No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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MARK LINNEAR HAYS,

Petitioner,

- v -

RANDY L. TEWS,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A federal prisoner who seeks to challenge the legality of his conviction or sentence usually must do so in a motion under 28 U.S.C. §2255. Under the saving clause in §2255(e), however, a prisoner may file a petition for a writ of *habeas corpus* under 28 U.S.C. §2241 when it "appears" that a §2255 motion is "inadequate or ineffective to test the legality of his detention."

The question presented is whether a federal prisoner's challenge to his conviction or sentence under 28 U.S.C. §2255 is "inadequate or ineffective" – and thus the prisoner may raise that challenge in a *habeas* petition under 28 U.S.C. §2241 – because the challenge relies on a new decision of this Court that interprets and narrows the reach of a federal statute, and §2255(h) bars the prisoner from raising that challenge in a second or successive §2255 motion?

STATEMENT OF RELATED CASES

United States v. Mark Linnear Hays, No. 3:95-cr-0141, United States District Court for the Northern District of Texas. District court proceeding in which sentence sought to be challenged in this case was imposed. Judgment entered on October 21, 1996.

United States v. Mark Linnear Hays, No. 96-11326, United States Court of Appeals for the Fifth Circuit. Direct appeal. Judgment entered on April 16, 1999.

United States v. Mark Linnear Hays, No. 3:00-cv-0842, United States District Court for the Northern District of Texas. Hays's first 28 U.S.C. §2255 proceeding. Judgment entered on September 26, 2000.

United States v. Mark Linnear Hays, No. 00-11146, United States Court of Appeals for the Fifth Circuit. Denial of certificate of appealability related to Hays's first 28 U.S.C. §2255 proceeding. Judgment entered on April 6, 2001.

Mark Linnear Hays v. Randy L. Tews, No. 14-cv-5081, United States District Court for the Central District of California. Proceeding on petition for a writ of *habeas corpus* under 28 U.S.C. §2241. Judgment entered on September 28, 2015.

Mark Linnear Hays v. Randy L. Tews, No. 15-56593, United States Court of Appeals for the Ninth Circuit. Affirming dismissal of §2241 petition. Judgment entered on June 10, 2019.

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INTRODUCTION

In 1996, Petitioner Mark Hays was convicted of Hobbs Act robbery, 18 U.S.C. §1951, in the Northern District of Texas. He received a mandatory life sentence under the federal "three strikes" law, 18 U.S.C. §3559(c). His two prior strikes – or "serious violent felonies" – were for robbery under California Penal Code §211. After this Court issued its opinion in *Johnson v. United States*, 559 U.S. 133 (2010), it became clear that Hays's California robbery convictions are not §3559(c) predicates because the quantum of force required to qualify as a serious violent felony is substantially greater than is required to violate §211. Accordingly, Hays's mandatory life sentence was wrongly imposed.

Unfortunately for Hays, he had filed an unsuccessful 28 U.S.C. §2255 motion attacking his sentence in 2000, thus by 2010 he was barred from filing a second or successive §2255 motion unless he could meet the gate-keeping provisions in §2255(h). He cannot do so with respect to his quantum of force claim because that claim doesn't rely on newly discovered evidence or a "new rule of Constitutional law," 28 U.S.C. §2255(h)(1) & (2) – this Court's 2010 *Johnson* opinion involved statutory interpretation. In most circuits, these circumstances would allow Hays to invoke §2255(e)'s "saving clause," which frees a petitioner from §2255's procedural bars by allowing him to proceed with a *habeas* petition under 28 U.S.C. §2241 when a §2255 motion "is inadequate or ineffective to test the legality of his detention." Under the Ninth Circuit's construction of the saving clause, however, Hays was barred from such relief.

Whether Hays is entitled to relief under the saving clause hinges on resolution of a mature and entrenched conflict among the circuit courts on an important and recurring issue involving the review of federal criminal judgments. When this Court issues a retroactively applicable decision narrowing the construction of a federal criminal statute, it will become evident that there are people

whose convictions or sentences are invalid. Some of those people will be able to seek relief on direct appeal, others will be able to file §2255 motions. But those who have completed their direct appeals and adjudicated a first §2255 motion are barred from relief by §2255(h)'s strict limits on second or successive §2255 motions. This case presents the question whether §2255(e)'s saving clause permits such people to pursue *habeas* relief under §2241, and, if so, what threshold showing they must make.

The circuit courts are divided 10-2, with ten circuits permitting claims based on intervening case law under the saving clause, though those courts differ on at least two subsidiary issues. Because this case is a good vehicle for resolving the broad circuit conflict, as well as the subsidiary issues, the petition for a writ of certiorari should be granted.

