No. 17-85

In the Supreme Court of the United States

DAN CARMICHAEL MCCARTHAN, PETITIONER

v.

JOSEPH C. COLLINS, CHIEF UNITED STATES PROBATION OFFICER FOR THE MIDDLE DISTRICT OF FLORIDA

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

BRIEF FOR RESPONDENT 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, with "second or successive" attacks limited to certain claims that suggest factual innocence or that rely on retroactive constitutional-law decisions of this Court. 28 U.S.C. 2255(h). Under 28 U.S.C. 2255(e), an "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 * * * 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 was denied at a time when a particular statutory claim would have failed under circuit precedent is entitled to seek habeas relief by asserting that the circuit precedent has been abrogated by a statutory-interpretation decision of this Court.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-164a) is reported at 851 F.3d 1076. The earlier opinion of the court of appeals panel (Pet. App. 165a-203a) is reported at 811 F.3d 1237. The order of the district court denying petitioner's application for a writ of habeas corpus (Pet. App. 206a-208a) is not published in the Federal Supplement but is available at 2012 WL 12969682.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2017. On May 25, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 12, 2017, and the petition was filed on that date. 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 Middle District of Florida, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 211 months of imprisonment, to be followed by five years of supervised release, and did not appeal his conviction or sentence. Pet. App. 3a; Pet. 5. In 2004, petitioner filed a motion under 28 U.S.C. 2255 alleging ineffective assistance of counsel, which the district court denied. Pet. App. 3a. In 2009, petitioner filed an amended petition for a writ of habeas corpus under 28 U.S.C. 2241. The district court denied that petition, Pet. App. 206a-208a, and a panel of the court of appeals affirmed, *id.* at 165a-203a. On rehearing, the en banc court of appeals affirmed. *Id.* at 1a-164a.

1. On March 4, 2003, petitioner pleaded guilty to possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 167a. The indictment alleged that petitioner had three prior felony convictions under Florida law: a 1987 conviction for possessing with intent to sell or deliver cocaine, a 1992 conviction for escape, and a 1994 conviction for third-degree murder. *Ibid.*

A violation of Section 922(g)(1) ordinarily carries a maximum sentence of ten years of imprisonment. See 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), however, provides for a mandatory-minimum sentence of 15 years of imprisonment if the defendant "has three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). The ACCA defines a "serious drug

offense" to include a state-law offense "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 ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. 924(e)(2)(B).

The Probation Office prepared a Presentence Investigation Report (PSR) that listed petitioner's three prior felony convictions under Florida law, as well as two additional felony convictions under Georgia law for possessing with intent to distribute cocaine. The Probation Office recommended that petitioner's sentence be enhanced under the ACCA but did not specify which convictions triggered the enhancement. As relevant here, petitioner objected before sentencing to treating his prior escape offense as a violent felony under the ACCA, but he did not renew that objection at sentencing. The district court sentenced petitioner to 211 months of imprisonment, without indicating which convictions supported his ACCA sentence. Petitioner did not object to the PSR's or the district court's failure to identify which of his prior convictions justified an

ACCA enhancement. Petitioner did not appeal. Pet. App. 3a, 167a-169a, 191a; Sent. Tr. 3-6; PSR ¶¶ 22, 31-34, 38, 43, 77.

2. In June 2004, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 on the ground that his trial counsel had rendered ineffective assistance by not moving to suppress certain evidence. Petitioner did not challenge his sentence. The district court denied his motion and subsequent request for a certificate of appealability. The court of appeals similarly denied his request for a certificate of appealability. Pet. App. 3a; Gov't C.A. En Banc Br. 5-6.

3. Petitioner filed an amended petition for a writ of habeas corpus under 28 U.S.C. 2241 alleging that his 1992 escape conviction no longer qualified as a "violent felony" and that, as a result, he was not properly subject to an enhanced sentence under the ACCA. Pet. App. 3a-4a. Petitioner relied on two intervening decisions of this Court: *Begay* v. *United States*, 553 U.S. 137 (2008), which held that a New Mexico conviction for driving under the influence of alcohol is not a "violent felony" for ACCA purposes, and *Chambers* v. *United States*, 555 U.S. 122 (2009), which held that some Illinois escape convictions do not qualify as violent felonies for ACCA purposes. See Pet. App. 3a, 169a-170a. Petitioner could not have brought that claim in a second or successive motion for relief under Section 2255, because Section 2255(h) limits such further motions to certain claims of factual innocence and claims relying on retroactive decisions from this Court on matters of "constitutional" law. 28 U.S.C. 2255(h)(1) and (2).

