No. 18-9495

IN THE SUPRME COURT OF THE UNITED STATES

JASON JONES, PETITIONER

v.

MARTHA UNDERWOOD, WARDEN

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jason Jones
Reg. No. 21370-031
Federal Correctional Institution
P.O. Box 9000
Seagoville Tx, 75159

Pro Se

RECEIVED
OCT 16 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

TABLE OF AUTHORITES

SUPREME COURT CASES

COURTS of APPEALS CASES

CONTINUED

INTRODUCTION

Petitioner Jones asks the Court to grant certiorari to resolve the split among the courts of appeals, vacate the judgment below, and remand his case with instructions that the lower courts address whether he can satisfy the savings clause criteria and if so, address whether his detention is unlawful in light of this Court's decision in Mathis v. United States, 136 S. Ct. 2243 (2016). The savings clause of 28 U.S.C. 2255(e) provides relief by way of 28 U.S.C. 2241 if the applicant can demonstrate that the remedy by the motion [Section 2255] is "inadequate or ineffective" to test the legality of his detention. 28 U.S.C. 2255(e). Nonetheless, the lower courts dismissed his Section 2241 because it concluded that the savings clause does not apply to alleged sentencing errors.

The Solicitor General agrees a division of authority exists among the courts of appeals on the issue currently presented. Response at 18. But, it maintains further review is unwarranted because 28 U.S.C. 2255(h)(2) limits Section 2255 relief following a prior unsuccessful motion to claims relying on intervening decisions of "constitutional law" made retroactively by this Court.

Petitioner Jones replies to suggest that, the Government's reading of Section 2255(e) would contradict the Constitution's Suspension Clause, which guarantess every person incarcerated here the right to seek habeas corpus relief to challenge an unlawful detention. U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless

when Cases of Rebellion or Invasion the Public Safety may require it."). Thus, if there is no path (as the Government contends) to challenge an unlawful detention, surely, the Suspension Clause is offended. And, at the same time, Congress did nothing to disturb the savings clause, and it remains a part of the law. It seems obvious that if Congress meant to bar all successive collateral attacks on convictions and sentences except for the two categories allowed by Section 2255(h), it would have simply repealed the savings clause. It did not.

A second or successive motion would be inadequate because, when this Court interprets a statute and applies its ruling retroactively, a prisoner is barred from relying on that interpretation merely because this Court decided the case after his first initial 2255 proceeding was done, Section 2255 has certainly proved inadequate or ineffective within the meaning of the savings clause.

Because the Suspension Clause requires consideration of these claims and yet Section 2255 otherwise does not allow them, Section 2255(e) must permit a prisoner to bring such claims in an application for writ of habeas corpus. And since Petitioner Jones seeks to rely on a retroactively applicable rule of statutory law that was not available when he filed his initial Section 2255, Section 2255(e) authorizes consideration of his claim.

ARGUMENT

I. THE SAVINGS CLAUSE OF SECTION 2255(e) PROVIDES RELIEF THROUGH SECTION 2241 FOR FEDERAL INMATES RAISING STATUTORY CLAIMS, AT LEAST, WHERE AN INTERVENING CHANGE OF STATUTORY INTERPRETATION BY THIS COURT THAT HAS RETROACTIVE EFFECT, ESTABLISHES THAT THE INMATE HAS BEEN CONVICTED OF A CRIME THAT IS NO LONGER CRIMINAL OR ESTABLISHES THAT HIS MINIMUM SENTENCE WAS ERRONEOUSLY IMPOSED

1. The Government contends that the lower courts correctly declined to entertain Petitioner's collateral attack on his sentence on whether Section 2255's savings clause permits him to challenge his sentence enhancement, but even if he were challenging his conviction the savings clause would provide no basis for him to raise a statutory claim. Response at 10-18.

a. The Government first notes, that the language indicates a focus on whether a particulr 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. Response at 11-12. However, the majority of the circuits holds that the language in Section 2255(e) indicates a focus on whether a particular challenge to the legality of a prisoner's detention would have succeeded had not his argument been foreclosed by circuit case law or Supreme Court precedent at the time of his direct appeal or initial Section 2255 motion. See United States v. Tyler, 732 F.3d 241, 246 (3d Cir. 2013)(savings clause may apply if "the petitioner is actually innocent, that is [if] the petitioner's conduct had been rendered non-criminal due to the Supreme Court decision [or] our own precedent construing the Supreme Court's decision."); Alaimalo v. United States, 636 F.3d 1092, 1097-98 (9th Cir. 2010)(For purposes of determining whether a claim was unavailable under § 2241, we look to whether controlling law in this circuit foreclosed petitioner's argument)(citation omitted); In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000)(a claim is not available when "settled law of this circuit or Supreme Court establishes the legality of conviction...")

