No.

In the Supreme Court of the United States

DETRIC LEWIS,

Petitioner,

v.

N.C. ENGLISH,
WARDEN, USP-LEAVENWORTH,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ROMAN MARTINEZ
Counsel of Record
BENJAMIN W. SNYDER
GENEVIEVE P. HOFFMAN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

Counsel for Petitioner

QUESTION PRESENTED

Federal criminal defendants are entitled to challenge the validity of their conviction and sentence by means of a direct appeal and a motion for post-conviction relief under 28 U.S.C. § 2255. Those efforts sometimes fail because erroneous circuit precedent interpreting a federal statute forecloses the defendant's legitimate claim for relief. This gives rise to an obvious injustice when a later decision by this Court or the circuit overturns the erroneous precedent. In those circumstances, the prisoner cannot again seek relief under Section 2255, which generally bars second or successive applications.

As the government has recognized, a deep circuit split has arisen over whether such a prisoner may file a petition for a writ of habeas corpus under 28 U.S.C. § 2241. Nine courts of appeals hold that such petitions are authorized by Section 2255(e), which allows a prisoner to pursue such habeas relief if the remedy provided by Section 2255 is "inadequate or ineffective to test the legality of his detention." Two other courts of appeals, including the Tenth Circuit below, hold that the prisoner may *not* use Section 2241, and thus that he has no way to challenge his unlawful detention.

The question presented here is:

May a federal prisoner file a petition for habeas corpus under 28 U.S.C. § 2241 in order to raise arguments that were foreclosed by binding (but erroneous) circuit precedent at the time of his direct appeal and original application for post-conviction relief under 28 U.S.C. § 2255, but which are meritorious in light of a subsequent decision overturning that erroneous precedent?

TABLE OF CONTENTS

APPENDIX

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Detric Lewis respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit (Pet. App. 1a-7a) is reported at — F. App'x —, 2018 WL 2684276. The district court's order denying petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2241 (Pet. App. 8a-14a) is unreported, but available at 2018 WL 1242073.

JURISDICTION

The Tenth Circuit entered its judgment on June 5, 2018 (Pet. App. 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. §§ 2241 and 2255, are reproduced in the Appendix to this petition.

INTRODUCTION

This case presents a deep and universally acknowledged circuit split over the availability of relief for federal prisoners who are currently serving sentences that are unlawful under non-constitutional decisions of this Court. The United States has repeatedly recognized that "a circuit conflict exists on the question presented," and that "given the significance of the issue . . ., this Court's review would be warranted in an appropriate case." U.S. BIO 11, 25, *McCarthan v. Collins*, No. 17-85, 2017 WL 4947338 (Oct. 30, 2017) ("*McCarthan* BIO"); *see also*

U.S. Mot. to Stay Mandate 2-3, *United States v. Wheeler*, No. 16-6073 (4th Cir. June 13, 2018) ("*Wheeler* Stay Mot.") (acknowledging circuit split and predicting that "[t]he Supreme Court is likely to grant a petition for certiorari" on the issue). This is that case.

Section 2255 of Title 28 of the U.S. Code provides for collateral review of federal convictions and sentences. 28 U.S.C. § 2255(a). Ordinarily, a federal prisoner subject to Section 2255 may initiate such collateral review proceedings only once, and must do so within a year of receiving his sentence. *See id.* § 2255(f). That rule, however, is subject to several exceptions. First, Section 2255(h) allows a prisoner to file a "second or successive motion" under Section 2255 itself if a court of appeals determines that "newly discovered evidence" or a "new rule of constitutional law" has undermined the prisoner's conviction or sentence. *Id.* § 2255(h). Second, Section 2255(e) provides that if it "appears that the remedy by motion [under Section 2255] is *inadequate or ineffective* to test the legality of his detention," then the prisoner may make "[a]n application for a writ of habeas corpus" under 28 U.S.C. § 2241. *Id.* § 2255(e) (emphasis added).

This case concerns the scope of the "inadequate or ineffective" exception. Nine circuits have held that if circuit precedent required the district court to hold the prisoner's detention lawful at the time of his original Section 2255 motion—even though the detention was in fact *un*lawful—that is sufficient to make it "appear[] that the remedy by motion is inadequate or ineffective to test the legality of his detention" within the meaning of 28 U.S.C. § 2255(e). Those circuits therefore hold that the hypothetical

prisoner can press his claim for relief in a petition for a writ of habeas corpus under 28 U.S.C. § 2241.

Two other circuits, however, hold that a motion that the district court was required (wrongly) to reject does *not* "appear[] . . . inadequate or ineffective" under Section 2255(e), because the prisoner could have filed his motion with the district court, lost, appealed, lost, and then sought discretionary review from the en banc court of appeals or this Court. In their view, therefore, Section 2255(e) prohibits a court from entertaining the prisoner's petition for a writ of habeas corpus filed under Section 2241. In those circuits, the hypothetical prisoner is left with no avenue of relief—even though his detention is undeniably unlawful.

This issue frequently arises and is exceptionally important. Under the Tenth and Eleventh Circuits' minority approach, prisoners within those circuits—unlike identically situated prisoners in the rest of the country—will serve years of additional time in prison based on convictions and sentences that are indisputably contrary to law. And they will serve that time even though they have never had a full and fair opportunity to challenge the legality of their detention before a court empowered to grant them the relief they are due. Both the government and the lower courts have acknowledged that this Court's intervention is needed to resolve the split. *See, e.g.*, *United States v. Wheeler*, — F. App'x —, 2018 WL 2947929, at *1-2 (4th Cir. 2018) (statements regarding denial of rehearing en banc discussing split); Pet. App. 6a-7a (discussing split); *McCarthan* BIO 25 (acknowledging the split and that this Court's review of the question presented is "appropriate," but objecting to the petition as an unsuitable vehicle).

Until recently, the government recognized that the majority approach—the one rejected in the decision below—was also the *correct* approach. The government reversed its position last year, as a result of the most recent change in presidential administration. *See, e.g.*, *United States v. Wheeler*, 886 F.3d 415, 434 n.12 (4th Cir. 2018) (noting that "the government cannot identify any principled reason for its turnabout").

This case directly implicates the entrenched circuit conflict, and is an ideal vehicle for resolving it. In the decision below, the Tenth Circuit held that even though binding circuit precedent at the time of Petitioner Detric Lewis's initial Section 2255 motion would have required the district court to reject his (meritorious) challenge to his sentence, Section 2255(e) nevertheless prohibits Lewis from seeking review through a petition for habeas corpus now that the illegality of his sentence has become apparent. Pet. App. 5a-7a. In doing so, the Tenth Circuit panel acknowledged that "several of our sibling circuits . . . apply [Section 2255(e)] if a circuit court's subsequently overturned interpretation of a statute precluded relief at the time the § 2241 petitioner moved for relief under § 2255," but concluded that the Tenth Circuit had "specifically rejected that approach in *Prost* [*v. Anderson*, 636 F.3d 578, 593-94 (10th Cir. 2011), *cert. denied*, 565 U.S. 1111 (2012)]" and that "this panel cannot revisit that decision." Pet. App. 6a-7a. As a result, Lewis will serve an extra five-plus years in prison.

This Court should grant review, establish a nationwide standard on this important federal question, and provide prisoners like Lewis with a means to challenge their plainly unlawful detention.

STATEMENT OF THE CASE

1. In 2011, petitioner Detric Lewis pled guilty in the Northern District of Texas to a drug conspiracy charge. *See* Pet. App. 8a. The Probation Office concluded that Lewis must be treated as a career offender under U.S. Sentencing Guidelines Manual § 4B1.1(a) (2010) ("U.S.S.G."), because he had two or more qualifying predicate convictions. Second Addendum to the Presentence Report 1-2, *United States v. Lewis*, No. 3:10-cr-00040-D-3 (N.D. Tex. Jan. 4, 2011), ECF No. 194-1. The Presentence Report ("PSR") identified only two prior convictions that it claimed qualified Lewis for career offender status, including—as relevant here—a Texas conviction for possessing a controlled substance with intent to deliver it in violation of Section 481.112(a) of the Texas Health & Safety Code. *Id.*; *see also* Pet. App. 11a, 42a-43a. At sentencing, the district court adopted the PSR's career offender designation without change. *See* Judgment 1, *Lewis*, No. 3:10-cr-00040-D-3 (N.D. Tex. Mar. 25, 2011), ECF No. 222; Sentencing Tr. 3:19-25, *Lewis*, No. 3:10-cr-00040-D-3 (N.D. Tex. May 6, 2011), ECF No. 245 ("Sentencing Tr.").

The career offender designation substantially increased Lewis's Guidelines range. Without the career offender designation, Lewis had a criminal history category of VI and a total offense level of 29, which included a three-level reduction for acceptance of responsibility. Addendum to the Presentence Report 1-2, *Lewis*, No. 3:10-cr-00040-D-3 (N.D. Tex. Nov. 8, 2010), ECF No. 162-1. At sentencing, Lewis received an additional three-level reduction for substantial assistance. Sentencing Tr. 8:1-19. Without the career offender enhancement, this would

have put his offense level at 26, resulting in a Guidelines range of 120-150 months under the 2010 Guidelines. *See* U.S.S.G. Sentencing Table. *With* the career offender enhancement, however, Lewis's Guidelines range skyrocketed upwards by more than five years, to 188-235 months. Sentencing Tr. 8:20-22.

That incorrect Guidelines range was dispositive of Lewis's sentence. At the sentencing hearing, the district court explained its view that a sentence "within the advisory guideline range is sufficient but not greater than necessary," *id.* at 9:1-2, and that "[i]n order to give effect to the defendant's cooperation and in recognition of the arguments . . . made" on Lewis's behalf, a sentence at the bottom of the advisory range was appropriate, *id.* at 9:5-9. Accordingly, the court sentenced Lewis to 188 months in prison and five years of supervised release—the very bottom of the Guidelines range it had calculated. *Id.* at 9:13-22.

Lewis appealed his sentence to the Fifth Circuit. In doing so, he argued that his prior Texas drug offense should not have been treated as a qualifying "controlled substance offense" for purposes of the career offender enhancement, and that his trial-court counsel had been ineffective for failing to object to its treatment as such. *See* Pet. App. 22a. But the Fifth Circuit rejected Lewis's argument based on its binding decision in *United States v. Ford*, 509 F.3d 714 (5th Cir. 2007), *cert. denied*, 555 U.S. 831 (2008). *See* Pet. App. 22a-23a. The court explained that under *Ford*, the Texas offense of "possession with intent to deliver" was a "controlled substance offense" under the Guidelines, and that there was therefore "no legal basis" on which Lewis's counsel could have "object[ed] to the enhancement." *Id.*

In 2013, within a year of his conviction and sentence becoming final, Lewis filed a timely motion to vacate or set aside his sentence in the sentencing court under 28 U.S.C. § 2255. *See* Pet. App. 24a. The sentencing court denied that motion. *Id.* at 30a, 32a.

