No. 13-1221

In the Supreme Court of the United States

ALBERT WILLIAMS, PETITIONER

v.

SUZANNE R. HASTINGS, WARDEN, ET AL.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 2255(e) of Title 28 of the United States Code provides that an application for habeas corpus by a federal prisoner who may seek relief under Section 2255 "shall not be entertained" unless the remedy by motion under Section 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). The question presented is whether Section 2255 is "inadequate or ineffective," such that a court may entertain petitioner's application for federal habeas corpus relief, based on his claim that, under the retroactive statutory-construction decision of this Court in *Begay* v. *United States*, 553 U.S. 137 (2008), his sentence exceeds the maximum authorized by law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-54) is reported at 713 F.3d 1332. The order of the district court adopting the magistrate judge's report and recommendation (Pet. App. 63-64) is not published in the Federal Supplement, but is available at 2011 WL 2666839.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2013. A petition for rehearing was denied on January 8, 2014 (Pet. App. 66). The petition for a writ of certiorari was filed on April 8, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 293 months of imprisonment under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to be followed by five years of supervised release. Judgment 1-3. On direct appeal, the court of appeals affirmed. 182 F.3d 936 (Table).

From 2000 to 2010, petitioner filed numerous motions collaterally attacking his sentence, all of which were rejected. Pet. App. 4-5, 48-54. In November 2010, petitioner filed a habeas corpus petition in the United States District Court for the Southern District of Georgia attacking his sentence under 28 U.S.C. 2241. Pet. App. 5. The court dismissed the petition. *Ibid.* The court of appeals affirmed. *Id.* at 1-35.

1. In February 1997, petitioner pointed a firearm at undercover police officers who were trying to buy drugs from him in Miami, Florida. The officers arrested petitioner and seized crack cocaine from him. Presentence Investigation Report (PSR) ¶ 2. In 1998, petitioner was tried for being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). PSR ¶ 1.

Ordinarily, a violation of Section 922(g)(1) carries a maximum sentence of ten years of imprisonment. See 18 U.S.C. 924(a)(2). Before trial, however, the government filed a motion to enhance petitioner's sentence under the ACCA, 18 U.S.C. 924(e). Pet. App. 3. The ACCA provides for a mandatory minimum sentence of 15 years of imprisonment for any defendant convicted of being a felon in possession of a firearm who has "three previous convictions * * * for a

violent felony or a serious drug offense." 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 government supported its ACCA motion by noting petitioner's six prior criminal convictions, including a robbery conviction and two convictions for second-degree burglary of a dwelling in violation of Fla. Stat. Ann. § 810.02 (Supp. 1989). Pet. App. 2-3; see also PSR ¶¶ 21, 23.[1]

Petitioner was tried and convicted of the Section 922(g)(1) offense in 1998. At sentencing, the Probation Office recommended the ACCA enhancement based on the robbery and two burglary convictions, and it calculated a guidelines range of 235 to 293

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[1] At the time of petitioner's burglary offenses, Florida defined burglary to include "entering or remaining in a structure or conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." Fla. Stat. Ann. § 810.02(1) (Supp. 1989); see also *id.* § 810.02(3) (classifying burglary of a "dwelling" as a second-degree felony); *id.* § 810.011(2) (defining "dwelling" as a "building or conveyance of any kind, * * * which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof").

months. PSR ¶¶ 1, 12, 53; Pet. App. 3. At the time, petitioner did not object to the validity of his prior convictions under the ACCA. Pet. App. 3. The district court sentenced petitioner to 293 months of imprisonment. *Ibid.* On direct appeal, petitioner did not challenge the validity of his prior convictions under the ACCA. *Id.* at 3-4. The court of appeals affirmed. 182 F.3d 936 (Table).

2. Beginning in 2000, petitioner filed multiple post-conviction motions attacking the validity of his burglary convictions under the ACCA. Pet. App. 4-5, 48-54. In July 2000, he filed a motion under 28 U.S.C. 2255 alleging that his trial counsel rendered ineffective assistance by failing to argue that his burglary convictions were not violent felonies under the ACCA in light of *Taylor* v. *United States*, 495 U.S. 575 (1990). Pet. App. 4, 48. That case held that only generic burglary, *i.e.*, the unlawful or unprivileged entry into, or remaining in, a building or other structure, qualifies as a violent felony under the enumerated felonies provision of Section 924(e)(2)(B)(ii). *Taylor*, 495 U.S. at 598-599.

The district court denied petitioner's ACCA motion and subsequent request for a certificate of appealability (COA). Pet. App. 4. The court of appeals also denied petitioner's COA request. *Ibid.* That court noted that petitioner's 1989 burglary conviction may have been invalid in light of *Taylor*, but it stated that any error was harmless because petitioner's other convictions would support the enhancement. *Ibid.* This Court denied certiorari. 543 U.S. 864 (2004) (No. 03-11022). Pet. App. 4, 48-49.

In 2005 and 2006, petitioner filed motions under Fed. R. Civ. P. 60(b) that raised different versions of

his ACCA claim. Pet. App. 4-5, 50, 51. The first motion relied on *Shepard* v. *United States*, 544 U.S. 13 (2005), which held that when determining whether a prior conviction is a generic burglary for ACCA purposes, a court "is generally limited to examining the statutory definition [of the crime], charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.* at 16. The motion was unsuccessful in the district court and the court of appeals. Pet. App. 4-5, 50. This Court denied certiorari. 547 U.S. 1141 (2006) (No. 05-10336). Petitioner's second motion relied on both *Taylor* and *Shepard*. Pet. App. 5, 51. The district court denied relief, and the court of appeals denied a COA. *Ibid.* In 2006 and 2007, petitioner filed another Section 2255 motion and a separate habeas corpus petition under 28 U.S.C. 2241, but these too were denied. Pet. App. 5, 50-52.

