No.

In the Supreme Court of the United States

ANGEL L. MORALES,

Petitioner,

v.

B. R. JETT, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 1956(a)(1)(A)(i), it is a crime to engage in a financial transaction involving the "proceeds" of specified unlawful activity—in this case, the operation of an illegal gambling business—with the intent to "promote" specified unlawful activity. Petitioner was convicted of conspiracy to violate that provision for having received payments deducted from bet money that he collected and then delivered to the operator of the gambling business. The question presented—which already is pending before this Court in *United States* v. *Santos*, No. 06-1005 (argued Oct. 3, 2007)—is whether petitioner is actually innocent of the conspiracy offense, and entitled to collateral relief, because (1) the payments were deducted from gross rather than net proceeds, (2) the only unlawful activity promoted by the payments was the underlying offense itself (*i.e.*, the ongoing operation of the gambling business), and/or (3) petitioner's conduct is otherwise not covered by the statute.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Angel L. Morales, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 499 F.3d 668. The order and judgment of the district court dismissing petitioner's petition for a writ of habeas corpus (App., *infra*, 14a-16a) are unreported. The order of the district court transferring petitioner's petition for a writ of habeas corpus (App., *infra*, 17a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2007. A timely petition for rehearing was denied on November 15, 2007. App., *infra*, 20a-21a. Justice Stevens extended the time for filing a petition for a writ of certiorari until March 14, 2008, and further extended that time until April 13, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the Appendix. App., *infra*, 22a-27a.

STATEMENT

This Court has granted certiorari in *United States* v. *Santos*, No. 06-1005 (argued Oct. 3, 2007), to decide whether, in the principal federal money-laundering statute, 18 U.S.C. § 1956(a)(1), "proceeds" of specified unlawful activity means the gross receipts from the unlawful activity or only the profits (*i.e.*, gross receipts less expenses). This case presents

the same question. Indeed, petitioner here—Angel L. Morales—and respondents in *Santos*—Efrain Santos and Benedicto Diaz—were co-defendants in the underlying criminal case, where they were charged with money-laundering offenses arising from the same course of conduct. This Court's decision in *Santos* will thus determine, not only whether respondents there are actually innocent of conspiracy to commit money laundering, but also whether petitioner here is actually innocent of that crime. Accordingly, the Court should hold the petition in this case for disposition as appropriate in light of its decision in *Santos*.

A. The Convictions and Direct Appeal

1. On May 10, 1996, petitioner was charged in an indictment in the Northern District of Indiana. Pet. C.A. App. 1-19. The charges related to his involvement as a "collector" in an illegal lottery business operated by his co-defendant Efrain Santos. The indictment alleged that, after "runners" employed by Santos solicited bets in bars and restaurants, petitioner and his co-defendant Benedicto Diaz paid a commission to the runners for the bets they solicited and then delivered the betting slips and remaining money to Santos. *Id.* at 5-6.

As relevant here, the indictment charged the following offenses: conspiracy to operate an illegal gambling business, in violation of 18 U.S.C. § 371 (Count One); operation of an illegal gambling business, in violation of 18 U.S.C. § 1955 (Count Two); conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 1956(h) (Count Three); and laundering of monetary instruments, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (Counts Four and Five). Pet. C.A. App. 1-15. Under Section 1956(a)(1)(A)(i),

it is a crime to engage in a financial transaction involving the "proceeds" of specified unlawful activity—including the operation of an illegal gambling business (see 18 U.S.C. §§ 1956(c)(7)(A), 1961(1))—with the intent to "promote" specified unlawful activity.[1] Under Section 1956(h), it is a crime to conspire to commit that offense.

2. A jury found Santos guilty on Counts One through Five of the indictment. Diaz pleaded guilty to Count Three. Santos was sentenced to 210 months of imprisonment and Diaz was sentenced to 108 months. *United States* v. *Febus*, 218 F.3d 784, 788-789 (7th Cir. 2000).

