

No. 17-7141

IN THE SUPREME COURT OF THE UNITED STATES

JAMES R. YOUNG, PETITIONER

v.

MANUEL OCASIO, WARDEN

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

JOHN M. PELLETTIERI
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

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

The question presented is whether petitioner may seek habeas relief under Section 2241 based on a claim of statutory error under Mathis v. United States, 136 S. Ct. 2243 (2016), where petitioner does not contend that Mathis removed a preexisting barrier to the assertion of a substantively identical claim at the time of his sentencing, direct appeal, and first Section 2255 motion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unreported. The order of the district court (Pet. App. B1-B2) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2017. The petition for a writ of certiorari was filed on December 1, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 262 months of imprisonment, to be followed by five years of supervised release. 94-cr-1036 Docket entry No. 37 (Dec. 15, 1994). The court of appeals affirmed. 115 F.3d 834. In 2000, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, which the district court dismissed. See Pet. App. A1 (describing procedural history). In 2016, the court of appeals denied multiple applications by petitioner for permission to file second or successive motions for relief under 28 U.S.C. 2255. See Pet. App. A2 (describing procedural history). In December 2016, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, which the district court dismissed for lack of jurisdiction. Pet. App. B1-B2. The court of appeals, upon determining that petitioner's appeal was frivolous, denied his motion to proceed in forma pauperis, Pet. App. A1-A4, and later dismissed the appeal after petitioner failed to pay the required docketing and filing fees, 17-12130 Entry of Dismissal.

1. In June 1994, police found a rifle in petitioner's attic that had been stolen about a year earlier from a home in Gainesville, Florida. Presentence Investigation Report (PSR)

¶¶ 4, 5. Police learned about the gun from a 14-year-old girl who had run away from home, was staying with petitioner, and had seen the gun while hiding in the attic (at petitioner's suggestion) as police and her father came to petitioner's residence to look for her. PSR ¶ 4. Fingerprints recovered from the home from which the rifle had been stolen were identified as belonging to petitioner. PSR ¶ 5.

A federal grand jury returned an indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g). The indictment alleged that petitioner had six prior felony convictions under Florida law: a 1991 conviction for aggravated assault and five 1991 convictions for burglary of a dwelling and grand theft. Indictment 1 (Aug. 10, 1994).

A violation of Section 922(g)(1) has a default sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), however, provides for a sentencing range of 15 years to life imprisonment if the defendant "has three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as:

any crime punishable by imprisonment for a term exceeding one year * * * that—

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

18 U.S.C. 924(e)(2)(B). The clause that follows the enumeration of burglary and other offenses is commonly referred to as the "residual clause." See Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

After a jury found petitioner guilty, the Probation Office prepared a presentence report that listed six prior Florida convictions that qualified as violent felonies: a conviction for aggravated assault, a conviction for burglary of a structure, and four convictions for burglary of a dwelling. PSR ¶¶ 6, 29, 31, 32, 37, 41, 42, 44. Petitioner did not object to application of the ACCA's enhanced penalty provisions. See PSR Addendum ¶¶ 100-111; 12/14/97 Sent. Tr. 3. The district court sentenced petitioner to 262 months of imprisonment, noting that petitioner "seems to be a one-man crime wave, starting from the age of fifteen years old." 12/14/97 Sent. Tr. 8; see ibid. ("I don't know how many times he has been convicted of burglary of dwellings, armed burglary, burglary, burglary, burglary, burglary, burglary, burglary, and it seems he wiped out a lot of them at one time by pleading to them."). Petitioner appealed but did not challenge application of the ACCA's

enhanced penalty provisions. 115 F.3d 834, 835-836. The court of appeals affirmed his conviction and sentence. Id. at 838.

2. In 2000, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. 94-cr-1036 Docket entry No. 58 (Feb. 11, 2000). Petitioner raised a number of claims, including claims of ineffective assistance of counsel, but did not challenge application of the ACCA's enhanced sentencing provisions. Ibid. The district court denied the motion as untimely. See Pet. App. A1 (describing procedural history).