(emhasis added); In re Davenport. 147 F.3d 605, 610 (7th Cir. 1998)("[A] procedure for postconviction relief can fairly be term inadequate when it is so configured as to deny a convicted defendant any opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense."): Williams v. Warden, Fed. Bureau of Prisons, 713 F.3d 1332, 1343 (11th Cir. 2013)(interpreting prior precedent to allow application of the savings clause "when a fundamental defect in sentencing occurred and petitioner [has] not had an opportunity to obtain judicial correction of that defect earlier" (internal quotation marks omitted)).

b. Next, the Government contends that Section 2255(h)(1) and (2) strengthens the inference that Congress deliberately intended to preclude statutory claims following an initial unsuccessful Section 2255 motion. Response at 13-19. However, if that were correct, it would contradict the Constitution's Suspension Clause, which guarantees every person incarceration here the right to seek the writ of habeas corpus to challenge an unlawful detention. U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion of Invasion the Public Satefy may require it."). If there is no path to challenge an unlawful sentence, surely the Suspension Clause is offended. Congress recognized this possibility when it enacted the time and number bars that make relief under § 2255 so difficult to obtain. To save Section 2255 from unconstitutionality, it enacted what is known as the savings clause. 28 U.S.C. 2255(e); see McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1122 (11th Cir. 2017 (en banc)(Rosenbaum, J., dissenting)("The savings clause serves as a failsafe mechanism to protect § 2255 from unconstitutionality by providing a substitute remedy for habeas corpus relief that § 2255 otherwise precludes but the Suspension Clause may require.").

The Government also contends that 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 and successive motions based on new nonconstitutional rules cannot go forward, even when this Court has given those rules retroactive effect. Response at 14. However, the savings clause provides: An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained... unless it also appears that the remedy by motion is inadequate or ineffective to test the legailty of his detention. 28 U.S.C. 2255(e). This text addresses instances in which a second or successive motion under Section 2255 would be inadequate or ineffective to test the legality of sentences imposed under 18 U.S.C. 924(e)(1) before Mathis v. United STates, 136 S. Ct. 2243 (2016). A second or successive would be inadequate because, an inmate would not even be allowed to bring one. See McCarthan, 851 F.3d at 1118 (Martin, J., dissenting) ("When the Supreme Court interprets a statute and applies its ruling retroactively, but a prisoner is barred from relying on that interpretation merely because the Supreme Court decided the case after his first § 2255 proceeding was done, § 2255 has certainly proved inadequate or ineffective within the meaning of the savings clause."(quotation marks and citation omitted)). Therefore, the savings clause's text permits federal inmates to raise statutory claims following unsuccessful Section 2255 motions. To hold otherwise, would rewrite Section 2255(e) and ignore its command. Lewis v. City of Chicago, 560 U.S. 205, 215 (2010)("It is not for us to rewrite the statute so that it covers...what we think is necessary to achieve what we think Congress really intended."); Antonin Scalia & Bryan A. Garner Reading Law: The Interpretation of Legal Text 56 (2012)("[T]he purpose [of a statute] must be derived from the text, not from extrinsic sources such a legislative history or an assumption about what the legal drafter's desires.").

Because the statutory text is clear, the Court must "enforce it according to its terms." Dodd v. United, 545 U.S. 353, 359 (2005). In addition, while it is correct that in 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220, to amend Section 2255 by adding (among other things) the Section 2255(h) limitation on filing more than one motion under that statute. At the same time, Congress did nothing to disturb the savings clause, and it remains a part of the law. It seems obvious that if Congress meant to barr all successive collateral attacks on convictions and sentences except for the two categories allowed by Section 2255(h), it would have simply repealed the savings clause. It did not. See McCarthan, 851 F.3d at 1117 (Martin, J., dissenting). Therefore, "AEDPA's narrowing of the availability of Section 2255 remedy only heightens the importance of the savings clause, whose express purpose is to ensure that, in every case, federal collateral review remains "[] adequte [and] [] effective." Id.

