

No. __-____

IN THE
SUPREME COURT OF THE UNITED STATES

DARYL DEON EVERETT,
Petitioner,

v.

ERIC D. WILSON,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A federal prisoner whose case is final may ordinarily challenge the legality of his sentence only by filing a motion under 28 U.S.C. § 2255. The “savings clause” of § 2255(e), however, permits the prisoner to file a habeas corpus petition under 28 U.S.C. § 2241 if it “appears” that § 2255 is “inadequate or ineffective to test the legality of his detention.”

Petitioner was wrongly classified as a career offender at his original sentencing, but the incorrectness of that designation only became clear after he had already filed a § 2255 motion, and he cannot satisfy the standard for filing a successive motion. The lower courts dismissed his § 2241 petition because he did not challenge his underlying conviction and his sentence was within the statutory maximum.

The question presented is whether claims going only to sentencing are cognizable under § 2241 via the savings clause of § 2255(e), an issue that has divided the circuits.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page. The petitioner is a federal prisoner, and the respondent, a federal employee, was his custodian at the time this petition under 28 U.S.C. § 2241 was filed.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals, which is unpublished, appears at pages 1a to 2a of the appendix to this petition and at 699 F. App'x 270 (4th Cir. 2017). The unpublished ruling of the district court adopting the report and recommendation of the magistrate judge and dismissing Mr. Everett's 28 U.S.C. § 2241 petition appears at pages 3a to 4a of the appendix to this petition. The magistrate judge's report and recommendation appears at pages 5a to 21a of the appendix to this petition.

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 2241. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. That court issued its opinion and judgment on October 31, 2017. Pet. App. 1a. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2241(a) of Title 28 of the United States Code provides in relevant part:

Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

Section 2241(c) of Title 28 of the United States Code provides in relevant part:

The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

Section 2255(e) of Title 28 of the United States Code provides as follows:

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.

Section 2255(h) of Title 28 of the United States Code provides as follows:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT

Introduction

Petitioner Daryl Everett was designated as a career offender at his federal sentencing, based on three prior drug-related convictions. After his sentence was final, however, the Fourth Circuit overruled its own precedent and concluded that certain North Carolina convictions – like two of Petitioner’s – did not qualify as felonies, and thus could not count in classifying a defendant as a career offender. Mr. Everett pursued collateral relief, but at the time, the favorable decision he relied on was not retroactively applicable. Although too late to help Mr. Everett, the Fourth Circuit eventually deemed its new rule to be retroactive.

As a final resort, Mr. Everett has filed a habeas corpus petition under 28 U.S.C. § 2241. He argues that he can take advantage of the “savings clause” of 28 U.S.C. § 2255(e),

which permits a prisoner to proceed under § 2241 if § 2255 is “inadequate or ineffective to test the legality of his detention.” The district court dismissed his petition because the Fourth Circuit prohibits consideration of any sentencing claim under § 2241, leaving that option only to those who assert claims of actual innocence.

The circuit courts are deeply divided on the important question of whether sentencing claims are cognizable under § 2241. This Court should grant Mr. Everett’s petition, resolve the circuit split, and hold that sentencing claims based on retroactively applicable decisions of statutory interpretation may be brought under § 2241.

A. Mr. Everett is classified as a career offender at his initial sentencing, and is sentenced far in excess of the guideline range that would have applied without that label.

In 2005, Mr. Everett pled guilty in the Eastern District of North Carolina to one count of possession with intent to distribute cocaine, and one count of carrying a firearm during and in relation to a drug trafficking offense. *See* 2005 Plea Agreement, Doc. 5-2, at 1, 6-8.¹ A probation officer prepared a presentence report that classified Mr. Everett as a career offender under U.S.S.G. § 4B1.1. His resulting guideline range was 262 to 327 months of imprisonment. Pet. App. 6a. The predicate convictions supporting the career offender designation were North Carolina convictions for (1) felony cocaine possession, (2) sale of marijuana, and (3) maintaining a dwelling for the purpose of selling controlled substances. *See* Gov’t Resp. to § 2255 Motion, Doc. 5-7, at 1.

¹ Citations to the appendix to this petition are to “Pet. App. ____.” Citations to other documents in the record refer to their docket entry number in the district court case, *Everett v. Wilson*, No. 2:13-cv-524-RAJ-DEM (E.D. Va.), and to page numbers therein.

