APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6096

JERMAINE LENARD MOSS,

Petitioner – Appellant,

v.

KENNY ATKINSON, Warden,

Respondent – Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:17-hc-02078-D)

Argued: March 19, 2019 Decided: April 19, 2019

Before GREGORY, Chief Judge, and DIAZ and HARRIS, Circuit Judges.

Affirmed by unpublished opinion. Judge Diaz wrote the opinion, in which Chief Judge Gregory and Judge Harris joined.

ARGUED: Jason Neal, WEST VIRGINIA UNIVERSITY COLLEGE OF LAW, Morgantown, West Virginia, for Appellant. Amy N. Okereke, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF**: Lawrence D. Rosenberg, Washington, D.C., Benjamin G. Minegar, JONES DAY, Pittsburgh, Pennsylvania, for Appellant. Robert J. Higdon, Jr., Jennifer P. May-Parker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

DIAZ, Circuit Judge:

Jermaine Moss appeals the denial of his petition for habeas corpus. He contends that a retroactive change in the law has made his sentence unlawful. We affirm the district court's judgment because Moss's sentence remains lawful under applicable precedent.

I.

Moss was tried in a Florida federal district court for two drug offenses and one firearms offense. The jury convicted him on all three counts. At sentencing, the district court calculated a Guidelines range of 324–405 months in prison, with lengthy mandatory minimums on the drug charges. It sentenced Moss to 27 years each on the drug charges and 20 years on the firearms charge, all concurrent.

Normally, one of Moss's drug offenses would carry a mandatory minimum of 10 years and the other a mandatory minimum of 5 years. 21 U.S.C. § 841(b)(1)(A), (b)(1)(B) (2006). But the government filed an information pursuant to 21 U.S.C. § 851(a) before trial. The information said that Moss had a prior conviction for a serious drug felony. Under the law at the time, such a prior conviction increased the mandatory minimums to 20 years and 10 years, respectively. 21 U.S.C. § 841(b)(1)(A), (b)(1)(B) (2006). The purported conviction arose when Moss pleaded nolo contendere to a drug felony in Florida state court; the state judge withheld adjudication of guilt for the offense.

An Eleventh Circuit case established that Moss's nolo contendere plea counted as a conviction for § 841, despite the withholding of adjudication. See *United States v. Mejias*, 47 F.3d 401, 403–04 (11th Cir. 1995). Given that precedent, Moss didn't challenge the mandatory minimums in his direct appeal, his motion for habeas corpus under 28 U.S.C. § 2255, or his other attempts at collateral relief. But Moss now contends that the Eleventh Circuit effectively overruled *Mejias* in *United States v. Clarke*, 822 F.3d 1213 (11th Cir. 2016). After *Clarke*, Moss sought resentencing through a petition for habeas corpus under 28 U.S.C. § 2241 in federal district court in North Carolina (where he is now incarcerated). The district court denied the petition, and Moss appealed.

Before appellate briefing, this court decided *United States v. Wheeler*, which set the standard for challenging an illegal sentence through § 2241. 886 F.3d 415 (4th Cir. 2018), *cert. denied*, No. 18-420, 2019 WL 1231947 (U.S. Mar. 18, 2019). Applying the

Wheeler standard, we affirm the district court's judgment.

II.

Whether Moss may challenge his sentence through a § 2241 petition is a question of law that we review de novo. See *Lester v. Flournoy*, 909 F.3d 708, 710 (4th Cir. 2018). Under our precedent, a federal prisoner may challenge his sentence through a § 2241 petition if

> (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.

Wheeler, 886 F.3d at 429. Moss can satisfy *Wheeler*'s first and third elements. But he can't satisfy *Wheeler*'s second element because his sentence is still legal under Eleventh Circuit law.[*] When he was sentenced,

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[*] This court has not definitively resolved whether a petitioner sentenced out of circuit must show that his sentence is illegal under the sentencing circuit's law or our circuit's law. *Wheeler* concerned a change in Fourth Circuit law for a petitioner sentenced in circuit. 886 F.3d at 429–30. And while the petitioner in *Lester* was sentenced in the Eleventh Circuit, the law had changed in the petitioner's favor in both our court and the

Eleventh Circuit precedent squarely established that his conviction counted as a prior "serious drug felony" under 21 U.S.C. § 841. *Mejias*, 47 F.3d at 403–04. Moss claims that Clarke effectively overruled that precedent. 822 F.3d at 1215. But there is every indication that *Mejias* is still good law.

