No. 12-425

In the Supreme Court of the United States

JEROMI BAZUAYE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals appropriately dismissed petitioner's appeal from the denial of his petition for post-conviction relief as frivolous.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule: Page

Miscellaneous:

In the Supreme Court of the United States

No. 12-425

JEROMI BAZUAYE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals dismissing petitioner's appeal (Pet. App. 8-9), denying petitioner's motion to reinstate his appeal (Pet. App. 6-7), and denying petitioner's motion for rehearing (Pet. App. 3-5) are not reported. An earlier opinion of the court of appeals affirming petitioner's convictions (Pet. App. 23-28) is not published in the *Federal Reporter* but is reprinted at 311 Fed. Appx. 382. The relevant orders of the district court (Pet. App. 10-22) are not reported.

JURISDICTION

The order of the court of appeals dismissing petitioner's appeal was entered on September 9, 2011, its order denying petitioner's motion to reinstate the appeal was entered on March 13, 2012, and its order denying petitioner's motion for rehearing was denied on May 8, 2012. On July 27, 2012, Justice Ginsburg extended the time

within which to file a petition for a writ of certiorari to October 5, 2012, and the petition was filed on October 4, 2012. 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 Southern District of New York, petitioner was convicted on three counts of bank fraud, in violation of 18 U.S.C. 1344, and one count of access device fraud, in violation of 18 U.S.C. 1029(a)(2). Gov't C.A. Br. 7-9. He was sentenced to 33 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 23-28.

Petitioner subsequently filed a post-conviction challenge under 28 U.S.C. 2255, arguing that his counsel had been constitutionally ineffective on direct appeal by failing to raise an argument based on the Speedy Trial Act. The district court denied the motion and declined to grant a certificate of appealability (COA). Pet. App. 10-18. The district court thereafter granted petitioner's request to treat his Section 2255 motion as a *coram nobis* petition, but denied petitioner's motion to amend its judgment. *Id.* at 19-22. The court of appeals dismissed petitioner's appeal. *Id.* at 8-9.

1. Between August 2000 and December 2002, petitioner used false names and social security numbers to open seven phony credit card accounts. Petitioner also obtained a credit card processing machine, which he used to siphon money directly from the banks that issued the cards. In all, petitioner used the cards to run up more than $35,000 in unauthorized charges. Gov't C.A. Br. 2-3.

2. a. On January 3, 2003, a federal grand jury returned an indictment charging petitioner with three counts of bank fraud and one count of access device fraud. At the arraignment and initial pretrial conference held on January 10, 2003, the government requested a two-week adjournment to produce discovery, and petitioner advised the court that he was in the process of obtaining an attorney to replace his court-appointed counsel. The court scheduled the next appearance for January 27, 2003, anticipating that by then petitioner would have received the discovery and would be in a position to determine whether he wished to pursue a motion for the return of $6000 that had been seized from him at the time of his arrest. Gov't C.A. Br. 10-11.

At the conclusion of the conference, the government successfully moved to exclude the 17 days between January 10 and January 27 under the Speedy Trial Act, 18 U.S.C. 3161 *et seq*. Gov't C.A. Br. 10-11. The Speedy Trial Act requires a criminal defendant's trial to commence within 70 days of his indictment or initial appearance, whichever occurs later, 18 U.S.C. 3161(c)(1), and entitles the defendant to dismissal of the charges if that deadline is not met, 18 U.S.C. 3162(a)(2). The Act excludes from the 70-day clock periods of delay that occur for certain enumerated reasons. 18 U.S.C. 3161(h).