At Mr. Everett's sentencing in March of 2006, the government agreed that a downward departure from the career offender guideline range was appropriate. Motion for Downward Departure, Doc. 5-3, at 1-3. Ultimately, the district court sentenced Mr. Everett to a term of 120 months' imprisonment on the cocaine charge, and a consecutive 60-month term on the firearm charge, for a total sentence of 180 months. *See* Pet. App. 6a. Absent the career offender designation, the guideline range based on the amount of drugs involved in the offense would have been 21 to 27 months, plus 60 months on the firearm charge. *See* Pet. App. 7a. Mr. Everett filed an appeal from his 180-month sentence, but voluntarily dismissed the appeal in May 2006. Pet. App. 6a.

B. Subsequent decisions make clear that the career offender designation was erroneous, but Mr. Everett's § 2255 motion is denied.

In 2011, the Fourth Circuit issued its decision in *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc). *Simmons* held that prior convictions for which a defendant "faced no possibility of imprisonment" for more than one year were not eligible to be counted for the purpose of determining career offender status. *Id.* at 238. In light of *Simmons*, Mr. Everett's convictions for the sale of marijuana and for maintaining a drug house did not qualify as controlled substances offenses under the career offender guideline. *See* § 2255 Motion, Doc. 5-6, at 23. In other words, *Simmons* made clear that Mr. Everett had been improperly classified as a career offender, because he had only one remaining qualifying conviction.

In 2012, Mr. Everett filed a motion under 28 U.S.C. § 2255 in the Eastern District of North Carolina to vacate his sentence in light of *Simmons*. Pet. App. 7a-8a. The government opposed the motion, although it did not dispute that two of Mr. Everett's career offender predicates no longer counted as felonies. See Gov't Resp., Doc. 5-7, at 2-9. The district court denied Mr. Everett's § 2255 motion, finding that it was untimely, and that *Simmons* neither re-started the limitations period nor provided a basis for equitable tolling. See *United States v. Everett*, 2013 WL 139955, *1-*2, Nos. 5:05-CR-189-H, 5:12-CV-236-H (E.D.N.C. Jan. 10, 2013) .

In August of 2013, the Fourth Circuit held that *Simmons* had announced a substantive rule that was retroactively applicable on collateral review. See *Miller v. United States*, 735 F.3d 141, 147 (4th Cir. 2013). One day later, the Fourth Circuit dismissed Mr. Everett's pro se appeal from the district court's order denying his § 2255 motion. See *United States v. Everett*, 538 F. App'x 290 (4th Cir. 2013); Pet. App. 8a.

C. Mr. Everett's § 2241 petition is dismissed because he challenges only his sentence and the lower courts hold that he does not fall within § 2255's savings clause.

1. In September of 2013, Mr. Everett filed a pro se petition under 28 U.S.C. § 2241 in the Eastern District of Virginia.² See § 2241 Petition, Doc. 1, at 1; Pet. App. 8a.

² At the time he filed his petition, Mr. Everett was incarcerated in the Eastern District of Virginia at FCI Petersburg. He is currently incarcerated in the Eastern District of North Carolina. His transfer, however, did not divest the district court of subject matter jurisdiction. See *United States v. Poole*, 531 F.3d 263, 270 n.12 (4th Cir. 2008) (citing *Rumsfeld v. Padilla*, 542 U.S. 426, 434 n.7 (2004)). Moreover, the government never asserted any challenge to venue in the Eastern District of Virginia or to that court's exercise of personal jurisdiction over Respondent. See *Kanai v. McHugh*, 638 F.3d 251, 258 (4th Cir.

Mr. Everett again argued that his sentence was illegal because he was incorrectly designated as a career offender. Mr. Everett argued that he could proceed under § 2241 because § 2255 was “inadequate and ineffective” to test the legality of his sentence. Pet. App. 8a. Although § 2255 is the usual mechanism for a post-conviction challenge to a federal prisoner’s sentence, that statute contains a provision permitting a prisoner to proceed under § 2241 if § 2255 “appears” to be “inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e). This provision is known as the “savings clause.” Mr. Everett argued that § 2255 was inadequate because he had already filed an unsuccessful motion under that statute, and that he was barred from filing a second or successive motion, as his claim rested on statutory rather than constitutional grounds. *See* 18 U.S.C. § 2255(h).