The government argued that 28 U.S.C. 2255(e) precluded the district court from entertaining the claim

even when packaged in a habeas petition. Under Section 2255(e), a prisoner's "application for a writ of habeas corpus * * * shall not be entertained" by a sentencing court if "such court has denied him relief" by motion under Section 2255, "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." The government argued that petitioner could not satisfy the "unless" clause, known as the saving clause. The government explained that even without his escape conviction, petitioner still had four qualifying ACCA convictions: his Florida convictions for murder and for possessing with intent to sell or deliver cocaine, and his two Georgia convictions for possessing with intent to distribute cocaine. Because petitioner still qualified for an ACCA sentence even without considering his escape conviction, he could not show that the remedy provided by Section 2255 was "inadequate or ineffective to test the legality of his detention" within the meaning of the saving clause. In reply, petitioner argued that the government was precluded from relying on his two Georgia convictions because they had not been included in the indictment. See Pet. App. 170a-171a; Gov't C.A. En Banc Br. 6-7.

The district court dismissed petitioner's habeas application. Pet. App. 206a-208a. The court concluded, *inter alia*, that "[p]etitioner has other convictions for crimes that remain classified as 'violent felonies' under 18 U.S.C. §924(e)." *Id.* at 208a. The court denied petitioner's motion for reconsideration. *Id.* at 204a-205a.

4. A panel of the court of appeals affirmed the dismissal of petitioner's habeas application. Pet. App. 165a-203a. The court applied a five-part test that, under then-circuit law, offered an avenue for obtaining habeas

review of previously foreclosed claims based on retroactively applicable statutory-interpretation decisions of this Court. *Id.* at 172a-174a. The panel concluded that petitioner did not satisfy that test because, even without counting his Florida escape conviction, he had at least three other ACCA-qualifying convictions that triggered an enhanced sentence: "his 1987 Florida possession-of-cocaine-with-intent-to-sell-or-deliver conviction and his two 1988 Georgia possession-of-cocaine-with-intent-to-distribute convictions." *Id.* at 198a; see *id.* at 183a-198a.

5. The court of appeals vacated the panel's decision and ordered rehearing en banc, directing the parties to brief the following questions: "(1) do [Eleventh Circuit] precedents erroneously interpret the saving clause, 28 U.S.C. § 2255(e); (2) what is the correct interpretation of the saving clause; and (3) applying the correct standard, is [petitioner] entitled to petition for a writ of habeas corpus?" Pet. App. 4a-5a. In its en banc brief, the government took the position that the Eleventh Circuit had correctly interpreted Section 2255's saving clause as providing a narrow avenue for obtaining habeas review of a previously foreclosed statutory claim that is based on a retroactively applicable decision of this Court establishing a fundamental defect in a prisoner's conviction or sentence. The government also maintained, however, that petitioner was not entitled to relief because of his other ACCA-qualifying convictions. See Gov't C.A. En Banc Br. 11, 15-47. In view of the government's position, the court appointed an amicus curiae "to argue that [Eleventh Circuit] precedents erroneously interpreted the saving clause." Pet. App. 5a.

a. The en banc court of appeals affirmed dismissal of the habeas petition. Pet. App. 1a-164a. The court held

that "[a] motion to vacate [under Section 2255] is inadequate or ineffective to test the legality of a prisoner's detention," and thus allowed by the saving clause, "only when it cannot remedy a particular kind of claim." *Id.* at 42a. And it reasoned that because petitioner's challenge to ACCA treatment of his escape conviction "is cognizable under section 2255," that challenge "does not qualify for the savings clause." *Ibid.*

The court observed that, "[s]ince 1948, Congress has required that a federal prisoner file a motion to vacate, 28 U.S.C. § 2255, instead of a petition for a writ of habeas corpus, *id.* § 2241, to collaterally attack the legality of his sentence." Pet. App. 5a-6a. In enacting Section 2255, Congress "address[ed] the 'serious administrative problems' caused by the requirement that habeas petitions be brought in the district of incarceration, often far from where relevant records and witnesses were located," by providing for collateral challenges through Section 2255 motions that are instead filed in the district in which the prisoner was sentenced. *Id.* at 7a (quoting *United States* v. *Hayman*, 342 U.S. 205, 212 (1952)). "Section 2255(e) makes clear," the court continued, "that a motion to vacate is the exclusive mechanism for a federal prisoner to seek collateral relief unless he can satisfy the 'saving clause' at the end of that subsection," *i.e.*, "'unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of [the prisoner's] detention.'" *Id.* at 6a (quoting 28 U.S.C. 2255(e)) (emphasis omitted).

