No. 10-1426

In the Supreme Court of the United States

TRACY BUSCH, 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 petitioner, who was seeking to vacate his sentence under 28 U.S.C. 2255 based on the use of a stun belt at his trial and his trial and appellate counsels' alleged ineffective assistance in failing to challenge its use, was entitled to an evidentiary hearing to demonstrate prejudice.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the *Federal Reporter* but is reprinted in 411 Fed. Appx. 872.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2011. The petition for a writ of certiorari was filed on May 18, 2011. 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 Ohio, petitioner was found guilty of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1), and possessing ammu-

nition as a convicted felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 300 months of imprisonment, to be followed by five years of supervised release. *Id*. at 2-3. The court of appeals affirmed. *United States* v. *Busch*, No. 06-3229 (6th Cir. June 6, 2007) (unpublished).

Petitioner subsequently filed a pro se motion to set aside his sentence pursuant to 28 U.S.C. 2255, claiming for the first time that the use of a stun belt at his trial affected his ability to assist in his defense and prejudiced him in front of the jury, that the district court erred in failing to hold a hearing and make evidentiary findings regarding the need for the stun belt, and that his trial and appellate counsel were ineffective because they failed to raise the issue. Pet. App. 17a-80a. The district court denied the motion and declined to issue a certificate of appealability. *Id.* at 12a-16a. The court of appeals granted a certificate of appealability and affirmed. *Id.* at 1a-11a.

1. On October 18, 2004, police officers in Hamilton County, Ohio, found a gun in petitioner's waistband. When the police instructed petitioner to put his hands up, petitioner reached for his waistband. Petitioner was arrested and later remarked to a police officer, "I should have shot you." Gov't C.A. Br. 7. Petitioner had three prior convictions for violent felonies. Indictment.

On March 2, 2005, a grand jury in the Southern District of Ohio returned an indictment charging petitioner with one count of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1), and one count of possessing ammunition as a convicted felon, in violation of 18 U.S.C. 922(g)(1). Indictment.

2. At trial, the district court required petitioner to wear a stun belt restraint on his leg. On both days of

trial, the United States Marshal's Service provided petitioner with a form titled "Notification of Electronic Restraint System Use." Pet. App. 89a-92a. Petitioner refused to sign the form. He did not, however, object to the use of the stun belt and the trial record contains no reference to the stun belt. Petitioner did not testify at trial. Gov't C.A. Br. 6-7; Pet. App. 2a.

Petitioner was convicted on both counts of the indictment. Judgment 1. He was sentenced to 300 months of imprisonment, to be followed by five years of supervised release. Judgment 3; Gov't C.A. Br. 5.

3. Petitioner appealed, but did not challenge the use of the stun belt at trial. The court of appeals affirmed petitioner's conviction and sentence. *Busch*, No. 06-3229 (June 6, 2007) (unpublished).

4. Almost one year later, petitioner filed a pro se motion to set aside his sentence pursuant to 28 U.S.C. 2255, claiming for the first time that the use of the stun belt at his trial affected his ability to assist in his defense and prejudiced him in front of the jury, that the district court erred in failing to hold an evidentiary hearing about the use of the stun belt, and that his trial and appellate counsel were ineffective because they failed to raise the issue. Pet. App. 17a-80a. Petitioner failed to offer any direct evidentiary support for his claims of prejudice. See *id.* at 2a, 17a-80a.

The government opposed the motion, arguing that petitioner's violent criminal history supported the district court's discretionary decision to employ the stun belt and that petitioner failed to demonstrate any actual impact on the jury. The government also argued that petitioner's counsel's strategic decision not to challenge the use of the stun belt did not constitute ineffective assistance of counsel. Pet. App. 81a-88a.

