CASE NO. 14-1294

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MATTHEW HALE,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
J. OLIVER, Warden,	)
	)
Respondent-Appellee.	)

On Appeal from the United States District Court
for the District of Colorado
The Honorable Lewis T. Babcock, Senior U.S. District Judge
D.C. No. 1:14-CV-1233-LTB

APPELLANT'S REPLY BRIEF

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. The Parties Agree That the *Prost* Test Does Not Apply and That If It Did, Mr. Hale's Claim Would Satisfy It.

The parties agree on two points central to this appeal. First, they agree that the *Prost* test does not apply because Mr. Hale's claim is predicated on new evidence. Supp. Op. Br. at 7-8; Supp. Ans. Br. at 4. Second, they agree that Mr. Hale's claim would satisfy *Prost*'s test if it did apply. Supp. Op. Br. at 8-9; Supp. Ans. Br. at 5. As the government puts it, under the *Prost* test, "the savings clause would allow a claim of new evidence in a § 2241 petition." Supp. Ans. Br. at 5.

II. Mr. Hale's Claim Satisfies the Government's Proposed Test.

Operating outside of *Prost*, the government proposes the following rule: if a claim doesn't "categorically elude permission for § 2255 relief," the savings clause is unavailable. Supp. Ans. Br. at 6. Under this test, any claim that falls within the class of claims for which § 2255(h) authorizes a second or successive § 2255 motion is barred under the savings clause. The government contends that Mr. Hale's claim falls within that class because it is based on new evidence. This argument fails for two reasons.

First, the government cites no authority in support of its proposed rule. It does not appear that any circuit – or any other court, for that matter – has adopted it. It's a test entirely of the government's own creation.

Second, even if the government's test was the correct one, Mr. Hale's claim would satisfy it because his claim does *not* fall within the class of claims for which a second or successive § 2255 motion is authorized. Section 2255(h) authorizes a second or successive motion in two circumstances: where the claim involves either (1) new evidence that proves the prisoner's innocence by clear and convincing evidence, or (2) a new rule of constitutional law made retroactive by the Supreme Court. The government contends that Mr. Hale's claim falls into the first category because it involves new evidence.

But not just any new evidence counts under the statute. It has to be evidence of innocence, and as the government concedes (at 7), Mr. Hale's new evidence has nothing to do with innocence. It's evidence of juror misconduct, which bears solely on the integrity of the trial. Evidence of this sort, no matter how compelling, would never relate to a defendant's guilt or innocence. A prisoner armed with conclusive proof that all 12 of his jurors were bribed to convict would fail at the very threshold. As a result, this isn't a case of evidence that simply falls short of § 2255(h)'s clear-and-convincing proof requirements. It's a case involving evidence of another nature altogether. The difference is one of kind, not degree.

Thus, Mr. Hale's claim *does*, in the government's words, "categorically elude permission" for § 2255 relief. And according to the government, claims that fall

into that category are governed by the *Prost* test. Supp. Ans. Br. at 4 (asserting that *Prost* "adopted a savings-clause test for claims that categorically elude permission for a successive § 2255 motion"). Thus, Mr. Hale wins under the government's own approach, for the government concedes that Mr. Hale's claim satisfies the *Prost* test.

III. The Savings Clause Should Be Available In the Unique Circumstances of This Case.

In his supplemental opening brief (at 11-15), Mr. Hale argued that the unique circumstances of his case entitle him to pursue his claim by way of the savings clause. Those circumstances include that the evidence of Juror Hoffman's misconduct existed at the time of trial but was not discovered or discoverable by Mr. Hale until after his initial § 2255 motion was due and filed. They also include the fact that the new evidence implicates the right to an impartial jury, a right that the Supreme Court has described as our "most priceless" safeguard of individual liberty, *Irvin v. Dowd*, 366 U.S. 717, 721 (1961), and that this Court has described as "the cornerstone of our system of justice," *Stouffer v. Trammell*, 738 F.3d 1205, 1213 (10th Cir. 2013).

