No. 21-763

In the Supreme Court of the United States

JOHN FORREST HAM, JR., PETITIONER

v.

M. BRECKON, WARDEN

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2255, a federal prisoner may collaterally attack his sentence once on any ground cognizable on collateral review, with "second or successive" attacks limited to certain claims that indicate factual innocence or rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. 2255(h). Under Section 2255(e), a petition 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." 28 U.S.C. 2255(e).

The question presented is whether petitioner is entitled to seek federal habeas corpus relief under Section 2241 based on his claim that his South Carolina third-degree burglary conviction is not a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.S.C.):

United States v. *Ham*, No. 10-cr-46 (Sept. 10, 2010) (criminal judgment)

United States v. *Ham*, Nos. 10-cr-46 & 12-cv-1892 (Aug. 9, 2013) (denying motion under 28 U.S.C. 2255)

United States v. *Ham*, Nos. 10-cr-46 & 17-cv-1703 (Mar. 2, 2018) (dismissing motion under 28 U.S.C. 2255)

United States v. *Ham*, Nos. 10-cr-46 & 19-cv-1105 (Sept. 18, 2019) (dismissing motion under 28 U.S.C. 2255)

United States District Court (W.D. Va.):

Ham v. *United States*, No. 17-cv-295 (June 27, 2017) (denying habeas petition)

Ham v. *Breckon*, No. 18-cv-649 (June 15, 2020) (denying habeas petition)

United States Court of Appeals (4th Cir.):

United States v. *Ham*, No. 10-4992 (July 12, 2011) (affirming criminal judgment)

In re Ham, No. 19-191 (May 2, 2019) (denying leave to file successive motion under 28 U.S.C. 2255)

United States v. *Ham*, No. 19-6307 (July 22, 2019) (denying certificate of appealability and dismissing appeal)

Ham v. *Breckon*, No. 20-6972 (Apr. 20, 2021) (affirming denial of habeas petition)

In re Ham, No. 20-393 (Sept. 1, 2021) (denying leave to file successive motion under 28 U.S.C. 2255)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 994 F.3d 682. The order of the district court (Pet. App. 30a-44a) is unreported but is available at 2020 WL 3213445.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2021. A petition for rehearing was denied on June 21, 2021 (Pet. App. 45a). By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari

was filed on November 18, 2021. 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 South Carolina, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1); carjacking, in violation of 18 U.S.C. 2119(1); and possessing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). See 10-cr-46 Judgment 1; 10-cr-46 Indictment 1-2. He was sentenced to 319 months of imprisonment, to be followed by five years of supervised release. 10-cr-46 Judgment 2-3. The court of appeals affirmed. 438 Fed. Appx. 183.

Over the years, petitioner filed or sought leave to file multiple motions under 28 U.S.C. 2255 to vacate, correct, or set aside his sentence, all of which were denied or dismissed. See Pet. App. 6a-7a; 17-cv-295 D. Ct. Doc. 3 (June 27, 2017); 10-cr-46 D. Ct. Doc. 114 (Mar. 2, 2018); 19-6307 C.A. Doc. 6 (July 22, 2019); 19-191 C.A. Doc. 5 (May 2, 2019); 10-cr-46 D. Ct. Doc. 148 (Sept. 18, 2019); 20-393 C.A. Doc. 7 (Sept. 1, 2021).

In 2018, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Western District of Virginia, the district where he was confined. The district court dismissed the petition for lack of jurisdiction. Pet. App. 30a-44a. The court of appeals affirmed. *Id.* at 1a-29a.

