

No. \_\_\_\_\_

In The  
Supreme Court of the United States

October Term 2017

Cleveland Brandon  
Petitioner,

v.

S. Entzell, Warden,  
Respondent.

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit

Petition for Certiorari

Cleveland Brandon  
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### Question Presented

Brandon Moved Under the saving clause to vacate his sentence under the ACCA. The Fourth Circuit found that the clause only applied to those who are challenging the underlying convictions. The question that has the court deeply divided is whether the saving clause may be used to attack a sentence after this Court has issue a decision leaving him ineligible for the ACCA enhancement?

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To The Chief Justice And Associate Justices  
of the United States Supreme Court:

Cleveland Brandon ("Brandon"), acting in want of counsel respectfully moves for certiorari to the United States Court of Appeals for the Fourth Circuit the order dismissing his section 2241, under the saving clause, and in support states:

Opinions Below

The Fourth Circuit Court of Appeals Affirmed as modified on November 1, 2017. The Fourth Circuit stayed the mandate pending merit review on November 20, 2017, and rehearing with suggestions for rehearing en banc was denied January 28, 2018, and are all reproduced at Exhibit-A.

## Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1).

## Statutory Provisions Involved

Section 2241(a) of Title 28 United States Code Provides in pertinent 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 United States Code provides in relavant part:

The writ of habeas corpus shall not extend to a prisoner unless  
(1) He is in the custody under or by color of the authority of the United States or is committed for a 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 the custody in violation of the Constitution or laws or treaties of the United States[.]

Section 2255(e) of Title 28 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 application 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 Titled 28 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.

#### I. Statement of the Case

On Decmeber 2, 2009, a grand jury sitting in United States District for the District of Massachuettts, returned an indictment charging Brandon under 18 U.S.C. § 922(g)(1). Because, however, Brandon had three prior Massachuettts drug convictions, the Government sought an enhanced penalty the Armed Career Criminal Act (ACCA), which vaulted Brandon's statutory maximum from ten-years to life and installed a minimum penalty of 15-years.

Following this Court decision in Johnson v. United States, 135 S.Ct. 2551 (2015), Brandon filed under § 2255. Subsequently, the court denied that motion, and Brandon filed under this Court's recent

decision in Mathis v. United States, 136 S.Ct. 2243 (2016), seeking to exercise the saving clause under § 2255(e), and file a § 2241. Initially, the district court dismissed the action with prejudice claiming that Brandon could not satisfy the second prong of the In re Jones, 226 F.3d 328 (4th Cir. 2000), test. It was Brandon's position that under that court's recent decision in United States v. Surratt, 797 F.3d 240 (4th Cir. 2015), he could pass through the saving clause and file under § 2241. Subsequently, the Fourth Circuit granted a rehearing en banc on Surratt, and Brandon pressed that it may be appropriate for the district court to stay the case pending the decision in Surratt. Surratt, however, was later granted clemency and the case was dismissed. Consequently, the the district court denied Brandon's motion with prejudice and he appealed. On appeal Brandon argued that the court had jurisdiction and its decision in Rice v. Rivera, 617 F.3d 802 (4th Cir. 2010), was a "drive-by" jurisdictional case and did not strip the court of jurisdiction. While the Fourth Circuit ultimately affirmed, it did so by modifying the district court's decision to reflect dismissed without prejudice for lack of jurisdiction under Rice. Brandon filed for a rehearing en banc but following a brief stay the Fourth Circuit denied that rehearing. This action follows.

## II. Reasons For Granting Certiorari

No court disputes that there is a deep split on whether a prisoner may rely on the saving clause to attack a sentence on the bases of a retroactive decision that has left the sentence unlawful.

This Court recently denied certiorari in McCarthan v. Collins, 17-85, arguing this very issue and the United States acknowledges that the split exists and that this Court intervention is required but argued that McCarthan was not the correct case to resolve the issue. Brandon presumes that it was because McCarthan was already released.

