No. 19-401

In the Supreme Court of the United States

LAMONT DEJUAN HIGGS, PETITIONER

v.

WARDEN WILSON

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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 indicate 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 a prisoner, whose Section 2255 motion challenging the applicability of a sentencing enhancement under the advisory Sentencing Guidelines was denied as untimely, may later seek habeas relief under Section 2241 to challenge that sentencing enhancement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 772 Fed. Appx. 167. The order of the district court is not published in the Federal Supplement but is available at 2018 WL 6171706.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2019. The petition for a writ of certiorari was filed on September 18, 2019. 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 Northern District of Texas, petitioner was convicted on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2),

and one count of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D). Judgment 1. He was sentenced to 151 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. Petitioner did not appeal. See Pet. App. 11a, 20a. The district court denied petitioner's subsequent motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 16a-18a.

Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Northern District of Texas, the district where he is confined, which the district court denied. Pet. App. 8a-9a. The court of appeals dismissed petitioner's appeal. *Id.* at 1a-3a.

1. In 2012, police officers in Dallas, Texas observed petitioner at an apartment complex where he had previously received a criminal trespass warning to stay off the property. Presentence Investigation Report (PSR) ¶ 11. The officers repeatedly knocked on the door of the apartment that petitioner had entered after he saw the officers; petitioner eventually answered. PSR ¶¶ 12-13. Out of concern that additional suspects might be in the apartment, the officers conducted a protective sweep, during which they observed a clear plastic bag of marijuana on a shelf. PSR ¶¶ 13-14. The officers obtained a search warrant for the apartment; the resulting search uncovered additional marijuana, cocaine, two firearms, and several rounds of ammunition. PSR ¶¶ 15-18.

A federal grand jury in the Northern District of Texas charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), and possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D).

Indictment 1-2. Petitioner pleaded guilty to both counts. Judgment 1; Plea Agreement 1-8.

In calculating petitioner's advisory sentencing range under the federal Sentencing Guidelines, the Probation Office determined that his base offense level was 26 because, among other things, petitioner had committed the Section 922(g) offense "subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense," Sentencing Guidelines § 2K2.1 (2013). PSR ¶ 32. The Probation Office explained that petitioner's prior Texas conviction for robbery constituted a "crime of violence," and that his prior Texas conviction for unlawful possession with intent to distribute cocaine constituted a "controlled substance offense," under the guidelines. PSR ¶¶ 22, 32, 47, 52.

Based on those same two prior convictions, the Probation Office also determined that petitioner qualified as a "career offender" because, among other things, petitioner "ha[d] at least two prior felony convictions of either a crime of violence or a controlled substance offense," Sentencing Guidelines § 4B1.1(a) (2013). PSR ¶ 39. But because the career-offender offense level (24) was lower than the base offense level under Section 2K2.1 (26), the Probation Office determined that "no career offender enhancements will be applied." PSR ¶ 39; see Sentencing Guidelines § 4B1.1(b)(5) (2013).

The district court adopted the Probation Office's calculations with one exception: it concluded that petitioner's criminal history category was VI, not V as the Probation Office had recommended, based on petitioner's status as a career offender. 13-cr-461 D. Ct. Doc. 36, at 1 (June 19, 2014). The court determined that petitioner's advisory guidelines range was 151 to 180

months of imprisonment. *Ibid.* The court sentenced petitioner to 151 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. Petitioner did not appeal. See Pet. App. 11a, 20a.

2. Nearly two years after his conviction became final, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 20a. As relevant here, petitioner challenged his career-offender designation under the advisory Sentencing Guidelines, contending that his prior Texas conviction for unlawful possession with intent to distribute cocaine was not a "controlled substance offense" in light of this Court's decision in *Mathis* v. *United States*, 136 S. Ct. 2243 (2016). Pet. App. 20a-24a. *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 Armed Career Criminal Act of 1984, 18 U.S.C. 924(e). 136 S. Ct. at 2248. Citing *Mathis*, the Fifth Circuit subsequently held that the Texas statute criminalizing possession with intent to distribute a controlled substance was indivisible and broader than the definition of "controlled substance offense" in the advisory guidelines. *United States* v. *Hinkle*, 832 F.3d 569, 576 (2016).

