No. 18-5730

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRENCE DENMARK, PETITIONER

v.

UNITED STATES

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

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# 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 2006, petitioner was sentenced to a statutory-minimum term of 20 years of imprisonment following his conviction for a drug-trafficking conspiracy that involved five kilograms or more of cocaine and 50 grams or more of cocaine base, which he had engaged in "after a prior conviction for a felony drug offense ha[d] become final." 21 U.S.C. 841(b)(1)(A); see Presentence Investigation Report (PSR) ¶¶ 151-152. 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 1992 convictions in Florida for possession of

cocaine with intent to sell and possession of marijuana with intent to sell; a 1992 conviction in Florida for possession of cocaine; a 1992 conviction in Florida for possession of cocaine with intent to sell; and a 1997 federal conviction for conspiracy to possess cocaine base with intent to distribute. PSR ¶¶ 102, 107, 109, 111.

After petitioner's 2006 conviction and sentence became final, he filed a motion to vacate, correct, or set aside the sentence under 28 U.S.C. 2255. The district court denied the motion. Pet. App., Dist. Ct. Op. at 2.

In 2014, petitioner filed a habeas petition under 28 U.S.C. 2241. Pet. App., C.A. Op. at 2. As relevant here, petitioner eventually argued, relying on this Court's decision in Mathis v. United States, 136 S. Ct. 2243 (2016), that the district court had erroneously sentenced him under the career-offender provision of the Sentencing Guidelines. Pet. App., C.A. Op. at 3. That provision classifies a defendant as a "career offender" -- and therefore subject 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 "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). According to petitioner, Mathis established that his prior convictions did not qualify as "controlled substance offense[s]" under the career-offender guideline.

The district court dismissed the habeas petition for lack of jurisdiction, concluding that it was foreclosed by the saving clause of 28 U.S.C. 2255(e). Pet. App., Dist. Ct. Op. at 3-5. The court of appeals affirmed. Pet. App., C.A. Op. at 3-4.

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 above, 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 for several independent reasons, petitioner would not be entitled to relief even in the courts of appeals that have given the saving clause the most prisoner-favorable interpretation.

First, the career-offender provision of the Sentencing Guidelines did not determine petitioner's sentence. Petitioner's

20-year sentence was statutorily mandated as a result of the drug quantities involved in his offense and his prior drug convictions. See 18 U.S.C. 841(b)(1)(A). Therefore, even if his Guidelines challenge were both cognizable under the saving clause and meritorious, it would not entitle him to resentencing.

Second, 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 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 release guidelines that were contrary to the sentencing court's expectation of the time the defendant would actually 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 determined 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. And no circuit has granted relief under the saving clause to a defendant who seeks to challenge an application of the advisory Guidelines.

Third, even if a challenge to the advisory Guidelines were otherwise cognizable on collateral review, petitioner's Mathis claim could not be reviewed even in the circuits that construe the saving clause to permit a habeas petition based on an intervening decision of statutory interpretation. 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). Petitioner cannot satisfy either of those prerequisites.

On the first prerequisite, 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. And 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. Therefore, 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).

On the second prerequisite, 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 based on Mathis, which explained that a statute is not "divisible" into multiple offenses for purposes of classifying a conviction if it sets forth alternative "means" of committing a single crime, rather than alternative "elements" of separate crimes. 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).").

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 need not be held for Wheeler.*

Respectfully submitted.

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Solicitor General

NOVEMBER 2018

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