Petition Appendix

In the

United States Court of Appeals

For the Seventh Circuit

No. 17-1362

JOSHUA E. SHEPHERD,

Petitioner-Appellant,

v.

JEFFREY E. KRUEGER,
Warden, FCI, Terre Haute,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana, Terre Haute Division.
No. 17-CV-26 — **Larry J. McKinney**, *Judge*.

ARGUED SEPTEMBER 12, 2018 — DECIDED DECEMBER 26, 2018

Before EASTERBROOK, ROVNER, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Petitioner-appellant Joshua E. Shepherd was pulled over by the police in Kentucky. The officers found marijuana and a gun in his car. He pleaded guilty in federal court to one count of possession of marijuana with intent to distribute, one count of being a felon in possession

of a firearm, and two counts for criminal forfeiture. At sentencing, the district judge in Kentucky applied an Armed Career Criminal Act ("ACCA") enhancement based on his prior convictions and sentenced Shepherd to the mandatory minimum fifteen years in prison. See 18 U.S.C. § 924(e). For nearly ten years, Shepherd has been challenging the enhanced sentence under ACCA. The Sixth Circuit affirmed on direct appeal, and several courts have declined to overturn his sentence in collateral attacks under 28 U.S.C. § 2255.

Though his case originated in Kentucky, Shepherd is in a federal prison in Indiana. Having failed to win relief under § 2255 from the district court in Kentucky and the Sixth Circuit, Shepherd filed a motion under 28 U.S.C. § 2241 in the Southern District of Indiana. Section 2255 is by far the primary route for federal prisoners to challenge the lawfulness of their convictions and sentences. Section 2255(h) sharply limits the ability of a prisoner to bring a second or successive motion under that section. Section 2255(e) steers almost all prisoner challenges to their convictions and sentences toward § 2255, but it recognizes an exception. A habeas corpus petition under § 2241 may be allowed if the prisoner can show "that the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of his detention."

Shepherd seeks relief under § 2241 to take advantage of the "inadequate or ineffective" exception in § 2255(e), the scope of which is controversial both within this circuit and beyond. See *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (en banc) (reversing denial of § 2241 petition by vote of six to five); *In re Davenport*, 147 F.3d 605, 608–09 (7th Cir. 1998); see also, e.g., *Prost v. Anderson*, 636 F.3d 578, 592–93 (10th Cir. 2011) (reviewing divided circuit opinions on scope of

§ 2255(e)); *id*. at 604–06 (Seymour, J., dissenting in part); *Gilbert v. United States*, 640 F.3d 1293, 1312–15 (11th Cir. 2011) (en banc) (reviewing divided opinions on scope of § 2255(e)); *id.* at 1335–36 (Martin, J., dissenting).

The parties have briefed a number of procedural issues, including whether Shepherd's original plea agreement waived his right to bring this sort of collateral challenge, whether § 2241 should be available to him at all, and if so whether this court should apply our own precedent or Sixth Circuit precedent (or simply the law of the United States of America, since we operate within a unified system). We elect to bypass these procedural hurdles for relief because this case can be resolved most simply on the merits. The Sixth Circuit held recently that Kentucky second-degree burglary qualifies as a predicate offense for an ACCA enhancement. *United States v. Malone*, 889 F.3d 310, 313 (6th Cir. 2018), *petition for cert. filed* (U.S. Nov 13, 2018) (No. 18-6671). Our colleagues' statutory interpretation and conclusion are persuasive. We see no reason to disagree, whether we have the right and power to disagree or not. Cf. *Christianson v. Colt Industries Operating Corp*., 486 U.S. 800, 803–04 (1988) (resolving jurisdictional disagreement between Seventh and Federal Circuits). On the basis of *Malone*, we affirm the denial of Shepherd's § 2241 petition.

I. *Factual and Procedural Background*

Shepherd was pulled over while driving in Kentucky. Police discovered marijuana and a gun in his car. Shepherd pleaded guilty in the United States District Court for the Western District of Kentucky in 2008 to one count of possession of marijuana with intent to distribute, one count of being a felon in possession of a gun, and two counts of criminal forfeiture.

The district court found that Shepherd was subject to an ACCA enhancement based on his three prior convictions for Kentucky second-degree burglary. His plea agreement included the following waiver provision:

> The Defendant knowingly and voluntarily waives the right to directly appeal his conviction and the resulting sentence pursuant to Fed. R. App. P. 4(b) and 18 U.S.C. § 3742. However, defendant shall maintain his right to appeal the sentence imposed only if the Court departs from the applicable advisory guideline range, *as determined by the Court*. Defendant expressly waives the right to contest or collaterally attack his conviction and the resulting sentence pursuant to 28 U.S.C. § 2255 or for any other reason.

This waiver provision was discussed at his change of plea conference and at sentencing in terms of his direct appeal. The judge told him: "So if you want to appeal the issues that you raised here today about whether the armed career offender statute applies, then you are free to do so." There was no discussion, however, of Shepherd's waiver of collateral challenges.

With the ACCA enhancement, Shepherd was sentenced to the mandatory minimum fifteen years in prison. On direct appeal, the Sixth Circuit affirmed this decision. *United States v. Shepherd*, 408 F. App'x 945 (6th Cir. 2011) (per curiam). Shepherd then filed a motion for relief under 28 U.S.C. § 2255 in the Western District of Kentucky, which was denied. Shepherd appealed that as well, and the Sixth Circuit declined to issue a certificate of appealability, writing that "Shepherd's

plea agreement includes an express waiver of the right to collaterally attack his sentence under § 2255." *Shepherd v. United States*, No. 12-5014 (6th Cir. Feb. 14, 2013) (order). Shepherd then filed several successive § 2255 motions in the Sixth Circuit between 2014 and 2016. Most recently, Shepherd sought leave in the Sixth Circuit to file a successive § 2255 motion to challenge his ACCA sentence based on *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). Shepherd argued that he no longer qualified as an armed career criminal because his prior Kentucky burglary convictions were counted as violent felonies under the so-called residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) that *Johnson* held unconstitutionally vague. The Sixth Circuit denied that motion in November 2016, explaining that Shepherd's sentence depended not on the residual clause but on burglaries as violent felonies enumerated in § 924(e)(2)(B)(ii):

> Shepherd was classified as an armed career because he had three prior Kentucky convictions for second-degree burglary. The district court specifically found at sentencing that the burglary convictions constituted "generic" burglaries and thus were proper predicates under the ACCA's enumerated offenses clause. We also found on direct appeal that Shepherd's second-degree burglary convictions were "generic" burglaries that fell under the enumerated offenses clause. . . . Because Shepherd's predicate offenses were counted under the enumerated offenses clause rather than the residual clause, Shepherd has not made a prima facie showing

> that he is entitled to relief under *Johnson*. *See Johnson*, 135 S. Ct. at 2563.[1]

In re Joshua Shepherd, No. 16-5795 (6th Cir. Nov. 16, 2016) (order).

Finally, in 2017, Shepherd filed a petition for relief under 28 U.S.C. § 2241(c)(3) in the Southern District of Indiana, where he is in prison. He argued that Kentucky's burglary statute is overbroad under *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016), so that his convictions should not count as ACCA predicates. The district court dismissed the petition under 28 U.S.C. § 2244(a), reasoning that it need not consider it because the Sixth Circuit had previously determined the legality of Shepherd's detention in 2016. Shepherd has appealed to this court.

II. *Analysis*

We review the denial of a § 2241 petition without deference to the district court's analysis of the legal issues. *Hill v. Werlinger*, 695 F.3d 644, 647 (7th Cir. 2012). The ACCA lists burglary as one of several "violent felonies" that can enhance a defendant's felon-in-possession sentence. 18 U.S.C. §§ 924(e)(1), (e)(2)(B)(ii). However, a state burglary offense constitutes "burglary" under the ACCA only if the state burglary statute describes the "generic" version of the crime. *Descamps v. United States*, 570 U.S. 254, 257 (2013). Generic burglary, under this statutory provision, "contains at least the

[1] In his reply brief in that appeal, Shepherd had put forward the argument that is the subject of his current § 2241 motion—that the Supreme Court's new rule in *Mathis v. United States*, 136 S. Ct. 2243 (2016), warranted relief. However, the Sixth Circuit did not address *Mathis* in its order denying this successive motion.

following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). To decide whether a particular conviction qualifies, courts must use a "categorical approach," focusing "on whether the elements of the crime of conviction sufficiently match the elements of generic burglary." *Mathis*, 136 S. Ct. at 2248. In *Mathis*, the Supreme Court recently held that Iowa's burglary statute "covers more conduct than generic burglary" because it "reaches a broader range of places: 'any building, structure, [*or*] *land, water, or air vehicle*.'" 136 S. Ct. at 2250 (citation omitted).

These issues under ACCA are being sorted out crime by crime and state by state. Kentucky law provides: "A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling." Ky. Rev. Stat. Ann. § 511.030. This definitional section is included in the same chapter of the statute:

> The following definitions apply in this chapter unless the context otherwise requires:
>
> (1) "Building," in addition to its ordinary meaning, means any structure, vehicle, watercraft or aircraft:
>
> (a) Where any person lives; or
>
> (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation.

> Each unit of a building consisting of two (2) or more units separately secured or occupied is a separate building.
>
> (2) "Dwelling" means a building which is usually occupied by a person lodging therein.
>
> (3) "Premises" includes the term "building" as defined herein and any real property.

Ky. Rev. Stat. Ann. § 511.010.

In *United States v. Malone*, 889 F.3d 310, 313 (6th Cir. 2018), the Sixth Circuit answered the question that controls the merits of Shepherd's § 2241 petition—whether Kentucky second-degree burglary is "generic burglary" for purposes of the ACCA. Its answer was yes. *Malone* held that Kentucky second-degree burglary is generic burglary because the statute applies only to buildings in the ordinary sense. *Id.* The court reasoned that "dwelling" in § 511.030(1) encompasses only "buildings" as *Taylor* understood the term and does not incorporate the broader "building" definition in Kentucky's separate definitional statute, § 511.010(1). See 889 F.3d at 312–13. To arrive at this conclusion, the court compared the language of the different definitions quoted above. The key difference is that the definition of "dwelling" refers to a building generally, while the definition of "premises" refers to "'building' *as defined herein*." *Id.*, citing § 511.010. Thus, the definition of "premises" explicitly includes § 511.010(1)'s special "building" definition, and it can therefore include "vehicle[s], watercraft, or aircraft." *Id.* By contrast, the definition of "dwelling" does not include that specialized definition since it does not say building "as defined herein." *Id.* Kentucky's second-degree burglary statute's use of the term "dwelling" means it

applies to buildings generally, within the meaning of generic burglary under ACCA, and not to vehicles, watercraft, and the like, which would expand the state offense beyond the scope of generic burglary for purposes of ACCA. A Kentucky conviction for second-degree burglary thus falls within the scope of a burglary conviction under ACCA.

We agree with the reasoning of our colleagues in the Sixth Circuit. Even if Shepherd could overcome all of the procedural obstacles to his petition, he was properly sentenced under the Armed Career Criminal Act. The district court's denial of Shepherd's petition under 28 U.S.C. § 2241 is

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JOSHUA SHEPHERD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2:17-cv-026-LJM-MJD
	)	
STEVEN JULIAN, Warden,	)	
	)	
Respondent.	)	

FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58

The Court having this day directed the entry of final judgment, the Court now enters FINAL JUDGMENT in favor of the respondent and against the petitioner, Joshua Shepherd.

Shepherd's petition for writ of habeas corpus is denied and the action is dismissed with prejudice.

Date: 2/2/2017

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Laura Briggs, Clerk of Court

By: Lana Harves
Deputy Clerk

Distribution:

Joshua Shepherd
Reg. No. 10671-033
TERRE HAUTE FEDERAL CORRECTIONAL INSTITUTION
Inmate Mail/Parcels
P.O. BOX 33
TERRE HAUTE, IN 47808

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JOSHUA SHEPHERD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2:17-cv-026-LJM-MJD
	)	
STEVEN JULIAN, Warden,	)	
	)	
Respondent.	)	

Entry Dismissing Action and Directing Entry of Final Judgment

I.

"Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face." *McFarland v. Scott*, 512 U.S. 849, 856 (1994). For the reasons explained in this Entry, this is an appropriate case for such a disposition.

Background

In 2009, petitioner Shepherd pleaded guilty to possessing with intent to distribute marijuana and being a felon in possession of a firearm. He was sentenced as an armed career criminal to a total term of 180 months of imprisonment. The disposition was affirmed in *United States v. Shepherd*, No. 09-5507 (6th Cir. May 4, 2011) (order).

Following the imposition of sentence, Shepherd filed a motion for relief pursuant to 28 U.S.C. § 2255. The trial court denied relief. Shepherd most recently sought leave in the Sixth Circuit in No. 16-5795 to file a second or successive 28 U.S.C. § 2255 motion, challenging his ACCA sentence based on *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). The Sixth Circuit denied that motion on November 16, 2016, explaining:

> Shepherd argues that he no longer qualifies as an armed career criminal because his prior Kentucky burglary convictions were counted as violent felonies under [18 U.S.C.] § 924(e)(2)(B)(ii)'s now-invalidated residual clause.
> . . . .
> Shepherd was classified as an armed career criminal because he had three prior Kentucky convictions for second-degree burglary. The district court specifically found at sentencing that the burglary convictions constituted "generic" burglaries and thus were proper predicates under the ACCA's enumerated offenses clause. We also found on direct appeal that Shepherd's second-degree burglary convictions were "generic" burglaries that fell under the enumerated offenses clause . . . . Because Shepherd's predicate offenses were counted under the enumerated offenses clause rather than the residual clause, Shepherd has not made a prima facie showing that he is entitled to relief under *Johnson*. *See Johnson*, 135 S. Ct. at 2563.
> Accordingly, we DENY Shepherd's motion.

This action, in which Shepherd invokes 28 U.S.C. § 2241(c)(3), was then filed on January 12, 2017.

Discussion

A motion pursuant to 28 U.S.C. § 2255 is the presumptive means by which a federal prisoner can challenge his conviction or sentence. *See Davis v. United States*, 417 U.S. 333, 343 (1974); *United States v. Bezy*, 499 F.3d 668, 670 (7th Cir. 2007). Shepherd, however, challenges his sentence and seeks habeas corpus relief pursuant to 28 U.S.C. § 2241(c)(3). "A federal prisoner may use a § 2241 petition for a writ of habeas corpus to attack his conviction or sentence only if § 2255 is 'inadequate or ineffective.'" *Hill v. Werlinger*, 695 F.3d 644, 645 (7th Cir. 2012) (quoting 28 U.S.C. § 2255(e)). Whether § 2255 is inadequate or ineffective depends on "whether it allows the petitioner 'a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.'" *Webster v. Daniels*, 784 F.3d 1123, 1136 (7th Cir. 2015) (en banc) (quoting *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998)). To properly invoke the Savings Clause of 28 U.S.C. § 2255(e), a petitioner is required to show "something more than a lack of success with a section 2255 motion," *i.e.*, "some kind of structural problem

with section 2255." *Id.* "The petitioner bears the burden of coming forward with evidence affirmatively showing the inadequacy or ineffectiveness of the § 2255 remedy." *Smith v. Warden, FCC Coleman–Low*, 503 F. App'x 763, 765 (11th Cir. 2013) (citation omitted).

Additionally, and of pivotal significance here, under 28 U.S.C. § 2244(a), "[n]o circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255."

The Sixth Circuit explained that Shepherd's prior convictions for burglary in Kentucky were violent offenses under the enumerated-offenses clause of the ACCA. His argument otherwise was explicitly rejected in No. 16-5795 when his motion for leave to file a second or successive 28 U.S.C. § 2255 motion was denied. The Sixth Circuit's ruling post-dates *Mathis v. United States*, 136 S. Ct. 2243 (2016), which Shepherd cited in support of his motion in his filing of July 8, 2016. Sixth Circuit law controls on this point. *Salazar v. Sherrod*, 2012 WL 3779075 at *3 (S.D. Ill. Aug. 31, 2012) (unpublished) (citing *Hernandez v. Gilkey*, 242 F.Supp.2d 549, 554 (S.D. Ill. 2001)). And 28 U.S.C. § 2244(a) prohibits another bite at the apple in these circumstances.

Conclusion

The dispositive question here is whether Shepherd's habeas claim permits him to traverse the portal created by § 2255(e). *It does not.* Based on the foregoing, Shepherd has sought relief pursuant to 28 U.S.C. § 2241 under circumstances which do not permit or justify the use of that remedy. This is apparent from the face of his habeas petition and the public record concerning his collateral challenges. Therefore, for the reasons outlined above, the petition for a writ of habeas corpus is **denied**.

II.

Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

Date: 2/2/2017

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Joshua Shepherd
Reg. No. 10671-033
TERRE HAUTE FEDERAL CORRECTIONAL INSTITUTION
Inmate Mail/Parcels
P.O. BOX 33
TERRE HAUTE, IN 47808

L UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

February 21, 2018

Before

DIANE P. WOOD, *Chief Judge*
DANIEL A. MANION, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*

No. 17-1362	JOSHUA E. SHEPHERD, Petitioner - Appellant v. STEPHEN JULIAN, Respondent - Appellee
Originating Case Information:	
District Court No: 2:17-cv-00026-LJM-MJD Southern District of Indiana, Terre Haute Division District Judge Larry J. McKinney	

The following are before the court:

1. **STIPULATED MOTION TO REVERSE AND REMAND**, filed on December 15, 2018, by counsel for the appellee.

2. **RESPONDENT'S MEMORANDUM**, filed on January 22, 2018, by counsel for the appellee.

3. **MEMORANDUM FOR PETITIONER**, filed on January 25, 2018, by counsel for the appellant.

IT IS ORDERED that the parties' joint motion to reverse and remand is **DENIED**.

IT IS FURTHER ORDERED that appellant's request to file an amended brief is **GRANTED**. Briefing shall proceed as follows:

1. The appellant's amended brief is due by March 22, 2018.

2. The brief of the appellee is due by April 23, 2018.

3. The reply brief of the appellant, if any, is due by May 7, 2018.

Important Scheduling Notice !

Notices of hearing for particular appeals are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your particular appeal might be scheduled, please write the clerk advising him of the time period and the reason for such unavailability. Session data is located at http://www.ca7.uscourts.gov/cal/calendar.pdf. Once an appeal is formally scheduled for a certain date, it is very difficult to have the setting changed. See Circuit Rule 34(e).

form name: **c7_Order_3J**(form ID: **177**)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

January 12, 2018

By the Court:

No. 17-1362	JOSHUA E. SHEPHERD, Petitioner - Appellant v. STEPHEN JULIAN, Respondent - Appellee
Originating Case Information:	
District Court No: 2:17-cv-00026-LJM-MJD Southern District of Indiana, Terre Haute Division District Judge Larry J. McKinney	

Upon consideration of the **STIPULATED MOTION TO REVERSE AND REMAND**, filed on December 15, 2017, by counsel for the appellee,

IT IS ORDERED that the parties provide the court with memoranda answering the following questions: 1) Under Seventh Circuit precedent, would Shepherd's prior burglaries count as predicate offenses under the Armed Career Criminal Act?; 2) If the answer to the first question is "yes," under 28 U.S.C. § 2241 should this court apply the law of the Sixth Circuit or of the Seventh Circuit?; and 3) If the answer to the first question is "yes," would it be a "miscarriage of justice" for this court to refuse to enforce Sixth Circuit law with which it disagrees?

The parties shall file their memoranda by January 26, 2018.

form name: **c7_Order_BTC**(form ID: **178**)

18 U.S. Code § 922 - Unlawful acts

***

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

***

18 U.S. Code § 924 - Penalties

***

(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

***

Ky. Rev. Stat. Ann. § 511.030 - Burglary in the second degree

(1) A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling.
(2) Burglary in the second degree is a Class C felony.

Effective: July 15, 1980
History: Amended 1980 Ky. Acts ch. 376, sec. 3, effective July 15, 1980. -- Amended 1978 Ky. Acts ch. 125, sec. 2, effective June 17, 1978. -- Created 1974 Ky. Acts ch. 406, sec. 98, effective January 1, 1975.

Ky. Rev. Stat. Ann. § 511.010 – Definitions

The following definitions apply in this chapter unless the context otherwise requires:

(1) "Building," in addition to its ordinary meaning, means any structure, vehicle, watercraft or aircraft:

(a) Where any person lives; or

(b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation.

Each unit of a building consisting of two (2) or more units separately secured or occupied is a separate building.

(2) "Dwelling" means a building which is usually occupied by a person lodging therein.

(3) "Premises" includes the term "building" as defined herein and any real property.

Effective: July 15, 1980

History: Amended 1980 Ky. Acts ch. 376, sec. 1, effective July 15, 1980. -- Created 1974 Ky. Acts ch. 406, sec. 96, effective January 1, 1975.

No. 17-1362

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSHUA E. SHEPHERD,
Petitioner,

v.

STEPHEN JULIAN,
Warden, FCI Terre Haute,
Respondent.

On Appeal from the United States District Court
For the Southern District of Indiana, Terre Haute Division
The Honorable Larry J. McKinney
Case No. 2:17-cv-00026-LJM-MJD

AMENDED BRIEF OF PETITIONER JOSHUA E. SHEPHERD

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

SARAH O'ROURKE SCHRUP
Attorney
JOHN N. PAVLETIC
Senior Law Student
BRENDAN J. GERDES
Senior Law Student
CLAUDIA T. BROKISH
Senior Law Student

Counsel for Petitioner
JOSHUA E. SHEPHERD

No. 17-1362

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSHUA E. SHEPHERD, Petitioner, v. STEPHEN JULIAN, Warden, FCI Terre Haute, Respondent.	Appeal from the United States District Court for the Southern District Of Indiana, Terre Haute Division Case No. 2:17-cv-00026-LJM-MJD Hon. Larry J. McKinney, Presiding Judge

DISCLOSURE STATEMENT

I, the undersigned counsel for the Petitioner, Joshua E. Shepherd, furnish the following list in compliance with FED. R. APP. P. 26.1 and CIR. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case:

   Joshua E. Shepherd.

2. This party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

   Sarah O'Rourke Schrup (attorney of record), John N. Pavletic (senior law student), Brendan J. Gerdes (senior law student), and Claudia T. Brokish (senior law student) of the Bluhm Legal Clinic at the Northwestern Pritzker School of Law.

4. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

   Joshua E. Shepherd, pro se.

Attorney's Signature: /s/ Sarah O'Rourke Schrup
Dated: March 20, 2018

Attorney's Printed Name: Sarah O'Rourke Schrup

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). **Yes**

375 East Chicago Avenue
Chicago, Illinois 60611
Phone: (312) 503-0063
Fax: (312) 503-8977
s-schrup@law.northwestern.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Habeas corpus exists to protect against improper detentions that cannot be remedied in any other way. Here, Joshua Shepherd remains incarcerated beyond the statutory maximum term he has already served due to an improper Armed Career Criminal Act ("ACCA") sentencing enhancement. Shepherd retained the right to appeal that determination and has consistently fought to do so from direct appeal through his collateral challenges. The Supreme Court issued its decision in *Mathis v. United States* in 2016; Shepherd promptly pursued relief, arguing that the Kentucky burglary statute used to enhance his sentence under the ACCA was overbroad. Most recently, he filed in the Southern District of Indiana, his district of confinement, a petition pursuant to 28 U.S.C. § 2241. The district court improperly denied the petition. Although the Sixth Circuit has now recognized that the enhancement was illegal and both parties to this case filed a joint motion stipulating that Shepherd's prior offenses do not qualify as ACCA predicates, Shepherd sits in prison. He asks this Court to recognize the unjust nature of his sentence and grant his petition for a writ of habeas corpus.