2. In 2016, this Court decided *Mathis v. United States*, 136 S. Ct. 2243 (2016). That decision held that the modified categorical approach should not be used with statutes that are not truly "divisible" and merely list "various factual means of committing a single element" of an offense, rather than alternative elements of an offense. *Id.* at 2249, 2257. The Court also provided guidance as to how federal courts should determine whether a predicate statute is divisible, noting that courts should first look to state-law authorities to determine whether the statute at issue lists alternative elements or alternative "means." *Id.* at 2256-57.

Shortly thereafter, the Fifth Circuit recognized that under *Mathis*'s divisibility holding, Section 481.112(a) of the Texas Health & Safety Code—which establishes the crime of "possess[ion] with intent to deliver"—is *not* a divisible statute and, as a result, "possess[ion] with intent to deliver" under Texas law is not a "controlled substance offense" within the meaning of the Guidelines. *United States v. Hinkle*, 832 F.3d 569, 572, 574-77 (5th Cir. 2016). The Fifth Circuit therefore held that, contrary to its pre-*Mathis* decision in *Ford*, a Texas conviction under Section 481.112(a) cannot serve as a predicate under the Guidelines' career offender provision, U.S.S.G. § 4B1.1. *Hinkle*, 832 F.3d at 576-77; *see also United States v. Tanksley*, 848 F.3d 347, 350-52 (5th Cir. 2017) (explaining that *Ford* is irreconcilable with *Mathis*).

Once *Mathis* and *Hinkle* made clear that Texas convictions for possession with intent to deliver cannot be used to impose a career offender designation under the Guidelines—and that Lewis's sentence had been based on an unlawfully calculated Guidelines range—Lewis sought permission to file a second or successive Section 2255 motion, in order to challenge his status as a career offender under that ruling. *See* Pet. App. 34a-35a; *see also id.* at 9a. The Fifth Circuit denied the motion based on 28 U.S.C. § 2255(h), because Lewis had not identified any newly discovered evidence and could not point to a "new rule of *constitutional* law" under which his sentence was unlawful. 28 U.S.C. § 2255(h)(1)-(2) (emphasis added); *see* Pet. App. 35a.[1]

3. Barred from pursuing his *Mathis*-based claim under Section 2255, Lewis filed a habeas petition under 28 U.S.C. § 2241 in the federal district court for the District of Kansas, the district where he is currently confined. *See* Pet. App. 9a. Section 2241 provides that, where a prisoner is being held "in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2241(c)(3), "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions," *id.* § 2241(a).

---

[1] Lewis filed a second motion for authorization to file a successive Section 2255 petition, which the Fifth Circuit again rejected in May 2017, warning against any future "frivolous" filings. Pet. App. 37a; *id.* at 9a. Lewis then filed a Rule 60(b) motion in his underlying criminal case, yet again seeking relief under *Mathis* and *Hinkle*. The district court rejected this motion as a successive Section 2255 motion. *See id.* at 46a-47a.

Lewis argued that his petition was authorized under Section 2241 and the "saving" clause of Section 2255(e). Pet. App. 9a. The saving clause allows a prisoner to file a petition for a writ of habeas corpus under Section 2241 where "the remedy by motion [under § 2255] is *inadequate or ineffective* to test the legality of his detention." 28 U.S.C. § 2255(e) (emphasis added).

Lewis contended that Section 2255 was "inadequate or ineffective to test the legality" of his sentence because (1) Fifth Circuit precedent in effect at the time of his original Section 2255 motion would have required the district court to reject his argument that his conviction for violating Section 481.112(a) of the Texas Health & Safety Code was not a qualifying offense for the career offender designation; and (2) Section 2255(h) only permits successive motions based on changes in constitutional law rather than statutory interpretation. *See* 28 U.S.C. § 2255(h); Pet. CA10 Br. 8-11, 15-19 (Apr. 19, 2018).

The district court dismissed Lewis's petition under the Tenth Circuit's decision in *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011), *cert. denied*, 565 U.S. 1111 (2012), holding that "the savings clause of § 2255(e) does not apply and therefore the Court lacks statutory jurisdiction." Pet. App. 13a. In *Prost*, the Tenth Circuit (Gorsuch, J.) had concluded that Section 2255(e) does *not* provide an avenue of relief based on a change in statutory interpretation, even where the petitioner's argument is squarely foreclosed under existing precedent at the time of his initial motion. 636 F.3d at 590-91. The Tenth Circuit had reasoned that while the Section 2255 motion would unquestionably be denied, the prisoner might subsequently obtain reversal through Supreme Court

or en banc review. *Id.* And that *possibility* of relief on discretionary appellate review, it had concluded, meant that the Section 2255 motion was not "inadequate or ineffective to test the legality of his detention" for purposes of Section 2255(e). *Id.*; *see also* 28 U.S.C. § 2255(e).

Here, the district court held that Lewis could not show that Section 2255 was an "inadequate or ineffective remedy" under *Prost*, because Lewis had been free to raise his argument about the Texas predicate conviction in his initial Section 2255 petition, even though this argument was squarely foreclosed by *Ford* at that time. Pet. App. 10a-13a. The court did not address the fact that Lewis's sentence is plainly unlawful under the subsequent decisions in *Mathis*, *Hinkle*, and *Tanksley*.

4. The Tenth Circuit affirmed. *See id.* at 1a-7a. Like the district court, the court of appeals did not deny that Lewis's 2011 sentence had been unlawfully imposed. Instead, it held that Lewis was procedurally barred from challenging that unlawful sentence under Section 2255(e)'s saving clause and Section 2241.

In doing so, the court acknowledged that "because [Lewis's] *Mathis* argument was unavailable to him when he filed his initial § 2255 motion" as a result of binding Fifth Circuit precedent, "the only way Lewis could've prevailed under § 2255 is if he [1] anticipated *Mathis*, [2] argued it in the face of conflicting Fifth Circuit precedent, [3] secured a writ of certiorari or en banc review, and [4] convinced the Supreme Court or en banc Fifth Circuit that his position was correct." Pet. App. 6a. The court also acknowledged that Lewis would have been able to take advantage of the saving clause under the approach of "several of our

sibling circuits [that] follow what's known as the erroneous-circuit-foreclosure test," under which they "apply the savings clause if a circuit court's subsequently overturned interpretation of a statute precluded relief at the time the § 2241 petitioner moved for relief under § 2255." *Id.* (citing *Hill v. Masters*, 836 F.3d 591, 595 (6th Cir. 2016); *In re Davenport*, 147 F.3d 605, 610 (7th Cir. 1998)).

Nevertheless, the Tenth Circuit panel recognized that "we specifically rejected [the erroneous-circuit-foreclosure test] in *Prost*." *Id.* at 7a. Accordingly, the panel found that the district court lacked jurisdiction to consider the unlawfulness of Lewis's detention under 28 U.S.C. § 2241.

As a result, Lewis is now serving an indisputably unlawful 188-month sentence. He has not yet received any fair adjudication of his challenge to the career-offender designation. And unless this Court intervenes, he never will.

REASONS FOR GRANTING THE WRIT

As the government has previously recognized, the question presented in this case cries out for consideration by this Court. The courts of appeals are intractably divided, and the upshot of the minority rule applied by the Tenth and Eleventh Circuits is that certain prisoners—including Lewis—will be unjustly imprisoned for years beyond what is authorized by law.

Denying federal prisoners the right to pursue unquestionably meritorious challenges to their detention directly undermines the fairness and integrity of the judicial system. *See, e.g.*, *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) ("[W]hat reasonable citizen wouldn't bear a rightly

diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?" (citation omitted)). Unsurprisingly, therefore, a substantial majority of the courts of appeals have concluded that Congress did not intend to achieve that perverse result. In their view, Section 2255(e) allows such prisoners to seek habeas relief under Section 2241 if a decision from this Court or the court of appeals overturns erroneous circuit precedent that barred a challenge to the prisoner's detention in his direct appeal and original Section 2255 motion.

Nevertheless, the Tenth and Eleventh Circuits have expressly rejected that majority approach and concluded that Section 2255(e) bars habeas petitions even in circumstances where erroneous circuit precedent made it a foregone conclusion that any Section 2255 motion the petitioner filed would have been denied (and that such denial would have been upheld on appeal). They have held that Section 2255 is not "inadequate or ineffective" in that circumstance—even if the motion was indisputably doomed to failure under binding precedent—because of the theoretical and remote possibility of discretionary en banc or certiorari review.

The government has acknowledged that the courts of appeals are intractably divided on this question. *See, e.g.*, *McCarthan* BIO 11 (recognizing that "a circuit conflict exists on the question presented"). It has recognized, too, that the question is deeply important and warrants review, because it means that federal prisoners in the Tenth and Eleventh Circuits will spend years serving indisputably unlawful prison sentences, while identically situated

prisoners in the rest of the country will be released. *See, e.g.*, *Wheeler* Stay Mot. 2-3 ("The subject of the circuit split . . . qualifies as an 'important matter'" under this Court's Rule 10 because "it affects the rights of federal prisoners across the country, in a way that depends on where they are housed."). And this case is an excellent vehicle in which to resolve the conflict. The petition should be granted.

A. There Is A Universally Acknowledged, Deep, And Intractable Circuit Split Over The Question Presented

The circuit split here is as clear as they come.

Nine courts of appeals hold that where circuit precedent would have required the district court and appellate panel to reject—erroneously—an argument about the legality of the prisoner's detention at the time of his original Section 2255 motion, that Section 2255 motion is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e); *see United States v. Barrett*, 178 F.3d 34, 51-52 (1st Cir. 1999), *cert. denied*, 528 U.S. 1176 (2000); *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 247-48, 251 (3d Cir. 1997); *United States v. Wheeler*, 886 F.3d 415, 434 (4th Cir. 2018); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *Martin v. Perez*, 319 F.3d 799, 805 (6th Cir. 2003); *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998); *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002).

The rationale adopted by those courts is straightforward and tracks basic common sense: When binding circuit precedent renders a Section 2255 motion futile, that motion is "inadequate or

ineffective" because the judges adjudicating the motion will necessarily reject it—regardless of the judges' own views on the legality of the prisoner's detention. *See, e.g.*, *In re Davenport*, 147 F.3d at 610-11.

In those nine circuits, if and when that erroneous circuit precedent is overruled by a subsequent decision by this Court or the court of appeals, therefore, the prisoner has the right to challenge the legality of his detention under 28 U.S.C. § 2241. That allows the prisoner to take advantage of the intervening decision and receive a fair adjudication of whether he is lawfully imprisoned.

