No. 18-9495

IN THE SUPREME COURT OF THE UNITED STATES

JASON JONES, PETITIONER

v.

MARTHA UNDERWOOD, WARDEN

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground cognizable on collateral review, with "second or successive" attacks limited to certain claims that indicate factual innocence or that rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. 2255(h). Under 28 U.S.C. 2255(e), an "application for a writ of habeas corpus [under 28 U.S.C. 2241] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained * * * unless it * * * appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

The question presented is whether petitioner is entitled to seek federal habeas corpus relief under Section 2241 based on his claim that his Missouri second-degree burglary convictions are not violent felonies under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), when the merits of such a claim remain unsettled in both the circuit where petitioner was convicted and the circuit where petitioner is confined.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Kan.):

United States v. Jones, No. 11-cr-10131 (Mar. 2, 2015)

Jones v. United States, No. 14-cv-1371 (Mar. 23, 2015)

United States District Court (C.D. Cal.):

Jones v. Langford, No. 17-cv-438 (Aug. 17, 2017)

United States District Court (N.D. Tex.):

Jones v. Underwood, No. 18-cv-1961 (Oct. 12, 2018)

United States Court of Appeals (10th Cir.):

United States v. Jones, No. 12-3261 (July 25, 2013)

United States v. Jones, No. 15-3063 (July 20, 2015)

In re: Jones, No. 16-3296 (Oct. 25, 2016)

United States Court of Appeals (5th Cir.):

Jones v. Underwood, No. 18-11405 (Apr. 26, 2019)

Supreme Court of the United States:

Jones v. United States, No. 13-6741 (Nov. 4, 2013)

Jones v. United States, No. 15-7388 (Jan. 19, 2016)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2)[1] is not published in the Federal Reporter but is reprinted at 768 Fed. Appx. 293. The order of the district court (Pet. App. 7) is not published in the Federal Supplement but is available at 2018 WL 4955228.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2019. The petition for a writ of certiorari was filed on May 21,

[1] The appendix to the petition for a writ of certiorari is not paginated. This brief refers to the pages in the appendix in consecutive order.

2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Kansas, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1; Pet. App. 1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed, 530 Fed. Appx. 747, and this Court denied a petition for a writ of certiorari, 571 U.S. 1003. Petitioner subsequently filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, which the district court denied. 11-cr-10131 D. Ct. Doc. 83 (Mar. 2, 2015). The court of appeals denied petitioner's request for a certificate of appealability (COA) and dismissed his appeal, 608 Fed. Appx. 712, and this Court again denied a petition for a writ of certiorari, 136 S. Ct. 918. The court of appeals later denied petitioner's application for permission to file a second or successive motion for relief under Section 2255. See 10/25/16 C.A. Order (C.A. Order).[2] Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, which the district court dismissed for lack of jurisdiction. Pet. App. 7. The court of appeals affirmed. Id. at 1-2.

[2] All references to documents from the court of appeals are to No. 16-3296.

1. Petitioner stole a 12-gauge shotgun during a home burglary and later sold the shotgun to undercover federal agents. 530 Fed. Appx. at 749. In 2012, petitioner pleaded guilty, without a plea agreement, to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). 530 Fed. Appx. at 749; Judgment 1.

A conviction for violating 18 U.S.C. 922(g)(1) carries a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, a defendant has at least three prior convictions "for a violent felony or a serious drug offense" committed on different occasions, the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1). The ACCA defines "violent felony" to include, among other things, "any crime punishable by imprisonment for a term exceeding one year" that "is burglary." 18 U.S.C. 924(e)(2)(B)(ii).

The Probation Office determined that petitioner had four prior convictions for violent felonies, three of which were for Missouri second-degree burglary. See Presentence Investigation Report (PSR) ¶¶ 35, 45, 47-48, 58. Over petitioner's objection, the district court agreed that all three Missouri convictions were violent felonies under the ACCA and sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. See 11-cr-10131 D. Ct. Doc. 42 (July 18, 2012); Judgment 2-3. The court of appeals affirmed, 530 Fed. Appx. at 749-755,

and this Court denied a petition for a writ of certiorari, 571 U.S. 1003.

