APPENDIX

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6972

JOHN FORREST HAM, JR.,

Petitioner – Appellant,

v.

WARDEN M. BRECKON,

Respondent – Appellee.

KATHRYN MARGARET BARBER, Esq.,

Court-Assigned Amicus Counsel.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Glen E. Conrad, Senior District Judge. (7:18-cv-00649-GEC-PMS)

Argued: January 28, 2021 Decided: April 20, 2021

Before AGEE, THACKER, and QUATTLEBAUM, Circuit Judges.

Affirmed by published opinion. Judge Thacker wrote the opinion, in which Judge Agee and Judge Quattlebaum joined.

ARGUED: Lisa M. Lorish, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charlottesville, Virginia, for Appellant. Jennifer R. Bockhorst, OFFICE OF THE UNITED STATES ATTORNEY, Abingdon, Virginia, for Appellee. Kathryn Margaret Barber, MCGUIREWOODS LLP, Richmond, Virginia, Court-Assigned Amicus Counsel. **ON BRIEF:** Juval O. Scott, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Roanoke, Virginia, for Appellant. Thomas T. Cullen, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee. Matthew A. Fitzgerald, MCGUIREWOODS LLP, Richmond, Virginia, Court-Assigned Amicus Counsel.

THACKER, Circuit Judge:

John Forrest Ham, Jr. ("Petitioner") appeals the district court's dismissal of his 28 U.S.C. § 2241 habeas petition for lack of jurisdiction. He claims that, pursuant to *United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018), the district court was permitted to address the merits of his petition. *Wheeler* provides a four-part test for a federal prisoner who wishes to seek relief from an allegedly defective sentence, where remedy by a 28 U.S.C. § 2255 motion would be "inadequate or ineffective." 28 U.S.C. § 2255(e) (commonly known as the "savings clause").[1] Relevant to this appeal, *Wheeler* requires that, in order for a district court to possess jurisdiction to consider a § 2241 petition pursuant to the savings clause, a petitioner must demonstrate a retroactive change in settled substantive law subsequent to his direct appeal and first § 2255 motion.

Petitioner claims that in his case, *Mathis v. United States*, 136 S. Ct. 2243 (2016), satisfies this requirement. Specifically, he argues *Mathis* changed "well-settled substantive law" regarding how a sentencing court should apply the categorical approach.[2] Pet'r's Br. 11. The district court rejected

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[1] "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. § 2255(e).

[2] The categorical approach, as applied in cases such as Petitioner's, is an analytical sentencing method by which courts

this argument, and we affirm. To the extent Petitioner contends *Mathis* changed settled substantive Supreme Court law, *Mathis* itself made clear that it was not changing, but rather clarifying, the law. To the extent Petitioner contends *Mathis* changed settled Fourth Circuit law, for the reasons that follow, we are not convinced. Therefore, Petitioner cannot meet the high bar to pass through the savings clause and have his § 2241 petition heard on the merits.

I.

A.

Procedural History

1.

Petitioner's Plea and Sentencing

On May 12, 2010, Petitioner pled guilty in the United States District Court for the District of South Carolina ("DSC") to (1) being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), with three prior convictions for a violent felony or a serious drug offense, *see id.* § 924(e)(1) (the Armed Career Criminal Act ("ACCA")); (2) carjacking, in violation of 18 U.S.C. § 2119(1); and (3) possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1).

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determine whether the elements of a defendant's prior conviction fit within a generic definition of a federal crime. Using this approach, courts can decide if, when, and how a defendant should receive an enhanced sentence. The modified categorical approach allows courts to look behind the elements to documents underlying the prior conviction, such as the charging papers and jury instructions, in certain circumstances.

Petitioner was sentenced on September 10, 2010, to a total term of 319 months, consisting of 235 months on the ACCA count and 180 months on the carjacking count, to run concurrently. On the § 924(c) count, Petitioner received a sentence of 84 months, to run consecutively to the ACCA and carjacking sentences. By his § 2241 petition, Petitioner seeks to challenge his sentencing enhancement pursuant to the ACCA, which provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a ***violent felony*** or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .
>
> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that . . . ***is burglary*** . . . .

18 U.S.C. § 924(e)(1), (e)(2)(B)(ii) (emphases supplied). Applying the modified categorical approach, the DSC sentenced Petitioner to an enhanced sentence based in part on his prior conviction for South Carolina third-degree burglary,[3] which provides, "A person is guilty of burglary in the third degree if the person enters a ***building*** without consent and with intent to commit

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[3] The DSC also relied on Petitioner's prior conviction for South Carolina assault and battery of a high and aggravated nature ("ABHAN") and a drug offense. The validity of these prior convictions is not at issue in this appeal.

a crime therein." S.C. Code Ann. § 16-11-313(A) (emphasis supplied). "Building" is defined to include "any structure, vehicle, watercraft, or aircraft . . . [w]here any person lodges or lives . . . people assemble . . . or where goods are stored." *Id.* § 16-11-310(1). This court affirmed Petitioner's conviction and sentence on July 12, 2011. *See United States v. Ham*, 438 F. App'x 183 (4th Cir. 2011) (per curiam).

2.

Post-Conviction Litigation

a.

In July 2012, Petitioner filed his first § 2255 motion to vacate his sentence, raising several ineffective assistance of counsel claims, including a claim his attorney should have argued that South Carolina third degree burglary "is not an armed career criminal [p]redicate." Mot. at 6, *United States v. Ham*, No. 6:10-cr-46 (D.S.C. filed July 5, 2012), ECF No. 44. While that motion was pending, the Supreme Court decided *Descamps v. United States*, 570 U.S. 254 (2013), holding that courts *may not* apply the modified categorical approach to an ACCA sentencing when the offense of conviction has a single, indivisible set of elements.

On August 9, 2013, seven weeks after *Descamps* was decided, the DSC dismissed Petitioner's first § 2255 motion as without merit. In addressing the ineffective assistance claim grounded in the ACCA, the DSC explained that trial counsel was not ineffective for failing to argue that South Carolina third degree burglary is not an ACCA predicate because "there was no basis for [Petitioner's] defense

counsel to object." *United States v. Ham*, No. 6:10-cr-46, 2013 WL 4048988, at *3 (D.S.C. Aug. 9, 2013). The DSC explained, "[B]ecause some states broadly define 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.'" *Id.* (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)). The DSC also cited this court's unpublished decision in *United States v. Hickman*, which held that when analyzing South Carolina third degree burglary, the court "may rely on a prepared presentence investigations report . . . to determine whether a prior crime qualifies as a predicate offense under the ACCA." *Id.* (quoting *Hickman*, 358 F. App'x 488, 489 (4th Cir. 2009) (per curiam)). It then looked to Petitioner's PSR and saw that Petitioner's "state burglary conviction was committed when [Petitioner] forced open the front door of [the victim's] residence and entered the residence"; therefore, the offense constituted a generic burglary for purposes of the ACCA. *Id.* The DSC did not cite *Descamps*, and Petitioner did not appeal.

b.