In 2010, petitioner filed yet another Section 2255 motion alleging that his burglary convictions were not violent felonies under the ACCA. Pet. App. 5, 52. This time, petitioner relied on this Court's decision in *Begay* v. *United States*, 553 U.S. 137 (2008), which held that a New Mexico conviction for driving under the influence of alcohol (DUI) is not a "violent felony" for ACCA purposes. The Court explained that, unlike the other crimes listed in 18 U.S.C. 924(e)(2)(B)(ii), a DUI offense does not involve "purposeful, violent, and aggressive conduct." 553 U.S. at 142-148. The district court ruled that it had no jurisdiction to consider the motion. Petitioner did not appeal. Pet. App. 5, 52.

3. In 2010, petitioner reasserted his *Begay* claim in a habeas corpus petition filed under 28 U.S.C. 2241.

Pet. App. 5-6, 53-54. Section 2255(e) provides that such habeas petitions

> shall not be entertained [by any court] if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention*.

28 U.S.C. 2255(e) (emphasis added). The italicized language above is known as Section 2255(e)'s "savings clause."

Petitioner argued that the district court could adjudicate his Section 2241 petition under the savings clause. Pet. App. 5. The court disagreed and dismissed the petition. *Id.* at 63-64. It held that under *Gilbert* v. *United States*, 640 F.3d 1293 (11th Cir. 2011), cert. denied, 132 S. Ct. 1001 (2012), the savings clause is limited to claims of actual innocence and does not authorize any challenge to a petitioner's sentence. Pet. App. 5-6, 53-54, 63-64.[2]

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[2] In the district court, the government argued that the savings clause would allow a prisoner to challenge his sentence under Section 2241, but only if (1) "the claim involves a 'fundamental defect' in sentencing"; (2) "the petitioner did not have an opportunity to obtain judicial correction of that defect [alleged in his Section 2241 claim] earlier"; and (3) the Section 2241 claim "is based upon a retroactively applicable Supreme Court decision overturning circuit precedent." 10-CV-180 Docket entry No. 12, at 11 (Feb. 28, 2011) (Resp. in Opp'n to Habeas Pet.) (arguing that the test set forth in *Wofford* v. *Scott*, 177 F.3d 1236, 1244-1245 (11th Cir. 1999), should apply to sentencing claims). The government further argued that petitioner was not able to satisfy this test and that his *Begay* claim could not prevail on the merits. *Id.* at 12-18.

4. A divided panel of the court of appeals affirmed. Pet. App. 1-54.

a. Judge Marcus's opinion for the court began by holding that Section 2255(e) imposes a jurisdictional limit on the authority of federal courts to adjudicate a Section 2241 petition. Pet. App. 9-15. It emphasized the plain language of Section 2255(e)—and especially its directive that a Section 2241 habeas petition "shall not be entertained" unless a Section 2255 motion for relief is inadequate or ineffective. *Id.* at 10 (explaining that by this language, "Congress expressed its clear intent to impose a jurisdictional limitation on a federal court's ability to grant a habeas petitioner what is effectively a third bite at the apple") (citation and emphasis omitted); see also *id.* at 11-15 (examining the statutory context and relevant Supreme Court and circuit precedent).

Relying on *Wofford* v. *Scott*, 177 F.3d 1236 (11th Cir. 1999), the court of appeals next held that Section 2255 is "inadequate or ineffective," and thus a habeas petition may be entertained, if two necessary conditions are met: (1) the claim must be based on a retroactively applicable decision from the Supreme Court, and (2) the Supreme Court decision "must have overturned a circuit precedent that squarely resolved the claim so that the petitioner had no genuine opportunity to raise it at trial, on appeal, or in his first [Section] 2255 motion." Pet. App. 22.

The court of appeals then concluded that petitioner could not satisfy that test because nothing had prevented him from presenting his ACCA claim to the courts in his first Section 2255 motion. Pet. App. 24-35. It explained that no circuit precedent had squarely held that Florida burglary was a violent felony

under the ACCA during petitioner's direct appeal and collateral attacks between 1998 and 2004. *Id.* at 24-26. Although circuit precedent pre-dating *Taylor* had held that Florida burglary was a violent felony under the ACCA's enumerated felonies clause, the court noted that *Taylor* had abrogated that precedent. *Id.* at 24-25. The court acknowledged that it had later held that Florida's burglary and attempted-burglary statutes did constitute "violent felon[ies]" under the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii), but only *after* petitioner had litigated his direct appeal and first Section 2255 motion. Pet. App. 25 (citing *United States* v. *James*, 430 F.3d 1150 (11th Cir. 2005), aff'd, 550 U.S. 192 (2007), and *United States* v. *Matthews*, 466 F.3d 1271, 1275-1276 (11th Cir. 2006), cert. denied, 552 U.S. 921 (2007)).

