No. 19-52

In the Supreme Court of the United States

ALFRED J. WALKER, PETITIONER

v.

N.C. ENGLISH, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH 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 statutory minimum was denied based on circuit precedent, may later rely on a change in the interpretation of the relevant statute in the circuit where he was convicted to seek habeas relief in a different circuit that has not addressed the statutory-interpretation issue.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 770 Fed. Appx. 430. The order of the district court (Pet. App. 5a-13a) is not published in the Federal Supplement but is available at 2018 WL 5923488.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2019. The petition for a writ of certiorari was filed on July 8, 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 Western District of Missouri, 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(e)(1). See Pet. App. 24a. He was sentenced to 180 months of

imprisonment, to be followed by five years of supervised release. Judgment 1-3. After the court of appeals affirmed, Pet. App. 24a-25a, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, which the district court denied, Pet. App. 26a-27a. The court of appeals subsequently denied petitioner's application for permission to file a second or successive motion for relief under 28 U.S.C. 2255. Pet. App. 28a. Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, which the district court dismissed for lack of jurisdiction. Pet. App. 12a. The court of appeals affirmed. *Id.* at 1a-4a.

1. A police officer in Kansas City, Missouri, arrested petitioner after observing him fighting with a man who had accused petitioner of breaking into his house. Presentence Investigation Report (PSR) ¶¶ 7-8. The officer found a Winchester .12-gauge shotgun inside a tarp that petitioner had been carrying. PSR ¶ 9. Petitioner admitted to police that he possessed the shotgun and had prior felony convictions. PSR ¶ 10; see PSR ¶¶ 32-33, 36-39, 41. A federal grand jury in the Western District of Missouri returned a single-count indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Indictment 1. Petitioner pleaded guilty. Plea Tr. 2-13.

A conviction for violating 18 U.S.C. 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," 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 determined that petitioner had four prior convictions for violent felonies, three of which were for Missouri second-degree burglary. See PSR ¶¶ 33, 38, 39, 41. Over petitioner's objection, the district court agreed that all three Missouri convictions were violent felonies under the ACCA and sentenced petitioner to 15 years of imprisonment. See Sent. Tr. 8, 13; Judgment 2.

The court of appeals affirmed. See Pet. App. 24a-25a. Citing *United States* v. *Bell*, 445 F.3d 1086 (8th Cir. 2006), the court explained that it previously had "held that the offense described in [the Missouri] statute is 'burglary' within the meaning of" the ACCA "so long as the burglary is of a 'building or structure,'" and petitioner "admitted that the burglaries for which he was convicted were of buildings." Pet. App. 25a.

The district court denied petitioner's subsequent motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, which did not challenge the ACCA enhancement. See Pet. App. 26a-27a. Petitioner did not appeal that ruling.

Two years later, petitioner sought leave from the Eighth Circuit to file a second or successive Section 2255 motion, arguing that his Missouri burglary convictions were not violent felonies in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), in which this Court found the "residual clause" of the ACCA to be unconstitutionally vague, *id.* at 2557. See 16-3158 C.A. Doc. 4428767-2 (8th Cir. July 21, 2016). The court of appeals denied authorization for a second or successive Section 2255 motion. See Pet. App. 28a.

2. Two years after the Eighth Circuit denied him leave to file a second or successive Section 2255 motion, petitioner filed an application for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the District of Kansas, which is the district court of the district where he is in custody. See Pet. App. 5a. Petitioner argued that his Missouri burglary convictions were not convictions for violent felonies under the ACCA in light of this Court's decision in *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), and the Eighth Circuit's decision in *United States* v. *Naylor*, 887 F.3d 397 (2018) (en banc). See 18-cv-3271 D. Ct. Doc. 2, at 2 (Oct. 22, 2018) (Application). *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. In *Naylor*, the Eighth Circuit relied on *Mathis* to conclude that Missouri second-degree burglary is not "burglary" under the ACCA and to overturn its previous holding in *Bell*. *Naylor*, 887 F.3d at 400-407.