1. In 2009, petitioner fled from police who had reported to the scene of an alleged burglary in Greenville, South Carolina. 10-cr-46 Presentence Investigation Report (PSR) ¶ 6. Petitioner was armed and pulled out his firearm during the chase. PSR ¶ 8. Petitioner made his way to the Greenville Community Residence Center, a

facility for special needs individuals and assisted living. PSR ¶ 9. There, he threatened a facility employee with his firearm and took control of a bus, driving off with a facility resident still inside. *Ibid.*

Petitioner drove straight toward police officers while pointing his gun at them. PSR ¶ 9. The officers shot at petitioner and at the tires of the bus, but petitioner evaded the police and drove onto the highway. *Ibid.* The police gave chase, and petitioner eventually pulled over the bus, which had a flat tire, to the side of the road and fled on foot. PSR ¶ 10. Petitioner pulled his gun on an officer who caught up with him, but the officer's dog attacked petitioner and caused him to drop the firearm. *Ibid.* Additional officers arrived and subdued and arrested petitioner after a prolonged struggle. *Ibid.*

2. A federal grand jury in the District of South Carolina charged petitioner with possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1); carjacking, in violation of 18 U.S.C. 2119(1); and possessing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). 10-cr-46 Indictment 1-2. Petitioner pleaded guilty to all charges. 10-cr-46 Judgment 1.

A conviction for violating Section 922(g)(1) carries a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, a defendant has at least three prior convictions "for a violent felony or a serious drug offense" committed on different occasions, the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1). The ACCA defines "violent felony" to include, among other things, "any crime punishable by

imprisonment for a term exceeding one year" that "is burglary." 18 U.S.C. 924(e)(2)(B)(ii).

The Probation Office's presentence report concluded that petitioner was subject to the ACCA's 15-year statutory minimum because he had one prior conviction for a serious drug offense (trafficking methamphetamine) and two prior convictions for violent felonies: assault and battery of a high and aggravated nature, and South Carolina third-degree burglary. See PSR ¶¶ 20, 21, 24, 69. The Probation Office also recommended that petitioner be sentenced as a "career offender" under Section 4B1.1 of the Sentencing Guidelines, which increases a defendant's advisory guidelines range if, among other things, "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." Sentencing Guidelines § 4B1.1 (2009); see PSR ¶¶ 22, 53. The Probation Office determined that petitioner's drug-trafficking and assault-and-battery convictions qualified as career-offender predicates. PSR ¶¶ 21, 24.

The career-offender designation yielded an advisory guidelines range of 188 to 235 months of imprisonment for the felon-in-possession and carjacking offenses. PSR ¶ 58. The carjacking offense on its own carries a 15-year maximum term of imprisonment. See 18 U.S.C. 2119(1). Petitioner's Section 924(c) conviction carries a statutory minimum sentence of seven years of imprisonment consecutive to any sentence imposed on the felon-in-possession and carjacking charges because petitioner brandished the firearm during the crime of violence. 10-cr-46 Change of Plea Tr. 34; see 18 U.S.C. 924(c)(1)(A)(ii) and (D)(ii). Petitioner's advisory guidelines range on all three counts was therefore 272 to 319 months of imprisonment. PSR ¶ 58.

At sentencing, petitioner informed the district court that he had no objections to the presentence report and requested a sentence at the low end of the advisory guidelines range. 10-cr-46 Sentencing Tr. 4-5. The court rejected that request, observing that "this was a very egregious case, particularly since the victim was a special needs person." *Id.* at 5. The court imposed a sentence of 319 months of imprisonment, which was the upper end of the advisory guidelines range, to be followed by five years of supervised release. *Id.* at 5-6; 10-cr-46 Judgment 2-3. That term of imprisonment consisted of 235 months of imprisonment on the felon-in-possession count and 180 months of imprisonment (the statutory maximum) on the carjacking count, to run concurrently, plus 84 months on the Section 924(c) count, to run consecutively. 10-cr-46 Judgment 2.

The court of appeals affirmed. 438 Fed. Appx. 183. The court determined that petitioner's sentence was "both procedurally and substantively reasonable." *Id.* at 184.

3. In 2012, petitioner filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. 10-cr-46 D. Ct. Doc. 44 (July 5, 2012). He argued, among other things, that he had received ineffective assistance of trial counsel because his lawyer had not argued that his South Carolina conviction for third-degree burglary did not qualify as a violent felony under the ACCA. *Id.* at 6; see Pet. App. 6a. The district court denied the motion, and petitioner did not appeal. See Pet. App. 6a-7a.