The court of appeals rejected petitioner's argument that *Begay* had overturned Eleventh Circuit precedent and therefore now entitled him to bring his Section 2241 claim under the savings clause. Pet. App. 28-33. In *Begay*, this Court held that a state DUI offense was not a violent felony under the ACCA's residual clause because that offense did not involve "purposeful, violent, and aggressive conduct." 553 U.S. at 142-148. The court of appeals stated that although *Begay* changed the analytical framework for evaluating certain violent felonies, it did not overrule circuit precedent holding that Florida burglary was a violent felony. Pet. App. 30-31.

In a footnote, the court of appeals further noted that in *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), this Court "substantially circumscribed the reach of *Begay* so that its similar-in-kind requirement [*i.e.*, the "purposeful, violent, and aggressive conduct" test] no

longer applies to intentional crimes like Fla. Stat. § 810.02." Pet. App. 30-31 n.6. The court explained that *Begay*'s analysis applies to "strict liability, negligence, and recklessness crimes," and not to crimes involving "'knowing or intentional conduct.'" *Ibid.* (quoting *United States* v. *Chitwood*, 676 F.3d 971, 979 (11th Cir.), cert. denied, 133 S. Ct. 288 (2012)).

b. Judge Martin dissented. Pet. App. 36-47. In her view, Section 2255(e)'s savings clause allows a prisoner to argue that his sentence is unlawful based on a retroactively applicable Supreme Court decision, whether or not the prisoner could have advanced that argument earlier under circuit precedent. *Id.* at 37-38. She would have held that if petitioner could establish that he was never an armed career criminal under the ACCA in light of *Begay*, his continued incarceration would violate due process and Section 2255 would be "inadequate or ineffective to test the legality of his detention." *Id.* at 44 (quoting 28 U.S.C. 2255(e)). Judge Martin indicated that, in her view, the case should be remanded to the district court to consider petitioner's *Begay* claim on the merits. *Id.* at 47.

ARGUMENT

Petitioner contends (Pet. 16-35) that the court of appeals erred in holding that it lacked jurisdiction to adjudicate his Section 2241 petition under the savings clause of Section 2255(e) and that this decision implicates various splits of authority among the courts of appeals. But the court's conclusion that Section 2255(e) was not "inadequate or ineffective" in the circumstances presented is correct. That decision is consistent with the analysis adopted by virtually every other circuit, and no split of authority warrants this Court's review at this time. Moreover, petitioner's

underlying ACCA claim is foreclosed by this Court's decision in *James* v. *United States*, 550 U.S. 192 (2007). Petitioner therefore would not obtain relief even if the lower courts had jurisdiction under the savings clause. The petition should be denied.[3]

1. The court of appeals in this case correctly held that (1) Section 2255(e) places a jurisdictional limitation on the power of courts to adjudicate habeas petitions filed under Section 2241, and (2) petitioner's ACCA claim is jurisdictionally barred because it does not fall within the scope of the savings clause.

a. Section 2255 generally provides the exclusive means by which a federal prisoner may collaterally attack the validity (as distinguished from the execution) of his conviction or sentence. See, *e.g.*, *Matheny* v. *Morrison*, 307 F.3d 709, 711 (8th Cir. 2002) ("A petitioner may attack the execution of his sentence through [Section] 2241 in the district where he is incarcerated; a challenge to the validity of the sentence itself must be brought under [Section] 2255 in the district of the sentencing court."); *Valona* v. *United States*, 138 F.3d 693, 694 (7th Cir. 1998) (similar); *Bradshaw* v. *Story*, 86 F.3d 164, 166-167 (10th Cir. 1996) (similar). Under 28 U.S.C. 2255(e), a federal prisoner seeking to challenge the validity of his sen-

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[3] This Court has recently and repeatedly denied review of petitions raising similar issues about the scope of Section 2241's savings clause. See, *e.g.*, *Abernathy* v. *Cozza-Rhodes*, 134 S. Ct. 1874 (2014) (No. 13-7723); *Prince* v. *Thomas*, 134 S. Ct. 160 (2013) (No. 12-10719); *Blanchard* v. *Stephens*, 133 S. Ct. 2021 (2013) (No. 12-7894); *Jones* v. *Castillo*, 133 S. Ct. 1632 (2013) (No. 12-6925); *Thornton* v. *Ives*, 133 S. Ct. 1631 (2013) (No. 12-6608); *McKelvey* v. *Rivera*, 133 S. Ct. 930 (2013) (No. 12-5699); *Youree* v. *Tamez*, 133 S. Ct. 930 (2013) (No. 12-5768); *Sorrell* v. *Bledsoe*, 132 S. Ct. 1544 (2012) (No. 11-7416).

tence may file a petition for a writ of habeas corpus under Section 2241 only if he can show that Section 2255 is "inadequate or ineffective to test the legality of his detention."[4]

Section 2255(e) imposes a jurisdictional limit on the power of federal courts to adjudicate a habeas petition under Section 2241. Section 2255(e) states that a habeas petition "shall not be entertained" by any court if the applicant has failed to seek relief from the sentencing court (under Section 2255), or if such court has already denied him relief, unless a Section 2255 motion is "inadequate or ineffective." The key phrase—"shall not be entertained"—unambiguously bars courts from adjudicating a Section 2241 claim in the identified circumstances. Under this Court's precedent, that clear statement creates a jurisdictional limit on the federal courts' authority to grant relief. See *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 510 (2006) (noting that requirement for bringing suit is jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional"); see also *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011) ("Congress, of course, need not use magic words in order to speak clearly on this point."); Pet. App. 9-15. Virtually all of the courts of appeals have agreed that Section 2255(e) is jurisdictional.[5]

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[4] For a description of the history of the savings clause and the interpretation of that clause by the courts of appeals, see U.S. Br. in Opp. at 8-13, *Prince* v. *Thomas*, No. 12-10719 (Aug. 12, 2013).