Brandon will demonstrate the need for this Court to step in and resolve this issue and grant certiorari. This case is an ideal vehicle for such a resolution because it is from a circuit that cuts against the Seventh and Sixth Circuits, but is broader than the Eleventh Circuit, and the Tenth Circuit is close to the Fourth Circuit. The split was recognized in Bryant v. Warden, 738 F.3d 1253 (11th Cir. 2013), where the court acknowledged the existence of a "deep and mature" circuit conflict on the availability and scope of Section 2255(e)'s saving clause. Id. at 1279. After that decision the Sixth Circuit came-around in Hill v. Masters, 836 F.3d 591 (6th Cir. 2016).

In Hill, the issue was whether following this Court's decision in Descamp v. United States, 133 S.Ct. 2276 (2013), permitted the use of the saving clause when the prisoner has already filed a motion under § 2255. Hill was sentenced under the then-mandatory guidelines as a career offender. That provision was based in part on Hill's Maryland second-degree assault, which as Hill claimed is no longer a crime of violence after Descamps. The district court, in Hill, dismissed the § 2241 at the screening stage. See Hill v. Sepanek, No. 14-CV-85, 2017 U.S. Dist. LEXIS 1916 \*7 (E.D. Ky. Jan.

6, 2017)). The Sixth Circuit, however, disagreed. That court held that a petition under § 2241 was authorized for prisoners who were sentenced under the mandatory sentencing guidelines pre-Booker, who were foreclosed from filing a successive petition under § 2255, and a subsequent, retroactive change in statutory interpretation by this Court had revealed that a previous conviction was not a predicate offense for a career offender enhancement. Interestingly, the district court in Hill dismissed the § 2241 on the grounds that he didn't claim to be factually innocent of that assault. In that vein, that is exactly how the Fourth Circuit currently views filing under § 2241, that is, that the prisoner must claim actual innocence of the predicate prior conviction.

The McCarthan, en banc decision created the need for this Court's intervention, and Brandon seeks to put an end to the split. This case presents this Court with the opportunity to clear the split up and resolve this reoccurring problem regarding the saving clause. In fact, at least three times in the last year, the Government has pointed to decisions below as evidence of a circuit conflict on the availability of habease review. First, the Solicitor General in McCarthan observed in changing its position that the "first three courts of appeals that addressed the issue decline[d] to adopt the Government's restrictive reading of the habeas preserving provision of § 2255." citing Triestman v. United States, 124 F.3d 361, 376 (2d Cir. 1997); In re Davenport, 147 F.3d 605, 608-12 (7th Cir. 1998); In re Dorasainvil, 119 F.3d 245, 248-52 (3rd Cir. 1997). The McCarthan petition also points to the Government's views in Cortes v. Hastings, No. 16-773 (April 19, 2017), and Montana

v. Werlich, No. 16-775 (Mar. 20, 2017).

Tenth Circuit has adopted its categorical rule in Prost v. Anderson, 636 F.3d 578 (2011), cert denied, 565 U.S. 1111 (2012). Writing for the majority, then-Judge Gorsuch stated that "the plain language of § 2255 means what it says and says what it means: a prisoner can proceed to § 2241 only if his initial § 2255 motion is itself inadequate or ineffective to the task of providing the petitioner with a chance to test his sentence or conviction." Id. at 587. He reasoned that an intervening change in circuit precedent as a result of a decision of this Court does not mean that a "petitioner "lacked] an opportunity to bring his argument," because the saving clause "guarantee[s] nothing about what the opportunity promised will ultimately yield in terms of relief." Id. at 584. Put differently, the fact that a court was bound by adverse circuit precedent at the time of the initial Section 2255 motion is simply irrelevant to the inadequacy of the Section 2255 remedy. Id. at 590. Instead, under the Tenth Circuit's interpretation, the Section 2255 remedy is "inadequate or ineffective" only when a prisoner has no practical ability to invoke it: for example, if the prisoner is unable to comply with the venue requirement of Section 2255. Id. at 587-88. Judge Seymour concurred in part and dissented in part. She criticized the majority for "creating an unnecessary circuit split on an issue that was neither raised by the parties nor implicated by the facts of the case." 636 F.3d at 599. Judge Seymour reasoned that "the fundamental purpose of habeas corpus and collateral review even post-AEDPA is to afford a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality

of his conviction and sentence." Id. at 605 (quoting Davenport, 147 F.3d at 609). Although the Government supported the applicant's petition for rehearing en banc, the Tenth Circuit denied rehearing in Prost by a 5-5 vote.