3. In 2016, petitioner filed multiple applications requesting leave to file second or successive Section 2255 motions challenging his ACCA-enhanced sentence. Under 28 U.S.C. 2255(h), a movant may file a successive Section 2255 motion only if the court of appeals finds that the movant has made a prima facie showing that the motion contains either (1) "newly discovered evidence" that strongly indicates that the movant was not guilty of the crime, or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Petitioner argued in his applications that his ACCA sentence was invalid in light of this Court's decisions in Descamps v. United States, 570 U.S. 254 (2013), Johnson v. United States, 135 S. Ct. 2551 (2015), and Mathis v. United States, 136 S. Ct. 2243 (2016). The court of appeals denied each of petitioner's applications.

a. The court of appeals denied petitioner's first application to file a second or successive Section 2255 motion on March 1, 2016. The court concluded that Johnson, which held that the ACCA's residual clause is unconstitutionally vague, had not established "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," 28 U.S.C. 2255(h), because at the time, this Court had not yet made Johnson retroactive to cases on collateral review. 16-10429 Order 5. The court of appeals declined to stay petitioner's application sua sponte pending this Court's resolution of Welch v. United States, 136 S. Ct. 790 (2016) (petition granted January 8, 2016), in which certiorari had been granted to consider whether Johnson applied retroactively. 16-10429 Order 5. Judge Martin dissented, explaining that she would have held petitioner's application in abeyance pending this Court's decision in Welch. Id. at 12.

b. The court of appeals denied petitioner's second application to file a second or successive Section 2255 motion on April 28, 2016, shortly after this Court held in Welch that Johnson established a new substantive rule that applies retroactively to cases on collateral review. The court of appeals concluded that "[a]lthough Johnson's constitutional rule is retroactive, [petitioner's] current application still fails because his ACCA sentencing enhancement was not based on the now-voided residual clause." 16-11532 Order 4-5. The court explained that it had

previously held in United States v. Weeks, 711 F.3d 1255 (11th Cir.) (per curiam), cert. denied, 134 S. Ct. 311 (2013), that “[a]lthough Florida’s burglary statute facially encompasses both generic and non-generic burglaries, a conviction under the statute can still qualify as a generic burglary if the charging documents or other Shepard-approved sources show that the offense involved unlawful entry into a building or structure.” 16-11532 Order 6 (quoting Weeks, 711 F.3d at 1262-1263); see Shepard v. United States, 544 U.S. 13 (2005). And the court found that for petitioner’s application, “the undisputed facts in the presentence report show that [petitioner’s] convictions qualify as generic burglaries under the ACCA’s enumerated-offenses clause and his sentence is valid without the residual clause.” 16-11532 Order 6. “In short,” the court determined, “the status of [petitioner’s] burglary convictions as qualifying predicate felonies under the enumerated offense clause in [the ACCA] is not affected by the unconstitutionality of the residual clause announced in Johnson.” Ibid.

The court of appeals acknowledged that in Descamps, this Court had “held that sentencing courts may not now apply the modified categorical approach” -- i.e., the approach under which certain records of the prior conviction may be consulted -- “to determine if a state conviction is a ‘violent felony’ under the enumerated offense clause when the statutory crime of conviction has a

'single, indivisible set of elements.'" 16-11532 Order 6-7 (quoting Descamps, 570 U.S. at 258). But the court of appeals determined that Descamps "did not announce a new rule of constitutional law" and instead "provided guidance to courts in interpreting a criminal statute." Id. at 7. The court therefore declined to decide whether the Florida burglary statute under which petitioner had been convicted was divisible or indivisible "because those issues involve rules of statutory construction, not new rules of constitutional law." Ibid.

Judge Wilson dissented, arguing that petitioner "may have been subjected to the ACCA's sentencing enhancement based on the residual clause," and that it was "unclear under our precedents whether [petitioner's] prior convictions could have qualified as ACCA predicates based on any ACCA clause other than the residual clause." 16-11532 Order 9.

c. The court of appeals denied petitioner's third application to file a second or successive Section 2255 motion on June 8, 2016. The court noted that, after its denial of petitioner's previous application, it had "held that 'Descamps did not announce a new rule of constitutional law as required under § 2255(h)(2).'" 16-12248 Order 5 (quoting In re Thomas, 823 F.3d 1345, 1349 (11th Cir. 2016)). The court accordingly determined, for that reason and the reasons outlined in its prior orders, that petitioner "has failed to make a prima facie showing of the

existence of either of the grounds set forth in 28 U.S.C. § 2255.” Ibid. Judge Wilson again dissented, reiterating the reasoning from his prior dissent. Id. at 6.