Between January 27, 2003, and the start of petitioner's trial on April 28, 2004, the district court excluded numerous periods of time from the speedy-trial clock. Some of these periods of delay were excluded because defense motions were pending, while others were excluded because petitioner discharged a succession of lawyers (including the original public defender and three private attorneys), necessitating time for each new

attorney to get up to speed. Gov't C.A. Br. 11-26; see 18 U.S.C. 3161(h)(1)(D) and (7)(A).

b. Before trial, petitioner moved to dismiss the indictment under the Speedy Trial Act, arguing that more than the permissible 70 days of non-excludable time had elapsed. Petitioner asserted, *inter alia*, that the 17-day period from January 10 to January 27, 2003, was not excludable under the Act. The district court denied petitioner's motion, agreeing with the government that only 56 days had elapsed on the speedy-trial clock. 4/12/04 Order (available at 2004 WL 784835). The court painstakingly analyzed the various periods of delay and explained why each was excludable. With respect to the 17 days between January 10 and January 27, 2003, the court explained that it had granted an "interests of justice" exclusion pursuant to 18 U.S.C. 3161(h)(7). 4/12/04 Order *6-*7. The court noted that petitioner was attempting to obtain counsel of his own choosing and was considering whether to file a motion seeking the return of $6000 that had been seized from him at the time of his arrest. *Id.* at *7. "Therefore," the court held, "the record shows that this exclusion was entirely proper" because petitioner would have been "denied substantial rights that would [have] result[ed] in a miscarriage of justice if the adjournment [had] not [been] granted." *Ibid.*

Petitioner proceeded to trial and was convicted on all four counts.

3. On direct appeal, petitioner contested the exclusion of three specific periods of time under the Speedy Trial Act. The 17-day period from January 10 to January 27, 2003 was not among them. See Gov't C.A. Br. 31. The court of appeals affirmed. Pet. App. 23-28. The court examined the three challenged exclusions and

agreed that only 56 days had elapsed for purposes of the Speedy Trial Act. *Id.* at 26-28. This Court denied certiorari. 555 U.S. 935 (2008).

4. a. On September 29, 2009, petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255. Petitioner claimed that he had received ineffective assistance of counsel on direct appeal because his attorney failed to challenge the exclusion of the 17 days from January 10 to January 27, 2003. As petitioner saw it, his attorney should have argued that the 17-day period was not excludable because it fell within the first 30 days following his initial appearance, a time during which petitioner's trial could not commence without his consent. See 18 U.S.C. 3161(c)(2).

The district court denied relief, Pet. App. 10-18, holding that petitioner's attorney had not acted deficiently by failing to make this argument on appeal because the argument lacked merit. The court found no support for petitioner's contention that time within the first 30 days after an initial appearance cannot be excluded, noting that the Second Circuit had upheld an exclusion of time within this window in *United States* v. *Hammad*, 902 F.2d 1062, 1064, cert. denied, 498 U.S. 871 (1990). Pet. App. 14-16. The court also rejected petitioner's claim that the 17 days were not excludable because the court had not used the precise words "ends of justice" in ordering the exclusion. *Id.* at 16-17. The court thought it "clear" that it had "prospectively excluded [the] time in contemplation of the 'ends of justice'" in order "to allow [p]etitioner to obtain [new] counsel and prepare for trial as well as to permit the parties to determine whether the $6000.00 was rightfully his." *Ibid.* The court declined to issue a certificate of appealability. *Id.* at 18.

b. Petitioner thereafter filed a motion in the district court to amend the judgment denying his Section 2255 motion to reflect whether the issue of ineffective assistance of appellate counsel had been decided. Pet. App. 20. Because petitioner's term of supervised release had terminated on November 6, 2010, and he was in the custody of immigration authorities awaiting deportation, the district court treated his Section 2255 motion as a *coram nobis* petition under 28 U.S.C. 1651. Pet. App. 19 n.1.[1]

The district court denied petitioner's motion to amend the judgment. Pet. App. 19-22. The court noted that petitioner had "challenged his conviction on the sole ground of ineffective assistance of appellate counsel" and that the court's denial of the Section 2255 motion "clearly states that the court based its denial of the habeas petition on its determination that [p]etitioner's counsel was not ineffective." *Id.* at 21-22.