The magistrate judge recommended that petitioner's Section 2255 motion be denied as untimely. Pet. App. 25a. Under 28 U.S.C. 2255(f), a Section 2255 motion must be filed within one year of the latest of various triggering events, including "the date on which the judgment of conviction becomes final" and "the date on which the right asserted was initially recognized by the Supreme Court * * * and made retroactively applicable to cases on collateral review." 28 U.S.C. 2255(f)(1) and

(3). The magistrate judge explained that "*Mathis* did not announce a new rule" and, therefore, the latest applicable date for starting the one-year clock was when petitioner's conviction became final. Pet. App. 23a. The magistrate judge further explained that petitioner had not demonstrated any basis to warrant equitable tolling of the one-year limitations period. *Id.* at 24a-25a. The district court adopted the magistrate judge's findings, conclusions, and recommendations, and denied petitioner's Section 2255 motion as untimely. *Id.* at 16a.

3. Petitioner then filed a habeas petition under 28 U.S.C. 2241 in the United States District Court for the Northern District of Texas, which is the district court of the district where he is in custody. See 18-cv-2537 D. Ct. Doc. 2 (Sept. 12, 2018); 18-cv-2537 D. Ct. Doc. 6-1 (Oct. 12, 2018) (Amended 2241 Pet.). As relevant here, petitioner argued that his trial counsel was ineffective for not recognizing that his prior Texas cocaine conviction was not a "controlled substance offense" under the advisory guidelines. See Amended 2241 Pet. 4.

Petitioner also argued that the district court had jurisdiction to entertain his habeas petition under the so-called "saving clause" in 28 U.S.C. 2255(e). See Amended 2241 Pet. 4-7. Ordinarily, a federal prisoner may seek postconviction relief only by motion under Section 2255; a habeas application under Section 2241 "shall not be entertained." 28 U.S.C. 2255(e). But the saving clause creates an exception when it "appears that the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." *Ibid.* Petitioner contended that saving-clause relief was appropriate here because he was "actual[ly] innocent of the sentence imposed" but could not "meet the gate keeping

provisions" required to file a "second or successive motion[]" under Section 2255. Amended 2241 Pet. 6.

The magistrate judge determined that Section 2255(e) barred petitioner's habeas petition. Pet. App. 10a-14a. The magistrate judge stated that petitioner "has not shown that he was convicted of a nonexistent offense, so his claims do not fall within the savings clause of § 2255(e)." *Id.* at 13a. The magistrate judge also explained that a prisoner "may not use the savings clause to avoid procedural hurdles presented under § 2255, such as the statute of limitations or the restriction on filing second or successive motions to vacate." *Id.* at 13a-14a.

The district court adopted the magistrate judge's findings, conclusions, and recommendations, and denied the habeas petition. Pet. App. 8a-9a; 2018 WL 6171706, at *1. Petitioner filed an application with the district court for leave to proceed *in forma pauperis* on appeal, which the district court denied after determining that the "appeal presents no legal points of arguable merit and is therefore frivolous." Pet. App. 4a-5a.

4. Petitioner sought leave from the court of appeals to proceed *in forma pauperis* on appeal, which the court denied in an unpublished per curiam order. Pet. App. 1a-3a. The court explained that petitioner's "challenge to the validity of a sentencing enhancement does not satisfy the" requirements to invoke the saving clause. *Id.* at 2a-3a. The court further explained that petitioner's "argument that § 2255 is inadequate to test the legality of his detention because his § 2255 motion was denied as time barred is unavailing, as we have held that relief under § 2255 is not inadequate or ineffective

merely because the petitioner has filed a prior unsuccessful § 2255 motion." *Id.* at 2a. The court of appeals accordingly dismissed petitioner's appeal. *Id.* at 2a-3a.