Mejias held that the term "conviction" in 21 U.S.C. § 841 is defined by federal law, not by the law of the state of conviction. 47 F.3d at 403–04 (citing *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119 (1983) (holding that federal law defines terms in federal statutes unless Congress indicates otherwise)). As an example of what the term "conviction" means under federal law, the court cited *United States v. Jones*, 910 F.2d 760, 761 (11th Cir. 1990). In *Jones*, a nolo contendere plea with adjudication withheld counted as a conviction for purposes of a Sentencing Guidelines enhancement. *Id.* The court in Mejias saw no reason for a different rule for § 841, which might disrupt uniformity in sentencing and undermine efforts to deter recidivism. 47 F.3d at 404.

The Eleventh Circuit's *Clarke* decision concerned the federal felon in possession statute, which defines the term "conviction" according to the law of the state

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Eleventh Circuit. 909 F.3d at 710, 712. In this case, we will apply the substantive law of the Eleventh Circuit. The parties agree that Moss, who was sentenced in a district court in Florida, deserves resentencing only if his sentence is now illegal under Eleventh Circuit law. And applying our court's substantive law likely wouldn't change the outcome because Moss's sentencing enhancement would likely be legal under Fourth Circuit precedent. *See United States v. Bridges*, 741 F.3d 464, 469–70 (4th Cir. 2014); *United States v. Campbell*, 980 F.2d 245, 249–51 (4th Cir. 1992).

where the crime was prosecuted. 822 F.3d at 1214; see 18 U.S.C. § 921(a)(20). In *Clarke*, the Eleventh Circuit certified the question to the Florida Supreme Court of whether a guilty plea with adjudication withheld is a conviction under Florida law. 822 F.3d at 1214. The Florida Supreme Court ruled that such a plea is not a conviction under state law. *Clarke v. United States*, 184 So. 3d 1107, 1116 (Fla. 2016). With that answer in hand, the Eleventh Circuit held that such a plea is not a conviction for the federal felon in possession statute. *Clarke*, 822 F.3d at 1214–15. In so ruling, the court overruled two circuit precedents that had come to the opposite conclusion about Florida law. *Id*. at 1215.

Moss's argument is as follows. *Mejias* relied on *Jones*. *Jones*, in turn, relied on cases that *Clarke* overruled. Thus, *Clarke* effectively overruled both *Jones* and *Mejias*. But in the Eleventh Circuit, the first panel decision controls unless there has been an intervening change in applicable law. *Hattaway v. McMillian*, 903 F.2d 1440, 1445 n.5 (11th Cir. 1990). The *Clarke* panel could only overrule two Eleventh Circuit precedents because of an intervening change in Florida law. 822 F.3d at 1215. *Mejias*, in contrast, explains what a conviction is for purposes of federal law. Thus, the *Clarke* panel could not overrule *Mejias*—only the Supreme Court or the en banc Eleventh Circuit could.

In any event, *Mejias* can stand without the cases that *Clarke* overruled. Those cases turned on Florida state law, whereas *Mejias* relies on a federal law definition of "conviction." A new construction of Florida law would have no impact on whether a nolo contendere plea with adjudication withheld is a

conviction for 21 U.S.C. § 841. *Mejias*'s citation to *Jones*, moreover, changes nothing.