Petitioner argued that the district court had jurisdiction to entertain his habeas application under the so-called "saving clause" in 28 U.S.C. 2255(e). See Application 2. Ordinarily, a federal prisoner may seek post-conviction 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 argued that Section 2255 was "inadequate or ineffective" in his case, observing that his statutory claim

under *Mathis* and *Naylor* was not the type of constitutional or factual-innocence claim for which a second or successive claim may be authorized under 28 U.S.C. 2255(h). Application 5 (citation omitted). Petitioner acknowledged that his argument was foreclosed by *Prost* v. *Anderson*, 636 F.3d 578 (10th Cir. 2011) (Gorsuch, J.), cert. denied, 565 U.S. 1111 (2012) (No. 11-249), which had rejected a similar attempt to rely on the saving clause as a mechanism for bringing a successive collateral attack that Section 2255(h) otherwise would not allow. *Id.* at 584-588. He argued, however, that *Prost* should be overturned. See Application 7.

The district court dismissed petitioner's habeas application for lack of statutory jurisdiction before the government had made an appearance in the case or filed a response to the application. Pet. App. 5a-13a; see Docket in No. 18-cv-3271 (D. Kan.). The court observed that it was bound by *Prost*, which had considered and rejected the same arguments petitioner now raised for why he qualified for saving-clause relief. Pet. App. 10a & n.1; see *id.* at 9a-12a. The court explained that under *Prost*, "§ 2255 is not 'inadequate or ineffective' merely because adverse circuit precedent existed at the time" the prisoner filed his initial Section 2255 motion. *Id.* at 11a (citation omitted). As the court explained, even if "binding Eighth Circuit precedent left 'no legal basis' for Petitioner to argue that his sentence should not have been enhanced[,] * * * 'nothing prevented [petitioner] from raising the argument [that Missouri second-degree burglary is not a violent felony under the ACCA] in his initial § 2255 motion and then challenging any contrary precedent via en banc or certiorari review.'" *Ibid.* (citations omitted).

3. The court of appeals affirmed, also without the government's participation in the case. Pet. App. 1a-4a; see Docket in No. 18-3249 (10th Cir.). The court explained that it was bound by *Prost* "'absent en banc reconsideration or a superseding contrary decision by the Supreme Court,'" and that petitioner had "not identif[ied] any such intervening decision." Pet. App. 4a (citation omitted).

ARGUMENT

Petitioner renews his contention (Pet. 17-25) that the saving clause in 28 U.S.C. 2255(e) permits a federal prisoner to challenge his conviction or sentence in an application for a writ of habeas corpus under 28 U.S.C. 2241 based on an intervening decision of statutory interpretation, and identifies (Pet. 13-17) a circuit conflict on that issue. Further review is unwarranted. This Court recently denied a petition for a writ of certiorari filed by the government seeking review of the same issue. 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. Furthermore, unlike in *Wheeler*, the court of appeals' decision here is correct. And the petition here presents a complicated scenario, which courts of appeals have not fully addressed, in which a prisoner seeks to rely on a change in the law in one circuit to seek habeas relief in another.

1. The court of appeals correctly determined that petitioner cannot seek relief under Section 2241 for his statutory claim.

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* The pending petition in *Jones* v. *Underwood*, No. 18-9495 (filed May 21, 2019), also raises a similar issue.

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 rely on an intervening statutory decision to seek relief 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 such 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 suggests 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, 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 illustrates the point. On both direct review and in his initial motion under Section 2255, petitioner had the opportunity to raise, and be heard on, his claim that his Missouri second-degree burglary offenses were not violent felonies under the ACCA. Although the Eighth Circuit had adverse panel precedent, that did not foreclose petitioner from pressing the issue—just as the defendant in *United States* v. *Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc), who was successful in overturning that precedent, did. 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). The arguments that the Eighth Circuit accepted in *Naylor* were available well before *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), which made clear that it was merely applying "long-standing principles" and reiterating "exactly th[e] point" this Court "ha[d] already made" in earlier ACCA cases. *Id.* at 2251, 2253. And even if *Mathis* had set

forth a new rule, nothing prevented petitioner from advocating for that rule in his direct appeal or in his initial Section 2255 motion—as the defendant in *Mathis* itself did.