ARGUMENT

Petitioner renews his contention (Pet. 14-20) that the saving clause in 28 U.S.C. 2255(e) permits a federal prisoner to challenge his sentence in an application for a writ of habeas corpus under 28 U.S.C. 2241 based on a claim that the district court erroneously calculated his recommended sentencing range under the advisory Sentencing Guidelines. Petitioner also identifies (Pet. 6-11) 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 statutory decision. Further review is unwarranted. The court of appeals correctly determined that petitioner is not entitled to saving-clause relief here. And this Court recently denied a petition for a writ of certiorari filed by the government seeking review of the circuit conflict on the scope of the saving clause. See *United States* v. *Wheeler*, 139 S. Ct. 1318 (2019) (No. 18-420).[*] The same considerations that would have supported denial of the petition in *Wheeler* would apply here as well.

In any event, this case is an unsuitable vehicle in which to review that conflict because petitioner would not be entitled to relief even in the circuits that have given the saving clause the most prisoner-favorable in-

[*] The pending petitions for writs of certiorari in *Quary* v. *English*, No. 19-5154 (filed Apr. 16, 2019), *Jones* v. *Underwood*, No. 18-9495 (filed May 21, 2019), *Dyab* v. *English*, No. 19-5241 (filed June 12, 2019), and *Walker* v. *English*, No. 19-52 (filed July 8, 2019), also seek review of that conflict.

terpretation. No court of appeals has held that the saving clause of Section 2255(e) extends to claims of error involving application of the advisory Sentencing Guidelines, and this Court recently denied a petition for a writ of certiorari raising that issue. See *Lewis* v. *English*, 139 S. Ct. 1318 (2019) (No. 18-292). The Court should follow the same course here.

1. The court of appeals correctly determined that petitioner cannot seek habeas relief under 28 U.S.C. 2241 on his claim that the sentencing court misapplied the advisory Sentencing Guidelines.

a. Section 2255 provides the general mechanism for a federal prisoner to obtain collateral review of his conviction or sentence. See 28 U.S.C. 2255(a). Subject to procedural limitations, such a prisoner may file a single motion under Section 2255 that asserts any ground eligible for collateral relief. See *ibid.* In 1996, Congress passed and the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220, which restricted the grounds on which federal prisoners may file second or successive Section 2255 motions. AEDPA limited the availability of such motions to cases involving either (1) persuasive new evidence that the prisoner was factually not guilty of the offense or (2) a new rule of constitutional law made retroactive by this 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.

That omission does not imply that a prisoner may seek relief based on an intervening statutory decision through a writ of habeas corpus under 28 U.S.C. 2241

instead. Under the saving clause of Section 2255(e), a prisoner may seek habeas relief 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). That language indicates a focus on whether a particular challenge to the legality of the prisoner's detention was *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* v. *Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076 (en banc), cert. denied, 138 S. Ct. 502 (2017) (No. 17-85), "'[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." *Id.* 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).

This case is illustrative. Petitioner had the opportunity on direct review to raise, and be heard on, his claim that his Texas drug conviction is not a "controlled substance offense" under Section 4B1.2(b) of the advisory guidelines. Although petitioner asserts (Pet. 13) that "he could not have raised [his claim] on direct appeal," he neither explains why nor identifies any Fifth Circuit precedent that would have foreclosed his claim at the time. And even if he had identified such precedent, adverse circuit precedent alone does not prevent a prisoner from pressing an issue. Cf. *Bousley* v.