2. On November 7, 2014, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. 11-cr-10131 D. Ct. Doc. 75. Petitioner contended, as he had on direct appeal, that his ACCA sentence was improper because his prior convictions had not been proved to a jury beyond a reasonable doubt. 11-cr-10131 D. Ct. Doc. 83, at 1-2; see 530 Fed. Appx. at 754. The district court denied the motion, 11-cr-10131 D. Ct. Doc. 83, at 2-3, and the court of appeals denied petitioner's request for a COA and dismissed his appeal, 608 Fed. Appx. 712. This Court denied a petition for a writ of certiorari, 136 S. Ct. 918.

In 2016, petitioner sought leave from the Tenth Circuit to file a second or successive Section 2255 motion. 9/27/16 C.A. Appl. (C.A. Appl.). Under 28 U.S.C. 2255(h), a movant may file a successive Section 2255 motion only if the court of appeals finds that the movant has made a prima facie showing that the motion contains either (1) "newly discovered evidence" that strongly indicates that the movant was not guilty of the crime, or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." As relevant here, petitioner argued that his Missouri burglary convictions were not convictions for violent felonies under the ACCA in light of this Court's decision in Mathis

v. United States, 136 S. Ct. 2243 (2016). C.A. Appl. 2. Mathis stated that if a state burglary statute "sets out a single (or 'indivisible') set of elements to define a single crime" that is broader than "generic burglary," the offense it defines is not "burglary" under the ACCA. 136 S. Ct. at 2248.

The Tenth Circuit denied petitioner's application and determined that petitioner was not entitled to authorization to raise his Mathis claim in a second or successive Section 2255 motion. C.A. Order 4-5. The court explained that petitioner "cannot bring a second or successive § 2255 motion based on the holding in Mathis because that case did not announce a new rule of law." Id. at 5. The court observed that, in Mathis, this Court had "referr[ed] to 'longstanding principles' announced in prior precedential cases and explain[ed] that * * * Taylor v. United States, 495 U.S. 575 (1990), 'set out the essential rule governing ACCA cases more than a quarter century ago.'" Ibid. (quoting Mathis, 136 S. Ct. at 2251). The court of appeals further explained that, "in any event," this Court "has not made the rule in Mathis retroactive to cases on collateral review." Ibid.

3. Three months after the Tenth Circuit denied him leave to file a second or successive Section 2255 motion, petitioner filed an application for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Central District of California, the district court of the district where he was then in custody. 17-cv-438 D. Ct. Doc. 14, at 1-2 (July 10, 2017).

Petitioner again contended that his ACCA sentence was improper on the theory that his prior Missouri burglary convictions were no longer violent felonies in light of Mathis. Id. at 3-4.

Petitioner argued that the district court had jurisdiction to entertain his habeas application under the so-called "saving clause" in 28 U.S.C. 2255(e). 17-cv-438 D. Ct. Doc. 1, at 3 (Jan. 19, 2017). Section 2255(e) provides that, ordinarily, a habeas application under Section 2241 by "a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained." 28 U.S.C. 2255(e). But its saving clause creates an exception when it "appears that the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." Ibid. Petitioner argued that Section 2255 was "inadequate or ineffective" in his case, observing that his statutory claim under Mathis was not the type of constitutional or factual-innocence claim for which a second or successive claim may be allowed under 28 U.S.C. 2255(h). 17-cv-438 D. Ct. Doc. 1, at 4. Petitioner further argued that he satisfied the requirements for Section 2255(e)'s saving clause on the theory that he was "innocent" of his ACCA sentence based on Mathis and lacked an opportunity to raise that claim earlier because his first Section 2255 motion was denied before this Court issued Mathis. 17-cv-438 D. Ct. Doc. 14, at 5-6 (citation omitted).