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 court of appeals' 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) 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 perversely 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 post-conviction disputes about the legality of a conviction or sentence away from the district of confinement and into the district of conviction and sentencing. See *Hill* v. *United States*, 368 U.S. 424, 427-428 (1962); *United States* v. *Hayman*, 342 U.S. 205, 219 (1952). Allowing a federal inmate to bring claims in the district of his confinement "resurrects the problems that section 2255 was enacted to solve, such as heavy burdens on courts located in districts with federal prisons." *McCarthan*, 851 F.3d at 1092.

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. Ultimately, "[i]t is for Congress, not this Court, to amend the statute" if the legislature believes that the narrowly drawn provisions found in Section 2255(h) "unduly restrict[] federal prisoners' ability to file second or successive motions." *Id.* at 359-360. To that end, the Department of Justice has 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 the "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. 13-17) a division of authority among the courts of appeals on the issue here. The Tenth and Eleventh Circuits have correctly held that habeas relief under the saving clause is unavailable based on a retroactive rule of statutory construction. See Pet. App. 3a-4a; *McCarthan*, 851 F.3d at 1086; see also *Prost*, 636 F.3d at 590-591. By contrast, nine courts of appeals would permit such relief in some circumstances. See Pet. 13 (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 the conviction, but also 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 panel here simply followed its previous holding in *Prost*, as it was bound to do "absent en banc reconsideration or a superseding contrary decision by [this] Court." Pet. App. 4a (citation omitted). The circuit conflict therefore does not warrant this Court's review any more than it did six months ago.

Petitioner errs in asserting (Pet. 28-30) that vehicle problems in *Wheeler* rendered review in that case inappropriate. Petitioner contends (Pet. 28-29) that *Wheeler* presented potential mootness concerns because of the possibility that the defendant there would serve his entire sentence before this Court could complete its review. But in fact the district court in *Wheeler* ordered

the defendant released approximately eight months before his term of imprisonment would have expired, thereby ensuring that the controversy would remain live. See Letter from Noel J. Francisco, Solicitor General, to Scott S. Harris, Clerk at 1, *Wheeler*, *supra* (Feb. 28, 2019); see also Letter from Joshua B. Carpenter to Scott S. Harris, Clerk at 1, *Wheeler*, *supra* (Mar. 1, 2019) (respondents' letter acknowledging that "concerns of potential mootness" would "no longer be present").

Petitioner also argues (Pet. 29) that *Wheeler* presented "significant threshold issues" of waiver and jurisdiction that are not present here. That argument is misplaced. As the *Wheeler* petition explained, the case presented no waiver concerns because "neither the court of appeals nor this Court would [have been] required to treat the government's position in the district court," in which it viewed saving-clause relief to be available, "as dispositive," given the government's appellate defense of the district court's dismissal order. Gov't Pet. at 26-27, *Wheeler*, *supra* (citing *Koons* v. *United States*, 138 S. Ct. 1783 (2018)). The *Wheeler* petition also explained that the disposition of the case did not depend on whether Section 2255(e) imposes a limitation on the subject matter jurisdiction of federal courts, and that even if it did, the Court could productively resolve that issue as well. See Gov't Cert. Reply Br. at 7, *Wheeler*, *supra*. Petitioner therefore fails to identify a sound reason for granting certiorari in this case notwithstanding the Court's recent denial of the petition for a writ of certiorari in *Wheeler*.

b. This case, moreover, presents complications that *Wheeler* did not. There, the Fourth Circuit allowed relief under the saving clause based on its *own* updated

circuit law making unambiguously clear that, as a statutory matter, the sentencing court had erroneously applied a statutory minimum. See *Wheeler*, 886 F.3d at 429 (extending the availability of saving-clause relief to prisoners relying on "a change in this circuit's controlling law"). Here, however, petitioner identifies no Tenth Circuit decision establishing that his detention is unlawful, and in *United States* v. *Phelps*, 17 F.3d 1334, cert. denied, 513 U.S. 844 (1994), the Tenth Circuit determined that Missouri second-degree burglary *is* a violent felony under the ACCA. *Id.* at 1341-1342. Petitioner principally relies on the decision of the Eighth Circuit in *Naylor*, *supra*. But nothing requires the Tenth Circuit to agree with that decision rather than adhere to its own decision in *Phelps*. Cf. *United States* v. *Geozos*, 870 F.3d 890, 901 (9th Cir. 2017) (disagreeing with the Eleventh Circuit's conclusion that Florida robbery is a violent felony under the ACCA's "elements clause"), abrogated by *Stokeling* v. *United States*, 139 S. Ct. 544 (2019).

