No. 16-773

In the Supreme Court of the United States

JORGE CORTES-MORALES, PETITIONER

v.

SUZANNE R. HASTINGS, WARDEN

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

Whether petitioner is entitled to habeas corpus relief based on his claim that, in light of amendments to state law that postdate his federal sentencing, his convictions for drug crimes under New York law do not qualify as "serious drug offense[s]" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(A).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 827 F.3d 1009. The order of the district court (Pet. App. 16a-24a) is not published in the Federal Supplement but is available at 2013 WL 3868173.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a) was entered on June 27, 2016. A petition for rehearing was denied on September 20, 2016 (Pet. App. 25a-26a). The petition for a writ of certiorari was filed on December 16, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Puerto Rico, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(e). He was sentenced to 210 months of imprisonment, to be followed by five years of supervised release. Pet. App. 4a; Judgment 2-3. Petitioner did not file a direct appeal. Pet. App. 19a.

In 2007, petitioner filed a motion to set aside his conviction and sentence under 28 U.S.C. 2255. Pet. App. 4a. The district court granted the motion in part and entered an amended judgment ordering petitioner's sentence to run concurrently with a sentence imposed for certain violations of Puerto Rico law. *Ibid.* The court of appeals affirmed, *ibid.*, and this Court denied a petition for a writ of certiorari, 559 U.S. 1079 (2010) (No. 09-9549).

In 2010, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the district of his confinement. The district court denied the petition and petitioner's motion for reconsideration. Pet. App. 6a-7a, 19a-20a. In 2013, petitioner filed a second Section 2241 petition. The district court denied the petition, *id.* at 16a-24a, and the court of appeals affirmed, *id.* at 1a-15a.

1. In September 2005, police obtained a warrant to search petitioner's residence in Isabela, Puerto Rico. Officers seized 128 bags of heroin, 133 bags of cocaine, and two firearms: a .22 caliber long rifle loaded with seven rounds of ammunition and a .38 caliber pistol loaded with 13 rounds of ammunition. Presentence Investigation Report (PSR) ¶¶ 5, 9.

In December 2005, petitioner was charged in a three-count indictment in the District of Puerto Rico with possession with the intent to distribute heroin and cocaine, in violation of 21 U.S.C. 841(a) and (b) (Count 1); possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (Count 2); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(e) (Count 3). Indictment 1.

In February 2006, petitioner entered into a plea agreement under which he agreed to plead guilty to Count 3 of the indictment in exchange for the dismissal of Counts 1 and 2. Plea Agreement 1-2, 5; see Fed. R. Crim. P. 11(c)(1)(C). Petitioner further agreed that, as charged in the indictment, he qualified for sentencing under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). Plea Agreement 1-3, 10. Under the ACCA, a defendant with "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another" is subject to a term of imprisonment of 15 years to life. 18 U.S.C. 924(e)(1). As relevant here, the ACCA defines the term "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii).

The plea agreement listed a 1997 conviction for aggravated assault as a qualifying violent felony and two earlier convictions under New York law as qualifying serious drug offenses. Plea Agreement 2. The first of the New York convictions was a 1990 conviction for attempted criminal sale of a controlled substance, a Class C felony. At the time of conviction, that crime was punishable by up to 15 years of imprisonment; petitioner was sentenced to one to three years of imprisonment. Pet. App. 3a. The second was a 1991 conviction for criminal sale of a controlled substance, a Class B felony. At the time of conviction, that crime was punishable by up to 25 years of imprisonment; petitioner was sentenced to one-and-half to three years of imprisonment, to run concurrently with his sentence on the Class C felony. *Ibid.* Petitioner completed those state sentences in 1994. *Ibid.*

As an armed career criminal, petitioner had a sentencing range under the advisory Sentencing Guidelines of 210 to 262 months. Plea Agreement 4-5; PSR ¶ 36. The district court sentenced petitioner to 210 months of imprisonment, the bottom of the advisory Guidelines range and 30 months below the term to which petitioner had agreed in the plea agreement. Pet. App. 4a; Plea Agreement 5. Petitioner did not file a direct appeal. Pet. App. 19a.