Many of the cases addressing the question presented in those majority jurisdictions have involved defendants whose *convictions* have been undermined by subsequent precedent. *See, e.g.*, *Reyes-Requena*, 243 F.3d at 904. But at least three courts of appeals—the Fourth, Sixth, and Seventh Circuits—have also applied the majority rule to cases, like this one, in which the legal error infected the defendant's *sentence*. *See Wheeler*, 886 F.3d at 432-33 (holding that Section 2255 is inadequate or ineffective to test the legality of a sentence and noting that "[w]e agree with our sister circuits' view . . . that a sentencing error need not result in a sentence that exceeds statutory limits in order to be a fundamental defect" (citing *Hill v. Masters*, 836 F.3d 591, 599 (6th Cir. 2016); *Brown v. Caraway*, 719 F.3d 583, 587 (7th Cir. 2013)); *see also McCarthan v. Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1097 (11th Cir.) (en banc) ("[T]he Seventh Circuit has extended the saving clause to all sentencing errors . . . ."), *cert. denied*, 138 S. Ct. 502 (2017).

On the other side of the split, meanwhile, the Tenth and Eleventh Circuits hold that even where circuit precedent precludes a given argument, the fact that the defendant is free to include that (sure-to-lose) argument in a Section 2255 motion makes Section 2255 "[]adequate" and "[]effective" because of the possibility of en banc or certiorari review. *See* Pet. App. 6a-7a; *McCarthan*, 851 F.3d at 1086; *Prost v. Anderson*, 636 F.3d 578, 590-91 (10th Cir. 2011), *cert. denied*, 565 U.S. 1111 (2012). As a result, those circuits will *not* allow a prisoner to invoke Section 2241 to challenge his unlawful detention, even after this Court or the circuit at issue later makes clear that the precedent foreclosing the initial challenge was erroneous. In the Tenth and Eleventh Circuits, therefore, the procedural bar operates to keep the prisoner behind bars—even though his conviction or sentence is indisputably illegal, and even though the prisoner has never had a fair hearing on his claim.

This split has been widely acknowledged, including by courts and the government. The decision below, for example, expressly recognized that the Tenth Circuit's approach contradicts the one embraced by the Sixth Circuit in *Hill*, 836 F.3d at 594-95, and the Seventh Circuit in *In re Davenport*, 147 F.3d at 610. Pet. App. 6a-7a. In *Prost* itself, the Tenth Circuit recognized that the court's rejection of the erroneous-circuit-foreclosure rule would create a circuit split. *See Prost*, 636 F.3d at 592-93 (recognizing conflict with, *inter alia*, *In re Davenport*, 147 F.3d at 610, and *Reyes-Requena*, 243 F.3d at 904). And in *McCarthan*, the Eleventh Circuit stated that the approach it was taking was different from the one employed by "most of our sister circuits." 851 F.3d at 1097.

Courts on the majority side of the split have recognized it, too. Last year, for example, the Third Circuit explained that "[n]ine of our sister circuits agree . . . that the saving clause permits a prisoner to challenge his detention" based on "a change in statutory interpretation," while "[t]wo circuits see things differently, holding that an intervening change in statutory interpretation cannot render § 2255 inadequate or ineffective." *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 179-80 (3d Cir. 2017).[2] And in *Wheeler*, Judge Agee's statement respecting denial of the government's petition for rehearing en banc noted the "existing circuit split" on an issue "of significant national importance" that is "best considered by the Supreme Court at the earliest possible date." *United States v. Wheeler*, — F. App'x —, 2018 WL 2947929, at *1 (4th Cir. 2018) (Statement Respecting Denial of Rehearing En Banc of Agee, J.).

The government itself has repeatedly declared that the circuit split over the question presented is real and warrants this Court's review. In requesting a stay of the mandate in *Wheeler* (a case argued in the Fourth Circuit by an attorney from the Office of the Solicitor General), the government explained that the interpretation of Section 2255(e) is the "subject of [a] circuit split" and "qualifies as an 'important matter'" within the meaning of this Court's Rule 10(a) because it "affects the rights of federal prisoners across the

---

[2] The Third Circuit treated the Eighth Circuit as having sided with the majority approach in *Abdullah v. Hedrick*, 392 F.3d 957, 960-64 (8th Cir. 2004), *cert. denied*, 545 U.S. 1147 (2005). Because *Abdullah* found the majority rule unmet on the facts before it without actually deciding whether the majority rule was correct, however, we do not include the decision in our description of the split above. *See supra* at 13-14.

country, in a way that depends on where they are housed." *Wheeler* Stay Mot. 2-3. And in its brief opposing certiorari in *McCarthan*—a case, like this one, involving a challenge to the prisoner's sentence—the government acknowledged that a "circuit conflict exists on the question presented" and that the "significance" of the issue means that "this Court's review would be warranted in an appropriate case." *McCarthan* BIO 11, 25. We agree.[3]

B. The Minority Rule Is Wrong, As The Government Has Previously Recognized

Certiorari is also warranted because the interpretation of Section 2255(e) adopted by the Tenth and Eleventh Circuits is mistaken.

1. In Section 2255(e), Congress provided that the availability of habeas review for a federal prisoner depends on whether Section 2255 "appears . . . inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). In circumstances where erroneous circuit precedent forecloses a valid argument at the time a prisoner files his Section 2255 motion, the only way a prisoner can obtain redress through that Section 2255 motion is if the en banc court of appeals or this Court makes a discretionary decision to grant review.

Those procedural vehicles for discretionary review are not "[]adequate or []effective to test the legality of his detention." *Id.* Most importantly, they do not

---

[3] The government successfully urged the Court to deny review in *McCarthan* because of significant vehicle problems, including most notably the fact that the prisoner had a separately pending Section 2255 motion that allowed him to "test the legality of his detention" on other grounds. *See McCarthan* BIO 28-29. No such obstacles exist here.

require Article III judges to actually consider the legality of the individual prisoner's sentence or conviction. Indeed, those mechanisms for discretionary review are designed to give courts the opportunity to resolve issues of systemic importance, and they are not intended to be used to correct errors in individual cases.

Where erroneous circuit precedent was in effect at the time of the initial Section 2255 motion, therefore, it is entirely possible that every single jurist to consider the prisoner's case—the district court judge, the court of appeals panel, the en banc panel, and all nine Justices of this Court—would conclude that his detention is unlawful, and yet also deny him relief. Specifically:

- The district judge and appellate panel could conclude that his sentence was incorrect but that they were bound by the existing circuit precedent;
- All of the court of appeals judges voting on the petition for rehearing en banc might conclude that the sentence was illegal, but that en banc review was not "necessary to secure or maintain uniformity of the court's decisions" and not warranted because the case did not "involve[] a question of exceptional importance," Fed. R. App. P. 35(a); and
- All nine Justices of this Court could conclude that his sentence is unlawful, but that certiorari is unwarranted because there is no "conflict with the decision of another United States court of appeals on the same important matter" and the decision below did not "so far depart[] from the accepted and usual course of

> judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

The fact that *every single jurist* in that chain could conclude that the prisoner's detention is unlawful—and yet the prisoner could still be properly denied relief—necessarily means that in that circumstance, Section 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

2. The Tenth Circuit acknowledged that the "only" way a defendant could obtain relief through a Section 2255 motion in the face of binding circuit precedent would be through en banc or certiorari review. Pet. App. 5a-6a ("[T]he only way Lewis could've prevailed under § 2255 is if he anticipated *Mathis*, argued it in the face of conflicting Fifth Circuit precedent, secured a writ of certiorari or en banc review, and convinced the Supreme Court or en banc Fifth Circuit that his position was correct."). Under *Prost*, however, that remote prospect of discretionary relief is enough to make Section 2255 "[]adequate" and "[]effective to test the legality of [Lewis's] detention," even though the court here recognized that it would be an "uphill battle." *Id.* at 5a-6a.

Saying that prisoners like Lewis would face an "uphill battle" is a gross understatement: In 2012, the Fifth Circuit granted less than three percent of the motions for en banc rehearing that it entertained, *see* U.S. Court of Appeals, Fifth Circuit, *Clerk's Annual Report July 2011-June 2012* at 23 (Oct. 2012),[4] and

---

[4] http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/statistics/arstats-2012.pdf (last visited Aug. 31, 2018).

this Court granted review in just 0.9 percent of the cases in which parties petitioned for certiorari, *see The Supreme Court - The Statistics*, 126 Harv. L. Rev. 388, 395 (2012).[5] A prisoner should not have to win the lottery in order to obtain a fair hearing on his claim—especially when years of freedom are at stake.

The more fundamental problem with the Tenth Circuit's analysis, though, is that it focuses on what arguments "the petitioner [had] an opportunity to *bring*," Pet. App. 5a (emphasis altered), rather than on whether the Section 2255 motion would in any real-world sense "test the legality of his detention," 28 U.S.C. § 2255(e). The text of Section 2255(e) is concerned with the latter, not the former. 28 U.S.C. § 2255(e). And once one focuses on the question posed by Section 2255(e)'s text, it becomes clear that where relief through a Section 2255 motion depends on discretionary considerations wholly separate from the question of "legality," the Section 2255 motion is not

---

[5] Available statistics from other circuits are similar, with the Ninth, Sixth, and D.C. Circuits granting roughly 2-3 percent of petitions filed each year. *See, e.g.*, U.S. Courts for the Ninth Circuit, *2012 Annual Report* 62, https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2012.pdf (last visited Aug. 31, 2018) (about 2 percent); Pierre H. Bergeron, *En Banc Practice in the Sixth Circuit: An Empirical Study, 1990-2000*, 68 Tenn. L. Rev. 771, 780 (2001) (about 2 percent); Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 Geo. Wash. L. Rev. 1008, 1044 (1991) (2.3 percent on average in the D.C. Circuit). According to its website, the Fourth Circuit grants rehearing en banc in just 0.3 percent of the cases in which en banc review is requested. *See* FAQs - Statistics, United States Court of Appeals for the Fourth Circuit, http://www.ca4.uscourts.gov/faqs/faqs---statistics (last visited Aug. 31, 2018).

"[]adequate or []effective" for the purpose that matters. *Id.*

3. Until recently, the government agreed that the bare possibility of discretionary review that might overrule otherwise binding circuit precedent is not enough to make Section 2255 adequate and effective to test the legality of a federal prisoner's detention. In briefs filed with this Court, it has repeatedly criticized *Prost*'s "overly restrictive interpretation of Section 2255(e) that departs from the other circuits to have addressed the issue." U.S. BIO 20-21, *Williams v. Hastings*, No. 13-1221, 2014 WL 3749512 (July 30, 2014); *see also* U.S. BIO 17, *Abernathy v. Cozza-Rhodes*, No. 13-7723 (Mar. 7, 2014); U.S. BIO 12-13, *Prince v. Thomas*, No. 12-10719 (Aug. 12, 2013); U.S. BIO 14, *Blanchard v. Castillo*, No. 12-7894 (Mar. 26, 2013); U.S. BIO 9-10, *Jones v. Castillo*, No. 12-6925 (Feb. 21, 2013); U.S. BIO 12, 14-15, *McCorvey v. Young*, No. 12-7559 (Feb. 4, 2013); U.S. BIO 13-14, *Thornton v. Ives*, No. 12-6608 (Feb. 1, 2013); U.S. BIO 10-11, *Youree v. Tamez*, No. 12-5768 (Dec. 17, 2012); U.S. BIO 16, *McKelvey v. Rivera*, No. 12-5699 (Dec. 17, 2012); U.S. BIO 11-12 & n.1, *Sorrell v. Bledsoe*, No. 11-7416 (Jan. 17, 2012).

