No.

In The
Supreme Court of the United States

JOHN FORREST HAM, JR.,

Petitioner,

v.

WARDEN M. BRECKON.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A person in federal custody ordinarily may collaterally challenge the legality of his detention only once, by filing a motion to vacate or set aside his conviction or sentence under 28 U.S.C. § 2255. Under section 2255(e)'s saving clause, however, such a person may file an application for habeas corpus under 28 U.S.C. § 2241 when it "appears" that a section 2255 motion is "inadequate or ineffective to test the legality of his detention."

The question presented is:

Whether a district court has jurisdiction under section 2241 to review a claim that a federal prisoner's sentence is invalid in light of an intervening and retroactively applicable statutory-interpretation decision of this Court, where circuit precedent foreclosed the claim at the time of the prisoner's prior section 2255 motion.

PARTIES TO THE PROCEEDINGS

Petitioner is John Forrest Ham, Jr., an inmate imprisoned at the U.S. Penitentiary Lee County in the Western District of Virginia.

Respondent is Warden Michael Breckon, Warden at the U.S. Penitentiary Lee County.

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INTRODUCTION

The decision in this case deepens a widely recognized conflict over an important and recurring question involving habeas review of federal criminal judgments. Under a retroactively applicable decision by this Court narrowing the reach of a federal criminal statute (*Mathis v. United States*), Petitioner John Forrest Ham, Jr., is confined to detention for a term well beyond the maximum authorized by law. All parties thus agree that Ham's sentence is invalid. They further agree that Fourth Circuit precedent foreclosed Ham's pre-*Mathis* motion to vacate or set aside the sentence under 28 U.S.C. § 2255.

If Ham were confined in a federal prison in the Sixth, Seventh, or Ninth Circuits, the district court would have jurisdiction to review (and grant) his post-*Mathis* habeas claim under the saving clause of section 2255(e), which permits a district court to "entertain" a federal inmate's habeas application when it "appears" that a section 2255 motion is "inadequate or ineffective to test the legality of his detention." But not so in the Fourth Circuit, which in the decision below injected into the saving clause's "inadequate or ineffective" standard an atextual requirement that the intervening decision from this Court announce a "new rule" that changes settled substantive law. Nor could Ham seek habeas relief if confined in the Fifth, Tenth, or Eleventh Circuits, which forbid all sentencing challenges based on intervening and retroactive statutory-interpretation decisions, notwithstanding the saving clause.

Because "the vagaries of the prison lottery" should not "dictate how much postconviction review a

prisoner gets," courts of appeals have called for this Court to provide much-needed guidance and uniformity. Indeed, the federal government supported Ham below and has previously urged this Court to settle the scope of section 2255(e) in the appropriate case. This case provides an ideal vehicle to resolve that pressing question.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 994 F.3d 682. The opinion and order of the district court denying Ham's application for a writ of habeas corpus under 28 U.S.C. § 2241 (App., *infra*, 30a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2021. A timely petition for rehearing and rehearing en banc was filed on June 4, 2021. The court of appeals denied that petition on June 21, 2021. The instant petition is thus subject to this Court's July 19, 2021 Order extending the time to file a petition for writ of certiorari to 150 days from the date of an order denying a timely rehearing petition issued on or before July 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2241(a) of title 28 of the U.S. Code 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 2241(c) of title 28 of the U.S. Code provides in relevant part:

> The writ of habeas corpus shall not extend to a prisoner unless—
>
> > (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> >
> > (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
> >
> > (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

Section 2255(e) of title 28 of the U.S. Code provides as follows:

> An application for a writ of habeas corpus [o]n 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.

Section 2255(h) of title 28 of the U.S. Code 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.

STATEMENT OF THE CASE

A. Legal Framework

"As a general rule, a federal prisoner wishing to collaterally attack his conviction or sentence must do so under [28 U.S.C.] § 2255 in the district of conviction." *Chazen v. Marske*, 938 F.3d 851, 856 (7th Cir. 2019). Ordinarily, "[a] second or successive motion" under section 2255 requires presentation of one of two things: "(1) newly discovered evidence" establishing 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." 28 U.S.C. § 2255(h).