This Court stated in Boumediene v. Bush, which was decided after the AEDPA-that the purpose of the savings clause is to"provid[e] that a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective. 533 U.S. 723, 776 (2008), So when there are "challenges to both convictions and sentences as a structural matter cannot be entertain by use of 2255 motion," Section 2255 is "inadequate or ineffective." Webster v. Daniel, 784 F.3d 1123, 1139 (7th Cir. 2015).

Petitioner's reading of Section 2255(e) only gives effect to words Congress wrote. It is critical to remember that Congress perserved the savings clause as an avenue of relief for prisoners even as it passed Section 2255 motions. Here, the Government actually seeks to "graft the requirements of Section 2255(h) onto the savings clause and thus, stripped that clause of any independent meaning." See Gilbert v. United States, 640 F.3d 1293, 1333 (Martin, J., dissenting). It has been said that, an interpretation rendering a statutory clause meaningless violates the "cardinal principle of statutory construction:" that we must "give effect, if possible, to every clause and word of a statute." Williams v. Taylor, 529 U.S. 362, 404 (2000). Further, it should be noted, that the Government has not pointed to any indication-must less a clear statement-from Congress that it intended for Section 2255(h) to repeal the savings clause of Section 2255(e). Thus, its reading should not stand. See Boumedience, 553 U.S. at 738 ("Congress should 'not' be presumed to have effected such denial of habeas relief absent an unmistakably clear statement to the contrary."' (quoting Hamdan v. Rumsfeld, 548 U.S. 559, 575 (2006)(alteration adopted))).

Because the Suspension Clause requires considerartion of these claims and yet Section 2255 otherwise does not allow them, Section 2255(e) must permit a prisoner to bring such claims in an application for writ of habeas corpus. And since Petitioner Jones seeks to rely of a new retroactively applicable rule of statutory law that was not available when he filed his initial Section

2255, Section 2255(e) authorizes consideration of his claim.[1]

2. With respect to the Government's beliefs that its interpretation of the statute [Section 2255] respects the balance Congress struck between finality and error-correction, while still leaving the savings clause with meaningful work to do because: (1) the savings clause would ensure 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; and (2) the the savings 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. Response at 16 (qoutation marks omitted)(citing Prost v. Anderson, 636 F.3d 578, 588 (10th Cir. 2011)(Gorsuch, J.). In the instant case, the problem that these examples ignore the "authorization clause" of Section 2255(e).

a. As explained in Andrews v. United States, the "motion" that Section 2255(e) refers to is a motion to vacate filed by a federal prisoner in the federal court that imposed the sentence. 373 U.S. 334, 338 (1963); see also

---

[1] In a dissenting opinion in McCarthan, Circuit Judge, Rosenbaum, answered her own question as to why Congress did not enumerate this type of claim along with the two types of claims listed in Section 2255(h), particularly Section 2255(h)(2). 851 F.3d at 1141. She explained that based on her review of Supreme Court precedent, however, she believe the answer is that Section 2255(h) was Congress's effect to ensure that constitutionality required second or successive claims not be precluded by AEDPA's amendments. But when Congress enacted Section 2255(h) in 1996, this Court had not yet ruled that new statutory rules could be retroactive just like new constitutional rules could be. Instead, at that time, as far as claims based on retroactively applicable new rules were concerned, Congress likely understood the Constitution to require consideration of only those claims based on new substantive rules of constitutional law, as Justice Harlan's Mackey concurrence had suggested. Id (citing Mackey v. United States, 401 U.S. 667, 684 (1971)(Harlan, J., concurring)). She also noted that, while she read Section 2255(h) as Congress's attempt to ensure that Section 2255 preserved habeas's constitutional scope, she also read Section 2255(e) in

Yirkovsky v. Gonzales, 2017 U.S. Dist. LEXIS 63674, 2007 WL 2476766, at *1 (D.S.D. Aug. 27, 2007)("Petitioner is 'authorized to apply for relief by motion' pursuant to [] § 2255 because he is a prisoner in custody pursuant to a federal conviction and sentence who may move the [sentencing] court that imposed the sentence to vacate, set aside or correct sentence[.]"). As a result, Section 2255(e) "operates to bar a Section 2241 habeas petition only if Section 2255 authorizes the prisoner to bring a...motion [to vacate]. Importantly, if the [a]uthorization [c]lause is not satisfied subsection (e) plays no role in determining whether a prisoner can bring his habeas petition."

