No. _____

In the

# Supreme Court of the United States

**JUSTIN KIRK GRAVES.** Petitioner

v.

**DAVID SHINN, DIRECTOR, WARDEN, UNITED STATES PENITENTIARY, VICTORVILLE**, Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

## Petition for Writ of Certiorari

CUAUHTEMOC ORTEGA
Interim Federal Public Defender
BRIANNA MIRCHEFF *
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
Tel: 213-894-4784
Fax: 213-894-0081
Email: Brianna_Mircheff@fd.org
Attorneys for Petitioner
* *Counsel of Record*

## Questions Presented

Petitioner Justin Graves challenged his sentencing enhancement under 18 U.S.C. § 924(e), the Armed Career Criminal Act, by filing a petition for writ of habeas corpus, 28 U.S.C. § 2241. In it, he claimed that he was actually innocent of the ACCA enhancement, because Texas burglary was no longer an ACCA predicate offense. The district court dismissed the petition on procedural grounds. At the government's urging, the Ninth Circuit summarily affirmed the district court on the merits, concluding that it was bound by Fifth Circuit's decision deeming Texas burglary an ACCA predicate offense. In doing so, the Ninth Circuit created a 2-1 circuit split on the question of which Circuit's substantive law applies when the court considers a § 2241 petition claiming actual innocence—the law in the district of conviction or the district of confinement.

This petition presents the following questions:

1. Did the Ninth Court err in deeming the Fifth Circuit's decision on Texas burglary to be conclusive of whether Mr. Graves could state a claim of actual innocence in the Ninth Circuit?
2. Should the Court hold this petition pending the petition for a writ of certiorari in *United States v. Herrold*, 19-7731, the decision that purportedly controls the Ninth Circuit's decision in this case?

## Related Proceedings

United States Court of Appeals for the Ninth Circuit

*Justin Kirk Graves v. David Shinn, Warden*, Case No. 19-55317.

Memorandum Decision/Order Granting Summary Affirmance Entered: February 6, 2020; Rehearing Denied: May 11, 2020.

United States District Court for the Central District of California

*Justin Kirk Graves v. United States*, Case No. 5:18-cv-01087-JVS-SP.

Judgment Entered: March 15, 2019.

United States District Court for the Northern District of Texas

*United States v. Justin Kirk Graves*, Case No. 5:11-cr-00042-C-BQ-1

Judgment Entered: December 8, 2011

## Table of Contents

Opinions Below ..... 1

Jurisdiction..... 1

Constitutional and Statutory Provisions Involved ..... 2

Introduction..... 3

Statement of the Case ..... 5

Reasons for Granting the Writ..... 8

A. There is a circuit split on the choice-of-law question in § 2241 petitions.....8

1. The Ninth Circuit joins the Fourth Circuit in holding that the substantive law of the circuit of conviction should control. .....9

2. The Seventh Circuit has held that the substantive law in the district of confinement should control. ..... 10

B. The Ninth Circuit Was Wrong to Decide That Mr. Graves's Petition Was Foreclosed Based on Fifth Circuit Law. ..... 12

C. The Question Presented Is An Important Federal Question That Requires Clarity. ..... 14

D. Mr. Graves's Petition Squarely Presents the Question. ..... 16

E. In the Alternative, the Court Should Grant Certiorari in *Herrold* and Hold This Case Pending Resolution of *Herrold*. ..... 18

Conclusion ..... 20

Appendix: Ninth Circuit Order Denying Reconsideration (May 11, 2020) ..... App. 1a

Appendix: Ninth Circuit Order Granting Summary Affirmance (Feb. 6, 2020) ..... App. 2a

Appendix: District Court Judgment (Mar. 16, 2019) ..... App. 3a

Appendix: District Court Order Accepting Report and Recommendation (Mar. 16, 2019) ..... App. 3a

Appendix: District Court Order Granting Certificate of Appealability (Mar. 15, 2019) ..... App. 6a

Appendix: District Court Report and Recommendation (Feb. 2, 2019) ..App. 9a

Appendix: Sentencing District Court Judgment (Dec. 8, 2011) ..... App. 23a

## TABLE OF AUTHORITIES

**Page(s)**

### Federal Cases

*AER Advisors, Inc. v. Fidelity Brokerage Servs.*,
921 F.3d 282 ..... 12

*Alaimalo v. United States*,
645 F.3d 1042 (9th Cir. 2011) ..... 3

*Allen v. Ives*,
950 F.3d 1184 (9th Cir. 2020) ..... 14

*Brown v. Caraway*,
719 F.3d 583 (7th Cir. 2013) ..... 14

*Chaney v. O'Brien*,
No. 7:07-CV-00121, 2007 WL 1189641 (W.D. Va. Apr. 23, 2007) ..... 9