[5] See, *e.g.*, Pet. App. 9-15; *Abernathy* v. *Wandes*, 713 F.3d 538, 557 (10th Cir. 2013), cert. denied, 134 S. Ct. 1874 (2014); *Rice* v. *Rivera*, 617 F.3d 802, 807 (4th Cir. 2010) (per curiam); *Hill* v. *Morrison*, 349 F.3d 1089, 1091 (8th Cir. 2003); *Christopher* v.

b. This Court has not addressed the circumstances under which a Section 2255 motion is "inadequate or ineffective to test the legality of [a prisoner's] detention," thereby making resort to Section 2241 appropriate. 28 U.S.C. 2255(e). The courts of appeals, however, have generally agreed on several governing principles. They recognize that Section 2255 is not "inadequate or ineffective" simply because relief has been denied under that provision, see, *e.g.*, *Pack* v. *Yusuff*, 218 F.3d 448, 452 (5th Cir. 2000); or because a prisoner has been denied authorization to file a second or successive Section 2255 motion, see, *e.g.*, *United States* v. *Barrett*, 178 F.3d 34, 50 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); or because a prisoner is barred from pursuing Section 2255 relief once the statute of limitations has expired, see, *e.g.*, *Hill* v. *Morrison*, 349 F.3d 1089, 1091 (8th Cir. 2003). See generally *Charles* v. *Chandler*, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam) (collecting circuit cases supporting each statement above). A contrary rule, as the courts have explained, would nullify the limitations that Congress placed on federal collateral review. See *In re Jones*, 226 F.3d 328, 333 (4th Cir. 2000); *Barrett*, 178 F.3d at 50; *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998); *Triestman* v. *United*

Miles, 342 F.3d 378, 379 (5th Cir.), cert. denied, 540 U.S. 1085 (2003); *Cephas* v. *Nash*, 328 F.3d 98, 103-104 (2d Cir. 2003); *Okereke* v. *United States*, 307 F.3d 117, 120-121 (3d Cir.), cert. denied, 537 U.S. 1038 (2002); *United States* v. *Peterman*, 249 F.3d 458, 462 (6th Cir.), cert. denied, 534 U.S. 1008 (2001); *Hernandez* v. *Campbell*, 204 F.3d 861, 865 (9th Cir. 2000) (per curiam); but see *Harris* v. *Warden*, 425 F.3d 386, 388 (7th Cir. 2005) (stating that "neither [Section 2241 or 2255] is a jurisdictional clause"), cert. denied, 546 U.S. 1145 (2006).

States, 124 F.3d 361, 376 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997).

Section 2255 expressly authorizes a prisoner to file a successive motion collaterally attacking his conviction if his claim rests on newly discovered evidence of innocence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255(h)(1)-(2). In such circumstances, Section 2255 is not "inadequate or ineffective," and Section 2241 is therefore unnecessary. But the statute does not provide for successive Section 2255 motions based on intervening *statutory* decisions. The courts of appeals have generally agreed that Section 2241 relief may be available in such circumstances. See *Wofford* v. *Scott*, 177 F.3d 1236, 1242-1245 (11th Cir. 1999) (summarizing decisions from the Second, Third, Fourth, and Seventh Circuits so holding); *Reyes-Requena* v. *United States*, 243 F.3d 893, 902-903 (5th Cir. 2001) (agreeing with those decisions).

Although the courts of appeals have offered varying rationales and adopted slightly different formulations, they generally agree that the statutory remedy provided by Section 2255 is "inadequate or ineffective to test the legality of [a prisoner's] detention," 28 U.S.C. 2255(e), when the prisoner invokes an intervening statutory-construction decision of this Court if (1) the decision narrows the reach of a federal criminal statute in a way that establishes that the prisoner stands convicted of conduct that is not criminal; and (2) controlling circuit precedent had squarely foreclosed the prisoner's claim at the time of his trial, appeal, and first motion under Section 2255. See

Reyes-Requena, 243 F.3d at 902-904.[6] The basic theory underlying the second requirement is that when a prisoner could not ask a court hearing a Section 2255 motion to consider a fundamental statutory claim because it was barred by circuit precedent, Section 2255 did not provide a procedurally adequate opportunity to test the legality of his detention. See, *e.g.*, *Wofford*, 177 F.3d at 1244; *Davenport*, 147 F.3d at 609-611.

In certain circumstances, the savings clause is also available to prisoners raising certain fundamental sentencing claims. Sentences that erroneously exceed the statutory maximum, or that were erroneously based on a statutory mandatory minimum, are cognizable under the savings clause when the error is revealed by a retroactively applicable decision of this Court that both (1) postdated the prisoner's sentencing, direct appeal, and initial Section 2255 motion; and (2) overturned circuit precedent previously foreclosing his claim. See U.S. Br. at 14-19, *Persaud* v. *United*

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[6] See also, *e.g.*, *Jones*, 226 F.3d at 333-334; *Wofford*, 177 F.3d at 1244; *Davenport*, 147 F.3d at 609-612; but see *Prost* v. *Anderson*, 636 F.3d 578, 584-585, 590 (10th Cir. 2011) (divided decision rejecting test adopted by other circuits and holding that a prisoner may not utilize Section 2241 if "the legality of his detention could have been tested in an initial [Section] 2255 motion," regardless of circuit precedent), cert. denied, 132 S. Ct. 1001 (2012). The government disagrees with the Tenth Circuit's interpretation of the savings clause in *Prost*, and it acquiesced in Prost's petition for rehearing en banc (while emphasizing that Prost's Section 2241 petition should fail on the merits). 08-1455 Docket entry 8-13 (10th Cir. Apr. 25, 2011). The court of appeals denied Prost's petition for rehearing en banc by an evenly divided 5-5 vote, and this Court denied Prost's petition for a writ of certiorari in January 2012. 132 S. Ct. 1001 (No. 11-249).