d. The court of appeals denied petitioner’s fourth application to file a second or successive Section 2255 motion on August 8, 2016. The court determined that the application raised the same grounds as petitioner’s previous applications and therefore was barred by two statutory provisions -- namely, the provision that precludes a habeas petitioner from raising in an application to file a second or successive petition a claim that has been presented in a prior application, 28 U.S.C. 2244(b)(1), and the provision that precludes a prisoner from filing a motion to reconsider the denial of an application to file a second or successive application, 28 U.S.C. 2244(b)(3)(E). 16-14477 Order 2-3. The court noted that in In re Baptiste, 828 F.3d 1337 (11th Cir. 2016), it had recently held that those statutory mandates apply to applications for leave to file a second or successive motion for relief under 28 U.S.C. 2255. 16-14477 Order 2.

Judge Martin dissented, expressing her view that petitioner’s “ACCA sentence is unlawful,” 16-14477 Order 4, and that In re Baptiste was wrongly decided, id. at 6-7.

e. The court of appeals denied petitioner’s fifth application to file a second or successive Section 2255 motion on October 19, 2016. The court again concluded that petitioner’s

application was barred by statute. 16-16096 Order 3-4. Judge Martin concurred in the judgment. Id. at 5-8. She reiterated her view that petitioner's ACCA sentence is unlawful and that In re Baptiste was wrongly decided, but she acknowledged that "Baptiste is nevertheless binding precedent in this Circuit." Id. at 8.

3. On December 23, 2016, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, renewing his claim that his Florida burglary convictions no longer qualify as "violent felon[ies]" in light of this Court's decisions in Johnson and Mathis and that, as a result, he was not properly subject to an enhanced sentence under the ACCA. 16-cv-737 Docket entry No. 1, at 7.

The district court dismissed the habeas petition for lack of jurisdiction. Pet. App. B1-B2. The court observed that "[r]ecently, sitting en banc the Eleventh Circuit overruled prior precedent and held that 28 U.S.C. § 2241 is not available to challenge the validity of a sentence except upon very narrow grounds not present in this case." Ibid. (citing McCarthan v. Director of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, cert. denied, 138 S. Ct. 502 (2017) (No. 17-85)).

The court of appeals denied petitioner's motion to proceed in forma pauperis on appeal. Pet. App. A1-A4.¹ The court observed

¹ The court of appeals also denied two applications for permission to file second or successive 2255 motions that petitioner had filed after filing his habeas petition in the

that, "because [petitioner] seeks IFP status, his appeal is subject to a frivolity determination." Id. at A2. The court explained that the so-called "saving clause" of 28 U.S.C. 2255(e) "permits a federal prisoner * * * to file a habeas petition pursuant to § 2241," as opposed to a motion under 28 U.S.C. 2255, only in "limited circumstances." Pet. App. A3. The court observed that its decision in McCarthan had held "that the saving clause permits federal prisoners to proceed under § 2241 only when: (1) 'challenging the execution of his sentence, such as the deprivation of good-time credits or parole determinations'; (2) 'the sentencing court was unavailable,' such as when the sentencing court itself has been dissolved; or (3) 'practical considerations (such as multiple sentencing courts) might prevent a petitioner from filing a motion to vacate.'" Ibid. (quoting McCarthan, 851 F.3d at 1092-1093) (brackets omitted).

The court of appeals concluded that none of the circumstances identified by McCarthan applied here and that petitioner instead "clearly challenged the validity of his sentence." Pet. App. A3. The court noted that "[t]he saving clause of § 2255(e) does not allow access to § 2241 whenever a claim is barred by the rule against second or successive § 2255 motions," and "[c]onsequently, a petitioner who has filed a previous § 2255 motion that has been

district court. See 16-17499 Order (Jan. 11, 2017); 17-14396 Order (Nov. 1, 2017).

denied may not circumvent the restriction on successive § 2255 motions simply by filing a petition under § 2241.” Ibid. After petitioner failed to pay the required docketing and filing fees, the court dismissed his appeal for want of prosecution. 17-12130 Entry of Dismissal (Oct. 13, 2017).

