No. 18 - ____

In The

Supreme Court of the United States

CHARLES NEUMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

Charles Neuman
#90449-079
Petitioner Pro Se
FCI Manchester
Post Office Box 4000
Manchester, KY 40962

QUESTION PRESENTED

I. A person in federal custody may ordinarily challenge the legality of his conviction or sentence only by filing a motion to vacate or set aside his sentence under 28 U.S.C. §2255. Under the saving clause in 28 U.S.C. §2255(e), however, such a person may file an application for habeas corpus under 28 U.S.C. 2241 when it "appears" that a Section 2255 motion is "inadequate or ineffective to test the legality of his detention." The question presented is as follows:

Whether a claim of actual innocence of Armed Career Criminal status, based on this Court's decision in *Mathis* is cognizable under the savings clause, as the Seventh Circuit has recognized or foreclosed as the Sixth Circuit held in this case?

PARTIES TO THE PROCEEDINGS

Petitioner, Charles Neuman was the Petitioner in the United States District Court for the Eastern District of Kentucky, Southern Division, at London, in USDC Case 6:17-cv-3 and Appellant in the United States Court of Appeals for the Sixth Circuit in USCA Case No. 17-6100.

Respondent, United States of America was the named Appellee in the United States Court of Appeals for the Sixth Circuit in USCA Case No. 17-6100. Warden Sandra Butler was the named Respondent in the United States District Court for the Eastern District of Kentucky, Southern Division, at London, in USDC Case 6:17-cv-3. The matter was dismissed without service on Warden Butler. No other relevant parties are represented in the instant action.

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The Order of the United States Court of Appeals for the Sixth Circuit affirming the District Court's judgment is unpublished and may be found at USCA Case No. 17-6100; *Charles Neuman v. United States of America* (May 21, 2018) (Appendix A - A1).

The Judgement of the District Court for the Eastern District of Kentucky at London is unpublished and may be found at E.D.KY. Case No.6:17-cv-3; *Charles Neuman v. Sandra Butler* (Aug 29, 2017) (Appendix B - A6).

The Order of the United States Court of Appeals for the Sixth Circuit denying rehearing and rehearing *en banc* is unpublished and may be found at USCA Case No. 17-6100; *Charles Neuman v. United States of America* (Jul 11, 2018) (Appendix C - A17).

STATEMENT OF JURISDICTION

The Sixth Circuit denied Mr. Neuman's timely motion for rehearing and rehearing en banc on July 11, 2018. The instant petition is timely filed within 90 days of that ruling and this Court has jurisdiction pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE

Section 2241(a) of Title 28 of the United States Code provides in relevant part:

> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

Section 2241(c) of Title 28 of the United States Code provides in relevant part:

> The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1)He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3)He is in custody in violation of the Constitution or laws or treaties of the United States[.]

Section 2255(e) of Title 28 of the United States Code provides as follows:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Section 2255(h) of Title 28 of the United States Code provides as follows:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

This case presents a mature and widely recognized conflict on an exceptionally important and recurring question involving the review of federal criminal judgments. When this Court issues a retroactively applicable decision narrowing the reach of a federal criminal statute, there will be persons in custody who stand convicted of conduct that is no longer criminal or who remain in custody beyond the maximum term authorized by law. Some of those persons will be able to challenge their unlawful confinement on direct appeal or on an initial motion to vacate or set aside the sentence under 28 U.S.C. 2255. But for others who have exhausted their direct appeal and initial Section 2255 motion before this Court issued its decision rendering their confinement illegal, there will be no further avenue for relief under Section 2255, given its familiar bar on second or successive motions—even though the Court's decision applies retroactively. This case presents the question whether the saving clause in Section 2255(e) permits such persons to pursue habeas relief under Section 2241 (and, if so, what threshold showing they must make).

