Prost v. Anderson: *In The Tenth Circuit Non-Existent Crime Doesn't Pay Either*

By: Kellen G. Ressmeyer and Carl W. Oberdier

In February, the Tenth Circuit Court of Appeals issued *Prost v. Anderson*, 636 F.3d 578, 2011 WL 590334 (10th Cir. Feb. 22, 2011), ruling that federal habeas statutes provide no relief in many cases where subsequent changes in the controlling law render convicts actually innocent. As a result, federal prisoners in the country's largest geographical Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) will remain imprisoned for non-existent offenses.

Worse yet, the majority in *Prost* was not required to address this issue at all—it did so over the objection of *both* the criminal defendant and the government. *See* Court-Ordered Response of the United States To Petition For Rehearing *En Banc*, filed Apr. 25, 2011 (United States Response), at 2. The panel unanimously agreed on the narrower issue necessary to resolve the appeal: controlling circuit precedent had not foreclosed Prost's exculpatory statutory interpretation at the time of his first habeas petition, thus he was barred from basing a second habeas petition on the U.S. Supreme Court's subsequent adoption of that interpretation.

The majority, however, reached out to reject the "erroneous circuit foreclosure test," which permits a second or successive habeas petition to go forward if controlling circuit precedent foreclosed the petitioner's innocence claim in the first instance. Although the majority discerned a "circuit split" on this issue, that was only because certain Circuit Courts had adopted an even *more liberal* rule.

Even the government implored the Court to refrain from considering the correctness of the erroneous circuit foreclosure test. United States Response, at 9 ("*Prost*'s case did not present, much less require a decision on, the correctness of out-of-circuit precedent embracing the erroneous circuit foreclosure test[.]"). Indeed, in a rare occurrence in criminal appeal, the government joined the defendant in arguing for rehearing of the majority's decision en banc. "[A]bsent en banc review," the United States contended, the majority's "interpretation will bind future panels of this Court and force individuals who have been convicted of nonexistent offenses to languish in jail. Nothing in the text, history, or purposes of Section 2255 supports that extreme result." United States Response, at 5. In an equally-divided decision issued in May, however, the Tenth Circuit declined to hear the case *en banc*.

Statutory Background

By the mid-twentieth century, habeas petitions were disproportionately crowding courts in areas with large numbers of incarcerated prisoners. At the same time, federal courts nationwide faced a "sea change in federal habeas petitions filed by state prisoners raising new constitutional claims." King, Nancy J., *et al.*, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 110 (Univ. of Chi. Press 2011).

In response, Congress revised the statutory framework governing federal habeas relief. Under the new regime, 28 U.S.C. § 2225 served as the exclusive vehicle for challenging the validity of a conviction or sentence, whereas 28 U.S.C. § 2241 was to be used to challenge the execution of a sentence. In other words, "[e]very federal prisoner attacking his conviction or sentence was required to use the new Section 2255 remedy *unless* it was 'inadequate or ineffective to test the legality of his detention,' a statutory phrase that became known as the 'savings clause.'" *King, supra* at 110-11 (emphasis added). If Section 2255 is inadequate or ineffective, then the prisoner can proceed under Section 2241 to attack the validity of his conviction or sentence.

In the absence of a clear directive from the Supreme Court, the U.S. Courts of Appeal have applied varying standards of the "inadequate or ineffective" test. However, "although the precise formulations vary, essentially each test provides that a federal prisoner who is 'actually innocent' of the crime of conviction, but who never has had an unobstructed procedural shot at presenting a claim of innocence," is entitled to proceed under Section 2241. Yackle, Larry W., POSTCONVICTION REMEDIES § 5:7. *Federal prisoners—Section 2241 habeas corpus petitions* (Database updated Aug. 2011). Until now.

Keith Prost's Case

At issue in *Prost* was whether the U.S. Supreme Court's decision in *United States v. Santos*, 553 U.S. 507 (2008), defining "proceeds" as "profits" (not "gross receipts") for purposes of federal statutes criminalizing money laundering, rendered Prost actually innocent of his 1999 conviction for money laundering.

In 1999, Keith Prost pleaded guilty to conspiracy to launder illegal drug "proceeds," in violation of 18 U.S.C. § 1956(a)(1). In the underlying criminal proceedings, the government provided evidence that Prost had laundered "gross receipts" from drug transactions. The District Court of Missouri sentenced Prost to 168 months' imprisonment.

At the time of Prost's first petition for habeas relief pursuant to 28 U.S.C. § 2255(a), the Eighth Circuit (the reviewing court for the District of Missouri) had not decided whether the term "proceeds" under 18 U.S.C. § 1956(a)(1) included gross receipts.[1] Prost did not raise the argument in his initial habeas petition.