Three years later, the Supreme Court decided *Mathis v. United States*, 136 S. Ct. 2243 (2016). Petitioner thereafter filed a pro se § 2241 petition in the district of his confinement, the United States District Court for the Western District of Virginia ("WDVA"), arguing that pursuant to *Mathis*, and employing the categorical approach (not modified), South Carolina third degree burglary is not a violent felony. Pet. at 2, *Ham v. Breckon*, No. 7:17-cv-295 (W.D. Va. June 23, 2017), ECF No. 1. The WDVA

construed the § 2241 petition as a § 2255 motion and transferred it to the DSC, the district of sentencing. The WDVA also opined that § 2241 relief was not available because *Mathis* "had no effect on the criminality of [Petitioner's] federal offense conduct," and this court had not yet concluded that a prisoner could challenge the legality of his sentence via the savings clause. Mem. Op. at 2, *id*. (W.D. Va. June 27, 2017), ECF No. 3.

On March 2, 2018, the DSC dismissed the transferred § 2255 motion as successive. Later that same month, we decided *United States v. Wheeler*, setting forth a four-part test for prisoners wishing to the challenge the legality of their sentence pursuant to the savings clause of § 2255(e). *See* 886 F.3d 415 (4th Cir. 2018). The test requires:

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

Id. at 429.

Petitioner promptly filed a motion to alter or amend in the DSC, asking that court to reassess its

order dismissing his § 2255 motion as successive in light of *Wheeler*. On January 7, 2019, the DSC denied the motion, concluding "[Petitioner] cannot meet the second prong of *Wheeler*" because Petitioner "d[id] not rely on a retroactively applicable change in substantive law." Order at 2–3, No. 6:10-cr-46 (D.S.C. Jan. 7, 2018), ECF No. 131. Petitioner appealed, and we denied a certificate of appealability and dismissed the appeal. *See United States v. Ham*, 773 F. App'x 746 (4th Cir. 2019) (per curiam).

While the motion to reconsider was pending in the DSC, on December 31, 2018, Petitioner filed the instant pro se § 2241 petition in the WDVA, alleging that he could meet *Wheeler*'s four prongs because his sentencing enhancement was misapplied "in light of subsequent caselaw establishing that [his] predicate offenses no longer qualify." J.A. 33.[4] The Government responded to Petitioner's § 2241 petition, agreeing that Petitioner was entitled to relief.

Nonetheless, the WDVA dismissed the § 2241 petition for lack of jurisdiction. Like the DSC, the WDVA concluded Petitioner did not meet prong two of the *Wheeler* test, reasoning that his § 2241 petition "does not rely on a retroactively applicable change in substantive law subsequent to his direct appeal and first § 2255 motion." J.A. 67 (internal quotation marks omitted). Specifically, the WDVA explained that many courts -- including this court in unpublished decisions -- "have found that *Mathis* did *not change* settled substantive law." J.A. 68 (emphasis in original). In so holding, the WDVA cited our

[4] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

unpublished decision in *Brooks v. Bragg*, in which we stated, "*Descamps* and *Mathis* did not announce a retroactively applicable substantive change in the law. Rather, these cases reiterated and clarified the application of the categorical approach or the modified categorical approach, to determine whether prior convictions qualify as predicates for recidivist enhancements." 735 F. App'x 108, 109 (4th Cir. 2018) (per curiam); *see also Muhammad v. Wilson*, 715 F. App'x 251, 252 (4th Cir. 2017) (per curiam) ("*Descamps* and *Mathis* did not announce a substantive change to the law."). Thus, the WDVA determined that Petitioner "has simply failed to make the requisite showing" under *Wheeler*. J.A. 69.

c.

Petitioner timely noted this appeal from the WDVA's dismissal of his § 2241 petition. Because the Government and Petitioner agree that Petitioner is entitled to pass through the savings clause, we appointed amicus counsel to argue the position of the district court. Whether a petitioner satisfies the requirements of the savings clause is a jurisdictional question that we review de novo. *See Wheeler*, 886 F.3d at 426; *Young v. Antonelli*, 982 F.3d 914, 917 (4th Cir. 2020).

B.

Legal Landscape -- *Mathis* and the Categorical Approach

Because Petitioner bases his *Wheeler* claim on *Mathis*, we start with an overview of that decision and its place in a succession of Supreme Court cases addressing the categorical approach.

1.

Taylor v. United States

In the seminal case of *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court held that generally, in determining whether an offense qualifies as a "violent felony" under the ACCA, a federal sentencing court "must look only to the statutory definition" -- i.e., the elements of a defendant's prior offenses, and not to "the particular facts underlying those convictions." 495 U.S. at 600. If the definition of the prior offense sweeps more broadly than the generic offense, then the prior offense fails to qualify as an ACCA predicate. *See id*. at 599. The Supreme Court referred to this framework as the "formal categorical approach." *Id*. at 600. *Taylor* also recognized, however, that this approach "may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of [the generic offense]." *Id*. at 602. In such a case, *Taylor* explained a court may look beyond the statutory elements to the "charging paper and jury instructions" to determine whether an offense qualifies as a violent felony. *Id*.

This process of looking behind statutory elements of the crime became known as the "modified categorical approach." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007) (quoting *Conteh v. Gonzales*, 461 F.3d 45, 54 (1st Cir. 2006)).

2.

Descamps v. United States

In 2013, the Supreme Court clarified that the modified categorical approach does not apply to statutes containing a single, indivisible set of elements. *See Descamps*, 570 U.S. at 258. Rather, the modified categorical approach only applies when an offense is divisible with alternative elements. *See id.* at 260. As an example, the Court explained that a statute that sets forth divisible, alternative elements would be a "burglary [statute that] involves entry into a building *or* an automobile." *Id.* at 257 (emphasis in original).

3.

Mathis v. United States

Finally, in *Mathis*, the Supreme Court relied on *Taylor* and *Descamps* to clarify that where an offense of conviction enumerates various alternative factual means of satisfying one element of the crime, courts may not use the modified categorical approach. *See* 136 S. Ct. at 2248–49. Specifically, the Court addressed Iowa burglary, which prohibited unprivileged entry into an "occupied structure" -- defined to include "any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place." Iowa Code § 702.12. The Court explained the Iowa statute did not list "alternative elements" but rather, "alternative ways of satisfying a single locational element." *Mathis*, 136 S. Ct. at 2250. In other words, "occupied structure" was the element, and the different variances of "occupied structure" were merely ways to

satisfy that element. Thus, the Iowa statute was not divisible, and the modified categorical approach was not appropriate. Using the categorical approach, then, the Supreme Court determined that because Iowa burglary applied to burglary of "any building, structure, *or land, water, or air vehicle*," *id*. (emphasis supplied), the Iowa statute covered a broader swath of conduct than the generic burglary offense, defined in *Taylor* as unlawful entry into a "building or other structure," *id*. (quoting *Taylor*, 495 U.S. at 598). Therefore, Iowa burglary could not serve as an ACCA predicate.