The government elaborated on those views at length in a 2016 filing in the Fourth Circuit signed by Deputy Solicitor General Dreeben. There, it argued that "[t]he savings clause in Section 2255(e) preserves the fundamental purposes of habeas corpus by allowing review of a narrow category of claims that warrant relief even after the defendant has completed direct appeal and a prior collateral attack." U.S. Reh'g Supp. Br. 11, *United States v. Surratt*, No. 14-6851 (4th Cir. Feb. 2, 2016) ("*Surratt* Reh'g Supp. Br.").

"The text of Section 2255(e)," the government wrote, "readily encompasses more than a mere procedural opportunity to raise a claim. The habeas savings clause applies when Section 2255 is 'inadequate or ineffective to test the legality of [the prisoner's] detention, and those words embrace '[t]he essential function of habeas corpus,' which 'is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.'" *Id.* at 29-30 (alterations in original) (citations omitted). "A defendant whose claim is foreclosed by controlling circuit law cannot readily 'test' his claim" because "[t]he district and circuit courts are bound by the precedent, and only rare and discretionary action by the en banc court or the Supreme Court can alter the law." *Id.* at 30.[6]

The government recognized that the Tenth Circuit had reached a different understanding in *Prost*, but it concluded, correctly, that "*Prost*'s analysis is refuted by Section 2255(e)'s text, when read as a whole." *Id.*

---

[6] The government at times sought to limit the scope of Section 2255(e) by arguing that it applies to errors in calculation of the statutory sentencing range but not the Guidelines range (which it deemed less significant). *See, e.g.*, U.S. BIO 12-16, *Sorrell v. Bledsoe*, No. 11-7416 (Jan. 17, 2012). Section 2255(e) provides no textual basis for that distinction. Moreover, the distinction is inconsistent with this Court's recent clarification that erroneous errors in the calculation of the Guidelines range virtually always warrant correction—even when they are not raised by the defendant in the district court—because (1) they are "reasonably likely to have resulted in a longer prison sentence than necessary" and (2) they "seriously affect the fairness, integrity, and public reputation of judicial proceedings." *Rosales-Mireles*, 138 S. Ct. at 1910-11; *see also Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016).

at 32. In particular, it noted that while *Prost* had held that Section 2255(e) bars habeas review so long as a defendant has had an *opportunity* to press his claim in an earlier Section 2255 proceeding, Section 2255(e) expressly applies to some circumstances in which a "court has denied [the prisoner] relief." 28 U.S.C. § 2255(e); *Surratt* Reh'g Supp. Br. 31-32. As the government explained, that shows that "Section 2255(e) itself . . . contemplates cases where, even after a prisoner has sought and been denied relief from an existing sentencing court, the statutory remedy proves to be inadequate or ineffective to test the legality of his detention." *Surratt* Reh'g Supp. Br. 32. In other words, merely having the opportunity to try and lose is not enough.[7]

4. This case provides a perfect illustration of the deficiencies in the Tenth Circuit's approach. Following *Mathis* and *Hinkle*, it is now clear that while the district court determined that Lewis should be sentenced at the bottom of his Guidelines range, *see* Sentencing Tr. 9:5-9, the sentence it actually imposed was more than five years *higher* than the bottom of a properly calculated Guidelines range. *See supra* at 5-6. Yet, at the time of Lewis's sentence and

---

[7] In 2017, following the change in Administration, the government embraced the Tenth Circuit's interpretation of Section 2255(e) that it had previously criticized as "overly restrictive" and inconsistent with the statute's text and structure. *See, e.g.*, *United States v. Wheeler*, 886 F.3d 415, 434 n.12 (4th Cir. 2018) (stating that "[i]t was not until oral argument that the Assistant to the Solicitor General attributed the change of position to 'new leadership in the [Justice] Department,'" and further noting that "the Government cannot identify any principled reason for its turnabout" (alteration in original) (citation omitted)).

first motion under Section 2255, binding Fifth Circuit precedent left "no legal basis" for Lewis's argument that his sentence should have been lower because he did not qualify as a career offender. Pet. App. 22a-23a.

Regardless of what they believed about the actual legality of Lewis's sentence, therefore, neither the district court considering his Section 2255 motion in the first instance nor the Fifth Circuit panel considering that motion on appeal would have had any authority to grant him relief. The only way for Lewis to vindicate his right to a lawful sentence would have been to appeal to the discretion of the en banc Fifth Circuit or this Court. In the real world, that sort of "Hail Mary" is not an adequate or effective means of testing the legality of his detention. Lewis has never received a fair hearing on his argument, and—unless this Court intervenes—he never will.

C. The Question Presented Is Exceptionally Important, And This Case Offers An Ideal Vehicle In Which To Resolve It

1. The question presented here is "significant" and warrants this Court's review, as the government itself has repeatedly acknowledged. *See McCarthan* BIO 25 ("This Court's review would be warranted in an appropriate case."); *Wheeler* Stay Mot. 2-3 ("The Supreme Court is likely to grant a petition for certiorari [to resolve the issue].").

Most importantly, it directly implicates the core purpose of habeas corpus—protecting liberty by ensuring that no person is confined in prison unless convicted and sentenced in accordance with law. The majority rule advances this core principle by allowing federal prisoners to take advantage of new legal rules

announced by this Court or a court of appeals overturning circuit precedent and thereby making clear that their detention is unlawful. The minority rule, by contrast, ensures that federal prisoners will remain incarcerated even when it is indisputable that their detention is contrary to law.

This unwarranted disparity in approach affects large numbers of federal prisoners. This Court regularly issues decisions narrowing overly broad interpretations given to federal criminal statutes and sentencing provisions by the courts of appeals. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016); *Rosemond v. United States*, 572 U.S. 65, 82-83 (2014); *Descamps v. United States*, 570 U.S. 254, 276-78 (2013); *Skilling v. United States*, 561 U.S. 358, 368 (2010); *Carr v. United States*, 560 U.S. 438, 454-58 (2010); *Chambers v. United States*, 555 U.S. 122, 129-30 (2009); *United States v. Santos*, 553 U.S. 507, 523-24 (2008); *Begay v. United States*, 553 U.S. 137, 148 (2008); *Watson v. United States*, 552 U.S. 74, 80-83 (2007). Frequently, those decisions make it clear that substantial numbers of federal prisoners are serving unlawful sentences, either because they were sentenced for conduct that was not in fact a crime or because they were sentenced to unlawfully extended terms.

In the nine courts of appeals that follow the majority rule, those prisoners are able to secure release from their unquestionably illegal sentences. In the Tenth and Eleventh Circuits, however, many of them cannot: If the prisoner has already filed a Section 2255 motion and that motion has been adjudicated, or if the time for filing a Section 2255 motion has already passed, then under *Prost* and *McCarthan* the prisoner has *no* mechanism by which

to secure release from his unlawful sentence. Instead, he will remain incarcerated, directly contrary to Congress's intent in the underlying criminal statute or sentencing provision.

Given the circuit split, what makes the difference between whether a prisoner is released from an illegal sentence or forced to continue to serve it is the federal Bureau of Prisons' choice of where the prisoner is housed. That is because the proper venue for a petition for a writ of habeas corpus under Section 2241 is the district in which a prisoner is incarcerated, rather than the district in which he was sentenced. *Compare* 28 U.S.C. § 2241(a), (d), *with id.* § 2255(a). As a result, two individuals with identical criminal histories, sentenced for identical crimes to identical terms—on the same day and in the same courtroom—could end up serving vastly different sentences if one of them is incarcerated in a federal prison in the Fourth Circuit and the other in the Tenth. This Court should not allow such dramatic differences in the availability of relief from unlawful detention to persist based on the arbitrary happenstance of where a particular prisoner is detained.

2. In light of all of the foregoing, the government itself has recognized that "review [of the question presented] would be warranted in an appropriate case." *McCarthan* BIO 25. This is such a case.

There can be no serious dispute that before *Mathis* and *Hinkle*, Lewis's sentencing court would have been *required* to reject his argument that he was not a career offender because his Texas conviction for possession with intent to deliver was not a controlled substance offense under U.S.S.G. § 4B1.1(a). Nor can there be any serious dispute that *after Mathis* and

Hinkle, Lewis's Texas conviction for possession with intent to deliver is plainly *not* a controlled substance offense. *See supra* at 6-8. And because the government did not purport to identify any *other* offense that could have supported his career offender designation at sentencing, it follows that the Guidelines range the district court employed in calculating his sentence was incorrect. That in itself renders Lewis's sentence unlawful. *See, e.g.*, *Peugh v. United States*, 569 U.S. 530, 541 (2013).

Moreover, given that the district court here manifestly desired to impose a sentence at the very bottom of the Guidelines range, it is virtually certain that the error here resulted in a sentence that is more than *five years longer* than what Lewis would have received in a lawful proceeding. *See Molina-Martinez*, 136 S. Ct. at 1346 ("In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome."). Indeed, this Court has recognized that the type of sentencing error at issue in this case is "exceptional"—and virtually always warrants correction, even on plain error review—precisely because it is "reasonably likely to have resulted in a longer prison sentence than necessary." *Rosales-Mireles*, 138 S. Ct. at 1910.

As this Court has emphasized, "the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' *and that 'provide opportunities for error correction*.'" *Id.* at 1908 (emphasis added) (citation omitted). In Section 2255(e), Congress sought to ensure just that. But the Tenth Circuit's misunderstanding of that provision denied Lewis any

adequate or effective means of correcting the indisputable error in his sentence.

This case therefore presents an ideal opportunity for this Court to resolve the entrenched confusion over Sections 2241 and 2255. By granting review, this Court can restore the vital safeguard against unlawful detention that Congress intended, and that justice demands.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROMAN MARTINEZ
Counsel of Record
BENJAMIN W. SNYDER
GENEVIEVE P. HOFFMAN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

Counsel for Petitioner

September 4, 2018

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

FILED
United States Court of Appeals
Tenth Circuit
June 5, 2018
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DETRIC LEWIS, Petitioner - Appellant, v. N.C. ENGLISH, Warden, USP-Leavenworth, Respondent - Appellee.	No. 18-3046 (D.C. No. 5:18-CV-03044-JWL) (D. Kan.)

ORDER AND JUDGMENT[*]

Before **BACHARACH**, **MURPHY**, and **MORITZ**, Circuit Judges.

---

[*] After examining Lewis' brief and the appellate record, this panel has determined unanimously that oral argument wouldn't materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

--- F. App'x ----, 2018 WL 2684276

Detric Lewis is currently serving a federal narcotics sentence in Leavenworth, Kansas. Proceeding pro se,[1] Lewis petitioned the district court for a writ of habeas corpus under 28 U.S.C. § 2241. The district court dismissed for lack of jurisdiction. For the reasons explained below, we affirm.