*Chazen v. Marske*,
938 F.3d 851 (7th Cir. 2019) ..... 10

*Gonzales v. Duenas-Alvarez*,
549 U.S. 183 (2007) ..... 17

*Hahn v. Moseley*,
931 F.3d 295 (4th Cir. 2019) ..... 9

*Herrold v. United States*,
19-7731 (Feb. 18, 2020) ..... 4, 18

*Hill v. Masters*,
836 F.3d 591 (6th Cir. 2016) ..... 14

*Hogan v. Butler*,
No. 6:15-046-GFVT, 2015 WL 4635612 (E.D. Ky. Aug. 3, 2015) ..... 9

**Federal Cases (continued)**

*Hueso v. Barnhart*,
948 F.3d 324 (6th Cir. 2020)..... 10, 11, 12, 16

*In re Korean Air Lines Disaster*,
829 F.2d 1171 (D.C. Cir. 1987)..... 12

*Lester v. Flournoy*,
909 F.3d 708 (4th Cir. 2018)..... 13

*Marrero v. Ives*,
682 F.3d 1190 (9th Cir. 2012).....3

*Mathis v. United States*,
136 S. Ct. 2243 (2016).....6

*McCarthan v. Dir. of Goodwill Indus.*,
851 F.3d 1076 (11th Cir. 2017)..... 14

*Olson v. Kallis*,
No. 17-1540-JES, 2018 WL 10036539 (C.D. Ill. Dec. 8, 2018) ..... 10

*Prost v. Anderson*,
636 F.3d 578 (10th Cir. 2011)..... 16

*Roberts v. Watson*,
No. 16-CV-541, 2017 WL 6375812 (W.D. Wis. Dec. 12, 2017).....9

*Shepherd v. Julian*,
17-1362 (7th Cir. 2018)..... 10, 11

*Stephens v. Herrera*,
464 F.3d 895 (9th Cir. 2006).....3

*United States v. Castillo-Rivera*,
853 F.3d 218 (5th Cir. 2017) ..... 17

*United States v. Grisel*,
488 F.3d 844 (9th Cir. 2008) ..... 17

**Federal Cases (continued)**

*United States v. Herrold*,
883 F.3d 517 (5th Cir. 2018) ..... 6

*United States v. Herrold*,
941 F.3d 173 (5th Cir. 2019) ..... 8, 16, 17

*United States v. Hooton*,
693 F.2d 857 (9th Cir. 1982) ..... 8

*United States v. Nungaray*,
697 F.3d 1114 (9th Cir. 2012) ..... 12

*United States v. Wheeler*,
886 F.3d 415 (4th Cir. 2018) ..... 14

*Van Cannon v. United States*,
890 F.3d 656 (7th Cir. 2018) ..... 19

*Walker v. English*,
19-52 (September 2019) ..... 8

*Zuniga v. Gilkey*,
242 F. Supp. 2d 549 (S.D. Ill. 2001) ..... 9

**State Cases**

*Clark v. Clark*,
222 A.2d 205 (N.H. 1966) ..... 13

**Federal Statutes and Rules of Court**

18 U.S.C. § 924(a) ..... 5

18 U.S.C. § 924(e) ..... 5, 14

28 U.S.C. § 1254 ..... 1

28 U.S.C. § 2241 ..... *passim*

28 U.S.C. § 2255 ..... *passim*

28 U.S.C. § 2255(e) ..... 2, 3

Ninth Cir. Rule 27-10 ..... 1, 8

S. Ct. Rule 13.3 .....1

**Other Authorities**

Bureau of Prisons, *Population Statistics* (last visited July 1, 2020)..... 15

U.S. Sentencing Comm'n, Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System, (Mar. 2018), ..... 15

## Petition for Writ of Certiorari

Justin Kirk Graves petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

## Opinions Below

The Ninth Circuit's order granting summary affirmance in *Justin Kirk Graves v. David Shin*, Warden, Case No. 19-55317, was not published. App. 2a. The district court's order in *Graves v. Shinn*, Case No. 5:18-cv-01087-JVS-SP, also was not published. App. 3a.