The magistrate judge recommended that petitioner's habeas application be dismissed for lack of jurisdiction. 17-cv-438

D. Ct. Doc. 14, at 4-16. Although the magistrate judge accepted the proposition that a claim based on a new rule of statutory interpretation might be cognizable under the saving clause, the magistrate judge determined that petitioner's Mathis claim did not qualify for multiple reasons. First, the magistrate judge observed that petitioner's claim "relate[d] only to his enhanced [ACCA] sentence," not to his conviction. Id. at 8. Second, the magistrate judge found that "petitioner did not lack an unobstructed procedural shot to present his Mathis claim" on direct appeal or in his first Section 2255 motion. Id. at 9 (capitalization and emphasis omitted); see id. at 9-10. The magistrate judge observed that, in denying petitioner's application to file a second or successive Section 2255 motion, the Tenth Circuit had determined that Mathis did not "represent[] a change in the law" because "the decision was based on longstanding principles." Id. at 10. The magistrate judge found that because the basis for petitioner's claim "existed long before Mathis was decided," petitioner could have raised the same challenge to his ACCA sentence "on direct appeal or in his first section 2255 motion (albeit without citation to Mathis)." Id. at 11-12.

After petitioner filed no objections to the magistrate judge's report and recommendation, the district court accepted and adopted the magistrate judge's findings, conclusions, and

recommendations and dismissed petitioner's habeas application. 17-cv-438 D. Ct. Doc. 15 (Aug. 17, 2017)

4. On July 30, 2018, petitioner filed another application for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Northern District of Texas, the district court of the district where he is now confined. 18-cv-1961 D. Ct. Doc. 3. Petitioner again raised a claim that his Missouri burglary convictions no longer qualify as "violent felon[ies]" in light of this Court's decision in Mathis and that, as a result, he was not properly subject to an enhanced sentence under the ACCA. 18-cv-1961 D. Ct. Doc. 4, at 1-2, 12 (July 30, 2018).

Before the government had made an appearance in the case or filed a response to the application, the district court dismissed petitioner's habeas application for lack of statutory jurisdiction. Pet. App. 7; see No. 18-cv-1961 Docket (N.D. Tex.). Adopting the findings and conclusions of a magistrate judge who issued a report and recommendation regarding the application, the court determined that petitioner's claim "is not reviewable" under the habeas saving clause and "can only be raised in a § 2255 motion filed in the sentencing court." Pet. App. 5; see id. at 7. The court explained that "[a] claim that a petitioner is innocent of the career offender enhancement under the ACCA does not fall with[in] the savings clause of § 2255(e)" and that, in any event,

"Mathis did not announce a new rule of law made retroactively applicable to cases on collateral review." Ibid.

The court of appeals affirmed, also without the government's participation in the case. Pet. App. 1-2. The court explained that, under Reyes-Requena v. United States, 243 F.3d 893 (5th Cir. 2001), petitioner's habeas application would be cognizable under the saving clause only if petitioner could show that the application stated a claim that (1) was "based on a retroactively applicable Supreme Court decision" establishing that petitioner "may have been convicted of a nonexistent offense," and (2) "was foreclosed by circuit law at the time when the claim should have been raised in [his] trial, appeal, or first § 2255 motion." Pet. App. 2 (quoting Reyes-Requena, 243 F.3d at 904) (brackets in original). The court found that, "[a]s [he] concede[d]," petitioner could not make that showing. Ibid. The court observed that it had "repeatedly held a district court lacks jurisdiction to review a § 2241 petition that challenges the validity of a sentencing enhancement," and the court of appeals declined "to expand the Reyes-Requena test." Ibid.