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Indiana had subject matter jurisdiction over Joshua Shepherd's § 2241 petition for a writ of habeas corpus pursuant to 28 U.S.C. § 1331. *See, e.g.*, *Moore v. Olson*, 368 F.3d 757, 759 (7th Cir. 2004). The district court entered a final order denying Shepherd's petition for a writ of habeas corpus on February 2, 2017. (A.45.)[1] On February 22, 2017, Shepherd filed a timely notice of appeal in the United States Court of Appeals for the Seventh Circuit. (R.11, Notice of Appeal.) This Court has jurisdiction to review the district court's denial of habeas corpus relief pursuant to 28 U.S.C. § 2253.

[1] References to the material in the first appendix shall be denoted as (A.__.). References to the material in the second appendix shall be denoted as (B.__.).

STATEMENT OF THE ISSUES

I. Written plea agreements often include standard-form provisions purporting to waive a defendant's right to appeal his conviction and sentence. The first issue presented for review is whether a waiver is enforceable when, in open court, the judge, prosecutor, and defense counsel agreed that the defendant retained his right to appeal a sentencing enhancement under the ACCA.

II. Under the framework set out in *In re Davenport*, 147 F.3d 605 (7th Cir. 1998), an intervening Supreme Court decision interpreting a relevant statute may be grounds for habeas relief under 28 U.S.C. § 2241. The second issue presented for review is whether post-conviction relief is available under § 2241 for a claim pursuant to *Mathis v. United States*, 136 S. Ct. 2243 (2016). If so, the question becomes whether the merits of the claim should be decided using the law of the circuit of conviction or the circuit of confinement, and, under either, whether Kentucky's second-degree burglary statute is a predicate offense under the ACCA.

STATEMENT OF THE CASE

After police pulled over Petitioner Joshua Shepherd in Kentucky, discovering marijuana and a gun in his car, Shepherd pled guilty to one count of possession of marijuana with the intent to distribute and one count of being a felon in possession of a firearm. (A.2–3.) During sentencing, the district court applied an ACCA enhancement and, as a result, sentenced Shepherd to 15 years' imprisonment. (A.27.) The Sixth Circuit affirmed this decision on direct appeal, as has every court in Shepherd's subsequent collateral attacks. (B.5.) Shepherd now seeks relief once again. The issues before this Court involve the intersection of plea procedure, substantive sentencing law, and the privilege of habeas corpus.

The Plea Process

On February 6, 2008, the government indicted Shepherd. (B.39.) A little over a week later, on February 15, law enforcement arrested Shepherd, and he has been detained on these charges ever since. (B.39.) Shepherd signed a guilty plea on July 28, 2008. (A.11.) As part of his guilty plea, Shepherd waived certain aspects of his appeal, but contradictory representations within the written plea agreement, the change-of-plea hearing, and the sentencing hearing muddied the scope of that waiver. The written plea agreement, for example, told Shepherd that he "waive[d] his right to directly appeal his conviction and the resulting sentence," but in the very next breath stated that he did "maintain his right to appeal the sentence imposed" under certain circumstances. (A.8.)

Notwithstanding this confusing language in the agreement, at the change-of-plea hearing, the court, the prosecutor, the defense attorney, and Shepherd himself all agreed that Shepherd could appeal any potential ACCA sentencing enhancement. (A.13–17); *see also* (A.17) (district court telling Shepherd "essentially, you are agreeing no matter what the language is of this agreement that all of those things that I just talked about having to decide are things that you can appeal if I decide them against you."). At sentencing, the parties continued to discuss Shepherd's right to appeal. (A.29–30.) Each party involved in the proceedings agreed that Shepherd retained his right to challenge his sentence. (A.30.)

The ACCA Sentence Enhancement

Relying on Shepherd's three prior convictions for Kentucky second-degree burglary, the district court found Shepherd eligible for an ACCA enhancement. (A.27.) The parties and the court recognized that the Kentucky burglary statute at issue was broader than generic burglary because it included theft from cars, boats, and planes. (A.24–26.) The district court did not stop with its overbreadth rationale. Instead, the district court—relying on an unpublished Sixth Circuit case—followed the government's suggestion and applied the modified categorical approach. (A.23–27) (citing *United States v. McGovney*, 270 F. App'x 386 (6th Cir. 2008)). In examining the underlying documents, the court found that Shepherd was actually convicted of the generic form of burglary because he burglarized residences (not cars, boats, or planes).[2] (A.26–27.)

[2] The sentencing judge explained that he was not counting the four third-degree burglary convictions from 1998. (A.27.) In Kentucky, a "person is guilty of burglary in the third

Accordingly, the judge sentenced Shepherd to two concurrent terms of imprisonment: (1) 60 months for Count I, possession of marijuana with intent to distribute; and (2) 180 months for Count II, felon in possession of a firearm. (A.34.) With the ACCA enhancement, Shepherd faced a 15-year mandatory minimum with the possibility of a life sentence. Without the ACCA enhancement, however, Shepherd would have faced no mandatory minimum; Count I carried a maximum sentence of five years and Count II prescribed a maximum sentence of 10 years. The court entered a judgment pursuant to the plea agreement on April 10, 2009. (A.32.) Shepherd has been incarcerated since February 15, 2008, and so he has now served more than the ten-year statutory maximum sentence that he would have received absent the ACCA enhancement. (B.39–40.) Shepherd appealed his ACCA-enhanced sentence. (B.3.)

Shepherd's Direct Appeal and Collateral Attacks

On April 24, 2009, Shepherd filed a notice of appeal in the United States Court of Appeals for the Sixth Circuit. Shepherd's appointed appellate attorney ultimately filed an *Anders* brief and an accompanying motion to withdraw as counsel. (B.2.) The attorney suggested that any appeal would be frivolous given Shepherd's waiver of his appeal rights in the plea agreement. Shepherd, proceeding *pro se*, responded by arguing that the sentencing judge should not have counted his prior convictions as separate predicate offenses under the ACCA. (B.4.)

---

degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building." Ky. Rev. Stat. Ann. § 511.040. The same definition of "building" that applies to second-degree burglary applies to third-degree burglary. *Id.* § 511.010(1).

On May 5, 2011, the Sixth Circuit granted the appointed attorney's motion to withdraw and affirmed the district court's judgment. (B.5.) The court held that Shepherd waived his right to appeal any issue that did not involve the calculation of the Guidelines range. (B.3.) Nevertheless, the court reviewed the merits of Shepherd's ACCA claim and the reasonableness of his sentence. (B.3–5.) Rejecting Shepherd's *pro se* arguments and relying on an unpublished Sixth Circuit opinion, the court found that the district court properly sentenced Shepherd with an ACCA enhancement. (B.4) (citing *United States v. Manness*, 23 F.3d 1006 (6th Cir. 1994)).

Motion to Vacate the Sentence under 28 U.S.C. § 2255

Shepherd filed a § 2255 motion to vacate his sentence on August 12, 2011. (B.11.) He argued that he: (1) was actually innocent of being an armed career criminal because his prior burglary convictions were not crimes of violence; and (2) received ineffective assistance of counsel. (B.11.) The government countered that Shepherd expressly waived his right to appeal the sentence. (B.11.) Shepherd, however, claimed that the waiver did not preclude his challenge to the district court's calculation of his Guidelines range because it erred in applying the ACCA enhancement. (B.11.) The district court referred the motion to a magistrate judge. (B.7.)

Relying solely on the written plea agreement—and not the transcripts from the change-of-plea or sentencing hearings—the magistrate judge found that the ACCA sentencing enhancement was an exception to Shepherd's appellate waiver. (B.12.) The magistrate judge then reasoned that because the portion of the agreement

containing the exception appeared after the waiver of direct appeal, and a similarly worded provision did not appear after the waiver of collateral attack, the exception only applied on direct appeal. (B.12–13.) The magistrate judge thus recommended dismissal. (B.16.) The district court adopted the opinion of the magistrate judge in full, dismissed the motion on November 14, 2011, and declined to issue a certificate of appealability. (B.21.)

Shepherd then appealed to the Sixth Circuit, which also denied his application for a certificate of appealability. (B.26.) In its order, the Sixth Circuit held that the plea agreement included an express waiver of Shepherd's right to collateral attack under § 2255. (B.25.) The court explained that, even if the right was not waived, the motion failed on the merits. (B.26.) The court relied on the law of the circuit and applied the modified categorical approach to an indivisible statute. (B.26.)

Successive Motions under § 2255

Shepherd has since filed several successive motions under § 2255 in the Sixth Circuit. In 2014 Shepherd filed his second motion under § 2255, challenging his sentence under a newly decided Supreme Court ACCA case. (B.29.) The panel denied his motion. (B.29.) That panel cited to the court's previous holdings of waiver in the direct appeal, in the first § 2255 motion, and the subsequent § 2255 appeal. (B.28–29.) The court denied relief under § 2255 because it did not believe that the new Supreme Court precedent met the threshold requirements for successive habeas relief. (B.29.) Specifically, it neither articulated a new rule of constitutional law, nor was it made retroactive by the Supreme Court. (B.29.) Then, in 2015,

Shepherd filed his third motion under § 2255. The Sixth Circuit dismissed the case for want of prosecution because Shepherd did not timely comply with circuit rules. (B.32.) Accordingly, the court did not reach the substantive bases of his motion. (B.32.)

Shepherd tried again in 2016, filing a fourth successive motion—arguing that the court improperly enhanced his sentence under ACCA's residual clause, which the Supreme Court had recently invalidated. (B.34–35.) The Sixth Circuit—without ever mentioning waiver—focused on its earlier direct-appeal ruling that applied ACCA's enumerated-offenses clause. (B.35.) Because Shepherd was sentenced under the enumerated-offenses rather than the residual clause, the court concluded that the new Supreme Court precedent did not apply. (B.35.) In his reply brief, Shepherd had argued that the Supreme Court's new rule in *Mathis v. United States* warranted relief under § 2255. (Movant Joshua Shepherd's Reply to the United States' Response to Petition Under 28 U.S.C. § 2244 at 2, Shepherd v. United States, No. 16-5795 (6th Cir. July 8, 2016) (arguing that Kentucky second-degree burglary is broader than the generic offense under *Mathis*).) Despite this, the Sixth Circuit did not address *Mathis* in its order denying his successive motion. (B.34–35.)

Petition for a Writ of Habeas Corpus under § 2241

In 2017 Shepherd filed a petition under § 2241 in the Southern District of Indiana, his district of confinement. (A.41.) He argued that Kentucky's burglary statute was overbroad under *Mathis* and, therefore, his prior convictions were not violent crimes under the ACCA. (Verified Petition for a Writ of Habeas Corpus

Pursuant to Title 28, United States Code, § 2241 at 4, 6–7, 8, Shepherd v. Julian, No. 2:17-cv-00026-LJM-MJD (S.D. Ind. Jan. 12, 2017).) The district court dismissed the petition. (A.45.) In doing so, the district court never addressed waiver, but rather relied on § 2244(a). (A.42.) That statute, in relevant part, states that:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States *on a prior application for a writ of habeas corpus*, except as provided in section 2255.

28 U.S.C. § 2244(a) (emphasis added). The court reasoned that it need not consider Shepherd's petition because the Sixth Circuit had previously determined the legality of his detention in 2016. (A.42.)

The court applied § 2244(a) even though this was Shepherd's first petition for a writ of habeas corpus. (A.42.) Further, the court did not discuss the savings clause of the statute, § 2255(e), which excepts litigants like Shepherd who seek relief under § 2255. (A.41.) Finally, although the district court observed that Shepherd cited *Mathis* in support of his most recent § 2255 motion in 2016, and that the Sixth Circuit's ruling on the motion post-dated *Mathis*, the district court did not acknowledge that the Sixth Circuit opinion failed to mention *Mathis* at all. (A.42.)

This Appeal

On February 22, 2017, Shepherd appealed the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2241. (R.11, Notice of Appeal.) After Shepherd filed his opening brief, the parties agreed to resolve the appeal, and on December 15, 2017, filed a stipulated motion to reverse and remand to the

district court of conviction for resentencing. (Stipulated Motion to Reverse and Remand, Shepherd v. Julian, 17-1362 (7th Cir. Dec. 15, 2017), ECF No. 17 (hereinafter, "Stipulated Motion").) On January 12, 2018, this Court ordered the parties to provide it with memoranda responding to the following questions: (1) Would Shepherd's prior burglaries count as predicate offenses under the Armed Career Criminal Act under Seventh Circuit precedent?; (2) If yes, should this court apply the law of the Sixth Circuit or of the Seventh Circuit?; and (3) If yes, would it be a "miscarriage of justice" for this court to refuse to enforce Sixth Circuit law with which it disagrees? (Shepherd v. Julian, No. 17-1362 (7th Cir. Jan. 12, 2018), ECF No. 19.)