A statutory "exception to the general rule," however, "permits a federal prisoner to file a habeas corpus petition pursuant to [28 U.S.C.] § 2241 to contest the legality of a sentence where his remedy under § 2255 is 'inadequate or ineffective to test the

legality of his detention.'" *Allen v. Ives*, 950 F.3d 1184, 1188 (9th Cir. 2020) (some internal quotation marks omitted) (quoting 28 U.S.C. § 2255(e)). Termed the "saving clause" or "escape hatch," *id.*, section 2255(e) provides jurisdiction "under § 2241, the general federal habeas corpus statute, in the district of incarceration" rather than in the district of conviction. *Chazen*, 938 F.3d at 856. This Court has "placed explicit reliance" on the saving clause in holding that section 2255 complies with the "uncontroversial" understanding that the constitutional "privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene v. Bush*, 553 U.S. 723, 776, 779 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

B. Factual Background

1. Ham receives an enhanced sentence.

In 2010, Ham pleaded guilty to three offenses, including a felon-in-possession offense under 18 U.S.C. § 922(g)(1). App., *infra*, 4a. (The other two offenses are not at issue in this case.) That offense generally carries a *maximum* penalty of ten years of imprisonment. 18 U.S.C. § 924(a)(2). If a defendant has three prior convictions for a "violent felony" or a "serious drug offense," however, the penalty increases to a *minimum* of fifteen years of imprisonment under the Armed Career Criminal Act (ACCA). *Id.* § 924(e)(1).

Applying Fourth Circuit precedent at the time of his sentencing, the district court determined that Ham had three prior state-court convictions that qualified

as ACCA predicate offenses. App., *infra*, 5a-6a. One of those convictions was for third-degree burglary under South Carolina law. *Id.* The court sentenced Ham to an ACCA-enhanced sentence of 235 months on the felon-in-possession offense. App., *infra*, 5a.

On direct appeal, Ham's counsel filed an *Anders* brief "finding no meritorious grounds for appeal," and Ham "filed a pro se supplemental brief arguing that the district court erred by designating him as an armed career criminal." *United States v. Ham*, 438 F. App'x 183, 184 (4th Cir. 2011) (per curiam). The Fourth Circuit "affirm[ed] Ham's convictions and sentence," finding "no meritorious issues for appeal." *Id.* at 184-185; *see* App., *infra*, 6a.

2. Ham has "no basis" to challenge his sentence under circuit precedent.

In 2012, Ham moved for relief under 28 U.S.C. § 2255. He raised several ineffective assistance of counsel claims, including a claim that his attorney should have argued that his South Carolina burglary conviction "is not an armed career criminal [p]redicate." App., *infra*, 6a. The district court rejected that claim because "there was no basis for [Ham's] defense counsel to object" that the prior state conviction was not a violent felony under the ACCA. *Id.* at 6a-7a.

To determine whether an offense qualifies as a "violent felony" or a "serious drug offense" under the ACCA, courts generally must use a "categorical approach," which permits them to "look only to the fact of conviction and the statutory definition of the prior offense." *Taylor v. United States*, 495 U.S. 575, 602 (1990). At the time, however, the district court

understood that, where a state "broadly define[s] burglary to include places other than buildings, the categorical approach may be modified to 'permit the sentencing court to go beyond the mere fact of conviction'" to determine whether the particular defendant's alleged conduct involved a building. App., *infra*, 7a (quoting *Taylor*, 495 U.S. at 602). South Carolina's burglary statute covers more conduct than generic burglary, because it defines "[b]uilding" to include "any structure, vehicle, watercraft, or aircraft *** [w]here any person lodges or lives" or "[w]here people assemble." S.C. CODE ANN. §§ 16-11-310(1), 16-11-313(A). Fourth Circuit precedent then "held that when analyzing South Carolina third degree burglary, the court 'may rely on a prepared presentence investigation[] report *** to determine whether a prior crime qualifies as a predicate offense under the ACCA.'" App., *infra*, 7a (quoting *United States v. Hickman*, 358 F. App'x 488, 489 (4th Cir. 2009) (per curiam)).

Because Ham's presentence report stated that his "state burglary conviction was committed when [he] forced open the front door of [the victim's] residence and entered the residence," the district court concluded that his third-degree burglary conviction under South Carolina law "constituted a generic burglary for purposes of the ACCA." App., *infra*, 7a. (second alteration in original). The Fourth Circuit had reached the same conclusion in *United States v. Hall (Hall I)*, 495 F. App'x 319, 327 (4th Cir. 2012), and would reach the same conclusion with respect to second-degree burglary a few years later in *United States v. McLeod*, 808 F.3d 972, 976 (4th Cir. 2015).