States, No. 13-6435 (Dec. 20, 2013); Br. in Opp. at 12-17 & n.2, *McCorvey* v. *Young*, No. 12-7559 (Feb. 4, 2013); Br. in Opp. at 11-13 & nn. 3, 4, *Dority* v. *Roy*, No. 10-8286 (Mar. 16, 2011). The Eleventh Circuit has granted relief in those circumstances for an erroneous sentence above the statutory maximum penalty. *Bryant* v. *Warden*, 738 F.3d 1253, 1279-1287 (2013); see also *Brown* v. *Rios*, 696 F.3d 638, 640-641 (7th Cir. 2012) (granting relief on the government's concession that savings clause covers such circumstances).

c. In this case, the court of appeals correctly rejected petitioner's attempt to invoke the savings clause. The court began by holding that Section 2255(e) imposes a jurisdictional limit on the authority of federal courts to adjudicate petitioner's habeas petition. Pet. App. 9-15. It then explained that to pass muster under Section 2255(e)'s savings clause, petitioner's sentencing claim must rest on a retroactively applicable decision by this Court that "must have overturned a circuit precedent that squarely resolved the claim so that the petitioner had no genuine opportunity to raise it at trial, on appeal, or in his first [Section] 2255 motion." *Id.* at 17-23 (relying on Eleventh Circuit's decision in *Wofford* and Seventh Circuit's analysis in *Davenport*).

The court of appeals then held that between 1998 and March 2004—during petitioner's trial, direct appeal, and first Section 2255 motion—no Eleventh Circuit precedent squarely held that burglary of a dwelling under Fla. Stat. Ann. § 810.02 was a violent felony for ACCA purposes. Pet. App. 24-26. This Court's 2008 decision in *Begay* v. *United States*, 553 U.S. 137, did not overturn any such precedent, and nothing prevented petitioner from raising his claim

that his Florida burglary convictions did not qualify as "violent felon[ies]" under the ACCA in his first Section 2255 petition. Pet. App. 30-35. The court thus correctly concluded that petitioner could not belatedly raise that claim, for the first time, in the instant Section 2241 petition. *Id.* at 35.

d. Petitioner contends (Pet. 29-31) that the court of appeals erred in holding that Section 2255(e) is jurisdictional, arguing that Congress did not speak with sufficient clarity to warrant that conclusion. But Section 2255(e) declares that a habeas petition "shall not be entertained" unless certain specified conditions are met, and that language constitutes a mandatory instruction to the courts that limits their power over habeas claims. That is the definition of a jurisdictional provision.

Contrary to petitioner's suggestion (Pet. 30), Section 2255(e)'s restriction on review is not analogous to a nonjurisdictional statute of limitations. If anything, as petitioner himself seems to acknowledge (*ibid.*), it is comparable to the statutory restriction on bringing second or successive collateral attacks on a final judgment of conviction. This Court has recognized that the statutory restriction on bringing "second or successive" collateral attacks *is* jurisdictional. *Burton* v. *Stewart*, 549 U.S. 147, 157 (2007) (per curiam). And as the court of appeals explained, "[i]t would make little sense for th[ose] provision[s] to be jurisdictional in nature but for the savings clause to be nonjurisdictional, since both * * * are designed to give prisoners a limited opportunity to mount a *second* postconviction challenge that Congress has otherwise denied them through the statutory bar on second or successive motions." Pet. App. 12.

Petitioner cites a prominent treatise for the proposition that "[c]ourts have historically treated restrictions on 'second or successive' habeas petitions as procedural defenses—not jurisdictional requirements." Pet. 30-31 (citing 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 28.3[c][i], at 1592 (6th ed. 2011) (*Federal Habeas Corpus*)). But petitioner neglects to mention that the cited discussion comes in a section of the treatise addressing "pre-[Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214] cases." *Federal Habeas Corpus* § 28[c][i], at 1591 (emphasis omitted). That same treatise recognizes that, under AEDPA, "the bar to adjudication of successive petitions absent court of appeals certification is jurisdictional." *Id.* § 28.3[d], at 1610, 1612-1613 n.116 (citing *Burton*, 549 U.S. at 157).

d. Petitioner also asserts (Pet. 27-28) that the court of appeals' holding that he must show that his ACCA claim was foreclosed by circuit precedent violates the separation of powers by allowing him to remain in prison despite the fact that his sentence (allegedly) exceeds the statutory maximum imposed by Congress. But nothing in the Constitution entitles a prisoner to advance for the first time—over a decade after his conviction became final—an argument that he could have raised at trial, on appeal, or in his first Section 2255 motion. On the contrary, at most, "[a]ll the Constitution requires" is for a prisoner to have a "reasonable * * * procedural opportunity" to raise his claim before a court whose hands are not tied by directly adverse circuit precedent. *Wofford*, 177 F.3d at

1244 (endorsing constitutional analysis set forth in *Davenport*, 147 F.3d at 609).