Importantly for the case at hand, *Mathis* made clear that it was *not* breaking new ground or changing any of its prior decisions regarding how to apply the categorical approach. Indeed, *Mathis* begins by noting, "*For more than 25 years*, our decisions have held that the prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense." *Mathis*, 136 S. Ct. at 2247 (emphasis supplied). It then declined to make an "exception" to this established rule for the situation in which a defendant is convicted under a statute "that lists multiple, alternative means of satisfying one (or more) of its elements." *Id*. at 2247–48. *Mathis* did not amend any elements of any state burglary statutes, nor did it render any such statutes indivisible that the Supreme Court had previously rendered divisible. It merely reiterated the "*longstanding principle*[]" that "[h]ow a given defendant actually perpetrated the crime . . . makes no difference" in analyzing a prior conviction under the categorical approach. *Id*. at 2251 (emphasis supplied).

II.

Prong Two of the *Wheeler* Test[5]

This case boils down to an analysis of prong two of the *Wheeler* test. Prong two has two components. First, it requires the "settled substantive law" establishing the legality of the prisoner's sentence to have "changed." *United States v. Wheeler*, 886 F.3d 415, 429 (4th Cir. 2018). Second, it requires this change to have been "deemed to apply retroactively on collateral review." *Id.* Because we conclude *Mathis* did not change the settled substantive law, we need not reach the retroactivity question.

A.

Change in Settled Substantive Law

Wheeler prong two requires the petitioner to demonstrate that "the aforementioned settled substantive law changed," 886 F.3d at 429, that is, "the 'settled law of this circuit or the Supreme Court,'" *Young v. Antonelli*, 982 F.3d 914, 918 (4th Cir. 2020) (quoting *Wheeler*, 886 F.3d at 429).

1.

Origin and Application

In this court's decision *In re Jones*, we held for the first time that a prisoner could pass through the savings clause and challenge his *conviction* if he could demonstrate that the "substantive law changed." 226 F.3d 328, 334 (4th Cir. 2000). In *Jones*, the petitioner, Byron Jones, sought § 2241 relief based on the

[5] Because we conclude Petitioner cannot satisfy prong two, we do not consider the other three prongs.

Supreme Court decision in *Bailey v. United States*, which held that the Government "must prove active employment of a firearm in order to convict under the 'use' prong of [18 U.S.C.] § 924(c)(1)." *Id.* at 330. We explained *Bailey* "overruled the prior law of this circuit." *Id.* Specifically, before *Bailey*, this court had concluded "constructive possession of firearms in relation to a drug transaction is sufficient to establish 'use.'" *United States v. Paz*, 927 F.2d 176, 179 (4th Cir. 1991).

Because Jones could not meet the requirements for a second or successive § 2255 motion, he attempted to pass through the savings clause of § 2255(e) by demonstrating that a § 2255 motion was "inadequate or ineffective" to test the legality of his conviction. *See Jones*, 226 F.3d at 331. We created a three-part test, explaining that, inter alia, the prisoner was required to demonstrate that the "substantive law changed" such that the conduct of which the prisoner was convicted was no longer criminal. *Id.* at 333–34; *see Hahn v. Moseley*, 931 F.3d 295, 303 (4th Cir. 2019) ("*Jones* assumes that the factual record is settled but requires this Court to compare prior and current precedent to evaluate whether a substantive change in the law has occurred."); *see also id.* at 302 (applying *Jones*, concluding the substantive law changed where a decision "introduce[d] a new statutory framework" that was not present at the time of conviction).[6]

[6] *Jones* also required that a petitioner show that at the time of his conviction, the "settled law of this circuit or the Supreme Court established the legality of the conviction," and that he "cannot satisfy the gatekeeping provisions of § 2255

Eighteen years later in *Wheeler*, we extended *Jones* to erroneous sentences resulting in fundamental defects. In making this extension, we specifically relied on the idea that *Jones* "contemplate[d] a change in 'substantive law,'" and we borrowed that requirement in fashioning prong two of the *Wheeler* test. *Wheeler*, 886 F.3d at 428 (quoting *Jones*, 226 F.3d at 333–34); *see also Braswell v. Smith*, 952 F.3d 441, 448 (4th Cir. 2020) ("[T]he combination of the *change in settled substantive law* and its retroactivity must occur after the first § 2255 motion has been resolved." (alteration omitted) (emphasis supplied)).

The petitioner in *Wheeler* was able to demonstrate a change in settled substantive law because at the time of his sentencing (where he received an enhanced sentence based on having a prior felony drug offense punishable by a prison term "exceeding one year," 886 F.3d at 420), the settled substantive law in this circuit was that "to determine whether a conviction is for a crime punishable by a prison term exceeding one year, . . . we consider the maximum *aggravated* sentence that could be imposed for that crime upon a defendant with the worst possible criminal history," *United States v. Harp*, 406 F.3d 242, 246 (4th Cir. 2005) (emphasis in original). However, after Wheeler's direct appeal and first § 2255 motion, this court decided *United States v. Simmons*, wherein we overturned *Harp* and ruled that a district court could no longer look to a *hypothetical* defendant with the worst possible criminal history. *See* 649 F.3d 237, 246 (4th Cir. 2011) (en banc).

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because the new rule is not one of constitutional law." 226 F.3d at 333–34. Neither of those requirements are relevant here.

Instead, a sentencing court could only consider the maximum possible sentence that the particular defendant could have received. *See id.* at 246–47. *Simmons*, therefore, changed the settled substantive law of this circuit. *See Miller v. United States*, 735 F.3d 141, 144 (4th Cir. 2013) (explaining that in *Simmons*, "this Court changed course, overruling long-standing precedent").

Likewise, in our few published decisions applying the *Wheeler* test, those petitioners who were granted entry through the savings clause presented substantive changes in the law.

For example, *Braswell*, like *Wheeler*, relied on the change in law set forth in *Simmons*. *See* 952 F.3d at 448. And, in *Lester v. Flournoy*, 909 F.3d 708, 712 (4th Cir. 2018), we concluded that the petitioner, Stoney Lester, satisfied prong two of *Wheeler* based on a change in this court's law regarding the crime of walkaway escape.[7] First, the Supreme Court held that the Illinois crime of failure to report to a prison was not a violent felony for purposes of the ACCA in *Chambers v. United States*, 555 U.S. 122, 130 (2009). Then, based on *Chambers*, this court ruled that walkway escape, Lester's prior offense, was not a crime of violence for purposes of the (then mandatory) career offender Sentencing Guidelines, *see United*

[7] Provided, *Lester* was primarily concerned not with whether a substantive change occurred, but whether there was "an error sufficiently grave to be deemed a fundamental defect." 909 F.3d at 712. In fact, the opinion's brief analysis of the first three prongs of *Wheeler* appears rooted in the parties' agreement. *See id.* ("Nobody disagrees that the first three *Wheeler* requirements are satisfied.").

States v. Clay, 627 F.3d 959, 969 (4th Cir. 2010). We noted that after *Chambers* and *Clay*, Lester had "new precedents in hand." *Lester*, 909 F.3d at 710; *see also id*. at 711 (suggesting Lester's petition was based on a "new statutory construction[]"); *id*. at 712 (referring to *Chambers* and *Clay* as "new authority"); *cf. Young*, 982 F.3d at 918–19 (holding that, although this court elected to change the law of this circuit by extending *Burrage v. United States*, 571 U.S. 204, 206 (2014), to the death results Sentencing Guidelines, the district court was correct that at the time of its decision, *Burrage* had not changed the law of this circuit).