3. This Court thereafter takes a different view on the ACCA issue.

After the district court dismissed Ham's section 2255 motion, this Court decided *Mathis v. United States*, 136 S. Ct. 2243 (2016). *Mathis* drew a distinction between a statute "that lists multiple elements disjunctively" and "one that enumerates various factual means of committing a single element." *Id.* at 2249. "The itemized construction" of the latter, this Court clarified, "gives a sentencing court no special warrant to explore the facts of an offense, rather than to determine the crime's elements and compare them with the generic definition." *Id.* at 2251. Considering an Iowa statute that, like South Carolina's, defines burglary as unlawful entry into "any building, structure, *[or] land, water, or air vehicle*," the Court explained that "those listed locations are not alternative elements, going toward the creation of separate crimes," but instead "lay out alternative ways of satisfying a single locational element." *Id.* at 2250 (quoting IOWA CODE § 702.12 (2013)). Therefore, this Court held, it was "err[or]" to "apply[] the modified categorical approach to determine the means by which Mathis committed his prior crimes," which could not "give rise to an ACCA sentence." *Id.* at 2253, 2257.

"*Mathis* is dispositive," the Fourth Circuit later held when confronted with a section 2255 motion filed by a defendant whose felon-in-possession sentence had been enhanced (pre-*Mathis*) based on a prior South Carolina third-degree burglary conviction. *United States v. Hall (Hall II)*, 684 F. App'x 333, 335 (4th Cir. 2017) (per curiam). Applying this Court's intervening decision retroactively, the Fourth Circuit explained

that, "[a]s with the Iowa statute, the South Carolina statute covers unlawful entry into not only buildings but also vehicles, watercraft, and aircraft." *Id.* Those locations "are not alternative elements of the offense; instead, they are alternative means of satisfying the locational element of third-degree burglary." *Id.* at 336. Accordingly, "[u]nder *Mathis*, [a defendant's] conviction of third-degree burglary [under South Carolina law] cannot serve as a predicate felony under the ACCA." *Id.* at 335.

C. Procedural History

1. In view of the prior denial of his pre-*Mathis* section 2255 motion raising the same issue, Ham filed a *pro se* petition for a writ of habeas corpus under section 2241 in his district of confinement, the Western District of Virginia. Ham asserted that "his federal criminal sentence is unlawful under *Mathis*." App., *infra*, 30a.[1] The United States agreed: "[under] *Mathis*, Ham no longer meets the requirements of the ACCA, and his current sentence exceeds the otherwise applicable statutory maximum." *Id.* at 34a. Moreover, the United States agreed that the court "possesses jurisdiction over the petition" and "that *Mathis* is retroactive," and "expressly waive[d] any procedural defenses such as the statute of limitations." *Id.* at 34a.

The district court nonetheless dismissed the petition. Finding that *Mathis* did not constitute an "applicable change in substantive law" necessary to trigger the section 2255(e) saving clause, the district

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[1] Ham made two other attempts to correct his sentence in light of *Mathis*, both of which were construed as section 2255 motions and dismissed as successive. *See* App., *infra*, 31a-34a.

court held that the intervening decision did not render "the remedy in § 2255 *** inadequate and ineffective to test the legality of [his] sentence." App., *infra*, 36a-37a, 39a-40a. The district court thus concluded "that it lacks jurisdiction to address [Ham's] claims under the saving[] clause and § 2241." *Id.* at 40a-41a.

2. The court of appeals appointed an amicus to defend the district court's decision and affirmed. App., *infra*, 10a. The panel acknowledged that, prior to *Mathis*, Fourth Circuit precedent had applied the modified categorical approach to convictions for second-degree burglary under South Carolina law, "which contains the same definition of 'building' as third degree burglary," and thus permitted that offense to constitute an ACCA predicate. *Id.* at 22a-23a (citing *McLeod*, 808 F.3d at 974-976). The panel also recognized that the Fourth Circuit had since "concluded that South Carolina third degree burglary 'cannot serve as a predicate felony under the ACCA,'" in light of the retroactive application of *Mathis*. *Id.* at 21a (quoting *Hall*, 684 F. App'x at 335).

The panel nevertheless held that section 2255 was not inadequate or ineffective to test the legality of Ham's detention under *Mathis* because that intervening decision merely "clarif[ied]" that circuit precedent was incorrect under existing law, rather than "change the settled substantive law." App., *infra*, 4a, 14a. Even though the Fourth Circuit in *Hall II* had held that "*Mathis* is dispositive" that South Carolina third-degree burglary cannot constitute a predicate ACCA offense (contrary to prior circuit precedent), that holding did not "demarcate a change in settled law," according to the panel, because *Hall II* was

unpublished. *Id.* at 21a (internal quotation marks omitted).

