No. 18-6212

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS BURGESS, PETITIONER

v.

NICOLE ENGLISH, WARDEN

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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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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground, with "second or successive" attacks limited to certain claims that suggest 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 question presented is whether petitioner may seek habeas relief under Section 2241 based on a claim that the district court erred in computing his criminal history score under the advisory Sentencing Guidelines.

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## OPINION BELOW

The order of the court of appeals (Pet. App. B1-B2)* is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 1, 2018. A motion for reconsideration was denied on September 11, 2018 (Pet. App. A1). The petition for a writ of certiorari was

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* In this brief, citations to the petition appendix assign consecutive letters to each separately paginated document.

filed on September 25, 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 Florida, petitioner was convicted of possession with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1). Pet App. D1-D2. He was sentenced to 125 months of imprisonment. Id. at D2. In 2012, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, which was ultimately denied. 2016 WL 1583829. In 2018, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 challenging the legality of his sentence. The district court dismissed the petition for lack of jurisdiction. Pet. App. C1-C2. The court of appeals denied petitioner's motion to proceed in forma pauperis. Id. at B1-B2.

1. In 2007, petitioner agreed to sell cocaine base to an undercover police informant at a parking lot in Palm Beach, Florida. Police officers arrested petitioner and seized 74.97 grams of cocaine base from his car. Gov't Br. 6-7, 627 Fed. Appx. 864.

In 2011, petitioner was charged with possession with intent to distribute 50 grams or more of cocaine base. At the time of petitioner's offense, the statutory penalty was ten years to life. 21 U.S.C. 841(b)(1)(A)(iii); see Dorsey v. United States, 567 U.S. 260, 266 (2012). Petitioner agreed to plead guilty to the charge

based on his understanding that his statutory minimum sentence was ten years. Plea Agreement ¶ 3. Petitioner also agreed to waive his right to appeal his sentence unless the sentence exceeded the statutory maximum or varied above his advisory Sentencing Guidelines range. Id. ¶ 9.

Before sentencing, the Probation Office prepared a report calculating petitioner's recommended sentencing range under the advisory Sentencing Guidelines. See Presentence Investigation Report (PSR). It determined that petitioner should be assigned to criminal history category V based on (1) 2003 convictions for criminal mischief, improper exhibition of a dangerous weapon, and retail theft, stemming from an incident at a gas station; (2) a 2004 conviction for fleeing or attempting to elude a marked police car; (3) a 2004 conviction for criminal mischief; (4) a 2004 citation for driving while his license was suspended, cancelled, or revoked; and (5) 2006 convictions for cocaine and marijuana offenses. PSR ¶¶ 34, 36-39, 42. The Probation Office determined that petitioner's offense level and criminal history would result in an advisory Guidelines range of 100 to 125 months. PSR ¶ 99. In light of his ten-year statutory minimum, however, the Probation Office determined that petitioner's actual Guidelines range was 120 to 125 months. Ibid.

The district court sentenced petitioner to 125 months of imprisonment. See Sent. Tr. 2, 4. Petitioner did not object at

sentencing to the Probation Office's recommendations, and petitioner did not appeal his conviction or sentence. Id. at 2, 6.

2. In 2012, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255 on the ground, inter alia, that his counsel was ineffective in failing to object to the Probation Office's recommended criminal history designation. 12-cv-30340 D. Ct. Doc. 4 (Mar. 29, 2012). Petitioner argued that his two criminal mischief sentences should have counted as a single sentence because he was sentenced for both on the same day, and that his drug conviction and his conviction for driving with a suspended license should also have counted as a single sentence because he was arrested for both offenses on the same day. See Sentencing Guidelines § 4A1.2(a)(2) (describing treatment under the Guidelines of multiple prior sentences).

The district court denied petitioner's motion, but the Eleventh Circuit vacated and remanded because the district court had not addressed all of petitioner's ineffective-assistance arguments. 609 Fed. Appx. 627. On remand, the district court again denied his Section 2255 motion. 2016 WL 1583829; see 2016 WL 1624010 (magistrate judge's report and recommendation).

3. In November 2014, petitioner filed a motion for reduction of sentence under 18 U.S.C. 3582(c)(2) based on Amendment 782 to the Sentencing Guidelines, which lowered the base offense levels in the default drug Guidelines, see Sentencing Guidelines

§ 2D1.1, by two levels for offenses involving certain drug quantities, see Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). The district court denied the motion, and the court of appeals affirmed. 627 Fed. Appx. 864.