United States, 523 U.S. 614, 623 (1998) ("[F]utility cannot constitute cause [to excuse 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). Indeed, the defendant in *United States* v. *Hinkle*, 832 F.3d 569 (5th Cir. 2016), successfully argued on appeal that the Texas statute does not define a controlled substance offense within the meaning of the advisory guidelines. See *id.* at 576. Although *Hinkle* was decided after *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), on which petitioner relies (Pet. 4-5), the defendant there made the argument before the decision in *Mathis*, see Initial Br. of Appellant, *Hinkle*, *supra*, No. 15-10067, 2015 WL 3529919, at *7-*19 (June 1, 2015). See p. 17, *infra*. Nothing prevented petitioner from doing the same.

b. Treating the remedy in Section 2255 as "inadequate or ineffective" to test the legality of petitioner's confinement 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), neither of which encompasses petitioner's claim here. The logical inference from the language Congress drafted is that Congress intended subsections (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. "The saving clause does not create a third exception." *McCarthan*, 851 F.3d at 1090 (emphasis omitted).

In particular, the most natural reason for Congress to have included 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 this 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 necessarily would 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 federal prisoner 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). 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. See *Dodd* v. *United States*, 545 U.S. 353, 357 (2005).

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 initial unsuccessful Section 2255 motion. See *Prost*, 636 F.3d at 585-586, 591; cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (presuming that Congress's choice of different language in nearby provisions of same statute is deliberate). Petitioner's reading of the saving clause would allow such statutory claims precisely when—indeed, precisely *because*—Section 2255(h) does not. That reading would render AEDPA's restrictions on second or successive motions largely self-defeating. Cf. *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").

By contrast, the Tenth and Eleventh Circuits' interpretation of the statute respects the balance Congress struck between finality and error-correction, while still leaving the saving clause with meaningful work to do. For example, 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; see *id.* at 1081. Such challenges are not cognizable under Section 2255, which is limited to attacks on the sentence or the underlying conviction. "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." *Id.* at 1093; see *Prost*, 636 F.3d at 588.

c. Petitioner's reading of the saving clause also would have the practical effect of granting federal 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. For example, the requirement that a second or successive Section 2255 motion be certified by the court of appeals to ensure compliance with the strictures of subsection (h), see 28 U.S.C. 2244(b)(3), does not apply to an application for a writ of habeas corpus under the saving clause. And a habeas application is subject neither to AEDPA's one-year limitations period, 28 U.S.C. 2255(f), nor to AEDPA's procedure for obtaining a certificate of appealability if relief is denied by the district court, 28 U.S.C. 2253(c)(1). Petitioner's interpretation of the statute thus provides "a *superior* remedy" to prisoners with purely statutory claims than to those with constitutional claims. *McCarthan*, 851 F.3d at 1091. The Congress that enacted AEDPA in 1996 could not have intended that result when it enacted a provision designed to *limit* the availability of postconviction relief by redefining the point at which finality concerns outweigh any interest in additional error-correction.

Furthermore, allowing an inmate's second or successive collateral attack to proceed by way of habeas corpus subverts "the legislative decision of 1948" that is reflected in Section 2255—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 postconviction 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.

Although adherence to the statutory text may lead to "harsh results in some cases," courts are "not free to rewrite the statute that Congress has enacted." *Dodd*, 545 U.S. at 359. The Department of Justice has accordingly supported 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 "undue severity" of a prisoner's sentence. U.S. Dep't of Justice, *Justice Manual* § 9-140.113 (Apr. 2018).

2. a. Petitioner correctly identifies (Pet. 6-11) a division of authority among the courts of appeals on the scope of the saving clause for statutory claims. As noted above, the Tenth and Eleventh Circuits have correctly determined that habeas relief under the saving clause is unavailable based on a retroactive rule of statutory construction. See *McCarthan*, 851 F.3d at 1086; see also *Prost*, 636 F.3d at 590-591. By contrast, nine courts of appeals—including the Fifth Circuit—would permit such relief in some circumstances. See *Reyes-Requena* v. *United States*, 243 F.3d 893 (5th Cir. 2001); Pet. 6-7 (listing cases); Gov't Pet. at 24 n.2, *Wheeler*, *supra* (No. 18-420). The more expansive view of the saving clause