5. The court of appeals consolidated petitioner's separate appeals from the denials of his Section 2255 motion and his motion to amend the judgment, construing the entire case as an appeal from the denial of a *coram nobis* petition. Pet. App. 9. The court then *sua sponte* dismissed the appeal, finding that "it lack[ed] an arguable basis in law or in fact." *Id.* at 8-9. The court of appeals denied petitioner's subsequent motions to reinstate the appeal, *id.* at 6-7, and for rehearing, *id.* at 3-5.

---

[1] The district court made a typographical error in stating that petitioner's period of supervised release terminated on November 6, 2000. Petitioner's custodial sentence terminated on November 8, 2005, and his five-year term of supervised release ended in November 2010.

ARGUMENT

Petitioner contends (Pet. 6-11) that the court of appeals erred by summarily dismissing his appeal as frivolous without briefing or argument. The court of appeals permissibly dismissed petitioner's appeal, which was indeed frivolous, and its course of action was consistent with this Court's decisions and does not implicate a split among the circuits. Further review is unwarranted.

1. The court of appeals summarily dismissed petitioner's appeal because it "lack[ed] an arguable basis in law or in fact." Pet. App. 9. In doing so, the court relied on *Pillay* v. *INS*, 45 F.3d 14 (2d Cir. 1995), which held that the court of appeals "has inherent authority, wholly aside from any statutory warrant, to dismiss an appeal * * * when [it] presents no arguably meritorious issue for [the court's] consideration." *Id.* at 17.

Petitioner argues (Pet. 8-9) that appellate courts lack the inherent authority to dismiss an appeal before, at a minimum, receiving briefs from the parties. That contention runs contrary to this Court's longstanding recognition that federal courts possess certain "inherent power[s]" that are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citation omitted). Among these inherent powers are the power to "dismiss an action on grounds of *forum non conveniens*," the power to "act *sua sponte* to dismiss a suit for failure to prosecute," and the power to "vacate [the] judgment upon proof that a fraud has been perpetrated upon the court." *Id.* at 44. The power to dismiss an obviously frivolous appeal without briefing or argument is of a piece because allowing courts to clear away meritless cases is integral to "the

orderly and expeditious disposition of cases" on the court's docket. *Id.* at 43 (citation omitted).

In claiming a circuit split, petitioner cites (Pet. 6-7) a string of cases discussing *sua sponte* dismissals of appeals prosecuted *in forma pauperis* (IFP). The statute that authorizes appellants to proceed IFP directs courts to "dismiss the case at any time if the court determines that" the appeal "is frivolous or malicious." 28 U.S.C. 1915(e)(2)(B). The cases that petitioner cites simply stand for the proposition that the statutory authority to dismiss appeals under Section 1915(e)(2)(B) only applies to appellants who proceed IFP. But none of these cases holds that appellate courts lack the inherent authority to dismiss a frivolous appeal *sua sponte* where the statutory authority under Section 1915(e)(2)(B) does not apply because the appellant has paid the filing fee. To the contrary, this Court has recognized, albeit in dicta, that although Section 1915(e)(2)(B) "authorizes courts to dismiss a 'frivolous or malicious' action, * * * there is little doubt they would have power to do so even in the absence of this statutory provision." *Mallard* v. *United States Dist. Court*, 490 U.S. 296, 307-308 (1989). Petitioner has not identified any circuit split warranting this Court's review.

2. Petitioner next argues (Pet. 9-11) that his appeal was not in fact frivolous. Petitioner is incorrect.

a. Petitioner claims (Pet. 9-11) that he received ineffective assistance of counsel because his attorney failed to argue on direct appeal that the 17 days between January 10 and January 27, 2003 should not have been excluded under the Speedy Trial Act because they fell within the 30-day window immediately following petitioner's initial appearance, during which the trial could not commence. Because this argument utterly lacks

merit, petitioner cannot establish that his attorney rendered deficient performance by failing to raise it or that petitioner suffered prejudice as a result, dooming his ineffective-assistance claim. See *Strickland* v. *Washington*, 466 U.S. 668, 688-689, 693-694 (1984).