2. In 2007, petitioner filed a motion to vacate his conviction and sentence under 28 U.S.C. 2255. Pet. App. 4a. He argued, *inter alia*, that his conviction violated the Double Jeopardy Clause and that his counsel had rendered ineffective assistance by failing to request that petitioner's federal term of imprisonment run concurrently with his sentence under Puerto Rico law for crimes arising from the same set of facts. *Id.* at 4a, 19a. The district court found merit in petitioner's ineffective-assistance claim and, as a remedy, entered an amended judgment ordering that his federal sentence run concurrently with the Puerto Rico sentence. *Ibid.* The court denied petitioner's motion in all other respects. *Ibid.*

3. In 2010, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in his district of confinement, the Southern District of Georgia. That petition principally argued that his 1990 Class C felo-

ny conviction under New York law did not qualify as a serious drug offense for purposes of the ACCA because the conviction was based on an attempted sale. Pet. App. 6a. The district court ultimately denied relief, ruling that petitioner's 1990 conviction did qualify as a serious drug offense under the ACCA. *Ibid.*; see 2:10-cv-159 Docket entry No. 27 (S.D. Ga. Mar. 13, 2012).

Petitioner moved for reconsideration. Pet. App. 6a. He raised a new argument: that his New York drug convictions did not qualify as serious drug offenses because New York's 2004 and 2009 Drug Law Reform Acts (DLRA) had lowered the maximum terms of imprisonment for his offenses below the ten-year threshold required under the ACCA. See 2:10-cv-159 Docket entry No. 28 (S.D. Ga. Mar. 22, 2012). The 2004 DLRA had prospectively lowered the maximum sentence for Class B felonies to nine years and the maximum sentence for Class C felonies to five-and-a-half years, but did not permit defendants previously convicted of those offenses to seek resentencing. Pet. App. 5a (citing portion of 2004 DLRA codified at N.Y. Penal Law § 70.70)). The 2009 DLRA did authorize resentencing for individuals convicted of Class B felonies and for those convicted simultaneously of a Class B and Class C felony—but only for defendants who sought resentencing while in state custody "serving an indeterminate sentence with a maximum term of more than three years." *Ibid.* (quoting portion of 2009 DLRA codified at N.Y. Crim. Proc. Law § 440.46).

The district court denied the motion for reconsideration. Pet. App. 7a; 2:10-cv-159 Docket entry No. 30 (S.D. Ga. June 29, 2012). The court suggested that petitioner could seek "a determination" in state court "of whether his previous convictions under [s]tate law still qualify as felony convictions" and, if successful, then seek relief from his ACCA sentence under Section 2255 in the federal court that had sentenced him (the district court in Puerto Rico). Pet. App. 7a.

In January 2013, a New York trial court denied petitioner's motion to be resentenced pursuant to the 2009 DLRA. 2:13-cv-57 Docket entry No. 1, at 12-13 (S.D. Ga. Apr. 22, 2013). The state court determined that petitioner was not eligible for resentencing because he had already served his sentence and his maximum sentence had not exceeded three years. *Ibid.*; Pet. App. 8a.

4. a. In April 2013, petitioner filed a second Section 2241 petition in the district of his confinement, raising the same argument that he had raised in his earlier motion for reconsideration. Pet. App. 8a. A magistrate judge issued a report recommending that the petition be dismissed because it did not satisfy a precondition to a request for relief under Section 2241 —that "the remedy provided under 28 U.S.C. § 2255 'is inadequate or ineffective to test the legality of [the prisoner's] detention.'" *Id.* at 21a (quoting *Wofford* v. *Scott*, 177 F.3d 1236, 1238 (11th Cir. 1999) (quoting 28 U.S.C. 2255(e)). The district court overruled petitioner's objection, adopted the magistrate judge's recommendation, and dismissed the Section 2241 petition. *Id.* at 16a-18a.

b. The court of appeals affirmed in a per curiam opinion. Pet. App. 1a-15a.

