No. 02-319

In the Supreme Court of the United States

DONTE JAVON PITT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly denied petitioner's application for a certificate of appealability under 28 U.S.C. 2253(c) with respect to petitioner's claim that he was convicted in violation of the Due Process Clause of the Fifth Amendment because, without the prosecutors' knowledge, a police officer gave false testimony about his own credentials at petitioner's trial.

2. Whether the court of appeals correctly denied petitioner's application for a certificate of appealability under 28 U.S.C. 2253(c) with respect to petitioner's claim that the district court was required to hold an evidentiary hearing on whether petitioner was denied effective assistance of counsel during plea negotiations.

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OPINIONS BELOW

The per curiam order of the court of appeals denying a certificate of appealability (Pet. App. 29a-30a) is not published in the Federal Reporter, but is reprinted at 30 Fed. Appx. 321. The memorandum opinion of the district court denying petitioner's motion under 28 U.S.C. 2255 (Pet. App. 1a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2002. A petition for rehearing was denied on May 29, 2002 (Pet. App. 31a-32a). The petition for a writ of certiorari was filed on August 26, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiring to distribute cocaine base, in violation of 21 U.S.C. 846, single counts of possessing cocaine base with intent to distribute it, possessing cocaine with intent to distribute it, and distributing cocaine base, all in violation of 21 U.S.C. 841(a)(1), one count of using a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c), and one count of being a convicted felon in possession of a firearm, in violation of 18 U.S.C. 922(g). 6/2/97 Judgment 1, 1.01. The court of appeals affirmed in an unpublished decision, *United States* v. *Pitt*, No. 97-4420, 1999 WL 25552 (4th Cir. Jan. 22, 1999) (noted at 172 F.3d 45 (Table)), and this Court denied certiorari, 526 U.S. 1151 (1999).

The district court denied petitioner's motion for post-conviction relief under 28 U.S.C. 2255. Pet. App. 1a-28a. The court of appeals denied petitioner a certificate of appealability under 28 U.S.C. 2253(c). Pet. App. 29a-30a.

1. On March 25, 1995, police officers responded to a burglar alarm at a house in Temple Hills, Maryland. The officers smelled natural gas and called the fire department. The firefighters and police then entered the house to address the apparent danger. In the house, the police saw what appeared to be cocaine and materials used for producing cocaine base (crack). The officers obtained and executed search warrants. They discovered evidence of a drug manufacturing and distribution operation, including 16 trash bags containing a total of 512 wrappers for kilograms of cocaine, 202 empty baking soda boxes, 77 plastic bags with cocaine

residue, 178 grams of cocaine base, 363 grams of cocaine, approximately $2000 in cash, two semi-automatic handguns, and various documents. In a safe, the officers discovered two kilograms of cocaine, approximately $300,000 in cash, and three more semi-automatic handguns. Pet. App. 2a-3a.

Documents discovered in the house connected petitioner to an apartment in Temple Hills, which officers searched with the consent of the building's management after the apartment was vacated by the tenants. The search resulted in the recovery of a microwave oven containing crack residue, 23 grams of crack, two grams of cocaine powder, and petitioner's fingerprints on items in the apartment. 97-4420 Gov't C.A. Br. 3-4.

2. At petitioner's trial, government testimony about an exchange of crack for guns linked petitioner to two of the handguns seized from the house in Temple Hills. Petitioner's fingerprints were found on several items seized from the house, including boxes of baking soda, a plastic bag containing crack residue, and several juice bottles. A government handwriting expert testified that petitioner's handwriting matched handwriting and signatures on papers found in the Temple Hills house and on several documents signed by "Robert Watson," including the lease for the house, the application for the house's security system, and a service contract for the house. Two witnesses who provided services at the house identified petitioner. The house's telephone service was installed in the name of petitioner's sister; the security-alarm company was given the phone numbers of petitioner's brother and sister as contact numbers; and the password for the alarm system was the name of petitioner's mother. 97-4420 Gov't C.A. Br. 3.

