

No. 17-8274

IN THE SUPREME COURT OF THE UNITED STATES

CLEVELAND BRANDON, PETITIONER

v.

DAVID R. WILSON, WARDEN

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

JENNY C. ELLICKSON
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 constitutional-law decisions made retroactive by 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 Mathis did not remove any preexisting barrier to an assertion of a substantively identical claim by motion under Section 2255.

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-8274

CLEVELAND BRANDON, PETITIONER

v.

DAVID R. WILSON, WARDEN

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 699 Fed. Appx. 283. The order of the district court (Pet. App. 5-7) is not published in the Federal Supplement but is available at 2017 WL 707490.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2017. A petition for rehearing was denied on January 23, 2018 (Pet. App. 4). The petition for a writ of certiorari was filed on

March 6, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Massachusetts, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 9. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Ibid. In April 2016, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, which the district court denied. Pet. App. 9-10. In October 2016, petitioner filed in the United States District Court for the Northern District of West Virginia an application for habeas relief under 28 U.S.C. 2241, which the court denied and dismissed with prejudice. Pet. App. 5-7; see 16-cv-142 Docket entry No. 1 (Oct. 11, 2016). The court of appeals modified the district court's order to reflect a dismissal without prejudice for lack of jurisdiction and affirmed the dismissal as modified. Pet. App. 2.

1. In October 2009, petitioner was pulled over by police while driving at a high speed. Presentence Investigation Report (PSR) ¶ 10. Petitioner, a convicted felon, slowed down and tossed a handgun out of his car window before stopping. PSR ¶¶ 10-11, 17.

A federal grand jury charged petitioner with possession of a firearm and ammunition by a felon, in violation of 18 U.S.C.

922(g)(1). Indictment 1. 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 portion of Section 924(e)(2)(B)(ii) that begins with "otherwise" is commonly referred to as the "residual clause." See Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

After petitioner pleaded guilty to the charge in the indictment, the Probation Office prepared a presentence report concluding that petitioner had six prior convictions that qualified as "serious drug offenses" under the ACCA: three 1995 convictions for distributing heroin, in violation of Mass. Gen. Laws Ann. ch. 94C, § 32 (West 1995); a 1995 conviction for

possessing heroin with intent to distribute, in violation of Mass. Gen. Laws Ann. ch. 94C, § 32 (West 1995); a 1998 conviction for possessing cocaine with intent to distribute, in violation of Mass. Gen. Laws Ann. ch. 94C, § 32A (West 1995); and a 2003 conviction for distributing cocaine, in violation of Mass. Gen. Laws Ann. ch. 94C, § 32A (West 1995). PSR ¶¶ 41-44, 52, 56, 63; see Pet. App. 10; Pet. C.A. Br. 7-8. Petitioner submitted no written objections to the presentence report and did not object to it at sentencing. See PSR Addendum 1; 09-cr-10377 Docket entry (Dkt.) No. 33, at 3 (July 5, 2016). At sentencing, the district court found that petitioner was subject to an enhanced sentence under the ACCA because he had at least three prior qualifying convictions. Dkt. No. 33, at 3-4. Although the court did not explicitly identify at the hearing the prior convictions on which that finding relied, it adopted the presentence report without alteration. Id. at 4; see Judgment 9. The court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Pet. App. 9. Petitioner did not appeal. Ibid.

2. In April 2016, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 in the United States District Court for the District of Massachusetts, where he had been convicted and sentenced. Dkt. No. 29 (Apr. 18, 2016). Petitioner contended that his ACCA sentence was invalid in light of this Court's decision in Johnson v. United States, 135 S. Ct.

2551 (2015), which held that the ACCA's residual clause is unconstitutionally vague. Dkt. No. 29, at 2. While petitioner's motion was pending in district court, this Court decided Mathis v. United States, 136 S. Ct. 2243 (2016), which explained that a statute is not "divisible" -- and thus, not subject to the "modified categorical approach" under which a sentencing court may attempt to determine which form of the crime underlies a particular defendant's conviction -- if it describes alternative "means" of committing a single crime, rather than alternative "elements" of separate crimes. Id. at 2248-2256. Petitioner did not amend or supplement his Section 2255 motion to add a claim or argument based on Mathis.

In August 2016, the district court denied petitioner's Section 2255 motion. Dkt. No. 34 (Aug. 16, 2016) (adopting magistrate judge's report and recommendation); see Dkt. No. 33 (report and recommendation). The court determined that petitioner's Johnson claim was "misplaced" because "Johnson did not alter the definition of a serious drug offense, but only the residual clause pertaining to certain violent felonies as predicate offenses." Dkt. No. 33, at 7-8. The court further determined that petitioner had six prior convictions for serious drug offenses, "mandating the conclusion that he qualifies as an armed career criminal properly subject to the ACCA sentence enhancement applied in his

case.” Id. at 11; see id. at 9-11. Petitioner did not appeal that decision. Pet. App. 10.

