

No. 18-7098

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IN THE SUPREME COURT OF THE UNITED STATES

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AMOS JUNIOR SCOTT, PETITIONER

v.

HERIBERTO H. TELLEZ, ACTING WARDEN

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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NOEL J. FRANCISCO  
Solicitor General  
Counsel of Record  
Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217

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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 Section 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." 28 U.S.C. 2255(e). 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 for a writ of certiorari should therefore be denied and need not be held pending the disposition of the petition in Wheeler.

1. In 2001, following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of conspiring to possess with the intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(ii), and 846. See Pet. App. B, at 2; Pet. App. C, at 1. At the time of his sentencing, petitioner had prior California convictions for assault with a deadly weapon and possession of cocaine base. Pet. App. B, at 2-3. The relevant California assault statute made it unlawful to "commit[] an assault upon the person of another with a firearm" or "with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." Cal. Penal Code § 245(a) (1986).

According to California court records, petitioner shot and killed an individual in Stockton, California. Pet. App. B, at 4. He was initially charged with first degree murder but later pleaded guilty to assault with a deadly weapon, in violation of Cal. Penal Code § 245(a) (1986). See Pet. App. B, at 4.

The district court determined that petitioner's prior California convictions classified him as a "career offender" under Sentencing Guidelines § 4B1.1 (2001). Under that provision, a defendant is 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." Ibid. Then, as now, the term "crime of violence" was defined to include an offense that is punishable by imprisonment for a term exceeding one year and "has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. § 4B1.2(a) (2000). Petitioner's career-offender designation resulted in a Guidelines range of 360 months to life imprisonment, and the court sentenced petitioner to a life term of imprisonment. Pet. App. B, at 2-3. The court of appeals affirmed, rejecting petitioner's claim that the district court had erred in sentencing him as a career offender. 40 Fed. Appx. 807.

2. Petitioner then filed a motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255, arguing, as relevant here, that he received ineffective assistance of counsel at sentencing, which had resulted in his career-offender designation.

2005 WL 2994301, at \*2. The district court denied the motion, id. at \*7, and both that court and the court of appeals denied a certificate of appealability (COA). 185 Fed. Appx. 292.

Petitioner sought authorization to file a second or successive motion for relief under 28 U.S.C. 2255, but the court of appeals denied his request, determining that petitioner did not satisfy the procedural requirements imposed by 28 U.S.C. 2255(h). 346 Fed. Appx. 975; see 2009 WL 186185, at \*3 (dismissing second or successive Section 2255 motion because petitioner had not received the required authorization from the court of appeals).

In 2017, petitioner filed a habeas petition under 28 U.S.C. 2241 in the United States District Court for Central District of California, the district of his confinement, challenging his classification as a career offender under the Guidelines. As relevant here, petitioner's argument was based on this Court's decision in Mathis v. United States, 136 S. Ct. 2243 (2016), which explained that a statute is not "divisible" into multiple offenses for purposes of classifying a conviction as a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2), if it sets forth alternative "means" of committing a single crime, rather than alternative "elements" of separate crimes. Id. at 2248-2256. Petitioner argued that Mathis established that California's assault-with-a-deadly-weapon statute is not divisible into multiple offenses, leaving the undivided statute broader than the federal definition of a "crime of violence" for purposes of

the career-offender guideline. Petitioner also argued that, even if the California statute were divisible, the relevant court records established that he had been convicted under the California provision prohibiting assault "by any means of force likely to produce great bodily injury," an offense that he viewed not to be a crime of violence. Pet. App. B, at 8-9.

The district court dismissed the habeas petition for lack of jurisdiction, concluding that the petition was foreclosed by 28 U.S.C. 2255(e). Pet. App. B, at 1. In reaching that conclusion, the court applied circuit precedent under which the saving clause had been read to allow prisoners to raise only claims of actual innocence, not claims that the prisoner has been erroneously designated a career offender under the Sentencing Guidelines. Id. at 11-12 (citing Marrero v. Ives, 682 F.3d 1190, 1193-1195 (9th Cir. 2012), cert. denied, 568 U.S. 1173 (2013)). The court of appeals denied a COA. Pet. App. A, at 1.

3. Petitioner renews his contention (Pet. 12-18) that he was erroneously sentenced as a career offender because he was convicted of assault by any means of force likely to produce great bodily injury, and not assault with a deadly weapon, both of which are proscribed by Cal. Penal Code § 245(a) (1986), and which he asserts to be separate crimes in light of Mathis. He also argues (Pet. 8-12) that the saving clause of 28 U.S.C. 2255(e) permits him to raise that claim in a habeas petition under 28 U.S.C. 2241. As noted, 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 circuits that construe the saving clause to permit relief based on an intervening decision of statutory interpretation generally have required a prisoner to 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 of statutory interpretation, 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 those requirements.

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 contends that he did not qualify as a career offender because (1) the California assault statute, Cal. Penal Code § 245(a) (1986), is not divisible, or (2), if it is divisible, court records show that he was convicted of violating the statute by committing assault by "any means of force likely to produce great bodily injury," which he asserts not to be a "crime of violence." Petitioner had an unobstructed opportunity at the time of his sentencing and direct appeal, however, to argue that his career-offender designation was erroneous on the grounds now raised in his habeas petition. To the extent that his challenge to his Guidelines range is cognizable on collateral review at all, he could also have raised that challenge 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 error in the calculation of his Sentencing Guidelines range. In United States v. Grajeda, 581 F.3d 1186, 1192 (2009), cert. denied, 562 U.S. 1035 (2010), the Ninth Circuit correctly determined that an assault conviction under Cal. Penal Code § 245(a) (1986) categorically qualifies as a crime of violence whether the offense was committed with a deadly weapon or through force likely to cause great bodily injury, because both variants have as an element the use, attempted use, or threatened use of physical force against the person of another. No intervening precedent undermines that determination. See United States v. Martinez-Gomez, 668 Fed. Appx. 246, 247 (9th Cir. 2016) (confirming that Grajeda "remains good law" after this Court's decisions in Mathis, supra, and Descamps v. United States, 570 U.S. 254 (2013)).

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., U.S. 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); McCarthan v. Collins, 138 S. Ct. 502

(2017). The Court should follow the same course here, and the petition need not be held for Wheeler.\*

Respectfully submitted.

NOEL J. FRANCISCO  
Solicitor General

FEBRUARY 2019

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