No. 20-1704

In the Supreme Court of the United States

RONRICO SIMMONS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts erred in finding that petitioner's assertion that an impediment prevented him from filing earlier, unaccompanied by any alleged facts or explanation connecting that impediment to his failure to timely file, was insufficient to allege that his motion was timely under 28 U.S.C. 2255(f)(2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is published at 974 F.3d 791. The order of the district court (Pet. 15a-22a) is not published in the Federal Supplement but is available at 2019 WL 2205849. A prior order of the district court (Pet. App. 23a-30a) is unpublished. The report and recommendation of the magistrate judge (Pet. App. 31a-47a) is not published in the Federal Supplement but is available at 2019 WL 2932453. A prior report and recommendation of the magistrate judge (Pet. App. 48a-53a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2020. A petition for rehearing en banc was denied on January 5, 2021 (Pet. App. 54a-55a). By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any

petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on June 4, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to possess with intent to distribute more than a kilogram of heroin, in violation of 21 U.S.C. 841(b)(1)(A) (2012) and 21 U.S.C. 846, and maintaining drug-involved premises, in violation of 21 U.S.C. 856(a)(1) and 18 U.S.C. 2. Pet. App. 2a; C.A. ROA (ROA) 168. He was sentenced to 190 months of imprisonment, to be followed by five years of supervised release. ROA 169-170. Petitioner did not appeal his conviction or sentence. In 2018, more than a year after his conviction became final, petitioner moved to vacate his sentence under 28 U.S.C. 2255 and to deem that motion timely under 28 U.S.C. 2255(f)(2). Pet. App. 3a. The district court denied both motions. *Id.* at 15a-22a. The court of appeals affirmed. *Id.* at 1a-14a.

1. Between 2011 and 2012, petitioner participated in a conspiracy to purchase and sell heroin for further distribution and transport in Michigan. ROA 141-142. To protect the conspiracy, petitioner persuaded others to house heroin, drug money, and a co-conspirator in exchange for free and reduced-cost heroin. ROA 142.

Petitioner pleaded guilty to one count of conspiring to possess with intent to distribute more than a kilogram of heroin, in violation of 21 U.S.C. 841(b)(1)(A)

(2012) and 21 U.S.C. 846, and to one count of maintaining drug-involved premises, in violation of 21 U.S.C. 856(a)(1) and 18 U.S.C. 2. Pet. App. 2a; ROA 168. On September 8, 2016, the district court sentenced petitioner to 190 months of imprisonment, to be followed by five years of supervised release. ROA 169-170. Petitioner did not appeal, and the judgment of conviction became final on September 22, 2016. Pet. App. 2a-3a.

2. Almost two years later, on August 13, 2018, petitioner moved to vacate his sentence under 28 U.S.C. 2255, claiming ineffective assistance of counsel. Pet. App. 66a-79a. Section 2255 allows a federal prisoner to file such a motion within a year after the latest of several triggering events, one of which is his conviction becoming final. 28 U.S.C. 2255(f)(1); Pet. App. 3a. Petitioner, who did not file within a year of any standard triggering event, moved to deem his motion timely under Section 2255(f)(2). Pet. App. 56a. Section 2255(f)(2) provides that the one-year limitations period will run from "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action." 28 U.S.C. 2255(f)(2).

Petitioner asserted that Section 2255(f)(2) applied because he was initially serving his sentence in state custody and (according to petitioner) the state facilities did not have federal law materials. Pet. App. 3a-4a. He initially claimed that he did not gain access to such resources until September 27, 2017, but after the government had responded to his initial claim, he admitted that he obtained access to federal materials when he first arrived at a federal facility on August 29. *Ibid.*

Petitioner asserted, however, that while he was in state custody, he "had no access to [a] federal law library; legal materials; assistance by prison authorities in the preparation and filing of meaningful legal papers; and no access to the Rules Governing 2255 Proceedings and AEPDA [sic] statute of limitations." *Id.* at 4a (quoting *id.* at 60a). He further asserted that those inadequacies "prevented him from having the ability to timely pursue and know the timeliness for filing a 2255 Motion." *Ibid.* (quoting *id.* at 60a-61a).