The court of appeals observed at the outset that petitioner raised his sentencing challenge in a Section 2241 habeas corpus petition filed pursuant to "the so-called '[s]avings [c]lause" in 28 U.S.C. 2255(e), Pet.

App. 10a, which provides that "[a]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to [Section 2255] * * * shall not be entertained if it appears that * * * the court which sentenced him * * * has denied him relief" under Section 2255, "unless it also appears that the remedy by motion [in the sentencing court] is inadequate or ineffective to test the legality of his detention," 28 U.S.C. 2255(e). The court of appeals explained that it had previously established "a test for determining" whether a prisoner "claim[ing] he was sentenced above the statutory maximum" may file a habeas corpus petition under the savings clause, and that the test required (among other things) that the claim be based on a Supreme Court decision that "overturned * * * circuit precedent." Pet. App. 10a-11a (discussing *Bryant* v. *Warden*, 738 F.3d 1253 (11th Cir. 2013)). As the court noted, petitioner "conced[ed] that he cannot meet th[at] test." *Id.* at 11a. Rather than addressing whether "to adopt an expanded view of the [s]avings [c]lause," as petitioner urged, the court "assume[d], without deciding, that [petitioner] is right that the [s]avings [c]lause may reach a claim that a retroactive change in New York's sentencing laws invalidated his sentence." *Ibid.*

On the merits, the court of appeals held that the amendments to New York's laws did not entitle petitioner to relief from his ACCA sentence. Pet. App. 11a-14a. The court noted that this Court had held that a crime's status as a "serious drug offense" under the ACCA is determined by the statutory maximum "at the time of [the] conviction for that offense," but had reserved the possibility of an exception when a State subsequently lowers the applicable maximum and makes that reduction available to defendants previously sentenced for that offense. *Id.* at 8a (quoting *McNeill* v. *United States*, 563 U.S. 816, 825 & n.* (2011)).

The court of appeals concluded, however, that petitioner did not fall within any such exception because he was undisputedly ineligible for resentencing under the 2004 DLRA and 2009 DLRA, which were therefore "not retroactive as to [him]." Pet. App. 11a-12a. The court explained that Congress had chosen "to defer to the state lawmaker's judgment" in defining the drug crimes that trigger an ACCA sentence, *id.* at 12a (quoting *United States* v. *Rodriquez*, 553 U.S. 377, 388 (2008)), and that "such deference is appropriate where, as here, the state legislature has made a clear, reasoned judgment" that an offender in petitioner's position "is not among the class of defendants the 2009 DLRA is designed to benefit," *id.* at 12a-13a. In reaching that conclusion, the court rejected petitioner's contention that considering whether state legislative amendments were retroactive to a defendant in "particular circumstances" contravened the "categorical approach" used to determine the ACCA's applicability. *Id.* at 13a. The court explained that considering an individual defendant's eligibility for relief under state law is no less appropriate than "tak[ing] into account whether a state's recidivist statute imposed a higher sentencing maximum for the defendant in question," another "aspect[] of the particular defendant's" record that this Court has held appropriate to consider under the ACCA. *Ibid.* (citing *Rodriquez*, 553 U.S. at 382-383).

In a concurring opinion, Judge Pryor agreed that petitioner's sentencing challenge failed because the 2009 DLRA "is not retroactive for prisoners like [petitioner]," but criticized the court of appeals' existing test determining when a prisoner may file a habeas corpus petition under the Section 2255(e) savings clause. Pet. App. 15a.

ARGUMENT

Petitioner contends (Pet. 10-32) that he does not qualify for sentencing as an armed career criminal because of amendments to New York's drug laws that postdate his federal sentencing and do not entitle him to resentencing as a matter of state law. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. In addition, this case would not be a suitable vehicle for addressing petitioner's contention because it is clear that he would not be entitled to relief in the Eleventh Circuit on an alternative ground and, in any event, review here would require this Court to address a complicated threshold procedural issue not resolved below. Further review is therefore unwarranted.