Examining the "whole text" of Section 2255(e), the court of appeals found that the provision "makes clear that a change in caselaw does not trigger relief under the saving clause." Pet. App. 14a. The court explained that the saving clause—by requiring a prisoner to show

that the "remedy by [Section 2255] motion is inadequate or ineffective to test the legality of his detention" —focuses on the prisoner's opportunity to present a claim, not his likelihood of success. *Ibid.*; see *id.* at 16a ("'To test' the legality of his detention and satisfy the saving clause, a prisoner is not required 'to win' his release. 'To test' means 'to try.'") (citation omitted). It determined that petitioner had not been deprived of that opportunity by adverse circuit precedent on the ACCA-classification of his escape conviction at the time of his Section 2255 motion, because he "could have tested the legality of his detention by requesting that [the court] reconsider [its] precedent en banc or by petitioning the Supreme Court for a writ of certiorari" (as the defendant in *Chambers* had himself done on direct review). *Id.* at 16a; see *id.* at 14a-17a. The court explained that the term "'[i]nadequate or ineffective' * * * connotes that the saving clause permits a prisoner to bring a claim in a petition for habeas corpus that could not have been raised in his initial motion to vacate." *Id.* at 18a. "That a particular argument is doomed under circuit precedent," the court reasoned, "says nothing about the nature of the motion to vacate." *Ibid.*; see *id.* at 19a (contrasting petitioner's argument with "a prisoner's claim about the *execution* of his sentence," which "is not cognizable under section 2255(a)").

The court of appeals found further support for its interpretation of the saving clause in other provisions of Section 2255. Pet. App. 24a-26a. The court explained that although a Section 2255 motion "was intended to be a *substitute* remedy for the writ of habeas corpus, * * * permitting federal prisoners to file habeas petitions based on an intervening change in statutory interpretation provides those prisoners with a *superior* remedy."

Id. at 24a. The court observed that "allowing a prisoner to use the saving clause to bring a statutory claim in a habeas petition circumvents the bar on successive" motions under Section 2255, which must be premised on claims of factual innocence or particular new rules of constitutional law, *id.* at 25a (citing 28 U.S.C. 2255(h)); "does away with the one-year statute of limitations" for Section 2255 motions, *id.* at 25a-26a (citing 28 U.S.C. 2255(f)); and "renders the process for obtaining permission to file a second or successive motion, and that for obtaining a certificate of appealability, a nullity," *ibid.* (citing 28 U.S.C. 2253(b) and (c)(1)). "A prisoner who brings a constitutional claim under section 2255(h), in contrast, must overcome these procedural hurdles." *Ibid.* The court also observed that "[a]llowing a prisoner to bring an ordinary attack on his sentence in the district where he is detained" by filing a habeas petition would "resurrect[] the problems that section 2255 was enacted to solve," such as overburdening courts in districts with prisons and inconveniencing witnesses. *Id.* at 27a; see *id.* at 27a-28a.

b. Judge Jordan concurred in the judgment. Pet. App. 47a-66a. He agreed that relief under the saving clause should not be available for statutory sentencing claims like the one asserted by petitioner, but he concluded that such relief should remain available for claims asserting that "a new (and governing) interpretation of the statute of conviction demonstrates that [the federal prisoner] never committed a crime." *Id.* at 47a.

c. Four judges dissented in three different opinions. Pet. App. 67a-164a. Judge Wilson took the view that "the equitable nature of the Great Writ dictates" that the saving clause remedy remain available not only "to

a prisoner who asserts a claim of actual innocence," but also to "a prisoner whose sentence exceeds the statutory maximum" based on an intervening change in the law, as "each prisoner is being deprived of his liberty even though no law authorizes the deprivation." *Id.* at 67a. Judge Martin took the view that Section 2255 should be interpreted "to allow a prisoner to file a habeas petition under the savings clause when he shows that, at some point after his first § 2255 proceeding, there was a retroactive decision from an authoritative federal court, which interpreted a statute in a way that now reveals a fundamental defect in that prisoner's conviction or sentence." *Id.* at 77a. She also believed that petitioner was entitled to relief on the merits of his claim and that he should be resentenced to no more than ten years. *Id.* at 88a; see *id.* at 85a-87a. And Judge Rosenbaum took the view that, under the Suspension Clause, prisoners must be allowed to file habeas petitions raising "claims based on a retroactively applicable new rule of statutory law" when they "ha[ve] not previously had a meaningful opportunity to have had such claims heard." *Id.* at 91a.