Petitioner also claims (Pet. 28-29) that the court of appeals' rule leads to "arbitrary results." He explains (Pet. 28) that "a [prisoner] who is the first to raise a specific issue will not be entitled to use the savings clause if a retroactively applicable decision of this Court later overturns the erroneous circuit precedent established by his own case," whereas a later prisoner whose claim is squarely foreclosed by circuit precedent will get the benefit of this Court's intervening decision. But the purpose of the savings clause is to ensure that each prisoner has an adequate and effective opportunity to present his claim to the courts. In petitioner's hypothetical, the first prisoner would have had that opportunity, but the second—whose claim was directly foreclosed by circuit precedent—would not. See Pet. App. 29 (explaining that existence of adverse circuit precedent would deprive a petitioner of adequate test of claim because "*stare decisis* would make us unwilling . . . to listen to him") (quoting *Davenport*, 147 F.3d at 611). It is not arbitrary to grant the second prisoner a fair opportunity to litigate his claim at a time when binding circuit precedent does not dictate an adverse outcome.

2. Petitioner's case for review rests largely on his assertion (Pet. 16-27) that the courts of appeals are intractably divided over various issues relating to the proper interpretation of Section 2255(e). But any actual disagreement among the circuits is quite narrow and does not warrant this Court's review in this case.

a. Petitioner contends (Pet. 24-27) that the circuits are divided over whether or not Section 2255(e) limits

the subject-matter jurisdiction of federal courts. Petitioner rightly concedes (Pet. 25-27) that virtually all of the courts of appeals have treated that provision as jurisdictional, but he correctly notes that the Seventh Circuit stated otherwise in *Harris* v. *Warden*, 425 F.3d 386 (2005), cert. denied, 546 U.S. 1145 (2006). See *id.* at 388 (stating that Section 2255 is not a "jurisdictional clause"); see also pp. 11-12 n.5, *supra* (citing cases).

This Court's review is not warranted. The Seventh Circuit has not had occasion to reconsider its jurisdictional analysis in light of this Court's subsequent decision in *Burton*, which made clear that the habeas statutes' analogous restrictions on second and successive motions for relief under Section 2255 *are* jurisdictional. See 549 U.S. at 157. Nor has the Seventh Circuit had the benefit of the thorough analysis of the Eleventh Circuit in this case, which noted the prior "dearth of authority." Pet. App. 9. In fact, the Seventh Circuit has cited the jurisdictional portion of *Harris* only once, in an unpublished decision issued in 2006. See *Howell* v. *Bezy*, 163 Fed. Appx. 416, 418, cert. denied, 549 U.S. 1042 (2006). The Seventh Circuit might well reconsider its outlier holding in future cases. And, in any event, the issue is not so recurring or important that it warrants review in its own right.

b. Petitioner correctly identifies (Pet. 22-24) some disagreement among the circuits over whether a prisoner may use Section 2255(e)'s savings clause to bring a challenge to his sentence, or whether that clause is categorically limited to claims of actual innocence. The Eleventh Circuit has expressly agreed with petitioner's view that the savings clause allows a prisoner to pursue a claim that his sentence exceeds the appli-

cable statutory maximum in certain circumstances. See *Bryant*, 738 F.3d at 1279-1287. The government also agrees with this position. See pp. 14-15, *supra*. As petitioner notes (Pet. 24), however, the Fifth and Sixth Circuits have held—in unpublished opinions—that sentencing claims are not within the scope of the savings clause.

This Court's intervention on this issue is not warranted at the present time. The court of appeals applied the rule petitioner favors, and the Fifth and Sixth Circuit decisions disagreeing with that rule are unpublished and nonprecedential. Those courts may reconsider their analysis in a future case. This Court's review would accordingly be premature.

c. Petitioner also alleges (Pet. 16-22) a series of splits over the circumstances in which a prisoner may invoke the savings clause to argue that a retroactive decision by this Court on a matter of statutory construction renders his detention unlawful. According to petitioner (*ibid.*), the courts are divided into three camps, with (1) the Tenth Circuit holding that the savings clause is reserved only for circumstances in which a prisoner could not have raised his argument in an initial Section 2255 motion; (2) the First, Fourth, Fifth, Seventh, and Eleventh Circuits allowing use of the savings clause only if the intervening Supreme Court decision abrogated circuit precedent otherwise foreclosing his specific claim; and (3) the Second, Third, Sixth, and Ninth Circuits allowing use of the savings clause whenever the prisoner asserts that the intervening decision shows that he is innocent of the underlying offense.

Petitioner is correct (Pet. 17, 22) that the Tenth Circuit's decision in *Prost* v. *Anderson*, 636 F.3d 578

(2011), cert. denied, 132 S. Ct. 1001 (2012) has embraced an overly restrictive interpretation of Section 2255(e) that departs from the other circuits to have addressed the issue. See p. 14 n.6, *supra* (noting government's disagreement with *Prost*). But it is possible that the Tenth Circuit will eliminate the conflict on its own, as that court denied rehearing en banc by an evenly divided vote and the panel in *Prost* expressly reserved the option of reinterpreting Section 2255(e) more expansively in a future case if necessary to avoid serious constitutional issues. See 636 F.3d at 593-594. In any event, *Prost*'s holding did not affect the Eleventh Circuit's resolution of this case, because the court of appeals here recognized that certain substantive claims are cognizable when they were previously foreclosed by precedent.[7]

Petitioner is wrong to suggest that there is a clear division of authority among the other courts of appeals. Although those other circuits use somewhat different language, they all allow a prisoner to invoke the savings clause to challenge his detention when this Court has issued an intervening statutory-construction decision that both (1) establishes the prisoner's innocence of the crime of conviction, and (2) overturns circuit precedent that foreclosed the claim of innocence at the time of the prisoner's trial, direct appeal, and first Section 2255 motion. See pp. 13-14, *supra*.