Petitioner's argument that time during the first 30 days after an initial appearance cannot be excluded for the ends of justice finds no statutory or case support. The Speedy Trial Act provides that, absent the defendant's consent, "the trial shall not commence less than thirty days from the date on which the defendant first appears." 18 U.S.C. 3161(c)(2) (Supp. II 2008). The purpose of Section 3161(c)(2) is to "guarantee the defendant a minimum of thirty days for the preparation of his defense." *United States* v. *Moya-Gomez*, 860 F.2d 706, 742 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989). But nothing in Section 3161(c)(2) forecloses excluding time for continuances during that 30-day period; indeed, the provision says nothing at all about continuances or exclusions. Petitioner cites no case, and the government is aware of none, holding that an ends-of-justice continuance cannot be granted within the 30-day period following a defendant's initial appearance.[2]

Petitioner nonetheless contends (Pet. 10) that the guidelines issued by the Judicial Conference interpreting the Speedy Trial Act support his claim that an "ends

---

[2] Petitioner's reliance (Pet. 10) on *United States* v. *Bigler*, 810 F.2d 1317 (5th Cir.), cert. denied, 484 U.S. 842 (1987), is misplaced. The narrow issue there was whether the government's failure to seek the appointment of counsel in time to permit the defendant to have 30 days to prepare with counsel for trial, when the trial was scheduled for a date beyond the 70-day limit, violated the defendant's rights under the Act. See *id.* at 1317. The court did not consider, nor purport to decide, whether an ends-of-justice continuance could be granted within the first 30 days following a defendant's initial appearance.

of justice" continuance can only apply to dates on which trial otherwise would have been possible. Petitioner is mistaken. The relevant part of the guidelines discussing "ends of justice" continuances provides:

> A continuance under paragraph (h)(8) may be granted at any time that it appears to the court that the ends of justice will preclude trial (or indictment) within the time limits as otherwise calculated. For example, if the court concludes on the 30th day following indictment that the ends of justice require that trial start later than the expiration date of the 70-day limit, it should set a trial date accordingly. Of necessity, such a decision will be based on incomplete knowledge of what the time limit would otherwise be, since additional excludable time may be generated after the (h)(8) continuance is granted.
>
> In such a case, the clerk should continue to record the time excludable under other paragraphs, *and should charge to (h)(8) only the time not excludable under other provisions.* The starting date recorded for the (h)(8) continuance will thus be the day following the day that would otherwise have been the last day for commencement of trial, as indicated above, even though that date could not be finally determined at the time the judge granted the (h)(8) continuance.
>
> The effect of this practice is to maintain the safety-valve function of the (h)(8) exclusion. If further postponement of the trial date is considered, and the proposed new date is not within the 70-day limit as extended by the automatic exclusions, the court should consider whether an additional ends-of-justice continuance is warranted.

Comm. on the Admin. of the Crim. Law of the Judicial Conf. of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as amended*, 106 F.R.D. 271, 303 (Dec. 1979, with amendments through Oct. 1984) (emphasis added). Plainly, the Judicial Conference's guidance does not indicate that an ends-of-justice continuance cannot be granted during the 30-day period after the indictment or initial appearance. Rather, the guidance points out that automatic exclusions under the Act could follow earlier ends-of-justice continuances, and explains that those automatic exclusions should be counted first and only time not excludable under such provisions should be charged to an ends-of-justice continuance.