The magistrate judge overseeing the case appointed counsel for Mr. Everett and ultimately held the case in abeyance pending the outcome of the Fourth Circuit’s en banc hearing in *Whiteside v. United States*, 775 F.3d 180 (4th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2890 (2015). *See* Pet. App. 9a. The issue in *Whiteside* was identical to Mr. Everett’s § 2255 motion: whether *Simmons* re-started the limitations period or provided a basis for equitable tolling. The en banc court held that it did not do either. *Id.* at 184, 186.

After *Whiteside*, the magistrate judge issued a report recommending that the district court dismiss the petition. Pet. App. 5a, 19a. The report concluded that *Simmons* did not provide a means for Mr. Everett to challenge his sentence, and that his attempt to proceed

2011) (noting that these defenses are waived if not timely asserted in § 2241 proceeding).

under § 2241 did not satisfy the savings clause in § 2255(e). Pet. App. 11a-19a. The district court later adopted the report and recommendation and dismissed the petition. Pet. App. 4a.

2. Mr. Everett appealed the dismissal to the Fourth Circuit, which took more than twenty-three months after the completion of briefing to decide the case. In a one-paragraph, unpublished, per curiam opinion, the court of appeals affirmed, citing prior Fourth Circuit decisions holding that a prisoner may not raise a sentencing claim in a § 2241 petition unless he had literally no opportunity to file a § 2255 motion to challenge his sentence. *See* Pet. App. 2a (citing *Rice v. Rivera*, 617 F.3d 802, 807 (4th Cir. 2010), and *United States v. Poole*, 531 F.3d 263, 267 n.7 (4th Cir. 2008)).

REASONS FOR GRANTING THE PETITION

Daryl Everett is a victim of bad timing. He is not a career offender, but he was sentenced as one based on the law in effect at the time. The law later changed, but that came too late for Mr. Everett to raise in an appeal or a § 2255 motion. The district court denied his § 2241 petition after concluding that time had run out for Mr. Everett to challenge his sentence. Then the court of appeals took nearly two years to issue a boilerplate decision relying on longstanding circuit precedent. Only this Court can set this right, by resolving the split of authority over when sentencing claims are cognizable under § 2241 via the savings clause of § 2255. And it should do so now, as the circuit split on this issue is entrenched and shows no signs of resolution absent intervention by this Court. *See* S. Ct. R. 10(a).

A. The circuit courts are divided on whether a federal prisoner may bring a sentencing claim in a § 2241 proceeding via the savings clause of § 2255.

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) limited the ability of federal prisoners to seek post-conviction relief. *See Rhines v. Weber*, 544 U.S. 269, 274 (2005). As a general matter, federal prisoners seeking to challenge their convictions or sentences must proceed under § 2255, and a § 2241 petition is not a “substitute.” *Pack v. Yusuff*, 218 F.3d 448, 452 (5th Cir. 2000). But in limited circumstances, a prisoner can resort to § 2241, under what is known as the “savings clause” of § 2255:

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).

The “inadequate or ineffective” standard has been read narrowly, and it generally does not suffice that a § 2255 motion would be unsuccessful or is procedurally barred. *See, e.g., Prost v. Anderson*, 636 F.3d 578, 584-86 (10th Cir. 2011) (Gorsuch, J.). The circuit courts have divided, however, on whether the limited access to § 2241 relief extends to prisoners raising challenges only to their sentences, and not to their underlying convictions (such as “actual innocence” claims).

On one side of the split, a majority of circuits to have squarely addressed the issue have concluded that prisoners cannot get relief for sentencing errors in a § 2241 proceeding

coming under the savings clause of § 2255. The Second, Fourth, Fifth, Tenth, and Eleventh Circuits hold as much. *See McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1080 (11th Cir. 2017) (en banc) (overruling prior precedent and holding 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’”); *Prost*, 636 F.3d at 584 (holding that if “a petitioner’s argument challenging the legality of his detention could have been tested in an initial § 2255 motion . . . then the petitioner may not resort to the savings clause and § 2241”); *In re Bradford*, 660 F.3d 226, 230 (5th Cir. 2011) (holding that challenge to career offender guideline enhancement could not be brought under § 2241); *United States v. Poole*, 531 F.3d 263, 267 n.7 (4th Cir. 2008) (same); *Poindexter v. Nash*, 333 F.3d 372, 382 (2d Cir. 2003) (same). The Third and Ninth Circuits appear to have suggested similar readings of the savings clause, but have not issued definitive rulings on the issue. *See Marrero v. Ives*, 682 F.3d 1190, 1193 (9th Cir. 2012); *Okereke v. United States*, 307 F.3d 117, 120-21 (3d Cir. 2002).