The panel expressly departed from "the three other circuits that provide relief from erroneous sentences via the saving[] clause." App., *infra*, 27a (discussing *McCormick v. Butler*, 977 F.3d 521, 525 (6th Cir. 2020); *Chazen*, 938 F.3d at 856; *Allen*, 950 F.3d at 1188). Those circuits "do not utilize a test" "requiring a change in substantive law," but instead "merely require[] the petitioner to demonstrate that *Mathis* could not have been invoked, whether as foreclosed by circuit precedent or otherwise." *Id.* at 27a-28a. Rejecting that alternative approach, the panel affirmed the district court's dismissal of Ham's section 2241 petition. *Id.* at 28a-29a.

REASONS FOR GRANTING THE WRIT

This case presents an important question involving the availability of federal habeas review on which the circuits are in irreconcilable conflict. Three courts of appeals (Sixth, Seventh, and Ninth Circuits) permit petitions under section 2241 when a decision of this Court interpreting a criminal statute gives rise to a challenge to a federal inmate's detention that circuit precedent foreclosed at the time of his initial section 2255 motion. In the decision below, the Fourth Circuit expressly departed from that approach and required that the intervening decision also announce a new rule that changed settled law. But that extra hurdle cannot be squared with the language of section 2255(e), which guarantees habeas review when the section 2255 remedy is otherwise "inadequate or ineffective." Nor is the Fourth Circuit's atextual approach any more consistent with the constitutional

promise of a "meaningful opportunity" for habeas review than the holdings by other courts of appeals (Fifth, Tenth, and Eleventh Circuits) that an intervening statutory-interpretation decision can never give rise to a sentencing challenge under the saving clause.

All agree that Ham is serving a sentence that is invalid under this Court's (and the Fourth Circuit's) case law. The only issue is whether he—and other federal inmates affected by this Court's intervening decisions narrowing the scope of criminal statutes—may raise such a claim under section 2255(e)'s saving clause. This case is an ideal vehicle to settle that critical and recurring question.

I. THE DECISION BELOW DEEPENS A WIDELY RECOGNIZED CONFLICT AMONG THE COURTS OF APPEALS

The court below expressly recognized that its decision deepened a conflict among the courts of appeals concerning the scope of section 2255(e). *See* App., *infra*, 27a-28a. This Court's review is necessary to resolve that conflict.

1. Throughout this case, the parties have agreed that Ham could invoke section 2255(e) to seek relief under section 2241 because an intervening and retroactively applicable statutory-interpretation decision of this Court rendered his sentence unlawful. That view is consistent with the holdings of the Sixth, Seventh, and Ninth Circuits, which expressly permit saving clause challenges to sentencing enhancements in identical circumstances. *See McCormick*, 977 F.3d 521 (6th Cir.); *Guenther v. Marske*, 997 F.3d 735 (7th

Cir. 2021); *Chazen*, 938 F.3d 851 (7th Cir.); *Allen*, 950 F.3d 1184 (9th Cir.).

Each of those circuits allows a section 2241 petition when section 2255 is "inadequate or ineffective" because circuit precedent "foreclosed" the prisoner's statutory claim at the time of his first section 2255 motion. *Allen*, 950 F.3d at 1190 ("Allen did not have an unobstructed procedural shot at presenting his claim *** because it was foreclosed by existing precedent at the time of his direct appeal and § 2255 motion."); *see Guenther*, 997 F.3d at 742 ("[I]t would have been futile *** for Guenther to raise his new arguments in his first § 2255 motion because *** [c]ircuit precedent was firmly against him at that point."); *McCormick*, 977 F.3d at 527 (analyzing whether prisoner "could not have invoked his *** claim earlier because [of the modified categorical approach] our precedents allowed" at the time of his initial section 2255 motion). Simply put, where (as here) "an intervening case of statutory interpretation opens the door to [the] previously foreclosed claim," the district court has jurisdiction to consider the claim under section 2241. *Chazen*, 938 F.3d at 856; *see Allen*, 950 F.3d at 1190-1191 (fact that "legal basis for [petitioner's] argument arose only after [he] had appealed and after he had filed his § 2255 motion" "resolves the question of statutory jurisdiction"); *McCormick*, 977 F.3d at 526-528 (intervening case from this Court "clarified" that what circuit precedent previously "allowed *** is forbidden").