5. The district court denied petitioner's Section 2255 motion and declined to issue a certificate of appealability. Pet. App. 12a-16a. The court did not hold a hearing. It concluded that petitioner had failed to demonstrate prejudice from the use of the stun belt and noted that there was no evidence that the jury was even aware of the device. *Id*. at 14a. The court stated that petitioner's "violent background, including three separate violent felonies as well as assaults on police officers and others, fully supported" its discretionary decision to employ the stun belt. *Ibid*. In addition, the court stated that defense counsel's decision not to contest the belt's use was objectively reasonable because use of the belt was within the court's discretion. *Id*. at 14a-15a.

6. The court of appeals granted a certificate of appealability on the issues of whether (1) the district court abused its discretion by failing to hold a hearing and make findings of fact on the need for the stun belt and, if so, whether the error was harmless; and (2) counsel provided ineffective assistance in failing to raise the issue. The court of appeals affirmed. Pet. App. 1a-11a.

First, the court considered the "threshold question" of whether petitioner had procedurally defaulted his stun belt claim. Pet. App. 4. Although the government failed to raise default as a defense, the court exercised its discretion to consider the question and concluded that petitioner had defaulted the claim by failing to raise it on direct review. Thus, the court required petitioner to demonstrate "cause and prejudice" to excuse his trial and appellate counsels' failure to raise the stun belt issue. *Id.* at 4a-6a. The court's analysis therefore focused on whether counsel's performance was constitutionally

deficient under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

The court concluded petitioner had not shown that his trial counsel's failure to challenge the use of the stun belt was "so serious as to deprive [him] of a fair trial, a trial whose result is reliable," or that it was reasonably probable that the result would have been different. Pet. App. 7a (quoting *Strickland*, 466 U.S. at 687) (brackets in original). The court concluded that petitioner's "nebulous allegation of anxiety caused by the stun belt is inherently incredible because it lacks any specificity and is belied by his demonstrated ability to communicate with the trial judge while wearing the stun belt." *Id*. at 7a-8a. The court also rejected petitioner's contention that prejudice should be presumed under *Deck* v. *Missouri*, 544 U.S. 622 (2005), because the district court had found there was "no evidence that the jury was even aware of the stun belt." Pet. App. 8a.

The court of appeals next held that appellate counsel's failure to raise the stun belt issue did not prejudice petitioner because there was no reasonable probability that the challenge would have succeeded on appeal. Pet. App. 9a-10a. Petitioner would not have been able to satisfy the plain-error standard that would have applied on appeal, the court explained, because he had failed to present any evidence that the stun belt was visible to the jury. *Ibid.*

Finally, the court of appeals held that petitioner was not entitled to a hearing on the question of prejudice because he had failed to present even "some evidence" showing that he could reasonably be entitled to relief. Pet. App. 10a (citing *Bowling* v. *Parker*, 344 F.3d 487, 512 (6th Cir. 2003), cert. denied, 543 U.S. 842 (2004)). The court characterized as "circular" petitioner's argu-

ment that he was unable to demonstrate prejudice because he needed an evidentiary hearing to determine what prejudice existed. *Ibid.* (citing *Washington* v. *Renico*, 455 F.3d 722, 733 (6th Cir. 2006), cert. denied, 549 U.S. 1306 (2007)). Rather, "[a] hearing is for the petitioner who has already amassed enough evidence to entitle him to relief, if that evidence is proven true, and who now needs a hearing to prove that his evidence will indeed withstand scrutiny." *Id.* at 10a-11a (quoting *Post* v. *Bradshaw*, 621 F.3d 406, 425 (6th Cir. 2010), cert. denied, 131 S. Ct. 2902 (2011)).

ARGUMENT

Petitioner contends (Pet. 13-22) that the circuits are divided on when a prisoner challenging the use of a stun belt on collateral review may obtain an evidentiary hearing to demonstrate prejudice. The courts of appeals, however, do not disagree about the relevant legal principles. Petitioner also claims (Pet. 11-26) that he was entitled to an evidentiary hearing to demonstrate prejudice from the use of a stun belt at his trial, despite his failure to provide any concrete facts indicating that his ability to assist in his defense was hampered or that the stun belt was visible to the jury. Petitioner's claim lacks merit. This Court's review of the court of appeals' fact-bound and unreported decision is unwarranted.