in those circuits generally requires a prisoner to demonstrate a "material change in the applicable law" since his initial Section 2255 motion that undermines his conviction—for example, by indicating that his conduct was not in fact a crime on a ground that previously was foreclosed by controlling precedent. *Alaimalo* v. *United States*, 645 F.3d 1042, 1047-1048 (9th Cir. 2011); see, *e.g.*, *Triestman* v. *United States*, 124 F.3d 361, 379 (2d Cir. 1997) (similar). At least three of the nine circuits have extended that concept to encompass not just claims challenging the conviction, but also some claims challenging the sentence—for example, when a statutory minimum is no longer applicable. See *United States* v. *Wheeler*, 886 F.3d 415, 427-428 (4th Cir. 2018), cert. denied, 139 S. Ct. 1318 (2019) (No. 18-420); *Hill* v. *Masters*, 836 F.3d 591, 595-596 (6th Cir. 2016); *Brown* v. *Rios*, 696 F.3d 638, 640-641 (7th Cir. 2012). Those circuits generally require the sentencing error to be "sufficiently grave to be deemed a miscarriage of justice or a fundamental defect." *Hill*, 836 F.3d at 595; see *Brown* v. *Caraway*, 719 F.3d 583, 586 (7th Cir. 2013).

But notwithstanding that circuit conflict and its importance, this Court recently declined to review the issue when it was raised in the government's petition for a writ of certiorari in *Wheeler*, *supra*, in March. The division of authority that petitioner identifies on whether the saving clause is ever available for statutory claims precluded by Section 2255(h) is unchanged since that time. Indeed, the court of appeals here simply followed its previous holdings in *Reyes-Requena*, *supra*, and *Pack* v. *Yusuff*, 218 F.3d 448 (5th Cir. 2000), to determine that petitioner was not entitled to invoke the saving clause here. See Pet. App. 2a-3a. The circuit

conflict therefore does not warrant this Court's review any more than it did nine months ago.

b. In any event, even if that conflict warrants review in an appropriate case, this is not a suitable vehicle because petitioner would not be entitled to relief even in the circuits that have adopted the most prisoner-favorable interpretation of the saving clause. Those circuits generally have granted relief only when a prisoner can show (1) that his claim was foreclosed by (erroneous) precedent at the time of his sentencing, direct appeal, and initial motion under Section 2255; and (2) that an intervening decision, made retroactive on collateral review, has since established that he 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*, 836 F.3d at 595-596, 598-600; *Rios*, 696 F.3d at 640-641; see also *Reyes-Requena*, 243 F.3d at 902-904. Not only does petitioner fail to satisfy either of those two conditions, but challenges to the application of advisory sentencing guidelines are in any event not cognizable on collateral review.

First, petitioner has not shown that his claim was foreclosed at the time of his direct appeal or first Section 2255 motion by any since-abrogated precedent. Petitioner does not identify any case from this Court or the Fifth Circuit that precluded his claim that possession with intent to distribute cocaine under Texas law is not a "controlled substance offense" within the meaning of the advisory guidelines. Petitioner thus had an unobstructed opportunity at the time of his sentencing and direct appeal to argue that his career-offender designa-

tion was erroneous—just as the prisoner in *Hinkle* itself successfully did. See 832 F.3d at 576-577. And to the extent that his challenge might have been cognizable on collateral review, petitioner likewise could have raised it in a timely initial Section 2255 motion. Therefore, 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).

Second, petitioner has not identified an intervening decision of this Court, made retroactive on collateral review, establishing that his sentence exceeds the applicable maximum or was imposed under an erroneous mandatory minimum. Contrary to petitioner's suggestion (Pet. 4-5), *Mathis* is not such a decision. *Mathis* itself acknowledged that it was not announcing a new rule, but instead was applying principles that "more than 25 years" of this Court's precedents "ha[d] repeatedly made clear," "over and over." 136 S. Ct. at 2257; see *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).").