Like Diaz, petitioner pleaded guilty to Count Three: conspiracy to launder monetary instruments. In reciting the factual basis for the plea in the district court, the government made clear that the financial transactions at issue were petitioner's payments from Santos for his work as a "collector," payments that petitioner himself deducted before delivering the bet money to Santos. Petitioner was sentenced to 151 months of imprisonment. He began

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[1] The text of 18 U.S.C. § 1956(a)(1) reads, in relevant part, as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> > (A)(i) with the intent to promote the carrying on of specified unlawful activity * * *
>
> * * *
>
> shall be [guilty of an offense].

serving his sentence on February 1, 1999. *Febus*, 218 F.3d at 789; Pet. C.A. App. 65-66, 75.[2]

3. Santos, Diaz, and petitioner filed a direct appeal. On July 14, 2000, the Seventh Circuit rejected their claims and affirmed their convictions. *Febus*, *supra*. On October 17, 2000, the Seventh Circuit denied petitioner's request for rehearing or rehearing en banc. Santos, but not petitioner, filed a petition for a writ of certiorari, which this Court denied. *Santos* v. *United States*, 531 U.S. 1021 (2000).

B. Collateral Proceedings in District Court

1. In or about August 2000, approximately one month after his conviction was affirmed on direct appeal, petitioner retained a lawyer to file a motion for collateral relief under 28 U.S.C. § 2255. Pet. C.A. App. 121. The motion was due on January 15, 2002, one year after the expiration of the period for filing a

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[2] Petitioner's 151-month sentence was based on a total offense level of 34 under the then-mandatory Sentencing Guidelines. Pet. C.A. App. 78. The offense level was driven by the money-laundering guideline, which provided for a base offense level of 23 and an increase of up to 13 levels depending on the value of the funds. See U.S.S.G. § 2S1.1(a)(1), (b)(2) (1998). Under the gambling guideline, in contrast, petitioner's base offense level would have been only 12, with no increase based on the amount of money involved. See U.S.S.G. § 2E3.1(a)(1) (1998). As with the Guidelines, the statutory maximum sentence for money laundering was much higher than the statutory maximum for gambling. Compare 18 U.S.C. § 1956(a)(1) (20 years) and 18 U.S.C. § 1956(h) (same) with 18 U.S.C. § 1955 (5 years) and 18 U.S.C. § 371 (same). Petitioner's sentence thus was drastically increased by application of the money-laundering guideline, even though the case involves the operation of an illegal gambling business and the conduct underlying the money-laundering charges is identical to that underlying the gambling charges.

petition for a writ of certiorari. 28 U.S.C. § 2255 ¶ 6(1); see *Clay* v. *United States*, 537 U.S. 522 (2003). Petitioner's lawyer accepted payment and repeatedly assured him that the motion had been filed within the limitation period, but in fact the lawyer did not file a motion at all. Pet. C.A. App. 121-122.[3]

Diaz and Santos did file timely Section 2255 motions—Diaz on August 16, 2001 and Santos on November 30, 2001. *United States* v. *Santos*, 342 F. Supp. 2d 781, 784, 786 (N.D. Ind. 2004); *United States* v. *Diaz*, No. 2:01 CV 501, slip op. at 6 (N.D. Ind. Feb. 24, 2005).

2. On February 28, 2002, while the Section 2255 motions filed by Santos and Diaz were pending, and approximately six weeks after the expiration of the limitation period for the filing of a Section 2255 motion by petitioner, the Seventh Circuit decided *United States* v. *Scialabba*, 282 F.3d 475 (7th Cir.), cert. denied, 537 U.S. 1071 (2002). That case presented the question whether the term "proceeds" in 18 U.S.C. § 1956(a)(1) "refers to the gross income from an offense, or only the net income." *Scialabba*, 282 F.3d at 475. In a unanimous opinion by Judge

[3] This was not the first time that happened. Petitioner's lawyer had previously accepted payment to file motions for post-conviction relief and then failed to file the motions without notifying his clients. See *In re Kinney*, 670 N.E.2d 1294, 1295-1296 (Ind. 1996). Indeed, the lawyer had a long history of misconduct, which resulted in at least one public reprimand and multiple suspensions from the practice of law. See *In re Kinney*, 605 N.E.2d 172 (Ind. 1993); *In re Kinney*, 670 N.E.2d 1294 (Ind. 1996); *In re Kinney*, 760 N.E.2d 602 (Ind. 2002); *In re Kinney*, 813 N.E.2d 329 (Ind. 2004). In October 2004, in the face of additional allegations of misconduct, the lawyer resigned from the Indiana bar. See *In re Kinney*, 816 N.E.2d 1157 (Ind. 2004).