The decision below charted a different path in rejecting the proposition that jurisdiction lies when an intervening and retroactive statutory-interpretation decision from this Court "could not have been invoked,

whether as foreclosed by circuit precedent or otherwise," in the prisoner's initial section 2255 petition. App., *infra*, 27a-28a. According to the Fourth Circuit, it is not enough that circuit precedent "misinterpret[s]," "runs contrary to," or is "undercut" by an intervening decision by this Court. *Id.* at 22a, 27a-28a & n.9. If the petitioner cannot show as a formal matter that this Court announced a new rule that "substantively changed" settled law, the district court lacks jurisdiction under section 2241. *Id.* at 28a.

2. The conflict is particularly stark here because several courts of appeals have applied their saving clause tests to the same intervening decision at issue in this case: *Mathis*, 136 S. Ct. 2243. In the Sixth, Seventh, and Ninth Circuits, "*Mathis* fits the bill" of an intervening and retroactive decision that supplies jurisdiction under section 2241. *Chazen*, 938 F.3d at 862; *see Allen*, 950 F.3d at 1191-1192 (reversing "district court's dismissal of [prisoner's] § 2241 petition for lack of jurisdiction," because his claim under *Mathis* "did not become available until after the [appellate court] denied his § 2255 motion"); *McCormick*, 977 F.3d at 523 ("The district court incorrectly concluded that McCormick could not bring a habeas petition under 28 U.S.C. § 2241" because, under *Mathis*, he "is serving a sentence that exceeds the maximum sentence prescribed by Congress for his offense").

Those three circuits hold that, by "inject[ing] much-needed clarity and direction into the law under the Armed Career Criminal Act," *Mathis* provided the necessary "daylight to seek relief *** in [a] § 2241 petition" where "it would have been futile for [the prisoner] to argue that his [state] burglary convictions

did not qualify as violent felonies" in his earlier section 2255 motion. *Chazen*, 938 F.3d at 862-863. They acknowledge that *Mathis* "announced no new rule" as a formal matter, and instead merely "clarified" and "expanded an old and 'essential rule governing ACCA cases.'" *McCormick*, 977 F.3d at 526-528 (quoting *Mathis*, 136 S. Ct. at 2251). But that fact is irrelevant under their test: "as a functional and practical matter," *Mathis* allows for "relief from a mandatory minimum sentence under the Act" that was not available under circuit precedent at the time of the initial section 2255 petition. *Chazen*, 938 F.3d at 862.

By contrast, the Fourth Circuit below held that the district court lacked jurisdiction under section 2241 to review Ham's claim that his sentence is unlawful in light of *Mathis*. It is undisputed that at the time of Ham's pre-*Mathis* section 2255 motion, "there was no basis" for him to object to his sentencing enhancement. App., *infra*, 6a-7a. And the parties "agree[d] that [Ham] is entitled to pass through the saving[] clause" of section 2255(e) because his sentencing enhancement could not be squared with the intervening and retroactive *Mathis* decision. *Id.* at 10a. Indeed, the Fourth Circuit had concluded in another case that, because of *Mathis*, "South Carolina third degree burglary"—*the same underlying conviction that triggered Ham's sentencing enhancement*—"cannot serve as a predicate felony under the ACCA." *Id.* at 21a (quoting *Hall II*, 684 F. App'x at 335). The decision below nevertheless affirmed the dismissal of Ham's section 2241 application because *Mathis* only clarified what the law "has *always* required," rather than announced a new

rule that "change[d] the settled substantive law." *Id.* at 19a-20a.

In so holding, the Fourth Circuit added a steep obstacle to jurisdiction that other circuits have expressly rejected. *See, e.g.*, *Chazen*, 938 F.3d at 861 (rejecting view that prisoner "cannot rely on the saving[] clause to pursue relief under § 2241 *** because *Mathis* did not announce a substantive change in the law, but rather clarified the circumstances under the [ACCA] in which a sentencing court may apply the modified categorical approach").

3. Beyond that direct conflict, the courts of appeals are in disarray more generally when it comes section 2255(e). Two courts of appeals categorically reject that "a change in caselaw can [ever] satisfy the saving clause of section 2255(e)." *McCarthan v. Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1082-1100 (11th Cir. 2017) (en banc); *see Prost v. Anderson*, 636 F.3d 578, 584-598 (10th Cir. 2011) (Gorsuch, J.) (rejecting "erroneous circuit foreclosure test" adopted by other circuits).