Not all federal collateral claims are "authorized" by motion under Section 2255. And, significantly, not all federal prisoners are authorized to file a Section 2255 motion. Instead, "[o]nly federal prisoners who have been 'sentence[d]' by a federal court are eligble." Here, the Government incorrectly assumes that prisoners challenging determinations about parole and good-time credits, or attacking a sentence imposed by a military trbunal that no longer exists, can file a motion to vacate under Section 2255. In the words of Section 2255(e)'s "authorization clause," prisoners in these two scenarios were never "authorized to apply for relief by motion pursuant to this section [i.e., Section 2255] in the

---

tandem as a failsafe mechanism that Congress continued to allow exist because it recognized that it may have overlooked constitutionally required claims. Congress could have repealed Section 2255 in 1996 if it intended Section 2255(h) to render Section 2255(e) superfluous, but it did not. To the extent that an argument might be made that Congress kept the savings clause for the separate reason that the clause was needed to provide relief where practical considerations arose, Congress could have amended the clause to expressly limit it to that situation, such as by explicitly referring to "practical consideration" or removing the language "or ineffective." Again, it did not. And to the extent that some might note that habeas corpus did not always require what are now considered to be retroactively applicable new rules of statutory construction to be retroactively applicable, the Supreme Court has stated that Felker v. Turpin, 518 U.S. 651 (1996), Swain v. Pressley, 430 U.S. 372 (1977) and United States v. Hayman, 342 U.S. 205 (1952) stand for the proposition that the Suspension Clause does not resist innovation in the field of habeas corpus." Id. (citing Boumediene, 553 U.S. at 795. Moreover, as this Court has explained "[h]abeas is not a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose." Jones v. Cunningham, 371 U.S. 236, 243 (1963). So the fact that Congress may have viewed the scope of habeas narrowly in 1996 is no answer to this Court's current explanation of the Suspension Clause's constitutional scope.

first place. And it is not clear that prisoners sentenced in dissolved territorial courts are any different. A statutory "savings clause" (like the one in Section 2255(e))) is a carve-out from the general requirements of a statute, and if the statute does not apply to begin with, then the "savings clause" never comes into play.

Federal prisoners challenging determinations about parole and good-time credits can seek habeas corpus relief pursuant to Section 2241. See e.g., Granville v. Hogan, 591 F.2d 323, 324 (5th Cir. 1979)(good-time credits); Gomori v. Arnold, 533 F.2d 871, 874-75 (3d Cir. 1976)(calculation of release date); Zannino v. Arnold, 531 F.2d 687, 690-91 (3d Cir. 1976)(parole); Halprin v. United States, 295 F.2d 458, 459 (9th Cir. 1961)(parole). But that does not mean that those prisoners can do so because of Section 2255(e).

In fact, prisoners challenging determinations about parole or good-time credits have always had to proceed under Section 2241 and have never been able to file motions to vacate under Section 2255. See, e.g., Hajduk v. United States, 764 F.2d 795, 796 (11th Cir. 1985)("A challenge to the lawfulness of the parole commission's actions cannot be brought pursuant to 28 U.S.C. Section 2255. Hajduk's ex post facto argument is nothing more than a challenge to the lawfulness of the parole commission's actions, not the lawfulness of the sentence imposed by the court. Such an action must be brought as a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2241."). As a result, such prisoners do not come within the "authorization clause" of Section 2255(e), and therefore do not need the "savings clause" to avail themselves of a habeas remedy.

The same is true of prisoners challenging a conviction secured in a military tribunal. Like federal prisoners who wish to challenge determinations about parole and good-time credits, federal prisoners convicted and sentenced in military tribunals have long been able to file traditional habeas corpus petitions. See, e.g., United States v. Augenblick, 393 U.S. 348, 350 (1969); Burns v. Wilson, 346 U.S. 137, 139-142 (1953); Gusik v. Schilder, 340 U.S. 128, 181 (1950).

Allowing a federal military prisoner to file a petition for writ of habeas corpus makes sense because a court-martial (or similar tribunal) "is a special body convened for a specific purpose, and when that purpose is accomplished its duties are concluded and the court is dissolved." McClaughry v. Deming, 186 U.S. 49, 64 (1902). Access to habeas for such prisoners, however, does not come from (or run into limitations of) Section 2255, which is reserved for federal prisoners convicted in, and sentenced by, federal courts. As noted, the Government cites the Tenth CIrcuit's decision in Prost (Response at 16) with approval, but this aspect of Prost is flawed. Prost relied on an earlier Tenth Circtuit decision, Ackerman v. Novak, 483 F.3d 647 (10th Cir. 2007), as support for its suggestion that a military prisoner may resort to the "savings clause" and file a Section 2255 petition where a Section 2255 motion "ha[s] to be brought in the (now nonexistent) sentencing court, [and] that remedial mechanism [is] neccessarily inadequate and ineffective to test the legality of his detention..." Prost, 636 F.3d at 588. But the panel in Prost missed the holding of Ackerman.