ORDERS AND OPINION BELOW

On May 21, 2015, a magistrate judge recommended dismissing Hays's *habeas corpus* petition, 28 U.S.C. §2241. *See* 5/21/15 Report & Rec. (attached in appendix).

On September 28, 2015, the United States District Court for the Central District of California dismissed Hays's *habeas corpus* petition. *See* 9/28/15 Order (attached in appendix).

On June 10, 2019, a Ninth Circuit panel filed an unpublished opinion affirming the district court's dismissal order. *See Hays v. Tews*, 771 Fed. App'x 769 (9th Cir. 2019) (attached in appendix).

On September 4, 2019, the Ninth Circuit denied Hays's petition for panel rehearing or rehearing *en banc*. *See* 9/4/19 Order (attached in appendix).

JURISDICTION

The opinion appealed from was entered on June 10, 2019, and Hays's petition for panel rehearing or rehearing *en banc* was denied on September 4, 2019. Accordingly, this Petition is timely, and jurisdiction is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2241(a) of Title 28 of the United States Code authorizes petitions for writs of *habeas corpus*, and provides in relevant part:

> 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.

Section 2255 of Title 28 of the United States Code authorizes collateral challenges to federal convictions and sentences, and §2255(e) provides as follows:

> 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*.

(Emphasis added.)

Section 2255(h) of Title 28 strictly limits second or successive motions under §2255, and provides as follows:

> 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.

(Emphasis added.)

STATEMENT OF THE CASE

I. Proceedings In Northern District Of Texas And Fifth Circuit

The federal "three strikes" law mandates a life sentence for a defendant convicted of "a serious violent felony" if he has prior convictions for "2 or more serious violent felonies." 18 U.S.C. § 3559(c)(1). Section 3559(c)(2)(F)(i) and (ii) define "serious violent felony" in three different clauses, specifically the (1) "enumerated offense," (2) "force," and (3) "residual" clauses.

In 1996, Hays was convicted of Hobbs Act Robbery, 18 U.S.C. §1951, in the Northern District of Texas, which qualified as a serious violent felony under §3559(c). As far as potential prior serious violent felony convictions that could support a mandatory life sentence, Hays had two robbery convictions under California Penal Code §211, from 1982 and 1993. Those don't qualify as serious violent felonies under §3559(c)(2)(F)(ii)'s force and residual clauses because under those clauses the prior offense must be punishable by ten years or more, and California robbery is (and was) punishable by a maximum of six years. *See* Cal. Penal Code §213(a)(1)(B). However, the district court and Fifth Circuit concluded that California robbery was a categorical match with robbery under 18 U.S.C. §2111, which is an enumerated offense in §3559(c)(2)(F)(i). On that basis, the district court imposed a mandatory life sentence and the Fifth Circuit affirmed. *See* ER 92-93; *United States v. Hays*, 180 F.3d 261 (5th Cir. 1999); *see also* AOB 12-17, 23-30.[1]

On April 21, 2000, Hays filed a 28 U.S.C. §2255 motion in the Northern District of Texas, *pro se*, arguing that his prior convictions did not qualify him for a mandatory life sentence under §3559(c). *See* ER 95-97. The district court denied relief in September 2000, holding that the Fifth

[1] ER refers to the Excerpts of Record Hays filed in the Ninth Circuit in case number 15-56593, at docket number 34. AOB refers to Hays's opening brief in that case (docket #33), which has a more detailed summary of the background of this case.

Circuit had already adjudicated that issue against Hays in his direct appeal. *See* ER 99-102. The Fifth Circuit denied Hays's request for a certificate of appealability (COA) in April 2001. *See* ER 103-04.

In sum, the Fifth Circuit held, and the district court effectively affirmed in a §2255 proceeding, that Hays's mandatory life sentence was lawfully imposed because his two California robbery convictions qualified as serious violent felonies under the enumerated offense clause of §3559(c)(2)(F)(i).

II. Hays's §2255(e) Saving Clause Claim In Central District Of California

Years later, this Court issued a series of cases about the quantum of force necessary for an offense to be considered "violent" under federal law, culminating in *Johnson v. United States*, 559 U.S. 133 (2010). *See Chambers v. United States*, 555 U.S. 122, 128 (2009); *Begay v. United States*, 553 U.S. 137, 144 (2008). The 2010 *Johnson* opinion made it evident that robbery under California Penal Code §211 does not qualify as a "serious violent felony" under §3559(c)(2)(F)(i)'s enumerated offense clause because the quantum of force necessary to commit robbery under 18 U.S.C. §2111 is greater than the quantum of force necessary to commit robbery under California Penal Code §211. Accordingly, the two offenses are not a categorical match.[2] *See, e.g., United States v. Garcia-Lopez*, 903 F.3d 887, 893 (9th Cir. 2018); *United States v. Dixon*, 805 F.3d 1193, 1196 (9th Cir. 2015); *Morrison v. United States*, 2019 WL 2472520, *6 (S.D. Cal. 2019). However, Hays was barred from raising this issue in a second or successive §2255 motion because he could not satisfy the requirements of §2255(h).