ARGUMENT

Petitioner contends (Pet. 8-15) that the saving clause in 28 U.S.C. 2255(e) permits him to challenge his enhanced sentence under the ACCA in an application for a writ of habeas corpus under 28 U.S.C. 2241 based on this Court's intervening decision in Mathis v. United States, 136 S. Ct. 2243 (2016). Further review is

unwarranted. This Court recently denied a petition for a writ of certiorari filed by the government asking this Court to resolve a circuit conflict regarding whether the saving clause allows a federal prisoner who has been denied Section 2255 relief to challenge his conviction or sentence in a habeas application based on an intervening, retroactively applicable decision of statutory interpretation.[3] See United States v. Wheeler, 139 S. Ct. 1318 (2019) (No. 18-420). Although the government continues to believe that the issue presented in Wheeler merits this Court's consideration in an appropriate case, the same considerations that would have supported denial of the petition in Wheeler would apply here as well. Furthermore, unlike in Wheeler, the court of appeals reached the right result here, and for several reasons, petitioner's case is not a suitable vehicle for addressing the availability of habeas relief under the saving clause.

1. The lower courts correctly declined to entertain petitioner's collateral attack on his sentence under Section 2241. Petitioner focuses his argument (Pet. 8-15) on whether Section 2255(e)'s saving clause permits him to challenge a sentence enhancement, but even if he were challenging his conviction, the saving clause would provide no basis for him to raise a statutory claim.

[3] Another petition for a writ of certiorari raising a similar issue is currently pending. See Walker v. English, No. 19-52 (filed July 8, 2019).

a. Section 2255 provides the general mechanism for a federal prisoner to obtain collateral relief from his conviction or sentence. 28 U.S.C. 2255(a). Subject to procedural limitations, such a prisoner may file a single motion under Section 2255 that raises any ground for collateral relief. See ibid. In 1996, Congress passed and the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220, which restricted the grounds on which federal prisoners may file second or successive Section 2255 motions. AEDPA limited the availability of such motions to cases involving either (1) persuasive new evidence that the prisoner was factually not guilty of the offense or (2) a new rule of constitutional law made retroactive by this Court to cases on collateral review. 28 U.S.C. 2255(h)(1) and (2); cf. Tyler v. Cain, 533 U.S. 656, 661-662 (2001) (interpreting the state-prisoner analogue to Section 2255(h)). AEDPA did not, however, provide for successive Section 2255 motions based on intervening statutory decisions.

That omission does not imply that a prisoner may instead rely on a writ of habeas corpus under 28 U.S.C. 2241 to seek relief based on an intervening statutory decision. Under the saving clause of Section 2255(e), a prisoner may seek habeas relief under Section 2241 only if the "remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). That language indicates a focus on whether a

particular challenge to the legality of a prisoner's detention was cognizable under Section 2255, not on the likelihood that the challenge would have succeeded in a particular court at a particular time.

As the Eleventh Circuit explained in McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, cert. denied, 138 S. Ct. 502 (2017), "'[t]o test' means 'to try,'" and "[t]he opportunity to test or try a claim * * * neither guarantees any relief nor requires any particular probability of success; it guarantees access to a procedure." Id. at 1086 (citation omitted). "In this way, the clause is concerned with process -- ensuring the petitioner an opportunity to bring his argument -- not with substance -- guaranteeing nothing about what the opportunity promised will ultimately yield in terms of relief." Prost v. Anderson, 636 F.3d 578, 584 (10th Cir. 2011) (Gorsuch, J.) (emphasis omitted), cert. denied, 565 U.S. 1111 (2012).

This case illustrates the point. On both direct review and his initial motion under Section 2255, petitioner had the opportunity to raise, and be heard on, his claim that his Missouri second-degree burglary offenses were not violent felonies under the ACCA. Although the Tenth Circuit had adverse panel precedent, see United States v. Phelps, 17 F.3d 1334, 1341-1342, cert. denied, 513 U.S. 844 (1994), that did not foreclose petitioner from pressing the issue -- just as the defendant in United States v. Naylor, 887 F.3d 397 (8th Cir. 2018) (en banc), who was successful