In Ackerman, a federal prisoner convicted by a military court-martial sought authorization from the Tenth Circuit, see 28 U.S.C. Section 2244(a), to file a second or successive habeas corpus petition under 28 U.S.C. Section 2254. See Ackerman, 483 F.3d at 648-49. The Ackerman panel first explained, in

no uncertain terms, that a prisoner convicted in, and sentenced by, a military tribunal can seek collateral review only by way of a habeas corpus petition under Section 2241. See id. at 649. Such a prisoner cannot use Section 2254 because that provision is reserved for prisoners in state custody, and cannot use Section 2255 because his military tribunal has dissolved and cannot entertain a collateral attack. See id. at 649-50 & n.2. The Ackerman panel concluded that, because a military court-martial is not a "court of the United States" within the meaning of Section 2244(a), the prisoner did not need to obtain circuit authorization to file a Section habeas corpus petition. See id. at 651-53.

Ackerman, then, provides no support for the claim by Prost, and the Government here, that a military prisoner needs the "savings clause" of Section 2255(e) to file a Section 2241 habeas corpus petition. Simply stated, a military prisoner has a Section 2241 remedy that is available independent of Section 2255. See Clinton v. Goldsmith, 526 U.S. 529, 537 n. 11 (1999) ("[O]nce a criminal conviction has been finally reviewed within the military system, and a servicemember in custody has exhausted other avenues provided under the [Code of Military Justice] to seek relief from his conviction, he is entitled to bring a habeas corpus petition, see 28 U.S.C. Section 2241(c), claiming that his conviction is affected by a fundamental defect that requires that it be set aside.")(citations omitted); Palomera v. Taylor, 344 F.2d 937, 938 (10th Cir. 1965)("A motion under 28 U.S.C. Section 2255 is not proper here because the petitioner was sentenced by military court-martial convened in 1944.").

3. Here, the Court would be deciding whether, to establish the "miscarriage of justice" or "fundamental defect" required for savings clause relief on the basis of statutory-construction in this Court, see Pet. at i, 8 & n.2, a habeas applicant must demonstrate the unlawfulness of his detention under the law of this Court precedent.[2] id.

a. It is also true, Petitioner Jones' entitlement to relief depends on whether Missouri second-degree burglary statute is a violent felony under the ACCA--which has not been address by the Tenth Circuit or the Fifth Circuit. Nevertheless, there is not circuit conflict as to this issue and this Court could examine the content of his claim that, his detention is unlawful in light of Mathis.[3]

CONCLUSION

FOR THESE REASONS, as well as those in his petition, Petitioner Jones asks that this Honorable Court grant a writ of certiorari, resolve the split among the courts of appeals, vacate the judgment of the court of appeals, and remand his case with instructions to address whether he can satisfy the savings clause criteria and if so, address whether his detention is unlawful in light of Mathis.

---

[2] Throughout the instant habeas corpus proceedings, Jones has been relying on Mathis to support his position that his Missouri second-degree burglary convictions are not violent felonies under the ACCA and therefore, his detention is unlawful. See Pet. at 8 n.2.

[3] See Garland v. Roy, 615 F.3d 391, 394 (5th Cir. 2010)(courts can examine the merits of the petitioner's claim to determine whther the savings clause test is satisfied).

It should be noted that, this Court's decision in United States v. Stitt, acknowledged that Missouri breaking and entering statute was beyond the scope of the Federal Act. 139 S. Ct. 399, 407 (2018).

As to the Government asserts that allowing a federal inmate to bring claims in the district of his confinement "resurrects the problems that Section 2255 was enacted to sovle..." Response at 18. Courts have remedied this problem by tranferring the Section 2241 petition to the original sentencing court. See Sutton v. Quintana, 2019 U.S. Dist. LEXIS 66642 at *1 (E.D. Mo. 2019); Chazen v. Williams, 2018 U.S. Dist. LEXIS 124234 (W.D. Wis. 2018).

Respectfully Submitted.

Jason Jones # 21370-031
FCI-Seagoville
P.O. Box 9000
Seagoville Tx, 75159

October 8, 2019