[2] The government did not dispute this conclusion on appeal.

Instead, in June 2014 Hays, proceeding *pro se*, filed a petition for a writ of *habeas corpus* under 28 U.S.C. §2241. As required, he did so in his place of confinement, the Central District of California. In that petition, Hays asserted that he qualified for relief under §2255(e)'s saving clause and thus could proceed under §2241, thereby avoiding §2255's procedural bars. The district court concluded that Hays had not satisfied the Ninth Circuit's requirements for proceeding under the saving clause and dismissed the petition, though without addressing Hays's quantum of force argument related to California Penal Code §211. *See* ER 144-45, 149-50, 155, 164-67, 182, 184-86, 193-94. Hays then noticed an appeal in the Ninth Circuit.

III. Hays's 2016 Motion Requesting That The Fifth Circuit Grant Him Leave To File A Second Or Successive §2255 Motion In The Northern District Of Texas

Hays promptly moved for the Ninth Circuit to stay his appeal, however, while he pursued a different avenue of relief in the Fifth Circuit. Specifically, Hays requested that the Fifth Circuit grant him leave to file a second or successive (SOS) §2255 motion in the Northern District of Texas. *See Hays v. Tews*, Ninth Cir. No. 15-56593 (docket ##11, 12). The Ninth Circuit granted the stay and on June 27, 2016, Hays filed an SOS motion in the Fifth Circuit with the following "Issue Presented for Review:"

> Does a petition for collateral relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), satisfy the standard articulated by 28 U.S.C. §§2255(h)(2) & 2244(b)(3)(A)? In other words, can a petitioner relying on *Johnson* make a prima facie showing that his proposed petition "contains . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable?"

6/27/2016 Hays Mt'n at 1, 5th Cir. No. 16-10712. As indicated in the issue presented, Hays's SOS motion was based on this Court's 2015 opinion in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the "residual clause" definition of a "violent felony" in the Armed Career Criminal

Act (ACCA) was unconstitutionally vague. Notably, the 2015 *Johnson* opinion announced a "new rule of Constitutional law, made retroactive to cases on collateral review by the Supreme Court," and thus could support an SOS motion under §2255(h)(2).[3] *See Welch v. United States*, 136 S. Ct. 1257 (2016). On the other hand, and as previously mentioned, Hays's quantum of force claim based on this Court's 2010 *Johnson* opinion could not get past §2255(h)'s gate-keeping provisions.

When the Fifth Circuit subsequently denied Hays's SOS motion, it relied on this Court's 2015 *Johnson* opinion, stating:

> As for [Hays's] contention that [the Supreme Court's 2015] *Johnson* [opinion] casts doubt on his life sentences that he argues were imposed under the residual clause of the three-strikes law, that clause refers to "a substantial risk that physical force against the person of another may be used in the course of committing the offense." 18 U.S.C. § 3559(c)(2)(F)(ii). We recently held in considering another statute that such a focus on conduct that poses a substantial risk of physical force is distinguishable from the Armed Career Criminal Act's focus on conduct that "presents a serious potential risk of physical injury to another" that was found problematic in *Johnson (II)*. *See United States v. Gonzalez-Longoria*, __ F.3d __, No. 15-40041, 2016 WL 4169127, at *3 (5th Cir. Aug. 5, 2016) (en banc).
>
> Accordingly, IT IS ORDERED that Hays's motion for authorization [to file a second or successive §2255 motion] is DENIED.

9/8/16 Order at 2-3, 5th Cir. No. 16-10712.

In sum, in his June 2016 motion in the Fifth Circuit, Hays: (1) raised a claim based on this Court's 2015 *Johnson* opinion; (2) did not raise his quantum of force, enumerated offense claim based on this Court's 2010 *Johnson* opinion; and (3) could not raise the latter claim because it was procedurally barred under §2255(h).