## Jurisdiction

The Ninth Circuit issued its order granting summary affirmance on February 6, 2020. App. 2a. The Court denied Graves' motion for reconsideration, with suggestion of reconsideration en banc, on May 11, 2020. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).[1]

[1] The Ninth Circuit rules provide for filing of a motion for reconsideration or reconsideration en banc of a case dispositive order such an order granting summary affirmance. This serves as the equivalent of a petition for rehearing or rehearing en banc for a case that has been decided summarily. Ninth Cir. Rule 27-10(a)(1). Though this Court's rule tolling the deadline for certiorari during the pendency of a timely petition for rehearing does not specifically provide for tolling pending a motion for reconsideration, S. Ct. Rule 13.3, the same rule should apply to this equivalent filing by a different name. Regardless, under this Court's extension of deadlines due to COVID-19, this

## Constitutional and Statutory Provisions Involved

28 U.S.C. § 2255(e) 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 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.

28 U.S.C. § 2241(a) provides:

> 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.

---

petition is timely because it is filed within 150 days of the Ninth Circuit's original order.

## Introduction

This petition involves an important choice-of-law question for § 2241 petitions. Ordinarily, a federal prisoner must apply to the sentencing court for relief from an illegal or unconstitutional sentence. See 28 U.S.C. § 2255(a). However, a district court in the district where a federal inmate is confined may entertain a petition for a writ of habeas corpus if the remedy by under § 2255(a) is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). This exception is known as the "escape hatch" of § 2255. *See generally Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012). The Ninth Circuit has held, in a series of cases, that a federal prisoner may use the escape hatch to seek relief from an illegal sentence under § 2241 if he "makes a claim of actual innocence" and "has not had an unobstructed procedural shot at presenting that claim." *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011) (internal citation omitted). It has applied these procedural requirements to all § 2241 petitions filed within the jurisdiction of this Court, including where the conviction was not sustained in this Circuit. *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (applying Ninth Circuit's procedural rules to conviction sustained in Oklahoma); *see* ER 64-70 (government brief assuming application of Ninth Circuit procedural

standard); *see also* ER 11-13 (magistrate court applying Ninth Circuit procedural law).

A separate question arises as to which circuit's substantive law should apply when deciding the merits of the claim—i.e., whether a defendant is actually innocent of an offense. Here, the Ninth Circuit granted the government's motion for summary affirmance, holding that Mr. Graves's petition was foreclosed in the Ninth Circuit once the Fifth Circuit held that Texas burglary remained a valid ACCA predicate. It do so even though Ninth Circuit precedent suggests that it would come to a different answer if applied its own law to the merits question. In so doing, the Ninth Circuit joined the Fourth Circuit in applying a sort of *Erie* doctrine for § 2241 petitions. It split with the Seventh Circuit, which has held that a § 2241 court applies its own law in deciding whether a defendant is actually innocent. It did so summarily, even though the Department of Justice has recently stated to the Seventh Circuit that its position was the law of the circuit of confinement should apply. This is an important circuit split that will often be outcome determinative—as it is in this case.

At a minimum, the Court should hold this petition pending disposition of the petition for a writ of certiorari in *Herrold v. United States*, No. 19-7731, which has been ordered distributed for conference on September 29, 2020.

Should the Court grant a writ of certiorari in that case and rule in Mr. Herrold's favor, the Ninth Circuit's decision was wrong regardless of what circuit's law applies. As such, the Court should at least hold Mr. Graves's petition pending decision in that case.

## Statement of the Case

1. Mr. Graves's petition challenged the legality of a conviction entered by the United States District Court for the Northern District of Texas on December 8, 2011. Mr. Graves was charged with being a convicted felon in possession of a firearm. (ER 34-35.) A felon-in-possession offense generally carries a maximum sentence of ten years. *See* 18 U.S.C. § 924(a)(2). But the government alleged in this case that Mr. Graves was subject to a sentence of at least fifteen years under the Armed Career Criminal Act, 18 U.S.C. § 924(e). (ER 34.)

On August 17, 2011, Mr. Graves pleaded guilty to the sole count in the plea agreement. (ER 38.) As part of his plea agreement, he admitted that he had at least three ACCA-qualifying predicate offenses, and that he was subject to a minimum sentence of fifteen years. (ER 45.) Two of the three predicate offenses were Texas burglary. The parties stipulated to, and the

Court imposed, the mandatory minimum fifteen-year sentence. (ER 40, 50.) Mr. Graves did not appeal, nor did he file any § 2255 petition.