On the other hand, in the Sixth and Seventh Circuits, a prisoner can pursue a sentencing claim via § 2241 when a § 2255 motion is unavailable. *See Hill v. Masters*, 836 F.3d 591, 597-99 (6th Cir. 2016); *Brown v. Caraway*, 719 F.3d 583, 588 (7th Cir. 2013). The First Circuit has indicated that at least some sentencing claims are viable in § 2241 proceedings, without setting firm limits as of yet. *See Trenkler v. United States*, 536 F.3d 85, 99 (1st Cir. 2008). In addition, several judges in majority-rule circuits have penned vigorous dissents, further highlighting the lack of uniformity on this issue. *See, e.g., McCarthan*, 851

F.3d at 1111 (Wilson, J., joined by Jill Pryor, J., dissenting); *id.* (Martin, J., joined by Jill Pryor, J., dissenting); *id.* at 1121 (Rosenbaum, J., dissenting); *United States v. Surratt*, 797 F.3d 240, 260 (4th Cir. 2015) (Gregory, J., dissenting).³

The circuits adopting the majority rule take the position that a § 2255 is an “adequate” means to test one’s sentence, even if settled law precludes relief on the sentencing claim. It is enough for these courts that § 2255 “theoretically” provides an opportunity to pursue the claim, despite the reality that the motion was virtually certain to fail. *McCarthan*, 851 F.3d at 1087. Accordingly, later decisions making clear that the original sentence was erroneous – even decisions from this Court – are irrelevant. These circuit courts have narrowed the scope of the savings clause to encompass only “actual innocence” claims, *see In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000), or a prisoner’s claims attacking other “aspects of his detention” “that do not challenge the validity of his sentence,” such as good-time credit, *McCarthan*, 851 F.3d at 1089.

By contrast, in the Sixth and Seventh Circuits, the erroneous designation that a defendant is a career offender can be remedied in a § 2241 petition if intervening decisions demonstrate the wrongness of that classification. In those circuits, such an error is considered a fundamental miscarriage of justice that § 2255 is inadequate to correct. *See*

³ The panel opinion in *Surratt* adhered to the Fourth Circuit’s rule that § 2241 relief was not available for pure sentencing claims that did not present an issue of actual innocence. *Surratt*, 797 F.3d at 251. As noted, Judge Gregory dissented. The panel opinion was vacated when the Fourth Circuit granted rehearing en banc, but the full court ultimately dismissed the case as moot after the President commuted Surratt’s sentence. *See United States v. Surratt*, 855 F.3d 218, 219 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 554 (2017).

Brown, 719 F.3d at 587-88. The Sixth Circuit agreed with *Brown* and Judge Gregory's dissent in *Surratt* that forcing someone to "bear[] the stigma of a 'repeat violent offender' and all its accompanying disadvantages, is a miscarriage of justice where he lacks the predicate felonies to justify such a characterization." *Hill*, 836 F.3d at 597-600; *see also* *McCarthan*, 851 F.3d at 1123-41 (Rosenbaum, J., dissenting) (analyzing statutory text at length and arguing that the Constitution's Suspension Clause⁴ requires that at least some sentencing claims must fall within § 2255's savings clause).

The circuit split is deep and intractable. If anything, the positions have hardened in recent years, with the Sixth Circuit deciding *Hill* in 2016, and the Fourth and Eleventh Circuit considering the issue en banc since then. There is no hope that the knot will untie itself.