ARGUMENT

Petitioner contends (Pet. 4-9) that the saving clause in 28 U.S.C. 2255(e) allows a federal prisoner who has unsuccessfully sought post-conviction relief under Section 2555 subsequently to file a habeas petition that relies on a later-issued decision of statutory interpretation. The court of appeals, relying on its en banc decision in McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017) (No. 17-85), correctly rejected that contention. Although a circuit conflict exists regarding the availability of habeas relief under the saving clause, petitioner’s case is not a suitable vehicle for addressing it. This Court has repeatedly denied review of petitions raising questions about the scope of the saving clause -- including petitions that were filed after the circuit conflict arose -- in which case-specific factors prevented the petitioning prisoner

from demonstrating his eligibility for relief.² The same result is warranted here.

1. In 1996, Congress restricted the grounds on which federal prisoners may file second or successive Section 2255 motions by enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220. AEDPA limited the availability of successive Section 2255 motions to cases involving either (1) persuasive new evidence that the prisoner was not guilty of the offense, or (2) a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review. 28 U.S.C. 2255(h) (1) and (2); cf. Tyler v. Cain, 533 U.S. 656, 661-662 (2001) (interpreting the state-prisoner analogue to Section 2255(h)). AEDPA did not, however, provide for successive Section 2255 motions based on intervening statutory decisions. The government previously took the view that an inmate can nevertheless seek relief on that basis under Section 2255(e), but the government has since reconsidered its position

² See, e.g., Williams v. Pastrana, 138 S. Ct. 1280 (2018) (No. 17-6332); Bernard v. Jarvis, 138 S. Ct. 1164 (2018) (No. 17-5686); Montana v. Werlich, 137 S. Ct. 1813 (2017) (No. 16-775); Williams v. Hastings, 135 S. Ct. 52 (2014) (No. 13-1221); Abernathy v. Cozza-Rhodes, 134 S. Ct. 1874 (2014) (No. 13-7723); Prince v. Thomas, 134 S. Ct. 160 (2013) (No. 12-10719); Blanchard v. Stephens, 133 S. Ct. 2021 (2013) (No. 12-7894); Jones v. Castillo, 568 U.S. 1258 (2013) (No. 12-6925); Thornton v. Ives, 568 U.S. 1251 (2013) (No. 12-6608); McKelvey v. Rivera, 568 U.S. 1126 (2013) (No. 12-5699); Youree v. Tamez, 568 U.S. 1126 (2013) (No. 12-5768); Sorrell v. Bledsoe, 565 U.S. 1229 (2012) (No. 11-7416).

and concluded that the en banc decision in McCarthan is correct. See Br. in Opp. at 11-15, McCarthan, supra (No. 17-85).

a. An inmate serving a sentence of imprisonment imposed by a federal court may seek habeas corpus relief only if the "remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). Petitioner has argued that Section 2255 is "inadequate or ineffective" because AEDPA's restrictions foreclose him from bringing his statutory claim in a second or successive Section 2255 motion, and because circuit precedent foreclosed him from prevailing on his statutory claim in his first motion. But the language of the saving clause suggests a focus on whether a particular challenge to the legality of the prisoner's detention is cognizable under Section 2255, not on the likelihood that the challenge would have succeeded in a particular court at a particular time.

As the court of appeals explained in McCarthan, "'[t]o test' means 'to try,'" and "[t]he opportunity to test or try a claim * * * neither guarantees any relief nor requires any particular probability of success; it guarantees access to a procedure." 851 F.3d at 1086 (citation omitted). "In this way, the clause is concerned with process -- ensuring the petitioner an opportunity to bring his argument -- not with substance -- guaranteeing nothing about what the opportunity promised will ultimately yield in terms

of relief.” Prost v. Anderson, 636 F.3d 578, 584 (10th Cir. 2011) (Gorsuch, J.) (emphasis omitted), cert. denied 565 U.S. 111 (2012). As Judge Easterbrook has explained, a “motion under § 2255 could reasonably be thought ‘inadequate or ineffective to test the legality of the prisoner’s detention’ if a class of argument were categorically excluded, but when an argument is permissible but fails on the merits there is no problem with the adequacy of § 2255.” Brown v. Caraway, 719 F.3d 583, 597 (7th Cir. 2013) (brackets omitted) (Easterbrook, C.J., statement concerning the circulation under Seventh Circuit Rule 40(e)).