The magistrate judge concluded that lack of access to a law library did not equitably toll the statute of limitations or constitute an illegal impediment preventing the filing of a timely motion under 28 U.S.C. 2255(f)(2). Pet. App. 51a. The district court adopted the magistrate judge's recommendation only in part. The court agreed with the magistrate judge that petitioner was not entitled to equitable tolling, but accepted that "lack of law library access could, in some circumstances, be considered a constitutional violation to the extent it deprives a petitioner of his right to 'meaningful access to the courts,' as recognized in *Bounds v. Smith*, 430 U.S. 817, 822 (1977)." *Id.* at 28a. The court observed that, although the government submitted an affidavit stating that petitioner had access to a library while in state custody, that affidavit merely created a factual question involving a credibility determination. *Id.* at 28a n.1. The court accordingly reasoned that the "relevant inquiry here is whether and under what circumstances lack of law library access amounts to a constitutional violation under 2255(f)(2), and whether petitioner's allegations are sufficient to trigger an evidentiary hearing on that issue." *Id.* at 28a. The court referred the case to the magistrate judge for further proceedings. *Id.* at 30a.

In a supplemental brief, petitioner again asserted that the state facility where he was initially incarcerated lacked federal materials and asserted that being incarcerated in a state facility "created an impediment" to filing his Section 2255 motion. Pet. App. 120a-122a (emphasis omitted). He did not, however, allege that he took any steps to file a Section 2255 motion, or otherwise try to exercise or even determine the existence of any right to collaterally attack his conviction and sentence, while in state custody. See *id.* at 6a, 120a-122a. Petitioner included an affidavit in which he stated that, during his incarceration in one of two state facilities, he "merely had access to state law," which was "of no benefit to [him]"; that the first federal facility in which he was incarcerated had only a library computer without a physical library or legal assistants; and that the lack of guidance in the federal facility "made it rough [for him] to begin legal research not having any idea where to start." *Id.* at 5a (quoting *id.* at 131a) (internal quotation marks omitted). A second affidavit, by a jailhouse clerk, averred that "few guys could navigate themselves through the Law Library system without" law clerk guidance, and that the clerk "can totally understand how [petitioner] waited til he arrived" at the second federal facility "to seek the aid of an experienced Law Clerk to help him." *Ibid.* (quoting *id.* at 133a) (emphases omitted).

The magistrate judge issued a new report, determining that petitioner's allegations were insufficient to invoke Section 2255(f)(2) because petitioner included only conclusory allegations, unsupported by any specifics, that the asserted lack of legal resources prevented him from timely filing his motion. Pet. App. 40a-42a. The magistrate judge observed that petitioner "has not

referenced any specifics regarding which particular references were available and which were missing" from the state library, nor "described any attempts he made (or the results of those attempts) to gain access to any of the federal materials that he states were missing from any source." *Id.* at 40a. Petitioner subsequently objected to the magistrate judge's recommendation, but did not ask for the opportunity to provide additional materials in response to it or substantively respond to the magistrate judge's analysis. See *id.* at 20a; ROA 406-412.

The district court adopted the magistrate judge's recommendation and denied the Section 2255 motion and the timeliness motion. Pet. App. 15a-22a. The court agreed with the magistrate judge's finding that petitioner's allegations were too "broad and generalized" and failed to explain "how the lack of [specific legal] materials prejudiced his ability to pursue his rights under section 2255." *Id.* at 20a. The court granted a certificate of appealability on the questions whether lack of access to legal materials can support relief under Section 2255(f)(2) and how specific a movant's allegations must be to invoke that provision. *Id.* at 21a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The court assumed without deciding that a lack of federal materials combined with a lack of a legal assistance program could be an unconstitutional impediment under Section 2255(f)(2), *id.* at 6a-9a, but observed that petitioner had failed adequately to allege such an impediment, *id.* at 9a-14a.

The court of appeals observed that it is "not controversial" that Section 2255(f)(2) "requires a causal relationship between the impediment" and the failure to timely file the Section 2255 motion, emphasizing that

"[o]ther circuits have arrived at similar conclusions." Pet. App. 10a. It further observed that it is the movant's obligation to "allege the relevant facts." *Ibid.* The court accordingly explained that, in order to satisfy Section 2255(f)(2), petitioner "had to allege a causal connection between the purportedly inadequate resources at the state facilities and his inability to file his motion on time." *Id.* at 11a.