Mr. Neuman is currently serving a sentence in excess of the proper statutory maximum by virtue of his erroneous enhancement under the Armed Career Criminal Act ("ACCA"). This Court's decision in *Mathis v. United States,* 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), establishes that he is not, and never was properly subject to such enhancement. Unfortunately, *Mathis* was decided long after Mr. Neuman's initial

motion to vacate under §2255 was denied. Mr. Neuman, whom suffers the misfortune of serving his sentence in the Sixth Circuit, which held in this case that *Mathis* may not serve as the basis for a savings clause petition, where the Circuit next door, the Seventh Circuit has recognized that it may, sought relief under the savings clause only to be denied by the local district court and have such denial affirmed by the Sixth Circuit. This split in authority is part of a broader disagreement concerning the proper scope of the savings clause, upon which the courts of appeals are currently split 9-2. Indeed, in its opinion below the Sixth Circuit explicitly recognized the lack of clarity as to the properly applicable savings clause standard. This case is an ideal vehicle for the Court to address this split in authority and thereby ensure uniform and just application of the savings clause and equal justice under the law throughout the United States.

A. Facts and Proceedings in the Courts Below

Underlying Criminal Proceedings

In 2009, a jury in the Eastern District of Louisiana convicted Mr. Neuman of conspiracy to traffic in counterfeit goods, trafficking in counterfeit goods, facilitating the importation of counterfeit goods, and being a felon in possession of a firearm. *See United States v. Neuman*, 406 F. App'x 847, 848-49 (5th Cir. 2010). Based upon two convictions in 1998 and 1999 for possession of substantial quantities of marijuana with intent to distribute, and three 1993 convictions for first-degree robbery under Louisiana

Revised Statutes § 14:64.1, the district court determined that Mr. Neuman was an armed career criminal pursuant to 18 U.S.C. § 924(e)(1) and USSG § 4B1.4, subjecting him to a mandatory minimum sentence of 15 years for the firearm offense, to run concurrently with his sentences for his other convictions. The Fifth Circuit affirmed his convictions and sentence on direct appeal. *Neuman*, 406 F. App'x at 852-53.

Initial Section 2255 Proceedings

In 2012, Mr. Neuman filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The district court denied the motion, and the Fifth Circuit denied him a certificate of appealability. *United States v. Neuman*, No. 12-30991 (5th Cir. July 31, 2013) (order).

Efforts to Obtain Permission to Initiate Second Section 2255 Proceeding

In 2016, Mr. Neuman sought permission from the Fifth Circuit to file a second or successive motion under § 2255, seeking to raise a claim based on *Johnson v. United States*, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) ("Johnson II"), which held the Armed Career Criminal Act's (ACCA) residual clause, 18 U.S.C. §924(e)(2)(B)(ii), void for vagueness. That court denied him permission, reasoning that pursuant to *United States v. Brown*, 437 F.3d 450, 452-53 (5th Cir. 2006), first-degree robbery under Louisiana law constituted a crime of violence under the ACCA's "use

of force" clause, 18 U.S.C. § 924(e)(2)(B)(i), and that the ACCA's residual clause was not implicated. *In re Neuman*, No. 16-30646 (5th Cir. Aug. 23, 2016) (order). In 2017, Mr. Neuman again applied for leave to file a second or successive § 2255 motion in the Fifth Circuit, this time challenging his sentence in light of *Mathis v. United States*, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016). The Fifth Circuit denied him leave for a second time, concluding that he had not made a *prima facie* showing that *Mathis* announced a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review. *In re Neuman*, No. 17-30087 (5th Cir. Mar. 29, 2017) (order).

The Savings Clause Petition

Mr. Neuman's § 2241 petition filed in the Eastern District of Kentucky, cited *Johnson II* and *Mathis*, but argued that the Fifth Circuit should not have applied its precedent in *Brown* to conclude that his prior robbery convictions satisfied the use-of-force clause of the ACCA, § 924(e)(2)(B)(i), and that he was entitled to relief in the Sixth Circuit under § 2255(e)'s "savings clause," based on *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016). He argued that, subsequent to *Brown*, the Supreme Court, in *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d (2010) ("Johnson I"), clarified the definition of "physical force" as used in § 924(e)(2)(B)(i) in a way that called *Brown* into question. He thus maintained that *Brown* was no longer good law.