Background

Lewis pleaded guilty in the Northern District of Texas to conspiracy to distribute a controlled substance. *United States v. Lewis*, 467 F. App'x 298, 299 (5th Cir. 2012) (unpublished). The sentencing court applied the United State Sentencing Guidelines' career-offender enhancement and sentenced Lewis to 188 months in prison. *Id.*; *see also* U.S.S.G. § 4B1.1. On direct appeal, Lewis argued that his counsel was ineffective in failing to argue that his prior Texas conviction for possession with intent to deliver didn't qualify as a controlled-substance offense for purposes of the career-offender enhancement. *See Lewis*, 467 F. App'x at 299. The Fifth Circuit affirmed because its controlling precedent at the time held that possession with intent to deliver under Texas law was a controlled-substance offense. *Id.*; *see also United States v. Ford*, 509 F.3d 714, 716–17 (5th Cir. 2007), *overruled by United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017). Thus, it concluded that Lewis' counsel had no grounds to challenge the enhancement. *Lewis*, 467 F. App'x at 299. Lewis asserted three additional ineffective-assistance-of-counsel claims in a 28 U.S.C.

---

[1] Because Lewis proceeds pro se, we liberally construe his pleadings. But we won't act as his advocate. *See James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013)

§ 2255 motion that he subsequently filed in the Northern District of Texas. *See Lewis v. United States*, No. 3:13-CV-2176-D, 2013 WL 6869471, at *2–3 (N.D. Tex. Dec. 30, 2013) (unpublished). The court rejected each. *See id.* at *4.

Then, following the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), Lewis requested the Fifth Circuit's permission to file a second or successive § 2255 motion on the theory that his possession-with-intent-to-deliver conviction wasn't a controlled-substance offense under *Mathis*' rule. *See In re Lewis*, No. 16-10799, slip op. at 1 (5th Cir. Oct. 20, 2016) (unpublished). The Fifth Circuit denied his request because *Mathis* didn't announce a new, retroactively applicable rule of constitutional law. *Id.* at 1–2. Subsequently, the Fifth Circuit held that *Mathis* abrogated *Ford*—its prior decision holding that possession with intent to deliver was a controlled-substance offense. *See Tanksley*, 848 F.3d at 349. In light of this development, Lewis once again requested authorization to file a second or successive § 2255 motion. *See In re Lewis*, No. 17-10389, slip op. at 1 (5th Cir. May 31, 2017) (unpublished). The Fifth Circuit again denied Lewis' request and warned him that it would sanction him if he continued to make "frivolous, repetitive, or otherwise abusive filings" within the Fifth Circuit. *Id.* at 2.

Lewis next turned his campaign for relief toward the District of Kansas to file the instant § 2241 petition.[2] Lewis recognized that § 2255 is generally

---

[2] Although § 2255 motions must be brought in the district where the movant was convicted, § 2241 petitions must be brought in the district where the petitioner is confined. *See Hale v. Fox*, 829 F.3d 1162, 1165 (10th Cir. 2016). Thus, insofar as

the exclusive mechanism to collaterally attack a federal sentence, but he argued that § 2255(e)'s savings clause allowed him to seek § 2241 relief because § 2255 was "inadequate or ineffective to test the legality of his detention." § 2255(e). Specifically, Lewis argued that *Mathis* and *Tanksley* exposed a "fundamental defect" in his sentence that he cannot challenge with a second or successive § 2255 motion because these cases announce a new rule of statutory interpretation as opposed to a new rule of constitutional law. R. 28 (quoting *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998)); *see also* § 2255(h) (authorizing second or successive § 2255 motions only in cases of newly discovered evidence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court").

The district court dismissed Lewis' petition for lack of jurisdiction. It explained that Lewis could have argued in his § 2255 motion that *Ford* should be overturned and he could have then sought en banc or certiorari review to achieve that end. Citing to our decision in *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011), the district court accordingly held that § 2255 was adequate to test the legality of Lewis' detention. Thus, the district court determined that § 2255(e)'s savings clause didn't apply and Lewis couldn't attack his sentence under § 2241. Lewis appeals.[3]

Lewis may challenge his sentence under § 2241, he has chosen the correct venue to do so.

[3] As a federal prisoner, Lewis doesn't need a certificate of appealability to appeal the district court's order dismissing his § 2241 petition. *See Eldridge v. Berkebile*, 791 F.3d 1239, 1241 (10th Cir. 2015).

Analysis

"A § 2255 motion is ordinarily the only means to challenge the validity of a federal conviction following the conclusion of direct appeal." *Hale*, 829 F.3d at 1165. Thus, a district court normally lacks jurisdiction to entertain a § 2241 petition challenging a federal prisoner's conviction or sentence. *See Abernathy v. Wandes*, 713 F.3d 538, 557 (10th Cir. 2013). But a federal prisoner may proceed under § 2241 in "rare instances" when "§ 2255 fail[s] as an adequate or effective remedy to challenge a conviction or the sentence imposed." *Sines v. Wilner*, 609 F.3d 1070, 1073 (10th Cir. 2010); *see also* § 2255(e) (authorizing federal prisoner to file § 2241 petition if it "appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention"). We have explained that if "a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion . . . , then the petitioner may not resort to the savings clause and § 2241." *Prost*, 636 F.3d at 584. In other words, the savings clause "is concerned with process—ensuring the petitioner an *opportunity* to bring his argument—not with substance—guaranteeing nothing about what the *opportunity* promised will ultimately yield in terms of relief." *Id.*

Lewis argues that the savings clause applies because his *Mathis* argument was unavailable to him when he filed his initial § 2255 motion. Further, he says, *Mathis* isn't a new rule of constitutional law that would've given him a basis to file a second or successive § 2255 motion. Thus, the only way Lewis could've prevailed under § 2255 is if he anticipated *Mathis*, argued it in the face of conflicting Fifth

Circuit precedent, secured a writ of certiorari or en banc review, and convinced the Supreme Court or en banc Fifth Circuit that his position was correct.

We don't doubt that this would have been an uphill battle; but Lewis at least had the *opportunity* to take this path. And *Prost* makes clear that this *opportunity*—as unlikely as success might have been—forecloses our application of § 2255(e)'s savings clause. *See* 636 F.3d at 590 (declining to apply savings clause after Supreme Court announced new rule of statutory interpretation reversing circuit precedent in effect at time of petitioner's § 2255 motion).

Lewis acknowledges that *Prost* poses a problem for his § 2241 petition. Instead of attempting to distinguish *Prost*, he simply asks us not to follow it. Lewis notes that several of our sibling circuits follow what's known as the erroneous-circuit-foreclosure test. Courts following that test apply the savings clause if a circuit court's subsequently overturned interpretation of a statute precluded relief at the time the § 2241 petitioner moved for relief under § 2255. *See, e.g.*, *Hill v. Masters*, 836 F.3d 591, 595 (6th Cir. 2016) (invoking savings clause where § 2241 petitioner "show[ed] (1) a case of statutory interpretation, (2) that is retroactive and could not have been invoked in the initial § 2255 motion, and (3) that the misapplied sentence presents an error sufficiently grave to be deemed a miscarriage of justice or a fundamental defect"); *Davenport*, 147 F.3d at 610 (allowing § 2241 petition to proceed because (1) "[t]he law of the circuit was . . . firmly against" petitioner when he filed § 2255 motion; (2) the Supreme Court subsequently adopted novel interpretation of relevant statute favorable to

petitioner; and (3) petitioner couldn't file a second or successive § 2255 motion because change in law was statutory, not constitutional). *But see McCarthan v. Dir. of Goodwill Indus.-Suncoast*, Inc., 851 F.3d 1076, 1099–1100 (11th Cir. 2017) (en banc) (overturning prior Eleventh Circuit precedent applying erroneous-circuit-foreclosure test). *See generally McCarthan*, 851 F.3d at 1084–85 (discussing six-way circuit split over savings clause's application). But we specifically rejected that approach in *Prost*. *See* 636 F.3d at 593–94. Absent intervening Supreme Court precedent or en banc review, this panel cannot revisit that decision. *See United States v. Fager*, 811 F.3d 381, 388 n.5 (10th Cir. 2016). Therefore, the savings clause doesn't apply and § 2255(e) precludes the district court from hearing Lewis' § 2241 petition. Accordingly, we affirm

Entered for the Court

Nancy L. Moritz
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

DETRIC LEWIS,

Petitioner,

v. **CASE NO. 18-3044-JWL**

N.C. ENGLISH, Warden, USP-Leavenworth,

Respondent.

2018 WL 1242073

MEMORANDUM AND ORDER

This matter is a petition for habeas corpus filed under 28 U.S.C. § 2241. Petitioner, a prisoner in federal custody at USP-Leavenworth, proceeds pro se. Petitioner challenges his designation as a career offender. The Court has screened his Petition (Doc. 1) under Rule 4 of the Rules Governing Habeas Corpus Cases, foll. 28 U.S.C. § 2254, and dismisses this action without prejudice for lack of statutory jurisdiction.

Background

Petitioner was sentenced to 188 months imprisonment in the U.S. District Court for the Northern District of Texas (Dallas Division) on March 25, 2011, after pleading guilty to conspiracy to distribute a controlled substance. *Lewis v. United States*, 2013 WL 6869471, at *1 (N.D. Tex. Dec. 30, 2013). Petitioner's case was affirmed on appeal. *See United States v. Lewis*, 467 F. App'x 298 (5th Cir.

2012). Petitioner then filed a § 2255 motion, asserting that he received ineffective assistance of counsel. *Lewis*, 2013 WL 6869471. Petitioner's § 2255 motion was denied and Petitioner sought permission to file a second or successive § 2255 motion in the Fifth Circuit Court of Appeals, challenging his sentence as a career offender. Case No. 16-10799 (5th Cir. 2016). The Fifth Circuit denied the motion, finding that "[o]nly a decision by the Supreme Court may serve as the basis for granting authorization, § 2255(h)(2), and Lewis has not made the requisite showing with respect to *Mathis* or *Johnson*." *Id*. at Doc. 00513727534. Plaintiff again filed a motion for authorization to file a successive § 2255 motion. Case No. 17-10389 (5th Cir. 2017). The Fifth Circuit denied the motion on May 31, 2017, noting that Petitioner's claims were repetitive of, or similar to, claims raised in his previous motion, and warning Petitioner that future frivolous filings would result in the imposition of sanctions. *Id*. at Doc. 00514013884. Petitioner then filed a motion under Fed. R. Civ. P. 60(b) in his underlying criminal case, seeking relief again under *Mathis v. United States*, 136 S. Ct. 2243 (2016). On September 19, 2017, the court adopted the magistrate judge's recommendation and found that the Rule 60(b) motion should be construed as an unauthorized successive § 2255 motion and transferred to the Fifth Circuit. *United States v. Lewis*, No. 3:10-cr-40-D (03), 2017 WL 4155279 (N.D. Tex. Sept. 19, 2017). Petitioner then sought to withdraw the transferred motion. *See* Case No. 17-10389, Doc. 00514260890.