Petitioner does not contend that he was precluded in his initial Section 2255 motion from raising, or obtaining a merits decision on, his argument concerning the proper interpretation of the ACCA. Even if the argument was contrary to then-prevailing circuit law, petitioner could have sought en banc or certiorari review in an effort to have the adverse precedent overturned. See McCarthan, 851 F.3d at 1089. Regardless of the practical likelihood or unlikelihood that petitioner’s challenge would have succeeded within the Eleventh Circuit at that time, the Section 2255 remedy therefore was neither inadequate nor ineffective to “test” the legality of his confinement. Cf. Bousley v. United States, 523 U.S. 614, 623 (1998) (“[F]utility cannot constitute cause [excusing a procedural default] if it means simply that a

claim was unacceptable to that particular court at that particular time.") (citation and internal quotation marks omitted).

b. Treating Section 2255 as "inadequate or ineffective" to test the legality of petitioner's detention would place Section 2255(e) at cross-purposes with Section 2255(h). That provision allows "second or successive" motions under Section 2255 only when a prisoner relies on "newly discovered evidence" that strongly indicates his factual innocence, 28 U.S.C. 2255(h)(1), or a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," 28 U.S.C. 2255(h)(2). The logical inference from the language Congress drafted is that Congress intended Section 2255(h)(1) and (2) to define the only available grounds on which a federal inmate who has previously filed a Section 2255 motion can obtain further collateral review of his conviction or sentence. In particular, the most natural reason for Congress to include the specific phrase "of constitutional law" in Section 2255(h)(2) was to make clear that second or successive motions based on new non-constitutional rules cannot go forward, even when the Supreme Court has given those rules retroactive effect. The Congress that enacted AEDPA could not have anticipated the exact statutory claims that have arisen in the ensuing two decades, but it would necessarily have understood that statutory claims of some kind would be raised. It would be anomalous to characterize the Section 2255 remedy as "inadequate

or ineffective" when the unavailability of Section 2255 relief in a particular case results from an evident congressional choice concerning the appropriate balance between finality and additional error correction.

Other provisions within Section 2255 reinforce the deliberateness of Congress's design. Under Section 2255(a), a prisoner in custody pursuant to a federal sentence of imprisonment may file an initial motion under Section 2255 "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. 2255(a) (emphasis added); see Davis v. United States, 417 U.S. 333, 345-347 (1974) (relying in part on underlined language to conclude that Section 2255 includes nonconstitutional claims). The time limit for seeking Section 2255 relief likewise anticipates nonconstitutional claims, allowing a motion to be filed within one year after "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," 28 U.S.C. 2255(f)(3), without limitation to decisions of constitutional law. Section 2255(h), however, contains a similarly worded provision that does limit Section 2255 relief following a prior unsuccessful motion to claims relying on intervening Supreme Court decisions of "constitutional law." 28 U.S.C. 2255(h)(2). That contrast

strengthens the inference that Congress deliberately intended to preclude statutory claims following an unsuccessful Section 2255 motion. See Prost, 636 F.3d at 585-586, 591; cf. Russello v. United States, 464 U.S. 16, 23 (1983) (Congress's choice of different language in nearby provisions of same statute presumed to be deliberate).

Even if Section 2255(e)'s saving clause could literally bear the reading that petitioner urges, the clause should not be construed in a manner that would render AEDPA's restrictions on second or successive Section 2255 motions largely self-defeating. Although both Section 2241 and the saving clause were enacted substantially before the 1996 enactment of AEDPA's restrictions on second or successive Section 2255 motions, the interpretive principle that related statutory provisions should be read, if possible, to form a coherent whole is not limited to provisions that were contemporaneously enacted. See, e.g., United States v. Fausto, 484 U.S. 439, 453 (1988) (referring to the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination").