One court of appeals holds that an intervening statutory interpretation decision can give rise to jurisdiction over a section 2241 petition presenting only challenges to unlawful *convictions*, not to unlawful *sentences*, though the saving clause draws no distinction between the two. *Padilla v. United States*, 416 F.3d 424, 427 (5th Cir. 2005) ("[B]ecause Padilla does not attack his conviction and his claims challenge only the validity of his sentence, Padilla's § 2241 petition does not fall within the saving[] clause of § 2255[.]"); *see In re Bradford*, 660 F.3d 226, 230 (5th

Cir. 2011) (holding that claim that prisoner "was erroneously sentenced as a career offender in light of recent decisions issued by [this Court] *** is not *** the type of claim that warrants review under § 2241").[2]

Accordingly, unlike in the Sixth, Seventh, and Ninth Circuits, but like in the Fourth Circuit, a federal prisoner in Ham's circumstances would be foreclosed from seeking relief from his invalid sentence in the Fifth, Tenth, and Eleventh Circuits.

4. The only constant amidst this disarray has been the broad recognition that "there is a circuit split" and that "the Supreme Court should grant certiorari *** to resolve [it]." *Allen v. Ives*, 976 F.3d 863, 868 (9th Cir. 2020) (Fletcher, J., concurring in denial of rehearing en banc); *see, e.g.*, *Camacho v. English*, 872 F.3d 811, 815 (7th Cir. 2017) (Easterbrook, J., concurring) ("[T]he Supreme Court needs to decide whether § 2255(e) permits litigation of this kind."); *Prost*, 636 F.3d at 594 (Gorsuch, J.) (acknowledging "messy field" in which circuits are "divided three different ways on how best to read the saving[] clause"). As then-Judge Barrett explained, the "circuit split on whether the lack of relief for statutory claims is a feature or a bug of § 2255"—and the resulting

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[2] Other courts of appeals have acknowledged that prisoners may invoke the saving clause to raise an actual innocence claim based on an intervening and retroactive statutory-interpretation decision of this Court that rendered a conviction unlawful, but have not addressed whether the same jurisdictional test applies to unlawful sentences. *See, e.g.*, *United States v. Tyler*, 732 F.3d 241, 246 (3d Cir. 2013); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002); *United States v. Barrett*, 178 F.3d 34, 52 (lst Cir. 1999); *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir. 1997).

"plague[]" of complex issues, like the "choice-of-law problem[s]" relating to inconsistent circuit approaches—have left litigants and district courts desperate for "better guidance." *Chazen*, 938 F.3d at 864 n.1, 865-866 (Barrett, J., concurring).

II. THE DECISION BELOW MISCONSTRUES THE SAVING CLAUSE OF SECTION 2255, CREATING SERIOUS CONSTITUTIONAL CONCERNS

The Fourth's Circuit's limitation on section 2255(e) cannot be squared with the statutory text and runs headlong into the constitutional protections afforded under the saving clause.

1. A federal prisoner may file a habeas corpus petition pursuant to section 2241 to contest the validity of a sentence where the ordinary remedy under section 2255 "appears" to be "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). That is the case here: "[T]here was no basis" for Ham to prevail on his *Mathis* claim under circuit precedent at the time of his initial section 2255 motion. App., *infra*, 6a-7a. And all agree that Ham cannot raise the claim through a "second or successive motion" because it is based on an intervening and retroactive decision of statutory interpretation, not on "newly discovered evidence" or "a new rule of constitutional law." 28 U.S.C. § 2255(h). Thus, Ham cannot (and never could) file a section 2255 motion to test the legality of his detention under *Mathis*—and so cannot obtain relief under that section from his undisputedly unlawful sentence.

Under the Fourth Circuit's test, section 2255 is nevertheless deemed "[]adequate [and] []effective"

because *Mathis* clarifies "an old rule," rather than announces a new rule that "change[s] the settled substantive law." App., *infra*, 18a-20a, 27a. That is a "mistake," which "confus[es] the test for saving-clause access with *Teague v. Lane*'s 'new rule' test for retroactivity, a separate habeas-related doctrine." *Wright v. Spaulding*, 939 F.3d 695, 705 n.7 (6th Cir. 2019). "Rather than mirroring *Teague*'s 'new rule' test, the central idea of the post-*Bailey [v. United States*, 516 U.S. 137 (1995)]-and-AEDPA saving-clause cases is 'whether an intervening case of statutory interpretation opens the door to a previously foreclosed claim.'" *Wright*, 939 F.3d at 705 n.7 (quoting *Chazen*, 938 F.3d at 862); *see Bousley v. United States*, 523 U.S. 614, 620 (1998) ("[W]e think [*Teague*] is inapplicable to the situation in which the Court decides the meaning of a criminal statute enacted by Congress."). After all, even under the *Teague* standard, "decisions that narrow the scope of a criminal statute by interpreting its terms" always apply retroactively "because [such decisions] necessarily carry a significant risk that a defendant *** faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004) (internal quotation marks omitted); *see Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (recognizing that "old rule" also applies retroactively).