Petitioner then filed the instant petition under 28 U.S.C. § 2241. Petitioner invokes the savings clause of § 2255(e), arguing that § 2255 is inadequate or ineffective to test the legality of his detention.

Analysis

The Court must first determine whether § 2241 was the proper vehicle to bring Petitioner's claims. Because "that issue impacts the court's statutory jurisdiction, it is a threshold matter." *Sandlain v. English*, 2017 WL 4479370 (10th Cir. Oct. 5, 2017) (unpublished) (finding that whether *Mathis* is retroactive goes to the merits and the court must first decide whether § 2241 is the proper vehicle to bring the claim) (citing *Abernathy v. Wandes*, 713 F.3d 538, 557 (10th Cir. 2013)).

A federal prisoner seeking release from allegedly illegal confinement may file a motion to "vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). A motion under § 2255 must be filed in the district where the petitioner was convicted and sentence imposed. *Sines v. Wilner*, 609 F.3d 1070, 1073 (10th Cir. 2010). Generally, the motion remedy under 28 U.S.C. § 2255 provides "the only means to challenge the validity of a federal conviction following the conclusion of direct appeal." *Hale v. Fox*, 829 F.3d 1162, 1165 (10th Cir. 2016), *cert. denied sub nom. Hale v. Julian*, 137 S. Ct. 641 (2017). However, under the "savings clause" in § 2255(e), a federal prisoner may file an application for habeas corpus under 28 U.S.C. § 2241 in the district of confinement if the petitioner demonstrates that the remedy provided by § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

Petitioner seeks relief based on the Fifth Circuit's post-*Mathis* overruling of *Ford*, the then-controlling precedent that foreclosed the claim he brought on direct appeal. *See United States v. Tanksley*, 848 F.3d 347 (5th Cir.), *supplemented by* 854 F.3d 284 (5th Cir.

2017). Petitioner claims that "as of today" a prior conviction under Section 481.112(a) does not count as "a controlled substance offense" under the career offender provision of the sentencing guidelines.

The Tenth Circuit relied on *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011),[1] to reject a similar argument in *Sandlain*.[2] In *Prost*, the Tenth Circuit held that Prost was free to raise and test his argument in his initial § 2255 motion, despite contrary circuit authority at the time. The Tenth Circuit held that "it is the infirmity of the § 2255 remedy itself, not the failure to use it or to prevail under it, that is determinative. To invoke the savings clause, there must be something about the initial § 2255 procedure that *itself* is inadequate or ineffective for *testing* a challenge to detention." *Prost*, 636 F.3d at 589. The Tenth Circuit noted that Prost

---

[1] Petitioner urges this Court to disregard or "overrule" *Prost*. This Court is bound by Tenth Circuit precedent. *United States v. Spedalieri*, 910 F.2d 707, 709, n.2 (10th Cir. 1990) ("A district court must follow the precedent of this circuit, regardless of its views concerning the advantages of the precedent of our sister circuits.") (citations omitted); *see also Leatherwood v. Allbaugh*, 861 F.3d 1034, 1042 n.6 (10th Cir. 2017) ("[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.") (quoting *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015)).

[2] "Sandlain claimed § 2255 was inadequate or ineffective to challenge his sentence because Sixth Circuit law at the time he filed his initial § 2255 motion precluded him from raising an ineffective assistance of counsel claim based on counsel's failure to challenge the use of the modified categorical approach to determine the means, rather than the elements, of his prior conviction under Mich. Comp. Laws § 333.7401." *Sandlain*, 2017 WL 4479370, at *2.

was free to raise his argument in his initial § 2255 motion, and the fact that his argument may have been foreclosed by erroneous circuit precedent was not enough to invoke the savings clause of § 2255(e). *Id.* at 590. "The savings clause doesn't guarantee results, only process," and "the possibility of an erroneous result—the denial of relief that should have been granted—does not render the procedural mechanism Congress provided for bringing that claim (whether it be 28 U.S.C. §§ 1331, 1332, 2201, 2255, or otherwise) an inadequate or ineffective *remedial vehicle* for *testing* its merits within the plain meaning of the savings clause." *Id.* (emphasis in original).

The petitioner has the burden to show that the remedy under § 2255 is inadequate or ineffective. *Hale*, 829 F.3d at 1179. Like the petitioners in *Sandlain* and *Prost*, Petitioner has failed to meet that burden. "[E]ven assuming there was contrary circuit precedent, nothing prevented him from raising the argument in his initial § 2255 motion and then challenging any contrary precedent via en banc or certiorari review." *Sandlain*, 2017 WL 4479370, at *3. The Fifth Circuit, in denying Petitioner's § 2255 motion, found that Petitioner had not made a prima facie showing under § 2255(h),[3] citing *In re Lott*, 838

---

[3] 28 U.S.C. § 2255(h) provides that:

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

F.3d 522, 523 (5th Cir. 2016) (per curiam). If § 2255 could be deemed "inadequate or ineffective" "any time a petitioner is barred from raising a meritorious second or successive challenge to his conviction—subsection (h) would become a nullity, a 'meaningless gesture.'" *Prost*, 636 F.3d at 586; *see also Hale*, 829 F.3d at 1174 ("Because Mr. Hale cannot satisfy § 2255(h), he cannot, under *Prost*, satisfy § 2255(e), and § 2241 review must be denied.").

Petitioner also claims that § 2255 is inadequate or ineffective because he is actually innocent, not of his underlying crime, but of his career offender sentence enhancement. However, a petitioner can only establish actual innocence "by bringing forward new exculpatory evidence," and the "[p]ossible misuse of a prior conviction as a predicate offense under the sentencing guidelines does not demonstrate actual innocence." *Sandlain*, 2017 WL 4479370, at *4 (citing *Hale*, 829 F.3d at 1171).

The Court finds that the savings clause of § 2255(e) does not apply and therefore the Court lacks statutory jurisdiction. Accordingly,

IT IS THEREFORE ORDERED BY THE COURT that the petition is **dismissed without prejudice**.

---

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

IT IS SO ORDERED.

Dated in Kansas City, Kansas, on this 9th day of March, 2018.

S/ John W. Lungstrum
JOHN W. LUNGSTRUM
UNITED STATES
DISTRICT JUDGE

28 U.S.C. § 2241

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign

state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been

determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus 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.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) 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;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

United States Court of Appeals
Fifth Circuit
FILED
Apr. 23, 2012
Lyle W. Cayce
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-10346
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DETRIC LEWIS,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:10-CR-40-3

---

467 F. App'x 298

Before BENAVIDES, STEWART, and HIGGINSON, Circuit Judges.

PER CURIAM:*

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent

Detric Lewis appeals his 188-month sentence following his guilty-plea conviction for conspiracy to distribute a controlled substance. He argues for the first time on appeal that counsel was ineffective for failing to challenge the finding that his prior Texas drug offense was a qualifying offense for the purpose of the career-offender enhancement under U.S.S.G. § 4B1.1. We may review this newly raised claim on direct appeal because counsel had no legal basis on which to object to the enhancement. *See United States v. Villegas-Rodriguez*, 171 F.3d 224, 230 (5th Cir. 1999).

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 689-94 (1984). Failure to establish either deficient performance or prejudice defeats the ineffective-counsel claim. *Id.* at 697.

The Guidelines provide for an enhancement of the offense level and criminal history category if the defendant is determined to be a career offender. U.S.S.G. § 4B1.1. "A defendant is a career offender if . . . . [inter alia] the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." § 4B1.1(a).

Lewis does not dispute that he judicially confessed to the Texas offense of possession with intent to deliver a controlled substance. In *United States v. Ford*, 509 F.3d 714, 716-17 (5th Cir. 2007), we held that the Texas offense of "possession with intent to

---

except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

deliver" qualifies as a "controlled substance offense" under U.S.S.G. § 2K2.1. That Guideline defines "controlled substance offense" by cross-reference to the career offense guidelines. As counsel had no legal basis on which to object to the enhancement, his failure to do so does not constitute ineffective assistance of counsel. *See Villegas-Rodriguez*, 171 F.3d at 230.

Accordingly, the judgment of the district court is AFFIRMED. The Government's motion for dismissal is therefore DENIED as unnecessary.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DETRIC LEWIS,	§	
	§	
Petitioner,	§	
	§	
V.	§	No. 3:13-cv-2176-D-BN
	§	
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Detric Lewis has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. For the reasons stated herein, Petitioner's motion should be denied.

Background

Petitioner pled guilty to conspiracy to possess with intent to distribute and to distribute 50 or more grams of cocaine base, in violation of 21 U.S.C. § 846, pursuant to a plea agreement and factual resume. He was sentenced to 188 months imprisonment on March 25, 2011. His case was affirmed on direct appeal. *See United States v. Lewis*, 467 F. App'x 298 (5th Cir. 2012). Petitioner then filed this timely Section 2255 motion to vacate, set aside, or correct sentence, asserting that he received ineffective assistance of counsel.

Legal standards

A Section 2255 motion is a proper procedural vehicle for raising a claim of ineffective assistance of counsel. *See United States v. Pierce,* 959 F.2d 1297, 1301 (5th Cir. 1992). The Sixth Amendment to the United States Constitution guarantees a defendant reasonably effective assistance of counsel at all critical stages of a criminal proceeding. *See Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980). In order to obtain post-conviction relief due to ineffective assistance of counsel, a petitioner must satisfy the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must demonstrate that counsel's performance fell below an objective standard of reasonable professional service. *See id.* at 687. Second, he must establish that he was prejudiced by the attorney's substandard performance. *See id.* at 691-92.

In order to obtain post-conviction relief due to ineffective assistance of counsel in the context of a guilty plea, the *Strickland* prejudice requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). To satisfy this standard, the prisoner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. In order to obtain post-conviction relief due to ineffective assistance of counsel during the punishment phase of a non-capital case, a petitioner must establish that he was subjected to additional jail time due to the deficient performance of his attorney. *See United States v. Grammas,* 376 F.3d 433, 439 (5th

Cir. 2004) (citing *Glover v. United States,* 531 U.S. 198, 203 (2001)). There is a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance. *See Romero v. Lynaugh*, 884 F.2d 871, 876 (5th Cir. 1989).

Analysis

Voluntariness of Guilty Plea

Although Petitioner does not specifically argue that his guilty plea was involuntary, he states in passing that his plea hearing was flawed because he was under the influence of "very powerful psychotropic medications," the Court declined to read the factual resume or "require that a factual basis for the conspiracy be spread upon the record," he was never advised of the essential elements of the charged offense, and he did not understand the nature of the offense for which he plead guilty. *See* Dkt. No. 3 at 3. These statements are entirely without merit.