The *Hill* case is a perfect example of how arbitrary distinctions can produce wildly disparate results. The prisoner in that case was convicted in the District of South Carolina, within the Fourth Circuit, and brought his direct appeal and initial § 2255 there. *Hill*, 836 F.3d at 592-93. When he sought to proceed under § 2241, after new decisions made clear that he was no longer a career offender, he initially filed his petition in the district of conviction, South Carolina. *Id.* at 593 n.1. The court there dismissed the petition for lack of jurisdiction, because Hill was then incarcerated in Kentucky. *Id.* He re-filed his petition in the Eastern District of Kentucky and eventually won relief. The Sixth Circuit noted that

⁴ "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

Hill had since been transferred to a prison in West Virginia, back in the Fourth Circuit, but the Kentucky court and the Sixth Circuit retained jurisdiction because he happened to be housed in that geographic area at the right time. *Id.* at 593 n.2. Had Hill never moved out of the Fourth Circuit, his claim would have lost. Likewise, had the South Carolina court denied relief on the merits and refused to transfer the case – as the court did in Petitioner’s case, Pet. App. 19a – the Fourth Circuit would have upheld Hill’s career offender sentence.

Because § 2241 petitions are brought in the district of confinement, such random differences mean that identically situated prisoners (indeed, even co-defendants sentenced at the same time by the same judge) could end up with completely opposite fates, with one getting relief from a career offender sentence and the other being forced to serve a sentence that indisputably lacks a legal basis. *See Hill v. Sepanek*, No. 14-cv-85-ART, 2017 WL 73338, at *6 (E.D. Ky. Jan. 6, 2017) (Thapar, J.) (“Prisoners transfer from Kentucky to West Virginia all the time. Those lucky enough to file habeas claims here will benefit from this new rule; those who file in West Virginia will not. That seems like an ‘unwarranted sentence disparit[y].’”) (quoting 18 U.S.C. § 3553(a)(6)). These disparate outcomes should not depend on the quirks of the Bureau of Prisons’ transfer decisions, something that is outside the control of the petitioner. Yet that is what the circuit split has produced.

This Court’s intervention is necessary to resolve this untenable division of authority.

B. A sentencing claim falls within the savings clause when a prisoner tests the legality of his detention, as Mr. Everett has sought to do.

The Court should take this opportunity to hold that the erroneous imposition of a career offender sentence is grounds for relief under § 2241, at least when settled law at the time of the prisoner's initial § 2255 foreclosed his claim. Although this position has only been adopted by a minority of the circuits, the text and purpose of the savings clause make clear that they have the stronger side of the argument.

The plain language of § 2255(e) permits this claim, as the savings clause is not limited to challenges to convictions. Rather, § 2241 is open to a prisoner who attacks “the legality of his *detention*.” 28 U.S.C. § 2255(e) (emphasis added). The term “detention” plainly includes a prisoner's sentence as well as his conviction. *See Brown*, 719 F.3d at 588; *McCarthan*, 851 F.3d at 1129-30 (Rosenbaum, J., dissenting). Had Congress desired to limit the savings clause only to challenges to convictions, it could have used the term “conviction” or “offense,” as it did in § 2255(h). The fact that Congress used a different term in § 2255(e) indicates that the savings clause “cover[s] some claims that § 2255(h) does not, and vice versa.” *Bryant v. Warden*, 738 F.3d 1253, 1282 (11th Cir. 2013), *overruled by McCarthan*, 851 F.3d at 1080; *see also Russello v. United States*, 464 U.S. 16, 23 (1983) (holding that different words in same statute should be presumed to have different meanings).

Further, § 2255 is “inadequate or ineffective” to test a sentence when it “fails to allow” a “meaningful opportunity” to bring a claim that relies on a retroactively applicable rule of law that reveals the illegality of the petitioner's sentence. *See McCarthan*, 851 F.3d

at 1132-33 (Rosenbaum, J., dissenting); *Hill*, 836 F.3d at 595; *Brown*, 719 F.3d at 586; accord *Williams v. Warden, Fed. Bureau of Prisons*, 713 F.3d 1332, 1343 (11th Cir. 2013).

This Court should adopt the test from *Hill* and *Brown* or Judge Rosenbaum’s thorough dissent in *McCarthan* to hold that a prisoner can take advantage of the savings clause when he relies on “(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.” *Hill*, 836 F.3d at 595; see also *McCarthan*, 851 F.3d at 1123 (Rosenbaum, J., dissenting) (“[T]he text of § 2255 and Supreme Court jurisprudence on habeas corpus, the Suspension Clause, and retroactivity necessarily require that the saving clause allow for consideration of second or successive claims based on a new retroactively applicable rule of statutory law.”).

The “essential function of habeas corpus” demands this result. *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998). That function “is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.” *Id.* A prisoner who has had a chance to attack his sentence on appeal and in an initial § 2255 has been given that “reasonable opportunity.” But a prisoner whose claim rests on decisions that issued after those avenues have been exhausted has not. In those circumstances, a § 2255 is “inadequate” and resort to § 2241 is appropriate. *Id.* at 611.