in overturning the Eighth Circuit's adverse panel precedent on Missouri second-degree burglary, did. Cf. Bousley v. United States, 523 U.S. 614, 623 (1998) ("[F]utility cannot constitute cause [to excuse a procedural default] if it means simply that a claim was unacceptable to that particular court at that particular time.") (citation and internal quotation marks omitted). The arguments that the Eighth Circuit accepted in Naylor were available well before Mathis, which made clear that it was merely applying "longstanding principles" and reiterating "exactly th[e] point" this Court "ha[d] already made" in earlier ACCA cases. 136 S. Ct. at 2251, 2253. Indeed, when the Tenth Circuit denied petitioner's application for leave to file a second or successive Section 2255 motion, that court recognized that Mathis "did not announce a new rule of law" and instead "referr[ed] to 'longstanding principles' announced in prior precedential cases." C.A. Order 5 (citation omitted). And even if Mathis had set forth a new rule, nothing prevented petitioner from advocating for that rule in his direct appeal or in his initial Section 2255 motion -- as the defendant in Mathis itself did.

b. Treating the remedy in Section 2255 as "inadequate or ineffective" to test the legality of petitioner's confinement would place Section 2255(e) at cross-purposes with Section 2255(h). The latter provision allows "second or successive" motions under Section 2255 only when a prisoner relies on "newly discovered evidence" that strongly indicates his factual

innocence, 28 U.S.C. 2255(h)(1), or a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," 28 U.S.C. 2255(h)(2), neither of which encompasses petitioner's claim here. The logical inference from the language Congress drafted is that Congress intended subsections (h)(1) and (2) to define the only available grounds on which a federal inmate who has previously filed a Section 2255 motion can obtain further collateral review of his conviction or sentence. "The saving clause does not create a third exception." McCarthan, 851 F.3d at 1090 (emphasis omitted).

In particular, the most natural reason for Congress to have included the specific phrase "of constitutional law" in Section 2255(h)(2) was to make clear that second or successive motions based on new nonconstitutional rules cannot go forward, even when this Court has given those rules retroactive effect. The Congress that enacted AEDPA could not have anticipated the exact statutory claims that have arisen in the ensuing two decades, but necessarily would have understood that statutory claims of some kind would be raised. It would be anomalous to characterize the Section 2255 remedy as "inadequate or ineffective" when the unavailability of Section 2255 relief in a particular case results from an evident congressional choice concerning the appropriate balance between finality and additional error correction.

Other provisions within Section 2255 reinforce the deliberateness of Congress's design. Under Section 2255(a), a

federal prisoner may file an initial motion under Section 2255 "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. 2255(a) (emphasis added); see Davis v. United States, 417 U.S. 333, 345-347 (1974). The time limit for seeking Section 2255 relief likewise anticipates nonconstitutional claims, allowing a motion to be filed within one year after "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," 28 U.S.C. 2255(f)(3), without limitation to decisions of constitutional law. See Dodd v. United States, 545 U.S. 353, 357 (2005).

Section 2255(h), however, contains a similarly worded provision that does limit Section 2255 relief following a prior unsuccessful motion to claims relying on intervening decisions of "constitutional law" made retroactive by this Court. 28 U.S.C. 2255(h)(2). That contrast strengthens the inference that Congress deliberately intended to preclude statutory claims following an initial unsuccessful Section 2255 motion. See Prost, 636 F.3d at 585-586, 591; cf. Russello v. United States, 464 U.S. 16, 23 (1983) (presuming that Congress's choice of different language in nearby provisions of same statute is deliberate). Petitioner's reading of the saving clause would allow such statutory claims precisely when -- indeed, precisely because -- Section 2255(h) does not.

That reading would render AEDPA's restrictions on second or successive motions largely self-defeating. Cf. United States v. Fausto, 484 U.S. 439, 453 (1988) (referring to the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination").