In 2017, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Western District of Virginia, which is the district where he is in custody. The district court construed that petition as a second or successive motion

under Section 2255 and transferred it to the South Carolina district court, which dismissed it for lack of jurisdiction. See 17-cv-295 D. Ct. Doc. 3; 10-cr-46 D. Ct. Doc. 114. The court of appeals denied a certificate of appealability and dismissed the appeal. 19-6307 C.A. Doc. 6.

In 2019, petitioner sought leave to file a third motion under Section 2255; the court of appeals denied that request, and the district court dismissed the motion. 19-191 C.A. Doc. 5; 10-cr-46 D. Ct. Doc. 148. In 2020, petitioner sought leave to file a fourth motion under Section 2255, which the court of appeals denied. 20-393 C.A. Doc. 7 (Sept. 1, 2021).

4. Meanwhile, in 2018, petitioner filed a second petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Virginia district court. See Pet. App. 9a, 30a. Petitioner argued that his South Carolina third-degree burglary conviction was not a conviction for a violent felony under the ACCA in light of this Court's decision in *Mathis* v. *United States*, 136 S. Ct. 2243 (2016). See Pet. App. 9a-10a, 30a. *Mathis* stated that if a state burglary statute "sets out a single (or 'indivisible') set of elements to define a single crime" that is broader than "generic burglary," the offense it defines is not "burglary" under the ACCA. 136 S. Ct. at 2248. Petitioner contended that the South Carolina third-degree burglary statute is not a violent felony under the ACCA because it covers unlawful entry into vehicles, watercraft, and aircraft, and therefore is broader than generic burglary. 18-cv-649 D. Ct. Doc. 40, at 7 (Feb. 25, 2020).

The government responded that in light of *Mathis*, petitioner "no longer meets the requirements of the" ACCA, and it agreed that petitioner was "entitled to relief under 18 U.S.C. 2241." 18-cv-649 D. Ct. Doc. 9, at 1 (Apr. 18, 2019). In a supplemental brief, the govern-

ment observed that the rule set forth in *Mathis* "was dictated by prior precedent and is thus not a new rule." 18-cv-649 D. Ct. Doc. 18, at 1 (Aug. 19, 2019). From that observation, the government concluded that *Mathis* "should be applied retroactively on collateral review," thereby entitling petitioner to habeas relief. *Id.* at 4.

The district court declined to grant relief, on the ground that petitioner's habeas petition was not authorized by the "saving clause" in 28 U.S.C. 2255(e), which provides that 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 [under Section 2255] is inadequate or ineffective to test the legality of his detention." See Pet. App. 30a-43a. The court observed that to be entitled to seek saving-clause habeas relief under governing Fourth Circuit precedent—in particular, *United States* v. *Wheeler*, 886 F.3d 415 (2018), cert. denied, 139 S. Ct. 1318 (2019)—petitioner would have to show, among other things, that "at the time of sentencing, settled law of [the Fourth Circuit] or the Supreme Court established the legality of the sentence" and "subsequent to [petitioner's] direct appeal and first § 2255 motion, the aforementioned settled substantive law [(1)] changed and [(2)] was deemed to apply retroactively on collateral review." Pet. App. 37a (quoting *Wheeler*, 886 F.3d at 429). The district court concluded that petitioner did not meet the latter two requirements because *Mathis* did not change settled substantive law and did not apply retroactively on collateral review. *Id.* at 39a-43a.

5. The court of appeals affirmed. Pet. App. 1a-29a. On appeal, notwithstanding the district court's decision,

the government continued to argue that "[b]ecause *Mathis* is an old rule, it is retroactively applicable on collateral review" and that petitioner thus satisfied the standard in *Wheeler* for pursuing habeas relief under the saving clause. 20-6972 Gov't C.A. Br. 21 (Aug. 20, 2020). The court of appeals appointed an amicus to defend the district court's judgment. See 20-6972 C.A. Doc. 38 (Oct. 27, 2020). Following supplemental briefing, the court of appeals agreed with the appointed amicus that the district court lacked jurisdiction pursuant to the saving clause.