2.

No Change in Supreme Court Law

Turning to the case at hand, we look to whether *Mathis* changed settled Supreme Court law with regard to application of the categorical approach. Petitioner submits that *Descamps* "clarif[ied] that the modified categorical approach only applies when an offense is divisible with *alternative elements*." Pet'r's Br. 12 (emphasis in original). But, Petitioner maintains, "it was not until *Mathis* that the Supreme Court gave further explanation of how to determine whether an offense had alternative *elements*, or alternative *methods* of committing a single offense." *Id*. at 13 (emphases in original).

But even in Petitioner's view, *Descamps* and *Mathis* provided "clarif[ication]" and "further explanation" of prior Supreme Court case law. And all parties in this appeal agree that *Mathis* was merely restating an old rule. *See* Pet'r's Br. 21–22 ("[T]he fact that *Mathis* itself explains that it was based on prior precedent demonstrates that it is an 'old rule' . . . ."");

Gov't's Br. 12, 17 ("*Mathis* is an old rule . . . ." and *Mathis* "was not saying anything new."); Amicus Br. 19 ("*Mathis* is an old rule that does not satisfy *Wheeler*'s second prong." (capitalization omitted)).

The parties are correct. *Mathis* made clear that the categorical approach has *always* required a look at the elements of an offense, not the facts underlying it. *See Mathis*, 136 S. Ct. at 2257 ("Whether or not [alternative means of commission are] made explicit, they remain what they ever were -- just the facts, which [the] ACCA (so we have held, over and over) does not care about."). Indeed, *Mathis* merely repeated the "simple point" that served as "a mantra" in its ACCA decisions: "a sentencing judge may look only to the elements of the offense, not to the facts of the defendant's conduct." *Id*. at 2251 (alterations and internal quotation marks omitted); *see also id*. at 2248 ("ACCA, *as we have always understood it*, cares not a whit about [facts]." (emphasis supplied)); *id*. at 2253 ("[O]ur cases involving the modified categorical approach have already made exactly that point [i.e., that facts cannot be used to enhance a sentence]."); *id*. at 2255 ("*Descamps* made clear that when the Court had earlier said (and said and said) 'elements,' it meant just that and nothing else."); *id*. at 2257 ("Our precedents make this a straightforward case."). At the risk of "downright tedium," it listed the ACCA decisions explaining this point. *Id*. at 2252 (citing *James v. United States*, 550 U.S. 192 (2007); *Sykes v. United States*, 564 U.S. 1 (2011); *Descamps*, 570 U.S. at 261).

Even in *Descamps*, which was decided while Petitioner's first § 2255 motion was pending, the Court

stated, "In [our prior] decisions . . . the modified approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." 570 U.S. at 260. And "[t]he key" when deciding whether to apply an enhancement pursuant to the ACCA "is elements, not facts." *Id*. at 261.

For these reasons, *Mathis* did not change the settled substantive law of the Supreme Court with regard to when a court should apply the categorical or modified categorical approach. *See Muhammad v. Wilson*, 715 F. App'x 251, 252–53 (4th Cir. 2017) (per curiam) ("*Descamps* and *Mathis* did not announce a substantive change to the law. Rather, these cases reiterated and clarified when to apply the categorical approach or the modified categorical approach, which was set forth in *Taylor*. . . .").

3.

No Change in Fourth Circuit Law

Primarily, however, Petitioner contends that he can satisfy the second prong of the *Wheeler* test because *Mathis* changed the settled substantive law *of this court*. As Petitioner's argument goes, before *Mathis*, courts in this circuit believed South Carolina third-degree burglary was divisible and therefore subject to the modified categorical approach, but after *Mathis*, those courts are now using the categorical approach. *See* Pet'r's Br. 15–16; *see also* Gov't's Br. 17–18. Petitioner's argument, however, misses the mark.

a.

United States v. Hall

First, Petitioner points to our unpublished decision in *United States v. Hall*, 684 F. App'x 333 (4th Cir. 2017) (per curiam), as evidence of the shift in this court's application of the categorical approach to South Carolina third degree burglary. *See* Pet'r's Br. 15. Specifically, *Hall* concluded that South Carolina third degree burglary "cannot serve as a predicate felony under the ACCA" because, like the Iowa statute at issue in *Mathis*, "the South Carolina statute . . . is not divisible." *Id.* at 335. And we said *Mathis* "is dispositive in this case." *Id.*

But *Hall* cannot bear the weight Petitioner gives it. *Hall* was an unpublished, non-precedential decision and cannot be faithfully read to demarcate a change in settled law. We have "be[en] clear" that, where this court concluded in an unpublished opinion that Virginia abduction fell within the residual clause of U.S.S.G. § 4B1.2(a), such a decision "d[id] not constitute binding authority under our circuit rules." *United States v. Morris*, 917 F.3d 818, 826 (4th Cir. 2019); *see also Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 545–46 n.4 (4th Cir. 2019) ("Unpublished decisions, of course, do not constitute binding precedent in this Circuit."); *Pressley v. Tupperware Long Term Disability Plan*, 553 F.3d 334, 339 (4th Cir. 2009) (reaching a decision at odds with unpublished precedent, noting that "[w]e . . . are not bound by" unpublished precedent, and "'we ordinarily do not accord precedential value to our unpublished decisions.'") (quoting *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 219 (4th Cir. 2006)); *cf.* 4th Cir.

Local R. 36(b) ("Unpublished opinions give *counsel, the parties, and the lower court or agency* a statement of the reasons for the decision." (emphasis supplied)).

b.

United States v. McLeod

Next, Petitioner relies on *United States v. McLeod* to demonstrate that this court was applying the modified categorical approach to South Carolina burglary after *Descamps* but before *Mathis*. *See* 808 F.3d 972, 974 (4th Cir. 2015). But this decision also does not help Petitioner.

In *McLeod*, this court applied the modified categorical approach to South Carolina second degree burglary (which contains the same definition of "building" as third degree burglary), saying that approach was "authorized by *Taylor* and *Descamps*." 808 F.3d at 974 (citation omitted). It also explained the South Carolina burglary statute "defines the term 'building' to include 'any structure, vehicle, watercraft, or aircraft,' providing *elements* alternative to generic burglary." *Id.* at 976 (emphasis supplied) (quoting S.C. Code Ann. § 16–11–310(1)).

But if, as Petitioner wishes, we read *McLeod* as standing for the proposition that this court viewed South Carolina burglary as a divisible offense necessitating the modified categorical approach, there has been no published circuit opinion abrogating that principle. Although *Mathis*'s clarification of when to use the modified categorical approach may undercut *McLeod*'s treatment of "structure, vehicle, watercraft, or aircraft" as "elements," *McLeod*, a precedential panel decision, could not have been "changed" by *Hall*,

a non-precedential decision, to satisfy prong two of *Wheeler*. *Wheeler*, 886 F.3d at 429.

c.