Because petitioner's Speedy Trial Act claim lacks merit, petitioner has failed to show either that appellate counsel's performance fell below professional norms or that he suffered prejudiced.

b. Moreover, petitioner's particular ineffective-assistance claim does not raise an error of sufficient magnitude to justify the extraordinary relief of *coram nobis*.[3]

---

[3] Petitioner originally filed a petition for post-conviction relief under 28 U.S.C. 2255, but the district court, noting that petitioner's term of supervised release had ended in November 2010, stated that "[u]pon request by [p]etitioner, the court will treat his earlier habeas petition as a *coram nobis* petition." Pet. App. 19 n.1. The court of appeals, in turn, construed petitioner's appeal "as from the denial of a *coram nobis* petition." *Id.* at 9. It is not entirely clear that this conversion was correct. A motion under Section 2255 is the appropriate vehicle to challenge a defendant's conviction if the defendant is "in custody" at the time he *files* the petition, see *Maleng* v. *Cook*, 490 U.S. 488, 490-491 (1989), and a defendant is "in custody" if he is subject to supervised release, see *Scanio* v. *United States*, 37 F.3d 858, 860 (2d Cir. 1994). Petitioner was still on supervised release when he filed his Section 2255 motion in September 2009. The district court cited

A writ of *coram nobis* "was traditionally available only to bring before the court factual errors 'material to the validity and regularity of the legal proceeding itself,' such as the defendant's being under age or having died before the verdict." *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (quoting *United States* v. *Mayer*, 235 U.S. 55, 67-68 (1914)). The circumstances in which the writ is appropriate to correct a criminal conviction are exceedingly rare. To ensure "that finality is not at risk in a great number of cases," this Court has "limit[ed] the availability of the writ to 'extraordinary' cases presenting circumstances compelling its use 'to achieve justice.'" *United States* v. *Denedo*, 556 U.S. 904, 911 (2009) (quoting *United States* v. *Morgan*, 346 U.S. 502, 511 (1954)). Although petitioner has couched his claim as one of ineffective assistance of counsel, his core complaint is that his counsel failed to object on appeal to the exclusion of 17 days from the statutory speedy-trial clock. Such an error (if it occurred) does nothing to cast doubt on the fundamental fairness of his conviction and it cannot meet the high bar for *coram nobis* relief.

United States v. *Morgan*, 346 U.S. 502 (1954), but in that case, the request for relief was filed long after the defendant's federal sentence expired. Courts of appeals have held that Section 2255 challenges to a conviction filed when the defendant is in custody do not become moot after release from custody because of the possibility of collateral consequences. See, *e.g.*, *Nguyen* v. *United States*, 114 F.3d 699, 703 (8th Cir. 1997). The conversion of petitioner's Section 2255 motion into a *coram nobis* petition is immaterial to the ultimate success of petitioner's claim, however, because petitioner's appeal would have been even *more* frivolous if it had been from the denial of a Section 2255 motion. Indeed, the court of appeals would have lacked jurisdiction to even consider it, given petitioner's failure to obtain a certificate of appealability. 28 U.S.C. 2253(c); see *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003).

3. Finally, petitioner summarily argues (Pet. 11) that the court of appeals erred by allowing a different panel to rule on his petition for rehearing than the panel that originally dismissed his appeal. Other than pointing to a Fourth Circuit local rule providing that "[t]he panel of judges who heard and decided the appeal will rule on the petition for rehearing," 4th Cir. R. 40.2, petitioner provides no support for his assertion that the same panel must consider a rehearing petition. The Second Circuit has no such local rule, and the Federal Rules of Appellate Procedure contain no such requirement. The courts of appeals have supervisory authority to formulate reasonable and appropriate procedural rules in matters not addressed by statute or the promulgated rules. See *Thomas* v. *Arn*, 474 U.S. 140, 147-148 (1985). This court's intervention to create a uniform practice in this area is neither desirable nor warranted. Cf. *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993) (declining to "mandate[] uniformity" in fugitive dismissal rules).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
DEBORAH WATSON
Attorney

FEBRUARY 2013