In its memorandum, the government argued that: (1) a conviction under the Kentucky second-degree burglary statute does not count as a predicate offense under the ACCA in the Sixth or the Seventh Circuits under *Mathis*, and that *Smith* does not extend far enough to meet the definition of "dwelling"; (2) the result of this case would be the same under either circuit's law, but that the choice-of-law question is unsettled, and although district courts in this circuit favor applying the law of the circuit of conviction, it suggested instead that the Court apply the law of the circuit of confinement; and (3) an order denying the petitioner relief would be a miscarriage of justice. (Respondent's Memorandum, Shepherd v. Julian, 17-1362 (7th Cir. Jan. 22, 2018), ECF No. 20.)

Shepherd agreed with the government's ultimate conclusion that under Seventh Circuit law Shepherd is not an armed career criminal, although based on a slightly

different reading of *Smith*. (Memorandum for Petitioner at 2, 5 n.3, Shepherd v. Julian, 17-1362 (7th Cir. Jan. 25, 2018), ECF No. 21.) In addition to that distinction, Shepherd argued that the law of the circuit of conviction should apply on the merits. *Id.* at 10–11. At bottom, however, Shepherd agreed with the government that it would be a miscarriage of justice for this Court to deny him relief and asked for the opportunity to file an amended brief should the Court not wish to grant the parties' joint motion. *Id.* at 12. On February 21, 2018, this Court denied the motion but granted Petitioner's request to file an amended brief. (Shepherd v. Julian, No. 17-1362 (7th Cir. Feb. 21, 2018), ECF No. 22 (order denying the parties' joint motion to reverse and remand).)

SUMMARY OF ARGUMENT

Congress carefully crafted a scheme of collateral review to ensure that prisoners retain their constitutional right to have a court review and correct illegal convictions and sentences. *See generally* 28 U.S.C. §§ 2241–2256. Although federal prisoners typically use § 2255 to mount such a challenge, Congress acknowledged instances in which § 2255 could be insufficient to protect prisoners' constitutional rights. To address this, Congress included a "savings clause"—28 U.S.C. § 2255(e)—to provide prisoners an avenue for relief when the legal landscape changes during their incarceration and forecloses an otherwise valid remedy.

Here, Shepherd remains incarcerated, serving a 15-year sentence imposed in violation of Supreme Court precedent: *Mathis v. United States*. As a preliminary matter, although Shepherd agreed to a limited appellate waiver as a part of his plea, he retained the right to challenge the ACCA enhancement that resulted in his higher sentence; statements by the court, the prosecutor, defense counsel, and Shepherd himself amply demonstrate that Shepherd preserved this right.

Not only is Shepherd entitled to bring this sentencing claim, he may use § 2241 to do so. In *Davenport* and its progeny, this Court defined a three-part test to determine whether a prisoner may invoke § 2255's savings clause to bring a petition for a writ of habeas corpus under § 2241. First, the intervening Supreme Court precedent must be one of statutory interpretation. Second, the new rule must be retroactively applicable on collateral review, and the rule must have been

unavailable to the petitioner when filing the original motion under § 2255. Third, the alleged error must be a miscarriage of justice.

The court below erred in denying Shepherd's petition under § 2241 because it did not apply this Court's three-part test, even though Shepherd raised a claim that had not been previously reviewed on its merits. First, *Mathis* is a statutory interpretation case. Second, this Court has determined that *Mathis* applies retroactively on collateral review, and the *Mathis* rule was unavailable to Shepherd when he first sought review under § 2255 in 2011. Alternatively, at the time of his direct appeal and first collateral attack, binding Sixth Circuit precedent barred Shepherd's ACCA sentencing claim. Third, an unfounded ACCA sentence enhancement is cognizable under § 2241 because it is a fundamental sentencing defect. Thus, *Mathis v. United States* meets all three criteria, and this Court should authorize Shepherd's petition for a writ of habeas corpus under § 2241.

After authorizing Shepherd's petition as a procedural matter, the next step is to assess its substantive merits—that is, whether Shepherd will be afforded sentencing relief from his ACCA enhancement. Here, this Court has many options. It may reach the merits itself, remand to the Indiana district court, or even transfer the case to the district court that initially sentenced Shepherd. If this Court chooses to evaluate the substantive ACCA claim itself, history and policy indicate that this Court should use Sixth Circuit law—the circuit of conviction. After all, § 2241 is only available by virtue of a provision in § 2255, which itself requires petitioners to bring their claims in the more convenient and appropriate circuit of conviction.

Congress enacted § 2255, in part, to ease the burden on the circuits of confinement that had previously borne the responsibility for such petitions. Most courts already look to the circuit of conviction during their procedural assessment of § 2241's availability, so continuing that approach into the substantive realm creates consistency and avoids unfair, arbitrary results and forum shopping.

If this Court applies Sixth Circuit law, Shepherd's ACCA enhancement cannot stand. Kentucky's burglary statute includes vehicles, movable enclosures, and even more structures than permitted by the Supreme Court's definition of generic burglary. The Kentucky statute is overbroad, and Shepherd's convictions are thus not predicate offenses under the ACCA.

Even if this Court applies Seventh Circuit law—the circuit of confinement—to the merits of Shepherd's claim, Kentucky's statute is still overbroad. Both the Supreme Court and the Seventh Circuit have consistently placed vehicles beyond the scope of generic burglary. Although this Court in *Smith v. United States* recently held that trailers and motor homes could fall within the generic definition because they were adapted for overnight accommodation, *Smith* did not reach other types of vehicles. Because the Kentucky statute includes other vehicles that may qualify as a dwelling in some circumstances, but do not do so in all circumstances, it is overbroad.

Finally, it would be a miscarriage of justice to deny Shepherd relief given the particular circumstances of his case. The Sixth Circuit now recognizes that the enhancement it applied to Shepherd's sentence is unlawful. The law in this Court is

cloudy given its recent pronouncements and the fact that Smith is currently seeking certiorari review in the Supreme Court. Shepherd's case should be resolved now because each day that passes is another beyond the maximum term of imprisonment that could have been imposed absent the ACCA enhancement. If this Court denies him relief, he will have no choice but to finish this illegal sentence. The writ is designed to remedy just such injustices, and this Court should grant Shepherd's petition.

ARGUMENT

I. The totality of Shepherd's plea proceedings shows that Shepherd did not knowingly and voluntarily waive his right to challenge his ACCA-enhanced sentence and that any waiver should not be enforced.

The parties agree that Shepherd did not waive his right to challenge his sentence. (Stipulated Motion at 1 (citing *United States v. Chapa,* 602 F.3d 865, 868 (7th Cir. 2010); Fed. R. Crim. P. 11(b)(1)(N)).) Given the government's decision not to argue waiver, this Court should move directly to the merits of the legal questions presented. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012); *United States v. Ryan*, 688 F.3d 845, 848 (7th Cir. 2012). Even if this Court were to decide to independently assess the waiver issue, the record shows that Shepherd did not "'knowingly and voluntarily' enter[ ] into the agreement," and that the waiver was not "express and unambiguous." *Chapa*, 602 F.3d at 868 (citing *United States v. Jemison*, 237 F.3d 911, 917 (7th Cir. 2001), and *United States v. Woolley*, 123 F.3d 627, 632 (7th Cir. 1997)).

Conflicting oral pronouncements at sentencing that he could appeal reasonably would have led Shepherd to believe that he retained the right to collaterally attack his ACCA status. During the plea colloquy, the district court, the prosecutor, and defense counsel all verbally agreed that Shepherd had not waived his right to appeal the ACCA enhancement. (A.15–16.) Following this exchange, the judge turned to Shepherd and paraphrased that conversation: "So, essentially, you are agreeing *no matter what the language is of this agreement* that all of those things that I just talked about having to decide are things that you can appeal if I decide

them against you." (A.17) (emphasis added). The prosecutor and defense counsel again agreed to this characterization of Shepherd's rights. (A.17.) This happened at sentencing. After the district court determined that Shepherd qualified for an ACCA sentencing enhancement, it asked defense counsel whether Shepherd had waived his right to appeal. (A.28–29.) Defense counsel stated—with no objections from the prosecutor—that it was a limited waiver. (A.28–29.) Then, after the clerk advised Shepherd of his right to appeal, the judge concluded sentencing by underscoring this right: "So if you want to appeal the issues that you raised here today about whether the armed career offender statute applies, then you are free to do so." (A.30.)

Even putting aside these express representations, a plea is only voluntary when "the defendant is made aware of the direct consequences of the plea." *United States v. Jordan*, 870 F.2d 1310, 1316 (7th Cir. 1989) (citing *Brady v. United States*, 397 U.S. 742, 755 (1970)). The district court failed to comply with Rule 11 when it did not ensure that Shepherd actually understood his appellate waiver and, specifically, the distinction between direct appeal and collateral review.[3] *See* Fed. R. Crim. P.

[3] This legal distinction often confuses defendants. *See, e.g.*, *Griffis v. United States*, No. CR 114-027, 2017 WL 1709316, at *5 (S.D. Ga. Feb. 16, 2017), *report and recommendation adopted*, No. CR 114-027, 2017 WL 1682538 (S.D. Ga. May 1, 2017); *Wiegand v. Zavares*, No. CIVA 08-CV-00862-BNB, 2008 WL 3895519, at *3 (D. Colo. Aug. 22, 2008); *Lamb v. United States*, No. 4:04-CV-116, 2007 WL 2402992, at *7 (E.D. Tenn. Aug. 20, 2007). ACCA errors are routinely pursued via collateral review, so Shepherd would have had no reason to believe that his appeal rights would not include this avenue of relief. *See Welch v. United States*, 604 F.3d 408, 412–13 (7th Cir. 2010) (stating "arguments of the sort at issue here, where a change in law reduces the defendant's statutory maximum sentence below the imposed sentence, have long been cognizable on collateral review").

11(b)(1)(N). Finally, any ambiguity should be read in favor of Shepherd, and against enforcing the waiver. *See United States v. Alcala*, 678 F.3d 574, 577 (7th Cir. 2012).

Since his guilty plea, Shepherd has persistently sought review of his sentence enhancement under the ACCA and nothing else. Shepherd has never and does not now seek to set aside his guilty plea; he merely asks this Court to recognize the limited appellate rights the district court repeatedly told him he retained. Because the parties have agreed that this is the best course, and because no prior court meaningfully considered the waiver question by examining the totality of the circumstances as required, *see* Stipulated Motion at 3 (explaining why "this an inappropriate case to press the law of the case doctrine"), this Court should find that Shepherd's claim may proceed.

II. This Court should hold that Shepherd is entitled to relief and that he may use § 2241 in order to obtain that relief.

District and circuit courts across the country have struggled to delineate the scope of the savings clause contained in § 2255(e) with different results. Courts likewise are grappling with how to apply the rapidly evolving ACCA jurisprudence, again with varied outcomes. And even when the § 2255(e) savings clause permits a given petitioner to employ § 2241, courts are unsure which jurisdiction's law should apply to the substantive merits of her underlying claim. Any one of these complex questions has sufficiently gummed up the lower courts such that Supreme Court guidance seems to be in order, if not inevitable.

Shepherd's case presents all three questions at once, but the path to resolving them is relatively straightforward. First, this Court has already answered the

question of when and how § 2241 should be used in its 1998 decision *In re Davenport*, 147 F.3d 605 (7th Cir. 1998). After resolving that threshold procedural question, this Court faces a fork in the road with three primary options: (1) apply Sixth Circuit ACCA law and grant Shepherd relief; (2) apply Seventh Circuit law and grant Shepherd relief; or (3) apply Seventh Circuit law and deny Shepherd relief. Keeping the fundamental purpose of habeas corpus top of mind—its role as a "bulwark against [detentions] that violate fundamental fairness"—renders the decision less thorny, at least in this particular case at this moment in time. *See Engle v. Isaac*, 456 U.S. 107, 126 (1982). Whichever route this Court chooses should be one that affords Shepherd relief because any other outcome would violate the notion of fundamental fairness that habeas corpus is meant to protect.