Reading Indivisible Statutes

Petitioner also cites *United States v. Kirksey*, 138 F.3d 120 (4th Cir. 1998), for the proposition that at the time of Petitioner's sentencing, this court was applying the modified categorical approach to statutes without divisible elements -- in that case, Maryland common law assault. *See* Pet'r's Br. 12. While that may be true for the particular Maryland offense at issue in *Kirksey*, we said nothing in that case about South Carolina burglary. In any event, we abrogated the approach taken in *Kirksey* years before *Mathis*. *See United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013). In *Royal*, we looked to the elements of Maryland assault, the first of which was "the defendant caused offensive physical contact with, or harm to, the victim." *Id.* We then explained that Maryland law did not require juries to be unanimous in finding *either* physical contact *or* harm; "it is enough that each juror agree only that one of the two occurred." *Id.* Thus, "[r]ather than alternative elements, . . . offensive physical contact and physical harm are merely alternative means of satisfying a single element of the Maryland offense. Consequently, because 'the dispute here does not concern any list of alternative elements,' the modified approach 'has no role to play.'" *Id.* (quoting *Descamps*, 570 U.S. at 264) (alteration and internal quotation marks omitted). In other words, by 2013 we were already reading certain statutes containing alternative means of fulfilling one element as they should always have been read -- as

indivisible statutes. In so doing, we expressed our view that "[i]n *Descamps*, the Supreme Court . . . *clarified* whether courts may apply the modified categorical approach to assess . . . an indivisible criminal statute." *Id.* at 340; *see also United States v. Aparicio-Soria*, 740 F.3d 152, 155–56 (4th Cir. 2014) (en banc) (observing how four different precedential decisions were abrogated by this court in decisions issued after *Descamps*, because *Descamps* clarified that those four decisions improperly applied the modified categorical approach to Maryland's assault statute).

Petitioner claims *Descamps* "began to change" the categorical approach, undercutting the idea that *Mathis* itself changed the substantive law of this circuit. Pet'r's Br. 12. In fact, *Mathis* itself cited with favor two of this court's decisions in describing how courts should differentiate between divisible and indivisible statutes. In the first instance, the Court set forth the circuit split that developed, in which some courts held that "ACCA's general rule -- that a defendant's crime of conviction can count as a predicate only if its elements match those of a generic offense -- gives way when a statute happens to list various means by which a defendant can satisfy an element." *Mathis*, 136 S. Ct. at 2251. In a footnote, the Court cited *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014) as properly rejecting that "exception." *See id.* at 2251 n.1. Indeed, we stated in *Omargharib* that "a crime is divisible under *Descamps* only if it is defined to include multiple alternative *elements* (thus creating multiple versions of a crime), as opposed to multiple alternative *means* (of committing the same crime)." 775 F.3d at 198 (emphases in original).

Mathis positively cited another Fourth Circuit case for the proposition that "if a statutory list is drafted to offer illustrative examples, then it includes only a crime's means of commission." 136 S. Ct. at 2256 (internal quotation marks omitted) (citing *United States v. Cabrera-Umanzor*, 728 F.3d 347, 353 (4th Cir. 2013)). The portion of *Cabrera-Umanzor* cited by *Mathis* addressed a Maryland sex abuse statute that required the State to prove that the defendant engaged in an act involving sexual molestation or exploitation of a minor with whom he held a certain familial or custodial relationship. *See* 728 F.3d at 353. Though the statute listed various types of crimes constituting sexual abuse (e.g., "incest, rape, or sexual offense in any degree"), this court held (and the Supreme Court presumably endorsed) that the listed crimes "are not elements of the offense, but serve only as a non-exhaustive list of various means by which the elements of sexual molestation or sexual exploitation can be committed." *Id.*

d.

Mathis

Unlike the decisions in *Simmons*, *Chambers*, *Clay*, *Bailey*, and *Burrage*, here, we cannot say *Mathis* changed this circuit's settled law. Instead, *Mathis* explained that courts must look to each individual state statute and/or law to apply the elements/means analysis:

> This threshold inquiry—elements or means?—is easy in this case, as it will be in many others. Here, a state court decision definitively answers the question: The listed premises in Iowa's

> burglary law, the State Supreme Court held, are "alternative method[s]" of committing one offense, so that a jury need not agree whether the burgled location was a building, other structure, or vehicle. When a ruling of that kind exists, a sentencing judge need only follow what it says. Likewise, the statute on its face may resolve the issue. If statutory alternatives carry different punishments, then under *Apprendi*[8] they must be elements. Conversely, if a statutory list is drafted to offer "illustrative examples," then it includes only a crime's means of commission. And a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means). Armed with such authoritative sources of state law, federal sentencing courts can readily determine the nature of an alternatively phrased list.

Mathis, 136 S. Ct. at 2256 (citations omitted); *see also id*. at 2257 ("Whether or not [alternative means of commission are] made explicit, they remain *what they ever were* -- just the facts, which ACCA (so we have held, over and over) does not care about." (emphasis supplied)). We decline to hold that *Mathis*'s explanation about how to determine whether parts of a statute are "elements or means" changed this circuit's substantive law applying the modified categorical approach to South Carolina third degree

[8] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

burglary.[9] And with no precedential circuit decision marking this change, Petitioner has simply failed to demonstrate a change in this circuit's settled substantive law.[10]

B.

Other Circuits' Savings Clause Tests

Finally, Petitioner relies on cases from the three other circuits that provide relief from erroneous sentences via the savings clause. However, these cases are inapposite because they do not utilize a test like *Wheeler*. First, the Sixth Circuit employs a savings clause test requiring "(1) a case of statutory interpretation, (2) that is retroactive and could not have been invoked in the initial § 2255 motion, and (3) that the misapplied sentence presents an error sufficiently grave to be deemed a miscarriage of justice or a fundamental defect." *McCormick v. Butler*, 977 F.3d 521, 525 (6th Cir. 2020). Rather than requiring a change in substantive law, as does *Wheeler*, the Sixth

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[9] At oral argument, Petitioner invited this court to create the change in substantive circuit law as part of our *Wheeler* analysis, like this court did in *Young v. Antonelli*. *See* 982 F.3d at 919. First, the drastic step taken in *Young* should be used sparingly in this jurisdictional analysis, and only when a change in Supreme Court precedent necessarily dictates a change in our circuit law. Here, for the reasons explained above and because we have binding precedent that runs contrary to the change Petitioner asks us to make, we decline to go so far.

[10] Petitioner has not argued what effect, if any, a future published decision of this court or the Supreme Court specifically abrogating *McLeod* may have on a future 2241 petition. Federal courts "may not issue advisory opinions," *Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 200 (4th Cir. 2019), and therefore we offer no view on such a future event.

Circuit test merely requires the petitioner to demonstrate that *Mathis* could not have been invoked, whether as foreclosed by circuit precedent or otherwise.

Similarly the Seventh Circuit requires: "(1) the claim relies on a statutory interpretation case, not a constitutional case, and thus could not have been invoked by a successive § 2255 motion; (2) the petitioner could not have invoked the decision in his first § 2255 motion and the decision applies retroactively; and (3) the error is grave enough to be deemed a miscarriage of justice." *Chazen v. Marske*, 938 F.3d 851, 856 (7th Cir. 2019) (internal quotation marks omitted). Again, unlike the *Wheeler* test, there is no requirement of a substantive change in law.

