No. 18-5760

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM BENJAMIN BROWN, PETITIONER

v.

ANDREW MANSUKHANI, WARDEN

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Whether any of the following alleged procedural errors invalidate the dismissal of petitioner's habeas petition under 28 U.S.C. 2241:

1. The government's omission in its response of a discussion of the effect, if any, of the government's position in another case;
2. The magistrate judge's filing of a second report and recommendation following the district court's remand;
3. The district court filing its order as a document on the docket rather than a text entry;
4. The district court's non-acceptance of an alleged government concession;
5. The district court's asserted failure to address all the claims in the habeas petition; or
6. The district court's decision not to address the government's position in the other case (noted above).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2)[1] is not published in the Federal Reporter but is reprinted at 712 Fed. Appx. 320. The order of the district court (Pet. App. 3-6) is not reported in the Federal Supplement but is available at 2017 WL 3725318.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 2018. A petition for rehearing was denied on May 21, 2018

[1] The appendix is not fully paginated. Page numbers refer to the page of the PDF on the Court's electronic docket. For materials not included therein, additional notations are included.

(Pet. App. 7). The petition for a writ of certiorari was filed on June 20, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Georgia, petitioner was convicted of possessing ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1), and failing to register as a sex offender following interstate travel, in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. 2250(a). He was sentenced to 180 months of imprisonment, to be followed by a lifetime term of supervised release. 11-cr-1 Doc. 59, at 1-3 (S.D. Ga. Dec. 5, 2011). The Eleventh Circuit dismissed his direct appeal as barred by the appeal waiver in his plea agreement. United States v. Brown, No. 11-16059 (Oct. 12, 2012).

In 2013, petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255, which the district court denied. See 11-cr-1 Doc. 85 (S.D. Ga. Aug. 1, 2013). The Eleventh Circuit declined to issue a certificate of appealability. 11-cr-1 Doc. 92 (S.D. Ga. Feb. 3, 2014). In 2014, petitioner filed a habeas petition under 28 U.S.C. 2241 in the District of South Carolina, where he is confined; the district court dismissed the petition and the Fourth Circuit affirmed. Pet. App. 11. In 2016, petitioner filed a second Section 2255 motion in Georgia, which the district court dismissed as successive. 11-cr-1 Doc. 102 (S.D.

Ga. Aug. 15, 2016). Petitioner then filed the instant action, another habeas petition under Section 2241, in South Carolina. See Pet. App. D1. The district court dismissed the petition. Id. at 5. The Fourth Circuit affirmed. Id. at 1-2.

1. In 1970, petitioner raped a woman in Detroit, Michigan, and was imprisoned for more than three years. Presentence Investigation Report (PSR) ¶ 46. Within months of being released on parole, he knocked on a woman's door, forced his way into her home, and raped her in her garage. PSR ¶ 47. Just over two months later, he allegedly tried to do this again to another victim but ran away when she screamed. PSR ¶ 52. After spending six years in prison for the second rape, he escaped. PSR ¶ 47.

Less than a year later, on May 23, 1981, petitioner broke into two different homes in Ann Arbor, Michigan, sexually assaulted one woman at knifepoint and threatened another into exposing herself to him. PSR ¶¶ 48-49. Petitioner went to trial and a jury found him guilty on two counts of breaking and entering and one count of felonious assault. Ibid. He spent nearly 27 years in prison, the maximum allowed under state law. PSR ¶ 49.

He was released in 2008 and moved from Michigan to Georgia. PSR ¶¶ 49, 6. He did not register as a sex offender as required under both Georgia and federal law. PSR ¶ 7. Officers executed a search warrant on his home and discovered three guns and a variety of ammunition. PSR ¶ 11.

2. A federal grand jury indicted petitioner on three counts: failing to register as a sex offender, in violation of 18 U.S.C. 2250(a); possessing a firearm following a felony conviction, in violation of 18 U.S.C 922(g)(1); and possessing ammunition following a felony conviction, in violation of 18 U.S.C 922(g)(1). PSR ¶ 3. Pursuant to a written plea agreement, petitioner pleaded guilty to the first and third counts, and the government dismissed the second count. Pet. App. 24. In the plea agreement, petitioner waived his rights to appeal and collaterally attack his convictions and sentence. Ibid.