1. The court of appeals correctly held (Pet. 11a-14a) that petitioner is not entitled to habeas corpus relief from his ACCA sentence based on changes to New York's drug laws that postdate his federal sentencing, because under state law those changes are not retroactively applicable to him.

a. Petitioner's sentence under the ACCA depends (as relevant here) on whether his two New York convictions for drug crimes qualify as "serious drug offense[s]"—that is, "offense[s] under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). In *McNeill* v. *United States*, 563 U.S. 816 (2011), this Court held "that a federal sentencing court must determine whether 'an offense under State law' is a 'serious drug offense' by consulting the 'maximum term of imprisonment' applicable to a defendant's previous drug offense at the time of the defendant's state conviction for that offense." *Id.* at 825 (citation omitted). The Court explained that an inquiry tied to the date of the state conviction was compelled by "[t]he plain text" of the statute; was consistent with the Court's earlier treatment of "the adjacent definition of 'violent felony'"; and served to "avoid[] the absurd results that would follow from consulting current state law to define a previous offense." *Id.* at 820-822.

Petitioner does not dispute that, under that inquiry, his prior New York convictions qualify as serious drug offenses. "[A]t the time of th[ose] conviction[s]," *McNeill*, 563 U.S. at 825, New York law prescribed a 15-year maximum term of imprisonment for his Class C felony and a 25-year maximum term of imprisonment for his Class B felony. Pet. App. 3a.

Petitioner relies, however, on the Court's concluding footnote in *McNeill*, which noted that "th[e] case d[id] not concern a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." 563 U.S. at 825 n.* (citing U.S. Br. at 18 n.5, *McNeill*, *supra* (No. 10-5258)). The Court did "not address whether or under what circumstances a federal court could consider the effect of that state action." *Ibid.*

The court of appeals correctly concluded that, even if a federal court can consider "the effect" of retroactively applicable changes to state law in some "circumstances," *McNeill*, 563 U.S. at 825 n.*, such consideration is not appropriate where—as here—the State has chosen not to apply the changes retroactively to the particular category of offenders to which the defendant belongs. Pet. App. 11a-14a. Petitioner did not qualify for resentencing under the 2004 DLRA or the 2009 DLRA, because he was no longer incarcerated and because the sentences that he served for his violations of New York's drug laws were not "indeterminate sentence[s] with a maximum term of more than three years." *Id.* at 5a (citation omitted); see *id.* at 11a ("[t]here is no dispute that [petitioner] is not eligible for resentencing" under the DLRAs); *id.* at 3a, 5a (explaining that petitioner's sentences for the New York offenses were for no more than three years of imprisonment); *id.* at 12a. Accordingly, the *McNeill* footnote has no application here, and no basis exists for "consulting" anything other than "the 'maximum term of imprisonment' applicable to" petitioner's "previous drug offense[s] at the time of [his] state conviction[s]." *McNeill*, 563 U.S. at 825.[1]

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[1] That conclusion is consistent with the government's position in its brief and at oral argument in *McNeill*. Petitioner quotes a statement in the government's brief in that case that, if a State has lowered a maximum penalty and made that reduction available to defendants previously sentenced, "the defendant could plausibly look to that reduced maximum as stating the law applicable to his previous conviction." Pet. 16-17 (quoting U.S. Br. 18 at n.5, *McNeill*, *supra* (No. 10-5258)). But petitioner omits the next sentence of that brief, which gives an example and states that a