6. Before the Eleventh Circuit reheard petitioner's appeal en banc, a panel of that court authorized him to file a second or successive motion under Section 2255 challenging the continued validity of his ACCA sentence in light of this Court's holding in *Johnson* v. *United States*, 135 S. Ct. 2551, 2556-2557 (2015), that the ACCA's residual clause is void for vagueness. Petitioner subsequently filed a second or successive Section 2255 motion raising a *Johnson* claim. See Gov't C.A. En Banc Br. 9. Proceedings on that motion have been stayed pending the outcome of the habeas petition in this case. See 16-cv-1768, Docket entry No. 17 (Nov. 14,

2016). On June 20, 2017, petitioner completed his term of imprisonment and was placed on supervised release. Pet. 5 n.1.

ARGUMENT

Petitioner contends (Pet. 12-21) that the saving clause in 28 U.S.C. 2255(e) allows a federal prisoner who has already unsuccessfully sought postconviction relief under Section 2555 subsequently to file a habeas petition that relies on a later-issued decision of statutory interpretation. The government agreed with that interpretation of the saving clause in the proceedings below, but has reconsidered its position in light of the court of appeals' decision in this case and has concluded that the decision correctly adheres to the text of the saving clause and Section 2255's overarching structural limitations on successive collateral attacks on the final judgment in a criminal case. Although a circuit conflict exists on the question presented, petitioner's case (which at this point involves only a challenge to the length of his term of supervised release, see Pet. 5 n.1) is not a suitable vehicle for addressing it. Petitioner has already been authorized to file a second or successive Section 2255 motion challenging the sentencing court's reliance on his escape conviction, and, in any event, his challenge to his sentence lacks merit because he has three qualifying ACCA predicates even without counting that conviction. The petition should be denied.

A. The Department Of Justice Has Reconsidered Its Position Regarding The Availability Of Habeas Relief

In 1996, Congress restricted the grounds on which federal prisoners may file second or successive Section 2255 motions by enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No.

104-132, § 105, 110 Stat. 1220. AEDPA limited the availability of successive Section 2255 motions to cases involving either (1) persuasive new evidence that the prisoner was not guilty of the offense, or (2) a new rule of constitutional law made retroactive by the Supreme 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.

In the immediate aftermath of AEDPA's enactment, criminal defendants who had already sought and been denied collateral relief under Section 2255, but who believed that an intervening statutory decision rendered their conduct of conviction noncriminal, instead sought writs of habeas corpus under 28 U.S.C. 2241. The Department of Justice argued that habeas relief was unavailable in that circumstance, including because it would have defeated Congress's newly enacted limits in Section 2255(h) on second or successive motions for collateral relief. After several courts of appeals rejected that view, however, the Department changed course and supported habeas relief for defendants whose conduct had in fact been rendered noncriminal. More recently, the Department has supported the availability of habeas relief for defendants who received sentences in excess of the statutory maximum and for defendants who were erroneously subject to mandatory-minimum sentences.

In light of subsequent developments, including the court of appeals' decision in this case, the Department of Justice has reconsidered the issue and now reverts to its original position. The statutory text compels the

view that habeas relief is not available to a defendant who, after having being denied Section 2255 relief, seeks to assert a statutory challenge to his conviction or sentence.

1. In *Bailey* v. *United States*, 516 U.S. 137, 139 (1995), this Court adopted a narrow construction of the requirement under 18 U.S.C. 924(c) that an offender must "use" a firearm during or in relation to a drug trafficking crime. As a result, in circuits that previously had given the statute a broader interpretation, a number of criminal defendants sought collateral relief arguing that their convictions were no longer valid. For defendants who had sought and been denied collateral relief under Section 2255 prior to *Bailey*, the Department of Justice took the position that relief was not available: Such a defendant could not file a second or successive Section 2255 motion because statutory claims are not included among the narrow circumstances in which second or successive motions are authorized, see 28 U.S.C. 2255(h); and he could not file a habeas petition under Section 2241 because a defendant generally may not file a habeas petition if he already has been "denied * * * relief" under Section 2255. 28 U.S.C. 2255(e). The Department further argued that the saving clause in Section 2255(e) did not authorize the defendant to seek habeas relief in that scenario because he could not show that Section 2255 was "inadequate or ineffective to test the legality of his detention." See generally, *e.g.*, U.S. Br., *In re Triestman*, No. 96-2563, 1996 WL 33485392 (2d Cir. 1996).

The first three courts of appeals that addressed the issue "decline[d] to adopt the government's restrictive reading of the habeas preserving provision of § 2255." *Triestman* v. *United States*, 124 F.3d 361, 376 (2d Cir.