A. The Question Presented Is Exceptionally Important And Re-Curring To A Level That Requires This Court's Intervention.

As a result of McCarthan, there are now two courts that find that a prisoner is unable to raise under § 2241 challenges to his sentence even where it is plain that the prisoner would be entitled to relief. Absent this Court's intervention, those prisoners like Brandon that have a obvious claim will be deprived of their liberty for years beyond their release dates as authorized by Congress. It is therefore, obvious, as the Government has recognized, that the question presented is one of recurring and exceptional importance. The Court's intervention is urgently required, and this case presents the Court with a suitable vehicle to resolve the conflict.

1. The Recurring And fundamental Fairness To The Criminal Justice System Calls for Immediate Attention.

This Court has issued numerous decision that narrower the reach of a criminal statute that relieves prisoners of the mistakes by federal court regarding their sentences. See Mathis v. United States, 136 S.Ct. 2243 (2016); Rosemond v. United States, 134 S.Ct. 1240 (2014); Descamps v. United States, 133 S.Ct. 1976 (2013); Skilling v. United States, 561 U.S. 438 (2010); Chambers v. United States, 555 U.S. 122

(2009); United States v. Santos, 553 U.S. 507 (2008); Begay v. United States, 553 U.S. 137 (2008); Watson v. United States, 552 U.S. 74 (2007). And consequently, any decision that "narrow[s] the scope of a criminal statute by interpreting its terms" is generally redressable on collateral review. Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004). If the Fourth Circuit's decision is allowed to stand, any prisoners that seek to argue decision such as Mathis will not be able to take advantage of those decisions and will remain incarcerated for conduct that all no longer calls for the enhanced penalty.

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2. The Critical Nature Of This Issue Will Leave Action Under § 2241 To The Mercy Of Where The Prisoner Happens To Be Housed.

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This Court has established that a prisoner must file his application under § 2241 in the district of confinement. See e.g., Rumsfeld v. Padilla, 542 U.S. 426, 442 (2004). That means if Brandon was imprisoned in Illinois or Michigan rather West Virginia, there is little reason to doubt that he would have been released from prison long ago and well have already completed the shortened term of supervised release to which he is entitled. Instead, Brandon has already been imprisoned 18-months longer than he would have been subjected to in the absence of ACCA. Whether Brandon is entitled to any remedy for this injustice is a critically important issue that deserves this Court's prompt attention.

3. Brandon's Case Is An Apt Vehicle For Considering And Resolving The question Presented.

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The question in this case is a pure question of law, and it was briefed in the court of appeals. While the Government did not submit a brief, that does not prevent this Court from reviewing the case. The significance of the issue here is in need of immediate resolution, as the courts below, on a daily basis are denying or dismissing saving clause cases because of the conflict in the circuits.

Currently before the Fourth Circuit is the awaiting decision in United States v. Wheeler, No. 16-6073, where the court is considering whether § 2255(e) is a claim processing rule, or a jurisdictional requirement. Arguments also include § 2241 relief for fundamental sentencing errors. For now, the Fourth Circuit is of the view that the saving clause is only available to those who are claiming actual innocence of the underlying conviction. In fact, as of this moment, Brandon is being held abey on the basis of a jurisdictional issue, that is plainly incorrect as a matter of law.

4. Providing Saving-Clause Relief For Fundamental Sentencing Errors Would Align Relief With The Sixth And Seventh Circuits.