As the court of appeals explained (Pet. App. 12a), that conclusion follows from this Court's recognition that "Congress chose to defer to the state lawmakers' judgment" by tying the ACCA's serious-drug-offense definition to the maximum sentence prescribed by state law. *United States* v. *Rodriquez*, 553 U.S. 377, 388 (2008). A federal court would not respect "state lawmakers' judgment," *ibid.*, if it gave effect to the State's decision to amend its drug laws but disregarded the limits that the State itself placed on the amendments' retroactive application. For instance, it would be anomalous for a federal court to consider for ACCA purposes a State's retroactive reduction of a statutory maximum sentence, yet to ignore the State's determination that certain categories of recidivists are "not among the class of defendants [that reduction] is designed to benefit." Pet. App. 13a; cf. N.Y. Crim. Proc. Law § 440.46 (excluding from resentencing eligibility defendants incarcerated for, or having a prior conviction for, certain violent offenses). Petitioner, however, would allow the "generally retroactive nature of" a reduced maximum (Pet. 9, 13) to take precedence over a State's considered decision not to extend the benefits of that reduction to a specific "class of offenders." Pet. App. 12a. That is not the kind of "defer[ence]" to state lawmakers that this Court's precedents contemplate. *Ibid.*; see *Rodriquez*, 553 U.S. at 388.

"reduced maximum could apply to [a defendant's] conviction" for ACCA purposes "*if* such a defendant had taken advantage of state sentence-modification proceedings to lower his sentence in accordance with a reduced maximum." U.S. Br. at 18 n.5, *McNeill*, *supra* (No. 10-5258) (emphasis added); see Oral Arg. Tr. at 22-24, 29-31, *McNeill*, *supra* (No. 10-5258).

Petitioner contends (Pet. 15) that his contrary view is necessary to avoid "absurd result[s]"—in particular, the result that defendants "still incarcerated" (and thus eligible for resentencing under state law) would be eligible for relief from an ACCA sentence while those "who have served their state sentence" would not. As the court of appeals explained, however, the New York legislature reasonably determined that the offenders "most in need of relief" did not include those already freed from "the burden of 'inordinately harsh punishment'" or those who (like petitioner) never suffered such a burden because they were sentenced to terms of imprisonment far below the subsequently reduced maximums. Pet. App. 12a-13a (quoting *People* v. *Paulin*, 952 N.E.2d 1028, 1032 (N.Y. 2011)); see *id.* at 3a, 5a. Adherence to that "reasoned judgment," *id.* at 12a, in the context of ACCA sentences does not produce an absurdity.

b. Petitioner's remaining attacks on the court of appeals' decision lack merit. He argues (Pet. 18-19) that, by focusing on whether an individual defendant was eligible for resentencing under the state-law amendments, the court contravened the categorical approach, which generally requires courts to "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor* v. *United States*, 495 U.S. 575, 600 (1990). But as the court of appeals explained, the categorical approach does not prevent a sentencing court determining the "maximum term of imprisonment" under state law from considering other aspects of an individual defendant's record—in particular, "whether a state's recidivist statute imposed a higher sentencing maximum for the defendant in question."

Pet. App. 13a; see *Rodriquez*, 553 U.S. at 382-383. Indeed, in *Rodriquez*, this Court saw "no connection" between the limitations that *Taylor*'s categorical approach places on defining enumerated offenses under the ACCA and "the meaning of the phrase 'maximum term of imprisonment . . . prescribed by law." 553 U.S. at 387 (quoting 18 U.S.C. 924(e)(2)(A)(ii)); cf. *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 579, 582 (2010) (rejecting approach that would treat prior state conviction as if it reflected a recidivist enhancement where the State could have charged that enhancement but did not).

Petitioner also asserts (Pet. 24-26) that the court of appeals' decision violates separation of powers principles and the Due Process Clause "by affirming a sentence that exceeds the maximum term authorized by Congress."[2] But that suggestion turns entirely on petitioner's view of the merits. And, for the reasons given above, the court of appeals' interpretation of that phrase here is the correct one.