c. Petitioner's reading, moreover, would have the practical effect of granting inmates greater latitude to pursue claims for collateral relief based on intervening statutory decisions than to pursue the constitutional claims that Section 2255(h)(2) specifically authorizes. The requirement that a second or

successive Section 2255 motion must be certified by a court of appeals panel to satisfy AEDPA's strict requirements, 28 U.S.C. 2255(h), does not apply to a petition for habeas corpus that is allowed to proceed under the saving clause. And a petition for habeas corpus is not subject to AEDPA's one-year limitations period, 28 U.S.C. 2255(f), or to the AEDPA procedure for obtaining a certificate of appealability if relief is denied by the district court, 28 U.S.C. 2253(c)(1). An interpretation that would "permit[] federal prisoners to file habeas petitions based on an intervening change in statutory interpretation," by obviating the need for inmates like petitioner to comply with AEDPA's requirements, thus "provides those prisoners with a superior remedy." McCarthan, 851 F.3d at 1091.

It is far-fetched to suppose that the Congress that enacted AEDPA in 1996 intended those results. There is likewise no evidence that the Congress that enacted the saving clause in 1948 intended it to protect federal inmates from a future Congress's adoption of restrictions, like the ones that Section 2255(h) imposes, that redefine the point at which concern for finality should take precedence over the interest in additional error-correction and thereby should preclude further collateral attack. And even under the approach taken by the court of appeals, the saving clause has meaningful work to do. Among other things, the saving clause ensures that some form of collateral review is

available if a federal prisoner seeks "to challenge the execution of his sentence, such as the deprivation of good-time credits or parole determinations." McCarthan, 851 F.3d at 1081, 1093. Such challenges are not cognizable under Section 2255, which is limited to attacks on the sentence itself. "The saving clause also allows a prisoner to bring a petition for a writ of habeas corpus when the sentencing court is unavailable," such as when a military court martial "has been dissolved." Ibid.; see Prost, 636 F.3d at 588.

With respect to challenges like this one, moreover, allowing an inmate's second collateral attack to proceed by way of habeas corpus subverts "the legislative decision of 1948" that Section 2255 reflects -- namely, that a federal inmate's collateral challenge to his conviction or sentence should, where possible, proceed before the original sentencing court. Webster v. Daniels, 784 F.3d 1123, 1149 (7th Cir. 2015) (en banc) (Easterbrook, J., dissenting). Congress created Section 2255 to channel post-conviction disputes about the legality of a conviction or sentence away from the district of confinement and into the district of conviction and sentencing. See Hill v. United States, 368 U.S. 424, 427-428 (1962); United States v. Hayman, 342 U.S. 205, 219 (1952). Allowing a federal inmate to bring claims in the district of his confinement "resurrects the problems that section 2255 was enacted to solve, such as heavy burdens on courts located in districts with federal prisons." McCarthan, 851 F.3d at 1092.

d. Although Congress's decision to foreclose relief for a prisoner like petitioner who wishes to invoke a non-constitutional rule of law when launching a second or successive collateral attack on his criminal judgment can lead to "harsh results in some cases," courts are "not free to rewrite the statute that Congress has enacted." Dodd v. United States, 545 U.S. 353, 359 (2005). Ultimately, "[i]t is for Congress, not this Court, to amend the statute" if the legislature believes that the narrowly drawn provisions found in Section 2255(h) "unduly restrict[] federal prisoners' ability to file second or successive motions." Id. at 359-360. To that end, the Department of Justice is working on efforts to introduce legislation that would enable some prisoners to benefit from later-issued, non-constitutional rules announced by this Court. And, of course, in the interim such prisoners are entitled to seek executive clemency, one recognized ground for which is the undue severity of a prisoner's sentence. See Office of the U.S. Att'ys, Dep't of Justice, United States Attorneys' Manual §§ 1-2.112, 1-2.113, <https://www.justice.gov/pardon/about-office-0#s1> (standards for considering pardon and commutation petitions).