2. On May 22, 2018, Mr. Graves filed the instant § 2241 petition in the Central District of California. (ER 18.) He argued that he received an illegal sentence under the ACCA and that the enhancement should be struck. The ACCA enhancement in his case had been premised on two prior convictions for Texas burglary, and the Fifth Circuit had recently held that Texas burglary of a dwelling was not generic burglary for ACCA purposes after *Mathis v. United States*, 136 S. Ct. 2243, 2251-52 (2016), and its statement of the standard for "divisible" statutes. *See United States v. Herrold*, 883 F.3d 517, 522-23 (5th Cir. 2018) (en banc), *vacated* 139 S. Ct. 2712 (2019). He argued that, under *Mathis* and based on the reasoning of *Herrold*, he was actually innocent of the ACCA enhancement and had received a sentence in excess of the authorized statutory maximum. (ER 30-31.) And, he argued, he had not had an unobstructed procedural shot at relief because his claim was foreclosed before *Mathis*. (ER 27-28.)

The government moved to dismiss on procedural grounds. (ER 53.) It argued that the district court did not have jurisdiction over the petition because it was barred by his plea waiver, and that his claim of an improper ACCA enhancement did not sound in actual innocence. (ER 63-64, 66-68.)

The government also argued that Graves could not demonstrate the lack of an unobstructed procedural shot at his claim, because he had not filed a Section 2255 motion in the court of conviction. (ER 68-70.)

The magistrate judge issued a Report and Recommendation, recommending dismissal on grounds that Mr. Graves had not established that he had not had an unobstructed procedural shot at relief. (ER 11-13.) The district court accepted the report and recommendation with only minor alteration. (ER 15-16.) Mr. Graves filed a timely notice of appeal. (ER 93.)

3. Mr. Graves filed his Opening Brief on October 9, 2019. (Dkt. #8.) On December 6, 2019, the government filed a motion for summary affirmance. Though it had never briefed the merits of Mr. Graves's motion, it argued that his claim was "foreclosed" by the Fifth Circuit's decision vacating its en banc decision in *Herrold* and issuing a new decision holding Texas burglary was a valid ACCA predicate offense. (Dkt. #15.) Mr. Graves opposed the motion, arguing that the Ninth Circuit was not bound by the Fifth Circuit's decision. He argued that the case was inappropriate for summary treatment in any event, because the Ninth Circuit had never decided which court's substantive law applies in a Section 2241 petition and there was a circuit split on that question. (Dkt. #18.) A screening panel of the Ninth Circuit granted the motion in a one-sentence order:

> Appellee's motion for summary affirmance (Docket Entry No. 15) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc).

App. 2a. *Hooten* holds that summary disposition is appropriate where the matter is "obviously controlled by precedent." *Hooten*, 693 F.2d at 858.

Petitioner filed a timely motion to reconsider, with a suggestion of reconsideration en banc under Ninth Cir. Rule 27-10. That motion was summarily denied. App. 1a.

## Reasons for Granting the Writ

### A. There is a circuit split on the choice-of-law question in § 2241 petitions.

In 2019, the Solicitor General described this question about choice-of-law in § 2241 petitions as "underdeveloped" and "complicated." Br. for the United States, *Walker v. English*, 19-52, at 6, 15-16 (September 2019). At the time, it was. In just the last year, however, a divided Seventh Circuit explicitly took one side of the split, the Ninth Circuit joined the Fourth Circuit in taking the opposite view in this case, and the Sixth Circuit issued a published decision describing the compelling arguments on both sides before ultimately avoiding the question. Given the importance of this issue to

incarcerated individuals who have viable claims that they are serving sentences in excess of applicable statutory maximums, the time is now to address this question head on.