Finally, the Ninth Circuit requires only that the prisoner (1) "make[] a claim of actual innocence," and (2) "not [have] had an unobstructed procedural shot at presenting that claim." *Allen v. Ives*, 950 F.3d 1184, 1188 (9th Cir. 2020) (internal quotation marks omitted). A "procedural shot" could arguably be obstructed by case law misinterpreting *Mathis*, rather than having a law in place that is later substantively changed.

Therefore, because none of these out of circuit tests equate to *Wheeler*, we find Petitioner's reliance on them unconvincing.

III.

For these reasons, *Mathis* did not change the substantive law of the Supreme Court or this court. Because Petitioner cannot satisfy prong two of the *Wheeler* test, we affirm the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

JOHN FORREST HAM, JR.,	)	**CASE NO. 7:18CV00649**
	)	
Petitioner,	)	
v.	)	**MEMORANDUM OPINION**
	)	
WARDEN M. BRECKON,	)	**By: Hon. Glen E. Conrad Senior United**
	)	**States District Judge**
Respondent.	)	

John Forrest Ham, Jr., a federal inmate, filed this action, pro se, as a petition for a writ of habeas corpus under 28 U.S.C. § 2241. Ham asserts that he should be resentenced because his federal criminal sentence is unlawful under Mathis v. United States, __U.S.__, 136 S. Ct. 2243 (2016), and Johnson v. United States, __U.S.__, 135 S. Ct. 2551 (2015). See United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018), cert. denied, 139 S. Ct. 1318, 203 L. Ed. 2d 600 (2019) (allowing § 2241 challenge to federal sentence as imposed). Upon review of the record, the court concludes that Ham's petition must be dismissed for lack of jurisdiction.

I.

Ham is currently confined at the United States Penitentiary Lee County, located in this judicial

district. Pursuant to a judgment entered on September 10, 2010, in Case No. 6:10-cr-00046-TMC by the United States District Court for the District of South Carolina, Ham stands convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e) (Count One); carjacking, in violation of 18 U.S.C. § 2119(1) (Count Two); and possession of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1) (Count Three). Based on prior convictions, Ham's sentence was enhanced pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), and the Career Offender provision of the United States Sentencing Guidelines ("USSG"), § 4B1.1. On August 31, 2010, the sentencing court imposed a total term of 319 months of imprisonment: 235 months as to Count One and 180 months as to Count Two, to run concurrently, and a consecutive term of 84 months as to Count Three. The court also imposed five years of supervised release: five years as to Counts One and Three and three years as to Count Two, with all terms to run concurrently. The judgment was affirmed on appeal. United States v. Ham, 438 F. App'x 183 (4th Cir. 2011) (unpublished).

In July 2012, Ham filed a motion to vacate, set aside or correct the sentence under 28 U.S.C. § 2255 in the sentencing court, which the court dismissed as without merit. See United States v. Ham, Case No. 6:10-46-TMC, 2013 WL 4048988 (D.S.C. Aug. 9, 2013). Ham did not appeal the dismissal of his motion.

In June 2017, Ham filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in this court. He claimed that after Mathis and Johnson, two

of his prior convictions—South Carolina third-degree burglary and assault and battery of a high and aggravated nature ("ABHAN")—did not qualify as predicates for sentence enhancements under the ACCA or the Career Offender guideline. This court denied § 2241 relief under In re Jones, 226 F.3d 328, 332 (4th Cir. 2000) (setting forth restrictive test for jurisdiction through 28 U.S.C. § 2255(e) to challenge federal conviction under § 2241). Because many courts were appointing defense counsel to assist petitioners with possible Johnson claims, the court construed Ham's submission as a § 2255 motion and transferred it to the sentencing court in South Carolina. See Ham v. United States, Case No. 7:17CV00295, 2017 WL 2799893 (W.D. Va. June 27, 2017). The South Carolina court dismissed Ham's § 2255 motion as successive pursuant to 28 U.S.C. § 2255(h). United States v. Ham, Case No. 6:10-cr-00046-TMC (D.S.C. Mar. 2, 2018), ECF No. 114-15. Ham did not appeal.

Shortly after the Fourth Circuit's decision in Wheeler, Ham filed a motion to alter or amend the South Carolina court's March 2018 order. Ham contended that the South Carolina court should construe his submission as a § 2241 petition and transfer it back to the Western District of Virginia for consideration of his unlawful sentence claim under Wheeler, 886 F.3d at 429 (setting forth restrictive requirements for jurisdiction through 28 U.S.C. § 2255(e) to challenge federal sentence under § 2241). In December 2018, while Ham's motion to alter or amend was pending in South Carolina, Ham filed his current § 2241 petition in this court challenging the validity of his federal sentence under Wheeler, Mathis, United States v. Hemingway, 734 F.3d 323 (4th Cir.

2013) (holding that South Carolina ABHAN conviction cannot serve as ACCA predicate), and United States v. Hall, 684 F. App'x 333 (4th Cir. 2017) (unpublished) (holding that South Carolina third-degree burglary cannot serve as ACCA predicate).[1]

A few weeks later, on January 7, 2019, United States District Judge Timothy M. Cain denied Ham's motion to alter or amend the order dismissing the South Carolina § 2255 case. Judge Cain found that Ham had not presented circumstances meeting the required factors under Wheeler for jurisdiction through § 2255(e) to address his sentence challenge under § 2241. Ham's appeal of Judge Cain's order was dismissed in July 2019 under 28 U.S.C. § 2253(c)(2), United States v. Ham, 773 F. App'x 746 (4th Cir. 2019) (unpublished), and the mandate issued on September 28, 2019.

In addition, Ham filed a second § 2255 motion on April 12, 2019, in the District of South Carolina, raising all the arguments that he raises in his § 2241 petition here. On May 2, 2019, the court of appeals denied Ham's application for certification to pursue his second § 2255 motion. Thereafter, on September

[1] Ham also notes that the Fourth Circuit held that South Carolina second-degree burglary no longer qualifies as an ACCA predicate in United States v. McLeod, 808 F.3d 972 (4th Cir. 2015) (finding that South Carolina nonviolent second-degree burglary could not serve as ACCA predicate offense). See United States v. Lloyd, 733 F. App'x 132, 133 (4th Cir. 2018) (unpublished) (agreeing that conviction for South Carolina second-degree burglary no longer qualifies as ACCA predicate and citing McLeod).

18, 2019, Judge Cain dismissed Ham's § 2255 motion as successive.