After examining petitioner's statements, the court of appeals determined that petitioner had "failed to adequately allege or explain how the supposedly inadequate state law libraries or lack of legal assistance had any bearing on his failure to file while in state custody." Pet. App. 11a. The court noted that petitioner "did not allege any facts connecting the facilities' alleged lack of resources and his failure to file his motion within the normal one-year limitation period." *Ibid.* The court observed, for example, that petitioner did not claim that he ever attempted to go to the state library to get materials or that he sought out help. *Id.* at 11a-12a. And it found that the affidavits that petitioner had submitted did not support his claim, noting that, "[i]f anything," the jail house clerk's affidavit suggested that petitioner's own "decision to wait" rather than the allegedly inadequate resources prevented him from filing earlier. *Id.* at 12a n.1.

The court of appeals explained that petitioner did not "need to answer any particular question in his allegations," but did "need[] to allege something reflecting a plausible causal connection" between a lack of materials and an inability to file within a year. Pet. App. 12a. In particular, the court agreed with the Seventh Circuit that if a prisoner "didn't want or need a law library during the year after his conviction became final," its

unavailability would not have triggered Section 2255(f). *Ibid.* (quoting *Estremera* v. *United States*, 724 F.3d 773, 777 (2013)). And it found that because petitioner provided only "the bare conclusory statement that the lack of access 'prevented him' from filing earlier," but supplied "no factual allegations" to support that statement, his claim "'amounts to little more than an incognizable complaint that his prison lacked an adequate library,'" presenting neither a sufficient claim nor a factual issue necessitating a full evidentiary hearing. *Id.* at 11a-12a & n.2 (quoting *Krause* v. *Thaler*, 637 F.3d 558, 562 (5th Cir. 2011)).

ARGUMENT

Petitioner contends (Pet. 11-28) that his claim that his motion to vacate his sentence was timely under 28 U.S.C. 2255(f)(2) was sufficient to warrant further proceedings. The court of appeals correctly rejected that contention, and its fact-bound decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. The court of appeals correctly determined that petitioner's particular allegations were insufficient to invoke 28 U.S.C. 2255(f)(2).

a. Section 2255(f)(2) provides that the one-year limitations period to file a Section 2255 motion begins to run on "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action." 28 U.S.C. 2255(f)(2). By its terms, Section 2255(f)(2) requires a causal relationship between a cognizable impediment and the movant's failure to file his motion earlier,

namely, that the impediment "prevented" the prisoner from making a motion.

That requirement is "not controversial." Pet. App. 10a. It flows directly from the statutory text, which provides that the later start date for the one-year limitations period applies only "*if* the movant was prevented from making a motion *by* such governmental action." 28 U.S.C. 2255(f)(2) (emphases added). And it is consistent with every court of appeals decision interpreting Section 2255(f)(2) and its counterpart for habeas motions filed by state prisoners, 28 U.S.C. 2244(d)(1)(B). See, *e.g.*, *Krause* v. *Thaler*, 637 F.3d 558, 561 (5th Cir. 2011) (explaining that a habeas petitioner "must also show that the lack of adequate legal materials actually *prevented* him from timely filing his habeas petition"); *Wood* v. *Spencer*, 487 F.3d 1, 7 (1st Cir.) (explaining that as a matter of "statutory construction," Section 2255(f)(2) "demands that a state-created impediment must, to animate the limitations-extending exception, 'prevent' a prisoner from filing for federal habeas relief"), cert. denied, 552 U.S. 912 (2007); *Bryant* v. *Schriro*, 499 F.3d 1056, 1060 (9th Cir. 2007) (explaining that "the petitioner must show a causal connection between the unlawful impediment and his failure to file a timely habeas petition").

The lower courts correctly applied that legal requirement to the specific allegations that petitioner made in this case. As the court of appeals recognized, petitioner "only provided the bare conclusory statement that the lack of access 'prevented him' from filing earlier." Pet. App. 11a-12a & n.1. He nowhere alleged that he attempted to seek relief from his conviction, only to be stymied by the lack of federal materials. See *id.* at 56a-65a, 66a-116a, 117a-134a. He did not allege that he ever

went to the library at the state facility or attempted to get legal assistance or otherwise took steps that, if the facilities were adequate, would have led to the timely filing of his Section 2255 motion. And in the absence of that, or any similar allegation, his claim was insufficient to meet the textual requirements of Section 2255(f)(2).