1997). They held instead that habeas relief was available to a defendant whose conduct was non-criminal under an intervening decision of statutory interpretation like *Bailey*. See *In re Davenport*, 147 F.3d 605, 608-612 (7th Cir. 1998); *Triestman*, 124 F.3d at 373-380; *In re Dorsainvil*, 119 F.3d 245, 248-252 (3d Cir. 1997). Following *Davenport*, the government changed positions in cases where the availability of habeas relief was necessary "to ensure review of claims of factual [*i.e.*, actual] innocence that were not available when the earlier [Section 2255] motion was filed." U.S. Br. in Opp. at 10, *Ferreira* v. *Holt*, 532 U.S. 975 (2001) (No. 00-7317).

Having accepted that a defendant could seek habeas relief based on an intervening Supreme Court decision of statutory interpretation that rendered his conduct of conviction no longer criminal, the Department of Justice eventually determined that two additional categories of defendants could take advantage of the same exception. First, in 2010, the Department argued that habeas relief is available for a defendant who seeks to challenge, on the basis of an intervening Supreme Court decision, a sentence that exceeds the applicable statutory maximum. See *Hunter* v. *United States*, 449 Fed. Appx. 860, 862 (11th Cir. 2011) (per curiam). Second, in 2013, the Department adopted the view that habeas relief is similarly available to a defendant who argues that he was improperly subject to a mandatory-minimum sentence. See U.S. Br., *United States* v. *Surratt*, 797 F.3d 240 (2015), dismissed as moot, 855 F.3d 218 (4th Cir. 2017) (en banc), petition for cert. pending, No. 17-5255 (filed July 20, 2017).

2. The Department of Justice has now reconsidered the issue and has come to a different conclusion regarding the availability of habeas relief under the saving

clause. Reconsideration was prompted in part by the court of appeals' en banc decision in this case, which overruled circuit precedent permitting habeas relief. See Pet. App. 7a-12a (discussing, *inter alia*, *Mackey* v. *Warden*, 739 F.3d 657 (11th Cir. 2014); *Bryant* v. *Warden*, 738 F.3d 1253 (11th Cir. 2013)); see also *Prost* v. *Anderson*, 636 F.3d 578, 584-594 (10th Cir. 2011) (Gorsuch, J.), cert. denied, 565 U.S. 1111 (2012) (adopting a similar reading of Section 2255(e), but declining to address the issue of constitutional avoidance). Following the en banc ruling in this case, the Department determined that its prior interpretation of Section 2255 was insufficiently faithful to the statute's text and to Congress's evident purpose in limiting the circumstances in which a criminal defendant may file a second or successive petition for collateral review.

B. Section 2255 Is Not Inadequate Or Ineffective To Test The Legality Of Petitioner's Detention

The decision below properly interprets the saving clause in Section 2255(e). A prisoner who, like petitioner, previously sought relief by motion under Section 2255 may not file a habeas petition based on a subsequent decision of statutory interpretation.

1. An inmate serving a sentence of imprisonment imposed by a federal court may seek habeas corpus 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). Petitioner claims that Section 2255 is "inadequate or ineffective" because AEDPA's restrictions foreclose him from bringing his statutory claim in a second motion—and because circuit precedent foreclosed him from *prevailing* on his statutory claim in his first motion. But the language of the saving clause suggests a focus on whether a particular

challenge to the legality of the prisoner's detention is *cognizable* under Section 2255, not on the likelihood that the challenge would have succeeded in a particular court at a particular time. As the court of appeals explained, "'[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." Pet. App. 16a (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*, 636 F.3d at 584 (emphasis omitted). As Judge Easterbrook has explained, a "motion under § 2255 could reasonably be thought 'inadequate or ineffective to test the legality of the prisoner's detention' if a class of argument were categorically excluded, but when an argument is permissible but fails on the merits there is no problem with the adequacy of § 2255." *Brown* v. *Caraway*, 719 F.3d 583, 597 (7th Cir. 2013) (Easterbrook, C.J., concerning the circulation under Circuit Rule 40(e)) (brackets omitted).

Petitioner does not dispute that his argument concerning the proper interpretation of the ACCA could have been raised and considered on the merits in his initial Section 2255 motion. Although the argument was contrary to then-prevailing circuit law, petitioner could have sought en banc or certiorari review in an effort to have the adverse precedent overturned. See Pet. App. 17a. Regardless of the practical likelihood or unlikelihood that petitioner's challenge would have succeeded within the Eleventh Circuit at that time, the Section

2255 remedy therefore was neither inadequate nor ineffective to "test" the legality of his confinement. Cf. *Bousley* v. *United States*, 523 U.S. 614, 623 (1998) ("[F]utility cannot constitute cause [excusing 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).