4. In 2018, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 arguing that his counsel had been ineffective in failing to object to the Probation Office's calculation of his criminal history under the Sentencing Guidelines. Petitioner argued that, under the Eleventh Circuit's intervening decision in United States v. Wright, 862 F.3d 1265 (2017), his criminal history score should have been reduced by four points, yielding a criminal history category of IV and an advisory Guidelines range of 84 to 105 months. See Habeas Pet. 19-20.

The magistrate judge recommended dismissal of the habeas petition for lack of jurisdiction. Pet. App. D1. Relying on McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017), the magistrate judge explained that petitioner's sentencing claim could have been raised in a Section 2255 motion, and therefore petitioner could not show that he satisfied the so-called saving clause, 28 U.S.C. 2255(e), which permits a prisoner like petitioner to seek habeas relief only if "the remedy by motion [under Section 2255] is inadequate or ineffective to test the

legality of his detention." Pet. App. D4-D5. The district court adopted the magistrate judge's recommendation and dismissed the petition. Pet. App. C1-C2.

Petitioner appealed, and the court of appeals denied his request to proceed in forma pauperis. Pet. App. B2. The court determined that the appeal was "frivolous" on the ground that petitioner "cannot use the saving clause of § 2255(e) to seek relief directly under § 2241" because "§ 2255's remedy was not inadequate or ineffective" to challenge his sentence. Ibid.

ARGUMENT

Petitioner argues that the Eleventh Circuit's decision in United States v. Wright, 862 F.3d 1265 (2017), demonstrates that his criminal history score was erroneously calculated, and he argues that he may file a habeas petition challenging his sentence under the saving clause of Section 2255(e). The United States has filed a petition for a writ of certiorari to resolve a circuit conflict regarding whether 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. Pet. for Cert., United States v. Wheeler, No. 18-420 (filed Oct. 3, 2018). For the reasons stated in the government's petition, the saving clause does not permit such relief. See id. at 14-23. Petitioner here seeks review of a similar question, but the

circumstances of his case would not lead to relief in any circuit. The petition should therefore be denied and need not be held pending the disposition of the petition in Wheeler.

1. At the outset, petitioner's challenge (Pet. 17-24) to his criminal history score under the advisory Sentencing Guidelines disregards the effect that the ten-year statutory minimum under 21 U.S.C. 841(b)(1)(A) would have on the proper sentencing range. Petitioner's 125-month sentence was only five months above the minimum sentence that the court could have imposed under that provision.

Petitioner separately contends (Pet. 24-28) that the statutory minimum should instead have been five years under the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, citing Amendment 782 to the Sentencing Guidelines; see Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). Petitioner raised a similar issue in his motion for reduction of sentence under 18 U.S.C. 3582(c)(2), and the Eleventh Circuit rejected it on the merits, determining that petitioner is "ineligible" for relief under Amendment 782 because "his mandatory minimum remains at 120 months, and his new guideline range cannot go below 120 months." 627 Fed. Appx. at 866. Petitioner's Fair Sentencing Act claim also is not properly before the Court, because he failed to raise it in his Section 2241 habeas petition, and the courts below

did not address it. See Sprietsma v. Mercury Marine, 537 U.S. 51, 56 n.4 (2002) (arguments not raised below are waived).

2. In any event, petitioner's Guidelines claim is not a valid basis for collaterally attacking his sentence. A claim that a sentencing court misapplied the advisory Sentencing Guidelines is not a claim that may be addressed on collateral review. An erroneous computation of an advisory guideline does not alter the statutory minimum sentence that the court must impose or the statutory maximum that it may impose. 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 advisory Guidelines 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 its release guidelines, which affected sentencing court's expectation of the time the defendant would actually service 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 concluded 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. 2580 (2015); Spencer v. United States, 773 F.3d 1132, 1134-1136 (11th Cir. 2014) (en banc), cert. denied, 135 S. Ct. 2836 (2015); United States v. Coleman, 763 F.3d 706, 708-709 (7th Cir. 2014), cert. denied, 135 S. Ct. 1574 (2015); cf. Sun Bear v. United States, 644 F.3d 700, 706 (8th Cir. 2011) (en banc) (holding that a misapplication of a career-offender enhancement under the pre-Booker mandatory Guidelines is not cognizable under Section 2255 in part because the defendant remained eligible to receive the same sentence); 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 after this Court's decision in United States v. Booker, 543 U.S. 220 (2005), and therefore would not be eligible for relief in any circuit. Moreover, no circuit has granted relief under the saving clause to a defendant who seeks to challenge an application of the advisory Guidelines.

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 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 the petition in Wheeler.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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