If Congress had wanted to incorporate the "new rule" standard into a habeas requirement, as it did in certain provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), it knew how to do so. *See, e.g.*, 28 U.S.C. § 2255(h)(2). Instead, the saving clause "exists to circumvent AEDPA." *Wright*, 939 F.3d at 705 n.7. Contrary to the Fourth Circuit's

formalistic approach, the plain terms of the "inadequate or ineffective" test indicate that Congress meant to guarantee not only a prisoner's theoretical process for challenging his detention, but also his practical opportunity.

This reading of the statutory text is consistent with the "essential function of habeas corpus": "to give a prisoner *reasonable opportunity* to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998) (emphasis added) (citing *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)). Insisting that a section 2255 motion is inadequate or ineffective to test a detention only if this Court's intervening and retroactive decision formally announces a new rule—even when there was previously "no basis" for the motion, App., *infra*, 6a-7a—tramples the saving clause's essential function.

2. The decision below also runs afoul of settled principles of constitutional avoidance. This Court construes the saving clause of section 2255 to ensure access to the writ of habeas corpus commensurate with what the Suspension Clause may constitutionally require. *See Boumediene*, 553 U.S. at 776 (explaining that this Court has "placed explicit reliance upon [the saving clause] provisions in upholding [section 2255 and the District of Columbia equivalent] against constitutional challenges."). Under that Clause, it is "uncontroversial *** that the privilege of habeas corpus entitles the prisoner to a *meaningful opportunity* to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Id.* at 779 (emphasis added) (quoting *St. Cyr*, 533 U.S. at 302).

The "reach and purpose of the Suspension Clause"—*i.e.*, what types of challenges to a detention must be meaningfully provided for—is "inform[ed]" by the separation-of-powers doctrine. *Boumediene*, 553 U.S. at 746. Under that doctrine, "a defendant may not receive a greater sentence than the legislature has authorized." *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980); *see United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts."). As the Solicitor General has previously told this Court, "a sentence above the statutory maximum implicates the separation-of-powers principle that 'the power *** to prescribe the punishments to be imposed upon those found guilty of [federal crimes] resides wholly with the Congress.'" Br. of U.S. 19-21, *Persaud v. United States*, No. 13-6435, 2013 WL 7088877 (U.S.) (alterations in original) (quoting *Whalen v. United States*, 445 U.S. 684, 689 (1980)). When "a fundamental defect" arises, it "warrants correction under the saving[] clause" if "the defendant otherwise had no opportunity to raise it." *Id.* at 21; *see Persaud v. United States*, 571 U.S. 1172 (2014) (granting certiorari, vacating, and remanding "in light of the position asserted by the Solicitor General").

The decision below precludes any "meaningful opportunity" for Ham to raise his separation-of-powers claim that the judiciary sentenced him to more years in prison than Congress allowed. A "theoretically available procedural alternative" that is "all but impossible[] to use successfully, *** does not offer most defendants a meaningful opportunity to present a claim." *Trevino v. Thaler*, 569 U.S. 413, 427-428 (2013). Here, despite agreement that Ham's prior

state-law burglary conviction is not a valid ACCA predicate, the Fourth Circuit's requirement of a new rule that "changes" settled law prevents him from presenting that claim.

That atextual hurdle, moreover, inverts the principle that a law "should 'not be presumed to have effected [a] denial [of habeas relief] absent an unmistakably clear statement to the contrary'"—*i.e.*, a statement by *Congress*, not by the courts. *Boumediene*, 553 U.S. at 738 (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 575 (2006) (second alteration in original)); *see St. Cyr*, 533 U.S. at 298 (recognizing "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction"). At a minimum, the Fourth Circuit's construction of section 2255(e) raises serious constitutional questions that the contrary interpretation of the Sixth, Seventh, and Ninth Circuits avoids.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW IN THIS CASE

As the government has recognized, the meaning of the saving clause presents a question "of recurring and exceptional importance." Gov't Resp. to Pet. for Reh'g En Banc 15, *Prost v. Anderson*, No. 08-1455 (10th Cir. Apr. 25, 2011). Indeed, a few Terms ago, the Solicitor General told this Court that "the circuits are divided regarding the availability of habeas relief under the saving clause" and that "the significance of the issue" means that "this Court's review would be warranted in an appropriate case." U.S. Br. in Opp. 25, *McCarthan v. Collins*, No. 17-85 (Oct. 30, 2017). This petition presents such a case.