Also at petitioner's trial, the government presented a retired detective of the Metropolitan Police Department in Washington, D.C., Johnny St. Valentine Brown, as an expert witness on the street drug trade, including crack manufacturing and distribution techniques. Detective Brown's qualifications as an expert witness included 21 years in the narcotics and drug investigations division of the Metropolitan Police, of which five years were spent as an undercover investigator. Pet. App. 4a-5a. Detective Brown received relevant training from several organizations and institutions, including the Drug Enforcement Agency and the United States Customs Service. *Id.* at 4a. Brown testified, in addition, that he was a licensed pharmacist, had a bachelor's degree, master's degree, and doctoral degree from Howard University, and had been a congressional aide. *Ibid.*

After the jury returned its guilty verdicts, the district court sentenced petitioner to 240 months' imprisonment on the drug-possession and drug-distribution charges, 60 months' imprisonment (to be served consecutively) for using a firearm during a drug-trafficking crime, and 120 months' imprisonment (to be served concurrently with the 240-month sentence) for possessing a firearm. 6/2/97 Judgment 2.

3. In January 1999, the court of appeals affirmed petitioner's convictions on direct appeal. The court of appeals rejected petitioner's claims that the district court erred by: failing to suppress evidence seized from the Temple Hills house (see 1999 WL 25552, at *3); admitting testimony that identified petitioner as the lessee of the Temple Hills house and established his involvement in the drugs-for-guns swap (see *id.* at *4-*5); failing to admit certain evidence that the defense offered or suggested it might offer (see *id.* at *4-*6);

replacing a juror (see *id.* at *6-*7); and failing to declare a mistrial in light of possible efforts to contact or intimidate jurors (see *id.* at *7). The court of appeals also rejected petitioner's argument that there was insufficient evidence to convict him on the drug-conspiracy count, finding "ample evidence" to support that conviction. *Id.* at *8. Petitioner did not raise in his direct appeal any of the issues that are presented in his current petition for certiorari.

4. Later in 1999, it was discovered in another case that, contrary to Detective Brown's testimony at petitioner's trial and in other proceedings, Brown was not a licensed pharmacist and does not hold degrees from Howard University. In February 2000, Brown pleaded guilty to perjury for making false statements about his credentials while under oath. Pet. App. 7a.

5. In May 2000, petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255, arguing in relevant part that his drug-trafficking convictions were obtained through the government's use of Brown's perjured testimony, in violation of the Fifth Amendment, and that his trial counsel was constitutionally ineffective during plea negotiations. In August 2001, the district court denied petitioner's Section 2255 motion. Pet. App. 1a-28a.

On the perjured-testimony claim, the district court determined that, even if jurors had completely disregarded Brown's testimony, petitioner "still would have been convicted on the basis of overwhelming evidence against him," and "the jury's judgment would not have been different in any way." Pet. App. 20a. The district court explained that other witnesses testified to many of the same facts as Brown, and the physical evidence against petitioner included "cash, crack manufacturing components and ingredients, scales, loaded firearms,

500 kilogram wrappers, crack residue laden plastic bags, and other perfunctory [*sic*] drug distribution and production devices." *Id.* at 21a. The district court noted, in addition, that Brown's false academic and pharmaceutical credentials were not the basis for his trial testimony about the drug trade. Instead, that testimony was based on Brown's street experience as a police officer (*ibid.*), which petitioner has not disputed.

The district court also rejected (Pet. App. 15a-16a) petitioner's argument that his trial counsel was constitutionally ineffective for inadequately advising petitioner about the possible sentence he would get if he pleaded guilty. The court determined that petitioner "was fully advised of the penalties, whether he chose to plea or go to trial and face sentencing." *Id.* at 15a. The court explained that the decision whether to accept a plea agreement was correctly left to petitioner (*id.* at 15a-16a), and that trial counsel performed adequately in attempting to negotiate a plea agreement for petitioner (*id.* at 16a).

6. Petitioner filed a notice of appeal. In March 2002, the court of appeals issued a per curiam decision treating petitioner's notice of appeal as a motion for a certificate of appealability under 28 U.S.C. 2253(c), denying that motion, and dismissing the appeal. Pet. App. 29a-30a.

ARGUMENT

When a district court denies a motion for collateral relief under 28 U.S.C. 2255, "[a] certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). To obtain a certificate of appealability, the petitioner must show "that reasonable jurists would find the district court's assessment of

the constitutional claims debatable or wrong." *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000). Petitioner cannot make that showing in this case.