In light of his criminal history (two rape convictions, two breaking-and-entering convictions, and a felonious assault conviction), PSR ¶¶ 46-49, the district court found the statutory enhancement in the Armed Career Criminal Act of 1994 (ACCA), 18 U.S.C. 924(e), applicable to his felon-in-possession crime. 12/5/2011 Sent. Tr. 32, 56. The court sentenced petitioner to the mandatory minimum of 180 months on the felon-in-possession count and 120 months, the statutory maximum, on the failure-to-register count. Id. at 56.

3. On April 10, 2013, petitioner filed his first motion for post-conviction relief. 11-cr-1 Doc. 74 (S.D. Ga.) He alleged five grounds for relief: (1) that the district court had lacked subject matter jurisdiction to prosecute him because, he claimed, his rights had been restored upon his completion of his Michigan sentence and he was no longer a felon; (2) that the government

"[b]reached the plea Agreement" at sentencing; (3) that he did not have three ACCA predicate felonies; (4) a discovery violation; and (5) that his counsel rendered ineffective assistance regarding the plea. Id. at 4-8. The court found the first four grounds barred by the plea agreement's collateral attack wavier, and rejected the fifth ground on the merits. 11-cr-1 Doc. 85 (S.D. Ga. Aug. 1, 2013).

Petitioner then filed his first petition for a writ of habeas corpus, under 28 U.S.C. 2241, raising the same five claims. See 14-cv-1355, Doc. 1 (D.S.C. Apr. 14, 2014). The district court dismissed the petition, finding that petitioner had not satisfied the criteria for relief under the saving clause of Section 2255(e) -- which permits a federal prisoner who can file a Section 2255 motion to seek habeas relief only if "the remedy by motion is inadequate or ineffective to test the legality of his detention" -- set forth in In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000). 2015 WL 2452768 (May 22, 2015). The Fourth Circuit affirmed, 621 Fed. Appx. 200 (2015), and this Court denied a petition for a writ of certiorari, 136 S. Ct. 1389 (2016) (No. 15-7837).

Petitioner then filed a second Section 2255 motion, yet again raising the same five claims. See 11-cr-1 Doc. 94 (S.D. Ga. June 27, 2016). The district court dismissed the motion as successive. 11-cr-1 Doc. 102 (S.D. Ga. Aug. 15, 2016); see 28 U.S.C. 2255(h).

4. Petitioner then filed a second petition for a writ of habeas corpus under Section 2241. See 16-cv-3079 Doc. 1 (D.S.C.

Sept. 9, 2016). Petitioner again raised a variation of his first claim, contending that he was actually innocent of the felon-in-possession charge because his civil rights had been restored, within the meaning of 18 U.S.C. 921(20). 16-cv-3079 Doc. 1, at 2 (Sept. 9, 2016). A magistrate judge issued a report and recommendation, recommending that the claim be dismissed on the grounds that petitioner's felony convictions still precluded him from serving on a jury under Michigan law and his right to possess firearms under state law had not been restored, so "his civil rights had not been restored." Pet. App. 30.

Petitioner also added the new claim that his SORNA conviction was invalid under an intervening Sixth Circuit decision, Does #1-5 v. Snyder, 834 F.3d 696 (2016), cert. denied, 138 S. Ct. 55 (2017). Pet. App. 27-32. The magistrate judge recommended dismissing that claim under Jones. Id. at 23-32. Jones provides that to satisfy the saving clause of Section 2255(e) and thus be able to raise a habeas petition under Section 2241, a petitioner must demonstrate: (1) "at the time of the conviction, settled law of this circuit or the Supreme Court established the legality of the conviction"; (2) after petitioner's direct appeal and first Section 2255 motion, "the substantive law changed such that the conduct of which [he] was convicted is deemed not to be criminal"; and (3) that change in law is statutory, not constitutional, rendering relief under Section 2255 itself unavailable. 226 F.3d at 333-334. The magistrate judge determined that Snyder

interpreted only the Michigan state sex offender registration regime, said nothing about the different federal regime in SORNA, and thus could not invalidate his conviction. Pet. App. 28.