A trial judge is required to ensure that a guilty plea is knowing and voluntary. *See James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995). The defendant must "'[have] a full understanding of what the plea connotes and of its consequence.'" *Taylor v. Whitley,* 933 F.2d 325, 329 (5th Cir. 1991) (quoting *Boykin v. Alabama,* 395 U.S. 238, 244 (1969)). The United States Court of Appeals for the Fifth Circuit has identified three core concerns in a guilty plea proceeding: (1) the absence of coercion; (2) a full understanding of the charges; and (3) a realistic appreciation of the consequences of the plea. *See United States v. Gracia,* 983 F.2d 625, 627-28 (5th Cir. 1993). Compliance with Federal Rule of Criminal Procedure 11's requirements provides "prophylactic

protection for the constitutional rights involved in the entry of guilty pleas." *Id.* at 627.

The record establishes that Petitioner was competent to enter a plea and that his guilty plea was knowing and voluntary. Petitioner was properly admonished in full accordance with Rule 11 before the Court accepted his guilty plea. *See* Dkt. No. 250. During his rearraignment, Petitioner stated that he had been taking, under the care of a doctor, the medications Pyloric Acid and Elavil. *See id.* at 4. However, Petitioner stated under oath that those prescriptions did not have side effects that prevented him from understanding the proceedings, and Petitioner confirmed that he was fully able to focus and concentrate on the hearing. *See id.* at 5-6. The Court declined to read the factual resume into the record because Petitioner indicated that he did not wish the document to be read and therefore waived reading of the factual resume. *See id.* at 16-17. Petitioner stated that he had the opportunity to carefully read the factual resume and discuss it with his attorney and that he understood the contents of the document. *See id.* at 17. Finally, the Court identified the factual resume's section containing the offense's essential elements and asked Petitioner whether he admitted that he had committed each of the essential elements set forth. *See id.* at 17-18. Petitioner admitted as much. *See id.* The Court found that:

> Mr. Lewis is fully competent and capable of entering an informed plea, that he is aware of the nature of the charge and of the consequences of his plea, and that his plea of guilty is a knowing and voluntary plea

> supported by an independent basis in fact containing each of the essential elements of the offense.

Id. at 18-19. The plea was therefore accepted, and Petitioner was found guilty of the charged drug conspiracy. *See id.* at 19.

Petitioner's sworn testimony carries a strong presumption of veracity in a subsequent habeas proceeding. *See Blackledge v. Allison,* 431 U.S. 63, 73-74 (1977). His conclusory claim that his plea was in any way flawed, either due to medications or the Court's failure to recite facts and elements that were specifically waived by Petitioner, is without merit.

Relevant Conduct

In his enumerated first ground for relief, Petitioner claims that his attorney, William Gary Nellis, provided ineffective assistance by failing to object to the drug quantity calculation contained within the Presentence Investigation Report ("PSR"). That is, Petitioner contends that the PSR attributed drug amounts that his coconspirators sold while he was in jail and before he joined the conspiracy. *See* Dkt. No. 3 at 6-7.

Although the PSR recounted the drug trafficking activities of the West Side Gator Boys drug trafficking gang that occurred as early as February 2007, *see* No. 3:10-cr-40-D, Dkt. No. 151-1 at 5-9, Petitioner was only held accountable for the amounts reasonably foreseeable during the time of his own participation in the conspiracy, *see id.* at 10. This relevant conduct, which amounted to 272.646 grams of cocaine base, *see id.*, is less than the 304.6 grams of cocaine base that Petitioner voluntarily stipulated was reasonably

foreseeable during his participation in the conspiracy, *see* No. 3:10-cr-40-D, Dkt. No. 127 at 2-3. Because Petitioner stipulated to a greater drug quantity than that eventually applied to him by the PSR, an objection to the total drug amount would have been meritless and cannot form the basis of an ineffective assistance claim. *See, e.g.*, *Sones v. Hargett,* 61 F.3d 410, 415 n.5 (5th Cir. 1995) (counsel is not deficient for failing to argue a meritless point).

Fair Sentencing Act

Petitioner also faults his defense attorney for failing to argue that the then-existing 100:1 disparity in sentences between crack cocaine offenses and powder cocaine offenses had a racially discriminatory impact and to urge the Court to apply the more lenient sentence called for by the Fair Sentencing Act of 2010 ("FSA"). The FSA took effect one month before Petitioner's guilty plea. Respondent concedes that, had the FSA been applied to Petitioner at sentencing, he would have had a total offense level of 34 rather than the 37 that was applied in the PSR. *See* Dkt. No. 7 at 10 n.3.

At the time of Petitioner's sentencing, Fifth Circuit law dictated that the FSA did not apply retroactively to defendants like Petitioner who committed their offenses before the Act's enactment, even though they were sentenced after enactment. *See United States v. Doggins*, 633 F.3d 379, 384 (5th Cir. 2011). Well after Petitioner's sentence was imposed, the United States Supreme Court held that the FSA applies retroactively to such offenders. *See Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012). However, determination of whether the performance of counsel was deficient is based upon the law "as of

the time of counsel's conduct." *Strickland*, 466 U.S. at 690. Counsel is not required to "anticipate changes in the law." *United States v. Fields*, 565 F.3d 290, 294 (5th Cir. 2009).

Although the FSA, if it had been applied at the time of sentencing, might have resulted in a lower offense level (a determination that the Court need not make in resolving Petitioner's Section 2255 motion), this does not establish that Nellis's performance was deficient. If Petitioner's counsel raised an objection at sentencing and urged the Court to apply the FSA retroactively, binding precedent would have compelled the Court to overrule his objection. That is, at the time of sentencing, such an objection to the application of the Sentencing Guidelines would have been meritless. Nellis was not ineffective for failing to urge the retroactive application of the FSA when Fifth Circuit law compelled otherwise. Petitioner has not established that his counsel's failure to raise this objection was deficient or that he would have received a lesser sentence of imprisonment if it had been urged. Accordingly, this claim should be denied.

Recommendation

Petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 should be denied.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to

which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: November 5, 2013

s/ David L. Horan
DAVID L. HORAN
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DETRIC LEWIS,	§	
	§	
Petitioner,	§	
	§	
V.	§	No. 3:13-CV-2176-D
	§	
UNITED STATES OF AMERICA,	§	
	§	
	§	
Respondent.	§	

ORDER

After making an independent review of the pleadings, files, and records in this case, and the findings, conclusions, and recommendation of the magistrate judge, the court concludes that the findings and conclusions are correct. It is therefore ordered that the findings, conclusions, and recommendation of the magistrate judge are adopted.

Considering the record in this case and pursuant to Fed. R. App. P. 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the court denies a certificate of appealability. The court adopts and incorporates by reference the magistrate judge's findings, conclusions, and recommendation filed in this case in support of its finding that the petitioner has failed to show (1) that reasonable jurists would find this court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a

valid claim of the denial of a constitutional right" and "debatable whether [this court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S.473, 484 (2000).

If petitioner files a notice of appeal,

( ) petitioner may proceed *in forma pauperis* on appeal.

(**X**) petitioner must pay the $505.00 appellate filing fee or submit a motion to proceed *in forma pauperis*.

SO ORDERED.

December 30, 2013.

s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-10799

[Seal omitted]

A True Copy
Certified order issued Oct 20, 2016
s/ Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

In re: DETRIC LEWIS,

Movant

Motion for an order authorizing
the United States District Court for the
Northern District of Texas, Dallas to consider
a successive 28 U.S.C. § 2255 motion

Before HIGGINBOTHAM, JONES, and HIGGINSON, Circuit Judges.

PER CURIAM:

Detric Lewis, federal prisoner # 39724-177, pleaded guilty to conspiracy to distribute a controlled substance. He moves for authorization to file a successive 28 U.S.C. § 2255 motion, challenging his sentence as a career offender pursuant to U.S.S.G. § 4Bl.1 and U.S.S.G. § 4Bl.2. § 2255(h); 28 U.S.C. § 2244(b)(3)(C); *Reyes-Requena v. United States,* 243 F.3d 893, 897-99 (5th Cir. 2001). Invoking *Johnson v. United States,* 135 S. Ct. 2551 (2015), Lewis argues that he is entitled to relief from the career offender

enhancement. He also asserts that he is entitled to authorization based upon *Mathis v. United States,* 136 S. Ct. 2243 (2016), and our decision in *United States v. Hinkle*, ___ F.3d ___, No. 15-10067, 2016 WL 4254372 (5th Cir. Aug. 11, 2016).

Only a decision by the Supreme Court may serve as the basis for granting authorization, § 2255(h)(2), and Lewis has not made the requisite showing with respect to *Mathis* or *Johnson*. *See In re Lott*, ___ F.3d ____, No. 16-10866, 2016 WL 5349745 (5th Cir. Sept. 26, 2016) (denying authorization to assert a claim based upon *Mathis); In re Arnick,* 826 F.3d 787, 788 (5th Cir. 2016) (denying authorization to challenge, based upon *Johnson,* a sentence under § 4Bl.2). Lewis requests that this court hold his case in abeyance pending the outcome of *Beckles v. United States,* 136 S. Ct. 2510 (2016), in which the Supreme Court recently granted certiorari to address whether *Johnson* applies to sentences enhanced under § 4Bl.2. The grant of certiorari in *Beckles* does not alter our current analysis. Under our case law, *see Wicker v. McCotter,* 798 F.2d 155, 157-58 (5th Cir. 1986), we are bound by our own precedent unless and until that precedent is altered by a decision of the Supreme Court.

Accordingly, IT IS ORDERED that Lewis's motion for authorization and motion to stay proceedings are DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10389

[Seal omitted]

A True Copy
Certified order issued May 31, 2017
s/ Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

In re: DETRIC LEWIS,

Movant

Motion for an order authorizing
the United States District Court for the
Northern District of Texas, Dallas to consider
a successive 28 U.S.C. § 2255 motion

Before HIGGINBOTHAM, JONES, and PRADO, Circuit Judges.

PER CURIAM:

Detric Lewis, federal prisoner # 39724-177, moves for authorization to file a successive 28 U.S.C. § 2255 motion challenging his sentence imposed following his guilty-plea conviction for conspiracy to distribute a controlled substance. Relying on *Mathis v. United States,* 136 S. Ct. 2243 (2016), *United States v. Hinkle,* 832 F.3d 569 (5th Cir. 2016), and *United States v. Tanksley,* 848 F.3d 237 (5th Cir.), *supplemented by* 854 F.3d 284 (5th Cir. 2017), Lewis contends that he

is entitled to relief from the enhancement of his sentence under the career offender guideline.

To obtain authorization, Lewis must make a prima facie showing that his proffered § 2255 motion relies on either (1) "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty," or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h); 28 U.S.C. § 2244(b)(3)(C); *see Reyes-Requena v. United States,* 243 F.3d 893, 897-99 (5th Cir. 2001).

Lewis has not made the required showing. *See In re Lott,* 838 F.3d 522, 523 (5th Cir. 2016); *In re Sparks,* 657 F.3d 258, 260 (5th Cir 2011); § 2244(b)(3)(C); § 2255(h)(2).

