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In the  
United States Court of Appeals  
For the Second Circuit

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AUGUST TERM, 2018

SUBMITTED: OCTOBER 10, 2018

DECIDED: OCTOBER 16, 2018

No. 18-35

FRANCISCO ILLARRAMENDI,  
*Petitioner-Appellant,*

*v.*

UNITED STATES OF AMERICA,  
*Respondent-Appellee.*

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Appeal from the United States District Court  
for the District of Connecticut  
No. 16-cv-1853 – Stefan R. Underhill, *Judge.*

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Before: WALKER, CALABRESI, and LIVINGSTON, *Circuit Judges.*

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Francisco Illarramendi appeals from the order of the District Court of the District of Connecticut (Underhill, *J.*) denying his motions for supervised release or bail pending resolution of his motion to vacate his sentence under 28 U.S.C. § 2255. The United

1 States now moves for summary affirmance of the district court's order  
2 on the grounds that neither supervised release nor bail is warranted  
3 under the circumstances and, regardless of the merits, Illarramendi  
4 failed to obtain a certificate of appealability as required by 28 U.S.C.  
5 § 2253(c)(1). We agree with the United States that neither supervised  
6 release nor bail is warranted here and therefore GRANT the motion  
7 for summary affirmance. A certificate of appealability from the  
8 district court's order is not necessary, however, because a denial of  
9 supervised release or bail is not a "final order[] that dispose[s] of the  
10 merits of a habeas corpus proceeding." *Harbison v. Bell*, 556 U.S. 180,  
11 183 (2009).

12 \_\_\_\_\_  
13  
14 FRANCISCO ILLARRAMENDI, *pro se*, for *Petitioner-*  
15 *Appellant*.

16 MICHAEL J. GUSTAFSON (John T. Pierpont, Jr., *on the*  
17 *brief*), United States Attorney's Office for the  
18 District of Connecticut, New Haven, CT, for  
19 *Respondent-Appellee*.

20 \_\_\_\_\_  
21  
22 PER CURIAM:

23 Francisco Illarramendi appeals from the order of the District  
24 Court of the District of Connecticut (Underhill, J.) denying his

1 motions for supervised release or bail<sup>1</sup> pending resolution of his  
2 motion to vacate his sentence under 28 U.S.C. § 2255. The United  
3 States now moves for summary affirmance of the district court's order  
4 on the grounds that neither supervised release nor bail is warranted  
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10 district court's order is not necessary, however, because a denial of  
11 supervised release or bail is not a "final order[] that dispose[s] of the  
12 merits of a habeas corpus proceeding." *Harbison v. Bell*, 556 U.S. 180,  
13 183 (2009).

#### 14 **BACKGROUND**

15 On March 7, 2011, Petitioner-Appellant Illarramendi pleaded  
16 guilty to two counts of wire fraud, and one count each of securities  
17 fraud, investor fraud, and conspiracy to obstruct justice. Plea Hearing  
18 Tr., *United States v. Illarramendi*, No. 11-cv-0041 (D. Conn. March 21,  
19 2011), ECF No. 9. The district court imposed a sentence of 156  
20 months' imprisonment and approximately \$370 million in restitution,

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<sup>1</sup> Although Illarramendi's motion was for supervised release, we liberally construe his *pro se* motion as seeking release on bail. The government accepts this interpretation in its memorandum in support of its motion to summarily affirm. Mem in Supp. of Mot. for Summ. Affirmance 6, ECF No. 33.

1 which we affirmed on appeal. *See United States v. Illarramendi*, 642 F.  
2 App'x 64 (2d Cir. 2016) (summary order) (affirming sentence); *United*  
3 *States v. Illarramendi*, 677 F. App'x 30 (2d Cir. 2017) (summary order)  
4 (affirming restitution).

5 On November 14, 2016, Illarramendi filed a habeas corpus  
6 petition under 28 U.S.C. § 2255 to vacate his sentence on the grounds  
7 that (1) he was denied counsel of choice because his assets were frozen  
8 in a related SEC civil proceeding; and (2) his attorneys provided  
9 ineffective assistance during the plea negotiations and at sentencing.  
10 Mot. to Vacate Sentence at vii, *Illarramendi v. United States*, No. 16-cv-  
11 1853 (D. Conn. Nov. 14, 2016), ECF No. 1.<sup>2</sup> The § 2255 petition is  
12 pending before the district court.