A. Shepherd may bring a § 2241 petition to challenge his sentence on *Mathis* grounds.

The parties agree that "§ 2241 is an appropriate vehicle for addressing the [*Mathis*] claim." (Stipulated Motion at 3.) Under this Court's test in *Davenport*, a petitioner must meet the following three conditions in order to bring a § 2241 petition: (1) there must have been an intervening Supreme Court decision involving statutory interpretation, not a constitutional case; (2) the Supreme Court's new rule must apply retroactively to cases on collateral review and the petitioner must have been unable to invoke the rule in his earlier proceeding; and (3) the error must be a miscarriage of justice. *Davenport*, 147 F.3d at 611. Had the district court applied this necessary test, it would have found that Shepherd's *Mathis* claim meets all three of that test's requirements.

Shepherd satisfies the first prong of the *Davenport* test because the Supreme Court interpreted a statute in *Mathis*—namely, the ACCA. *See Dawkins v. United States*, 829 F.3d 549, 551 (7th Cir. 2016) (per curiam). The second *Davenport* factor has two components: (1) retroactivity; and (2) prior unavailability of relief. Retroactivity is satisfied because this Court has held that "substantive decisions such as *Mathis* presumptively apply retroactively on collateral review." *Holt v. United States*, 843 F.3d 720, 721–22 (7th Cir. 2016) (citing *Davis v. United States*, 417 U.S. 333 (1974)); *see generally Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *see also Narvaez v. United States*, 674 F.3d 621, 625–26 (7th Cir. 2011). This Court uses two different tests for assessing prior unavailability of relief in cases brought under § 2241. *See Light v. Caraway*, 761 F.3d 809, 813 (7th Cir. 2014). Under one test, a petitioner satisfies the standard if the relevant Supreme Court case had not been decided by the time of his first motion under § 2255. *See Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012). An alternative test requires that the prisoner "show that his claim was 'foreclosed by binding precedent' at the time of his direct appeal and § 2255 motion." *Brown v. Caraway*, 719 F.3d 583, 595 (7th Cir. 2013) (quoting *Hill v. Werlinger*, 695 F.3d 644, 648 (7th Cir. 2012)).

Shepherd easily satisfies the first test for showing prior unavailability of relief; the Supreme Court decided *Mathis* in 2016— five years after Shepherd's first

§ 2255 motion.[4] Because the timing of the *Mathis* decision satisfies *Davenport's* second prong, this Court need not inquire any further. Nonetheless, Shepherd also satisfies this Court's second test. At the time of Shepherd's direct appeal and first § 2255 motion, the Sixth Circuit's precedent flatly contradicted not only existing Supreme Court precedent in *Taylor v. United States*, 495 U.S. 575 (1990), but also what would ultimately become the rule in *Mathis*. Further, there is contradictory case law in the Sixth Circuit that is irreconcilable with *Taylor* and its progeny because Kentucky defines burglary more expansively than federal law does. Courts held that second-degree burglary in Kentucky categorically counted as a crime of violence under the enumerated-offenses clause. *See United States v. Moody*, 634 F. App'x 531, 535 n.1 (6th Cir. 2015); *United States v. Taylor*, 800 F.3d 701, 719 (6th Cir. 2015); *United States v. Walker*, 599 F. App'x 582, 583 (6th Cir. 2015); *United States v. Jenkins*, 528 F. App'x 483, 484–85 (6th Cir. 2013); *United States v. Douglas*, 242 F. App'x 324, 331 (6th Cir. 2007).

Finally, an erroneous enhancement under the ACCA is a cognizable claim for habeas relief under § 2241 because it is a fundamental sentencing defect and therefore a miscarriage of justice. The Constitution voids a sentence that violates a substantive rule. *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016), *as revised*

[4] Shepherd could not have resorted to § 2255(h)(2)'s second-or-successive provisions in order to raise a *Mathis* claim. The rule in *Mathis* is not a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. *Holt*, 843 F.3d at 722 ("*Mathis* interprets the statutory word 'burglary' and does not depend on or announce any novel principle of constitutional law. Section 2255(h)(2) therefore does not authorize a second § 2255 proceeding."). Because a *Mathis* claim does not justify a second or successive motion under § 2255, section 2241 is Shepherd's only avenue of relief.

(Jan. 27, 2016) (citing *Ex parte Siebold*, 100 U.S. 371, 376 (1879)). This Court has held that "fundamental sentencing defects, such as a misapplication of the then-mandatory career offender Guideline, present a cognizable non-constitutional claim for initial collateral relief because the error resulted in a miscarriage of justice." *Light v. Caraway*, 761 F.3d 809, 813 (7th Cir. 2014) (citing *Brown v. Caraway*, 719 F.3d 583, 587 (7th Cir. 2013) (internal quotations omitted)). Here, the 15-year mandatory minimum sentence that the district court imposed pursuant to the ACCA exceeds the statutory maximum of ten years for Shepherd's felon-in-possession offense. Without the enhancement, Shepherd would not have been subject to the mandatory minimum.

B. Deciding the substantive merits of Shepherd's *Mathis* claim.

After applying *Davenport* and concluding that § 2241 is an option for Shepherd, the focus turns to the substantive merits of his *Mathis* claim. Here, the question becomes which circuit's law applies in order to decide whether he will obtain relief. No court, including this one, has definitively answered this question. Lower courts in this circuit seem to most often apply the law of the circuit of conviction on the merits (in Shepherd's case that would be the Sixth Circuit). *See Roberts v. Watson*, No. 16-CV-541-BBC, 2017 WL 2963527 at *2 (W.D. Wis. July 11, 2017); *but see Goodson v. Werlich*, No. 17-CV-1210-DRH, 2017 WL 5972989, at *2 (S.D. Ill. Nov. 30, 2017) (applying, without explaining why, the law of the circuit of confinement). Some district courts elsewhere apply the substantive law of the circuit of confinement but, again, most typically apply the law of the circuit of conviction to

the merits of a petitioner's claim. *See Hogan v. Butler*, No. CIV. 6:15-046-GFVT, 2015 WL 4635612, at *6–7 (E.D. Ky. Aug. 3, 2015) (applying the law of the circuit of conviction); *but see Rudisill v. Martin*, No. 5:08–cv–272(DCB)(MTP), 2013 WL 1871701 at *4, 6–7 (S.D. Miss. May 3, 2003) (applying the law of the circuit of confinement).

If and when it reaches the merits of a § 2241 petition, this Court appears to utilize both approaches without much explanation. *Compare Brown*, 719 F.3d at 595–96 (citing and relying on the circuit of confinement's—and the Supreme Court's—ACCA jurisprudence to determine whether third-degree arson qualified as a crime of violence under the mandatory sentencing Guidelines), *with Light*, 761 F.3d at 816 looking to both the law of the circuit of conviction and the circuit of confinement in the merits stage, but deferring to the circuit of conviction's interpretation of the substantive law). As a general matter, other circuits seemingly apply the law of the circuit of conviction when reaching the merits stage of the § 2241 analysis. *See, e.g.*, *Chaney v. O'Brien*, No. CIV.A. 7:07CV00121, 2007 WL 1189641 at *3 n.1 (W.D. Va. 2007), *aff'd* 241 Fed. App'x 977 (4th Cir. 2007) (per curiam) (reasoning that the substantive law relevant to a § 2241 petition is the law of the circuit of conviction).

As this Court's January 12, 2018, Order suggested, however, the time for equivocation and indefiniteness on these matters may have passed. For the reasons discussed below, applying the law of the circuit of conviction remains most faithful to habeas corpus principles and the AEDPA framework. But even if this Court

applies Seventh Circuit law, Shepherd should still be resentenced without the ACCA enhancement.

1. Apply Sixth Circuit law and grant Shepherd relief because under Stitt he is not an armed career criminal.

Shepherd was arrested, convicted, and sentenced in Kentucky under a Kentucky burglary statute. He happens to be incarcerated in Indiana because that is where the Bureau of Prisons sent him. Though his confinement in Indiana means his § 2241 claim must be filed in the Seventh Circuit, it by no means dictates that Seventh Circuit law should apply. Applying the law of the circuit of conviction—here, Sixth Circuit law—better aligns with congressional policies and judicial practice in habeas cases. It also ensures consistency through the collateral review process, avoiding the risk of post-conviction relief turning on the government's incidental decision about where it should house inmates. Should this Court choose to apply Sixth Circuit law, it should find that Shepherd is not an armed career criminal.

a. Sixth Circuit law should apply.

The law of habeas corpus is specialized and complex, informed by history and policies that make it unique. For instance, most routine legal questions are aptly and appropriately decided by the law of the circuit in which they are brought because that is where the activities underlying the lawsuit occurred. Civil suits, as well as criminal trials and direct appeals in federal and state court all for the most part orbit around a single jurisdiction and its laws. But federal courts sitting in habeas routinely look to, analyze, and apply other jurisdictions' laws, which makes

it different from the mine run of federal litigation. *See Aponte v. Gomez*, 993 F.2d 705, 707 (9th Cir. 1993) (federal courts are bound by a state court's construction of its own penal statutes); *see also, e.g., Snow v. Pfister*, 880 F.3d 857, 863–64 (7th Cir. 2018) (post-AEDPA, federal courts review state-court interpretations of federal law under a highly deferential standard). In a similar vein, habeas courts are accustomed to the fact that their litigants may have attenuated connections to the forum, either because they have long been incarcerated far away from where their underlying criminal cases took place or because they are bringing a claim in a court with no experience with the underlying case. Unlike the rhyme and reason that undergirds much federal litigation, the happenings in the world of habeas are different and courts should account for those differences in deciding whether the rules that apply to a typical litigant should apply to this special class.

In fact, Congress' decisions were animated by these special characteristics when it enacted AEDPA, and they weigh in favor of using the law of the circuit of conviction to decide cases arising under § 2241. For example, Congress required that § 2255 petitions be filed in the court where the defendant was convicted and sentenced, 28 U.S.C. § 2255(a), because before AEDPA district courts where federal prisons happened to be located had been flooded by habeas petitions in a way that significantly, and unequally, burdened them. *See United States v. Hayman*, 342 U.S. 205, 213–14 (1952). Congress also recognized that crucial evidence, such as witnesses and trial transcripts, was not readily available to courts reviewing habeas petitions filed in the circuit of confinement. *See id.* For that reason, using the circuit

of conviction was a more convenient and sensible solution. *See id.* at 219; *see also Johnson: Remembrance of Illegal Sentences Past*, 28 Fed. Sent. R. 58, 63, 2015 WL 7906242 (Vera Inst. Just.) ("the law of the [circuit of conviction] should govern the legality of the sentence, regardless of where the case is filed, *given § 2255's default to the home district*.") (emphasis added). Because Shepherd's § 2241 petition arises solely through the mechanism provided by § 2255(e), it makes sense to factor in the concerns that prompted Congress to enact AEDPA, and those concerns point towards using the court of conviction.

Indeed, this Court already does so in the procedural inquiry of its current § 2241 approach. Unlike the uncertainty that infects the "choice of law" question in the substantive inquiry, this Court typically looks to the law of the circuit of conviction as part of its second step of the *Davenport* test—deciding whether the petitioner's current claim could have been invoked in a § 2255 motion. *Brown v. Caraway*, 719 F.3d 583, 595–96 (7th Cir. 2013) (applying Third Circuit substantive law as the law of the circuit of conviction to determine whether the petitioner's claim was foreclosed by binding circuit precedent at the time of his original § 2255 motion); *see also Hill v. Masters*, 836 F.3d 591, 595–96 (6th Cir. 2016); *Light v. Caraway*, 761 F.3d 809, 813 (7th Cir. 2014).