Easterbrook, the court held that, "at least when the crime entails voluntary, business-like operations, 'proceeds' must be net income." *Ibid.* Otherwise, the court explained, "the predicate crime merges into money laundering (for no business can be carried on without expense) and the word 'proceeds' loses operational significance." *Ibid.* As in this case, the "business" in *Scialabba* was gambling. *Ibid.*

3. On October 20, 2004, the district court granted Santos' Section 2255 motion on the basis of *Scialabba*. *Santos*, 342 F. Supp. 2d at 794-799. The court ruled that (a) "the proceeds * * * used by Santos to pay winners and couriers could *only have been gross* proceeds"; (b) under *Scialabba*, Santos therefore "did not * * * violate § 1956(a)(1)"; and (c) Santos thus was "imprisoned for acts that are not * * * crimes." *Id.* at 799. The court accordingly vacated Santos' convictions under Sections 1956(a)(1)(A)(i) and 1956(h). *Ibid.* On November 5, 2004, Santos was released from prison.

On February 24, 2005, the district court granted Diaz's Section 2255 motion on the same ground. *Diaz*, No. 2:01 CV 501, slip op. at 13-26. The court ruled that, under *Scialabba*, Diaz was actually innocent of conspiracy to commit money laundering, because "the total collected bet monies from which Diaz * * * withdrew his salary *could only have been gross* proceeds." *Id.* at 25. The court therefore vacated Diaz's conviction. *Id.* at 25-26. On March 3, 2005, Diaz was released from prison.

4. Despite having been convicted of the same offense, for the same underlying conduct, as Diaz, petitioner remained in prison—and indeed remains in prison to this day. On April 11, 2005, his lawyer having failed to do so, petitioner filed, *pro se*, an ap-

plication for collateral relief in the Northern District of Indiana, the district where he had been convicted. Invoking both 28 U.S.C. § 2255 (the ordinary mechanism for a federal prisoner to request collateral relief) and 28 U.S.C. § 2241 (the general habeas corpus provision), petitioner argued that he was actually innocent under *Scialabba* and that his guilty plea was therefore constitutionally invalid. Pet. C.A. App. 94-125; see *Bousley* v. *United States*, 523 U.S. 614, 618 (1998) (guilty plea is unintelligent if "neither [the defendant], nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged").

The district court construed petitioner's motion as conceding untimeliness insofar as it sought relief under Section 2255. App., *infra*, 17a-18a. The court nevertheless determined that petitioner might have a valid claim under Section 2241. *Id.* at 18a. The court reasoned that (a) it had "recently vacated convictions relating to two * * * co-defendants on the basis that the[ir] conduct * * * was not actually criminal"; (b) petitioner "contends that he was convicted of engaging in similar conduct"; and (c) "factual innocence is a valid basis for relief under § 2241." *Ibid.* Because a Section 2241 petition must be filed in "the district of confinement, not the district where the case was tried," however, the court transferred the petition to the Southern District of Indiana, the district where petitioner was confined. *Id.* at 18a-19a. That action was taken on November 14, 2005.

On February 1, 2006, the district court in the Southern District of Indiana denied the Section 2241 petition. App., *infra*, 14a-16a. Quoting 28 U.S.C. § 2255 ¶ 5, the court observed that a federal prisoner may proceed under Section 2241 only when Section

2255 is "inadequate or ineffective to test the legality of [the] detention." App., *infra*, 14a.[4] The court ruled that petitioner did not satisfy that requirement, because, in the court's view, petitioner could have filed a Section 2255 motion before the one-year limitation period expired. *Id.* at 15a.

C. Collateral Proceedings in the Seventh Circuit and this Court

1. The government appealed the district court's decisions granting Santos and Diaz collateral relief. Its sole contention on appeal was that *Scialabba* was wrongly decided and should be overruled. On August 25, 2006, the Seventh Circuit rejected that claim and affirmed the grants of collateral relief. *Santos* v. *United States*, 461 F.3d 886 (7th Cir. 2006). The court determined that the government had "not presented a compelling reason to overturn *Scialabba* and its holding that the term 'proceeds' in § 1956(a)(1) means net income." *Id.* at 894.