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[2] Petitioner also suggests in a footnote (Pet. 26 n.5) that "[t]he decision below may * * * work an unconstitutional suspension of the writ of habeas corpus." This case presents no question under the Suspension Clause because, as petitioner elsewhere emphasizes (Pet. 30-32), the court of appeals did not resolve whether the habeas corpus savings clause reaches his type of claim and rejected his claim based on the merits of his challenge to his ACCA sentence. Petitioner's concern with access to habeas relief is especially misplaced given that he continues to pursue relief under the statutory mechanism (28 U.S.C. 2255) that Congress enacted as a substitute for habeas corpus. See *United States* v. *Hayman*, 342 U.S. 205, 219 (1952); see also Judgment, *Cortes-Morales* v. *United States*, No. 16-1822 (1st Cir. Feb. 14, 2017) (directing the Clerk to transfer petitioner's Section 2255 petition "to the District Court to be considered as his first challenge to his new sentence").

2. As petitioner recognizes (Pet. 28), no circuit disagreement exists on the ACCA question that he presents. Only one other court of appeals since *McNeill* has addressed the potential effect of a State's retroactive reduction of maximum sentences on an ACCA sentence, and that decision—*Rivera* v. *United States*, 716 F.3d 685 (2d Cir. 2013)—is fully consistent with the decision below. In *Rivera*, the Second Circuit concluded that *McNeill*'s time-of-conviction rule "squarely" governed when the "retroactive aspects" of New York's 2004 and 2009 DLRA did not apply to the defendant and did "not reduce the 'maximum sentence applicable' to [his] prior drug convictions." *Id.* at 690 (citation and quotation marks omitted). And no court of appeals has held that a retroactive reduction in a state statutory maximum—much less a reduction from which the defendant cannot benefit as a matter of state law—warrants an exception to *McNeill*'s time-of-conviction rule.

Petitioner asserts (Pet. 13-14, 27-28) that review is nevertheless warranted because the decision below conflicts with several district court decisions: *United States* v. *Jackson*, No. 13-cr-142, 2013 WL 4744828 (S.D.N.Y. Sept. 4, 2013); *United States* v. *Calix*, No. 13-cr-582, 2014 WL 2084098 (S.D.N.Y. May 13, 2014) (relying on *Jackson*); and *Saxon* v. *United States*, No. 12-cr-320, 2016 WL 3766388 (S.D.N.Y. July 8, 2016) (discussing *Jackson* and *Calix*).[3] But a district court

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[3] In *Saxon*, the district court discussed the effect of the 2009 DLRA in assessing whether counsel's performance was deficient for purposes of a prisoner's ineffective-assistance claim, but ultimately denied the claim on the ground that the prisoner suffered no prejudice. 2016 WL 3766388, at *12; see Pet. 29 n.7 (noting that the prisoner in *Saxon* has appealed).

decision cannot give rise to a conflict warranting this Court's review. See Sup. Ct. R. 10; cf. *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011) (noting that district court decisions lack precedential value). And, while those decisions attempted to distinguish *Rivera* on the ground that the defendant in that case was ineligible for resentencing under the New York DLRAs because of the class of felony he committed, rather than because of more individualized circumstances, the Second Circuit could well disagree—especially in light of the reasoning of the decision below, see Pet. App. 12a.

In addition, contrary to petitioner's suggestion (Pet. 29), the government's decision not to appeal two of the New York district court rulings does not indicate that the question presented will recur yet somehow evade this Court's review. Even absent a government appeal, the issue may soon reach the Second Circuit because the prisoner in *Saxon* has appealed the district court's denial of relief, see Pet. 29 n.7, and the government, in defending the judgment, has argued that the Eleventh Circuit's decision in this case correctly construes the ACCA. See Gov't Br. at 28-40, *Saxon* v. *United States*, No. 16-2735 (2d Cir. Dec. 7, 2016). A circuit conflict would also arise if a district court outside of the Eleventh Circuit follows the decision below and is reversed on appeal. And if petitioner is correct (Pet. 21-22 & n.3) that States beyond New York are considering retroactively applicable amendments to their drug laws, then other courts of appeals may well have occasion to address any effect of such state-law amendments on federal defendants' eligibility for ACCA sentences.

3. In any event, this case would be an unsuitable vehicle for addressing the ACCA question that petitioner presents. Petitioner is entitled to proceed with his Section 2241 petition only if his claim satisfies the habeas corpus savings clause, 28 U.S.C. 2255(e). And, in light of an *en banc* Eleventh Circuit decision that postdates the decision below, petitioner's claim could not do so.