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[3] Incidentally, Hays's challenge in his SOS motion was off-mark because: (1) it was directed at the residual clause in §3559(c)(2)(F)(ii); but (2) the Fifth Circuit did not rely on that clause when it sustained Hays's life sentence based on the California robbery convictions, because that residual clause requires that the prior offense be punishable by ten years or more, and California robbery is (and was) punishable by no more than six years. *See* Cal. Penal Code §213(a)(1)(B).

IV. Ninth Circuit Memorandum Opinion Denying Relief

Following the denial of Hays's 2016 SOS motion in the Fifth Circuit, the stay in the Ninth Circuit was lifted and that appeal proceeded. In a memorandum opinion filed on June 10, 2019, the Ninth Circuit affirmed the district court's order dismissing Hays's §2241 petition.

Two preliminary points bear making about that ruling. First, the Ninth Circuit has never held that a petitioner may rely on §2255(e)'s saving clause to bring a sentencing claim under §2241. It reserved ruling on that issue in *Marrero v. Ives*, 682 F.3d 1190, 1193-94 (9th Cir. 2012), while expressing skepticism. Nonetheless, in Hays's case the panel assumed the saving clause permitted Hays to raise a sentencing claim and then adjudicated Hays's claim by applying the test the Ninth Circuit uses when a petitioner relies on the saving clause to attack a conviction. Under that test, a petitioner must show that he did not previously have "'an unobstructed procedural shot' to present his claim[]." *Hays*, 771 Fed. App'x at 769 (quoting *Harrison v. Ollison*, 519 F.3d 952, 959 (9th Cir. 2008)); *see also Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006). The Ninth Circuit panel concluded that Hays had a prior opportunity to raise his quantum of force claim based on this Court's 2010 *Johnson* opinion – specifically, in his 2016 SOS motion in the Fifth Circuit. Thus, the court held, Hays could not meet its "unobstructed procedural shot" requirement. *Hays*, 771 Fed. App'x at 769 (attached in appendix).

Ninth Circuit case law does not flesh-out the meaning of "an unobstructed procedural shot." But under any reasonable construction of that language, Hays was obstructed from raising his quantum of force claim in his 2016 SOS motion in the Fifth Circuit. Indeed, he was completely barred from raising that claim under §2255(h)(2) because this Court's 2010 *Johnson* opinion involved statutory interpretation, not a "new rule of constitutional law." The upshot is that the Ninth

Circuit took away with one hand what it gave with the other, rendering meaningless in the sentencing context its acceptance of the propriety of relief under the saving clause when a petitioner challenges a conviction. *Cf. Trevino v. Thaler*, 569 U.S. 413, 427-28 (2013) (recognizing that "a theoretically available procedural alternative" "does not offer most defendants a meaningful opportunity").

REASONS FOR GRANTING THE PETITION

I. Introduction

This case presents an important issue on which there is a mature and entrenched circuit conflict regarding the availability of federal *habeas* review. The arguments on both sides of the conflict are well-developed in opinions from every circuit. There is little room for the law to develop further, and this case is an apt vehicle for resolving the conflict.

II. There Is A Mature And Entrenched Conflict Among The Circuit Courts

A. Majority View – The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, And D.C. Circuits

Nine of the circuit courts allow a federal prisoner to invoke §2255(e)'s saving clause and seek relief under §2241 when a statutory-interpretation decision of this Court that shows the prisoner's conviction is unlawful was issued after the prisoner filed his first §2255 motion. *See United States v. Barrett*, 178 F.3d 34, 52 (1st Cir. 1999); *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248, 251 (3d Cir. 1997); *United States v. Wheeler*, 886 F.3d 415, 426-27 (4th Cir. 2018); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *Martin v. Perez*, 319 F.3d 799, 805 (6th Cir. 2003); *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998); *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002). The Eighth Circuit is in line with this majority because in *Abdullah v.*

Hedrick, 392 F.3d 957, 960-964 (8th Cir. 2004), it applied the majority rule and denied relief, though without explicitly adopting the majority rule.

The decisions of the courts in the majority are mostly consistent with the reasoning of the Seventh Circuit in *Davenport*. *See Samak v. Warden*, 766 F.3d 1271, 1294 (11th Cir. 2014) (W. Pryor, J., concurring) (noting that "[t]he majority of our sister circuits have adopted variations of the Seventh Circuit rule from *In re Davenport*"). Interpreting the saving clause's "inadequate or ineffective" language, the Seventh Circuit in *Davenport* looked to the "essential function of habeas corpus," which it described as "giv[ing] a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." 147 F.3d at 609. The Seventh Circuit reasoned that a person who could not raise such a challenge on direct appeal or in his first §2255 motion because of erroneous circuit precedent has never had the reasonable opportunity that *habeas corpus* demands. *See id.* at 611. As the Seventh Circuit put it, until that binding precedent was corrected, a district judge "would not listen to [the petitioner]; stare decisis would make us unwilling (in all likelihood) to listen to him; and the Supreme Court does not view itself as being in the business of correcting errors." *Id.* Nor does §2255 provide an opportunity to raise such a claim based on an intervening statutory-interpretation decision of this Court that postdated a prisoner's first §2255 motion, because of the bar on second or successive motions in §2255(h).