First, the *Clarke* panel could not overrule *Jones*, a decision based on federal law. Second, *Mejias* turned on the general federal definition of the term "conviction" and used *Jones* to illustrate that definition. *Mejias*, 47 F.3d at 403–04. It does not appear that *Jones* controlled *Mejias*; in fact, the *Mejias* court considered whether to establish a different rule than *Jones* and decided against it. *Id*. at 404 ("To decide otherwise would disrupt uniformity in federal sentencing and frustrate the purpose of [§ 841(b)(1)(B)]—to punish and deter recidivism."). The Eleventh Circuit has consistently used the same definition for other cases in which federal law defines the term "conviction." See, e.g., *United States v. Maupin*, 520 F.3d 1304, 1306–07 (11th Cir. 2008); *United States v. Fernandez*, 234 F.3d 1345, 1346–47 (11th Cir. 2000). It seems quite unlikely that *Clarke*—which concerned state law—silently triggered a chain reaction that overruled a body of cases based on federal law.

This conclusion is in accord with Eleventh Circuit case law after *Clarke*. The same day it issued *Clarke*, the Eleventh Circuit panel issued an unpublished opinion in the same case. *United States v. Clarke (Clarke II)*, 649 F. App'x 837 (11th Cir. 2016). Despite the ruling in *Clarke*, the *Clarke II* opinion held that the district court did not plainly err by holding that a suspended sentence with adjudication withheld counts as a conviction for § 841. Id. at 848–49 (citing *Mejias*, 47 F.3d at 404). If the *Clarke* panel believed it had overruled *Mejias*, it likely would have found plain error on this point in *Clarke II*. What's more, several

recent unpublished Eleventh Circuit opinions that concern the federal definition of "conviction" treat *Mejias* as good law. See *United States v. Solis-Alonzo*, 723 F. App'x 863, 865 (11th Cir. 2018); *United States v. Marius*, 678 F. App'x 960, 964 (11th Cir. 2017); *United States v. Baker*, 680 F. App'x 861, 862, 865 (11th Cir. 2017); cf. *United States v. Green*, 873 F.3d 846, 859 (11th Cir. 2017) (citing *Mejias* in a discussion of Federal Rule of Evidence 404(b)).

We hold that Moss cannot demonstrate a change in Eleventh Circuit substantive law. Therefore, we need not address *Wheeler*'s remaining requirements.

Moss's three alternative arguments are unavailing. First, he contends that equitable principles justify remanding his case for resentencing, but he provides no authority suggesting that equitable relief remains an option when a petitioner fails to pass a threshold test for filing a § 2241 petition. Second, he contends that he is entitled to resentencing because he shouldn't have received a criminal history point for his nolo contendere plea. But Eleventh Circuit precedent forecloses this argument. See *United States v. Rockman*, 993 F.2d 811, 813–14 (11th Cir. 1993). As with *Mejias*, we think it is implausible that *Clarke* overruled *Rockman*. And third, Moss contends that if we do not grant his habeas petition, we should still transfer the petition to the sentencing court in Florida to decide the merits. But Moss fails to cite any procedural mechanism by which we could transfer this case to the Middle District of Florida without granting his petition. Furthermore, the Eleventh Circuit's jurisprudence on § 2241 petitions would foreclose Moss's petition, so transferring the petition to a Florida district court would be futile. See

McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1090 (11th Cir. 2017) (en banc) (holding that a § 2241 petition cannot be based on a change in circuit law).

The district court's judgment is therefore

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

WESTERN DIVISION

No. 5:17-HC-2078-D

JERMAINE LENARD MOSS, Petitioner,	)	
v.	)	**ORDER**
KENNY ATKINSON, Respondent.	)	

On April 7, 2017, Jermaine Lenard Moss ("Moss" or "petitioner"), a federal inmate proceeding prose, filed a petition for a writ ofhabeas corpus pursuant to 28 U.S.C. § 2241 [D.E. 1], a supporting memorandum [D.E. 1-1], and an exhibit [D.E. 1-2]. On April 19, 2017, Moss moved to amend his petition to include additional arguments [D.E. 4]. As explained below, the court grants Moss's motion to amend, conducts its preliminary review pursuant to 28 U.S.C. § 2243, and dismisses the petition.