Petitioner accordingly stops short of suggesting that a prisoner may file a habeas petition merely because the circuit in which he was convicted had adverse circuit precedent on the merits of a potential claim at the time of his first Section 2255 motion. He does not contend, for instance, that a prisoner who had unsuccessfully sought Section 2255 relief before *Bailey* in a circuit whose precedent had rejected that argument could, on the basis of that loss alone, claim that Section 2255 was "inadequate or ineffective" for him—thereby allowing him to seek habeas relief in the jurisdiction of his confinement, which might have more favorable circuit law. In other words, the existence of adverse circuit precedent alone is not sufficient to render the Section 2255 remedy "inadequate or ineffective." And if the remedy was not "inadequate or ineffective" at the time of the first Section 2255 motion, a later-issued, favorable merits decision of this Court does not make it "inadequate or ineffective" after the fact.

2. Treating Section 2255 as "inadequate or ineffective" to test the legality of petitioner's detention would also place Section 2255(e) at cross-purposes with Section 2255(h). That 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). The logical inference from the language Congress drafted is that Congress intended Section 2255(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. In particular, the most natural reason for Congress to include 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 the Supreme 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 would necessarily 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 prisoner in custody pursuant to a federal sentence of imprisonment may file an initial motion under Section 2255 "claim[ing] 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) (relying in part on italicized language to conclude that Section 2255 includes nonconstitutional claims). 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. 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 Supreme Court decisions of "constitutional law." 28 U.S.C. 2255(h)(2). That contrast strengthens the inference that Congress deliberately intended to preclude statutory claims following an unsuccessful Section 2255 motion. See *Prost*, 636 F.3d at 585-586, 591; cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (Congress's choice of different language in nearby provisions of same statute presumed to be deliberate).

Even if Section 2255(e)'s saving clause could literally bear the reading that petitioner urges, the clause should not be construed in a manner that would render AEDPA's restrictions on second or successive Section 2255 motions largely self-defeating. Although both Section 2241 and the saving clause were enacted substantially before the 1996 enactment of AEDPA's restrictions on second or successive Section 2255 motions, the interpretive principle that related statutory provisions should be read, if possible, to form a coherent whole is not limited to provisions that were contemporaneously enacted. See, *e.g.*, *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").

3. Petitioner's reading, moreover, would have the practical effect of granting 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. The requirement that a second or successive Section 2255 motion must be certified by a court of appeals panel to satisfy AEDPA's strict requirements, 28 U.S.C. 2255(h), does not apply to a petition for habeas corpus that is allowed to proceed under the saving clause. And a petition for habeas corpus is not subject to AEDPA's one-year limitations period, 28 U.S.C. 2255(f), or to the AEDPA procedure for obtaining a certificate of appealability if relief is denied by the district court, 28 U.S.C. 2253(c)(1). An interpretation that would "permit[] federal prisoners to file habeas petitions based on an intervening change in statutory interpretation," by obviating the need for inmates like petitioner to comply with AEDPA's requirements, thus "provides those prisoners with a *superior* remedy." Pet. App. 25a.

It is farfetched to suppose that the Congress that enacted AEDPA in 1996 intended these results. There is likewise no evidence that the Congress that enacted the saving clause in 1948 intended it to protect federal inmates from a future Congress's adoption of restrictions, like the ones that Section 2255(h) imposes, that redefine the point at which concern for finality should take precedence over the interest in additional error-correction and thereby should preclude further collateral attack. And even under the approach taken by the court of appeals, the saving clause has meaningful work to do. Among other things, 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." Pet. App. 28a. Such challenges are not cognizable under Section 2255, which is limited to attacks on the sentence itself. "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 29a; see *Prost*, 636 F.3d at 588.[1]

With respect to challenges like this one, moreover, allowing an inmate's second collateral attack to proceed by way of habeas corpus subverts "the legislative decision of 1948"—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) (Easterbrook, J., dissenting); see Pet. App. 27a-28a. 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

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[1] The saving clause refers to "[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 this section*." 28 U.S.C. 2255(e) (emphasis added). The italicized language is best understood to refer to the type of inmate referenced in Section 2255(a)—*i.e.*, "a prisoner in custody under sentence of a court established by Act of Congress"—rather than to the type of relief he seeks. Pet. App. 30a (citation omitted). Thus, a federal inmate who alleges a deprivation of good-time credits is "a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255, even though he does not contest the legality of his conviction or sentence and therefore has no claim cognizable under Section 2255(a). *Id.* at 29a (citation omitted).

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." Pet. App. 27a.