In reviewing the magistrate judge's recommendation, the district court took into account the government's argument in Surratt v. United States, 797 F.3d 240 (4th Cir. 2015). In that case, the government had argued that Jones's second criterion applied with equal force to changes in the law that would render the defendant ineligible for a statutory-minimum prison term, like the ACCA enhancement and the recidivist drug enhancement in 21 U.S.C. 851. See Surratt, 797 F.3d at 246. A panel of the Fourth Circuit rejected the government's view, however, id. at at 246-250, and then the full court vacated that opinion and heard the case en banc. Before the court issued an opinion, the President commuted Surratt's sentence, the en banc Fourth Circuit found the case moot and did not address the government's arguments. United States v. Surratt, 855 F.3d 218 (4th Cir.) (en banc), cert. denied, 138 S. Ct. 554 (2017). The district court in petitioner's case nevertheless directed the magistrate judge to reconsider petitioner's petition in light of the government's position in Surratt, Pet. App. 8, emphasizing that "this remand is not based upon any error whatsoever by the learned Magistrate Judge." 16-cv-3079 Docket entry No. 17 (D.S.C. Apr. 26, 2017).

The government thereafter moved to dismiss petitioner's habeas petition under Jones, without mentioning Surratt. 16-cv-

3079 Docs. 25, 26 (D.S.C. June 16, 2017). The magistrate judge requested the government address Surratt, and the government filed a two-paragraph response describing Surratt's procedural history and noting that Jones remained the governing standard. 16-cv-3079 Doc. 43 (D.S.C. July 26, 2017). The magistrate judge thereafter issued a new Report and Recommendation, essentially identical to the first, again recommending dismissal. Pet. App. 8-21.

Petitioner filed objections, mostly restating his underlying claims. 16-cv-3079 Doc. 47 (D.S.C. Aug. 8, 2017). Petitioner also objected that the government had not responded to the district court's order regarding Surratt. Id. at 4; Pet. App. 4. The district court adopted the magistrate judge's report and recommendation and dismissed the habeas petition. The court observed that petitioner "fail[ed] to set forth any specific objections to the Report" and explained that this failure "waives appellate review." Pet. App. 4. The court also noted that its order on Surratt was "directed to the Magistrate Judge, not" the government, and thus the government had not been obligated to respond. Id. at 5.

5. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1-2. The court "affirm[ed] for the reasons stated by the district court." Id. at 2.

ARGUMENT

Petitioner's questions presented raise six procedural issues, none of which has merit or warrants further review. He also

appears to raise (Pet. 10) three substantive issues: whether his prior Michigan convictions made him a felon; whether Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016), cert. denied, 138 S. Ct. 55 (2017), rendered his SORNA conviction invalid; and whether his breaking=and-entering convictions are valid ACCA predicates. The first two issues are meritless, as explained by the courts below. The third issue, which makes its first appearance in this case in the petition, is forfeited and provides no basis for relief. This Court's review is not warranted.

1. The lower courts did not commit any procedural errors in resolving petitioner's claims, let alone any error that might warrant this Court's review. First, as the district court explained, its order relating to Surratt v. United States, 797 F.3d 240 (4th Cir. 2015), was "directed to the Magistrate Judge, not" the government, and thus the government was not obliged to respond. Pet. App. 5. Because the government was not required to respond, its decision not to address Surratt in its motion to dismiss was not a concession or error.[2]

[2] It is not clear what petitioner believes the government conceded. Even if sentencing errors were amenable to saving clause relief, petitioner's sentence contains no errors. Furthermore, as the government has explained to the Court in its petition for a writ of certiorari in United States v. Wheeler, No. 18-420 (filed Oct. 3, 2018), and elsewhere, it has returned to its original position on the scope of the saving clause and no longer takes the view that it allows for claims of statutory error in a conviction or sentence. See U.S. Pet. 13, Wheeler (No. 18-420). And if the saving clause does not permit such statutory claims, then the courts below lacked jurisdiction to entertain most of petitioner's arguments here. But because the courts below found that

Second, the magistrate judge was directed to file a second report and recommendation. See 16-cv-3079 Docket entry No. 17 (D.S.C. Apr. 26, 2017); 28 U.S.C. 631(b)(1)(B). His doing so was not error.

Third, the district court filed its order publicly and sent it to petitioner. Petitioner's contention (Pet. 3) that the "ruling" was not made "a part of the Court Docket TEXT" does not suggest any error.

Fourth, the government did not make any concessions in, or relevant to, petitioner's case. The government's motion to dismiss explained why petitioner had not satisfied In re Jones, 226 F.3d 328 (4th Cir. 2000), the governing law in the Fourth Circuit on the scope of the saving clause. 16-cv-3079 Doc. 25 (D.S.C. June 16, 2017). In neither this case nor Surratt did the government concede that petitioner would be entitled to relief.

Fifth, the district court did address all the claims in petitioner's habeas petition. He raised two claims: (1) that his civil rights had been restored, making him not a "felon" under Section 922(g)(1); and (2) that Snyder rendered his SORNA conviction invalid. 16-cv-3079 Doc. 1 (D.S.C. Sept. 9, 2016). The report and recommendation explained why both claims lacked

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petitioner's claims did not warrant relief even under the Fourth Circuit's more expansive view of the saving clause, no reason exists to hold the petition here pending the disposition of the petition in Wheeler.

merit, Pet. App. 12-19, and the district court adopted the report and recommendation, id. at 5.

Sixth, it is not clear what error petitioner alleges in the district court "not ruling on its Court Order," Pet. i, but his petition appears to suggest that this refers to the April 26, 2017, Surratt order. But as explained above, that order merely remanded the case to the magistrate judge for further consideration. To the extent a ruling was required, the court's decision to adopt the magistrate judge's second report, Pet. App. 5, is clearly sufficient.

2. In any event, the merits claims petitioner raised below -- even if cognizable under the saving clause -- did not support any relief. See p.9 n.2, supra (noting that such claims are not cognizable under the saving clause).

First, petitioner argues (Pet. 6-7, 9) that he is not a felon because, under the automatic operation of Michigan law, his civil rights were restored when he completed his sentence. Federal law provides that a conviction for which a person "has had civil rights restored shall not be considered a conviction for purposes of this chapter," unless such "restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. 921(a)(20). As the magistrate judge pointed out, although Michigan law restores a felon's right to vote on completion of his sentence, it does not restore his right to sit on a jury. Pet. App. 15-16; see Froede v. Holland Ladder

& Mfg. Co., 523 N.W.2d 849 (Mich. 1994); Mich. Comp. Laws § 600.1307a(1)(e) (2012). For serious crimes like petitioner's, Michigan law also requires the released felon to apply for and receive a restoration of the right to possess firearms from his county's weapons licensing board. Pet. App. 16; see United States v. Ormsby, 252 F.3d 844, 850 (6th Cir. 2001). Petitioner has not done so. He therefore cannot qualify under the exception in Section 921(a)(20).

Second, contrary to petitioner's assertion (Pet. 10), the Sixth Circuit's decision in Snyder does not invalidate his SORNA conviction. As the magistrate judge explained, Pet. App. 13-15, Snyder addressed an Ex Post Facto Clause challenge to Michigan's state sex offender registry requirements. Snyder concluded that specific aspects of Michigan's registration law, notably, its substantive restrictions on where offenders could live, work, and "loiter," rendered it punitive. 834 F.3d at 705-706. SORNA, however, imposes no substantive requirements; it is a purely procedural statute that requires registration when an offender moves or changes information. See 34 U.S.C. 20913(a) and (b).

In contrast to Michigan's law, the Sixth Circuit has held that SORNA, like the Alaska regime this Court approved in Smith v. Doe, 538 U.S. 84 (2003), does not violate the Ex Post Facto Clause. United States v. Felts, 674 F.3d 599, 606 (6th Cir. 2012). Every court of appeals to have considered the question agrees. E.g., United States v. Parks, 698 F.3d 1, 6 (1st Cir. 2012), cert.

denied, 569 U.S. 960 (2013); United States v. Elkins, 683 F.3d 1039, 1045 (9th Cir. 2012); United States v. Leach, 639 F.3d 769, 773 (7th Cir. 2011); United States v. Shenandoah, 595 F.3d 151, 160–61 (3d Cir.), cert. denied, 560 U.S. 974 (2010); United States v. Guzman, 591 F.3d 83, 94 (2d Cir.), cert. denied, 561 U.S. 1019 (2010); United States v. Young, 585 F.3d 199, 204 (5th Cir. 2009), cert. denied, 559 U.S. 974 (2010); United States v. Gould, 568 F.3d 459, 466 (4th Cir. 2009); United States v. Ambert, 561 F.3d 1202, 1207 (11th Cir. 2009); United States v. Hinckley, 550 F.3d 926, 936–937 (10th Cir. 2008), cert. denied, 556 U.S. 1240 (2009); United States v. May, 535 F.3d 912, 919 (8th Cir. 2008), cert. denied, 556 U.S. 1258 (2009).[3]

3. Any additional issues -- to the extent they may be raised in a habeas petition pursuant to the saving clause -- have been forfeited or are not cognizable on collateral review.

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[3] This Court abrogated Shenandoah, Hinckley, and May, supra, in part on other grounds, namely, that SORNA's registration requirements did not apply to offenders convicted before its enactment until the Attorney General so required by regulation. Reynolds v. United States, 565 U.S. 432, 439 (2012); see 34 U.S.C. 20913(d). The Attorney General has so required. See 28 C.F.R. 72.3. This Court is currently considering the constitutionality of that regulation. Gundy v. United States, No. 17-6086 (argued Oct. 2, 2018). Petitioner was convicted of his sex offenses before SORNA's enactment, but this Court need not hold this petition for Gundy. Petitioner has never challenged the constitutionality of applying SORNA to him or otherwise raised the Gundy issue at any point in this case, including in the petition here, and regardless a habeas petition under Section 2241 would not be the appropriate vehicle for raising such a claim.

Petitioner argues in passing (Pet. 6, 10) that his prior convictions for breaking and entering under Michigan law do not qualify as ACCA predicates. That is correct but provides no basis for habeas relief. The 1981 version of Michigan's breaking-and-entering offense included burglary of tents and other structures (without regard to whether adapted or customarily used for overnight accommodation) that do not qualify as generic "burglary" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii). See Taylor v. United States, 495 U.S. 575, 598 (1990); see also United States v. Stitt, 139 S. Ct. 399 (2018). But petitioner did not challenge the ACCA classification of those convictions in his habeas petition, before the district court, or before the court of appeals. He thus forfeited the argument he seeks to make for the first time in this Court. The Court ordinarily does not consider issues that were not pressed or passed on below. See United States v. Williams, 504 U.S. 36, 41 (1992); see also Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").[4]

[4] Michigan has revised its breaking-and-entering statute, which is now called "home invasion," to focus only on "dwellings," and is additionally divisible into various separate offenses with aggravating factors. See Mich. Comp. Laws § 750.110a (1999). One such version is at issue in Quarles v. United States, No. 17-778 (conferenced Apr. 27, 2018). This petition need not be held for Quarles because the breaking-and-entering statute here is materially different and petitioner's ACCA sentence would stand regardless of any claim about his breaking-and-entering convictions.

In any event, petitioner had three qualifying ACCA predicates even without considering his breaking-and-entering convictions. A crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another" qualifies as an ACCA predicate. 18 U.S.C. 924(e)(2)(B)(i). Petitioner's two convictions for rape and one for felonious assault each meet that definition. The Michigan felonious assault statute under which petitioner was convicted required assault using a "dangerous weapon," which necessarily involves a threatened use of force. Mich. Comp. Laws § 750-82(a) (1979). And documents introduced at sentencing under Shepard v. United States, 544 U.S. 13 (2005), show that petitioner's two rape convictions were both under Michigan's former rape statute, which required "sexual penetration" accomplished "by force and against [the victim's] will." Michigan Comp. Laws § 750-520 (1970). Accordingly, petitioner is ACCA-eligible regardless of his breaking-and-entering convictions, no error occurred in his sentencing, and in any event petitioner waived his right to challenge his sentence.

Petitioner separately alludes (Pet. 5) to an alleged Fourth Amendment violation in the warrant-based search of his home that uncovered the ammunition. Fourth Amendment claims are not, however, cognizable on habeas review. Stone v. Powell, 428 U.S. 465, 494-495 (1976).

Finally, petitioner asserts (Pet. 6) that the sentencing court did not have a certified copy of his prior convictions.

Before petitioner's guilty plea, the government had not obtained a certified copy of petitioner's 1970 rape conviction, although it had the others. Sent. Tr. 11. By the time of sentencing, however, the government had received a certified copy and entered it into evidence at sentencing. Ibid. The parties disputed the timeliness of this offer, but no dispute existed that, once the records were admitted, the court had a certified copy of the conviction in front of it when it determined that petitioner was an ACCA offender. Ibid.

4. Petitioner does not allege, and the government is not aware of, any circuit conflict on any issue he raises. Rather, petitioner's various claims are largely factbound and all lack merit. Furthermore, some issues, such as that surrounding the 1981 version of Michigan's now-repealed breaking-and-entering statute, are of diminishing importance and do not warrant this Court's attention. In any event, this would be a particularly poor vehicle for review, given petitioner's appeal and collateral-attack waivers, the posture as a habeas petition under Section 2241, and his failure to preserve many of his claims in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2018