13 On August 28 and 29, 2017, Illarramendi filed two motions in  
14 the district court seeking “supervised release pending habeas  
15 proceedings.” No. 16-cv-1853, ECF Nos. 18, 19. The district court  
16 denied the motions, stating that it “has no authority to grant  
17 supervised release to a sentenced inmate.” No. 16-cv-1853, ECF No.  
18 23. Illarramendi then filed a notice of appeal with the district court  
19 from the denial of supervised release and moved for leave to proceed  
20 *in forma pauperis*. No. 16-cv-1853, ECF Nos. 24, 25. The district court  
21 granted the motion for leave to proceed *in forma pauperis*. No. 16-cv-  
22 1853, ECF No. 27.

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<sup>2</sup> The § 2255 action in the district court is hereinafter referred to as No. 16-cv-1853.



1           In *Grune v. Coughlin*, 913 F.2d 41, 44 (2d Cir. 1990), we held that  
2   § 2253’s COA<sup>3</sup> requirement applied “not only to the final  
3   determination of the merits [of the habeas proceeding] but also to an  
4   order denying bail” during the habeas proceeding. We reasoned that  
5   the interest served by requiring such a certificate—namely, relieving  
6   “the court system of the burdens resulting from litigation of  
7   insubstantial appeals—is equally served whether the order appealed  
8   is a final disposition of the merits or a collateral order.” *Id.*

9           Almost two decades later, the Supreme Court decided *Harbison*  
10   *v. Bell*, 556 U.S. 180 (2009). In *Harbison*, the district court denied  
11   appellant’s motion to authorize his federally appointed counsel in his  
12   habeas proceeding to represent him in a related state clemency  
13   proceeding. *Id.* at 182. Appellant appealed, but failed to obtain a  
14   COA under § 2253(c)(1). *Id.* at 183. The Court held that because  
15   § 2253(c)(1) “governs final orders that dispose of the merits of a  
16   habeas corpus proceeding—a proceeding challenging the lawfulness  
17   of the petitioner’s detention[,] . . . [a]n order that merely denies a  
18   motion to enlarge the authority of appointed counsel . . . is not such  
19   an order and is therefore not subject to the COA requirement.” *Id.*

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<sup>3</sup> In 1990, when *Grune* was decided, § 2253 required a certificate of probable cause before a party could appeal from a habeas proceeding. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) and amended § 2253 to, *inter alia*, change the name of a certificate of probable cause to a certificate of appealability. Pub. L. No. 104-132, § 102 110 Stat. 1214, 1217 (1996). There is no substantial difference between the two certificates.

1           We have never addressed *Harbison's* effect on *Grune* in a  
2 published decision, but two motions panels in unpublished orders  
3 denied as unnecessary COA motions in appeals from the denial of  
4 bail, with one order specifically citing *Harbison* for support. *See* Mot.  
5 Order, *United States v. Riccio (Lasher)*, No. 17-1629 (2d Cir. Nov. 6,  
6 2017), ECF No. 135; Mot. Order, *Fan v. United States*, No. 17-1619 (2d  
7 Cir. Aug 29, 2017), ECF No. 32. We agree with the two decisions. In  
8 *Grune*, we acknowledged that “the denial of bail . . . is a collateral and  
9 conclusive determination of the issue presented,” but never  
10 pretended that it was somehow a final disposition of the habeas  
11 proceeding. *Grune*, 913 F.2d at 44. Therefore, consistent with  
12 *Harbison*, we hold that a COA is not required when appealing from  
13 orders in a habeas proceeding that are collateral to the merits of the  
14 habeas claim itself, including the denial of bail. Thus, in this case, the  
15 absence of a COA was not a bar to Illarramendi’s appeal from the  
16 district court’s order denying his motion for supervised release or bail  
17 pending resolution of his habeas petition.

## 18           **II. Appellant’s Remaining Arguments**

19           After review of the record and Appellant’s arguments, we  
20 conclude that his motion for supervised release or bail pending  
21 review of his 28 U.S.C. § 2255 motion lacked merit because the  
22 motion does not present substantial questions and Appellant has not  
23 demonstrated that “extraordinary circumstances exist that make the

1 grant of bail necessary to make the habeas relief effective." *Mapp v.*  
2 *Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (internal citation, quotations,  
3 and alteration omitted). We therefore grant summary affirmance of  
4 the district court's order. *See United States v. Bonilla*, 618 F.3d 102,  
5 107–08 (2d Cir. 2010).

### 6 CONCLUSION

7 For the reasons stated above, the government's motion for  
8 summary affirmance of the district court's order denying supervised  
9 release is GRANTED.