No. 18-5781

IN THE SUPREME COURT OF THE UNITED STATES

LARRY DEAN DUSENBERY, PETITIONER

v.

RONNIE R. HOLT, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD 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 2001, petitioner was sentenced to a term of life imprisonment that was mandatory because he was convicted of a drug-trafficking conspiracy that involved five kilograms or more of cocaine "after two or more prior convictions for a felony drug offense ha[d] become final." 21 U.S.C. 841(b)(1)(A); see Pet. App. 2, at 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 1984 conviction in Florida for conspiracy to traffic cocaine; a 1986 federal conviction for possession of cocaine with the intent to distribute;

and a 1986 conviction in Ohio for aggravated trafficking. Pet. App. 2, at 2.

In 2004, after petitioner's 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, and the court of appeals denied an application for a certificate of appealability. Pet. App. 2, at 3. The court of appeals subsequently denied an application by petitioner for permission to file a second or successive motion for relief under 18 U.S.C. 2255. Pet. App. 2, at 3; see 28 U.S.C. 2255(h).

In 2017, petitioner filed a habeas petition under 28 U.S.C. 2241, arguing that this Court's decision in Mathis v. United States, 136 S. Ct. 2243 (2016), established that his Florida and Ohio drug convictions no longer qualified as "felony drug offense[s]," 21 U.S.C. 841(b)(1)(A), and therefore that he had been erroneously subjected to a mandatory life sentence. Pet. App. 2, at 3. The district court dismissed the petition for lack of jurisdiction, concluding that the petition was not cognizable under the saving clause of 28 U.S.C. 2255(e). Pet. App. 1, at 6-8. The court of appeals affirmed. Pet. App. 2, at 1-5.

2. Petitioner renews his contention (Pet. 5-6) that this Court's decisions in Mathis establishes that his Ohio and Florida convictions do not qualify as "felony drug offense[s]" and therefore that he was erroneously exposed to an enhanced sentence under 21 U.S.C. 841. Petitioner argues (Pet. 6-8) that the

relevant Florida and Ohio drug statutes prohibit conduct relating to substances that do not qualify as "narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances," 21 U.S.C. 802(44), and that, under Mathis, the Florida and Ohio statutes are not divisible into separate offenses that might individually qualify as felony drug offenses.

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

Even in circuits that construe the saving clause to permit a habeas petition based on an intervening decision of statutory interpretation -- like the Third Circuit, where petitioner here sought habeas relief -- 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); In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997). As the court of appeals recognized (Pet. App. 2, at 4-5), 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 Florida and Ohio convictions did not qualify as convictions for "felony drug offense[s]" under 21 U.S.C. 841. Assuming the categorical approach is used to determine whether a prior conviction qualifies as a serious drug offense for purposes of that statute, petitioner could have raised the argument that the Florida and Ohio statutes were overbroad and indivisible 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 minimum or maximum bounds set by statute. Petitioner argues that he is entitled to relief on the basis of 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 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 24-27, Young v. Ocasio, 138 S. Ct. 2673 (2018) (No. 17-7141); Br. in Opp. at 21-22, Venta v. Jarvis, 138 S. Ct. 648 (2018) (No. 17-6099). 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

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