Accordingly, IT IS ORDERED that Lewis's motion for authorization to file a successive § 2255 motion is DENIED. Lewis has now filed two meritless motions for authorization. Some of the claims raised in the instant motion are repetitive of or similar to claims that were raised in his previous motion for authorization. *See In re Lewis,* No. 16-10799 (5th Cir. Oct. 20, 2016). Lewis is WARNED that future frivolous, repetitive, or otherwise abusive filings will result in the imposition of sanctions, which may include dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court's jurisdiction.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	§	
	§	
V.	§	
	§	No. 3:10-cr-40-D (03)
DETRIC LEWIS,	§	
	§	
Defendant.	§	
	§	
	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Defendant Detric Lewis, a federal prisoner, has filed a *pro se* Motion Pursuant to Rule 60(b)(6), invoking, primarily, *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016) (the "Rule 60(b) motion"). *See* Dkt. No. 328. United States District Judge Sidney A. Fitzwater has referred the Rule 60(b) motion to the undersigned United States magistrate judge for hearing, if necessary, and entry of findings and recommendation under 28 U.S.C. § 636(b)(1)(B). *See* Dkt. No. 329.

The undersigned issues the following findings of fact, conclusions of law, and recommendation that, for the reasons explained below, because the Rule 60(b) motion is, in substance, an unauthorized successive motion under 28 U.S.C. § 2255, the Court, construing it as such, should transfer it to the United States Court of Appeals for the Fifth Circuit for appropriate

action. The Court also should direct the Clerk of the Court to open for statistical purposes a new Section 2255 case (nature of suit 510 directly assigned, per Special Order 3-250, to Judge Fitzwater and the undersigned) and to close the same on the basis of any order accepting this recommendation.

Applicable Background

"[F]ollowing his guilty-plea conviction for conspiracy to distribute a controlled substance," in violation of 21 U.S.C. § 846, Lewis was sentenced to 188 months of imprisonment. *United States v. Lewis*, 467 F. App'x 298, 299 (5th Cir. 2012) (per curiam). His criminal judgment was affirmed on direct appeal, after the United States Court of Appeals for the Fifth Circuit rejected Lewis's argument that his trial counsel "was ineffective for failing to challenge the finding that his prior Texas drug offense was a qualifying offense for the purpose of the career-offender enhancement under U.S.S.G. § 4B1.1":

> The Guidelines provide for an enhancement of the offense level and criminal history category if the defendant is determined to be a career offender. U.S.S.G. § 4B1.1. "A defendant is a career offender if . . . . [inter alia] the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." § 4B1.1(a).
>
> Lewis does not dispute that he judicially confessed to the Texas offense of possession with intent to deliver a controlled substance. In *United States v. Ford*, 509 F.3d 714, 716-17 (5th Cir. 2007), we held that the Texas offense of "possession with intent to deliver" qualifies as

> a "controlled substance offense" under U.S.S.G. § 2K2.1. That Guideline defines "controlled substance offense" by cross-reference to the career offense guidelines. As counsel had no legal basis on which to object to the enhancement, his failure to do so does not constitute ineffective assistance of counsel.

Id. (citation omitted).

And this Court denied Lewis's initial Section 2255 motion. *See Lewis v. United States*, No. 3:13-cv-2176-D, 2013 WL 6869471 (N.D. Tex. Dec. 30, 2013) (raising claims that his guilty plea was not voluntary and that his trial counsel was ineffective for failing to object to the drug-quantity calculation in the presentence investigation report and for failing to raise the applicability of the Fair Sentencing Act of 2010).

Legal Standards

Federal Rule of Civil Procedure 60(b) provides for relief from a civil judgment or order. But that rule is commonly invoked by criminal defendants in the context of motions related to post-conviction relief under Section 2255.

When that occurs, "the court must first determine whether the motion 'should be treated as a second or successive [Section 2255 motion or whether] it should be treated as a "true" 60(b) motion.'" *Pursley v. Estep*, 287 F. App'x 651, 653 (10th Cir. 2008) (per curiam) (quoting *Spitznas v. Boone*, 464 F.3d 1213, 1217 (10th Cir. 2006)); *cf. In re Jasper*, 559 F. App'x 366, 370-71 (5th Cir. 2014) ("In order to prevent conflicts between the strict limitations in [the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA")]

on second-or-successive habeas petitions and the more lenient restrictions in Rule 60(b) on motions for relief from final judgments, federal courts examine Rule 60(b) motions to determine whether they are, in fact, second-or-successive habeas petitions in disguise." (citing *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005))); *Balentine v. Thaler*, 626 F.3d 842, 846-47 (5th Cir. 2010) ("A state prisoner is not entitled to use Rule 60(b) as a broad opening for a second request in the federal court to overturn his conviction. Still, a Rule 60(b) motion, filed several years after an inmate's Section 2254 application had been denied, is in some circumstances an available option." (citing *Gonzalez*, 545 U.S. at 528-29)).

> In *Gonzalez v. Crosby*, the Supreme Court distinguished between a subsequent habeas petition and a Rule 60(b) motion along the lines of substance and procedure. A motion is substantive – and thus a successive habeas petition – if it "seeks to add a new ground for relief," or if it "attacks the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." If, however, the motion challenges "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," then a Rule 60(b) motion is proper.

In re Coleman, 768 F.3d 367, 371 (5th Cir. 2014) (quoting 545 U.S. at 532; footnotes omitted).

"While the *Gonzalez* court declined to consider whether its analysis would be equally applicable to § 2255 cases," *United States v. Brown*, 547 F. App'x 637, 641 (5th Cir. 2013) (per curiam) (citing *Gonzalez*, 545 U.S. at 529 n.3), the Fifth Circuit "has applied the holding in *Gonzalez* to § 2255 cases," *id.* (collecting cases); *see, e.g., United States v. Hernandes*, 708 F.3d 680, 681 (5th Cir. 2013) ("[W]here a Rule 60(b) motion advances one or more substantive claims, as opposed to a merely procedural claim, the motion should be construed as a successive § 2255 motion." (citations omitted)).

Analysis

The Rule 60(b) motion is substantive. Through it, Lewis does not attack "some defect in the integrity of the federal habeas proceedings," *Coleman*, 768 F.3d at 371, but instead seeks relief based on the Fifth Circuit's post-*Mathis* overruling of *Ford*, the then-controlling precedent that foreclosed the claim he brought on direct appeal.

Earlier this year, the Fifth Circuit, in *United States v. Tanksley*, 848 F.3d 347 (5th Cir.), *supplemented by* 854 F.3d 284 (5th Cir. 2017), held that *Mathis* overturned *Ford*, in which the Court of Appeals had "held that a conviction for possession with intent to deliver a controlled substance under section 481.112(a) of the Texas Health and Safety Code . . . qualifies as a 'controlled substance offense' under the [federal sentencing guidelines]," 848 F.3d at 349; *see id.* at 352 ("*Mathis* is more than merely illuminating with respect to the case before us; it unequivocally resolves the question in favor of Tanksley. *Ford* cannot stand. Section 481.112(a) is an indivisible statute to which the modified

categorical approach does not apply." (citations and internal quotation marks omitted)).

As such, today, a prior conviction under Section 481.112(a) does not count as "a controlled substance offense" under the career offender provision of the sentencing guidelines. *See, e.g., United States v. Hott*, ___ F.3d ____, No. 16-11435, 2017 WL 3379254, at *2 (5th Cir. Aug. 7, 2017) ("This court recently held that Texas possession with intent to deliver a controlled substance does not qualify as a controlled substance offense under the Guidelines. Based on *Tanksley*, the Government concedes error in calculation of the Guidelines range." (citation omitted)).

Whether *Mathis* should be applied retroactively in cases on collateral review – such that this Court may reconsider the sentencing-enhancement challenge foreclosed by *Ford* when Lewis filed a direct appeal – may be an open question. *But see, e.g., Watkins v. United States*, Nos. 4:17-cv-293-A & 4:06-cr-10-A, 2017 WL 1906810, at *2 (N.D. Tex. May 5, 2017) ("*Mathis* . . . did not announce a new rule nor was it made retroactively applicable to cases on collateral review," citing that the opinion itself noted that "the decision was dictated by decades of prior precedent" (citing *Mathis*, 136 S. Ct. at 2257; citations omitted)).

That said, in a Section 2255 challenge that was successive, the Fifth Circuit held that the movant "failed to make a prima facie showing that *Mathis* . . . [sets] forth a new [rule] of constitutional law that [has] been made retroactive to cases on collateral review." *In re Lott*, 838 F.3d 522, 523 (5th Cir. 2016) (per curiam) (citing 28 U.S.C. §§ 2244(b)(3)(C), 2255(h); *Reyes-Requena v. United States*, 243 F.3d 893, 897-99 (5th Cir. 2001)).

Despite Lott's failure to make that showing, however, given that the Rule 60(b) motion is a successive Section 2255 in disguise, Lewis should be given an opportunity to make the prima facie showing required before this Court may have jurisdiction over his successive motion. *See, e.g., United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (per curiam) (holding that the appellate-certification requirement for a successive Section 2255 motion "acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive [motion to vacate] until [the Fifth Circuit] has granted the [movant] permission to file one"; citations omitted).

The Court should therefore construe the Rule 60(b) motion to be, in substance, a successive Section 2255 motion and transfer it to the Fifth Circuit for appropriate action.

Recommendation

Because the Rule 60(b) motion [Dkt. No. 328] is, in substance, an unauthorized successive motion under 28 U.S.C. § 2255, the Court, construing it as such, should transfer it to the United States Court of Appeals for the Fifth Circuit for appropriate action, and the Court should direct the Clerk of the Court to open for statistical purposes a new Section 2255 case (nature of suit 510 directly assigned, per Special Order 3-250, to United States District Judge Sidney A. Fitzwater and United States Magistrate Judge David L. Horan) and to close the same on the basis of any order accepting this recommendation.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and

recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: August 16, 2017

s/ David L. Horn
DAVID L. HORN
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	§	
	§	
V.	§	
	§	No. 3:10-CR-40-D (03)
DETRIC LEWIS,	§	
	§	
Defendant.	§	
	§	
	§	

ORDER

The United States Magistrate Judge made findings, conclusions, and a recommendation in this case. No objections were filed. The District Court reviewed the proposed findings, conclusions, and recommendation for plain error. Finding none, the court adopts the findings, conclusions, and recommendation of the United States Magistrate Judge.

The motion pursuant to rule 60(b)(6) [Dkt. No. 328] is, in substance, an unauthorized successive motion under 28 U.S.C. § 2255. Construing it as such, the motion is therefore transferred to the United States Court of Appeals for the Fifth Circuit for appropriate action.

The court further directs the clerk of court to open for statistical purposes a new § 2255 case (nature of suit 510 directly assigned, per Special Order 3-250, to United States District Judge Sidney A. Fitzwater and

United States Magistrate Judge David L. Horan) and to close the same on the basis of this order.

SO ORDERED.

September 19, 2017.

s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE