No. 20-6448

IN THE SUPREME COURT OF THE UNITED STATES

EUGENE DAVIS, PETITIONER

v.

HERMAN QUAY, WARDEN

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

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

The question presented is whether petitioner is entitled to seek federal habeas corpus relief under Section 2241 based on his claim that his third-degree Iowa burglary convictions are not "violent felon[ies]" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Davis, No. 09-cr-52 (Apr. 16, 2010)

Davis v. United States, No. 12-cv-107 (Nov. 7, 2013)

Davis v. United States, No. 20-cv-117 (filed Dec. 7, 2020)

United States District Court (M.D. Pa.):

Davis v. Spalding, No. 17-cv-968 (June 17, 2019)

United States Court of Appeals (3d Cir.):

Davis v. Warden Allenwood FCI, No. 19-2641 (June 24, 2020)

United States Court of Appeals (8th Cir.):

United States v. Davis, No. 10-1980 (Mar. 30, 2011)

Davis v. United States, No. 15-2906 (Jan. 19, 2016)

Davis v. United States, No. 16-2293 (Mar. 31, 2017)

Supreme Court of the United States:

Davis v. United States, No. 11-435 (Nov. 7, 2011)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 818 Fed. Appx. 147. The opinion of the district court (Pet. App. 8a-17a) is not published in the Federal Supplement but is available at 2019 WL 2501459.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2020. The petition for a writ of certiorari was filed on November 19, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Iowa, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). 09-cr-52 Judgment 1. The district court sentenced petitioner to 210 months of imprisonment, to be followed by five years of supervised release. 09-cr-52 Judgment 2-3. The court of appeals affirmed, 414 Fed. Appx. 891 (8th Cir. 2011) (per curiam), and this Court denied a petition for a writ of certiorari, 565 U.S. 1015 (2011) (No. 11-435). In 2012, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255. See Pet. App. 3a. The district court denied that motion and declined to grant a certificate of appealability (COA). See ibid. In 2015, pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure, petitioner's sentence was reduced to 179 months of imprisonment, to be followed by five years of supervised release, 09-cr-52 Amended Judgment 1-3, and then further reduced to 152 months of imprisonment, to be followed by five years of supervised release, 09-cr-52 Second Amended Judgment 1-3. In 2016, petitioner filed two applications for leave to file second-or-successive Section 2255 motions, which the Eighth Circuit (the circuit where he was convicted) denied. See Pet. App. 3a.

In 2017, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Middle District of Pennsylvania, the district where he was

confined. 17-cv-968 D. Ct. Doc. 7 (Oct. 5, 2017) (2241 Pet.). The district court denied the petition. Pet. App. 8a-17a. The court of appeals affirmed. Id. at 1a-5a.

1. In 2009, police officers responding to a reported disturbance in Cedar Rapids, Iowa, heard a gunshot and saw petitioner run from an alley. 09-cr-52 Plea Agreement 6. A tracking dog traced petitioner's scent from the alley to a nearby street, where petitioner was found and arrested. Ibid. Police found a loaded short-barreled shotgun and a spent shell casing in the alley, suggesting that the gun had been fired. Ibid. Petitioner's fingerprints were on the gun. Ibid. In response to questioning, petitioner admitted that he had handled the gun in the past and that he knew it was illegal for him to possess a short-barreled shotgun. Id. at 6-7. Petitioner stated, however, that the gun's barrel had not yet been shortened at the time he handled it. Ibid.

A federal grand jury in the Northern District of Iowa charged petitioner with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). 09-cr-52 Indictment 1-2. Petitioner pleaded guilty to that offense. 09-cr-52 Judgment 1; see 09-cr-52 Plea Agreement 1. A conviction for violating Section 922(g)(1) carries a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, a defendant has at least three prior convictions "for a violent felony or a serious drug offense" committed on different occasions, the Armed

Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as a crime punishable by more than a year of imprisonment that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B)(ii). Clause (i) is known as the "elements clause"; the first part of clause (ii) is known as the "enumerated offenses clause"; and the latter part of clause (ii) (beginning with "otherwise") is known as the "residual clause." See Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

Petitioner admitted in his plea agreement that he had three prior convictions for third-degree Iowa burglary, each of which involved the burglary of an automobile dealership. 09-cr-52 Plea Agreement 5; see 09-cr-52 Presentence Investigation Report (PSR) ¶¶ 57-59. Petitioner acknowledged that those offenses qualified as "violent felon[ies]" under the ACCA. 09-cr-52 Plea Agreement 1, 5. Petitioner objected, however, to the Probation Office's determination that those convictions also qualified as "crime[s] of violence" for purposes of Sentencing Guidelines § 4B1.1 (2009), which increases the Guidelines offense level and criminal history category for certain career offenders. PSR ¶¶ 30-31. Petitioner contended that, despite contrary Eighth Circuit precedent, the

Guidelines' definition of a "crime of violence" did not cover commercial burglary. 09-cr-52 D. Ct. Doc. 37 (Apr. 2, 2010); see Sentencing Guidelines § 4B1.2(a)(2) (2009). The district court overruled that objection, applied the career-offender enhancement, and sentenced petitioner to 210 months of imprisonment. 09-cr-52 Judgment 2.

The court of appeals affirmed. 414 Fed. Appx. at 892. Petitioner argued on appeal that his prior Iowa burglary convictions were not crimes of violence under the career-offender guideline, but he did not contest the classification of those offenses as violent felonies under the ACCA. Ibid. The court determined that petitioner's Guidelines claim was foreclosed by Eighth Circuit precedent. Ibid. (citing United States v. Stymiest, 581 F.3d 759, 768-769 (8th Cir. 2009), cert. denied, 559 U.S. 1055 (2010)). This Court denied a petition for a writ of certiorari. 565 U.S. at 1015 (No. 11-435).

2. In 2012, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, again contending that his Iowa burglary convictions were not crimes of violence under the Guidelines. 12-cv-107 D. Ct. Doc. 1, at 3 (Oct. 18, 2012). Petitioner also appeared to suggest that those convictions did not constitute generic "burglary" under the ACCA. Id. at 4. The district court denied the motion and petitioner's request for a COA. 12-cv-107 D. Ct. Doc. 12, at 8 (Nov. 7, 2013).

In May 2015, pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure, petitioner's sentence was reduced, based on substantial assistance to law enforcement, to 179 months of imprisonment -- which is below the ACCA minimum -- to be followed by five years of supervised release. 09-cr-52 Amended Judgment 1-3; see Fed. R. Crim. P. 35(b)(4) ("When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute."). In December 2015, again under Rule 35(b), petitioner's sentence was further reduced to 152 months of imprisonment, to be followed by five years of supervised release. 09-cr-52 Second Amended Judgment 1-3.

Also in 2015, petitioner sought leave from the Eighth Circuit to file a second-or-successive Section 2255 motion. See 15-2906 C.A. Doc. 4311733 (Aug. 31, 2015). Under 28 U.S.C. 2255(h), a movant may file a second-or-successive Section 2255 motion only if the court of appeals finds that the movant has made a prima facie showing that motion contains either "newly discovered evidence" strongly indicating that the movant was not guilty of the crime or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Petitioner argued that his Iowa burglary convictions were not crimes of violence under the Guidelines in light of Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the ACCA's residual clause is unconstitutionally vague. Id. at 2557; see 15-2906 C.A. Doc. 4311733, at 1-3. The Eighth

Circuit denied petitioner's application. 15-2906 C.A. Doc. 4357275 (Jan. 19, 2016).

In 2016, petitioner again sought leave from the Eighth Circuit to file a second-or-successive Section 2255 motion, this time challenging his sentencing enhancement under the ACCA. 16-2293 C.A. Doc. 4402034, at 2-3 (May 24, 2016). In supplemental briefs, petitioner directed the Eighth Circuit to this Court's then-recent decision in Mathis v. United States, 136 S. Ct. 2243 (2016), which held that a conviction under Iowa's burglary statute did not categorically qualify as generic "burglary" under the ACCA. Id. at 2251; see 16-2293 C.A. Doc. 4518858, at 6-8 (Sept. 28, 2016); 16-2293 C.A. Doc. 4483238, at 10-16 (Dec. 21, 2016). The Eighth Circuit denied petitioner's application, explaining that because Mathis "did not announce a new rule of constitutional law," a Mathis-based challenge to the application of the ACCA's enumerated-offenses clause was not cognizable on a second-or-successive Section 2255 motion. 16-2293 C.A. Doc. 4518847, at 2 (Mar. 31, 2017); see id. at 1-2.