By contrast, the government's interpretation of the statute respects the balance Congress struck between finality and error-correction, while still leaving the saving clause with meaningful work to do. For example, the saving clause ensures that some form of collateral review is available if a federal prisoner seeks "to challenge the execution of his sentence, such as the deprivation of good-time credits or parole determinations." McCarthan, 851 F.3d at 1093; see id. at 1081. Such challenges are not cognizable under Section 2255, which is limited to attacks on the sentence or the underlying conviction. "The saving clause also allows a prisoner to bring a petition for a writ of habeas corpus when the sentencing court is unavailable," such as when a military court martial "has been dissolved." Id. at 1093; see Prost, 636 F.3d at 588.

c. Petitioner's reading of the saving clause also would have the practical effect of granting federal inmates greater latitude to pursue claims for collateral relief based on intervening statutory decisions than to pursue the constitutional claims that Section 2255(h)(2) specifically authorizes. For example, the requirement that a second or successive Section 2255

motion be certified by the court of appeals to ensure compliance with the strictures of subsection (h) does not apply to an application for a writ of habeas corpus under the saving clause. And a habeas application is subject neither to AEDPA's one-year limitations period, 28 U.S.C. 2255(f), nor to AEDPA's procedure for obtaining a COA if relief is denied by the district court, 28 U.S.C. 2253(c)(1). Petitioner's interpretation of the statute thus perversely provides "a superior remedy" to prisoners with purely statutory claims than to those with constitutional claims. McCarthan, 851 F.3d at 1091. The Congress that enacted AEDPA in 1996 could not have intended that result when it enacted a provision designed to limit the availability of postconviction relief by redefining the point at which finality concerns outweigh any interest in additional error correction.

Furthermore, allowing an inmate's second or successive collateral attack to proceed by way of habeas corpus subverts "the legislative decision of 1948" that is reflected in Section 2255 -- namely, that a federal inmate's collateral challenge to his conviction or sentence should, where possible, proceed before the original sentencing court. Webster v. Daniels, 784 F.3d 1123, 1149 (7th Cir. 2015) (en banc) (Easterbrook, J., dissenting). Congress created Section 2255 to channel post-conviction disputes about the legality of a conviction or sentence away from the district of confinement and into the district of conviction and sentencing. See Hill v. United States, 368 U.S. 424, 427-428

(1962); United States v. Hayman, 342 U.S. 205, 219 (1952). Allowing a federal inmate to bring claims in the district of his confinement "resurrects the problems that section 2255 was enacted to solve, such as heavy burdens on courts located in districts with federal prisons." McCarthan, 851 F.3d at 1092.

Although adherence to the statutory text may lead to "harsh results in some cases," courts are "not free to rewrite the statute that Congress has enacted." Dodd, 545 U.S. at 359. Ultimately, "[i]t is for Congress, not this Court, to amend the statute" if the legislature believes that the narrowly drawn provisions found in Section 2255(h) "unduly restrict[] federal prisoners' ability to file second or successive motions." Id. at 359-360. To that end, the Department of Justice has supported efforts to introduce legislation that would enable some prisoners to benefit from later-issued, non-constitutional rules announced by this Court. And in the interim, such prisoners are entitled to seek executive clemency, one recognized ground for which is the "undue severity" of a prisoner's sentence. U.S. Dep't of Justice, Justice Manual § 9-140.113 (Apr. 2018).

2. A division of authority exists among the courts of appeals on the issue here. The Tenth and Eleventh Circuits have held that habeas relief under the saving clause is unavailable

based on a retroactive rule of statutory construction. See McCarthan, 851 F.3d at 1086; Prost, 636 F.3d at 590-591.