2. Although the circuits are divided regarding the availability of habeas relief under the saving clause, most courts of appeals have squarely addressed the issue only in the context of a prisoner who challenges his conviction, rather than his

sentence (as petitioner does). Even the former cases -- i.e., those in which a prisoner alleges that he was convicted of conduct that has been rendered noncriminal by an intervening decision of statutory interpretation -- arise relatively infrequently. Nevertheless, given the significance of the issue in the small set of cases in which it does arise, this Court's review would be warranted in an appropriate case. But petitioner does not present such a case.

a. The courts of appeals are divided about whether Section 2241 relief is available under the saving clause based on a retroactive decision of statutory construction. Nine circuits have held that such relief is available in at least some circumstances.³ Although those courts have offered varying rationales and have adopted somewhat different formulations, they generally agree that the remedy provided by 28 U.S.C. 2255(e) is "inadequate or ineffective to test the legality of [a prisoner's] detention" if (1) an intervening decision of this Court has

³ See United States v. Barrett, 178 F.3d 34, 50-53 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); Triestman v. United States, 124 F.3d 361, 375-378 (2d Cir. 1997); In re Dorsainvil, 119 F.3d 245, 251-252 (3d Cir. 1997); In re Jones, 226 F.3d 328, 334 (4th Cir. 2000); Reyes-Requena v. United States, 243 F.3d 893, 902-904 (5th Cir. 2001); Wooten v. Cauley, 677 F.3d 303, 307 (6th Cir. 2012); In re Davenport, 147 F.3d 605, 609-612 (7th Cir. 1998); Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006), cert. denied, 549 U.S. 1313 (2007); In re Smith, 285 F.3d 6, 7-8 (D.C. Cir. 2002); see also Abdullah v. Hedrick, 392 F.3d 957, 960-964 (8th Cir. 2004) (discussing majority rule without expressly adopting it), cert. denied, 545 U.S. 1147 (2005).

narrowed the reach of a federal criminal statute, such that the prisoner now stands convicted of conduct that is not criminal; and (2) controlling circuit precedent squarely foreclosed the prisoner's claim at the time of his trial, appeal, and first motion under Section 2255. See, e.g., Reyes-Requena v. United States, 243 F.3d 893, 902-904 (5th Cir. 2001); In re Jones, 226 F.3d 328, 333-334 (4th Cir. 2000); In re Davenport, 147 F.3d 605, 609-612 (7th Cir. 1998).

Two courts of appeals have held that a prisoner like petitioner may invoke the saving clause to pursue a claim where his sentence exceeded the applicable maximum under a statute or under a mandatory Sentencing Guidelines regime. See, e.g., Brown v. Rios, 696 F.3d 638, 640-641 (7th Cir. 2012) (ACCA case); see also Hill v. Masters, 836 F.3d 591, 595-596, 598-600 (6th Cir. 2016) (authorizing habeas application by prisoner sentenced as career offender under mandatory Sentencing Guidelines regime, where prisoner's underlying assault conviction no longer qualified as "crime of violence" following Descamps v. United States, 570 U.S. 254 (2013)). And only one court of appeals has held that the saving clause applies to a prisoner who claims that his sentence, while below the statutory maximum, resulted from the improper application of a statutory minimum. See United States v. Wheeler, 886 F.3d 415, 426-433 (4th Cir. 2018).

By contrast, two courts of appeals have held that Section 2255(e) does not permit habeas relief based on an intervening decision of statutory interpretation in any circumstance. In Prost, the Tenth Circuit denied habeas relief on the ground that Section 2255 was not inadequate or ineffective where circuit precedent likely would have foreclosed the prisoner's claim in his initial Section 2255 motion. 636 F.3d at 584-585, 590. The Eleventh Circuit's decision in McCarthan reached a similar conclusion. See 851 F.3d at 1079-1080.

b. This case would be an unsuitable vehicle for addressing whether a federal prisoner may use the saving clause to seek habeas relief based on an intervening decision of statutory interpretation that narrows the scope of a federal criminal statute. Even in the circuits that generally permit such relief, petitioner would not be eligible for it. As noted above, even the circuits that have given Section 2255(e) the broadest interpretation have required a prisoner to show (1) that the prisoner's claim was foreclosed by (erroneous) precedent at the time of the prisoner's first motion under Section 2255; and (2) that an intervening decision, made retroactive on collateral review, has since established that the prisoner is in custody for an act that the law does not make criminal, has been sentenced in excess of the applicable statutory maximum, or received an

erroneous statutory minimum sentence. Petitioner cannot satisfy either of those requirements.