That wrinkle is important for two reasons. First, it would require this Court to decide as a threshold matter whether, to establish the "miscarriage of justice" or "fundamental defect" required for saving-clause relief on the basis of a change in circuit precedent, *Hill*, 836 F.3d at 595, a habeas applicant must demonstrate the unlawfulness of his detention under the law of the circuit of conviction, the law of the circuit of confinement, or both. That is an underdeveloped issue in the courts of appeals that could complicate this Court's review of the question presented here. Compare, *e.g.*, *Hahn* v. *Moseley*, 931 F.3d 295, 301 (4th Cir. 2019) (applying the law of the circuit of conviction when the government did not argue otherwise), with, *e.g.*, *Chazen* v.

Marske, No. 18-3268, 2019 WL 4254295, at *7 (7th Cir. Sept. 9, 2019) (reserving the question but applying the law of the circuit of confinement because the government agreed to it); cf. *In re Davenport*, 147 F.3d 605, 612 (7th Cir. 1998) (explaining that saving-clause relief is unavailable if there is "a difference between the law in the circuit in which the prisoner was sentenced and the law in the circuit in which he is incarcerated").

Second, petitioner's entitlement to relief depends on a view of the saving clause expansive enough to encompass the right to ask the Tenth Circuit to reconsider its prior decision in *Phelps*. No circuit has indicated that it would authorize saving-clause relief under such circumstances. The Seventh Circuit has explained that even the existence of "a circuit split" precludes saving-clause relief because "there is no presumption that the law in the circuit that favors the prisoner is correct, and hence there is no basis for supposing him unjustly convicted." *Davenport*, 147 F.3d at 612. And to the government's knowledge, only the Fourth Circuit has even allowed a prisoner to rely on the saving clause when the statutory issue is merely unresolved (with no adverse precedent of the sort at issue here) in the circuit of incarceration—and in that case, the government did not oppose relief on that ground. See *Hahn*, 931 F.3d at 301.

Moreover, even were the saving clause broad enough to allow petitioner to seek such merits review in the first instance, it is far from clear that the Tenth Circuit would adopt *Naylor* rather than adhere to the result in *Phelps*. At the time of petitioner's convictions, Missouri defined second-degree burglary as "knowingly enter[ing] unlawfully or knowingly remain[ing] unlawfully in a building or inhabitable structure for the purpose of committing a crime therein." Mo. Rev. Stat. § 569.170

(West 1979). Although *Naylor* concluded that "building or inhabitable structure" in Section 569.170 is indivisible —and thus defines a crime broader than generic burglary, see 887 F.3d at 401-407—the Eighth Circuit did not have the benefit of this Court's decision in *United States* v. *Stitt*, 139 S. Ct. 399 (2018), which makes clear that generic burglary encompasses a substantial range of inhabitable structures that are not traditional "buildings," *id.* at 407. And as the dissenters in *Naylor* observed, Missouri case law and charging practice can be read to support a determination that "building" and "inhabitable structure" in fact are elements, not means, and are therefore divisible. See *Naylor*, 887 F.3d at 411 (Shepherd, J., dissenting). Consideration of those and other factors may well lead the Tenth Circuit to find that Missouri second-degree burglary is divisible and that at least some versions of the offense are no broader than generic burglary, consistent with its prior decision in *Phelps*. In that event, petitioner—all of whose burglary convictions involved buildings—could not secure relief.

c. Finally, it bears mention that none of the issues here were briefed below; petitioner never served the government with his habeas application, and the government therefore never filed even an appearance, much less a brief, in either the district court or the court of appeals. Although that need not, standing alone, impede this Court's review, it does undercut petitioner's suggestion that this case is an "ideal" vehicle to answer the question presented. Pet. 30.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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