3. In 2017, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Middle District of Pennsylvania, the district where he was confined at the time. 2241 Pet. 1-2. Petitioner again contended that his ACCA sentence was improper on the theory that his prior Iowa burglary convictions no longer constituted violent felonies under the ACCA in light of Mathis. Id. at 2, 4-5.

Petitioner argued that the district court had jurisdiction to entertain his habeas petition under the so-called "saving clause" in 28 U.S.C. 2255(e). 2241 Pet. 2. Section 2255(e) provides that a habeas petition under Section 2241 by "a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 ordinarily "shall not be entertained." 28 U.S.C. 2255(e). But its saving clause creates an exception when it "appears that the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." Ibid. Petitioner argued that Section 2255 was "inadequate or ineffective" in his case, noting that the Eighth Circuit had concluded that his statutory claim under Mathis was not the type of constitutional claim for which a second or successive claim may be allowed under 28 U.S.C. 2255(h). 2241 Pet. 3. Petitioner further argued that he satisfied the requirements for Section 2255(e)'s saving clause on the theory that he was "actually innocent" of his ACCA sentence based on Mathis. Id. at 4-6. The government agreed with petitioner in its initial response, see 17-cv-968 D. Ct. Doc. 10, at 1, 6-9 (Nov. 13, 2017), but argued in an amended response that the petition should be dismissed for lack of jurisdiction on the ground that the saving clause did not apply to his Mathis claim, see 17-cv-968 D. Ct. Doc. 20, at 1, 8-14 (Feb. 7, 2019).

The magistrate judge recommended that petitioner's habeas petition be dismissed for lack of jurisdiction. Pet. App. 19a-28a. The magistrate judge accepted the proposition that a claim

based on a new, retroactive rule of statutory interpretation that renders the claimant actually innocent of a crime might be cognizable under the saving clause. Id. at 23a. But the magistrate judge determined that under Third Circuit precedent, petitioner's Mathis claim did not qualify because it related only to his enhanced ACCA sentence, not his conviction. Id. at 27a. "[T]he effect of Mathis," the magistrate judge reasoned, was not to "render his conduct 'non-criminal'" by "overturn[ing] the Iowa burglary statute under which [petitioner] was convicted," but "instead to hold" that the statute "could not serve as a predicate offense for the ACCA sentencing enhancement." Ibid. The magistrate judge accordingly concluded that petitioner could not claim actual innocence. Ibid.

Over petitioner's objections, the district court accepted and adopted the magistrate judge's findings, conclusions, and recommendations and dismissed petitioner's habeas petition. Pet. App. 8a-17a. The court agreed with the magistrate judge that under Third Circuit law, petitioner's Mathis claim did not qualify under the saving clause because it related only to his enhanced ACCA sentence, not his conviction. Id. at 13a-16a.

4. The court of appeals affirmed. Pet. App. 1a-5a. The court observed that it had previously held that Section 2255's saving clause applies in the "'narrow circumstances'" in which an applicant "'is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court

decision,' with 'no other avenue of judicial review available' to 'challenge his conviction.'" Pet. App. 4a (quoting In re Dorsainvil, 119 F.3d 245, 248, 251-252 (3d Cir. 1997)). But the court of appeals determined that petitioner "d[id] not fall into these 'narrow circumstances,'" because he contended only that he is no longer eligible for the ACCA sentencing enhancement and was not "challenging * * * his conviction under [Section] 922(g)(1)." Pet. App. 4a.

5. On December 7, 2020, after filing the petition for a writ of certiorari in this case, petitioner filed a pro se petition for a writ of habeas corpus under Section 2241, this time in the United States District Court for the Northern District of Iowa, the district where he was confined at the time. See 20-cv-117 D. Ct. Doc. 1. That petition, which remains pending, asserts that petitioner's counsel "was ineffective for not arguing that [his] burglary convictions were not predicate offenses for ACCA because they did not constitute generic burglary." Id. at 6.

On March 17, 2021, petitioner's sentence on the Section 922(g) conviction once again was reduced under Rule 35(b), now to time served. 09-cr-52 Third Amended Judgment 2; see 09-cr-52 Doc. 101, at 1 (Mar. 17, 2021). Petitioner was therefore released on that date, and currently is on supervised release.