1. Petitioner argues (Pet. 6-13) that this Court should grant certiorari to decide whether knowledge of Brown's false testimony should be attributed to the prosecution in petitioner's case, notwithstanding the conceded absence of any indication that the prosecution actually knew of Brown's perjury (see Pet. 9). Petitioner states that a conviction obtained through the prosecution's knowing use of perjured testimony violates due process "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" (Pet. 7 (quoting *United States* v. *Agurs*, 427 U.S. 97, 103 (1976)), and he maintains (Pet. 11-13) that such a likelihood exists in his case.

Petitioner notes (Pet. 8-9) that there is a narrow circuit split about when knowledge of a law enforcement officer's perjured testimony must be imputed to the prosecution. Compare *Boyd* v. *French*, 147 F.3d 319, 329 (4th Cir. 1998) ("[K]nowingly false or misleading testimony by a law enforcement officer is imputed to the prosecution."), cert. denied, 525 U.S. 1150 (1999), with *Koch* v. *Puckett*, 907 F.2d 524, 531 (5th Cir. 1990) (rejecting due process claim based on alleged perjury by sheriff and government investigators where habeas petitioner "does not allege that the prosecution knew that this testimony was false"), and *United States* v. *Bailey*, 123 F.3d 1381, 1397 (11th Cir. 1997) (no due process violation where prosecutor did not know of investigating agent's perjury and defendant did not show that perjury affected his conviction); see *Smith* v. *Secretary of N.M. Dep't of Corrs.*, 50 F.3d 801, 831 (10th Cir.) (upholding district court determination that prosecution did not knowingly allow witness to testify under

false name, although government investigator was aware of witness's true identity), cert. denied, 516 U.S. 905 (1995). This case, however, does not present an appropriate vehicle for considering whether to resolve that limited disagreement.

a. Petitioner's claim of a circuit split depends on the Fourth Circuit's adherence to the rule that "knowingly false or misleading testimony by a law enforcement officer is imputed to the prosecution." *Boyd*, 147 F.3d at 329. Petitioner cites no case of any other circuit that states a similar rule. Yet petitioner asserts that the district court in this case *failed* to apply the Fourth Circuit's rule. See Pet. 8-10. At most, therefore, the Fourth Circuit's failure to issue a certificate of appealability in this case indicates the possibility that its own law is unsettled, which undermines, rather than supports, petitioner's assertion that this Court should grant certiorari to resolve a circuit conflict.

b. Petitioner failed to raise his due process claim on direct appeal. Petitioner therefore was barred from raising that claim in his Section 2255 motion unless he could "first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley* v. *United States*, 523 U.S. 614, 622 (1998) (internal citations omitted).[1]

Petitioner cannot show cause for his procedural default. As the district court observed (Pet. App. 8a-9a); the government provided petitioner with Brown's ré-

[1] The government did not rely on the default in the lower courts. Nevertheless, the default is relevant to whether this Court should exercise its discretion on certiorari review. See Sup. Ct. R. 10; cf. *Trest* v. *Cain*, 522 U.S. 87, 90 (1997) (declining to decide "whether, or just when, a habeas court *may* consider a procedural default that the State at some point has waived, or failed to raise").

sumé in advance of trial, and petitioner had an opportunity to investigate Brown and to discredit his testimony at the trial. See *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986) ("[T]he existence of cause for a procedural default must ordinarily turn on * * * some objective factor external to the defense.").

Petitioner also cannot establish actual prejudice from Brown's false testimony. As the district court discussed (Pet. App. 8a, 20a-21a), Brown's perjured testimony about personal facts such as his academic and pharmaceutical credentials[2] does not cast doubt on Brown's expertise in the street drug trade, which Brown acquired during more than two decades in the Metropolitan Police's narcotics division. Furthermore, and as the district court also determined (*id.* at 20a-21a), the government presented "overwhelming evidence" (*id.* at 20a) at trial to convict petitioner of the drug-distribution offenses, and it would have made no difference to the jury's verdict if Brown's testimony had been entirely disregarded.

