No.

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS DEANGELO JONES,
Petitioner

v.

DEWAYNE HENDRIX, WARDEN,
Respondent

APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Brett M. Kavanaugh, Associate Justice and Circuit Justice for the Eighth Circuit: Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.2 of this Court, Marcus Deangelo Jones respectfully requests a 35-day extension of time, to and including Thursday, December 9, 2021, in which to file a petition for a writ of certiorari in this Court. The Court of Appeals for the Eighth Circuit entered judgment on August 6, 2021. See *Jones* v. *Hendrix*, 8 F.4th 683 (8th Cir. 2021). (A copy of the Eighth Circuit's opinion is attached as Exhibit 1.) Mr. Jones's time to file a petition for certiorari in this Court will currently expire on November 4, 2021. This application is being filed more than 10 days before that date.

The case presents an important issue of federal habeas law over which the courts of appeals have deeply split: whether a prisoner, who is barred from filing a successive 28 U.S.C. § 2255 motion to vacate, can petition for habeas corpus via § 2255(e)'s saving clause when new and retroactively applied statutory interpretations from this Court make clear that the prisoner's conduct was never a crime. Many federal courts of appeals and academic writers have expressly acknowledged the circuit split. See, *e.g.*, *Allen* v. *Ives*, 976 F.3d 863, 868 (9th Cir. 2020) (Fletcher, J., concurring in denial of petition for rehearing en banc) ("We agree with our dissenting colleague's argument that there is a circuit split. We also agree with our dissenting colleague's implicit argument that the Supreme Court should grant certiorari—in this or in some other case—to resolve the circuit split."); *Prost* v. *Anderson*, 636 F.3d 578, 594 (10th Cir. 2011) (noting "circuit split * * * on how best to read the savings clause") (Gorsuch, J.) ; see also Jennifer L. Case, *Kaleidoscopic Chaos: Understanding the Circuit Courts' Various Interpretations of § 2255's Savings Clause*, 45 U. Mem. L. Rev. 1, 15 (2014) ("Without Supreme Court guidance * * * the circuit courts have devised increasingly distinct and divergent tests for determining whether the Savings Clause's requirements are satisfied. The patchwork of rules created by the circuit courts is staggering."); Ethan D. Beck, Note, *Adequate and Effective: Postconviction Relief Through Section 2255 and Intervening Changes in Law,* 95 Notre Dame L. Rev. 2063, 2068-2070 (2020) (describing split).

The Solicitor General himself agrees: "An entrenched conflict exists in the courts of appeals on whether the saving clause allows a defendant who has been

denied Section 2255 relief to challenge his conviction or sentence based on an intervening decision of statutory interpretation." Pet. at 23, *United States* v. *Wheeler*, 139 S. Ct. 1318 (2019) (mem.) (No. 18-420). That "conflict," he has argued, "has produced, and will continue to produce, divergent outcomes for litigants in different jurisdictions on an issue of great significance." *Id*. at 13. And, as he has pointed out, "[o]nly this Court's intervention can ensure nationwide uniformity as to the saving clause's scope." *Id*. at 25-26; see *id*. at 13 ("Only this Court's intervention can provide the necessary clarity.").

Three federal courts of appeals now hold that a prisoner is barred from habeas relief under such circumstances, while eight hold that a prisoner is not. Compare Ex. 1, *infra*, 8 (holding that since "§ 2255's remedy is [not] inadequate or ineffective, [Jones] cannot proceed with a habeas petition"), *McCarthan* v. *Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1080 (11th Cir. 2017) (en banc) ("hold[ing] that a change in caselaw does not make a motion to vacate a prisoner's sentence 'inadequate or ineffective to test the legality of his detention.'") (quoting 18 U.S.C. § 2255(e)), and *Prost*, 636 F.3d at 580 (Gorsuch, J.) (holding that a change in statutory interpretation retroactively applied was not grounds for relief under § 2255(e) because "[t]he fact that § 2255 bars Mr. Prost from bringing his statutory interpretation argument *now*, in a *second* § 2255 motion almost a decade after his conviction, doesn't mean the § 2255 remedial process was ineffective or inadequate to test his argument"), with *Stephens* v. *Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) ("Along with many of our sister circuits, we have held that a § 2241 petition is

available under the 'escape hatch' of § 2255 when a petitioner (1) makes a claim of actual innocence, and (2) has not had an 'unobstructed procedural shot' at presenting that claim.") (quoting *Ivy* v. *Pontesso*, 328 F.3d 1057, 1060 (9th Cir. 2003)), *Martin* v. *Perez*, 319 F.3d 799, 804-805 (6th Cir. 2003) (holding that § 2255's saving clause applies when the Supreme Court makes clear after an initial § 2255 application is denied that statute does not criminalize the conduct defendant was convicted of), *Reyes-Requena* v. *United States*, 243 F.3d 893, 904 (5th Cir. 2001) (similar), *In re Jones*, 226 F.3d 328, 333-334 (4th Cir. 2000) ("§ 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law."),*United States* v. *Barrett*, 178 F.3d 34, 52 (1st Cir. 1999) (similar), *In re Davenport,* 147 F.3d 605, 610 (7th Cir. 1998) (holding that § 2255 is inadequate where the "law of the circuit was so firmly against" the prisoner that it would be futile to "use a first motion under [§ 2255] to obtain relief on a basis not yet established by law"), *Triestman* v. *United States*, 124 F.3d 361, 375-380 (2d Cir. 1997) (similar), and *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997) ("If, as the Supreme Court stated in *Davis*, it is a 'complete miscarriage of justice' to punish a defendant for an act that the law does not make criminal, thereby warranting resort to the collateral remedy afforded by § 2255, it must follow that it

is the same 'complete miscarriage of justice' when the AEDPA amendment to § 2255 makes that collateral remedy unavailable. In that unusual circumstance, the remedy afforded by § 2255 is 'inadequate or ineffective to test the legality of [Dorsainvil's] detention.").

Petitioner has engaged the University of Virginia School of Law's Supreme Court Litigation Clinic to file *pro bono* a petition for certiorari. The clinic is working diligently, but respectfully submits that the additional time requested is necessary to prepare Mr. Jones's petition. Substantial work remains to master the full record of the case and to prepare the petition and appendix for filing.

In addition to this case, the clinic is handling several other cases before this Court. It has filed petitions for certiorari in *Struve* v. *Iowa,* No. 21-374, and *Wright* v. *Indiana*,[1] and is currently preparing a cert petition in one other case.

On Monday, October 18, 2021, Petitioner's counsel emailed the Solicitor General's Office, counsel for Respondent, asking whether it would consent to an extension of time for 35 days. He renewed that request on Thursday, October 21, and notified the Solicitor General's Office that he intended to file the application on Friday, October 22. As of this filing, Petitioner's counsel has received no response.

Wherefore, Petitioner respectfully requests that an order be entered extending the time to file a petition for writ of certiorari up to and including December 4, 2021.

Respectfully submitted,

[1] Since the petition in *Wright* has not yet been docketed, it has no docket number.

/s/

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October 22, 2021