3. On October 11, 2016, petitioner filed an application for habeas relief under 28 U.S.C. 2241 in the United States District Court for the Northern District of West Virginia, where he was incarcerated. Petitioner argued that his ACCA sentence was invalid in light of Mathis. 16-cv-142 Docket entry No. 1, at 5. The district court, adopting the report and recommendation of a magistrate judge, denied the habeas application and dismissed it with prejudice. Pet. App. 5-7. The court determined that petitioner had failed to demonstrate that he was authorized to seek habeas relief under 18 U.S.C. 2255(e), often referred to as the habeas “saving clause,” which permits a prisoner to seek habeas relief only where relief by motion under Section 2255 “is inadequate or ineffective to test the legality of [the prisoner’s] detention.” 28 U.S.C. 2255(e); see Pet. App. 6-7.

The court of appeals granted petitioner leave to proceed in forma pauperis on appeal, modified the district court’s order to reflect a dismissal without prejudice for lack of jurisdiction, and affirmed the dismissal as modified. Pet. App. 2. The court of appeals explained that petitioner had failed to demonstrate that Section 2255 “is an inadequate or ineffective means of challenging the validity of his detention” and that the district

court therefore lacked jurisdiction over his habeas application.
Ibid.

ARGUMENT

Petitioner contends (Pet. 4-13) that he is entitled to seek federal habeas corpus relief under 28 U.S.C. 2241 based on his claim, in reliance on Mathis v. United States, 136 S. Ct. 2243 (2016), that his prior Massachusetts drug convictions are not “serious drug offenses” under the ACCA, 18 U.S.C. 924(e)(2)(A). The courts below 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.¹ The same result is warranted here.

¹ 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, 571 U.S. 864 (2013) (No. 12-10719); Blanchard v. Stephens, 569 U.S. 960 (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). The issue is also presented in Williams v. Jarvis, petition for cert. pending, No.

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 and concluded that the contrary view adopted by the en banc decision in McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076 (11th Cir.), cert. denied, 138 S. Ct. 502 (2017) (No. 17-85), 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

17-7974 (filed Feb. 28, 2018); and Young v. Ocasio, petition for cert. pending, No. 17-7141 (filed Dec. 1, 2017).

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. See Pet. 4-13; Pet. C.A. Br. 5. 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 Eleventh Circuit 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. 1111 (2012) (No. 11-249). 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) (statement of Easterbrook, C.J., concerning the circulation under Seventh Circuit Rule 40(e)) (brackets omitted).

Petitioner does not contend that he was precluded in his Section 2255 motion from raising, or obtaining a merits decision on, his argument concerning the proper interpretation of the ACCA. As explained below, petitioner's arguments were not contrary to then-prevailing circuit law; but even if they were, 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 court of appeals 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). The latter 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 decisions of "constitutional law" made retroactive by this Court. 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 contrary approach taken by some courts 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 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 Offices of the U.S. Att'ys, U.S. Dep't of Justice, United States Attorneys' Manual §§ 9-140.112, 9-140.113, <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.² 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 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

² 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).

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)). In addition, since deciding petitioner's case, the Fourth Circuit 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 (2018).

By contrast, two courts of appeals have held that Section 2255(e) categorically does not permit habeas relief based on an intervening decision of statutory interpretation. In Prost, the

Tenth Circuit denied habeas relief on the ground that Section 2255 was not inadequate or ineffective even though 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, a group that includes the Fourth Circuit, petitioner would not be eligible for it. As noted above, 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 an applicable maximum, or has received an erroneous statutory minimum sentence. Petitioner cannot satisfy either of those requirements.

First, petitioner has not shown that his claim was foreclosed at the time of his Section 2255 motion by any since-abrogated court

of appeals precedent. This Court issued its decision in Mathis, on which petitioner's habeas claim is based, while petitioner's Section 2255 motion was still pending in the district court. Petitioner could have sought leave to supplement that motion to add a claim based on Mathis, but he failed to do so. Petitioner thus had an unobstructed opportunity at the time of his Section 2255 motion 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).

Second, petitioner has identified no intervening decision, made retroactive on collateral review, establishing that his sentence exceeds the applicable maximum. During the proceedings below, petitioner argued that he is entitled to relief on the basis of Mathis, 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. 136 S. Ct. 2248-2256; see Pet. App. 6-7, 10-11; Pet. C.A. Br. 4-11. 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 [the same] point” about when that approach does or does not apply. 136 S. Ct. 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).”). And for reasons explained below, Mathis has no bearing on whether petitioner’s prior state offenses qualify as “serious drug offense[s]” under the ACCA, because those offenses satisfy the statutory definition of “serious drug offense” without regard to the modified categorical approach. See United States v. Moore, 286 F.3d 47, 50 (1st Cir.) (rejecting the need, in considering whether Mass. Gen. Laws Ann. ch. 94C, § 32A is an ACCA predicate, to “look to sources beyond the statutory definition of [the] crime (such as the charging papers or jury instructions)”), cert. denied, 537 U.S. 907 (2002).