ARGUMENT

Petitioner renews his contention (Pet. 8-16) that the saving clause in 28 U.S.C. 2255(e) permits him to challenge his enhanced

sentence under the ACCA in a petition for a writ of habeas corpus under 28 U.S.C. 2241 based on this Court's intervening decision in Mathis v. United States, 136 S. Ct. 2243 (2016). Further review is unwarranted. Although a circuit conflict exists on the scope of the saving clause, this Court recently denied a petition for a writ of certiorari filed by the government asking the Court to resolve that conflict, see United States v. Wheeler, 139 S. Ct. 1318 (2019) (No. 18-420), as well as numerous petitions filed by federal prisoners in analogous circumstances. The unpublished decision below does not alter or deepen the conflict that this Court has repeatedly declined to review, and the same considerations that would have supported denial of the petitions in Wheeler and other cases would apply here as well.

In any event, this case would be a poor vehicle in which to address the issue for at least two reasons. First, it is not clear that petitioner would be entitled to relief even in the courts of appeals that have given the saving clause the most prisoner-favorable interpretation. Second, petitioner has been released from prison.

1. Under the saving clause, a federal prisoner may file a petition for a writ of habeas corpus only if "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). Two courts of appeals have determined that Section 2255(e) does not permit habeas relief based on an intervening decision of statutory

interpretation. See McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1085-1092 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017); Prost v. Anderson, 636 F.3d 578, 584, 590 (10th Cir. 2011), cert. denied, 565 U.S. 1111 (2012).

In contrast, nine other courts of appeals -- including the court below -- have held that, in at least some circumstances, the saving clause of Section 2255(e) allows a federal prisoner to file a habeas petition under Section 2241 based on a retroactive decision of statutory construction. See United States v. Barrett, 178 F.3d 34, 50-53 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); Triestman v. United States, 124 F.3d 361, 375-378 (2d Cir. 1997); In re Dorsainvil, 119 F.3d 245, 251-252 (3d Cir. 1997); In re Jones, 226 F.3d 328, 333-334 (4th Cir. 2000); Reyes-Requena v. United States, 243 F.3d 893, 902-904 (5th Cir. 2001); Wooten v. Cauley, 677 F.3d 303, 306-307 (6th Cir. 2012); In re Davenport, 147 F.3d 605, 609-612 (7th Cir. 1998); Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006), cert. denied, 549 U.S. 1313 (2007); In re Smith, 285 F.3d 6, 7-8 (D.C. Cir. 2002); see also Abdullah v. Hedrick, 392 F.3d 957, 960-964 (8th Cir. 2004) (discussing majority rule without expressly adopting it), cert. denied, 545 U.S. 1147 (2005). Although those courts have offered varying rationales and have adopted somewhat different formulations, they generally all take the view that the remedy provided by Section 2255(e) is "inadequate or ineffective to test the legality of [a prisoner's] detention," 28 U.S.C. 2255(e), if (1) an intervening

decision of this Court has narrowed the reach of a federal criminal statute, such that the prisoner now stands convicted of conduct that is not criminal; and (2) controlling circuit precedent squarely foreclosed the prisoner's claim at the time of his trial (or plea), appeal, and first motion under Section 2255. See, e.g., Reyes-Requena, 243 F.3d at 902-904; Jones, 226 F.3d at 333-334; Davenport, 147 F.3d at 608-612.

Several of those circuits further have held that a prisoner may be entitled to habeas relief if an intervening decision of statutory interpretation, made retroactive on collateral review, has since established that the prisoner has been sentenced in excess of an applicable maximum under a statute or under a mandatory Sentencing Guidelines regime, or has received an erroneous statutory minimum sentence. See, e.g., United States v. Wheeler, 886 F.3d 415, 429-434 (4th Cir. 2018), cert. denied, 139 S. Ct. 1318 (2019); Hill v. Masters, 836 F.3d 591, 594-600 (6th Cir. 2016); Brown v. Rios, 696 F.3d 638, 640-641 (7th Cir. 2012); Allen v. Ives, 950 F.3d 1184 (9th Cir. 2020).