*1. The Ninth Circuit joins the Fourth Circuit in holding that the substantive law of the circuit of conviction should control.*

The Ninth Circuit's decision here, along with its citation to *Wooten*, places the Court decidedly in the camp that apply the law of the circuit of conviction in § 2241 cases. In doing so, the Ninth Circuit joins the Fourth Circuit, which has a published opinion on this question. In *Hahn v. Moseley*, 931 F.3d 295, 301 (4th Cir. 2019), that Court held that it would apply the substantive law of the circuit where the defendant was convicted when deciding whether a petitioner is "actually innocent." Numerous district court decisions have also landed on this side of the split.[2]

The argument for this view is primarily a pragmatic one. As articulated by the dissent in the Seventh Circuit's decision in *Chazen*, a contrary rule would result in arbitrariness because it would make relief depend on the

[2] *See, e.g.*, *Zuniga v. Gilkey*, 242 F. Supp. 2d 549, 554 (S.D. Ill. 2001); *Chaney v. O'Brien*, No. 7:07-CV-00121, 2007 WL 1189641, *3 (W.D. Va. Apr. 23, 2007); *Hernandez v. Gilkey*, 242 F. Supp. 2d 549, 554 (S.D. Ill. 2001); *Roberts v. Watson*, No. 16-CV-541, 2017 WL 6375812, at *2 (W.D. Wis. Dec. 12, 2017); *Hogan v. Butler*, No. 6:15-046-GFVT, 2015 WL 4635612, at *5 (E.D. Ky. Aug. 3, 2015).

fortuity of where the Bureau of Prisons designated an incarcerated individual to serve his sentence. *Chazen v. Marske*, 938 F.3d 851, 865 (7th Cir. 2019) (Barrett, J, concurring); *see also Hueso v. Barnhart*, 948 F.3d 324, 337 (6th Cir. 2020). Concretely, this could mean that defendants with identical claims who were sentenced in the same court would receive disparate results based on where they happened to be imprisoned. The Fourth Circuit's rule avoids that outcome.

*2. The Seventh Circuit has held that the substantive law in the district of confinement should control.*

In *Chazen v. Marske*, 938 F.3d 851 (7th Cir. 2019), the Seventh Circuit staked out the opposite position, accepting the concession of the United States Attorney that the district of confinement should apply its own law to decide the merits of a § 2241 petition. *Id.* at 860. *See* Answering Brief, *Shepherd v. Julian*, 17-1362 (7th Cir. 2018) (stating the "Department's view" that "[t]he Court should apply its own law to determine whether [the petitioner's] petition actually has merit."); *Olson v. Kallis*, No. 17-1540-JES, 2018 WL 10036539, at *5 (C.D. Ill. Dec. 8, 2018) (describing Department of Justice position that district of confinement should apply).

There are at least three primary arguments in favor of this position. As the Department of Justice explained in its brief in *Shepherd*, the respondent

for a § 2241 petition is the warden of the facility where the defendant is confined. And his actions are generally governed by the law of the circuit of confinement. *Id.* at 20-21. As such, "[i]t would be anomalous to conclude that a prisoner is being held unlawfully if the law of the circuit of confinement says that the detention is lawful." *Id.* at 21.

Second, this view reflects a default principle that a circuit applies its own law. Departures from that view are generally driven by concerns about comity, for example, with state law, but no such concerns are present in this context. *See Hueso v. Barnhart*, 948 F.3d 324, 337 (6th Cir. 2020).

Third, this view reflects Congress's intent. Traditionally a habeas petition would be filed against the jailer in the district of confinement, and early on, a prisoner challenging a federal conviction would file that challenge in the district of confinement. In 1948, however, the statute was modified to require that Section 2255s be filed in the district of conviction, rather than the district of confinement. *Id.* Cognizant of the challenges in applying the law of a distant circuit, Congress chose not to depart from the "default principle" that a circuit generally applies its own rules, choosing to "chang[e]

the venue, not the choice-of-law rules." *Id.*[3]

Each of these reasons counsel in favor of a circuit applying its own law.

### B. The Ninth Circuit Was Wrong to Decide That Mr. Graves's Petition Was Foreclosed Based on Fifth Circuit Law.

Though there are cogent arguments on both sides, the better view is that a § 2241 court should apply the law of its own circuit. The Ninth Circuit, in this case, got it wrong.

Federal courts generally "comprise a single system in which each tribunal endeavors to apply a single body of law." *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1175 (D.C. Cir. 1987). As such, while there are complex rules that govern cases in which the federal court must apply state law, there is no counterpart rule for one federal circuit to apply another circuit's rules. Instead, "[s]ince the federal courts are all interpreting the same federal law, uniformity does not require that transferee courts defer to the law of the transferor circuit." *AER Advisors, Inc. v. Fidelity Brokerage Servs.*, 921 F.3d 282, 288 n.5. Rather, the presumptive "background norm" is that "each court should apply its own precedent on the meaning of federal law." *Hueso v. Barnhart*, 948 F.3d 324, 337 (6th Cir. 2020). One circuit

[3] Though it set out the arguments on both sides, the Sixth Circuit noted the "difficult question" presented by this choice-of-law issue, and it ultimately ruled on a different ground.

follows the decisions of a sister circuit "only if persuaded that it is correct"—not because it is bound to do so. *United States v. Nungaray*, 697 F.3d 1114, 1118 (9th Cir. 2012).