c. Even if petitioner's claim were cognizable in a habeas application, the claim would fail on the merits because his six prior convictions properly qualify as "serious drug offense[s]." Under the ACCA, a "serious drug offense" includes "an offense under State law, involving * * * distributing, or possessing with intent to * * * distribute, a controlled substance * * * , for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e) (2) (A) (ii). Petitioner has four prior convictions for distributing or possessing with intent to distribute a class A controlled substance (heroin), in violation of Mass. Gen. Laws Ann. ch. 94C, § 32 (West 1995), and two prior convictions for distributing or possessing with intent to distribute a class B controlled substance (cocaine), in violation of Mass. Gen. Laws Ann. ch. 94C, § 32A (West 1995). See PSR ¶¶ 41-44, 52, 56, 63; see also Pet. App. 10. A first offense under either statute carries a potential sentence of "imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one-half years." Mass. Gen. Laws Ann. ch. 94C, § 32(a) (West 1995); see *id.* § 32A(a) (West 1995) (same). Because both statutes therefore authorize sentences of ten years for petitioner's offenses, petitioner's convictions "fit comfortably within the ambit of 'serious drug offense' as that term is defined" by the ACCA. United States v. López, 890

F.3d 332, 341 (1st Cir. 2018) (quoting Moore, 286 F.3d at 49) (brackets omitted).

During the proceedings below, petitioner contended that, after Mathis, his prior convictions do not constitute serious drug offenses under the ACCA because the elements of the relevant Massachusetts drug statutes "sweep more broadly than the generic 'serious drug offense.'" Pet. C.A. Br. 8; see id. at 7-11; 16-cv-142 Docket entry No. 1-1, at 6-9 (Oct. 11, 2016). Petitioner is incorrect that this Court's precedents require a sentencing court to determine the elements of the "generic" version of a "serious drug offense," rather than to apply the ACCA's statutory definition of that term. The ACCA requires analysis of the elements of "generic" offenses where Congress, "[i]n listing those crimes, * * * referred only to their usual or (in [the Court's] terminology) generic versions." Mathis, 136 S. Ct. at 2248; see, e.g., Taylor v. United States, 495 U.S. 575, 598 (1990) (determining elements of the "generic" version of "burglary," an enumerated but undefined term). But unlike the ACCA's enumerated offenses, Congress has expressly defined "serious drug offense." The ACCA broadly defines that term to include offenses "under State law involving" a set of listed drug activities -- "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. 924(e) (2) (A) (ii) (emphasis added). Courts therefore "need not search for the

elements of 'generic' definitions of 'serious drug offense' * * * because th[at] term[] [is already] defined by a federal statute." United States v. Smith, 775 F.3d 1262, 1267 (11th Cir. 2014), cert. denied, 135 S. Ct. 2827 (2015).

During the proceedings below, petitioner also argued that the Massachusetts statutes under which he was convicted each define two separate drug offenses -- one offense punishable by up to two and one-half years in jail, and a separate offense punishable by up to ten years in prison. See Pet. C.A. Br. 9; 16-cv-142 Docket entry No. 1-1, at 7-8. Petitioner's argument is mistaken. As the First Circuit has explained, the Massachusetts drug crimes at issue here qualify as "serious drug offense[s]" under the categorical approach, which "look[s] only to the statutory definitions of the prior offenses." Moore, 286 F.3d at 49 (quoting Taylor, 495 U.S. at 600); see López, 890 F.3d at 340-341 (reaffirming Moore and applying its analysis to convictions under both Massachusetts drug offenses). Each Massachusetts statute defines a "single offense" with two different punishment options, based on the prosecutor's charging decision. Moore, 286 F.3d at 50; see United States v. Weekes, 611 F.3d 68, 72 (1st Cir. 2010), cert. denied, 564 U.S. 1021 (2011); see also López, 890 F.3d at 337.

The ACCA directs a sentencing court to look at the "maximum term of imprisonment" for the prior state "offense." 18 U.S.C. 924(e) (2) (A) (ii). Here, neither Massachusetts statute sets out

two offenses with different elements; rather, each sets out a unitary offense, with a single set of elements, and then defines the potential punishment to include a maximum sentence of "imprisonment in the state prison for not more than ten years." Mass. Gen. Laws Ann. ch. 94C, § 32(a) (West 1995); see id. § 32A(a) (West 1995) (same); cf. Texas v. Cobb, 532 U.S. 162, 173 (2001) ("[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.") (citation and internal quotation marks omitted). The Massachusetts offenses thus "allow[] for a maximum possible penalty of ten years' incarceration, and, thus, fit[] comfortably within the ambit of 'serious drug offense' as that term is defined in 18 U.S.C. § 924(e)(2)(A)(ii)." Moore, 286 F.3d at 49.

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

JENNY C. ELLICKSON
Attorney

JUNE 2018