No. 18-5691

IN THE SUPREME COURT OF THE UNITED STATES

DARRYL JEROME BAKER, PETITIONER

v.

R. C. CHEATHAM, WARDEN

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

MEMORANDUM FOR THE UNITED STATES 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 the disposition of Wheeler.

1. In 2003, petitioner was sentenced to a mandatory term of life imprisonment because he was convicted of a drug-trafficking conspiracy that involved five kilograms or more of cocaine and 50 grams or more of cocaine base and committed the offense "after two or more prior convictions for a felony drug offense ha[d] become final." 21 U.S.C. 841(b)(1)(A) (2000 & Supp. II 2002); see Pet. App., Dist. Ct. Op. at 1-2. Then, as now, "felony drug offense" was defined as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44). Petitioner had a 1995 conviction in Florida for delivery and possession of cocaine and

1988 federal convictions for possession of crack cocaine with the intent to distribute and conspiracy to possess crack cocaine with the intent to distribute. Pet. App., Dist. Ct. Op. at 2.

In January 2006, after petitioner's 2003 conviction and sentence became final, he filed a motion to vacate, correct, or set aside the sentence under 28 U.S.C. 2255. Pet. App., Dist. Ct. Op. at 2. The district court denied the motion, and the court of appeals denied an application for a certificate of appealability. Id. at 2-3. In 2011, the court of appeals denied petitioner's application for permission to file a second or successive motion for relief under 18 U.S.C. 2255. Pet. App., Dist. Ct. Op. at 3; see 28 U.S.C. 2255(h).

In 2014, petitioner filed a habeas petition under 28 U.S.C. 2241, arguing that the district court had erroneously sentenced him under the career-offender provision of the Sentencing Guidelines. Pet. App., Dist. Ct. Op. at 3. That provision classifies a defendant as a "career offender" -- and therefore subjects the defendant to an enhanced 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." Sentencing Guidelines § 4B1.1 (a)(3) (2013). 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) (2013). According to petitioner, this Court's decision in Descamps v. United States, 570 U.S. 254, 254 (2013), 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, established that his prior Florida drug conviction did not qualify as a "controlled substance offense[]" under the career-offender guideline. Pet. App., Dist. Ct. Op. at 3.

The district court dismissed the habeas petition for lack of jurisdiction, concluding that the petition was foreclosed by the saving clause of 28 U.S.C. 2255(e). Pet. App., Dist. Ct. Op. at 4-5. The court of appeals determined that petitioner's appeal was frivolous, denied his motion to proceed in forma pauperis, and dismissed the appeal after petitioner failed to pay the required docketing and filing fees. Pet. App., C.A. Order at 1.

2. Petitioner renews his contention (Pet. 12-13) that this Court's decision in Descamps -- as well as its subsequent decision in Mathis v. United States, 136 S. Ct. 2243 (2016) -- established that the district court erroneously sentenced him under the career-offender provision of the Sentencing Guidelines.

As noted, the United States has filed a petition for a writ of certiorari in United States v. Wheeler, 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.

As an initial matter, the career-offender provision of the Sentencing Guidelines did not determine petitioner's sentence. Petitioner's life sentence was statutorily mandated as a result of the drug quantities involved and his prior drug convictions. See 18 U.S.C. 841(b)(1)(A). Even if his Guidelines challenge were cognizable under the saving clause, therefore, and even if his challenge had merit, it would not entitle him to resentencing.

In any event, even in circuits that construe the saving clause to permit a habeas petition based on an intervening decision of statutory interpretation, petitioner's habeas petition would not qualify. The circuits that have given Section 2255(e) the broadest interpretation generally have granted relief only when a prisoner can show (1) that the prisoner's claim was foreclosed by (erroneous) precedent at the time of the prisoner's first motion under Section 2255; and (2) that an intervening decision, made

retroactive on collateral review, has since established that the prisoner is in custody for an act that the law does not make criminal, has been sentenced in excess of an applicable maximum under a statute or under a mandatory Sentencing Guidelines regime, or has received an erroneous statutory minimum sentence. See, e.g., Hill v. Masters, 836 F.3d 591, 595-596, 598-600 (6th Cir. 2016); Brown v. Rios, 696 F.3d 638, 640-641 (7th Cir. 2012); Reyes-Requena v. United States, 243 F.3d 893, 902-904 (5th Cir. 2001); cf. Bruce v. Warden Lewisburg USP, 868 F.3d 170, 180 (3d Cir. 2017) (stating in dicta that relief under the saving clause would be available to a defendant who claims his offense conduct was not unlawful irrespective of "whether the prisoner's claim was viable under circuit precedent as it existed at the time of his direct appeal and initial § 2255 motion"). Petitioner cannot satisfy either of those prerequisites.

First, petitioner has not shown that his claim was foreclosed at the time of his first Section 2255 motion by any since-abrogated precedent. Petitioner had an unobstructed opportunity at the time of his sentencing and direct appeal to argue that his career-offender designation was erroneous on the basis now raised in his habeas application. To the extent that his challenge to a Guidelines range is cognizable on collateral review at all, he could also have raised it in his first Section 2255 motion. For that reason, no circuit would conclude under the circumstances that Section 2255 was "inadequate or ineffective to test the

legality of [petitioner's] detention." 28 U.S.C. 2255(e); see In re Davenport, 147 F.3d 605, 609 (7th Cir. 1998) (denying habeas relief where prisoner "had an unobstructed procedural shot at getting his sentence vacated" in his initial Section 2255 motion); see also Ivy v. Pontesso, 328 F.3d 1057, 1060 (9th Cir.) ("[I]t is not enough that the petitioner is presently barred from raising his claim of innocence by motion under § 2255. He must never have had the opportunity to raise it by motion."), cert. denied, 540 U.S. 1051 (2003).

Second, petitioner has identified no intervening decision, made retroactive on collateral review, establishing that his sentence exceeds the applicable maximum. Petitioner argues that he is entitled to relief on the basis of Descamps and Mathis, which explained that a statute is not "divisible" into multiple offenses for purposes of classifying a conviction under the statute if it sets forth alternative "means" of committing a single crime, rather than alternative "elements" of separate crimes. Mathis, 136 S. Ct. at 2248-2256. But the Court made clear in Mathis that it was not announcing any new principle, because its prior "cases involving the modified categorical approach ha[d] already made exactly that point." Id. at 2253; see id. at 2251-2254 (explaining that rule was dictated by Court's precedents); see also Arazola-Galea v. United States, 876 F.3d 1257, 1259 (9th Cir. 2017) ("We now join our sister circuits in definitively holding that Mathis did not establish a new rule of constitutional law."); In re Conzelmann,

872 F.3d 375, 376 (6th Cir. 2017) ("The Court's holding in Mathis was dictated by prior precedent (indeed two decades worth)."). Nor was the principle upon which petitioner rests announced for the first time in Descamps. See Descamps, 570 U.S. at 260 ("Our caselaw explaining the categorical approach and its 'modified' counterpart all but resolves this case."); id. at 264 ("That is the job, as we have always understood it, of the modified approach."); see also United States v. Morgan, 845 F.3d 664, 667 (5th Cir. 2017) ("We agree with our sister courts that Descamps did not establish a new rule.") (citing cases).

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., Br. in Opp. at 21-22, Venta v. Jarvis, 138 S. Ct. 648 (2018) (No. 17-6099); 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 for a writ of certiorari need not be held for Wheeler.*

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

Respectfully submitted.

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