1. The question presented is fundamental to the fairness of the criminal justice system. This Court has long given careful consideration to the constitutional significance of judicial findings that improperly increase the sentencing limits Congress has prescribed. *See, e.g.*, *Alleyne v. United States*, 570 U.S. 99, 108 (2013) (holding that sentencing court cannot find fact that increases defendant's minimum sentence); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (same with respect to statutory maximum). As explained (*see* pp. 20-22, *supra*), similar separation-of-powers and due-process concerns warrant the Court's attention in this case.

Beyond constitutional principle, sentencing errors like the one Ham suffered exact substantial and unjust practical harms. Often, as here, "[t]he increase in penalty is severe." *Borden v. United States*, 141 S. Ct. 1817, 1822 (2021). Ham's possible penalty surged from a ten-year *maximum* to a fifteen-year *minimum*. *Compare* 18 U.S.C. § 924(a)(2), *with id.* § 924(e)(1). The resulting 235-month sentence is nearly twice as long as the felon-in-possession conviction may support. Similarly dramatic increases occur in related contexts. *See id.* § 3559(c)(1)(A) (increasing sentence for person convicted of "serious violent felony" to mandatory life imprisonment based on two prior convictions for serious violent felonies or serious drug offenses); 21 U.S.C. §§ 841(b)(1)(A), (B) (substantially increasing sentence for conviction under Controlled Substances Act, up to life imprisonment, based on prior felony drug offenses)

2. Confusion over the meaning of the saving clause will recur each and every time this Court (or another appellate court) narrows the scope of an

offense that triggers a sentencing enhancement. *See Schriro*, 542 U.S. at 351-352 (explaining that decision by this Court that "narrow[s] the scope of a criminal statute by interpreting its terms" is generally retroactively applicable). That, of course, happens frequently (as it did in *Mathis*). *See, e.g.*, *Borden*, 141 S. Ct. 1817; *Rosemond v. United States*, 572 U.S. 65 (2014); *Descamps v. United States*, 570 U.S. 254 (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); *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

Courts have been considering the scope of the saving clause since shortly after Congress restricted prisoners' ability to bring successive 2255 petitions when it enacted AEDPA in 1996. Since then, nearly every court of appeals has attempted to explain what it means for a remedy to be "inadequate or ineffective," reaching starkly different answers. *See* pp. 12-18, *supra*. Further percolation of the question would not carry any benefit. As jurists have broadly urged, in the context of the circuit conflict implicated here, issues of "significant national importance *** are best considered by the Supreme Court at the earliest possible date." *United States v. Wheeler*, 734 F. App'x 892, 893 (4th Cir. 2018) (statement of Agee, J. concerning denial of rehearing); *Wright*, 939 F.3d at 710 (Thapar, J., concurring) ("[T]he Court should step in. And I would respectfully submit that sooner may be better than later.").

3. Worse still, because section 2241 petitions must be filed in the district of confinement, a federal

inmate's ability to obtain relief from an erroneous sentence presently turns on "the fortuitous placement of a prisoner by the Bureau of Prisons." *Chazen*, 938 F.3d at 865 (Barrett, J., concurring); *see, e.g.*, *Wright*, 939 F.3d at 710 (Thapar, J., concurring) (illustrating that "the vagaries of the prison lottery will dictate how much postconviction review a prisoner gets" by noting that "[a] federal inmate in Tennessee can bring claims that would be thrown out were he assigned to neighboring Alabama"). If Ham were transferred from the federal prison in Virginia to a federal prison located one state over, in Kentucky or Tennessee, a district court could grant the same section 2241 petition that the Fourth Circuit dismissed "for lack of jurisdiction" in this case. App., *infra*, 3a. As the law currently stands, whether Ham is treated as an armed career criminal—and spends many more years in federal prison as a result—depends not on the crime for which he was sentenced but on the circuit in which he happens to be incarcerated.

4. The instant case is an ideal opportunity for this Court squarely to resolve the question presented. All parties agree that Ham's sentence is invalid under *Mathis*. The only issue in the case is whether the saving clause allows Ham to bring a 2241 petition to correct this undisputed error. That is a pure question of law; it was fully briefed by the parties below (and by court-appointed amicus after the government sided with Ham); and it is dispositive.

Ham remains incarcerated on his felon-in-possession conviction. Unlike other petitions that have invited this Court to review the scope of the saving clause, here the sentencing court did not consider any other prior convictions that could replace

the erroneously applied South Carolina burglary conviction as a third ACCA predicate offense. A proper resentencing would undoubtedly shorten Ham's time in prison.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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