSION

For the above and foregoing reasons, Neal's petition for a writ of certiorari should be granted.

Respectfully submitted,

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