District courts in this circuit have generally carried that procedural preference for circuit of conviction into the substantive realm when deciding § 2241 cases on the merits. These courts reason that because § 2255 motions are filed in the circuit of conviction, using that court's law ensures consistency throughout the collateral-

review process. *See, e.g., Hernandez v. Gilkey*, 242 F. Supp. 2d 549, 554 (S.D. Ill. 2001); *see also Hogan v. Butler*, No. CIV. 6:15-046-GFVT 2015 WL 4635612, at *6 (E.D. Ky. 2015) (commenting that, if the law of the circuit of confinement applied, it would "turn the rule of the finality of judgements and convictions on its ear."); *In re Nwanze*, 242 F.3d 521, 527 (3d Cir. 2001) (transferring a habeas petition to the court of conviction because that court is in the best position to know its intentions when it sentenced the petitioner). In fact, the vast majority of lower courts—here and nationwide—echo *Hernandez*'s reasoning and hold that it makes more sense to apply the circuit of conviction's law. *See Aiken v. Taylor*, No. 115CV00771VEHSGC, 2017 WL 6383182, at *2 (N.D. Ala. Dec. 14, 2017); *Roberts v. Watson*, No. 16-CV-541-BBC, 2017 WL 6375812, at *2 (W.D. Wis. Dec. 12, 2017); *Bender v. Carter*, No. 5:12CV165, 2013 WL 5636745, at *2 (N.D.W. Va. Oct. 15, 2013); *Johnson v. Haynes*, No. CV212-128, 2013 WL 53990, at *1 (S.D. Ga. Jan. 3, 2013); *Morgenstern v. Andrews*, No. 5:12-HC-2209-FL, 2013 WL 6239262, at *3 (E.D.N.C. Dec. 3, 2013); *Cantrell v. Warden, FCC Coleman-USP-1*, No. 5:10-CV-483-OC-10TBS, 2012 WL 2127729, at *5 (M.D. Fla. June 12, 2012); *Salazar v. Sherrod*, No. 09-CV-619-DRH-DGW, 2012 WL 3779075, at *4–5 (S.D. Ill. Aug. 31, 2012); *Eames v. Jones*, 793 F. Supp. 2d 747, 749–50 (E.D.N.C. June 20, 2011).

Notably, courts that have applied the law of the circuit of confinement—whether in the procedural or substantive phase of the inquiry—have done so without any meaningful explanation of their decision to do so. *See Rudisill v. Martin*, No. 5:08-CV-272 DCB MTP, 2013 WL 1871701, at *3–4 (S.D. Miss. May 3, 2013); *Searcy v.*

Young, 489 Fed. App'x 808, 810 n.2 (5th Cir. 2012); *Alaimalo v. United States*, 645 F.3d 1042, 1048 (9th Cir. 2011); *Connor v. Hollard*, No. CIV.A. 10-104-HRW, 2010 WL 4791945 (E.D. Ky. Nov. 17, 2010); *Sosa v. Shartle*, No. 1:10CV0769, 2010 WL 3075123 (N.D. Ohio Aug. 4, 2010). In any event, applying the substantive law of the circuit of confinement creates arbitrariness rather than consistency. *See Hernandez*, 242 F. Supp. 2d at 554. The Bureau of Prisons has vast discretion in where it places inmates, 18 U.S.C. § 3621(b), and it often chooses to place inmates based on practical necessities, such as which facilities have available beds or which institution can provide particular services for an inmate, *see Olim v. Wakinekona*, 461 U.S. 238, 245–46 (1983) (explaining that overcrowding and other concerns can necessitate transfers); *Taylor v. Lariva*, 638 F. App'x 539, 541 (7th Cir. 2016) (mem.) (discussing how the BOP may consider these statutory factors, including facility resources and the prisoner's history and characteristics, in designating inmates); *see generally* U.S. Dep't. of Justice, Fed. Bureau of Prisons, *Inmate Security Designation and Custody Classification* (2006) (Program Statement No. 5100.08), available at http://www.bop.gov/policy/progstat/5100_008.pdf) (guiding the designation of an inmate to a specific institution). Its decisionmaking in no way accounts for an inmate's possible future collateral attacks. *See* § 3621 (listing a number of factors for the Bureau to consider in deciding the place of an individual's imprisonment and not mentioning the potential litigiousness of that person).

Using the law of the confinement circuit would result in "similarly situated prisoners—perhaps even co-defendants convicted of the exact same crimes—being

treated differently because of their location." *Hernandez*, 242 F. Supp. 2d at 554. Forum shopping by prisoners might also occur: "a prisoner desiring to have Seventh Circuit law apply to him could misbehave in order to be sent to USP-Marion." *Id.*; *see also Meachum v. Fano*, 427 U.S. 215, 228 (1976) (explaining "[t]hat an inmate's conduct, in general or in specific instances, may often be a major factor in the decision of prison officials to transfer him"). Finally, given that this Court has held that a circuit split cannot serve as a basis for § 2241 relief, *see In re Davenport*, 147 F.3d 605, 612 (7th Cir. 1998), returning to the circuit of conviction when assessing the substantive merits ensures that this Court's approaches are consistent.

b. Under Sixth Circuit law, Shepherd is not an armed career criminal.

The ACCA authorizes a 15-year mandatory minimum sentence if a defendant is convicted of being a felon in possession of a firearm after three prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). A "violent felony" includes any felony—federal or state—that is "burglary, arson, or extortion." § 924(e)(2)(B)(ii). When Congress listed those crimes, it was referring to their usual or "generic" versions, not all their state-law variations. *See Taylor v. United States*, 495 U.S. 575, 598 (1990). The generic version of burglary is the "crime contain[ing] the following elements: an unlawful or unprivileged entry into . . . a building or other structure, with intent to commit a crime." *Id.*[5]

[5] For indivisible statutes, courts apply the categorical approach to determine whether a prior conviction is for generic burglary. *See Taylor v. United States*, 495 U.S. 575, 600–01 (1990). With an indivisible statute, the application of the categorical approach is relatively straightforward: the court compares the elements of the crime of conviction to those of generic burglary and decides if it criminalizes more conduct than the federal offense. *See id.* A state burglary statute may also be divisible: structured in a way that lists several

This is an easy case if Sixth Circuit law applies because "vehicles and movable enclosures . . . fall outside the definition sweep of [*Taylor*'s] 'building or other structure.'" *United States v. Stitt*, 860 F.3d 854, 857 (6th Cir. 2017) (en banc), *petition for cert. filed* (U.S. Nov. 21, 2017) (No. 17-765). The Tennessee statute that *Stitt* found broader than generic burglary criminalizes "burglary of a habitation." Tenn. Code Ann. § 39-14-403. In turn, the Tennessee Code defines "habitation" as "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons . . . [including] a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant." *Id.* § 39-14-401. Because the Tennessee statute includes vehicles and movable enclosures, the Sixth Circuit held it is categorically broader than generic burglary, and so a conviction under the statute "does not count as a violent felony under the ACCA." *Stitt*, 860 F.3d at 862

The *Stitt* reasoning applies just the same to Kentucky's second-degree burglary statute. The Kentucky statute criminalizes burglary of a "dwelling," which it defines as "a building which is usually occupied by a person lodging therein." Ky. Rev. Stat. Ann. § 511.010(2). In turn, "building" is defined to include "any structure, vehicle, watercraft or aircraft . . . [w]here any person lives; or [w]here people assemble for

---

different crimes in the alternative, each with its own elements, and only one of those listed crimes might match generic burglary. *See Mathis v. United States*, 136 S. Ct. 2243, 2248–49 (2016). The Kentucky statute is indivisible because it proscribes the act of burglarizing a variety of locations, any one of which independently satisfies that element of burglary. *See* Ky. Rev. Stat. Ann. § 511.010(1). Thus, this brief focuses on the indivisibility analysis.

purposes of business, government, education, religion, entertainment or public transportation." *Id.* § 511.010(1). *Stitt* holds that the mere inclusion of vehicles and movable enclosures in a State burglary statute goes too far for generic burglary. 860 F.3d at 858. The Kentucky statute is no different. It too includes vehicles and movable enclosures (and a lot more, including things that the Tennessee statute does not cover, like boats and planes and schools and churches).

And under *Stitt*, it does not matter that Kentucky requires a building be "usually occupied by a person lodging therein" to count as a dwelling—just like it did not matter that Tennessee requires a vehicle or movable enclosure be "designed or adapted for the overnight accommodation of persons." *Id.* ("The issue before us . . . is whether a burglary statute that covers vehicles or movable enclosures only if they are ['designed or adapted for the overnight accommodation of persons'] fits within the bounds of generic burglary. We hold that it does not.") Indeed, as a concurrence specifically makes clear: "Kentucky's definition of a 'dwelling' includes vehicles, watercraft, and aircraft, and is thus broader than the common-law meaning of dwelling." *Id.* at 874. (White, J., concurring). Based on *Stitt*, Kentucky's burglary statute is broader than generic burglary and so Shepherd's convictions are not predicate offenses under the ACCA.

2. Alternatively, if this Court holds that Seventh Circuit law governs, Shepherd is still entitled to relief.

Even under Seventh Circuit law, Shepherd's prior burglary convictions do not count as ACCA predicate offenses because Kentucky's second-degree burglary goes beyond generic burglary. Still, should this Court disagree and hold Shepherd an

armed career criminal under circuit precedent, it would be a miscarriage of justice to deny him relief when this Court, sitting in habeas, has a variety of means to ensure that no fundamental unfairness is worked in this case.

a. Under this Court's ACCA jurisprudence, Shepherd is not an armed career criminal.

ACCA burglary is not burglary in all its state-law mutations, but only the generic crime defined in *Taylor*, 495 U.S. at 598. Though *Taylor* does not define "building or other structure," it gives this qualification: a state burglary statute that includes "places, such as *automobiles* and vending machines, other than buildings" goes beyond generic burglary. *Id.* at 599 (emphasis added).

Four times after *Taylor*, the Supreme Court again placed vehicles beyond the scope of generic burglary. *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016) (holding that Iowa's burglary statute "reaches a broader range of places" than generic burglary because it covers "any building, structure, *[or] land, water, or air vehicle*.") (emphasis in original); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (noting that "breaking into a building" falls within generic burglary but breaking into a "vessel" would not); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186–87 (2007) (noting that some States "define burglary more broadly, as by extending it to entries into boats and cars"); *Shepard v. United States*, 544 U.S. 13, 15–16 (2005) ("The [ACCA] makes burglary a violent felony only if committed in a building or enclosed space . . . not in a boat or motor vehicle.").

And just a few weeks ago, this Court reaffirmed that a state burglary statute is broader than generic burglary if it applies "for example, to unlawful entries into

vehicles as well as buildings or structures[.]" *United States v. Franklin*, No. 16-1580, 2018 WL 1044836, at *1 (7th Cir. Feb. 26, 2018) (emphasis added). A state burglary statute that reaches vehicles "does not count under the ACCA definition." *Id.* That remains the law in this circuit. This Court's recent decision in *Smith v. United States* is not to the contrary. 877 F.3d 720 (7th Cir. 2017), *petition for cert. filed* (U.S. Jan. 17, 2018) (No. 17-7517).

In *Smith*, this Court was tasked with deciding whether the Illinois residential burglary statute fell within the parameters of generic burglary so as to constitute an ACCA predicate. The Illinois statute criminalizes unlawful entry into the "dwelling place" of another, and defines "dwelling" as "a house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside." 720 ILCS § 5/2-6. Because prior Illinois case law had determined that this statute *excludes* "all vehicles other than occupied trailers," this Court's job was to simply decide whether mobile homes and trailers could be "structures" for *Taylor* purposes. *Smith*, 877 F.3d at 723. This Court held they could. *Id.* at 722-25 (analogizing to UCC definition of "mobile home" as a "structure" and calling it "just a prefabricated house."). But in *Smith* this Court had no occasion to—and did not—decide whether vehicles other than motor homes and trailers fall within the generic burglary definition.[6]

[6] At the very least, there is ambiguity in the Seventh Circuit about whether vehicles are categorically excluded from generic burglary under the ACCA. Ambiguity should be resolved in Shepherd's favor. *See Cleveland v. United States*, 531 U.S. 12, 25 (2000); *see also Taylor v. United States*, 495 U.S. 575, 596 (1990). (recognizing that criminal

The furthest any other circuit has gone in interpreting *Taylor*'s "building or other structure" element for generic burglary is to include vehicles (or other nonpermanent structures like tents) that are designed or adapted for human accommodation. *See, e.g.*, *United States v. Spring*, 80 F.3d 1450, 1462 (10th Cir. 1996); *United States v. Stitt*, 860 F.3d 854, 880–81 (6th Cir. 2017) (en banc) (Sutton, J., dissenting), *petition for cert. filed* (U.S. Nov. 21, 2017) (No. 17-765). Even under this approach, however, generic burglary does not include all vehicles (or all other nonpermanent structures); it only covers vehicles designed or adapted for human accommodation.