1. Section 2255(b) provides that when a federal prisoner raises a claim on collateral attack a district court need not grant a hearing if "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) (2006 & Supp. I 2007). An evidentiary hearing is therefore not required if the defendant's claims do not raise a factual dispute or if the trial record refutes his claim. See, *e.g.*,

Schriro v. *Landrigan*, 550 U.S. 465 (2007); *Hill* v. *Lockhart*, 474 U.S. 52, 60 (1985); *Torzala* v. *United States*, 545 F.3d 517, 525 (7th Cir. 2008), cert. denied, 129 S. Ct. 1637 (2009); *Anjulo-Lopez* v. *United States*, 541 F.3d 814, 817 (8th Cir. 2008); *United States* v. *Lilly*, 536 F.3d 190, 196-197 (3d Cir. 2008); see also Rules Governing Section 2255 Proceedings for the United States District Courts R. 8 advisory committee's note at 1269 ("The standards for § 2255 hearings are essentially the same as for evidentiary hearings under a habeas petition."). There is no conflict among the courts of appeals with respect to this standard.

Petitioner cites (Pet. 13-16) *Gonzalez* v. *Pliler*, 341 F.3d 897 (9th Cir. 2003), as evidence of a divergence among the circuits. But the Ninth Circuit in *Gonzalez* did not hold that a prisoner challenging the use of a stun belt is always entitled to an evidentiary hearing on the issue of prejudice; it held only that an evidentiary hearing was required on the facts before it. See *id*. at 903-904. Contrary to petitioner's assertion (Pet. 14), the facts in *Gonzalez* do not parallel those in this case. The stun belt used in *Gonzalez* was secured around the defendant's waist, 341 F.3d at 899, not his leg, and, significantly, unlike petitioner, Gonzalez testified at trial while wearing the stun belt, *id*. at 902. Both of these facts made it more plausible that the device was visible to the jury and that the defendant's ability to participate in his defense was impaired. See *id*. at 904.

Likewise, the decision in *United States* v. *Durham*, 287 F.3d 1297 (11th Cir. 2002), which petitioner cites (Pet. 17-18), is readily distinguishable. As petitioner acknowledges (Pet. 17), *Durham* was a direct appeal and the government bore the burden of demonstrating harmless error beyond a reasonable doubt. 287 F.3d at

1300. *Durham* said nothing of the requirements for an evidentiary hearing under 28 U.S.C. 2255. The court held only that "[t]he government has not demonstrated that Durham's defense was not harmed by such an impediment to Durham's ability to participate in the proceedings." 287 F.3d at 1309. In addition, the record in *Durham* showed that the belt protruded three inches from the wearer's back, and the court specifically observed that "if the stun belt protrudes from the defendant's back to a noticeable degree, it is at least possible that it may be viewed by a jury." *Id.* at 1305. In short, the court in *Durham* had no occasion to address when a habeas petitioner alleging prejudice from the use of a stun belt is entitled to a hearing. It held only that, on the facts before it, the government had not met its burden of demonstrating on direct appeal that the district court's error in requiring the use of a stun belt without providing a sufficient rationale was harmless beyond a reasonable doubt. *Id.* at 1309.

Finally, *Stephenson* v. *Wilson*, 619 F.3d 664 (7th Cir. 2010), petition for cert. pending, No. 10-9541 (filed Mar. 16, 2011), is entirely consistent with the court of appeals' analysis in this case. The court in *Stephenson* held only that jurors' speculation that the defendant was wearing a stun belt was not sufficient in and of itself to demonstrate *Strickland* prejudice in light of the "evidence generated over months of testimony and cross-examination" about the defendant's participation in multiple assassination-type murders. *Id.* at 671-673.

In short, there is no "disarray in the courts of appeals" on the question presented in this case. Pet. 20. The courts of appeals apply a consistent standard under Section 2255(b) to determine whether a habeas petitioner is entitled to an evidentiary hearing.