The district court denied Mr. Neuman's claims

as failing to satisfy the savings clause of § 2255(e) because, under *Hill*, he did not demonstrate that he was actually innocent, that his remedy under § 2255 was inadequate or ineffective, that *Mathis* was retroactive, and/or that he was sentenced under the pre-*United States v. Booker*, 543 U.S. 220 (2005) mandatory sentencing guidelines.

On appeal, Mr. Neuman reiterated his argument that the Fifth Circuit improperly relied upon its precedent in *Brown* to conclude that his prior robbery convictions satisfied the force clause of § 924(e)(2)(B)(i). He argued that the element "by use of force or intimidation" in Louisiana Revised Statutes § 14:64.1 does not in all instances mean the "threatened use of physical force against the person of another" as required in § 924(e)(2)(B)(i). Additionally, Mr. Neuman reasserted that *Johnson I* called *Brown* into question by clarifying that "physical force" as used in the force clause means only "force capable of causing physical pain or injury to another person," *Johnson I*, 559 U.S. at 140, and that mere "intimidation" did not qualify. Mr. Neuman concluded that he was entitled to bring this challenge under § 2241 pursuant to *Hill* because, as his prior robbery convictions no longer constitute valid predicate offenses for an ACCA enhancement, he was sentenced in excess of the statutory maximum of ten years contained in § 924(a)(2), which is the functional equivalent of having been sentenced under the mandatory sentencing guidelines as arguably required in *Hill*.

The Sixth Circuit affirmed the lower court's

denial of Mr. Neuman's savings clause petition, noting the lack of clarity as to the properly applicable savings clause standard under *Hill*, *see App. A, A4, n.1,* but concluding that Mr. Neuman was not entitled to savings clause relief based on his *Mathis* claim due to the Fifth Circuit's decision in *Brown* and refusing to consider the impact of *Johnson I* on *Brown*, as part of the threshold analysis of Neuman's *Mathis* claim.

Mr. Neuman timely petitioned for rehearing and rehearing *en banc*, noting that the Sixth Circuit's decision in this case conflicted with decisions of the Sixth Circuit, other circuits, and this Court. The Sixth Circuit denied rehearing and rehearing en banc on July 11, 2018. [App. C].

The instant petition is timely submitted pursuant to Rule 13, Rules of the Supreme Court.

REASONS FOR GRANTING THE WRIT

This case presents a mature and widely recognized conflict on an exceptionally important and recurring question involving the review of federal criminal judgments. When this Court issues a retroactively applicable decision narrowing the reach of a federal criminal statute, there will be persons in custody who stand convicted of conduct that is no longer criminal or who remain in custody beyond the maximum term authorized by law. Some of those persons will be able to challenge their unlawful confinement on direct appeal or on an initial motion to vacate or set aside the sentence under 28 U.S.C. 2255. But for others who have exhausted their direct appeal and initial Section 2255 motion before this Court issued its decision rendering their confinement illegal, there will be no further avenue for relief under Section 2255, given its familiar bar on second or successive motions—even though the Court's decision applies retroactively. This case presents the question whether the saving clause in Section 2255(e) permits such persons to pursue habeas relief under Section 2241 (and, if so, what threshold showing they must make).

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ARGUMENT

I. The Decision Below Deepens A Widely Recognized Conflict Among The Courts Of Appeals

The decision of the Sixth Circuit in this case conflicts with the Seventh Circuit's recognition that a *Mathis* claim is cognizable under the savings clause. *See Dawkins v. United States*, 829 F.3d 549, 551 (7th Cir. 2016). It also conflicts with the repeated concession of the United States that *Mathis* is a new substantive rule which may be applied retroactively under the savings clause. *See, e.g., Jahns v. Julian*, 305 F.Supp.3d 939, 944-45 (S.D.IN. 2018) (noting the United States' concession in that case that *Mathis* is a statutory interpretation case, satisfying the first savings clause criteria, and their concession in other cases filed in the same district that *Mathis* also appears to be retroactive, before granting the movant relief from his ACCA sentence based on *Mathis* under the savings clause).