Following a joint jury trial with a co-defendant,

> Moss was convicted of, and sentenced to a total of 324 months' imprisonment for: (1) conspiracy to possess with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. § 841(a)(l) ("Count 1"); (2) conspiracy to use and carry firearms during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(o) ("Count 2"); and (3) possession with intent to distribute 5 grams or more of crack cocaine on September 28, 2006, in violation of§ 841(a)(l) ("Count 9").

United States v. Moss, 290 F. App'x 234, 237 (11th Cir. 2008) (per curiam) (unpublished). The United States Court of Appeals for the Eleventh Circuit described the evidence against Moss as follows:

> The local county sheriff's office began investigating a group of people suspected of dealing crack cocaine from a certain house. Once it gathered, by way of "trash pulls," sufficient evidence of drug dealing and use of firearms within the house, it obtained a search warrant.
>
> * * * *
>
> Detective Richard Murray, a police officer with the local county sheriff's office, testified for the government that he conducted physical surveillance of: and "trash pulls" from, the duplex and another residence used by the co-indictees. The trash pulls yielded: (1) several plastic "sandwich bags," which Murray suspected from experience were used for storing crack cocaine for sale in small quantities and which field tests indicated had contained crack cocaine; (2) a drug ledger; (3) a box that had contained a

digital scale, which Murray suspected from experience was used for weighing drugs; (4) an empty baking soda box, the contents of which Murray suspected from experience had been mixed with powder cocaine to make crack cocaine; (5) razor blades, which Murray suspected from experience were used to cut the crack cocaine into smaller pieces and which field tests indicated had been used on crack cocaine; and (6) empty ammunition boxes for high-powered or assault rifle.

Jarvis McCants, a co-indictee of Moss's ..., testified for the government that the distribution ring operated from the aforementioned residences. Inside the residences were crack cocaine, cocaine powder, firearms, and money. The firearms were used to protect the drugs and money. The government presented each of the firearms confiscated from the duplex, and McCants identified each as either belonging to a member of the conspiracy or being kept in the duplex. The distribution ring used three cellular telephones for crack-cocaine orders. Customers would call, one of the co-conspirators would answer and take an order, and then the co-conspirator would meet the customer at a place outside the residence and deliver the crack cocaine.

Moss's job within the ring was answering the telephones, taking drug orders, and delivering drugs. McCants saw Moss with a firearm, specifically a chrome handgun, at the second residence. Also, one of the firearms kept at the residence, a pump-action shotgun, only could be

used by Moss because he was a big man and the firearm could be used by a big man only. However, Moss never used it.

* * * *

Quentin Branch, who met and spoke with Moss ... while in jail, testified for the government that, while in jail, Moss told Branch that Moss was involved in a drug ring. Moss stated he sold only "light" amounts of crack cocaine, whereas others in the ring "sold heavy duty" amounts.

* * * *

Wendy Davis-Zarvis, a detective with the local county sheriff's office, testified for the government that she participated in a "buy bust" on September 28, 2006. Her role was to act as a customer seeking crack cocaine. She filmed the ultimate transaction with a camera hidden in the button hole of her shirt. Specifically, Davis-Zarvis made a call to a particular telephone number and indicated that she wished to buy approximately $300 worth of crack cocaine. The person who answered the telephone call agreed to meet Davis-Zarvis at a particular gas station and told Davis-Zarvis what type of car he would be driving. After approximately ten minutes, a car matching this description arrived at the gas station carrying three back (sic) males. Rather than get into the car, Davis-Zarvis chose to lean into the car on the front passenger side for safety reasons. Once she leaned into the car in this manner, she could see the driver of the car. The driver asked to see Davis-Zarvis's money. When she showed him her "wad" of $300, he handed her

what she believed was crack cocaine, and she handed him the money ....