In those circumstances, the Seventh Circuit reasoned, section 2255 "can fairly be termed inadequate" because "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." *Davenport*, 147 F.3d at 611. The Seventh Circuit thus held that when a

person in federal custody "had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion," the saving clause in §2255(e) is triggered and a petition for a writ of *habeas corpus* under §2241 is permitted. *Id.* Similarly, most of the other circuits in the majority have held that a petitioner may rely on §2255(e)'s saving clause if he shows that: (1) at the time of his first §2255 motion, his claim that his conviction or sentence was unlawful was foreclosed; (2) a subsequent decision of this Court supported that claim; and (3) that subsequent decision is retroactively applicable on collateral review. *See, e.g., In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000); *Davenport*, 147 F.3d at 611-12. However, there are variations among those circuits on at least two key points.

Most of the circuits in the majority have held that the saving clause permits a defendant to raise a claim that his sentence is unlawful, not just a claim that his conviction is unlawful. *See United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018) (holding that the saving clause "is applicable to fundamental sentencing errors, as well as undermined convictions"); *Hill v. Masters*, 836 F.3d 591, 597-599 (6th Cir. 2016); *Brown v. Caraway*, 719 F.3d 583, 588 (7th Cir. 2013); *cf. Trenkler v. United States*, 536 F.3d 85, 99 (1st Cir. 2008) (suggesting it would apply the test to unlawful sentences). The Fifth Circuit has held to the contrary, *see In re Bradford*, 660 F.3d 226, 230 (5th Cir. 2011), even though the saving clause refers to "detention," and there is no principled reason for distinguishing between challenges to unlawful convictions and sentences. *See, e.g., United States v. Ameline*, 409 F.3d 1073, 1081 (9th Cir. 2005) (*en banc*) ("it is a miscarriage of justice to give a person an illegal sentence, just as it is to convict an innocent person"). As mentioned above, the Ninth Circuit has not decided this issue, though in *Marrero* that court expressed skepticism that a

petitioner could rely on the saving clause to raise a sentencing claim. 682 F.3d at 1193-94. And the panel in Hays's case effectively rendered saving clause relief a nullity when addressing Hays's sentencing claim. This case is therefore an apt vehicle for resolving that subsidiary circuit conflict.

Another significant difference among the ten circuits in the majority is whether a petitioner must show that the claim he seeks to raise was explicitly precluded by controlling circuit authority when he filed his first §2255 motion. Some circuits hold the answer is yes. *See, e.g., In re Jones*, 226 F.3d at 332-34 (stating that it would have been "futile" for the applicant to bring his claim earlier in light of "settled law of [the] circuit or the Supreme Court"); *Reyes-Requena*, 243 F.3d at 903-906 (citing the fact that the petitioner's claim was "foreclosed by circuit law"). Other circuits disagree, holding that it "matters not whether the prisoner's claim was viable under circuit precedent as it existed at the time of his direct appeal and initial § 2255 motion. What matters is that the prisoner has had no earlier opportunity to test the legality of his detention since the intervening Supreme Court decision [on which his new claim relies] issued." *Bruce v. Warden*, 868 F.3d 170, 180 (3d Cir. 2017). Resolution of this subsidiary issue is not necessary to decide Hays's case, however, because until this Court's 2010 *Johnson* opinion Hays's quantum of force claim was precluded by the Fifth Circuit's decision in his direct appeal. But if the Court grants review on the question presented presumably it would establish the appropriate test for when saving clause relief is available, and in doing so would necessarily resolve this subsidiary conflict.

B. Minority View – The Tenth and Eleventh Circuits

In contrast to the circuits discussed above, the Tenth and Eleventh Circuits have categorically rejected the proposition that an intervening statutory-interpretation decision of this Court provides a basis for relief under §2255(e)'s saving clause. As a result, a federal prisoner in those circuits has

no recourse when his conviction or sentence is shown to be unlawful by this Court's precedent issued after his first §2255 motion.