There is good reason for this presumption: For one thing, it furthers the goal of accuracy in decision making. That is, courts are generally better at applying their own law than they are at applying the law of others. *Clark v. Clark*, 222 A.2d 205, 208 (N.H. 1966) (articulating choice-of-law principle favoring application of a court's own law "because [a court] understands its own law better and therefore can do a better job of administering justice under it"). Moreover, there is particular reason to apply the default principle here. The respondent in a § 2241 petition is the warden of the facility where the petitioner is being housed. It would be passing strange to hold that a warden is not holding an inmate in violation of his constitutional rights because his conduct—while violating the law of his jurisdiction—does not violate the law of a distant court.

Concerns about arbitrariness provide an insufficient basis to depart from these bedrock principles. The nature of the federal system tolerates a degree of unevenness; one defendant may be subject to a mandatory minimum that another is free from depending on the caselaw in his circuit where he is prosecuted. Indeed, it is already true that defendants housed in

one circuit may qualify for relief deprived to others based on the differences in procedural requirements for § 2241 motions. *See, e.g., Lester v. Flournoy,* 909 F.3d 708, 714 (4th Cir. 2018) (granting § 2241 relief for conviction arising out of the Eleventh Circuit, though that same relief would have been barred if the petitioner had actually been housed in the Eleventh Circuit by *McCarthan v. Dir. of Goodwill Indus.*, 851 F.3d 1076 (11th Cir. 2017)).

Such differences, if significant enough, will ultimately be brought to this Court for decision and the unevenness will be remedied. In the meantime, the federal judicial system tolerates differential outcomes as an inevitable results outcome of a system that makes each circuit's decisions binding within their own territory. Such "arbitrariness" provides no reason to depart from the default rule that a court applies its own law.

### C. The Question Presented Is An Important Federal Question That Requires Clarity.

Though the matter may sound dry, the question presented in this petition impacts numerous federal prisoners. Section 2241 provides an important escape hatch for federal prisoners who have claims of actual innocence. Though the circuits are divided on this point, in four circuits, a defendant can claim "actual innocence" of a mandatory sentencing

enhancement, such as the Armed Career Criminal Act.[4] This makes the question presented here supremely important. An ACCA enhancement converts a conviction with a ten-year statutory maximum to one that bears a fifteen-year mandatory minimum. A recent report from the Sentencing Commission reflected over 300 ACCA sentences were imposed in a single year, Fiscal Year 2016.[5] That means, at any given point, there are several thousand individuals serving sentences that were enhanced by operation of the ACCA. And, given the significant and frequent developments in this Court's decisions with respect to that enhancement, there are numerous prisoners who are serving sentences that exceed the appropriate statutory maximum based on developments in this Court's caselaw. Clear direction on when such individuals can receive relief is necessary.

Though there are a number of circuits that have not yet weighed in, this Court should not wait for further development of the issue. First, 32% of

---

[4] *United States v. Wheeler*, 886 F.3d 415, 427-33 (4th Cir. 2018); *Hill v. Masters*, 836 F.3d 591, 597-600 (6th Cir. 2016); *Brown v. Caraway*, 719 F.3d 583, 587-88 (7th Cir. 2013); *Allen v. Ives*, 950 F.3d 1184, 1189-90 (9th Cir. 2020).

[5] U.S. Sentencing Comm'n, Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System, (Mar. 2018), available https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf.

federal inmates are housed in the Circuits that have already weighed in on the question (the Ninth, Fourth, and Seventh Circuits).[6] Second, of the circuits that have not yet weighed in, several have decisions on threshold procedural questions that will prevent them from reaching the question presented here.[7] The positions on each side are well-staked out and would not benefit from further development. The Court should provide an answer to the question now.

### D. Mr. Graves's Petition Squarely Presents the Question.

Mr. Graves's petition is an excellent case in which to decide this question. The argument was thoroughly presented below. And, though the Ninth Circuit's decision was issued in summary format, its citation to *Wooten* suggests its view that the question is firmly decided and its position is unlikely to be revisited in future cases.