Section 2255 generally provides the exclusive means by which a federal prisoner may collaterally attack the validity of his conviction or sentence. Under 28 U.S.C. 2255(e), a federal prisoner seeking to challenge the validity of his sentence may not file a petition for a writ of habeas corpus under Section 2241 unless he can show that Section 2255 is "inadequate or ineffective to test the legality of his detention." *Ibid.* 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." *Ibid.*

Several courts of appeals have held that intervening statutory-interpretation decisions that narrow the construction of a statute and make clear that the prisoner's conduct was not criminal permit resort to Section 2241 in certain circumstances. See, *e.g.*, *Reyes-Requena* v. *United States*, 243 F.3d 893, 902-904 (5th Cir. 2001) (collecting cases). The Seventh Circuit has accepted that savings-clause relief is available when a federal prisoner can show that his sentence under the ACCA was erroneous in light of intervening precedents of this Court narrowing the ACCA's reach. *Brown* v. *Rios*, 696 F.3d 638, 641 (7th Cir. 2012); see *Light* v. *Caraway*, 761 F.3d 809, 813 (7th Cir. 2014), cert. denied, 135 S. Ct. 970 (2015). But the Tenth Circuit has rejected a reading of the savings clause that permits reliance on intervening judicial decisions narrowing the interpretation of a statute. See *Prost* v. *Anderson*, 636 F.3d 578, 584, 590 (10th Cir. 2011) (reaching opposite conclusion), cert. denied, 565 U.S. 1111 (2012). And the Eleventh Circuit has now similarly held that the savings clause is unavailable for relief based on intervening decisions in any context. See *McCarthan* v. *Director of Goodwill Indus.-Suncoast*, *Inc.*, No. 12-14989, 2017 WL 977029 (11th Cir. Mar. 14, 2017).

Whatever the correct resolution of that issue, no court of appeals has extended the savings clause to reach sentencing challenges based not on an intervening judicial decision, but on the type of event on which petitioner relies: a state legislative enactment that postdates the prisoner's federal sentencing. Accordingly, even if petitioner were correct that his ACCA sentence is erroneous in light of changes to New York law, he cannot identify any court of appeals that recognizes the availability of savings-clause relief for that claim.

Petitioner argues (Pet. 30-32) that the savings-clause posture of the case is no impediment to review because the court of appeals—having "assumed without deciding" that "the [s]avings [c]lause may reach" his claim—could simply resolve the availability of savings-clause relief on remand from this Court. But the logic of the Eleventh Circuit's opinion in *McCarthan* reveals that he certainly could not obtain habeas relief in that court. See 2017 WL 977029, at *14-*17 (overruling *Bryant* as adopting too expansive a view of the savings clause). And, in any event, this Court could not properly resolve the ACCA question that petitioner presents without first addressing the savings clause. A majority of the courts of appeals, including the court below, correctly hold that "[t]he applicability of the savings clause is a threshold jurisdictional issue." *Williams* v. *Warden*, 713 F.3d 1332, 1337 (11th Cir. 2013), cert. denied, 135 S. Ct. 52 (2014); see *id.* at 1340 (so holding and collecting cases); see Br. in Opp. at 11-12, *Williams*, *supra* (No. 13-1221) (discussing meaning of the statement in Section 2255(e) that a habeas petition "shall not be entertained" by any court unless the savings clause applies). But see *Webster* v. *Caraway*, 761 F.3d 764, 768-770 (7th Cir.) (reaffirming circuit precedent holding that the savings clause "does not curtail subject-matter jurisdiction"), vacated on other grounds, 769 F.3d 1194 (7th Cir. 2014). To the extent that the savings clause implicates the federal courts' "*power* to adjudicate the case," *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998), this Court could not bypass the Section 2255(e) threshold inquiry. And the need to address that complicated issue, which was not addressed below, underscores the unsuitability of this case for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2017