The Tenth Circuit announced its holding in *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011). Writing for the majority, then-Judge Gorsuch stated that "the plain language of §2255 means what it says and says what it means: a prisoner can proceed to §2241 only if his initial §2255 motion was itself inadequate or ineffective to the task of providing the petitioner with a chance to test his sentence or conviction." *Id.* at 587. The majority opinion concluded that an intervening change in circuit precedent as a result of a decision of this Court does not mean that a "petitioner [lacked] an opportunity to bring his argument" previously, because §2255(e)'s saving clause "guarantee[s] nothing about what the opportunity promised will ultimately yield in terms of relief." *Id*. at 584. Instead, under the Tenth Circuit's interpretation a §2255 motion may only be considered "inadequate or ineffective" when a prisoner had no ability to invoke it. *See id.* at 587-588. In response to the charge that its holding rendered the saving clause a nullity, the only example the majority in *Prost* gave of the saving clause's potential operation is when a petitioner cannot comply with the requirement that he bring his motion in the court that sentenced him because that court is unavailable or defunct. *See id.* at 588; *see also McCarthan v. Director of Goodwill Ind.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (*en banc*) (stating that *Prost* posited the saving clause is meant to permit "a prisoner [to] file a petition for a writ of habeas corpus if his sentencing court has been dissolved") (citing *Prost*, 636 F.3d at 588). It is doubtful that Congress used the broad language "inadequate or ineffective" to address such a specific, and unlikely, scenario.

Tenth Circuit Judge Seymour concurred in part and dissented in part in *Prost*. She began by criticizing the majority for "creating an unnecessary circuit split on an issue that was neither

raised by the parties nor implicated by the facts of this case." 636 F.3d at 599. Consistent with the view of the majority of circuits, Judge Seymour then stated that "the fundamental purpose of *habeas corpus* and collateral review – even post-AEDPA – is to afford a prisoner a 'reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.'" *Id.* at 605 (quoting *Davenport*, 147 F.3d at 609). She ultimately concluded, however, that Prost could not rely on the saving clause because his new claim "was not foreclosed by circuit precedent" at the time he filed his first §2255 motion. *Id.* at 602. The government supported Prost's subsequent petition for rehearing *en banc* in the Tenth Circuit, but that was denied by a 5-5 vote.

In *McCarthan v. Director of Goodwill Ind.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (*en banc*), the Eleventh Circuit adopted the Tenth Circuit's reasoning in *Prost*. In doing so, the Eleventh Circuit overruled nearly two decades of its precedent, including an *en ban* opinion, which was consistent with the majority of circuits discussed above.[4] *See id.* at 1079-80, 1083. The six opinions issued in *McCarthan* staked out the range of positions with respect to the savings clause.

Seven judges joined the majority opinion, which adopted the reasoning and holding of *Prost*. *See McCarthan*, 851 F.3d at 1079-80, 1085, 1100. Another judge concluded that saving clause relief is available when a prisoner seeks to challenge his conviction, but not his sentence. *See id.* at 1101 (Jordan, J., concurring in part and dissenting in part). Four judges dissented in full, in three opinions. *See id.* at 1111 (Wilson, J., dissenting); *id.* at 1111 (Martin, J., dissenting); *id.* at 1121 (Rosenbaum, J., dissenting). The lengthy opinions show that the question presented is complicated and the circuit split will not be resolved without this Court's intervention. Indeed, it seems evident

[4] The Eleventh Circuit had permitted challenges to unlawful sentences to proceed under the saving clause. *See Bryant v. Warden*, 738 F.3d 1253, 1281-84 (11th Cir. 2013).

that the judges of the Eleventh Circuit sought to put forward the best arguments on every side of the question presented to frame it for this Court's review.

C. The Government's Recognition Of The Circuit Conflict And Longstanding Agreement With The Majority View

Prior to the Eleventh Circuit's decision in *McCarthan*, the government repeatedly told this Court that the majority view is correct. It appears the government may have switched sides since *McCarthan*, but that is not clear because a Third Circuit case filed after *McCarthan* stated that "the Government agree[d] with [the petitioner] that he may" rely on the saving clause to challenge his conviction under §2241 based on a Supreme Court statutory-construction opinion issued after he filed his first §2255 motion. *Bruce*, 868 F.3d at 177. At any rate, in the last eight years the government filed several briefs in this Court "agree[ing]" that §2255(e)'s saving clause provides relief where, among other things, "Section 2255 prevents a federal prisoner from presenting a claim that, under an intervening, retroactively applicable statutory-construction decision of this Court, his sentence is above the statutory maximum, and circuit law foreclosed his legal claim at the time of his sentencing, direct appeal, and first Section 2255 motion." U.S. Br. in Opp. at 9, 11-13, *Dority v. Roy*, No. 10-8286 (May 16, 2011).[5] The government has also told this Court that a federal