Notwithstanding that circuit conflict and its importance, this Court has recently and repeatedly declined to review the issue, including when raised by the government in Wheeler, supra (No. 18-420). E.g., Williams v. Coakley, 141 S. Ct. 908 (2020) (No. 20-5172); Cray v. Warden, FCI Coleman, 141 S. Ct. 908 (2020) (No. 20-5132); Hueso v. Barnhart, 141 S. Ct. 872 (2020) (No. 19-1365); Higgs v. Wilson, 140 S. Ct. 934 (2020) (No. 19-401); Walker

v. English, 140 S. Ct. 910 (2020) (No. 19-52); Quary v. English, 140 S. Ct. 898 (2020) (No. 19-5154); Jones v. Underwood, 140 S. Ct. 859 (2020) (No. 18-9495); Dyab v. English, 140 S. Ct. 847 (2020) (No. 19-5241). The circuit conflict does not warrant this Court's review in this case any more than it did when the government filed the petition in Wheeler.

2. In any event, this case would be a poor vehicle in which to review that conflict because it is not clear that petitioner would be entitled to relief under any circuit's view of the saving clause. As noted, the circuits that construe the saving clause most broadly to include sentencing challenges generally have required a prisoner to show that erroneous precedent foreclosed his claim at the time of sentencing, direct appeal, and a first motion under Section 2255. See, e.g., Allen, 950 F.3d at 1190; Wheeler, 886 F.3d at 429-434; Hill, 836 F.3d at 595-596; Brown, 696 F.3d at 640-641. Petitioner cannot satisfy that requirement.

Petitioner has not shown that when he filed his first Section 2255 motion, any since-abrogated precedent foreclosed his claim. Petitioner had an unobstructed opportunity at sentencing and on direct appeal in the Eighth Circuit to argue that Iowa third-degree burglary offenses were not violent felonies under the ACCA, an issue that was unsettled in the Eighth Circuit at the time. In fact, the defendant in Mathis challenged the same burglary statute on direct appeal in the Eighth Circuit, see United States v. Mathis, 786 F.3d 1068, 1071 (2015), rev'd, 136 S. Ct. 2243 (2016),

and that challenge ultimately succeeded before this Court, Mathis, 136 S. Ct. at 2253-2254.

Mathis did not abrogate any prior precedent: the prevailing arguments were available well before that decision, which made clear that the Court was merely applying "longstanding principles" and reiterating "exactly th[e] point" this Court "ha[d] already made" in earlier ACCA cases. 136 S. Ct. at 2251, 2253; see, e.g., In re Conzelmann, 872 F.3d 375, 376 (6th Cir. 2017) ("The Court's holding in Mathis was dictated by prior precedent (indeed two decades worth)."). Petitioner himself relied on this Court's ACCA precedents in arguing on direct appeal that his prior burglary convictions were not crimes of violence under the Sentencing Guidelines. See 10-1980 C.A. Doc. 3681800, at 12-13 (July 8, 2010); cf. Pet. 8 n.4; Pet. App. 17a. As the district court correctly explained, to the extent petitioner "raise[d] his Mathis claim before Mathis existed, albeit unsuccessfully," that would "not render Section 2255 inadequate or ineffective." Pet. App. 17a.

And to the extent that challenge was cognizable on collateral review, petitioner likewise was free to raise it in his initial Section 2255 motion. Indeed, although petitioner's initial Section 2255 motion focused on his argument that Iowa third-degree burglary is not a crime of violence under the Guidelines, petitioner did appear to suggest in that motion that Iowa's

burglary statute did not constitute generic burglary under the ACCA. See 12-cv-107 D. Ct. Doc. 1, at 4-5.

Accordingly, no circuit likely would conclude under the circumstances that Section 2255 was "inadequate or ineffective to test the legality of [petitioner's] detention." 28 U.S.C. 2255(e); see Davenport, 147 F.3d at 609 (denying habeas relief where prisoner "had an unobstructed procedural shot at getting his sentence vacated" in his initial Section 2255 motion); see also Ivy v. Pontesso, 328 F.3d 1057, 1060 (9th Cir.) ("[I]t is not enough that petitioner is presently barred from raising his claim of innocence by motion under § 2255. He must never have had the opportunity to raise it by motion."), cert. denied, 540 U.S. 1051 (2003).

Finally, even if this case otherwise warranted further review, petitioner's challenge to his ACCA sentence is complicated by the completion of his term of imprisonment and his concomitant release. As a result of those developments, the only relief petitioner could potentially obtain would be an amendment of his term of supervised release. Cf. 18 U.S.C. 3559(a)(3), 3583(b)(2). But he does not identify any decision allowing such relief in a habeas petition under the saving clause, and the Court's review of the question presented here could be impeded by that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2021