The government doesn't respond to this argument except to point out (at 12-13) that the case Mr. Hale cited as persuasive authority, *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015), relied on a case that *Prost* disagreed with. But as both

parties agree, *Prost* has no bearing on this case because the claim here is based on new evidence. *Webster* also involved new evidence. *Id.* at 1140. In light of *Prost*'s inapplicability, this Court is free to look to *Webster* for its persuasive value.

IV. The Savings Clause Should Be Available Under the Canon of Constitutional Avoidance.

As Mr. Hale argued in his supplemental opening brief (at 16-21), an interpretation of the savings clause that barred his claim of juror misconduct would pose serious constitutional questions. Thus, even were this Court to reject the government's concessions and Mr. Hale's other arguments, it should invoke the canon of constitutional avoidance and allow Mr. Hale's claim to go forward.

The government disputes that blocking Mr. Hale's claim would raise constitutional concerns, but much of its argument doesn't bear on the issue at all. For example, the government points out (at 9) that Mr. Hale's claim does not meet the statutory criteria for a second or successive § 2255 motion under § 2255(h). True but irrelevant. Mr. Hale's failure to meet the statutory requirements under subsection (h) has nothing to do with whether it might be unconstitutional to bar him from using a different subsection. The government similarly points out that this Court's prior cases have permitted access to the savings clause in limited circumstances such as when the original sentencing court no longer exists. Supp. Ans. Br. at 11 (citing *Caravalho v. Pugh*, 177 F.3d 1177, 1178 (10th Cir. 1999).

Again, that's true but irrelevant. None of those cases even discuss the canon of constitutional avoidance, let alone opine on the circumstances in which the canon might permit access to § 2241.

The government also notes (at 10) that the Second and Third Circuits have invoked the canon to allow a § 2241 petition only where a new interpretation of a statute revealed that the petitioner's conduct had not in fact been criminal. While that's true, neither circuit suggested that those were the only circumstances that would raise constitutional concerns. To the contrary, as the Second Circuit noted, the canon is available whenever "serious questions as to § 2255's constitutional validity are presented." *Triestman v. United States*, 124 F.3d 361, 377 (2d Cir. 1997).

They're presented here: if Mr. Hale is denied the ability to litigate his claim in a § 2241 proceeding, he will never obtain any review whatsoever of the claim. As Mr. Hale explained in his supplemental opening brief (at 19-21), to foreclose any and all avenues of relief on this question of constitutional law would pose serious concerns under both the Due Process Clause and the Suspension Clause.

The government doesn't respond to the due process argument at all. And its only response on the Suspension Clause is that the Supreme Court upheld statutory restrictions on successive § 2254 petitions that are similar to § 2255(h)'s

restrictions against a Suspension Clause challenge. Supp. Ans. Br. at 11-12 (citing *Felker v. Turpin*, 518 U.S. 651 (1996)). But unlike here, Felker's challenge was a facial one: he claimed that the restrictions on successive petitions violated the Suspension Clause per se, that is, in every case. *Felker*, 518 U.S. at 663-64. Mr. Hale has expressly disclaimed a facial challenge like Felker's. Op. Br. at 64-65. Instead, he argues that barring access to § 2241 would violate the Suspension Clause *on the facts of this case* because he would be wholly deprived of any review of his claim. *Felker* didn't involve much less decide an "as applied" challenge of this kind, and it is therefore irrelevant to this case.

As explained in Mr. Hale's supplemental opening brief (at 20), the relevant precedent is *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), which holds that entirely foreclosing review of an important question of law raises serious questions under the Suspension Clause. *Id.* at 300-01, 314. That was reason enough to invoke the canon of constitutional avoidance in *St. Cyr*, and it should be here as well.

CONCLUSION

For the reasons stated here, in the supplemental opening brief, and in Mr. Hale's pro se briefs, this Court should vacate the judgment and remand for a determination of the merits of Mr. Hale's § 2241 petition.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing **APPELLANT'S REPLY BRIEF**:

(1) all required privacy redactions have been made;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program Symantec Endpoint Protection version 12.1.5337.5000, Virus Definition File Dated: 8/18/15, r4, and, according to the program is free of viruses.

s/ Dean Sanderford
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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2015, I electronically filed the foregoing **APPELLANT'S REPLY BRIEF** using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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