[5] *See also* U.S. Br. in Opp. at 11-12, *Sorrell v. Bledsoe*, No. 11-7416 (Jan. 17, 2012); U.S. Br. in Opp. at 16, *McKelvey v. Rivera*, No. 12-5699 (Dec. 17, 2012); U.S. Br. in Opp. at 10-11, *Youree v. Tamez*, No. 12-5768 (Dec. 17, 2012); U.S. Br. in Opp. at 13-14, *Thornton v. Ives*, No. 12-6608 (Feb. 1, 2013); U.S. Br. in Opp. at 12, 14-15, *McCorvey v. Young*, No. 12-7559 (Feb. 4, 2013); U.S. Br. in Opp. at 9-10, *Jones v. Castillo*, No. 12-6925 (Feb. 21, 2013); U.S. Br. in Opp. at 14, *Blanchard v. Castillo*, No. 12-7894 (Mar. 26, 2013); U.S. Br. in Opp. at 12-13, *Prince v. Thomas*, No. 12-10719 (Aug. 12, 2013); U.S. Br. in Opp. at 17, *Abernathy v. Cozza-Rhodes*, No. 13-7723 (Mar. 7, 2014); U.S. Br. in Opp. at 14-15, 20, *Williams v. Hastings*, No. 13-1221 (July 30, 2014); *see also* U.S. Br. as *Amicus Curiae* at 20 n.9, *Tyler v. Cain*, No. 00-5961 (Mar. 2, 2001) (stating that "[b]ecause of the availability of the 'savings clause,' there is no concern that federal prisoners who have a claim based on a new decision of this Court cutting back on the sweep of a criminal statute" "will lack a remedy").

prisoner who meets the same conditions may rely on the saving clause to obtain relief from an erroneously imposed statutory minimum sentence. *See* U.S. Br. in Opp. at 19-21, *Persaud v. United States*, No. 13-6435 (Dec. 20, 2013); *see also United States v. Wheeler*, 886 F.3d 415, 431-33 (4th Cir. 2018) (granting saving clause relief from unlawful mandatory minimum sentence). And based on the government's stated position in *Persaud*, this Court granted the petition, vacated the judgment below, and "remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on December 20, 2013." 134 S. Ct. 1023 (2014).

Furthermore, in its previous briefs in this Court the government explicitly "disagree[d]," U.S. Br. in Opp. at 13 n.3, *Dority*, *supra*, with the Tenth Circuit's holding in *Prost*, calling it an "overly restrictive interpretation of Section 2255(e) that departs from the other circuits to have addressed the issue," U.S. Br. in Opp. at 21, *Williams*, *supra*. As noted above, the government also supported rehearing *en banc* in *Prost*, and in another brief it explained at length why "*Prost*'s analysis is refuted by Section 2255(e)'s text, when read as a whole." U.S. Supp. Br. at 32, *United States v. Suratt*, No. 14-6851 (4th Cir. Feb. 2, 2016).

Particularly in light of the government's longstanding – though perhaps recently reversed – position on the merits of the question presented, there is no doubt that the circuit conflict on that question warrants the Court's review.

III. The Question Presented Is Exceptionally Important And This Case Is A Good Vehicle For Resolving It

The need for this Court's intervention is evident. There are many federal prisoners in the Tenth and Eleventh circuits who are categorically barred from bringing collateral challenges to convictions and sentences that are indisputably unlawful. Furthermore, there are many federal

prisoners in the Fifth Circuit who are categorically barred from challenging sentences that are indisputably unlawful, as are many prisoners in the Ninth Circuit, evidenced by the ruling in Hays's case. Absent this Court's intervention, those prisoners will be deprived of their liberty for years beyond what Congress authorized, whereas those in the majority of circuits will be able to obtain relief under the saving clause and §2241. It is therefore obvious, as the government itself has recognized, that the question presented is "recurring and [of] exceptional importance." U.S. Resp. to Pet. for Reh'g at 15, *Prost*, *supra* (10th Cir. Apr. 25, 2011).