The Kentucky statute includes all sorts of vehicles: planes, trains, automobiles. Even watercraft—container ship to canoe—fall in the statute's sweep. Ky. Rev. Stat. Ann. § 511.010(1)(b) ("any structure, vehicle, watercraft or aircraft"). Because the statute adds vehicles to the list of places that can be burglarized, it is no different from the Iowa statute in *Mathis* and the Wisconsin statute in *Franklin*; like those statutes, the Kentucky statute is "a state burglary statute [that] is broader than 'generic burglary' by applying . . . to unlawful entries into vehicles as well as buildings or structures[.]" *Franklin*, 2018 WL 1044836, at *1. On this basis alone, a

---

sentencing provisions—such as the ACCA—should be construed in favor of the accused so long as those interpretations are not implausible or at odds with generally accepted contemporary meanings of terms). Lenity is "especially appropriate" when the ambiguous criminal offense is a springboard for harsher punishment, like generic burglary is under the AACA. *Id.* (describing the rule of lenity as "especially appropriate" for the federal mail fraud statute because it is a predicate offense under RICO and the money laundering statute). Resolving ambiguity in Shepherd's favor means interpreting generic burglary to categorically exclude vehicles. *See Franklin*, 2018 WL 1044836, at *1.

conviction under the Kentucky statute "does not count under the ACCA definition [of generic burglary]." *Id.*

Even under the Tenth Circuit's and Judge Sutton's more inclusive (and less lenient) interpretation of generic burglary, the Kentucky statute goes too far. The statute does not even limit the types of buildings it includes in its already-broad sweep to buildings where people live. It goes further to include all buildings (which, remember, is defined to included vehicles, watercrafts, and aircrafts) "where any person lives; *or [w]here people assemble for purposes of business, government, education, religion, entertainment or public transportation*." Ky. Rev. Stat. Ann. § 511.010(1) (emphasis added). According to the statute, factories, town halls, classrooms, movie theatres, churches, and even train stations can be burglarized. Yet like Judge Sutton's examples of bridges, cranes, gazebos, and doll house, these places are "as a matter of function . . . not designed to house people." *Stitt*, 860 F.3d at 879. Whether it be a gazebo or a factory, a doll house or a town hall, stealing from those types of buildings is not generic burglary because they are not designed or adapted for humans to live. *Id.*

On the very broadest interpretation of the ACCA—the opposite of what the rule of lenity requires—Kentucky's burglary statute could only be generic if its twin unruly phrases "any structure, vehicle, watercraft or aircraft" and "[w]here people assemble for purposes of business, government, education, religion, entertainment or public transportation" were bridled to go only as far as places or structures adapted or designed for overnight accommodation. Kentucky's after-thought

requirement in its definition of "dwelling" that a building be "usually occupied by a person lodging therein" is not enough. Ky. Rev. Stat. Ann. § 511.010(2). The Supreme Court of Kentucky has held that whether a building meets the "dwelling" definition (and, therefore, the usually-occupied proviso) "turns on [a building's] capacity, at the time of unlawful entry, of being occupied overnight and the intent of lawful or authorized persons to use it as such." *Cochran v. Commonwealth*, 114 S.W.3d 837, 839 (Ky. 2003). This makes Kentucky's usually-occupied proviso more inclusive than a requirement that a structure be designed or adapted for human occupation. A building can be "usually occupied by a person lodging therein" (and so it would count for Kentucky burglary) even though it was not designed or adapted for human accommodation (and so it would not count for generic burglary). The Kentucky statute impermissibly looks to the *use* of a structure, as idiosyncratic as it may be, while the generic inquiry takes a narrower focus on the *nature* of a structure. *United States v. Rainer*, 616 F.3d 1212, 1215 (11th Cir. 2010), *overruled on other grounds by United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014). Something can be usually occupied by a lodger (Kentucky's use-focus) without it necessarily being designed or adapted for human accommodation (the generic offense's nature-focus).

For example, someone fallen on hard times may live out of his car. The car would likely count as a "dwelling" under the Kentucky burglary statute because it has "capacity . . . of being occupied overnight" and would be "usually occupied by a person lodging therein." Yet someone can live in his car without the car being

designed or adapted for human accommodation (unlike, for example, a motor home). Similarly, a church may open its doors each night so people can take shelter and sleep on its pews. The church would be a "dwelling" under the Kentucky statute because it has "capacity . . . of being occupied overnight" and would be "usually occupied by a person lodging therein." Yet someone can live in a church without the church necessarily being designed or adapted for human accommodation (unlike, for example, a church-run night shelter). As shown, Kentucky's usually-occupied proviso focuses on a structure's use, not its nature.[7] And so even with the proviso, the Kentucky statute still lets in what even the broadest interpretation of generic burglary keeps out.

As this Court acknowledged in *Smith*, "if any of the defined ways to commit [burglary] in [the State] falls outside the federal definition of 'burglary,' the state-law convictions do not count under the [ACCA]." 877 F.3d at 723. Just so here. Kentucky's second-degree burglary statute is categorically overbroad: a vehicle or boat usually occupied by a person lodging therein may sometimes fall within the generic crime, but not *always* (because the vehicle or boat, though usually occupied, may not have been designed or adapted for human accommodation). No matter

[7] Kentucky courts have not decided whether a car or church can be burglarized under the second-degree burglary statute. But Kentucky courts have held that a storage shed and warehouse are "buildings" under § 511.010(1). *See, e.g.*, *Spears v. Commonwealth*, 78 S.W.3d 755, 760 (Ky. Ct. App. 2002) (shed); *Clubb v. Commonwealth*, No. 2008-CA-002014-MR, 2009 WL 4723175, at *2 (Ky. Ct. App. Dec. 11, 2009) (unpublished) (warehouse). If someone sleeps in a shed or warehouse, each would be a building "usually occupied by a person lodging therein," and so each would constitute a "dwelling" within the reach of Kentucky's second-degree burglary statute. But, importantly, neither would necessarily be designed or adapted for human accommodation, placing both beyond generic burglary.

which approach to the "building or other structure" element of generic burglary is taken, Shepherd's prior burglaries are not predicate offenses under the ACCA.

b. Even if this Court believes Shepherd's prior convictions qualify as ACCA predicates, it should nonetheless grant him habeas relief to avoid a miscarriage of justice.

This Court has the power when acting in habeas corpus to "ensure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). To this end, the habeas statute requires that courts dispose of petitions "as law and justice require." 28 U.S.C. § 2243. Equitable considerations govern habeas corpus to effectuate that promise, such that it is not "a static, narrow, formalistic remedy," *Jones v. Cunningham*, 371 U.S. 236, 243 (1963), but rather one that has the "ability to cut through barriers of form and procedural mazes," *Harris v. Nelson*, 394 U.S. 286, 291 (1969). Federal courts may grant any form of relief necessary to see that justice is done. *See Hilton v. Braunskill*, 481 U.S. 770, 775 (1987); *see also Peyton v. Rowe*, 391 U.S. 54, 66 (1968).

In order for this Court to exercise its inherent flexibility, Petitioner has identified no less than five options that this Court could employ to ensure that no miscarriage of justice occurs. The first four remedies, discussed in more detail below, involve the Court granting the petition and taking some additional remedial action on the merits: (1) order Shepherd's immediate release; (2) order his conditional release; (3) reverse and remand instructing the trial court to resentence him without the ACCA enhancement; and (4) reverse and remand instructing the

trial court to simply resentence him. Finally, a fifth option is for this Court to authorize the petition and transfer the case to the Kentucky sentencing court for substantive analysis on the merits in the first instance.

As of the filing time of this brief, Shepherd has been incarcerated beyond the maximum ten-year sentence he could have received without an ACCA enhancement. The first two options identified above—immediate release and conditional release—would permit this Court to promptly remedy the injustice stemming from his continued incarceration. *See United States v. Llewlyn*, 879 F.3d 1291, 1296 (11th Cir. 2018) (noting that a court "may vacate and set aside the judgment, resentence the defendant, grant a new trial, or correct the sentence as it sees fit."); *see In re Bonner*, 151 U.S. 242 (1894) (recognizing conditional release subject to the right of the government to invoke the power of the court of original jurisdiction to resentence the petitioner). Turning to options three and four, this Court also has the ability to include relevant instructions to guide the district court in its exercise of discretion. *See Narvaez v. United States*, 674 F.3d 621, 630 (7th Cir. 2011) (reversing and remanding with instructions "to impose the sentence applicable without the imposition of a career offender status").[8]

[8] In criminal cases, penalty statutes are jurisdictional in and of themselves, meaning that they circumscribe the actual power of the court. *See In re Mills*, 135 U.S. 263, 270 (1890) (collecting cases). To be sure, an excessive sentence does not render the lawful portion of the sentence void, but merely voids the excess, and thus, opens it to challenge. *See United States v. Pridgeon*, 153 U.S. 48, 62 (1894). To remedy a sentence imposed beyond the jurisdiction of the trial court, a reviewing court can send the case to the trial court for a resentencing within the appropriate bounds of its jurisdiction.

This Court could also opt not to weigh in on the substantive merits of the case by simply transferring it back to the sentencing court to handle it in the first instance. *See Conley v. Crabtree*, 14 F. Supp. 2d 1203, 1206–07 (D. Or. 1998) (concluding "that the threshold determination of whether the petition may even proceed under § 2241 should be made" in the habeas court, and if § 2241 is the appropriate mechanism for the claim, "the case should then be transferred to the district in which the petitioner was convicted and sentenced."). Especially in habeas cases, courts rely on their transfer powers to effectuate the interests of justice. *See In re Nwanze*, 242 F.3d 521, 527 (3d Cir. 2001) (denying petitioner's habeas claim without prejudice so a claim could be reinstated if the petitioner could not get relief in the sentencing court on jurisdictional grounds); *Hill v. Daniels*, CIV.05-1292-AA, 2005 WL 2249858, at *2 (D. Or. Sept. 14, 2005) (citing *United States v. Hayman*, 342 U.S. 205 (1952)) (holding that "transfer is consistent with the dichotomy that Congress established between the responsibilities of the sentencing court and those of the court in the district of incarceration").

This Court can choose from a range of options to grant Shepherd relief even if it believes that he would qualify as an armed career criminal under its law as it stands today, but did not when he filed his original brief, and may not after this case is over. This Court should use the broad remedial tools at its disposal when sitting in habeas because this petition represents that rare case where exceptional circumstances necessitate a remedy afforded by the writ.

For nearly a decade, Shepherd has asked courts to earnestly review his ACCA-enhanced sentence. (B.5, B.21, B.26, B.29, B.32, B.35, A.45, R.11.) None have, until now. This Court appointed counsel to assist Shepherd and to determine if he indeed had meritorious claims. (R.9, Order Appointing Counsel.) And he did—the government agreed. (*See generally* Stipulated Motion.) The Sixth Circuit seemingly would have as well given its abrogation of the cases on which the Kentucky district court relied in imposing Shepherd's ACCA enhancement. *See United States v. Nance*, 481 F.3d 882 (6th Cir. 2007), *overruled by United States v. Stitt*, 860 F.3d 854, 861 (6th Cir. 2017) (en banc); *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015), *abrogated by United States v. Stitt*, 860 F.3d 854, 861 n.4 (6th Cir. 2017) (en banc); *see also United States v. Ozier*, 796 F.3d 597 (6th Cir. 2015), *abrogated by Mathis v. United States*, 136 S. Ct. 2243, 2251 n.1 (2016).