Petitioner's procedural default likewise cannot be excused under an "actual innocence" theory. For the reasons discussed above and in the next paragraph, petitioner cannot demonstrate "that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him" (*Bousley*, 523 U.S. at 623 (citation and quotation marks omitted)) if Brown had not provided false testimony.

c. Petitioner's due process claim fails on its merits, because there is no "reasonable likelihood" that Brown's false credentials "could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103. Brown

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[2] Contrary to petitioner's claim (Pet. 4), Brown correctly stated his full name during his trial testimony. See 10/25/96 Tr. 8.

testified about the manufacture and distribution of street drugs—not the particular facts of petitioner's case (see 10/25/96 Tr. 13, 29-30)—and his expert knowledge of the drug trade was established independently of his false credentials. Even if the jury had disregarded Brown's entire testimony, other evidence at trial, such as the 512 discarded wrappers for kilograms of cocaine, the plastic bags with cocaine residue, the cash seized at the Temple Hills house, petitioner's fingerprints, and his involvement in obtaining the lease and security system for the house, overwhelmingly established that petitioner's drug crimes amounted to more than "personal possession" (Pet. 12). See pp. 2-3, *supra* (discussing evidence). Petitioner appears to concede that Brown's testimony was not necessary for the government to establish that the Temple Hills house was used "in large scale drug trafficking." Pet. 12. The trial judge, moreover, observed during the trial that, in his view, Brown's testimony about the drug trade was not "necessary" for the government to prove its case and might be "too much" evidence. 10/25/96 Tr. 31.

Because the court of appeals' denial of a certificate of appealability on petitioner's due process claim does not implicate any clear circuit split, and because the underlying due process claim was procedurally defaulted and lacks merit, this Court's review is not warranted.

2. Petitioner also contends (Pet. 14-20) that the district court was required to hold an evidentiary hearing on his Section 2255 motion because there was a material factual dispute about whether trial counsel provided effective assistance during plea negotiations. Section 2255 directs that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall * * * grant a

prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. 2255. Petitioner's argument (Pet. 17-20) is that his Section 2255 motion presented facts about his discussions with trial counsel that the government contradicted and, therefore, an evidentiary hearing was required to allow the district court to make a "credibility determination."

In his declaration supporting the Section 2255 motion, petitioner averred that his lead trial counsel advised that a government plea offer "would probably" result in a prison sentence of approximately 12 years, and that petitioner was prepared to accept the offer until another attorney suggested that, under the plea agreement, "there was a risk of a much higher sentence." Ex. Binder for Sec. 2255 Pet., Tab 6, paras. 4-5; see *id.* para. 10 (alleging that counsel advised "that the drug amount * * * was still a problem" in later plea proposal). In response, the government provided the district court with an affidavit of petitioner's lead trial counsel, who stated that he and the other attorney told petitioner that the judge would not be bound by the sentence that the government estimated as part of its plea offer, and that the judge "could enhance the sentence" in light of the 512 cocaine wrappers found at the Temple Hills house. Gov't Opp. to Def.'s Mot. to Vacate Sentence Pursuant to 2255, Ex. A at 1. Based on those affidavits and other record documents, the district court determined that petitioner was advised of the possible penalties if he pleaded guilty and if he proceeded to trial, that trial counsel did not attempt to persuade petitioner to take the plea or reject it, and that petitioner's counsel acted in accordance with their professional responsibilities. Pet. App. 15a-16a.

The district court resolved petitioner's ineffective-assistance claim on the basis of *uncontested* facts, about which petitioner and his trial counsel do not disagree. Petitioner, moreover, has not shown how counsel's warning about the possibility of an enhanced sentence after a plea agreement violated his Sixth Amendment rights.[3] See *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984) (to demonstrate Sixth Amendment violation, petitioner must show both deficient performance and prejudice from the deficient performance). The court of appeals correctly denied petitioner a certificate of appealability on the ineffective-assistance issue, and that denial raises no question that warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2002

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[3] Petitioner does not argue that his trial counsel provided legally erroneous advice or unreasonably suggested the possibility of a sentence enhancement. Instead, petitioner faults counsel for raising the possibility of an enhanced sentence during plea negotiations because, after a trial on all counts, petitioner's drug-distribution sentence ultimately was not enhanced. See Pet. 18.