Immediately after the transaction, Davis-Zarvis stated into her recording device that the driver was wearing a red shirt. Later, other officers stopped the car and arrested its passengers. At that time, the officers took photographs of the passengers. The government entered into evidence and played the videotape of the recording made from Davis-Zarvis's hidden camera. The videotape, however, did not show the driver exchanging crack cocaine for money because Davis-Zarvis was leaning on the front passenger seat and, therefore, blocking the view of the camera. The government also entered into evidence the photographs taken by the arresting officers. One of the photographs depicted a man wearing a red shirt. Davis-Zarvis identified this man as Moss and stated that she had "no doubt" that Moss was the man who sold her crack cocaine ....

Healy, the forensics chemist, testified for the government that he analyzed the amounts of possible crack cocaine seized pursuant to the buy bust. He found that the seized substances were crack cocaine and that one seized amount weighed 8.345 grams.

* * * *

After hearing this, and other evidence, the jury found Moss guilty of all charges. Moss ... filed motions for judgment[ ] of acquittal and new trial[ ], pursuant to Fed. R. Crim. P. 29 and Fed. R. Crim. P. 33, arguing that the evidence was

insufficient to support [his] conviction[ ]. The district court denied the motions.

Before Moss's ... sentencing, a probation officer prepared [a] presentence investigation report[ ]. Therein, the probation officer set Moss's total offense level at 40 and criminal history category at IT. Accordingly, Moss's guideline imprisonment range was 324 to 405 months. The probation officer noted that Count 1 carried a statutory term of 20 years' to life imprisonment, pursuant to 21 U.S. C. § 841(b)(l)(A);[1] Count 2 carried a statutory term of O to 20 years' imprisonment, pursuant to § 924(o); and Count 9 carried a statutory term of 10 years' to life imprisonment, pursuant to 21 U.S.C. § 841(b)(1)(B).

* * * *

At Moss's sentencing hearing, he argued that he deserved at least a minor-role reduction because he was not a "big player" or even an "average participant" in the conspiracy ....

Moss also argued that the guideline imprisonment range was greater than necessary

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[1] On April 26, 2007, the government filed notice of its intent to rely on Moss's prior conviction to seek an enhanced sentence under 21 U.S.C. § 851. Notice, *United States v. Moss*, No. 8:06-CR-00464-EAK.-TOW, [D.E. 133] (M.D. Fla. Apr. 26, 2007); see Pet. 6; Mem. Supp. Pet. 1–2; Ex. [D.E. 1-2] (copy of state court "criminal punishment code scoresheet"). The conviction-a plea of nolo contendere to felony possession of cocaine with adjudication withheld-was sufficient to support the section 851 enhancement. See *United States v. Green*, 873 F.3d 846, 859 (11th Cir. 2017); *United States v. Meiias*, 47 F.3d 401,403 (11th Cir. 1995).

> and requested a sentence of 20 years' imprisonment, or the statutory minimum mandatory. Moss's family members spoke in support of Moss. The government requested a sentence in the middle of the guideline imprisonment range, or 360 months, to reflect the serious nature of the offense and the serious nature of Moss's participation in the offense and to protect the public from Moss.
>
> The district court impliedly overruled Moss's mitigating-role objection. The district court stated that it had reviewed the parties' arguments and the factors set out in 18 U.S.C. § 3553(a) and noted that Moss was a danger to the community. The district court sentenced Moss to 324 months' imprisonment as to Counts 1 and 9 and 240 months' imprisonment as to Count 2, with all terms to be served concurrently. The district court concluded that this sentence was sufficient but not greater than necessary.

Id. at 238–43 (citation omitted).

On December 3, 2009, Moss filed a motion to vacate under 28 U.S.C. § 2255. *See* Mot. to Vacate, *Moss v. United States*, No. 8:09-CV -02463-EAK.-TOW, [D.E. 1] (M.D. Fla. Dec. 3, 2009); cf. Pet. 4 (stating that Moss filed the motion on a different date). On October 15, 2010, the court denied the motion. Order, *Moss v. United States*, No. 8:09-CV -02463-EAK.-TOW, [D.E. 27] (M.D. Fla. Oct. 15, 2010); *see* Pet. 4. Moss appealed, and on Aprill3, 2011, the United States Court for the Eleventh Circuit denied his application for a certificate of appealability. Order, *Moss v. United*

States, No. 8:09-CV-02463-EAK.-TOW, [D.E. 33] (M.D. Fla. Apr. 13, 2011).