2. The government then sought review of the Seventh Circuit's *Santos* decision in this Court. The question presented in the certiorari petition was the same one that was decided in *Scialabba*: "whether 'proceeds' [in 18 U.S.C. § 1956(a)(1)] means the gross receipts from the unlawful activities or only the prof-

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[4] Paragraph 5 of 28 U.S.C. § 2255 reads, in full, as follows:

> An application for a writ of habeas corpus [pursuant to 28 U.S.C. § 2241] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

its, *i.e.*, gross receipts less expenses." 06-1005 Pet. (I). On April, 23, 2007, the Court granted certiorari. *United States* v. *Santos*, 127 S. Ct. 2098 (2007).

3. In the meantime, petitioner had appealed the district courts' decisions denying him collateral relief. With respect to his claim under Section 2255, petitioner argued that (a) contrary to the conclusion of the district court in the Northern District of Indiana, he did not concede that his motion was untimely; (b) he may be entitled to equitable tolling of the limitation period, because his lawyer affirmatively deceived him into believing that a timely motion had been filed; and (c) he was entitled to a hearing on whether equitable tolling is available. Pet. C.A. Br. 16-34. With respect to his claim under Section 2241, petitioner argued that, contrary to the conclusion of the district court in the Southern District of Indiana, Section 2255 *is* "inadequate or ineffective," because his claim is one of actual innocence and the basis for the claim was not legally established until after the expiration of the period for filing a motion under Section 2255. Pet. C.A. Br. 34-47. On August 24, 2007, a divided panel of the Seventh Circuit rejected petitioner's arguments and affirmed the denial of collateral relief. App., *infra*, 1a-13a.

a. The majority first held that the Section 2255 claim was not properly before the court, because petitioner did not file a separate appeal from the decision of the district court in the Northern District of Indiana. App., *infra*, 4a-6a. The majority then rejected petitioner's Section 2241 claim on the merits, finding that his remedy under Section 2255 was not "inadequate or ineffective." *Id.* at 6a-8a.

In holding that petitioner could not proceed under Section 2241, the majority acknowledged that petitioner's claim "had no case support until this court decided * * * *Scialabba*" and that the decision in that case came "after the one-year deadline for the filing of [his] section 2255 motion had passed." App., *infra*, 7a. The majority explained, however, that "the fact that a position is novel does not allow a prisoner to bypass section 2255, with its one-year deadline." *Ibid.* The deadline is "lifted," according to the majority, "[o]nly if the position is foreclosed (as distinct from not being supported * * *) by precedent." *Ibid.*

The majority then addressed petitioner's argument that *Scialabba* and *Santos* establish that "he is actually innocent of the crime of which he was convicted," as opposed to "having been the victim merely of a procedural irregularity that would justify at most a new trial," and that "a person who is actually innocent should be allowed to file a section 2241 petition at any time." App., *infra*, 7a-8a. The majority rejected that argument, but not on the ground that claims of actual innocence are equally subject to the aforementioned "foreclosed by precedent" requirement. Instead, the majority rejected the argument on the ground that petitioner is not in fact actually innocent—at least not yet.

The majority reasoned that petitioner's claim of actual innocence was "premature," because the question of his innocence was "in limbo." App., *infra*, 8a. Relying on the pendency of the *Santos* case in this Court, the majority thought it would be "paradoxical to deem [petitioner] innocent by virtue of our decisions though within a year it may turn out that he is guilty by virtue of the Court's rejecting those decisions." *Ibid.* The majority concluded with the obser-

vation that, if this Court "affirms *Santos* or somehow fails to resolve the issue," thereby leaving the Seventh Circuit's decisions "intact," petitioner "can file a new section 2241 petition." *Ibid.*

b. Judge Rovner dissented. App., *infra*, 8a-13a. She would have granted relief under Section 2241, because, in her view, petitioner *is* actually innocent. *Id.* at 8a-10a. "Until the Supreme Court tells us otherwise," she explained, "our cases should control, and under our caselaw, [petitioner] has a meritorious claim of actual innocence." *Id.* at 9a.