Other courts of appeals have likewise rejected similar claims as deficient. See *Krause*, 637 F.3d at 561 (finding prisoner's allegations insufficient absent "facts as to why the transfer facility's lack of legal materials prevented him from filing a timely habeas application"); *Miller* v. *Marr*, 141 F.3d 976, 978 (10th Cir.) ("It is not enough to say that the Minnesota facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate."), cert. denied, 525 U.S. 891 (1998). Cf. *Lewis* v. *Casey*, 518 U.S. 343, 351 (1996) (explaining that a prisoner asserting a constitutional violation based on shortcomings in a library or legal assistance program must "demonstrate that the alleged shortcomings * * * hindered his efforts to pursue a legal claim" because the Constitution does not guarantee prisoners "an abstract, freestanding right to a law library or legal assistance"). As the court of appeals correctly explained, although petitioner "did not * * * need to answer any particular question in his allegations," he did need to allege "a plausible causal connection"—that is, specific facts, indicating how or why the claimed impediment prevented him from filing on time. Pet. App. 12a.

Because petitioner failed even to allege specific facts that might, if proved, satisfy the requirements for timeliness, the court of appeals was correct in determining that no evidentiary hearing was required. Courts have explained that no hearing is necessary if the claimant's

allegations "are contradicted by the record, inherently incredible, or conclusions rather than statements of facts." *Huff* v. *United States*, 734 F.3d 600, 607 (6th Cir. 2013) (citation omitted); see *United States* v. *Reed*, 719 F.3d 369, 373 (5th Cir. 2013) ("Conclusory allegations, unsubstantiated by evidence, do not support the request for an evidentiary hearing."); *Daniels* v. *United States*, 54 F.3d 290, 293 (7th Cir. 1995) ("[A] hearing is not necessary if the petitioner makes conclusory or speculative allegations rather than specific factual allegations."); *Nickerson* v. *Lee*, 971 F.2d 1125, 1136 (4th Cir. 1992) ("Unsupported, conclusory allegations do not entitle a habeas petitioner to an evidentiary hearing."), cert. denied, 507 U.S. 923 (1993); see also *Schriro* v. *Landrigan*, 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."). Here, the deficiencies in petitioner's allegations gave rise to no "factual dispute," *Huff*, 734 F.3d at 607 (citation omitted), that an evidentiary hearing might usefully resolve.

b. Petitioner's contrary arguments (Pet. 18-24) lack merit.

First, petitioner contends that the court of appeals "erroneously injected a diligence requirement into [Section] 2255(f)(2)." Pet. 19 (capitalization omitted). Petitioner is mistaken. The court of appeals did not require petitioner to establish his diligence; it merely required him to plausibly allege that the asserted lack of resources was in fact the obstacle that prevented him from timely filing a motion. See Pet. App. 11a-12a. If petitioner did not make any effort even to try to

commence postconviction proceedings for more than a year after his conviction became final, or if he never attempted to go to the library at the state facility, the fact that the state facility may have lacked certain resources did not "prevent[]," 28 U.S.C. 2255(f)(2), his timely filing. The absence of causal connection is fatal to his Section 2255(f)(2) claim, see pp. 8-9, *supra*, even if the same facts might also establish a lack of diligence for purposes of other theories. See *Wood*, 487 F.3d at 7-8 (explaining that a determination that a habeas petitioner had failed to establish that the alleged impediment was "the obstacle that prevented [him] from filing for federal habeas relief" did not amount to imposing "a hidden diligence requirement").

Second, petitioner contends (Pet. 22-24) that the panel's failure to remand for an evidentiary hearing contravenes Section 2255(b). Section 2255(b) provides for a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. 2255(b). Here, the uncontested timing of petitioner's motion more than a year after his conviction became final, and the absence of adequate allegations on an essential requirement to invoke Section 2255(f)(2) would "conclusively show," *ibid.*, that petitioner is entitled to no relief. See *Blackledge* v. *Allison*, 431 U.S. 63, 75 (1977) (observing that allegations that are "vague or conclusory" can warrant dismissal "for that reason alone") (brackets and citation omitted).

Petitioner's reliance on this Court's decision in *Fontaine* v. *United States*, 411 U.S. 213 (1973) (per curiam), is unsound. In *Fontaine*, the Court concluded that a prisoner was entitled to an evidentiary hearing on the claim that his guilty plea was coerced. *Id.* at 215. In

that case, however, the prisoner's Section 2255 motion set out "detailed factual allegations" of circumstances that "coerced his confession." *Id.* at 214-215. *Fontaine* does not suggest that an evidentiary hearing must be granted based on mere conclusory allegations.