Even this Court, until just weeks after Shepherd filed his original brief, recognized as overbroad statutes that explicitly include vehicles in their grasp, as Kentucky's does. *See United States v. Perry*, 862 F.3d 620, 624 (7th Cir. 2017) (observing that, although Indiana burglary does not cover vehicles or other movable conveyances, those locations take statutes that do include them outside the scope of generic burglary); *United States v. Haney*, 840 F.3d 472, 475 (7th Cir. 2016) (holding that the 1973 Illinois burglary statute covered a greater swath of conduct than the generic offense because it included vehicles like trailers, watercraft, aircraft, and railroad cars); *United States v. Edwards*, 836 F.3d 831, 837 (7th Cir. 2016) (citing *Mathis*, 136 S. Ct. at 2251) (finding that Wisconsin's burglary statute was broader

than the Guidelines offense because it reached locations such as railroad cars and ships).

This Court issued *Smith* on December 13, 2017, days before the government's brief filing date and while the parties were in discussions about the stipulated motion to reverse and remand. As detailed above, Shepherd believes that his prior Kentucky convictions do not qualify as ACCA predicates even under *Smith*. But Petitioner cannot read the tea leaves of *Smith*'s import to this Court, even more cloudy given this Court's recent decision in *Franklin*, which seemingly reaffirmed its position that vehicles fall outside the definition of generic burglary. *Franklin*, 2018 WL 1044836 at *1–2 (maintaining that the Wisconsin burglary statute is broader than generic burglary because it includes a handful of vehicles). Because Smith himself did not seek rehearing en banc before filing his petition for certiorari, however, Shepherd can divine nothing from that case's subsequent history except that Smith disagrees with the panel's reasoning. Petition for Writ of Certiorari, Smith v. United States, No. 17-7517 (2018) (calling *Smith* into question because the *Taylor* Court made a conscious choice to eliminate an occupancy requirement to exempt the MPC's inclusion of vehicles and it also expressly rejected a dwelling element because many states expanded beyond this concept or omitted it altogether).

Thus, Shepherd unfortunately finds himself in a shifting legal landscape neither of his making nor dictated by the Supreme Court. His appeal will surely conclude before anyone has a real sense of what the Supreme Court believes to be the proper

resolution, as it should, given that he has already served more than all the time he would have served had he been sentenced without the ACCA enhancement. *See* 18 U.S.C. § 924(a)(2) (imposing a 10-year statutory maximum for being a felon in possession of a firearm). Finally, once this court disposes of his case, he will have no other options but to sit and serve out the remaining five years of his original sentence. 28 U.S.C. § 2244(a) ("No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in § 2255."); *see United States v. Wilkozek*, 822 F.3d 364, 368 (7th Cir. 2016) (requiring as a condition of obtaining coram nobis relief that the petitioner be challenging his *conviction* and be no longer in custody); *see also Valona v. United States*, 138 F.3d 693, 694–95 (7th Cir. 1998) (explaining that "§ 2244(a) bars successive petitions under § 2241 directed to the same issue concerning execution of a sentence.").

In unusual circumstances such as these, the unique nature of the writ and the flexibility afforded a court to right perceived wrongs permits this Court to exercise its vast discretion under habeas and grant Shepherd relief, even if it believes that he would qualify as an armed career criminal under its law as it stands today.

3. If this Court applies Seventh Circuit law and denies Shepherd relief on that basis, it would affirmatively create the very miscarriage of justice that habeas seeks to avoid.

Not only does this Court have the power to grant habeas relief against detentions that violate fundamental fairness, *Engle v. Isaac*, 456 U.S 107, 126 (1982), it has a duty not to use habeas law in a way that affirmatively works such unfairness, *see Francis v. Henderson*, 425 U.S. 536, 539 (1976) (explaining that there may be some circumstances where a federal court must forego the exercise of its habeas corpus power). In ordering supplemental memoranda last January, this Court posed the following question: "If [it found that Shepherd would be an armed career criminal under Seventh Circuit law], would it be a 'miscarriage of justice' for this court to refuse to enforce Sixth Circuit law with which it disagrees?" (Shepherd v. Julian, No. 17-1362 (7th Cir. Jan. 12, 2018), ECF No. 19 (ordering that the parties provide the court with memoranda answering three questions).) Petitioner hopes that this brief demonstrates precisely why the answer to that question must be yes.

A district court in the Sixth Circuit enhanced Shepherd's sentence, and now the Sixth Circuit recognizes that such an enhancement is unlawful. If this Court holds that Shepherd is an armed career criminal, and consequently denies him relief, it will be papering over a fundamental defect in Shepherd's sentence—a true miscarriage of justice. *Cf. United States v. Addonizio*, 442 U.S. 178, 187 (1979). Shepherd will remain imprisoned for longer than he should. *See United States v. Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017) (stating that "[a]dditional months in prison are not simply numbers. Those months have exceptionally severe consequences for the incarcerated individual."); *United States v. Paladino*, 401 F.3d

471, 483 (7th Cir. 2005) (explaining that "[i]t is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person."); *Ex parte Lange*, 18 Wall. 163, 176–77 (1874) (holding that the Constitution prohibits a court from imposing a sentence greater than what the legislature authorized). If his sentence was imposed or reviewed in the Sixth Circuit today, Shepherd would receive a remedy. Here, and now, the privilege of habeas corpus guarantees him more than an arbitrary denial of relief solely because of his confinement in this circuit.

CONCLUSION

For the aforementioned reasons, this Court should grant Shepherd's petition for a writ of habeas corpus under 28 U.S.C. § 2241, and reverse and remand to the trial court with whatever conditions it deems appropriate. If this Court chooses not to do so, however, it should at a minimum order the transfer of this case to the Western District of Kentucky for a resentencing within that court's jurisdiction.

Respectfully submitted,

Joshua E. Shepherd
Petitioner

By: /s/ SARAH O'ROURKE SCHRUP
Attorney

JOHN N. PAVLETIC
Senior Law Student
BRENDAN J. GERDES
Senior Law Student
CLAUDIA T. BROKISH
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Petitioner
JOSHUA E. SHEPHERD

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,232 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

/s/ Sarah O'Rourke Schrup
Attorney

JOHN N. PAVLETIC
Senior Law Student
BRENDAN J. GERDES
Senior Law Student
CLAUDIA T. BROKISH
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Petitioner
JOSHUA E. SHEPHERD

Dated: March 20, 2018

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Petitioner, Joshua E. Shepherd, hereby certify that I electronically filed this brief and appendices with the clerk of the Seventh Circuit Court of Appeals on March 20, 2018, which will send notice of the filing to counsel of record in the case.

/s/ Sarah O'Rourke Schrup
Attorney

JOHN N. PAVLETIC
Senior Law Student
BRENDAN J. GERDES
Senior Law Student
CLAUDIA T. BROKISH
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Petitioner
JOSHUA E. SHEPHERD

Dated: March 20, 2018

CIRCUIT RULE 30(d) STATEMENT

I, the undersigned, counsel for Petitioner, Joshua E. Shepherd, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

/s/ Sarah O'Rourke Schrup
Attorney

JOHN N. PAVLETIC
Senior Law Student
BRENDAN J. GERDES
Senior Law Student
CLAUDIA T. BROKISH
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Petitioner
JOSHUA E. SHEPHERD

Dated: March 20, 2018

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSHUA E. SHEPHERD, Petitioner-Appellant, v. STEPHEN JULIAN, Respondent-Appellee.	))))))))))	USCA No. 17-1362 Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division USDC No. 2:17-cv-00026 Hon. Larry J. McKinney, *Judge*.

STIPULATED MOTION TO REVERSE AND REMAND

Respondent, by counsel, Josh J. Minkler, United States Attorney for the Southern District of Indiana, and Bob Wood, Assistant United States Attorney, files this stipulated motion on behalf of the parties. Specifically, the parties request that the Court reverse the decision of the district court, and remand with instructions to grant Shepherd's habeas petition under 28 U.S.C. § 2241 and send the case to the district of conviction for resentencing. In support of that request, the parties stipulate as follows:

1. Given the specific circumstances of this case, Joshua Shepherd's waiver of his right to collaterally challenge his Armed Career Criminal Act (ACCA) status was not knowing and voluntary. *See United States v. Chapa*, 602 F.3d 865, 868 (7th Cir. 2010); *see also* Fed. R. Crim. P. 11(b)(1)(N). His colloquy with the district court reasonably would have led him to believe that he had retained the right to challenge his ACCA status in a later forum.

Moreover, the record contains no indication that either the district judge or the parties explained to him the difference between his appeal rights and his collateral challenge rights. Indeed, the court never mentioned Shepherd's collateral waiver.

2. While Shepherd's district court of conviction enforced the waiver contained in his plea agreement at an earlier stage of collateral review, neither that court nor the Sixth Circuit passed on the voluntariness question the parties believe is central here. The parties agree that the sentencing judge's comments strongly suggested that Shepherd maintained an open-ended right to challenge his ACCA status, and Shepherd likely relied on those comments. *See United States v. Sura*, 511 F.3d 654, 659 (7th Cir. 2007); *United States v. Wood*, 378 F.3d 342, 349 (4th Cir. 2004). That set of facts, coupled with the rule that ambiguities such as those present here should be construed in a defendant's favor, *see United States v. Alcala*, 678 F.3d 574, 577 (7th Cir. 2012), render this an inappropriate case to press the law of the case doctrine. Accordingly, the Court should not enforce the written waiver in Shepherd's plea agreement.

3. With waiver set to one side, the remaining question is whether Shepherd's claim is appropriately addressed under § 2241. *See In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998). The parties agree that *Mathis v. United States*, 136 S. Ct. 2243 (2016), has retroactive effect in this case. It

is equally clear that, to the extent *Mathis* articulates an "old" rule, Shepherd nonetheless could not have relied on that rule in the Sixth Circuit prior to *Mathis*. (Appellant's Brief at 27-31.) Furthermore, *Mathis* concerns a statutory rule, not a constitutional one. Finally, the likelihood that Shepherd will not qualify for ACCA's mandatory minimum at resentencing supports his claim of a miscarriage of justice. *See Light v. Caraway*, 761 F.3d 809, 813 (7th Cir. 2014). Accordingly, § 2241 is an appropriate vehicle for addressing the claim.[1]

4. While case law in the Sixth Circuit suggests that Shepherd no longer possesses the requisite predicates for ACCA status and thus compels the parties to join in this stipulation, *see United States v. Stitt*, 860 F.3d 854, 860, 862 (6th Cir.) (*en banc*); *id.* at 874 (White, J., concurring), the merits of Shepherd's ACCA status will ultimately be determined at a resentencing in his district of conviction under the most current governing law at that time.

5. For all of these reasons, the parties request that the Court reverse the decision of the district court and remand with instructions to

[1] In one recent case, the Department of Justice adopted a revised view of the availability of relief under § 2241. *See* Brief in Op., *McCarthan v. Collins*, No. 17-85 (U.S. filed Oct. 30, 2017). The government notes that view here but does not advance an argument along those lines, given that Circuit precedent squarely supports Shepherd's claim in this case.

grant Shepherd's petition and send the matter back to his district of conviction for resentencing.

6. The undersigned counsel has discussed this motion with counsel for Shepherd, who has agreed to the stipulation.

Respectfully submitted,

JOSH J. MINKLER
United States Attorney

By: s/ Bob Wood
Bob Wood
Chief, Appeals Division

CERTIFICATE OF SERVICE

I certify that on December 15, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

All participants in the case are registered in CM/ECF and service will be accomplished by the CM/ECF system to the following:

Sarah O'Rourke Schrup
BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
s-schrup@law.northwestern.edu
Attorney for Petitioner-Appellant

s/ Bob Wood
Bob Wood
Chief, Appeals Division
Office of the United States Attorney
10 West Market Street, Suite 2100
Indianapolis, Indiana 46204-3048
Telephone: (317) 229-2434
Email: Bob.Wood@usdoj.gov