By contrast, nine courts of appeals -- including the Fifth Circuit, where petitioner here sought habeas relief -- would permit such relief in some circumstances. See Pet. at 24 n.2, Wheeler, supra (No. 18-420). The more expansive view of the saving clause in those circuits generally requires a prisoner to demonstrate a "material change in the applicable law" since his initial Section 2255 motion that undermines his conviction -- for example, a controlling judicial decision indicating that his conduct was not in fact a crime on a ground that previously was foreclosed by controlling precedent. Alaimalo v. United States, 645 F.3d 1042, 1047-1048 (9th Cir. 2011) (citation omitted); see, e.g., Triestman v. United States, 124 F.3d 361, 379 (2d Cir. 1997) (similar). At least three of the nine circuits have extended that concept to encompass not just the conviction, but also the sentence, with at least one permitting a claim that a statutory minimum is no longer applicable. See United States v. Wheeler, 886 F.3d 415, 427-428 (4th Cir. 2018), cert. denied, 139 S. Ct. 1318 (2019); see also Hill v. Masters, 836 F.3d 591, 595-596 (6th Cir. 2016); Brown v. Rios, 696 F.3d 638, 640-641 (7th Cir. 2012). Those circuits generally require the sentencing error to be "sufficiently grave to be deemed a miscarriage of justice or a fundamental defect."

Hill, 836 F.3d at 595; see Brown v. Caraway, 719 F.3d 583, 586 (7th Cir. 2013).

But notwithstanding that circuit conflict and its importance, this Court recently declined to review the issue when it was raised in the government's petition for a writ of certiorari in Wheeler, supra (No. 18-420), in March. The division of authority on whether the saving clause is ever available for statutory claims like petitioner's is unchanged since that time. Indeed, the court of appeals panel here simply followed its previous holding in Reyes-Requena v. United States, 243 F.3d 893 (5th Cir. 2001), as it was bound to do "absent an intervening change in the law, such as by a statutory amendment, or th[is] Court, or [the] en banc court." United States v. Traxler, 764 F.3d 486, 489 (5th Cir. 2014) (citation omitted); see Pet. App. 2 (citing Traxler, 764 F.3d at 489). The circuit conflict therefore does not warrant this Court's review any more than it did six months ago. Petitioner fails to identify a sound reason for granting certiorari in this case notwithstanding the Court's recent denial of the petition for a writ of certiorari in Wheeler.

3. In any event, for several reasons, this case would be an unsuitable vehicle for addressing whether a federal prisoner may use the saving clause to seek habeas relief based on an intervening decision that narrows the scope of a federal criminal statute. As noted, even circuits that construe the saving clause broadly have generally required a prisoner to show (1) that the prisoner's claim

was foreclosed by (erroneous) precedent at the time of the prisoner's first motion under Section 2255; and (2) that an intervening decision of statutory interpretation, made retroactive on collateral review, has since established that the prisoner is in custody for an act that the law does not make criminal, has been sentenced in excess of an applicable maximum under a statute or under a mandatory Sentencing Guidelines regime, or has received an erroneous statutory minimum sentence. See, e.g., Wheeler, 886 F.3d at 429-434; Hill, 836 F.3d at 594-600; Rios, 696 F.3d at 640-641. It is not clear that petitioner can satisfy those requirements.

a. This case presents complications that Wheeler did not. There, the Fourth Circuit allowed relief under the saving clause based on its own updated circuit law making unambiguously clear that, as a statutory matter, the sentencing court had erroneously applied a statutory minimum. See 886 F.3d at 429 (extending the availability of saving-clause relief to prisoners relying on "a change in this circuit's controlling law"). Here, however, petitioner identifies no decision from the Fifth Circuit (his circuit of confinement) or the Tenth Circuit (his circuit of conviction) establishing that his detention is unlawful. Instead, petitioner principally relies (Pet. 8-9 & n.2) on the Eighth Circuit's reasoning in Naylor, supra -- and nothing requires the Fifth or Tenth Circuit to agree with that decision. Cf. United States v. Geozos, 870 F.3d 890, 901 (9th Cir. 2017) (disagreeing

with the Eleventh Circuit's conclusion that Florida robbery is a violent felony under the ACCA's "elements clause") (citation omitted), abrogated by Stokeling v. United States, 139 S. Ct. 544 (2019).