2. The court of appeals correctly held that petitioner was not entitled to an evidentiary hearing. He failed to present any evidence showing that he was prejudiced from the use of a stun belt at his trial. Petitioner's Section 2255 motion made only vague and unsubstantiated allegations about general harm from the use of stun belts. Petitioner made no specific factual allegations about the harm he suffered as a result of the stun belt. A district court is not required to grant a hearing on such "conclusory statements" or "speculative allegations." *Gallo-Vasquez* v. *United States*, 402 F.3d 793, 797 (7th Cir. 2005); *Lynn* v. *United States*, 365 F.3d 1225, 1238-1239 (11th Cir.), cert. denied, 543 U.S. 891 (2004); *United States* v. *Johnson*, 988 F.2d 941, 945 (9th Cir. 1993). Petitioner failed to provide the specific factual allegations required to support his claim of prejudice.

Petitioner's general arguments about the potential visibility of stun belts have no bearing on whether the stun belt was visible in this case. Petitioner wore a stun belt on his leg, not visible shackles. The record did not support petitioner's claim that the stun belt was visible to the jury, and petitioner's motion contained no suggestion of evidence that the jury could have been aware of the device. See *Stevens* v. *McBride*, 489 F.3d 883, 899 (7th Cir. 2007) (noting that the use of a stun belt is not "inherently prejudicial" because it is "a method of restraint that minimizes the risk of prejudice because it is hidden beneath a defendant's clothing") (citation, internal quotations marks, and brackets omitted), cert. denied, 553 U.S. 1034 (2008); *United States* v. *McKissick*, 204 F.3d 1282, 1299 (10th Cir. 2000) (refusing to "presume prejudice" where defense counsel did not notice stun belts underneath defendants' clothing and the dis-

trict court concluded that the belts were "not visible"); see also *Deck* v. *Missouri*, 544 U.S. 622, 626-628 (2005) (addressing the use of "physical restraints that are visible to the jury").

Petitioner's Section 2255 motion contended that the jury could have speculated that petitioner was wearing a restraint. See Pet. App. 38a (stating there was "no record of whether the jury was aware of the use of the stun belt from means other than observing the defendant"). Yet petitioner presented no evidence to suggest that the jury actually reached this conclusion. Petitioner was not entitled to a hearing to fish for evidence that the jury saw the stun belt. See *United States* v. *Wardell*, 591 F.3d 1279, 1294 (10th Cir. 2009) ("we should not presume prejudice when there is no evidence that the jury noticed the stun belt") (quoting *McKissick*, 204 F.3d at 1299) (internal quotation marks omitted); *id.* at 1296 (declining to credit "speculation" that jury might have seen stun belts where defendant "identifie[d] nothing in the record that would indicate that a juror observed the stun belts"); *United States* v. *Miller*, 531 F.3d 340, 347 (6th Cir.) (under plain-error review, court will not assume that stun belt was visible to the jury in the absence of evidence that it was), cert. denied, 129 S. Ct. 307 (2008).

Petitioner also alleged that he suffered from anxiety and an inability to concentrate at trial. The court of appeals found this assertion to be "inherently incredible," Pet. App. 8a, because of its lack of specificity and the fact that petitioner communicated effectively with the trial judge while wearing the stun belt. Petitioner presented no "independent indicia of the likely merit" of his assertion. See *United States* v. *Edwards*, 442 F.3d 258, 264 (5th Cir.) (quoting *United States* v. *Cervantes*, 132

F.3d 1106, 1110 (5th Cir. 1998)), cert. denied, 548 U.S. 908 (2006); *Miller*, 531 F.3d at 347 (rejecting petitioner's contention that he was fearful at trial due to use of stun belt where record indicated that petitioner had participated in his defense).

Under petitioner's approach, a Section 2255 movant challenging for the first time the use of a stun belt must always be given a hearing because the issue did not arise at trial and is therefore not addressed in the record. That approach is irreconcilable with the plain language of Section 2255. The court of appeals' finding is supported by the record and does not warrant this Court's review. Petitioner did not present sufficient indicia of the merits of his prejudice claim to warrant a hearing under Section 2255.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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