2. Petitioner errs in suggesting that the outcome of his case might have been different in other circuits.

a. Petitioner cites (Pet. 12-15) several decisions that remanded a postconviction case for an evidentiary hearing as to timeliness. But none of those decisions specifically addressed the sufficiency of a prisoner's allegations or concluded that a hearing was warranted despite the prisoner's failure to adequately allege causation.

Petitioner principally relies on the Ninth Circuit's en banc decision in *Whalem/Hunt* v. *Early*, 233 F.3d 1146 (2000) (per curiam). But that case addressed the separate question whether a habeas petitioner's lack of knowledge about the existence of the one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, could constitute an "impediment" under 28 U.S.C. 2244(d)(1)(B). 233 F.3d at 1148; see *Whalem/Hunt* v. *Early*, 204 F.3d 907, 910 (9th Cir.) (reciting the issue in the certificate of appealability as "whether the failure to provide AEDPA materials constituted an impediment to filing the petition"), granted reh'g and reh'g en banc, 218 F.3d 1078 (9th Cir. 2000), rev'd on reh'g en banc, 233 F.3d 1146 (9th Cir. 2000) (per curiam). The court concluded that a prison's failure to make AEDPA materials available could, in some circumstances, constitute such an "impediment." *Whalem/Hunt*, 233 F.3d at 1148 (citation omitted). And because the warden had not had the opportunity to dispute the habeas petitioner's assertion that legal

materials describing AEDPA were in fact unavailable at the prison, the court remanded the case "for appropriate development of the record." *Id.* at 1147-1148. The Ninth Circuit's decision did not discuss, let alone resolve, whether the habeas petitioner sufficiently alleged a causal link between the asserted impediment and his failure to timely file.

Petitioner cites two unpublished decisions for the proposition that the Ninth Circuit has "reaffirmed" the rule that a claimant adequately alleges a causal link as long as it is possible that the asserted impediment prevented him from timely filing the petition. Pet. 13. The first decision, if anything, supports the opposite proposition; in that case, the Ninth Circuit determined that, although the habeas petitioner's allegations about inadequate library access were sufficient to entitle him to factual development for his equitable tolling claim, they were insufficient to satisfy the "far higher" showing required to establish that he was "prevented" from timely filing under Section 2244(d)(1)(B)—the counterpart to Section 2254(f)(2) for state prisoners. *Johnson* v. *Chavez*, 585 Fed. Appx. 448, 449 (2014) (citations omitted). And the second decision is inapposite because it addresses the allegations needed to proceed on an equitable tolling theory, rather than under Section 2244(d)(1)(B) or Section 2255(f)(2). See *Alarcon* v. *Marshall*, 188 Fed. Appx. 608, 610 (9th Cir. 2006).

Petitioner similarly errs in contending (Pet. 13-14) that the decision below conflicts with the Seventh Circuit's decision in *Estremera* v. *United States*, 724 F.3d 773 (2013). In *Estremera*, the government disputed whether, as a legal matter, lack of library access can be an impediment under Section 2255(f)(2), and whether, as a factual matter, the prisoner's allegation that he had

no access to legal resources was correct. *Id.* at 776. The Seventh Circuit reasoned that "[l]ack of library access can, in principle, be an 'impediment'" and remanded the case for an evidentiary hearing to resolve the factual dispute about what materials had been available. *Ibid.*; see Pet. App. 8a-9a. Although the Seventh Circuit indicated that questions related to causation would be assessed at an evidentiary hearing, it did not address the specificity of the movant's allegations, nor hold that a bare conclusory assertion that a prisoner was "prevented" from filing would adequately allege the causal relationship required to invoke Section 2255(f)(2). See *Estremera*, 724 F.3d at 777.

Petitioner also cites (Pet. 14) an earlier Seventh Circuit decision, *Moore* v. *Battaglia*, 476 F.3d 504 (2007). In that case, the court remanded because the district court had not required the State to respond to the petition and therefore the State had not yet had the opportunity to "establish whether the prison library was adequate." *Id.* at 508. Like *Estremera*, that decision does not address the sufficiency of allegations or the causal connection between an alleged impediment and the failure to file a timely motion.