Judge Rovner acknowledged that, under the Seventh Circuit's decisions, actual innocence may be a necessary condition for obtaining relief under Section 2241, but it is not sufficient. Such a remedy is available, she said, "when there is both a valid claim of actual innocence and the petitioner has not had an unobstructed opportunity to present the claim prior to this time." App., *infra*, 10a-11a (citing cases). She noted that the majority "conveys the impression" that petitioner "can proceed with a new petition" if this Court "upholds *Scialabba*," and she "agree[d]" with the majority that a Section 2241 remedy would be available in that event, because petitioner "did not have an unobstructed opportunity to present the claim prior to this time." *Id.* at 11a. That is so, Judge Rovner explained, because the "foreclosed by precedent" requirement does not apply to a claim of actual innocence. It is enough, she said, that "*Scialabba* was decided after the one-year time period expired for the filing of [a] § 2255 petition"; review of an actual-innocence claim should not be precluded "solely because a defendant did not anticipate any novel argument that could possibly be made." *Id.* at 11a-12a.

Were the rule otherwise, Judge Rovner observed, "the creativity of a defendant's attorney, if he even has one, or the sheer luck of timing would be the definitive factor in who remains in prison for a nonexistent crime and who gets out." App., *infra*, 12a. She added that this case "illustrates" the point "precisely," because petitioner's co-defendants (Santos and Diaz) "had pending § 2255 petitions at the time *Scialabba* was decided, and therefore were able to successfully raise the claim in [a] § 2255 petition and have long been released." *Ibid.*

4. On October 3, 2007, this Court heard oral argument in *Santos*. During the argument, several members of the Court suggested that Santos and Diaz might be entitled to relief, either from this Court or from the Seventh Circuit, on a ground different from the one on which *Scialabba* relied: not that the term "proceeds" in 18 U.S.C. § 1956(a)(1) means net (rather than gross) proceeds, but that the term "promote" in the statute refers to the promotion of unlawful activity other than the underlying crime itself (here, the ongoing operation of a gambling business). See 06-1005 Tr. 4-22, 28-29. That suggestion was motivated by the same concern that underlay *Scialabba*: that a contrary rule would mean that a violation of the gambling statute is necessarily a violation of the money-laundering statute (which carries significantly higher penalties). See *id.* at 4-6, 13-16, 19-22. The Court has not yet issued a decision in *Santos*.

5. On November 15, 2007, the Seventh Circuit denied petitioner's request for rehearing or rehearing

en banc of his appeal from the denial of collateral relief. App., *infra*, 20a-21a.[5]

REASONS FOR GRANTING THE PETITION

This case presents the same question that is presented in *United States* v. *Santos*, No. 06-1005: whether "proceeds" in 18 U.S.C. § 1956(a)(1) means gross income or net income. The Court should therefore hold the petition in this case pending the decision in *Santos* and then dispose of it as appropriate in light of the decision in that case. See E. GRESSMAN, K. GELLER, S. SHAPIRO, T. BISHOP & E. HARTNETT, SUPREME COURT PRACTICE §§ 4.16, 5.9 (9th ed. 2007).

1. In district court, petitioner argued that he was actually innocent of the crime of which he was convicted—conspiracy to commit money laundering—and that his guilty plea was therefore constitutionally invalid. Pet. C.A. App. 94-125; see *Bousley* v. *United States*, 523 U.S. 614, 618 (1998). One district court (in the district where he had been convicted) ruled that petitioner had no claim under 28 U.S.C. § 2255, because his motion was filed after the expiration of the limitation period. App., *infra*, 17a-19a. The other district court (in the district where he was confined) ruled that petitioner had no claim under 28 U.S.C. § 2241, because his Section 2255 remedy was not "inadequate or ineffective." App., *infra*, 14a-16a.

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[5] At the time of petitioner's appeal to the Seventh Circuit, the warden of the facility where he is confined was Mark A. Bezy. The current warden is B. R. Jett. Accordingly, while Bezy was the respondent-appellee in the court of appeals, Jett is the respondent in this Court. Cf. Sup. Ct. R. 35.3.