> On March 28, 2012, the trial court reduced Moss's drug sentences to 240 months each, pursuant to a retroactive reduction in the crack sentencing guidelines. On May 3, 2013, Moss filed a second § 2255 motion in the trial court. He argued that he was actually innocent of Count 9. The motion was denied, because Moss had not obtained permission to file a successive motion. Moss filed his third motion pursuant on § 2255 on October 7, with the Eleventh Circuit. He argued that his drug sentences were based on a drug quantity not found by the jury, that he is actually innocent of the firearm charge, and the trial court erred in instructing the jury on this charge. The appellate court denied him leave to proceed on the successive motion.

Moss v. Fisher, No. 3:14CV321-CWR-FKB, 2014 WL 2196392, at *1 (S.D. Miss. May 27, 2014) (unpublished) (citations omitted); *see In re Moss*, No. 13-14570-D, 2013 WL 10252931, at *3 (11th Cir. Oct. 23, 2013) (per curiam) (unpublished).

On April 17, 2014, Moss filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Southern District of Mississippi. *Moss*, 2014 WL 2196392, at *1. Moss "again claim[ed] that (1) his sentences were unlawfully based on drug quantities not found by the jury, (2) he [was] actually innocent of the firearm count, and (3) the jury was improperly instructed on the firearm count." *Id*. On May 27, 2014, the court dismissed Moss's section 2241 petition. *Id*. at *3.

Although Moss filed the current action under 28 U.S.C. § 2241, he again attacks his sentence. Specifically, Moss seeks "to vacate his sentence and remove the enhanced penalty under 21 U.S.C. § 851 and enter a new sentence that does not include the § 851 enhancement." Mem. Supp. Pet. 1; *see also* Mot. Amend 3. Moss relies on "several important cases" of the United States Supreme Court and various federal appellate courts "holding attacks in §851 enhancements may be cognizable." Mem. Supp. Pet. 9–10 (citing cases); *see also* Mot. Amend 1–2.

Moss must challenge the legality of his sentence under 28 U.S. C. § 2255 unless "the remedy by [section 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e) (the "savings clause"); *McCarthan v. Dir. of Goodwill Indus.-Suncoast Inc.*, 851 F.3d 1076, 1081 (11th Cir. 2017) (en bane); *In re Vial*, 115 F.3d 1192, 1194 (4th Cir. 1997) (en bane). If a section 2241 petition does not fall within the scope of section 2255(e)'s savings clause, the district court must dismiss the "unauthorized habeas motion ... for lack of jurisdiction." *Rice v. Rivera*, 617 F.3d 802, 807 (4th Cir. 2010) (per curiam).

Moss is procedurally barred from filing a section 2255 motion because he already filed one such motion and has not received authorization from the Eleventh Circuit to file another. See 28

U.S.C. § 2255(h); *McCarthan*, 851 F.3d at 1090; *Gilbert v. United States*, 640 F.3d 1293, 1308 (11th Cir. 2011) (en bane). Section 2255 is "not rendered inadequate or ineffective merely because ... an individual is procedurally barred from filing a [section]

2255 motion." *Vial*, 115 F.3d at 1194 n.5; *see Gilbert*, 640 F.3d at 1307–08. Rather, section 2255 "is inadequate or ineffective to test the legality of a conviction" only if three conditions are met:

> (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first [section] 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gate keeping provisions of [section] 2255 because the new rule is not one of constitutional law.