Petitioner's reliance (Pet. 15) on the Fifth Circuit's decision in *Egerton* v. *Cockrell*, 334 F.3d 433 (2003), is similarly misplaced. The Fifth Circuit in *Egerton* reasoned that "an inadequate prison law library may constitute a state[-]created impediment" under AEDPA. *Id.* at 439; see Pet. App. 8a. Petitioner relies (Pet. 15) on the Fifth Circuit's prior remand, in an unpublished order, to determine whether the habeas petitioner was in fact aware of the existence of AEDPA prior to the expiration of the one-year limitations period. See *Egerton*, 334 F.3d at 435-436 (describing the remand). But

the court did not, as petitioner suggests, remand the case despite insufficient allegations; to the contrary, the habeas petitioner made the very allegations that the court of appeals found lacking in this case: that he requested and was denied access to the library on several occasions, that he filed numerous forms requesting legal materials to no avail, that he did not receive requested books, and that the library did not have a copy of a book containing the relevant AEDPA provision. See *id.* at 435. And in any event, a prior decision to remand in a non-precedential order would not create any conflict warranting this Court's review.

Petitioner also invokes *Stephen* v. *United States*, 519 Fed. Appx. 682 (2013) (per curiam), an unpublished decision from the Eleventh Circuit. Pet. 14-15. In that case, the Eleventh Circuit vacated the district court's dismissal of a Section 2255 motion "[b]ecause the district court failed to address" the Section 2255(f)(2) question at all. 519 Fed. Appx. at 684; see *Stephen* v. *United States*, No. CV211-6, 2011 WL 1705575 (S.D. Ga. May 4, 2011) (district court decision addressing equitable tolling only), vacated, 519 Fed. Appx. 682 (11th Cir. 2013). Accordingly, that non-precedential decision has no bearing here.

b. Petitioner additionally relies on cases outside the Section 2255(f)(2) context, contending that the decision below conflicts with decisions from the Third, Fourth, and Eighth Circuits that required an evidentiary hearing based on a claimant's non-frivolous allegations. See Pet. 15-17. But those decisions—which say nothing about the Section 2255(f)(2) causation requirement—are simply examples of cases in which a claimant has made adequate allegations of an entitlement to relief that could not be assessed on the existing record. See

United States v. *White*, 366 F.3d 291, 297 (4th Cir. 2004) (explaining that, where a movant has made adequate allegations, a court cannot summarily dismiss them "simply because the petitioner has yet to prove them"). The Third, Fourth, and Eighth Circuits each recognize, in accord with the decision below, that a district court need not hold an evidentiary hearing based on conclusory assertions. *Engelen* v. *United States*, 68 F.3d 238, 240 (8th Cir. 1995) (explaining that a postconviction motion "can be dismissed without a hearing" if "the allegations cannot be accepted as true," including because they are "conclusions rather than statements of fact"); *United States* v. *McCoy*, 410 F.3d 124, 134 (3d Cir. 2005) (explaining that a hearing is unwarranted if a motion's allegations are "'conclusions rather than statements of fact'") (quoting *Engelen*, 68 F.3d at 240); *White*, 366 F.3d at 296-297 (explaining that a hearing is required only where "the parties produce evidence disputing material facts with respect to non-frivolous habeas allegations").

In any event, the cases all involve more specific allegations or record facts supportive of a postconviction claim than are present here. See, *e.g.*, *United States* v. *Scripps*, 961 F.3d 626, 634 (3d Cir. 2020) (remanding for an evidentiary hearing on an ineffective assistance claim based on allegations that appellate counsel failed to raise a specific and "clearly meritorious" argument); *Mayfield* v. *United States*, 955 F.3d 707, 710-711 (8th Cir. 2020) (remanding for an evidentiary hearing on ineffective assistance claim based on allegations that counsel gave incorrect advice on the applicable statutory minimum sentence, where the court determined that such advice if given "was not professionally reasonable" and record of the plea colloquy "len[t] some

support" to the argument); *McCoy*, 410 F.3d at 132-135 (remanding for an evidentiary hearing on an ineffective assistance claim where trial record gave substantial reason to doubt that conviction would have occurred without counsel's decision to enter a stipulation and did not establish whether the decision conferred a "strategic advantage"); *White*, 366 F.3d at 300 (finding that "extraordinary circumstances" warranted the "rare" step of requiring an evidentiary hearing on claim that plea was involuntary where movant alleged that prosecutor entered an oral agreement that movant could enter a guilty plea but still appeal, the government never denied that allegation, and other record evidence showed that movant had received ineffective assistance of counsel and an inadequate plea colloquy). Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2021