In the court of appeals, petitioner argued (among other things) that his remedy under Section 2255 *was* inadequate or ineffective, and that he therefore *was* entitled to relief under Section 2241, because he was actually innocent under *Scialabba* and the Seventh Circuit's decision in that case was not issued until after the expiration of the period for filing a Section 2255 motion. Pet. C.A. Br. 34-47. The court of appeals majority rejected that argument, on the ground that petitioner is not—at least yet—actually innocent. App., *infra*, 8a. Petitioner's claim of actual innocence was "premature," according to the majority, because of the pendency in this Court of *Santos*, which presents the same question that was decided in *Scialabba*. *Ibid.* The court of appeals majority made clear, however, that petitioner *would* be actually innocent "[i]f th[is] court affirm[ed] *Santos* or somehow fail[ed] to resolve the issue." *Ibid.*

It thus appears that petitioner would be entitled to relief in the court of appeals if this Court were to hold in *Santos* that the term "proceeds" in Section 1956(a)(1) means net income or if the Court were to dismiss the petition in that case as improvidently granted (or on any other ground). At that point, petitioner's claim of actual innocence would no longer be "premature" under the court of appeals' reasoning. App., *infra*, 8a. It is also likely that petitioner would be entitled to relief if the Court were to affirm in *Santos* on the alternative ground suggested by several members of the Court at oral argument—that the term "promote" refers to the promotion of unlawful activity other than the underlying crime (see 06-1005 Tr. 4-22, 28-29)—or, indeed, if the Court were to affirm on any other ground that excludes the criminal conduct at issue from the reach of the money-laundering statute. Petitioner might also be

able to obtain relief in the court of appeals, at least in the future, if the Court were to vacate the court of appeals' decision in *Santos* while leaving open the possibility that the court of appeals could reach the same result on remand on a different ground (for example, the ground suggested at oral argument).

Accordingly, the Court should hold the petition in this case pending the disposition of *Santos*. If the Court disposes of *Santos* in any of the ways described above, or in any other manner that is not inconsistent with petitioner's actual innocence, the Court should then grant the petition, vacate the judgment of the court of appeals, and remand the case for further consideration in light of this Court's decision in *Santos*.

2. It is true that the court of appeals majority did not say, explicitly, that it would grant relief to petitioner if this Court were to affirm in *Santos* or somehow fail to resolve the issue presented there. The majority said only that, in either event, petitioner would be able to "file a new section 2241 petition." App., *infra*, 8a. But that statement seems to rest on the assumption that petitioner's appeal would not be kept alive by the filing of a petition for a writ of certiorari. There is no reason to believe that the court of appeals could not—or would not—grant relief itself, on remand from this Court. As the majority observed, an affirmance or dismissal by this Court in *Santos* would simply "leav[e] * * * intact" the Seventh Circuit decisions on which petitioner relied in the court of appeals. *Ibid.* There would be no need for any factual development in the district court—or any other further proceedings there—for petitioner to be actually innocent under those decisions.

There is thus no reason to think that the court of appeals meant to require petitioner to start the process all over in district court, only to have to return to the court of appeals in the event that the district court denies relief (or in the event that the district court grants relief and the government appeals). Petitioner has been in prison since February 1999; the *Scialabba* decision holding that conduct like his does not violate the money-laundering statute was issued in February 2002; and he is scheduled to be released from prison in January 2010. If this Court renders a decision confirming that petitioner has been in prison all that time for a crime of which he is innocent, it is imperative that he be able to seek relief as expeditiously as possible, and it would be manifestly unjust to preclude him from doing so.[6]

3. It is also true that, before holding that petitioner is not (yet) actually innocent, the court of appeals majority explained that a Section 2555 remedy is not inadequate or ineffective unless the claim is foreclosed by precedent and that petitioner's claim under *Scialabba* was not foreclosed by precedent. App., *infra*, 6a-7a. But the majority's conclusion that petitioner is not actually innocent does not appear to be merely an alternative ground for denying relief, such that petitioner could not obtain relief even if he

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[6] It may be that, regardless of how this Court decides *Santos*, petitioner will not be actually innocent of the charges against him that were dismissed in exchange for his guilty plea: operating an illegal gambling business and conspiracy to do so. Pet. C.A. App. 22, 72; see *Bousley*, 523 U.S. at 623-624. If petitioner had been convicted on those charges, however, his sentence would almost certainly have been only a small fraction of the sentence imposed for the money-laundering conspiracy. See note 2, *supra*.