4. Principles of constitutional avoidance do not support the availability of habeas relief for prisoners like petitioner. None of the constitutional doctrines that have been mentioned as potential obstacles to reading the saving clause according to its terms—due process, the Suspension Clause, and separation of powers—precludes the effectuation of Congress's directive.

a. There is no merit to the underdeveloped suggestion of at least two courts of appeals that an inmate might be entitled under the Due Process Clause to a second opportunity for collateral review when an intervening judicial decision indicates that the conduct for which he was convicted does not actually violate the relevant criminal statute. See *Triestman*, 124 F.3d at 378-379; *Dorsainvil*, 119 F.3d at 248. An individual who is convicted of a crime has no due process right to any post-conviction review, or even to any direct appeal. See *United States* v. *MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion) ("The Due Process Clause of the Fifth Amendment does not establish any right to an appeal and certainly does not establish any right to collaterally attack a final judgment of conviction.") (citation omitted); *McKane* v. *Durston*, 153 U.S. 684, 687 (1894); see also *Pennsylvania* v. *Finley*, 481 U.S. 551, 556-557 (1987) ("States have no obligation to provide" a prisoner with any post-conviction review, which is "even further removed from the criminal trial than is discretionary direct review," and which "is not part of the criminal proceeding itself."). Congress has of course

authorized persons convicted of federal criminal offenses to appeal their convictions and sentences. Statutory challenges of the sort at issue here are also cognizable on initial motions under Section 2255, as are preserved claims that the prisoner's sentence exceeds the maximum authorized by statute. See *United States* v. *Newbold*, 791 F.3d 455, 460-461 (4th Cir. 2015). But the Due Process Clause does not require Congress to provide for a *second* round of collateral review at all, let alone to extend Section 2255(h)'s authorization to encompass statutory claims. See *Hale* v. *Fox*, 829 F.3d 1162, 1175 (10th Cir. 2016), cert. denied, 137 S. Ct. 641 (2017).

b. The restrictions on second or successive motions imposed by Section 2255(h) are likewise consistent with the Suspension Clause. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, Cl. 2. "To argue that section 2255 suspends the writ ignores that at common law, the writ of habeas corpus would not have been available at all to prisoners" who, like petitioner, are confined pursuant to federal criminal convictions. Pet. App. 32a. But even assuming that the Suspension Clause applies to federal postconviction habeas review and would bar a current Congress from eliminating *all* collateral review of federal prison sentences, statutory-interpretation claims of the sort that petitioner seeks to raise are cognizable on an initial Section 2255 motion. In *Felker* v. *Turpin*, 518 U.S. 651, 663-664 (1996), this Court upheld against a Suspension Clause challenge the parallel restrictions that AEDPA places on second or successive habeas petitions filed by state prisoners, see 28 U.S.C. 2244(b),

and the restrictions imposed by Section 2255(h) are similarly valid.

c. Applying Section 2255(h) in accordance with its plain terms is consistent with constitutional principles of separation of powers. It is Congress's prerogative to define the jurisdiction of the federal courts and, in particular, to fashion the measures that it deems appropriate for correcting the legal errors that inevitably occur in the course of judicial proceedings. In crafting a comprehensive and reticulated scheme for appellate and collateral review of federal criminal convictions and sentences, Congress can (within constitutional limits) strike what it views as the appropriate balance between error-correction and finality. Separation-of-powers principles thus counsel judicial respect for a congressional judgment not to authorize habeas relief at the behest of a federal inmate who previously filed a Section 2255 motion and raises only a statutory claim. See Pet. App. 45a (Carnes, J., concurring) (constitutional doctrine of separation of powers "is best served by respecting the fundamental principle that it is the role of Congress, not the Courts, to decide what the statutory law is to be, and Congress has done that in § 2255(h)").

Although Congress's decision to foreclose relief for a prisoner like petitioner who wishes to invoke a non-constitutional rule of law when launching a second or successive collateral attack on his criminal judgment can lead to "harsh results in some cases," courts are "not free to rewrite the statute that Congress has enacted." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005). 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 is currently working on a legislative proposal that would enable some prisoners to benefit from later, 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. See Dep't of Justice, *United States Attorneys' Manual* §§ 1-2.112, 1-2.113 (1997) (standards for considering pardon and commutation petitions), https://www.justice.gov/usam/usam-1-2000-organization-and-functions.

C. This Case Is Not An Appropriate Vehicle To Resolve The Division Among The Courts Of Appeals

Although the circuits are divided regarding the availability of habeas relief under the saving clause, most courts of appeals have squarely addressed the issue only in the context of a prisoner who challenges his conviction, rather than his sentence (as petitioner does). Even the former cases—*i.e.*, those in which a prisoner alleges that he was convicted of conduct that has been rendered noncriminal by an intervening decision of statutory interpretation—arise relatively infrequently. Nevertheless, given the significance of the issue in the small set of cases in which it does arise, this Court's review would be warranted in an appropriate case. But petitioner does not present such a case.