---

[6] Based on the population reports posted on the Bureau of Prisons website on June 25, 2020, there are 43,127 inmates housed in BOP-operated facilities in those three circuits, of a total population of 132.087 inmates. *See* https://www.bop.gov/about/statistics/population_statistics.jsp.

[7] *See, e.g.*, *Prost v. Anderson*, 636 F.3d 578, 585-86 (10th Cir. 2011) (foreclosing all escape-hatch petitions, so long as the claim could have been brought via § 2255); *Hueso v. Barnhart*, 948 F.3d 324, 332-33 (6th Cir. 2020) (§ 2241 relief must be based on a decision of the Supreme Court).

Moreover, this choice-of-law question is dispositive in Mr. Graves's motion. The Fifth Circuit has held, definitively, that Texas burglary is a valid ACCA predicate offense. *United States v. Herrold*, 941 F.3d 173, 178 (5th Cir. 2019) (*Herrold III*). Though acknowledging that Texas burglary was facially broader than generic burglary because it could be based on "any felony"—not only felonies that required intent—it faulted the defendant for failing to point to a case where burglary had been charged based on a crime that did not require intent. *Herrold III*, 941 F.3d at 178-79. The Court relied, in part, on its cases interpreting *Duenas-Alvarez*, which requires proof of a realistic probability that a state will prosecute conduct that falls outside the generic definition. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). The Fifth Circuit's decision in *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc), had held that the claim that particular conduct does not satisfy the generic definition "cannot simply rest on plausible interpretation of statutory text made in a vacuum." *Id.* More to the point, *Castillo-Rivera* made clear that *Duenas-Alvarez* was not satisfied even where the statute could be "plausibly interpreted as broader [than the generic definition] on its face." *Id.* at 224 n.4. Because the defendant in *Herrald* had not satisfied *Castillo-Rivera*'s test, the Fifth Circuit reinstated the defendant's ACCA enhancement. *Herrold III*, 941 F.3d at 179.

Though the Ninth Circuit has not yet considered Texas burglary specifically, its background principles differ in important ways from those in the Fifth Circuit. The Ninth Circuit has said that where a statute is broader than the generic definition on its face—as Texas's "any felony" arguably is—nothing more is required to satisfy *Duenas-Alvarez*. *United States v. Grisel*, 488 F.3d 844, 850-51 (9th Cir. 2008) (en banc), abrogated on other grounds, *United States v. Stitt*, 139 S. Ct. 399, 403-04 (2019). Because the two circuits are divided on that basic background principles, the Ninth Circuit would likely not come to the same conclusion if asked to decide whether Texas burglary is an ACCA predicate offense under Ninth Circuit law. *See* Petition for Writ of Certiorari, *Herrold v. United States*, No. 19-7731, at 19-20 (Feb. 18, 2020) (explaining why the Ninth Circuit would come out differently on Texas burglary than the Fifth Circuit). This makes the choice of law question decisive on the merits of Mr. Graves's claim.

For these reasons, Mr. Graves's petition is an excellent vehicle for this Court to decide the question.

### E. In the Alternative, the Court Should Grant Certiorari in *Herrold* and Hold This Case Pending Resolution of *Herrold*.

At the very least, Petitioner urges this Court to hold Mr. Graves's petition until the Court disposes of the cert petition seeking review of the

Fifth Circuit's decision in *United States v. Herrold*, the case that the Ninth Circuit found dispositive here. *See* Petition, *Herrold v. United States*, 19-7731 (Feb. 18, 2020). That case stakes out the Fifth Circuit's position in a different circuit split, one regarding the interpretation of ACCA burglary. The Seventh Circuit has found that a statute that shares Texas's "trespass-plus-crime" theory of burglary, is not generic burglary, for the very reasons that the defendant in *Herrold* argued and that the Fifth Circuit would later reject. *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018). The Seventh Circuit is right, and *Herrold* is wrong. And if the Fifth Circuit was wrong in *Herrold*, then the Ninth Circuit was wrong to summarily affirm on the strength of the Fifth Circuit's opinion—regardless of whether it was right about the choice of law question. Petitioner urges the Court to grant the writ in *Herrold* and hold Mr. Graves's petition pending the outcome of that case.

## Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

DATED: July 2, 2020

By: BRIANNA MIRCHEFF*
Deputy Federal Public Defender
Attorney for the Petitioner

*Counsel of Record