The court of appeals determined that petitioner could not satisfy the saving-clause standard that it had set forth in *Wheeler* because he could not establish that *Mathis* changed the settled substantive law of the circuit itself or of this Court. Pet. App. 14a-27a. The court of appeals explained that *Mathis* simply reiterated principles set forth in this Court's prior precedents, including *Taylor* v. *United States*, 495 U.S. 575 (1990), and thus did not effect any change in law. Pet. App. 18a-20a. The court of appeals further explained that "*Mathis*'s explanation about how to determine whether parts of a statute are 'elements or means'" likewise did not change the Fourth Circuit's own "substantive law applying the modified categorical approach to South Carolina third degree burglary." *Id.* at 26a-27a; see *id.* at 20a-27a. The court observed that at the time of petitioner's initial Section 2255 motion, no Fourth Circuit precedent had established that South Carolina's third-degree burglary statute was divisible. *Id.* at 21a-23a. The court further observed that *Mathis* itself cited with approval the Fourth Circuit's prior precedents describing how to differentiate between divisible and indivisible statutes. *Id.* at 23a-25a. Having "conclude[d] [that]

Mathis did not change the settled substantive law," the court did "not reach the retroactivity question." Pet. App. 14a.

ARGUMENT

Petitioner renews his contention (Pet. 11-22) that the saving clause in 28 U.S.C. 2255(e) permits him to challenge his enhanced sentence under the ACCA in a petition for a writ of habeas corpus under 28 U.S.C. 2241 based on this Court's intervening decision in *Mathis* v. *United States*, 136 S. Ct. 2243 (2016). Further review is unwarranted. Although a circuit conflict exists on the general scope of the saving clause, this Court recently denied a petition for a writ of certiorari filed by the government asking the Court to resolve that conflict, see *United States* v. *Wheeler*, 139 S. Ct. 1318 (2019) (No. 18-420), and has since denied several petitions filed by federal prisoners in analogous circumstances. Petitioner provides no meaningful new reason for the Court to review an issue that it has repeatedly declined to review.

In any event, this case would be a poor vehicle in which to address the circuit conflict for at least two reasons. First, petitioner likely would not be entitled to saving-clause relief even in the courts of appeals that have adopted the most prisoner-favorable interpretation of the saving clause. Second, even if petitioner were entitled to litigate his habeas petition under the saving clause and were to prevail on the merits of his ACCA claim, the district court could—and likely would—impose the same sentence.

1. Under the saving clause, a federal prisoner may file a petition for a writ of habeas corpus only if "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). Second or successive motions under

Section 2255 are authorized only when based on newly discovered evidence strongly indicative of factual innocence or a retroactive new rule of constitutional law that was unavailable at the time of the initial Section 2255 motion. 28 U.S.C. 2255(h). Three courts of appeals have held that Section 2255(e) categorically does not permit habeas relief based on an intervening decision of statutory interpretation. See *Jones* v. *Hendrix*, 8 F.4th 683, 687 (8th Cir. 2021), petition for cert. pending, No. 21-857 (filed Dec. 7, 2021); *McCarthan* v. *Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1085-1092 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017); *Prost* v. *Anderson*, 636 F.3d 578, 584, 590 (10th Cir. 2011), cert. denied, 565 U.S. 1111 (2012).