The Sixth and Seventh circuits got it right in applying the saving clause to fundamental sentencing errors in Brown v. Caraway, 719 F.3d 583 (7th Cir. 2013), and Hill, 836 F.3d at 591. Those decisions provide compelling reasons to apply the saving clause to claims alleging fundamental sentencing errors, and it is those decisions that should carry the day in this Court's reasoning. In Brown, the petitioner had been sentenced as a career offender under the mandatory guidelines in effect before United States v.

Booker, 542 U.S. 220 (2005). Brown, 719 F.3d at 585. He challenged his sentence based on the ground that one of his predicate convictions was not a crime of violence under Begay. Id. at 584. His first § 2255 was denied before Begay was decided, so he brought his Begay claim under the saving clause and § 2241. Id. As a career offender, he faced a guideline range of 360-months to life; without that enhancement, his range would have been 262 to 327 months. Id. The Seventh Circuit held that "the district court erred in concluding that challenges to a sentence (rather than the underlying conviction) are categorically barred under 28 U.S.C. § 2241." Id. at 585.

The Seventh Circuit identified three conditions that must be satisfied before the saving clause applies: (1) the petitioner must show that his claim is based on a case interpreting a statute, and not the constitution; (2) he must show "that he relies on a retroactive decision that he could not have invoked in his first § 2255 motion"; and (3) the sentencing error must be serious enough to amount to a "miscarriage of justice." Id. at 586. In the end, the Seventh Circuit found that sentencing under the mandatory regime rose to a level of fundamental.

In Hill v. Masters, the Sixth circuit addressed the same issue presented in Brown and, relying on Brown, held:

When seeking to petition under § 2241 based on a misapplied sentence, the petitioner must show: (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.

836 F.3d at 595.

The only issue in dispute in Hill was whether the erroneous, mandatory career-offender sentence was a fundamental defect or a miscarriage of justice.. Id. at 596. First the Hill court wholly rejected the notion that § 2241 "can never support a sentence challenge." Id. The Sixth Circuit was persuaded by Brown and by Judge Gregory's dissent from the Surratt panel majority's opinion. Id. at 599. In particular, it relied on the fact that § 2255(e) "makes no reference to 'convictions'" and instead refers to the legality of "detention." Id. at 598 (quoting Brown, 719 F.3d at 585). It also agreed with Judge Gregory's analysis that "Congress meant for the writ of habeas corpus to remain unabridged," : that the saving clause's use of the term "detention" rather than "conviction" expressed an intention to apply the saving clause to sentencing errors; and it "begs reason to expect a prisoner to bring a claim before the intervening law is decided." Id. at 599 (quoting Surratt, 797 F.3d at 270-71, 273-76, 274 (Gregory, J., dissenting)).

Next, the court agreed with the Government's position that a sentence above the statutory maximum amounts to a fundamental defect, because such a sentence "would present separation-of-powers concerns." Id. at 596 (citing Jones v. Thomas, 491 U.S. 376, 381 (1989)). But it disagreed with the Government's position that a sentence not exceeding the statutory maximum does not amount to a fundamental defect. Id. This interpretation of the saving clause, the court held, "can lead to problematic results." Id. For example, the court pointed out that "whether a misapplied enhancement

results in a miscarriage of justice should depend on whether the new statutory interpretation was announced before or after a prisoner filed a first § 2255," because "the timing of the decision invalidating the enhancement is beyond the prisoner's control." Id. at 597.

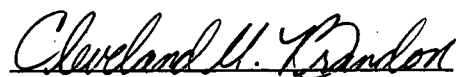
The court concluded that an erroneous, mandatory career-offender sentence is a "miscarriage of justice" justifying saving-clause relief for two reasons. First, the sentence is beyond what was called for by law and raises a fundamental fairness issue. Id. at 599. But second, "Congress, through the Sentencing Commission, intended the prisoner's Hill's position be eligible for certain reductions., " and his career offender classification wrongly deprived him of that relief. Id.

The courts' reasoning in Brown and Hill is persuasive, and this Court should grant certiorari and end the tangled circuit split.

#### Conclusion

The Court is the only branch that can resolve this critical matter and therefore it should grant certiorari.

Filed this 28th day of February, 2018, under the penalty of perjury.



Cleveland Brandon