That aspect of petitioner's claim is important for two reasons. First, it would require this Court to decide as a threshold matter whether, to establish the "miscarriage of justice" or "fundamental defect" required for saving-clause relief on the basis of a change in circuit precedent, Hill, 836 F.3d at 595, a habeas applicant must demonstrate the unlawfulness of his detention under the law of the circuit of conviction, the law of the circuit of confinement, or both. That is an underdeveloped issue in the courts of appeals that could complicate this Court's review of the question presented here. Compare, e.g., Chazen v. Marske, No. 18-3268, 2019 WL 4254295 (7th Cir. Sept. 9, 2019), slip op. 15-16 (reserving question but applying the law of the circuit of confinement based on parties' agreement), with Hahn v. Moseley, 931 F.3d 295, 301 (4th Cir. 2019) (applying the law of the circuit of conviction when the government did not argue otherwise); see also, e.g., In re Davenport, 147 F.3d 605, 612 (7th Cir. 1998) (explaining that saving-clause relief is unavailable if there is "a difference between the law in the circuit in which the prisoner was sentenced and the law in the circuit in which he is incarcerated").

Second, petitioner's entitlement to relief depends on a view of the saving clause expansive enough to encompass the right to ask the Fifth Circuit to decide an issue that it has not yet addressed -- namely, whether Missouri second-degree burglary is a violent felony under the ACCA. It is not clear that any circuit would privilege prisoners convicted out-of-circuit over prisoners convicted in-circuit by allowing them to invoke the saving clause to obtain merits review in the first instance of an unsettled statutory issue. See Davenport, 147 F.3d at 612; cf. Hahn, 931 F.3d at 301 (allowing such relief when the government did not contest the availability of relief on that ground). Indeed, the Seventh Circuit has explained that saving-clause relief is categorically unavailable "[w]hen there is a circuit split" because "there is no presumption that the law in the circuit that favors the prisoner is correct, and hence there is no basis for supposing him unjustly convicted." Davenport, 147 F.3d at 612. Similar reasoning would also have force when no circuit conflict has yet developed, but the circuit decision on which a petitioner relies is subject to reasonable dispute. As explained below, Naylor is such a decision.

b. In his habeas application, petitioner claimed that his convictions for Missouri second-degree burglary are not violent felonies under the ACCA. At the time of those convictions, Missouri defined second-degree burglary as "knowingly enter[ing] unlawfully or knowingly remain[ing] unlawfully in a building or

inhabitable structure for the purpose of committing a crime therein." Mo. Ann. Stat. § 569.170 (West 1979). In 1994, the Tenth Circuit held in Phelps, supra, that the Missouri burglary offense is a violent felony under the ACCA because it "contain[s] the essential elements of a generic burglary" described in Taylor v. United States, 495 U.S. 575 (1990). 17 F.3d at 1341. Although the Eighth Circuit has since concluded in Naylor that "building or inhabitable structure" in Section 569.170 is indivisible and defines a crime broader than generic burglary, 887 F.3d at 407, the Eighth Circuit did not have the benefit of this Court's decision in United States v. Stitt, 139 S. Ct. 399 (2018), which makes clear that generic burglary encompasses a substantial range of inhabitable structures that are not traditional "buildings," id. at 407 (citation omitted). And as the dissenters in Naylor observed, Missouri case law and charging practice can be read to support a determination that "building" and "inhabitable structure" in fact are elements, not means, and that the statute is therefore divisible into separate crimes. See 887 F.3d at 411 (Shepherd, J.).

If the Tenth Circuit were to revisit its 1994 ruling in Phelps, consideration of those and other factors might well lead that court to find that Missouri second-degree burglary is divisible and that at least some versions of the offense are no broader than generic burglary. The Fifth Circuit, where petitioner is now confined, may reach the same conclusion if it addresses the

issue. In that event, petitioner -- whose Missouri burglary convictions all involved buildings, see PSR ¶¶ 45, 47-48 -- could not secure relief.

c. Finally, it bears mention that none of the issues here were briefed below; the government never filed even an appearance, must less a brief, in either the district court or the court of appeals. Although that need not, standing alone, impede the Court's review, it makes petitioner's case a less-than-ideal vehicle to answer the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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