In re Jones, 226 F.3d 328, 333–34 (4th Cir. 2000)[2]. Here, the conduct of which Moss was convicted remains criminal, and the savings clause does not help him. *See, e.g., Venta v. Warden, FCC Coleman-Low*, No. 16-14986-GG, 2017 WL 4280936, at *2 (11th Cir. Aug. 3, 2017) (per curiam) (unpublished) *cert. denied*, 2018 WL 311484 (Jan. 8, 2018); *Smith v. FCC Coleman-Medium Warden*, 701 F. App'x 929, 931 (11th

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[2] The court would look to Eleventh Circuit precedent, in the context of the Jones test, to determine whether substantive law had changed between the time of conviction and after the filing of the prisoner's first section 2255 petition. *See, e.g., Eames v. Jones*, 793 F. Supp. 2d 747,749–50 (E.D.N.C. 2011); *Chaney v. O'Brien*, No. 7:07CV00121, 2007 WL 1189641, at *2–3 & n.1 (W.D. Va. Apr. 23, 2007) (unpublished), *aff'd*, 241 F. App'x 977 (4th Cir. 2007) (per curiam) (unpublished). In determining whether the Jones test applies, the court applies Fourth Circuit procedural law, including the procedural bar on applying the savings clause to sentence challenges. *See Chaney*, 2007 WL 1189641, at *3 n.l.

Cir. 2017) (per curiam) (unpublished); *Casado v. Flournoy*, No. 2:17-CV-38, 2017 WL 4684182, at *3–4 (S.D. Ga. Oct. 18, 2017) (unpublished), *report and recommendation adopted*, 2017 WL 5196615 (S.D. Ga. Nov. 9, 2017) (unpublished); *Hill v. Taylor*, No. 1:14-CV-00477-MHH-TMP, 2017 WL 1097216, at *4 (N.D. Ala. Mar. 2, 2017) (unpublished), *report and recommendation adopted*, 2017 WL 1076446 (N.D. Ala. Mar. 22, 2017) (unpublished); *Howard v. Warden. FCI Tallahassee*, No. 4:15CV66-RH/CAS, 2017 WL 781049, at *6 (N.D. Fla. Jan. 27, 2017) (unpublished), *report and recommendation adopted*, 2017 WL 776102 (N.D. Fla. Feb. 28, 2017) (unpublished). Because Moss has not demonstrated that section 2255 is an inadequate or ineffective remedy, Moss may not proceed on his claim under section 2241. Moreover, the court has considered the cases Moss has cited, and finds them distinguishable. See *Harden v. Young*, 612 F. App'x 256, 257 (5th Cir. 2015) (per curiam) (unpublished); *Henson v. Coakley*. No.5:14-CV-19118, 2017 WL 2508203, at *4 (S.D. W.Va. May 19, 2017) (unpublished), *report and recommendation adopted*, 2017 WL 2486351 (S.D. W.Va. June 8, 2017) (unpublished); *Rogers v. United States*, No. 3:08-CR-135-J-34JBT, 2017 WL 637487, at *2 n.3 (M.D. Fla. Feb. 16, 2017) (unpublished); *Howard*, 2017 WL 781049, at *6.

After reviewing the claims presented in Moss's habeas petition in light of the applicable standard, the court determines that reasonable jurists would not find the court's treatment of any of Moss's claims debatable or wrong, and none of the issues deserve encouragement to proceed further. See 28 U.S.C. § 2253(c); *Miller-El v. Cockrell*, 537 U.S. 322, 336–38

(2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, the court denies a certificate of appealability.

In sum, the court GRANTS petitioner's motion to amend [D.E. 4] and DISMISSES petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2241 [D.E. 1, 5] for lack of jurisdiction, or, alternatively, for failure to state a claim. The court DENIES a certificate of appealability. The clerk shall close the case.

SO ORDERED. This 22 day of January 2018.

JAMES C. DEVER III
Chief United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6096
(5:17-hc-02078-D)

JERMAINE LENARD MOSS,

Petitioner – Appellant,

v.

KENNY ATKINSON, Warden,

Respondent – Appellee.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Diaz, and Judge Harris.

For the Court
/s/ Patricia S. Connor, Clerk

APPENDIX D

28 U.S.C. § 2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under

the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an

alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence.

(a) A prisoner in custody under sentence of a court established by Act of Congress 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, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a

new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) 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 if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) 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; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.