That is precisely the situation in which Mr. Everett finds himself. His career offender sentence could not be imposed today, and should not have been imposed in 2006, based on a proper understanding of the state statutes underlying his predicate convictions. See *Rivers*

v. Roadway Express Inc., 511 U.S. 298, 312-13 (1994) (“A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.”). This Court should not let this defect persist any longer. As the saying goes, “[w]isdom too often never comes, and so one ought not to reject it merely because it comes late.” *Watson v. United States*, 552 U.S. 74, 84 (2007) (Ginsburg, J., concurring) (quoting *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)). It would be even worse, once that “wisdom” has arrived, to bar Petitioner and those in his shoes from relying on it at all.

C. This is an appropriate case to resolve this important, recurring issue.

The question presented is one of exceptional importance to the orderly functioning of the post-conviction system. The deadlock among the circuits shows the urgent need for this Court’s intervention. And Petitioner’s case is a suitable vehicle to resolve the issue in a way that will settle the matter and not leave the door open to innumerable follow-on claims.

First, the persistence of the issue is evident from the multitude of circuit court opinions over an extended span of time. The issue has percolated long enough for one court to overrule its prior authority and reverse its position, and for another to consider doing the same. This is not an issue that will eventually expire, either. For as long as this Court issues decisions of statutory interpretation, there will be prisoners whose sentences depended on now-discarded readings of those statutes.

Second, the circuit split has created the perverse state of affairs where the length of a prisoner’s sentence depends entirely on the happenstance of where the Bureau of Prisons

chooses to detain him. Had Petitioner been transferred to a facility in, for example, the Sixth Circuit, he quite likely would be free by now. But because he was housed within the Fourth Circuit when he filed his § 2241, he remains incarcerated, “bearing the stigma of a ‘repeat violent offender’ and all its accompanying disadvantages,” despite “lack[ing] the predicate felonies to justify such a characterization.” *Hill*, 836 F.3d at 600. Such an arbitrary outcome is intolerable in a federal system purporting to apply the same law to similarly situated prisoners.

Finally, Petitioner’s case presents the issue well. He has challenged his career offender designation at every turn, and has been thwarted through no fault of his own, but only because the courts understood too late that he was right. In the lower courts, the government never challenged the argument that Mr. Everett no longer has a sufficient number of predicate drug trafficking offenses to qualify as a career offender. Instead, the government argued solely that § 2241 was not available for him to raise that claim. This case does not involve a mandatory minimum sentence on Petitioner’s drug conviction, meaning that a reduced sentence is a likely outcome if he could obtain a resentencing. Further, because he was sentenced under an advisory guidelines scheme, a ruling from this Court in his favor would pretermitt further litigation. In other words, were this Court to address this issue in a case involving mandatory minimums (such as a case under the Armed Career Criminal Act), or mandatory guidelines, and rule in favor of the petitioner, it would still be necessary to address the issue in a case like Petitioner’s involving advisory guidelines. *See, e.g., Beckles v. United States*, 137 S. Ct. 886, 903 n.4 (2017) (Sotomayor, J., concurring in

the judgment) (noting distinction between mandatory and advisory guideline systems, and observing that resolution of a case under one does not necessarily preclude litigation under the other). Granting relief to Petitioner would resolve the issue in one stroke.

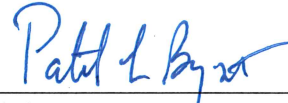
The need for this Court's intervention is apparent. The issue is frequently recurring, and the division among the circuit courts will persist until this Court decides the question. Even before *Hill* and *McCarthan* deepened the split, Judge Easterbrook stated that further consideration of the issue in the lower courts was futile: "Resolution of the conflict belongs to Congress or the Supreme Court." *Brown*, 719 F.3d at 600 (statement of Easterbrook, J., concerning circulation of opinion for en banc consideration). There is no reasonable likelihood that Congress will re-write the AEDPA any time soon. The only feasible alternative, and the necessary one, is for this Court to finally settle whether sentencing claims may be brought in a § 2241 petition pursuant to the savings clause in § 2255(e). Mr. Everett's petition presents that question, and the Court should grant review to resolve it.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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