In contrast, the other nine regional courts of appeals—including the court below—have held that, in at least some circumstances, the saving clause of Section 2255(e) allows a federal prisoner to file a habeas petition under Section 2241 based on an intervening and retroactive decision of statutory construction. 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, 333-334 (4th Cir. 2000); *Reyes-Requena* v. *United States*, 243 F.3d 893, 902-904 (5th Cir. 2001); *Wooten* v. *Cauley*, 677 F.3d 303, 306-307 (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). Although those courts have offered varying rationales and have adopted somewhat different formulations, they generally all take the view that the remedy provided by Sec-

tion 2255(e) is "inadequate or ineffective to test the legality of [a prisoner's] detention," 28 U.S.C. 2255(e), 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 prisoner's claim at the time of his trial (or plea), appeal, and first motion under Section 2255. See, *e.g.*, *Reyes-Requena*, 243 F.3d at 902-904; *Jones*, 226 F.3d at 333-334; *Davenport*, 147 F.3d at 608-612.

Several of those circuits—including the court below—further have held that a prisoner may be entitled to habeas relief if an intervening decision of statutory interpretation, made retroactive on collateral review, has since established that the prisoner has been sentenced in excess of an applicable maximum under a statute or mandatory Sentencing Guidelines regime, or has received an erroneous statutory minimum sentence. See, *e.g.*, *Lester* v. *Flournoy*, 909 F.3d 708, 712 (4th Cir. 2018); *United States* v. *Wheeler*, 886 F.3d 415, 429-434 (4th Cir. 2018), cert. denied, 139 S. Ct. 1318 (2019); *Hill* v. *Masters*, 836 F.3d 591, 594-600 (6th Cir. 2016); *Brown* v. *Rios*, 696 F.3d 638, 640-641 (7th Cir. 2012); *Allen* v. *Ives*, 950 F.3d 1184, 1190 (9th Cir. 2020). As with the threshold issue, those courts have offered varying rationales and adopted somewhat different formulations, but they all generally require, at a minimum, that binding precedent in the circuit of conviction have foreclosed the prisoner's claim at the time of the conviction, direct appeal, and initial Section 2255 motion. See, *e.g.*, *Allen*, 950 F.3d at 1190; *Chazen* v. *Marske*, 938 F.3d 851, 856 (7th Cir. 2019); *Hill*, 836 F.3d at 595.

Notwithstanding the broader circuit conflict and its importance, this Court has recently and repeatedly de-

clined to review the issue, including when raised by the government in *Wheeler*, *supra* (No. 18-420). *E.g.*, *Lewis* v. *Hendrix*, 142 S. Ct. 126 (2021) (No. 20-7863); *Peterson* v. *Butler*, 142 S. Ct. 125 (2021) (No. 20-7761); *Jackson* v. *Hudson*, 141 S. Ct. 2753 (2021) (No. 20-911); *Davis* v. *Quay*, 141 S. Ct. 2658 (2021) (No. 20-6448); *Williams* v. *Coakley*, 141 S. Ct. 908 (2020) (No. 20-5172); *Cray* v. *Warden, FCI Coleman*, 141 S. Ct. 908 (2020) (No. 20-5132); *Hueso* v. *Barnhart*, 141 S. Ct. 872 (2020) (No. 19-1365); *Higgs* v. *Wilson*, 140 S. Ct. 934 (2020) (No. 19-401); *Walker* v. *English*, 140 S. Ct. 910 (2020) (No. 19-52); *Quary* v. *English*, 140 S. Ct. 898 (2020) (No. 19-5154); *Jones* v. *Underwood*, 140 S. Ct. 859 (2020) (No. 18-9495); *Dyab* v. *English*, 140 S. Ct. 847 (2020) (No. 19-5241).

That circuit conflict does not warrant this Court's review in this case to any materially greater degree than it did when the government filed its petition for a writ of certiorari in *Wheeler*. Since the denial of that petition, the Eighth Circuit—which had been the only regional court of appeals yet to weigh in on the conflict in a precedential decision—has joined the Tenth and Eleventh Circuits in holding that the saving clause categorically does not permit habeas relief based on an intervening decision of statutory interpretation, see *Jones* v. *Hendrix*, 8 F.4th at 687, and a petition for a writ of certiorari to review that decision is pending, see *Jones* v. *Hendrix*, No. 21-857 (filed Dec. 7, 2021). But the circuit conflict predated that decision, and the prior absence of any square Eighth Circuit precedent may indicate that the issue is less frequently outcome-dispositive than it might seem. And here, petitioner principally challenges (Pet. 1, 11, 13-16, 18-20) the court of appeals' requirement that the intervening statutory decision have

changed settled substantive law—a requirement that comes directly from *Wheeler* itself, and involves the Fourth Circuit's application of its own saving-clause precedent to its own prior decisions relevant to petitioner's claim. See Pet. App. 8a, 14a-27a.