i. At the time of petitioner's first Section 2255 motion, no precedent of this Court or the court of appeals foreclosed him from arguing that his Florida burglary convictions were not "violent felon[ies]" under the ACCA. 18 U.S.C. 924(e)(1). This Court's decision in Taylor v. United States, 495 U.S. 575 (1990), decided years before petitioner's conviction, established that Florida burglary is broader than the generic definition of "burglary" in the ACCA. See James v. United States, 550 U.S. 192, 213 (2007). In fact, prior to petitioner's sentencing, the Eleventh Circuit had described Florida's burglary statute as "non-generic" for purposes of the ACCA sentencing enhancement. United States v. Adams, 91 F.3d 114, 115 (per curiam), cert. denied, 519 U.S. 1047 (1996). This Court and the Eleventh Circuit did not conclude that Florida burglary nonetheless qualified as a violent felony under the ACCA's residual clause until 2007 and 2006, respectively. See James, 550 U.S. at 212; United States v. Matthews, 466 F.3d 1271, 1276 (11th Cir. 2006).

Petitioner thus had an unobstructed opportunity at the time of his sentencing (in 1994), direct appeal (in 1997), and first Section 2255 motion (in 2000) to argue that his sentence was invalid on the basis now raised in his habeas application. For that reason, no circuit would conclude under the circumstances

that Section 2255 was “inadequate or ineffective to test the legality of [petitioner’s] detention.” 28 U.S.C. 2255(e); see Davenport, 147 F.3d at 609 (denying habeas relief where prisoner “had an unobstructed procedural shot at getting his sentence vacated” in his initial Section 2255 motion); see also Ivy v. Pontesso, 328 F.3d 1057, 1060 (9th Cir.) (“[I]t is not enough that the petitioner is presently barred from raising his claim of innocence by motion under § 2255. He must never have had the opportunity to raise it by motion.”), cert. denied, 540 U.S. 1051 (2003).

ii. Petitioner has also identified no intervening decision, made retroactive on collateral review, establishing that his sentence exceeds the applicable statutory maximum. Petitioner seeks relief on the basis of Mathis v. United States, 136 S. Ct. 2243 (2016), which explained that a statute is not “divisible” for purposes of the modified categorical approach if it establishes alternative “means” of committing a single crime, rather than alternative “elements” of separate crimes. Id. at 2248-2256. But this Court made clear in Mathis that it was not announcing any new principle, because the Court’s prior “cases involving the modified categorical approach ha[d] already made exactly that point.” Id. at 2253; see id. at 2251-2254 (explaining that the rule was dictated by this Court’s precedents); see also Arazola-Galea v. United States, 876 F.3d 1257, 1259 (9th Cir. 2017) (“We now join

our sister circuits in definitively holding that Mathis did not establish a new rule of constitutional law."); In re Conzelmann, 872 F.3d 375, 376 (6th Cir. 2017) ("The Court's holding in Mathis was dictated by prior precedent (indeed two decades worth)."). Nor was the principle upon which petitioner rests announced for the first time in Descamps. See Descamps, 570 U.S. at 260 ("Our caselaw explaining the categorical approach and its 'modified' counterpart all but resolves this case."); id. at 264 ("That is the job, as we have always understood it, of the modified approach."); see also United States v. Morgan, 845 F.3d 664, 667 (5th Cir. 2017) ("We agree with our sister courts that Descamps did not establish a new rule.") (citing cases). Further review is therefore unwarranted.⁴

⁴ The Eleventh Circuit held in United States v. Weeks, 711 F.3d 1255, 1262-1263 (per curiam), cert. denied, 134 S. Ct. 311 (2013), that a Florida burglary conviction may qualify as a conviction for generic burglary under the ACCA's enumerated offense clause under the modified categorical approach. The Eleventh Circuit later changed course in light of Descamps and Mathis, concluding that the Florida burglary statute is not divisible and therefore that the modified categorical approach is unavailable for convictions under that statute. United States v. Esprit, 841 F.3d 1235, 1240-1241 (11th Cir. 2016). But as noted, Descamps and Mathis did not announce any new principle but merely clarified application of the modified categorical approach. And in any event, as explained in the text, no circuit precedent prevented petitioner from challenging his ACCA enhancement at the time of his first Section 2255 motion (in 2000), more than a decade before Weeks.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

JOHN M. PELLETTIERI
Attorney

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