Petitioner claims (Pet. 19-21) that the Second, Third, Sixth, and Ninth Circuits do not require the

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[7] This Court has previously denied review in cases raising the split of authority created by *Prost*. See, *e.g.*, *Abernathy* v. *Cozza-Rhodes*, *supra* (No. 13-7723); *Prost* v. *Anderson*, *supra* (No. 11-249).

intervening statutory decision to overturn circuit precedent that previously foreclosed the prisoner's claim. But those courts have generally indicated that the savings clause allows prisoners to seek relief based on an intervening statutory decision if they "could not have effectively raised [their] claim[s] of innocence at an earlier time." *Cephas* v. *Nash*, 328 F.3d 98, 105 (2d Cir. 2003) (brackets in original) (quoting *Triestman*, 124 F.3d at 363); see *Dorsainvil*, 119 F.3d at 248, 251 (requiring claim to be based on a "previously unavailable statutory interpretation" that prisoner "had no earlier opportunity" to raise); *Wooten* v. *Cauley*, 677 F.3d 303, 307-308 (6th Cir. 2012) (requiring claim to be based on a "new interpretation of statutory law" issued after prisoner had a "meaningful time" to incorporate that interpretation into his direct appeal or Section 2255 motion); *Stephens* v. *Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (allowing savings clause to be used only when prisoner "has not had an unobstructed procedural shot at presenting that claim") (citation and internal quotation marks omitted), cert. denied, 549 U.S. 1313 (2007). This rule is consistent with the circuit-foreclosure requirement expressly embraced by the other circuits. As those courts have explained, an argument is unavailable to a prisoner—and he lacks a genuine opportunity to make that argument—when it is foreclosed by circuit precedent. See, *e.g.*, Pet. App. 22; *Davenport*, 147 F.3d at 609, 611; *Wofford*, 177 F.3d at 1244.

Moreover, the courts of appeals that petitioner identifies as rejecting the circuit-foreclosure test do not appear to believe that their respective approaches depart from that test in any significant way. The Second Circuit has stated that its rule is "similar" to

the circuit-foreclosure rule applied by other courts; the Third Circuit has highlighted the "common theme" uniting the approaches; the Ninth Circuit has described its rule as being shared by "many of our sister circuits"; and the Sixth Circuit has expressly relied on those other circuits in articulating its own approach. See *Cephas*, 328 F.3d at 104 n.6; *United States* v. *Brooks*, 230 F.3d 643, 648 (2000) (likening Third Circuit rule to the one applied by the Second, Seventh, and Eleventh Circuits); *Stephens*, 464 F.3d at 898 (likening Ninth Circuit rule to that applied by Second, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits); *United States* v. *Peterman*, 249 F.3d 458, 462 (6th Cir.) (drawing on decisions from Second, Third, and Seventh Circuits), cert. denied, 534 U.S. 1008 (2001).

In these circumstances, no reason exists to conclude that the courts of appeals identified by petitioner would actually disagree about the viability of his claim (or that of any other prisoner) under the savings clause. Indeed, petitioner has not cited any case from the Second, Third, Sixth, or Ninth Circuits allowing a prisoner to bring a claim under the savings clause where the claim was *not* previously foreclosed by circuit precedent. Without any clear split of authority, this Court's review is unwarranted at this time.

d. Finally, petitioner also asserts (Pet. 18-19) a split among several circuits on what it means for circuit precedent to "foreclose[]" a prisoner's claim at the time of his Section 2255 motion for purposes of the savings clause. Petitioner argues that (1) the Fifth and Seventh Circuits consider a claim foreclosed if it "falls within the scope of, and is excluded by, a prior holding of a controlling case," at least "as long as the

breadth of a prior holding was meant to encompass and preclude the argument," whereas (2) the Eleventh Circuit applies a more stringent test requiring the claim to have been "squarely foreclose[d]" by precedent "*specifically addressing*" the claim. *Ibid.* (citations and internal quotation marks omitted).

It is not clear whether the different language cited by petitioner actually reflects a different legal standard. In any event, petitioner would not be able to prevail under his preferred formulation. Below, petitioner asserted that his *Begay* claim was foreclosed by Eleventh Circuit decisions addressing the ACCA status of various Florida offenses such as conspiracy to commit robbery, felony escape, conveyance of a weapon in federal prison, and carrying a concealed firearm. Pet. App. 30-31. But none of these cases involved crimes closely analogous to burglary, and none involved a "holding [that] was meant to encompass and preclude" petitioner's argument that a Florida burglary under Fla. Stat. Ann. § 810.02 is not a violent felony under the residual clause. Pet. 19 (citation omitted). This case therefore does not implicate petitioner's asserted split.

