No. 18-5773

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL DELANCY, PETITIONER

v.

JORGE L. PASTRANA, WARDEN

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground cognizable on collateral review, with "second or successive" attacks limited to certain claims that show 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 United States has filed

a petition for a writ of certiorari in United States v. Wheeler, No. 18-420 (filed Oct. 3, 2018), seeking this Court's resolution of a circuit conflict regarding whether the portion of Section 2255(e) beginning with "unless," known as the saving clause, allows a defendant who has been denied Section 2255 relief to later file a habeas petition that challenges his conviction or sentence based on an intervening change in the judicial interpretation of a statute. Petitioner seeks review of a similar question, but the circumstances of his case would not lead to relief under any circuit's interpretation of the saving clause. The petition should therefore be denied and need not be held pending the disposition of Wheeler.

1. In 1999, petitioner was convicted of conspiring to distribute cocaine, cocaine base, and heroin, in violation of 21 U.S.C. 841(a)(1) and 846. See 2005 WL 1026019, at *1. The government filed a notice pursuant to 21 U.S.C. 851 indicating that petitioner had a prior conviction in Florida that qualified as a conviction for a "felony drug offense" under 21 U.S.C. 841. See 2005 WL 1026019, at *1. Petitioner was initially sentenced to life imprisonment, because the drug quantities with which he was charged exposed him to a life sentence. Ibid.; see 21 U.S.C. 841(b)(1)(A) (providing for 10 years to life imprisonment if defendant commits offense after a prior conviction for a "felony drug offense"). The court of appeals vacated petitioner's sentence in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), and

remanded for resentencing pursuant to 21 U.S.C. 841(b)(1)(C), the penalty provision that applied in the absence of a jury finding on drug type and quantity. See 2005 WL 1026019, at *1. Then, as now, that provision established a maximum penalty of 20 years of imprisonment but increased the maximum to 30 years if the defendant had a prior conviction for a "felony drug offense." 21 U.S.C. 841(b)(1)(C). Petitioner was sentenced to 30 years of imprisonment. 2005 WL 1026019, at *1. After petitioner's conviction and sentence were affirmed on direct appeal, he filed a motion to vacate, correct, or set aside the sentence under 28 U.S.C. 2255, which the district court denied. 2005 WL 1026019, at *3.

In 2016, petitioner filed a habeas petition under 28 U.S.C. 2241, arguing that this Court's ruling in Descamps v. United States, 570 U.S. 254 (2013), established that his Florida conviction does not qualify as a prior conviction for a "felony drug offense," 21 U.S.C. 841(b)(1)(C), because the Florida offense has a mens rea requirement that makes it broader than the definition of "felony drug offense." See D. Ct. Doc. 1, at 13-24 (Jan. 13, 2016). The district court dismissed the petition for lack of jurisdiction, concluding that the petition was not cognizable under by the saving clause of 28 U.S.C. 2255(e). Pet. App., Dist. Ct. Order at 1-3. The court of appeals affirmed. Pet. App., C.A. Op. at 3.

2. Petitioner contends (Pet. 15-19) that this Court's decisions in Mathis v. United States, 136 S. Ct. 2243 (2016),

establishes that his prior Florida conviction does not qualify as a conviction for a "felony drug offense" and therefore that he was erroneously exposed to an enhanced statutory maximum sentence under 21 U.S.C. 841(b)(1)(C). Petitioner argues that the definition of "felony drug offense" is limited to certain types of activity related to controlled substances, such as manufacture and distribution, whereas the relevant Florida drug statutes extend to additional activity, such as the sale and purchase of controlled substances. Petitioner further argues that, under Mathis, the Florida statutes are not divisible into multiple offenses that might individually satisfy the definition of "felony drug offense."

As noted above, the United States has filed a petition for a writ of certiorari in United States v. Wheeler, No. 18-420, asking this Court to resolve a circuit conflict regarding whether the saving clause allows a defendant who has been denied Section 2255 relief to challenge his conviction or sentence based on an intervening decision of statutory interpretation. The Court need not hold the petition in this case pending Wheeler, however, because for several independent reasons, petitioner would not be entitled to relief even in the courts of appeals that have given the saving clause the most prisoner-favorable interpretation.

First, petitioner is incorrect in arguing (Pet. 16) that the definition of "felony drug offense" in Section 841 is limited to "specific activity." A "felony drug offense" is defined as "an

offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44) (emphasis added). That definition readily encompasses the sale or purchase of a controlled substance.

Second, even in circuits that construe the saving clause to permit a habeas petition based on an intervening decision of statutory interpretation, petitioner's habeas petition would not qualify. The circuits that have given Section 2255(e) the broadest interpretation generally have granted relief only when a prisoner can 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 under a statute or under a mandatory Sentencing Guidelines regime, or has received an erroneous statutory minimum sentence. See, e.g., Hill v. Masters, 836 F.3d 591, 595-596, 598-600 (6th Cir. 2016); Brown v. Rios, 696 F.3d 638, 640-641 (7th Cir. 2012); Reyes-Requena v. United States, 243 F.3d 893, 902-904 (5th Cir. 2001). Petitioner cannot satisfy either of those prerequisites.

On the first prerequisite, petitioner has not shown that his claim was foreclosed at the time of his first Section 2255 motion

by any since-abrogated precedent. Petitioner had an unobstructed opportunity at the time of his sentencing and direct appeal to argue that his Florida conviction did not qualify as a conviction for a "felony drug offense" under 21 U.S.C. 841. Assuming the categorical approach is used to determine whether a prior conviction qualifies as a felony drug offense for purposes of that statute, petitioner could have raised the argument that the relevant Florida statutes were indivisible and overbroad in his first Section 2255 motion. 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 In re Davenport, 147 F.3d 605, 609 (7th Cir. 1998) (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).

On the second prerequisite, petitioner has identified no intervening decision, made retroactive on collateral review, establishing that his sentence exceeds the applicable maximum. Cf. United States v. Smith, 775 F.3d 1262, 1266-1267 (11th Cir. 2014) (rejecting argument that convictions under Florida's controlled-substances statute are not "serious drug offenses"

within the meaning of 18 U.S.C. 924(e)(2)(A)) (brackets omitted), cert. denied, 135 S. Ct. 2827 (2015). Petitioner argues that he is entitled to relief based on Mathis, which explained that a statute is not "divisible" into multiple offenses for purposes of classifying a conviction if it sets forth alternative "means" of committing a single crime, rather than alternative "elements" of separate crimes. 136 S. Ct. at 2248-2256. But the Court made clear in Mathis that it was not announcing any new principle, because its prior "cases involving the modified categorical approach ha[d] already made exactly that point." Id. at 2253; see id. at 2251-2254 (explaining that rule was dictated by 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).

This Court has denied petitions for writs of certiorari in cases in which the petitioners would not have been eligible for relief even in circuits that have allowed some statutory challenges to a conviction or sentence under the saving clause. See, e.g., Br. in Opp. at 24-27, Young v. Ocasio, 138 S. Ct. 2673 (2018) (No. 17-7141); Br. in Opp. at 21-22, Venta v. Jarvis, 138 S. Ct. 648 (2018) (No. 17-6099). The Court should follow the same course here, and the petition need not be held for Wheeler.*

Respectfully submitted.

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Solicitor General

NOVEMBER 2018

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* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.