This split is more pronounced than it appears at first blush, because only 3 of the 9 circuits which recognize that the savings clause is available to federal prisoners whom a subsequent decision of this Court establish may have been convicted of a non-existent offense – *See United States v. Barrett*, 178 F.3d 34, 52 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248, 251 (3d Cir. 1997); *In re Jones*, 226 F.3d 328, 334 (4th Cir. 2000);

Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001); *Martin v. Perez*, 319 F.3d 799, 805 (6th Cir. 2003); *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998); *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002) – the Sixth, Seventh, and Fourth, have applied the savings clause to sentencing claims. *See, United States v. Wheeler*, 886 F.3d 415, 427-30 (4th Cir. 2018); *Hill v. Masters*, 836 F.3d 591, 597-599 (6th Cir. 2016); *Brown v. Caraway*, 719 F.3d 583, 588 (7th Cir. 2013). Of those three, the Seventh allows relief for *Mathis* claims under the savings clause, the Sixth ruled to the contrary in this case, and the Fourth Circuit has yet to issue a holding on the question.

The Sixth Circuit mistakenly viewed Mr. Neuman's savings clause petition as not seeking relief based on *Mathis*, despite the clarity with which he asserted a *Mathis* claim, because ultimate relief on the *Mathis* claim required that court to recognize that this Court's decision in *Johnson I* had necessarily abrogated the Fifth Circuit's decision in *Brown*. This error should not be allowed to obscure the Sixth Circuit's role in the aforementioned circuit split, and does no detract from the reality that this case presents a suitable vehicle for this Court to address the issue.

II. The Question Presented is Exceptionally Important and Warrants Review in This Case

The need for this Court's immediate intervention is self-evident. As a result of the decision below, federal prisoners in the Sixth Circuit are now unable to bring collateral challenges to their ACCA enhanced sentences where those sentences have been invalidated by this Court's decision in *Mathis*. Absent this Court's intervention, those prisoners will potentially be deprived of their liberty for years beyond what Congress has authorized. The Court's intervention is urgently required, and this case presents the Court with a suitable vehicle to resolve the conflict.

The question presented is recurring and fundamental to the fairness of the criminal justice system. In recent years, this Court has issued numerous decisions rejecting a court of appeals' expansive interpretation of a federal criminal statute and narrowing the statute's scope with implications for the sentences imposed thereunder. *See, e.g.*, *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Descamps* v. *United States*, 133 S. Ct. 2276 (2013); *Chambers* v. *United States*, 555 U.S. 122 (2009); *Begay* v. *United States*, 553 U.S. 137 (2008). And a decision by this Court that "narrow[s] the scope of a criminal statute by interpreting its terms" is generally retroactively applicable. *Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004). If allowed to stand, the court of appeals' decision dictates that many federal prisoners

will not be able to take advantage of those decisions and will remain incarcerated for conduct that all agree is no longer criminal (or for a term of imprisonment that all agree exceeds the maximum term authorized by law). This is true because the Sixth Circuit's decision in this case refused to apply a threshold analysis which included not just the catalyst for the savings clause petition – *Mathis* – but also other substantive rules which were not relevant at the original sentencing, but had become so based on *Johnson*'s invalidation of the residual clause.

The circuit conflict on the question presented is especially pernicious because its impact will be felt by federal prisoners based on the happenstance of where the Bureau of Prisons chooses to detain them. A prisoner seeking traditional habeas relief under Section 2241 must file his application in the district where he is confined. *See, e.g.*, *Rumsfeld* v. *Padilla*, 542 U.S. 426, 442 (2004). Thus, if petitioner had been imprisoned in Illinois rather than Kentucky, there is little doubt that he would have been resentenced with out the erroneous ACCA enhancement and within the properly applicable statutory maximum Congress set for his firearm offense, as he is entitled.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Dated: This 12 day of September, 2018.

Respectfully submitted,

By: Charles Neuman

Charles Neuman, *Pro Se*
#90449-079
FCI Manchester
Post Office Box 4000
Manchester, KY 40962