3. Even if petitioner had alleged a circuit conflict worthy of this Court's review, this case would be a poor vehicle for resolving that conflict. Petitioner's underlying ACCA claim lacks merit under this Court's precedent, and he therefore would not obtain relief even if the courts below had jurisdiction over his petition.

Below, petitioner's core argument on the merits was that his prior Florida convictions for burglary of a dwelling do not qualify as "violent felon[ies]" under the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii).

Pet. C.A. Br. 33-50. Specifically, he claims that a burglary under Florida law does not categorically involve the sort of "purposeful, violent, [or] aggressive conduct" that this Court identified as a hallmark of residual-clause offenses in *Begay*. *Id.* at 37-38, 47 (citation and internal quotation marks omitted).

Petitioner is incorrect. The residual clause encompasses offenses "that present[] a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). In *James* v. *United States*, *supra*, this Court held that attempted burglary of a dwelling under Florida law qualifies as a violent felony under that definition. 550 U.S. at 195. The Court recognized that Florida burglary of a dwelling differs from generic burglary for ACCA purposes because Florida law defines "[d]welling" to include the "curtilage thereof." *Id.* at 212 (brackets in original; citation omitted). But the Court stated that under Florida law, the term "curtilage" refers to an "enclosed area surrounding a structure." *Id.* at 212-213 (citation omitted) (citing *State* v. *Hamilton*, 660 So. 2d 1038, 1044 (Fla. 1995)). The Court further concluded that a burglar who attempts to enter a structure creates the same risk of violence as a burglar who attempts to enter the curtilage of a structure. *Ibid.* Under the logic of *James*—which addressed a Florida conviction for *attempted* burglary—petitioner's Florida convictions for *completed* burglaries plainly qualify as violent felonies under ACCA's residual clause.

Petitioner argues (Pet. 34-35) that *James* only applies to burglaries committed after the Florida Supreme Court's 1995 decision in *Hamilton*. He argues that *Hamilton* narrowed the pre-existing definition of "curtilage" that prevailed when petitioner was con-

victed of Florida burglary in 1989 and 1990, respectively. Petitioner's interpretation of *Hamilton* is incorrect. Although *Hamilton* was decided in 1995, its definition of "curtilage" was based on both (1) the common law definition of the term, and (2) longstanding Florida precedent applying that term in the context of the burglary statute. See 660 So. 2d at 1042-1045. In other words, *Hamilton* did not change the definition of the curtilage, much less narrow it. Consistent with that view, the Eleventh Circuit has held that attempted burglary of the curtilage under Florida law as defined by *Hamilton* applied to burglary convictions that occurred in the mid-1980s, well before petitioner committed his burglaries in 1989 and 1990. *United States* v. *Matthews*, 466 F.3d 1271 (2006), cert. denied, 552 U.S. 921 (2007).

Petitioner's reliance (Pet. 34) on this Court's post-*James* decision in *Begay* is also misplaced. In *Begay*, this Court held that a state DUI offense did not constitute a violent felony under the ACCA's residual clause because it did not involve "purposeful, violent and aggressive conduct." 553 U.S. at 145, 148. *Begay* also stated that the residual clause extends only to "crimes that are roughly similar, in kind as well as in degree of risk posed" by the listed offenses. *Id.* at 143-145. But *Begay* did not involve a burglary offense, it did not purport to undermine *James*, and it did not imply that a burglary offense would fail the "purposeful, violent, and aggressive" test.

Furthermore, after *Begay*, in *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), this Court held that a prior felony conviction under Indiana law for vehicular flight from a law enforcement officer is a "violent felony" under the ACCA's residual clause because

vehicular flight categorically "presents a serious potential risk of physical injury to another." *Id.* at 2273. The Court indicated that *Begay*'s "purposeful, violent, and aggressive" formulation was useful to analyze strict liability, negligence, and recklessness crimes, but that "[i]n general"—with respect to other offenses—"levels of risk divide crimes that qualify [under the residual clause] from those that do not." *Id.* at 2275-2276.

As in *Sykes*, the crime at issue here—Florida burglary—is an intentional crime, and it is accordingly not subject to *Begay*'s "purposeful, violent, and aggressive" test. See *Sykes*, 131 S. Ct. at 2275-2276 (declining to apply *Begay* formulation). Indeed, the Eleventh Circuit has already declared that *Begay*'s test "no longer applies to intentional crimes like [burglary under] Fla. Stat. § 810.02." Pet. App. 30-31 n.6; see also *United States* v. *Chitwood*, 676 F.3d 971, 979 (11th Cir.), cert. denied, 133 S. Ct. 288 (2012). Furthermore, *James* already held that attempted burglary under Florida law has comparable risks to enumerated burglary under the ACCA, 550 U.S. at 212-213, and *Sykes* cited *James*'s holding with approval, 131 S. Ct. at 2275. For these reasons, as various circuits have recognized, a completed Florida burglary crime categorically qualifies as a violent felony under the ACCA's residual clause. See, *e.g.*, *United States* v. *Phillips*, No. 13-5344, 2014 WL 2180176, at *4 (6th Cir. May 27, 2014); *United States* v. *Sanchez-Ramirez*, 570 F.3d 75, 81-83 (1st Cir.), cert. denied, 558 U.S. 1005 (2009).

In sum, even if petitioner could prevail on the jurisdictional issues raised in the petition, his claim would ultimately fail on the merits. To the extent this

Court is interested in addressing the jurisdictional issues, it should do so in a case where resolving them would actually make a difference to the petitioner. This is not that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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