were to be deemed actually innocent by virtue of this Court's decision in *Santos*.[7]

The majority's holding that petitioner is not actually innocent came in response to his argument that the "foreclosed by precedent" requirement does not apply to claims of actual innocence. App., *infra*, 7a-8a. The majority did not respond to that argument by saying that that requirement *does* apply to claims of actual innocence, as it easily could have if that were its view. It did not even say that the requirement applies to claims of actual innocence *and in any event* petitioner is not actually innocent. Instead, the majority's response was simply that petitioner is not actually innocent.

Moreover, if the majority's response were intended as an alternative holding, it would not have said that, in the event that this Court affirms in *Santos* or does not reach the question presented there, petitioner "can file a new section 2241 petition." App., *infra*, 8a. If the majority believed that the "foreclosed by precedent" requirement applies to claims of actual innocence, it would necessarily believe that such a Section 2241 petition would be doomed from the start. Since the court was careful not to "raise false hopes" in holding that it was too late for petitioner to present his Section 2255 claim in the court of appeals (*id.* at 5a), it is difficult to believe that the court was doing just that when it said

[7] Petitioner's request for rehearing in the court of appeals (which the court denied) did characterize the majority opinion as having rendered "alternative" holdings. Pet. for Panel Reh'g & Suggestion for Reh'g En Banc 10. On reflection, however, we do not believe that is accurate, for the reasons set forth in the text following this footnote.

that petitioner could file a new Section 2241 petition if subsequent developments were to render him actually innocent.

Finally, we note that Judge Rovner, who dissented on the issue of petitioner's actual innocence, interpreted the majority opinion the same way that we do. "I *agree*" with the majority, she said, that petitioner "can proceed with a new petition" if "the Supreme Court upholds *Scialabba*," because that case "was decided after the one-year time period expired for the filing of his § 2255 petition." App., *infra*, 11a-12a (emphasis added). That view is consistent with statements by other judges of the Seventh Circuit.[8] And as far as we are aware, that court has never held that Section 2241 relief is unavailable when the basis for a claim of actual innocence arose after the expiration of the period for filing a Section 2255 motion.

4. Even if the majority opinion of the court of appeals does not unambiguously establish that petitioner will be *entitled* to relief if this Court's decision in *Santos* renders him actually innocent, the opinion cannot possibly be read to establish unambiguously that relief will be *foreclosed* to petitioner regardless of whether he is actually innocent. At most, the opinion is ambiguous with respect to the availability

[8] See *Cooper* v. *United States*, 199 F.3d 898, 901 (7th Cir. 1999) (Evans, J.) ("a valid claim of actual innocence would be enforceable under § 2241 without regard to time limits under § 2255 if relief under that section was not, for some reason, available"), cert. denied, 530 U.S. 1283 (2000); *Gray-Bey* v. *United States*, 201 F.3d 866, 876 (7th Cir. 2000) (Easterbrook, J., dissenting) (an actually innocent prisoner may proceed under Section 2241 "when the basis of the claim has not been legally established at the time of the first petition").

of relief if it is determined that he is actually innocent. Any such ambiguity should be resolved by the court of appeals itself, following a remand by this Court.

It is also possible that, rather than deciding that the "foreclosed by precedent" requirement either does or does not apply to claims of actual innocence, the court of appeals majority did not decide that question at all, because there was no need to do so in light of its conclusion that petitioner is not (yet) actually innocent. If that is what the court of appeals did, a remand would indisputably be necessary, because the court of appeals would no longer be able to avoid the question if this Court issued a decision whose effect was to confirm that petitioner *is* actually innocent.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Santos*, No. 06-1005. If the Court subsequently (1) affirms the Seventh Circuit's decision in that case, (2) vacates the decision while leaving open the possibility that the Seventh Circuit could reach the same result (on different grounds) on remand, (3) dismisses the petition in that case as improvidently granted (or on any other ground), or (4) otherwise disposes of the case in a manner that is not inconsistent with petitioner's actual innocence, then the petition in this case should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of this Court's decision in *Santos*.

Respectfully submitted.

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