In response to Ham's current petition under § 2241 to this court, the United States has summarily declared that Ham is entitled to sentencing relief under § 2241. Specifically, the United States asserts that under United States v. McLeod, 808 F.3d 972 (4th Cir. 2015), Hemingway, and Mathis, Ham no longer meets the requirements of the ACCA, and his current sentence exceeds the otherwise applicable statutory maximum. The court directed the United States to show cause why this court has jurisdiction under § 2255(e) and Wheeler to address Ham's sentence challenge in a § 2241 petition. The United States responded by moving for a stay in light of Ham's then-pending appeal of Judge Cain's denial of his motion to alter or amend the South Carolina court's previous order dismissing his motion to vacate. In addition, the United States reiterates its argument that this court possesses jurisdiction over the petition under Wheeler, cites the official position of the Department of Justice that Mathis is retroactive, and expressly waives any procedural defenses such as the statute of limitations. Ham also filed a response to the show cause order, arguing that the petition should not be dismissed for lack of jurisdiction.

The court granted the motion for stay and, pending the outcome of Ham's appeal, ordered further briefing on the jurisdictional issue, specifically directing the United States to include a detailed legal analysis of its positions on Wheeler and Mathis. In its supplemental memorandum, the United States argued, under Teague v. Lane, 489 U.S. 288 (1989),

that Mathis was directed by prior precedent and, therefore, did not announce a new rule. Under these circumstances, the United States maintains, Mathis should be applied retroactively on collateral review. In response, Ham agrees with the United States' Mathis argument and suggests that the Supreme Court's ruling in Johnson also provides a basis for relief under Wheeler and the savings clause. In addition, Ham filed a supplement to the petition in which he attacks his Career Offender designation.

After reviewing the petition and the parties' briefs on the jurisdictional issue, and noting the position of the District of South Carolina, the court appointed the Office of the Federal Public Defender to represent Ham. Counsel thereafter filed a supplemental brief in support of the petition. Counsel maintains that Ham is entitled to relief under Wheeler as he is no longer subject to the ACCA enhancement. Counsel supports the United States' analysis of Mathis and its conclusion that Mathis is retroactively applicable to cases on collateral review. Counsel further argues that the South Carolina third-degree burglary statute, S.C. Code. Ann. § 16-11-311–313, was very similar to the burglary statute at issue in Mathis and that, based on Mathis, the Fourth Circuit found that the South Carolina statute cannot serve as a predicate felony under the ACCA. See Hall, 684 F. App'x at 336. Thus, the question of jurisdiction has been thoroughly briefed.

II.

A federal prisoner bringing a claim for relief from an allegedly illegal sentence must normally do so in a § 2255 motion in the sentencing court. Section

2255(e) provides that a § 2241 habeas petition raising such a claim "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. § 2255(e) (emphasis added). The fact that relief under § 2255 is barred procedurally or by the gatekeeping requirements of § 2255 does not render the remedy inadequate or ineffective. In re Jones, 226 F.3d at 332; see also Cradle v. United States, 290 F.3d 536, 538-39 (3d Cir. 2002) ("It is the inefficacy of the remedy, not the personal inability to use it, that is determinative. Section 2255 is not inadequate or ineffective merely because the sentencing court does not grant relief, the one-year statute of limitations has expired, or the petitioner is unable to meet the stringent gatekeeping requirements of the amended § 2255.").

Several circuit courts of appeals, including the Fourth Circuit, have held that the last phrase in § 2255(e), known as the savings clause, is jurisdictional. Wheeler, 886 F.3d at 424-25 (citing Williams v. Warden, 713 F.3d 1332 (11th Cir. 2013)). In other words, the savings clause "commands the district court not to entertain a § 2241 petition that raises a claim ordinarily cognizable in the petitioner's first § 2255 motion except in . . . exceptional circumstance[s]." Id. at 425.[2] In this circuit, the

[2] The court has omitted internal quotation marks, alterations, and/or citations here and throughout this opinion, unless otherwise noted.

remedy in § 2255 is inadequate and ineffective to test the legality of a sentence when:

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

Wheeler, 886 F.3d at 429. Thus, unless the parties demonstrate that Ham can satisfy the four-part test in Wheeler so that the savings clause applies to permit his sentence challenge under Mathis and Johnson in a § 2241 petition, this court has no "power to act" on his § 2241 claim. Id.; see also Rice v. Rivera, 617 F.3d 802, 810 (4th Cir. 2010) ("Jurisdictional restrictions provide absolute limits on a court's power to hear and dispose of a case, and such limits can never be waived or forfeited.").

Ham and the United States make the following arguments by which they conclude that Ham meets the Wheeler factors to bring his sentence challenge in a § 2241 petition. First, Ham's sentence was legal under settled law at the time of sentencing in August 2010. Second, after Ham's appeal and first § 2255 motion, the Supreme Court decided Mathis under its

prior precedents, making Mathis an old rule that applies on collateral review. See Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("[A]n old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review."). In addition, after Ham's direct appeal and first § 2255 motion, the Fourth Circuit held that the South Carolina offenses (the basis for Ham's sentence enhancement) no longer qualify as ACCA predicates. Third, Ham is unable to meet the gatekeeping provisions of § 2255(h)(2), because Mathis is a decision of statutory law, not constitutional law.[3]

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[3] To the extent that Ham also relies on Johnson in support of his Wheeler argument, that argument fails. Johnson was a decision of constitutional, not statutory, interpretation, made retroactive to cases on collateral review by the Supreme Court. See Johnson, 135 S. Ct. at 2563 (holding that imposing an increased sentence under the residual clause of the ACC "violates the Constitution's guarantee of due process"); see also Welch v. United States, __U.S.__, 136 S. Ct. 1257, 1265 (2016) (holding Johnson retroactively applicable to cases on collateral review); cf. Wheeler, 886 F.3d at 430 (finding that appellant satisfied Wheeler's third requirement because the case on which he relied was a statutory decision not made retroactive by the Supreme Court).

Moreover, the time for raising post-conviction claims under Johnson has long since passed. See 28 U.S.C. § 2255(f) (noting that one-year statute of limitation applies to motions brought pursuant to § 2255, beginning on, among other circumstances, the "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"); see also Stewart v. Saad, Case No. 3:17-CV-109, 2018 WL 5289503, at *5 (N.D. W. Va. Sept. 28, 2018) (noting that claim based on Johnson was time barred, as it was filed after the June 26, 2016, deadline), adopted, 2018 WL 5284206 (N.D. W. Va. Oct. 24, 2018); Jones v. Saad,

Fourth, Ham's sentence as enhanced under the ACCA constitutes a fundamental defect, because, after Mathis, it exceeds otherwise applicable statutory maximum penalties for his offense.

Ham raised these same arguments in his motion to alter or amend Judge Cain's order refusing to construe the § 2255 motion as a § 2241 petition and transfer it back to this court for further proceedings. Judge Cain rejected Ham's Wheeler argument:

> The court finds that Ham cannot meet the second prong of Wheeler. In seeking habeas relief, Ham relies, in part, on the following cases: Mathis v. United States, 136 S. Ct. 2243, 2257 (2016), United States v. McLeod, 808 F.3d 972 (4th Cir. 2015), and United States v. Hemingway, 734 F.3d 323, 331 (4th Cir. 2013). The holdings in Mathis, McLeod, and Hemingway were not retroactive. See, e.g., Mathis, 136 S. Ct. at 2257 ("Our precedents make this a straightforward case. For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements."); Walker v. Kassell, 726 F. App'x 191, 192 (4th Cir. 2018) (per curiam) ("We affirm because Mathis has not been held retroactively applicable on collateral review, so [petitioner] may not proceed under § 2241."); Washington v. Moseley,

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Case No. 5:17CV95, 2018 WL 3688926, at *1 (N.D. W. Va. Aug. 3, 2018) (finding Johnson claim "untimely raised").