Third, the computation of a sentencing guidelines range that is merely advisory would not warrant collateral relief in any event. Such challenges may not be addressed on collateral review because an erroneous computation of an advisory guidelines range does not alter the statutory minimum or maximum sentences that define the boundaries of the sentencing court's discretion. At all times, those boundaries remain fixed by Congress. See *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989). Any error in applying the advisory guidelines—whether in the context of the career-offender provision or any other—is therefore not a fundamental defect that results in a complete miscarriage of justice warranting collateral relief. Cf. *United States* v. *Addonizio*, 442 U.S. 178, 186-187 (1979) (denying collateral relief for claim of sentencing error based on Parole Commission's postsentencing adoption of release guidelines, which affected the sentencing court's expectation of the time the defendant would serve in custody, because the actual sentence imposed was "within the statutory limits" and the error "did not affect the lawfulness of the judgment itself," but only how the judgment would be performed).

Every court of appeals to consider the issue has determined that a claim that a sentencing court erroneously computed an advisory guidelines range is not cognizable on collateral review. See *United States* v. *Foote*, 784 F.3d 931, 932, 935, 940 (4th Cir.), cert. denied, 135 S. Ct. 2850 (2015) (No. 14-9792); *United States* v. *Coleman*, 763 F.3d 706, 708-709 (7th Cir. 2014), cert. denied, 575 U.S. 923 (2015) (No. 14-8459); *Spencer* v. *United States*, 773 F.3d 1132, 1135-1137 (11th Cir. 2014) (en banc), cert. denied, 135 S. Ct. 2836 (2015) (No. 14-8449); see also *United States* v. *Hoskins*, 905 F.3d 97, 104 n.7

(2d Cir. 2018) ("Several circuits have concluded that sentences imposed pursuant to advisory Guidelines based on an erroneous or later invalidated career offender determination did not result in a complete miscarriage of justice sufficient to warrant collateral relief."), cert. denied, 140 S. Ct. 55 (2019) (No. 18-8636). And no court of appeals has held that the saving clause of Section 2255(e) extends to claims involving the application of the advisory sentencing guidelines.

Petitioner is mistaken when he contends (Pet. 12) that the Fourth Circuit's decision in *Wheeler*, *supra*, "involved a guidelines error." *Wheeler* did not involve an advisory guidelines error, but rather "a sentence issued with an erroneously increased mandatory minimum." 886 F.3d at 434; see also *id.* at 419 (concluding that a prisoner "satisfies the requirements of the savings clause" when "a retroactive change in the law, occurring after the time for direct appeal and the filing of his first § 2255 motion, render[s] his applicable mandatory minimum unduly increased, resulting in a fundamental defect in his sentence"); see also *Foote*, 784 F.3d at 932, 936 (recognizing that an error involving the advisory guidelines is not a "fundamental defect" that qualifies for collateral relief). Petitioner likewise is mistaken when he suggests (Pet. 6-9) that the Sixth and Seventh Circuits have extended saving-clause relief to claims alleging misapplication of the advisory sentencing guidelines. The cases he cites from those courts involved prisoners sentenced under the mandatory sentencing-guidelines regime that preceded this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). See *Hill*, 836 F.3d at 600 (concluding that the prisoner's "challenge to his misapplied career-offender enhancement is properly brought under § 2241

because he was sentenced under the mandatory Guidelines manual"); *Caraway*, 719 F.3d at 588 (concluding that "the misapplication of the sentencing guidelines, at least where (as here) the defendant was sentenced in the pre-*Booker* era, represents a fundamental defect that constitutes a miscarriage of justice corrigible in a § 2241 proceeding").

c. This Court recently denied a petition for a writ of certiorari asserting that the saving clause extends to claims of error involving application of the advisory sentencing guidelines. See *Lewis*, *supra* (No. 18-292). And it has recently and repeatedly denied petitions for writs of certiorari in which 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.*, *Lewis*, *supra* (No. 18-292); *Venta* v. *Jarvis*, 138 S. Ct. 648 (2018) (No. 17-6099); *Young* v. *Ocasio*, 138 S. Ct. 2673 (2018) (No. 17-7141). The Court should follow the same course here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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