2. In any event, this case would be a poor vehicle in which to review the circuit conflict for two reasons.

a. First, this case does not squarely implicate that conflict because petitioner likely would not be entitled to relief under any circuit's view of the saving clause. As noted, the circuits that construe the saving clause most broadly to include sentencing challenges—including the court below—generally have required a prisoner to show that erroneous precedent foreclosed his claim at the time of sentencing, direct appeal, and a first motion under Section 2255. See, *e.g.*, *Marlowe* v. *Warden, FCI Hazelton*, 6 F.4th 562, 570 (4th Cir. 2021); *Allen*, 950 F.3d at 1190; *Wheeler*, 886 F.3d at 429-434; *Hill*, 836 F.3d at 595-596; *Brown*, 696 F.3d at 640-641; see also Pet. 11, 13.

Petitioner cannot satisfy that requirement. As the decision below explains (Pet. App. 18a-27a), at the time of his sentencing, direct appeal, and first Section 2255 motion, the Fourth Circuit had not addressed in a published opinion whether South Carolina third-degree burglary was broader than generic burglary, let alone whether the state statute was divisible. Nor had the Fourth Circuit adopted a standard for assessing the divisibility of a statute that was inconsistent with *Mathis*, which itself simply reiterated the standard first set forth in *Taylor* v. *United States*, 495 U.S. 575 (1990). See, *e.g.*, *Mathis*, 136 S. Ct. at 2251-2252. To the contrary, even before this Court's decision in *Mathis*, the Fourth Circuit had determined, consistent with *Mathis*,

that statutes listing alternative means of committing an offense rather than alternative elements, were indivisible. See, *e.g.*, *United States* v. *Royal*, 731 F.3d 333, 341 (2013), cert. denied, 572 U.S. 1040 (2014); see also, *e.g.*, *Omargharib* v. *Holder*, 775 F.3d 192, 196 (2014) (addressing whether a state offense was an "aggravated felony" under the immigration laws); *United States* v. *Cabrera-Umanzor*, 728 F.3d 347, 353 (2013) (addressing whether a state offense was a "crime of violence" under the Sentencing Guidelines). Indeed, *Mathis* itself favorably cited *Omargharib* and *Cabrera-Umanzor*, see 136 S. Ct. at 2251 n.1 and 2256, which underscores that no binding precedent in the Fourth Circuit foreclosed petitioner's argument that South Carolina third-degree burglary is broader than generic burglary.

Petitioner contends (Pet. 12-13) that the decision below conflicts with decisions from the Sixth, Seventh, and Ninth Circuits determining that the saving clause permitted prisoners to raise claims in their habeas petitions based on *Mathis*. But as petitioner recognizes (Pet. 11, 13), each of those cases relied on the fact that at the time of the defendant's conviction, direct appeal, and initial Section 2255 motion, binding precedent in the circuit of conviction foreclosed the claim. See *Allen*, 950 F.3d at 1190 ("Under the law [in the circuit of conviction] at the time of his § 2255 motion, * * * the statute of conviction—Connecticut General Statute § 21a-277—would have been deemed divisible."); *Chazen*, 938 F.3d at 862 ("In short, in 2013—at the time Chazen first moved for post-conviction relief under § 2255—the law [in the circuit of conviction] was squarely against him in that it foreclosed the position he currently advances—that Minnesota burglary is not a violent felony under the [ACCA].") (citation and quotation marks omitted);

McCormick v. *Butler*, 977 F.3d 521, 523 (6th Cir. 2020) (explaining that Kentucky's third-degree burglary statute was broader than generic burglary and "[a]t the time of [the defendant's] sentencing * * * our precedent allowed the district court" to treat the statute as divisible).