> No.5:18-1292-HMH, 2018 WL 5095148, *3 (D.S.C. Oct. 19, 2018) (petitioner is unable to satisfy the second prong of the Wheeler test because McLeod has not been found by any court to apply retroactively to collateral challenges); Ladson v. United States, No. 4:09-cr-00226-TLW, 2015 WL 3604220, at *2 (D.S.C. June 5, 2015) (holding that Hemingway is not retroactive); Mason v. Thomas, No. 0:14-cv-2552-RBH, 2014 WL 7180801, at *4 (D.S.C. Dec.16, 2014) (same). Because Ham's habeas petition does not rely on a retroactively applicable change in substantive law subsequent to his direct appeal and first § 2255 motion, he cannot use these cases to satisfy the requirements of Wheeler.

United States v. Ham, Case No. 6:10-cr-00046-TMC, ECF No. 131 at 2-3 (D.S.C. Jan. 7, 2019); see also Stewart, 2018 WL 5289503, at *6 (finding that petitioner could not meet second prong of Wheeler because Mathis is not retroactive); Jones, 2018 WL 3688926, at *1 (same). The parties have not cited any controlling court decision reaching an outcome contrary to Judge Cain's ruling that Mathis, McLeod, and Hemingway fail to meet the second Wheeler prong.[4] Accordingly, this court is constrained to agree

[4] Ham's counseled brief focuses entirely on the South Carolina third-degree burglary conviction, not on the ABHAN charge. However, an argument based on ABHAN would fare no better, because courts continue to recognize that Hemingway is not retroactively applicable to cases on collateral review. See

with Judge Cain and conclude that it lacks jurisdiction to address Ham's claims under the savings clause and § 2241. See Stewart, 2018 WL 5289503, at *6 (noting that petitioner had failed to meet all four Wheeler requirements and, therefore, could not proceed under § 2241).

Moreover, many courts (including the Fourth Circuit in unpublished opinions) have found that Mathis did not change settled substantive law. As the Fourth Circuit has explained:

> Descamps [v. United States, 570 U.S. 254, 133 S. Ct. 2276 (2013)] and Mathis did not announce a retroactively applicable substantive change in the law. Rather, these cases reiterated and clarified the application of the categorical approach or the modified categorical approach, to determine whether prior convictions qualify as predicates for recidivist enhancements. See Mathis, 136 S. Ct. at 2257 ("Our precedents make this a straightforward case."); Descamps, 570 U.S. at 260, 133 S. Ct. 2276 (noting that Court's prior case law explaining categorical approach "all but resolves this case"); United States v. Royal, 731 F.3d 333, 340 (4th Cir. 2013) ("In Descamps, the Supreme Court recently clarified when courts may apply the modified categorical approach.").

McGaha v. Warden PFC Edgefield, Case No. 8:19-cv-2029, 2019 WL 4017996, at *7 (D.S.C. July 30, 2019) (citing cases).

Brooks v. Bragg, 735 F. App'x 108, 109 (4th Cir. 2018) (unpublished); see also Cox v. Wilson, 740 F. App'x 31, 32 (4th Cir. 2018) (unpublished) ("Mathis did not announce a new, retroactively applicable rule."); Muhammad v. Wilson, 715 F. App'x 251, 252 (4th Cir. 2017) (unpublished) ("Descamps and Mathis did not announce a substantive change to the law."); Waddy v. Warden, FCI Petersburg, No. 3:17CV802, 2019 WL 3755496, at *3-4 (E.D. Va. Aug. 8, 2019) (dismissing § 2241 upon finding that because Mathis was not a "retroactively applicable change in the substantive law subsequent to [defendant's] direct appeal and his first § 2255 motion, he cannot satisfy the requirement of Wheeler") (quoting Brooks, 735 F. App'x at 109) (emphasis added).

This court has reached the same conclusion in similar cases. See Cook v. Warden, USP Lee Cty., No. 7:18CV00311, 2019 WL 6221300, at *3 (W.D. Va. Nov. 21, 2019) (Conrad, J.) (dismissing § 2241 petition for lack of jurisdiction because "Mathis did not make a retroactive change in substantive law as contemplated by the analysis set forth in Wheeler"); Abdul-Sabur v. United States, 7:18CV00107, 2019 WL 4040697, at *3 (W.D. Va. Aug. 27, 2019) (Conrad, J.) (holding that the petitioner was unable to satisfy the second Wheeler requirement because "Mathis did not change settled substantive law"), aff'd, 794 F. App'x 320 (4th Cir. 2020) (unpublished).

Ham has made multiple attempts to challenge his sentence enhancement under the ACCA and the Career Offender provision of the USSG. See Ham, 2017 WL 2799893, at *1 (denying relief under § 2241 for failure to meet Jones standard, construing petition

as motion to vacate pursuant to § 2255, and transferring it to sentencing court); see also Ham, Case No. 6:10-cr-00046-TMC, ECF No. 131 at 4 (D.S.C. Jan. 7, 2019) (order denying on merits motion for reconsideration of denial of § 2255 motion to vacate (as construed and transferred by this court) as second or successive based on Ham's failure to meet Wheeler standard for consideration under § 2241), appeal dismissed, 773 F. App'x at 747 (4th Cir. 2019). Ham has simply failed to make the requisite showing under Jones and Wheeler. For the reasons stated, the court will dismiss Ham's § 2241 petition without prejudice for lack of jurisdiction. An appropriate order will issue herewith.

The Clerk is directed to send copies of this memorandum opinion and accompanying order to petitioner and to counsel of record.

ENTER: This 15th day of June, 2020.

/s/ Glen E. Conrad
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

JOHN FORREST HAM, JR.,	)	**CASE NO. 7:18CV00649**
	)	
Petitioner,	)	
v.	)	**FINAL ORDER**
	)	
WARDEN M. BRECKON,	)	**By: Hon. Glen E. Conrad**
	)	**Senior United States District Judge**
Respondent.	)	

In accordance with the accompanying memorandum opinion, it is hereby

ADJUDGED AND ORDERED

as follows:

1. The stay entered May 22, 2019, is **LIFTED**;

2. The petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction; and

3. The Clerk shall **CLOSE** the case.

ENTER: This 15th day of June, 2020.

/s/ Glen E. Conrad
Senior United States District Judge

FILED: June 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6972
(7:18-cv-00649-GEC-PMS)

JOHN FORREST HAM, JR.

Petitioner - Appellant

v.

WARDEN M. BRECKON

Respondent - Appellee

KATHRYN MARGARET BARBER, Esq.

Court-Assigned Amicus Counsel

O R D E R

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

Entered at the direction of the panel: Judge Agee, Judge Thacker, and Judge Quattlebaum.

For the Court

/s/ Patricia S. Connor, Clerk