In 2008, the U.S. Supreme Court decided *Santos v. United States*, 553 U.S. 507 (2008), limiting "proceeds" under § 1956(a)(1) to encompass "profits," not gross receipts. In October of that year, Prost filed a second petition for habeas relief before the District of Colorado (as habeas law requires, because he is presently incarcerated in Colorado), arguing that *Santos* rendered him innocent under § 1956. In other words, the conviction for laundering "gross receipts" was not a cognizable offense.

Prost invoked the savings clause before the district court, arguing (*a*) the statute of limitations barred any successive motion for § 2255 relief; and (*b*) *Santos* rendered him actually innocent of the crime of money laundering. Thus, he contended, § 2255 was inadequate or ineffective to test the legality of his conviction, and he was entitled to proceed under § 2241.

The Colorado district court dismissed the petition, reasoning (*a*) "the fact that Prost may be barred from raising his claims in a second or successive motion in the sentencing court pursuant to 28 U.S.C. § 2255, by itself, does not demonstrate that the remedy provided in § 2255 is inadequate or ineffective"; and (*b*) "Prost

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does not explain with any clarity how the distinction laid out in *Santos* between criminal profits and criminal receipts makes him either legally or factually innocent of the money laundering crime." *Prost v. Wiley*, 2008 WL 4925667, at *2 (D. Colo. Nov. 13, 2008). Prost then appealed to the Tenth Circuit.

The Tenth Circuit's Decision

Upon review, the Tenth Circuit unanimously affirmed the lower court's denial of Prost's petition, holding that Prost failed timely to present his statutory interpretation argument for actual innocence in his first habeas petition. *Prost*, 636 F.3d at 598 (Seymour J., concurring in part).

But the majority reached out further—rejecting the application of the erroneous circuit foreclosure test. The majority ruled that *even if* the Eighth Circuit had erroneously defined § 1956's use of "proceeds" as gross receipts at the time of Prost's first habeas petition (thereby requiring dismissal of a petition based on the argument that "proceeds" meant "profits"), § 2255 would have still been "adequate and effective". And thus if *Santos* later rendered him actually innocent of the crime of conviction, he would have no recourse. *See Prost*, at 585 ("The ultimate result may be right or wrong as a matter of substantive law, but the savings clause is satisfied so long as the petitioner had an opportunity to bring and test his claim." (Gorsuch, J.)).

In support, the majority reasoned that the "erroneous circuit foreclosure test" "would require us to address many novel questions of law, a fact [Judge Seymour's] concurrence fails to acknowledge." *Prost*, at 595. In rejecting the erroneous circuit foreclosure test, however, the majority ignored its decisive effect on other "novel" questions of law—such as the constitutional considerations governing procedural bars to factual innocence claims.

In response to indictments that *Prost* isolates the Tenth Circuit, the majority was dismissive: "[O]ur decision does nothing of the sort. Long before we arrived on the scene the circuits were already divided three different ways on how best to read the savings clause." *Prost*, at 594. But, although the Circuits apply varying formulations of an actual innocence test—they *all* agree that habeas relief obtains to prisoners with actual innocence claims previously foreclosed by Circuit law. *Compare Prost*, at 592 (arguing that "the Ninth Circuit has offered a very different test ... . And, ... the Second and Third Circuits have vigorously pursued another test still.") *with Taylor v. Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002) ("Every court that has addressed the matter has held that 2255 is 'inadequate or ineffective' only when a structural problem in 2255 forecloses even one round of effective collateral review-and then only when as in *Davenport* the claim being foreclosed is one of actual innocence." (citing the Third, Fourth, Fifth, Sixth, and Eleventh Circuits) (emphasis added)); *Harrison v. Ollison*, 519 F.3d 952, 959 (9th Cir. 2008) (a petition meets the requirements of the savings clause where "a petitioner (1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim.").

In light of this authority, Prost moved for rehearing *en banc*. The prosecution joined in moving the Court to reconsider its decision. "Rehearing *en banc* is warranted", argued the Department of Justice, because "the majority's interpretation of Section 2255(e) is incorrect, employs a faulty mode of interpretation, and will result in the continued incarceration of persons convicted without legislative authorization." United States Response, at 14.

An equally-divided Tenth Circuit, however, declined to *en banc* the case. The decision may reflect the Court's commitment to the ultimate conclusion (that Prost's petition was untimely) more than complicity in the analysis (rejecting the erroneous circuit foreclosure test). Whatever its reasoning, the Department of Justice has observed that under *Prost*'s new rule, "a prisoner with a valid claim of statutory innocence previously foreclosed by circuit law would be afforded an opportunity to seek habeas corpus relief in any of the *other* circuits that has interpreted Section 2255(e)", United States Response, at 14 (emphasis added), except the Tenth Circuit, where federal prisoners are subject to continued imprisonment for non-existent offenses. **SB**

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Endnote

[1]The Eighth Circuit had, however, construed "proceeds" to include "gross receipts" under the Racketeering Influenced and Corrupt Organizations Act ("RICO"). *See United States v. Simmons*, 154 F.3d 765 (8th Cir. 1998).

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