Conversely, those courts have generally declined to find saving-clause relief available when binding precedent in the circuit of conviction at the relevant times did *not* foreclose the defendant's claim. See, *e.g.*, *Wright* v. *Spaulding*, 939 F.3d 695, 706 (6th Cir. 2019) (explaining that the saving clause did not permit the defendant's *Mathis*-based claim because binding precedent at the time of the initial Section 2255 motion did not foreclose that claim); see also *Parker* v. *Sproul*, No. 18-1697, 2022 WL 258586, at *3 (7th Cir. Jan. 27, 2022) (same). Given the Fourth Circuit's own determination that binding circuit precedent at the time of petitioner's conviction, direct appeal, and initial Section 2255 motion did not foreclose his present argument that South Carolina third-degree burglary is broader than generic burglary, petitioner cannot demonstrate that the Sixth, Seventh, or Ninth Circuits would have decided this case differently.*

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* The government argued in the courts below that petitioner was entitled to pursue habeas relief under the saving clause on the ground that *Mathis* is retroactively applicable on collateral review. But that argument focused on whether *Mathis* was a "new rule" or an "old rule," and the implications of the answer on retroactivity. See 18-cv-649 D. Ct. Doc. 18, at 1-5; 20-6972 Gov't C.A. Br. 8-21. The government's briefs in the lower courts did not address the separate requirement in *Wheeler* and other cases that binding circuit precedent have foreclosed petitioner's claim at the time of his conviction, direct appeal, and initial Section 2255 motion.

b. Second, this case would be a poor vehicle in which to resolve any lingering circuit conflict on the question presented because petitioner would be subject to—and likely would receive—the same sentence even if his habeas claim were cognizable under the saving clause.

Even without applying the ACCA, petitioner would face approximately the same advisory sentencing range. As a result of his career-offender designation under the Guidelines, petitioner's advisory guidelines range was 272 to 319 months of imprisonment. See PSR ¶¶ 35-37, 52-58. That designation would continue to apply even disregarding petitioner's prior South Carolina third-degree burglary conviction, because it requires only two, not three, prior felony convictions for crimes of violence or controlled substance offenses. See Sentencing Guidelines § 4B1.1(a). Accordingly, if petitioner were to be resentenced today, his current advisory guidelines range would be 262 to 327 months of imprisonment, irrespective of the ACCA. See § 4B1.1(c)(2)(B) and (3).

That range falls within the authorized statutory term of imprisonment for his offenses, which is up to 25 years (300 months) of imprisonment on the felon-in-possession and carjacking counts, and up to life imprisonment—with a statutory minimum of seven years (84 months)—on the Section 924(c) count, to be served consecutive to any sentence on the other two counts. See 18 U.S.C. 924(a)(2) (specifying a ten-year statutory maximum sentence for a violation of 18 U.S.C. 922(g)); 18 U.S.C. 2119(1) (specifying a 15-year statutory maximum sentence for carjacking that does not result in serious bodily injury or death); 18 U.S.C. 924(c)(1)(A)(ii) and (D)(ii) (specifying a seven-year statutory minimum sentence, with no maximum, to be

served consecutive to any other sentence, for brandishing a firearm during a crime of violence); see also Sentencing Guidelines § 5G1.2(d) ("If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment.").

As a result, even without application of the ACCA, the district court would be authorized to impose the same sentence. And as the sentencing court observed (10-cr-46 Sentencing Tr. 5), petitioner's conduct was "very egregious" and warranted a sentence (319 months) at the very top of the advisory guidelines range, well above the statutory minimum sentence (264 months) that applied under the ACCA. Especially given that the top of the range that petitioner would now face (327 months) is even higher than the one that the sentencing court considered, petitioner provides no sound basis to conclude that he would receive meaningful relief in the form of a shorter sentence even if the question presented were resolved in his favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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