No. 18-292

In the Supreme Court of the United States

DETRIC LEWIS, PETITIONER

v.

NICOLE ENGLISH, WARDEN

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

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground cognizable on collateral review, with "second or successive" attacks limited to certain claims that show factual innocence or that rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. 2255(h). Under 28 U.S.C. 2255(e), an "application for a writ of habeas corpus [under 28 U.S.C. 2241] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained * * * unless it * * * appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." The United States has filed a petition for a writ of certiorari in *United States* v. *Wheeler*, No. 18-420 (filed Oct. 3, 2018), seeking this Court's resolution of a circuit conflict regarding whether the portion of Section 2255(e) beginning with "unless," known as

the saving clause, allows a defendant who has been denied Section 2255 relief to later file a habeas petition that challenges his conviction or sentence based on an intervening change in the judicial interpretation of a statute. Petitioner seeks review of a similar question, but the circumstances of his case would not lead to relief under any circuit's interpretation of the saving clause. The petition should therefore be denied and need not be held pending *Wheeler*.

1. Petitioner pleaded guilty to conspiracy to possess with intent to distribute 50 or more grams of cocaine base, in violation of 21 U.S.C. 846. Pet. App. 24a. At sentencing, the district court concluded that petitioner qualified as a "career-offender" under Sentencing Guidelines § 4B1.1 (2010), which increases the advisory Guidelines range if, among other things, "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." See Pet. App. 2a. A "controlled substance offense" is defined as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." Sentencing Guidelines § 4B1.2(b) (2010). As relevant here, the district court concluded that petitioner's prior conviction under Texas law for possession with intent to deliver a controlled substance constituted a "controlled-substance offense" under the career-offender guideline. See Pet. App. 2a.

The court of appeals affirmed, rejecting a claim by petitioner that he had received ineffective assistance of

counsel because his lawyer failed to argue that his prior Texas conviction did not qualify as a "controlled substance offense" for purposes of the career-offender guideline. Pet. App. 21a-23a. The court concluded that counsel did not perform deficiently because then-controlling circuit precedent, *United States* v. *Ford*, 509 F.3d 714, 716-717 (5th Cir. 2007), established that a Texas conviction for possession with intent to deliver a controlled substance qualified as a "controlled substance offense" for purposes of the career-offender guideline. Pet. App. 22a-23a. Petitioner then filed a motion to vacate, correct, or set aside the sentence under 28 U.S.C. 2255, which the district court denied. Pet. App. 24a-33a.

Four years after petitioner's conviction became final, this Court issued its decision in *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016), which discussed the proper approach to determining which statutes are "divisible" into separate offenses for purposes of determining whether a prior conviction was for an offense that satisfies a particular federal definition. The Fifth Circuit subsequently concluded that the Texas statute that proscribes possession of a controlled substance with intent to deliver is not divisible in light of *Mathis* and, therefore, that a conviction for violating that statute does not qualify as a "controlled substance offense" under the career-offender guideline. See *United States* v. *Hinkle*, 832 F.3d 569, 572, 574-577 (2016), appeal, 705 Fed. Appx. 272 (2017), cert. denied, 138 S. Ct. 1453 (2018). Petitioner sought authorization from the court of appeals to file a second or successive motion for collateral relief under 28 U.S.C. 2255 to challenge his career-offender designation, but the court denied his

application. Pet. App. 34a-35a. After the court subsequently confirmed in *United States* v. *Tanksley*, 848 F.3d 347, opinion supplemented, 854 F.3d 284 (5th Cir. 2017), that *Mathis* had abrogated its prior precedent on the divisibility of the Texas statute, see *id.* at 350-352 & n.1, petitioner again sought permission to file a second or successive Section 2255 motion, see Pet. App. 3a, but the court again denied his application, *id.* at 36a-37a.

Petitioner then filed a habeas petition under 28 U.S.C. 2241 in the District of Kansas, where he was incarcerated, renewing his claim that this Court's decision in *Mathis* established that the sentencing court had erroneously calculated his advisory Guidelines range. See Pet. App. 3a-4a. The district court dismissed the petition for lack of jurisdiction, concluding that his petition was foreclosed by the saving clause of 28 U.S.C. 2255(e). Pet. App. 8a-14a. The court of appeals affirmed. *Id.* at 1a-7a.

2. Petitioner renews his contention that this Court's decision in *Mathis* establishes that the district court erroneously applied a career-offender designation in calculating his recommended sentencing range under the advisory Guidelines.

As noted, the United States has filed a petition for a writ of certiorari in *Wheeler*, *supra* (No. 18-420), asking this Court to resolve a circuit conflict regarding whether the saving clause allows a defendant who has been denied Section 2255 relief to challenge his conviction or sentence based on an intervening decision of statutory interpretation. The Court need not hold the petition in this case pending *Wheeler*, however, because petitioner would not be entitled to relief even in the courts of appeals that have given the saving clause the most prisoner-favorable interpretation.

A claim that a sentencing court misapplied the advisory Guidelines is not a claim that may be addressed on collateral review. An erroneous computation of an advisory Guidelines range does not alter the statutory minimum or maximum sentences that define the boundaries of the sentencing court's discretion. At all times, those boundaries remain fixed by Congress. See *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989). Any error in applying the advisory Guidelines—whether in the context of the career-offender provision or any other—is therefore not a fundamental defect that results in a complete miscarriage of justice warranting collateral relief. Cf. *United States* v. *Addonizio*, 442 U.S. 178, 186-187 (1979) (denying collateral relief for claim of sentencing error based on Parole Commission's postsentencing adoption of its release guidelines, which affected the sentencing court's expectation of the time the defendant would serve in custody, because the actual sentence imposed was "within the statutory limits" and the error "did not affect the lawfulness of the judgment itself," but only how the judgment would be performed).

Every court of appeals to consider the issue has concluded that a claim that a sentencing court erroneously computed an advisory Guidelines range is not cognizable on collateral review. See *United States* v. *Foote*, 784 F.3d 931, 932, 935, 940 (4th Cir.), cert. denied, 135 S. Ct. 2850 (2015); *United States* v. *Coleman*, 763 F.3d 706, 708-709 (7th Cir. 2014), cert. denied, 135 S. Ct. 1574 (2015); *Spencer* v. *United States*, 773 F.3d 1132, 1135-1137 (11th Cir. 2014) (en banc), cert. denied, 135 S. Ct. 2836 (2015); see also *United States* v. *Hoskins*, 905 F.3d 97, 104 n.7 (2d Cir. 2018) ("Several circuits have concluded that sentences imposed pursuant to advisory Guidelines

based on an erroneous or later invalidated career offender determination did not result in a complete miscarriage of justice sufficient to warrant collateral relief."). Petitioner was sentenced under the advisory Guidelines following this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), and therefore would not be eligible for collateral relief in any circuit. Moreover, no circuit has granted relief under the saving clause to a defendant who seeks to challenge an application of the advisory Guidelines.

This Court has denied petitions for writs of certiorari in cases in which the petitioners would not have been eligible for relief even in circuits that have allowed some statutory challenges to a conviction or sentence under the saving clause. See, *e.g.*, U.S. Br. in Opp. at 21-22, *Venta* v. *Jarvis*, 138 S. Ct. 648 (2018) (No. 17-6099); U.S. Br. in Opp. at 24-27, *Young* v. *Ocasio*, 138 S. Ct. 2673 (2018) (No. 17-7141). The Court should follow the same course here, and the petition need not be held for *Wheeler*.[*]

Respectfully submitted.

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[*] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.