Resolving this question is particularly important because, in addition to the 2010 *Johnson* opinion, in recent years this Court has issued several opinions holding that the lower courts had given overly broad constructions to a range of federal statutes. *See, e.g., Mathis v. United States*, 136 S. Ct. 2243 (2016); *Rosemond v. United States*, 134 S. Ct. 1240 (2014); *Descamps v. United States*, 133 S. Ct. 2276 (2013); *Skilling v. United States*, 561 U.S. 358 (2010); *Carr v. United States*, 560 U.S. 438 (2010); *Chambers v. United States*, 555 U.S. 122 (2009); *United States v. Santos*, 553 U.S. 507 (2008); *Begay v. United States*, 553 U.S. 137 (2008); *Watson v. United States*, 552 U.S. 74 (2007). Those decisions, which effectively "narrow[] the scope of a criminal statute by interpreting its terms," are generally retroactively applicable. *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). Despite this, the courts in the minority with respect to §2255(e)'s saving clause preclude federal prisoners from taking advantage of this Court's retroactively applicable narrowing decisions. Those prisoners will instead remain incarcerated for conduct that all agree is no longer criminal, or for a term of imprisonment that all agree exceeds what is authorized by law.

The circuit conflict presented is especially troubling because its impact is felt by federal prisoners based on the happenstance of where the Bureau of Prisons chooses to detain them. That

is because a prisoner seeking traditional *habeas* relief under §2241 must file his petition in the district where he is confined. *See, e.g., Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004). Thus, if Hays were imprisoned in Illinois rather than California (or Florida, or Colorado), his §2241 petition would not have been dismissed and he almost surely would have been granted relief from his unlawful sentence.[6]

The unfairness of this situation is starkly illustrated by two recent decisions concerning Gary and Robert Bruce, brothers who were convicted of the same offense in the same court, and received the same sentence. After this Court's decision in *Fowler v. United States*, 563 U.S. 668 (2011), which narrowed the scope of liability under the Bruces' statute of conviction, both brothers relied on §2254(e)'s saving clause to file *habeas* petitions under §2241. Gary is incarcerated in the Third Circuit, whereas Robert is incarcerated in the Eleventh Circuit. Consequently, Gary was afforded a meaningful opportunity to challenge his detention under §2241, but Robert was not. *Compare Bruce v. Warden*, 868 F.3d 170, 183 (3d Cir. 2017), with *Bruce v. Warden*, 658 Fed. App'x 935, 939 (11th Cir. 2016) (unpublished opinion). In adjudicating Gary's claim, the Third Circuit implored this Court or Congress to resolve the "entrenched split" in circuit authority and thereby obviate the unjustifiably "disparate treatment" based solely on where a prisoner is housed. *Bruce*, 868 F.3d at 177, 180.

This case is an apt vehicle for resolving that split. To begin with, the question presented is purely legal. Furthermore, Hays satisfies the requirements for relief under the majority rule because

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[6] The circuit split also encourages prisoners housed in the Tenth and Eleventh Circuits who have valid claims based on this Court's statutory interpretation decisions to wait to raise those claims in the hope that they will be transferred to a circuit that will address their claims, or to seek a transfer for that purpose.

his quantum of force claim was foreclosed during his first §2255 proceedings, and this Court's subsequent 2010 *Johnson* opinion showed that Hays's sentence is unlawful.[7] The divergent tests amongst the circuits in the majority also warrant granting review because, as Hays's case illustrates, those tests can lead to inconsistent outcomes: Hays would almost surely have been allowed to proceed with his §2241 petition under the test exemplified by the Seventh Circuit's *Davenport* case, and would prevail on the merits because there is no dispute that his mandatory life sentence was wrongly imposed. But Hays was barred from proceeding on his §2241 petition under the Ninth Circuit's opaque "unobstructed procedural shot" test.

Finally, allowing further percolation in the lower courts would be pointless because the arguments on both sides have been exhaustively developed in opinions from every circuit court. It is unlikely that any of the circuit courts in the majority will switch sides, much less that ten of them will do so. Indeed, several circuit courts have explicitly declined to adopt the Eleventh Circuit's reasoning in *McCarthan* since that fractured decision was issued. *See, e.g., United States v. Wheeler*, 886 F.3d 415, 433-34 (4th Cir. 2018); *Bruce v. Warden*, 868 F.3d 170, 180-81 (3d Cir. 2017); *see also Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (*en banc*) (affirming and extending the Seventh Circuit's previous decision in *Davenport*). And there is no reason to believe that the Tenth Circuit (which denied rehearing *en banc* in *Prost*) and the Eleventh Circuit (which decided *McCarthan en banc* in 2017) will switch sides. As a result, and as Judge Easterbrook of the Seventh Circuit has urged, "[r]esolution of [this] conflict" requires action by "Congress or the Supreme

[7] At any rate, should this Court agree with Hays on the question presented, it can remand for the lower courts to determine the merits of Hays's underlying claim for relief from his mandatory life sentence.

Court." *Brown v. Caraway*, 719 F.3d 583, 600-601 (7th Cir. 2013) (statement of Easterbrook, C.J.). Since Congress has not acted, that leaves it to this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Todd W. Burns

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