1. As petitioner observes (Pet. 13-21), the courts of appeals are divided about whether Section 2241 relief is available under the saving clause based on a retroactive decision of statutory construction. See Court-Appointed Amicus C.A. Br. 6-10 (explaining the development of circuit law). Nine circuits have held that such

relief is available in at least some circumstances.[2] Although those courts have offered varying rationales and have adopted somewhat different formulations, they generally agree that the remedy provided by Section 2255 is "inadequate or ineffective to test the legality of [a prisoner's] detention" if (1) an intervening decision of this Court has narrowed the reach of a federal criminal statute, such that the prisoner now stands convicted of conduct that is not criminal; and (2) controlling circuit precedent squarely foreclosed the prisoner's claim at the time of his trial, appeal, and first motion under Section 2255. See, *e.g.*, *Reyes-Requena* v. *United States*, 243 F.3d 893, 902-904 (5th Cir. 2001); *In re, Jones*, 226 F.3d 328, 333-334 (4th Cir. 2000); *Davenport*, 147 F.3d at 609-612.

Only two courts of appeals have held that a prisoner like petitioner may invoke the saving clause to pursue a claim that his sentence exceeds the applicable statutory maximum. See *Brown* v. *Rios*, 696 F.3d 638, 640-641 (7th Cir. 2012) (ACCA case); see also *Hill* v. *Masters*, 836 F.3d 591, 595-596, 599-600 (6th Cir. 2016) (authorizing habeas application by prisoner sentenced as career offender under mandatory Sentencing Guidelines regime, where prisoner's underlying assault conviction no

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[2] See *United States* v. *Barrett*, 178 F.3d 34, 50-53 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); *Triestman*, 124 F.3d at 375-378 (2d Cir.); *Dorsainvil*, 119 F.3d at 251-252 (3d Cir.); *In re Jones*, 226 F.3d 328, 334 (4th Cir. 2000); *Reyes-Requena* v. *United States*, 243 F.3d 893, 903-904 (5th Cir. 2001); *Wooten* v. *Cauley*, 677 F.3d 303, 307 (6th Cir. 2012); *Davenport*, 147 F.3d at 609-612 (7th Cir.); *Stephens* v. *Herrera*, 464 F.3d 895, 898 (9th Cir. 2006), cert. denied, 549 U.S. 1313 (2007); *In re Smith*, 285 F.3d 6, 7-8 (D.C. Cir. 2002); see also *Abdullah* v. *Hedrick*, 392 F.3d 957, 960-964 (8th Cir. 2004) (discussing majority rule without expressly adopting it), cert. denied, 545 U.S. 1147 (2005).

longer qualified as "crime of violence" following *Descamps* v. *United States*, 133 S. Ct. 2276 (2013)).

By contrast, two courts of appeals have held that Section 2255(e) does not permit habeas relief based on an intervening decision of statutory interpretation in any circumstance. In *Prost*, the Tenth Circuit denied habeas relief on the ground that Section 2255 was not inadequate or ineffective even though circuit precedent likely would have foreclosed the prisoner's claim in his initial Section 2255 motion. 636 F.3d at 584-585, 590. That conclusion mirrors the Eleventh Circuit's decision in this case. See Pet. App. 1a-3a, 42a.

2. This case would be an unsuitable vehicle for addressing whether a federal prisoner may use the saving clause to seek habeas relief based on an intervening decision of statutory interpretation that narrows the scope of a federal criminal statute. Even in the circuits that generally permit such relief, petitioner would not be eligible for it. This Court has repeatedly denied review of petitions raising questions about the scope of the saving clause—including petitions that were filed after the circuit conflict arose—in which case-specific factors prevented the petitioning prisoner from demonstrating his eligibility for habeas relief. See, *e.g.*, *Montana* v. *Werlich*, 137 S. Ct. 1813 (2017) (No. 16-775); *Williams* v. *Hastings*, 135 S. Ct. 52 (2014) (No. 13-1221); *Abernathy* v. *Cozza-Rhodes*, 134 S. Ct. 1874 (2014) (No. 13-7723); *Prince* v. *Thomas*, 134 S. Ct. 160 (2013) (No. 12-10719); *Blanchard* v. *Stephens*, 133 S. Ct. 2021 (2013) (No. 12-7894); *Jones* v. *Castillo*, 568 U.S. 1258 (2013) (No. 12-6925); *Thornton* v. *Ives*, 568 U.S. 1251 (2013) (No. 12-6608); *Youree* v. *Tamez*, 568 U.S. 1126 (2013) (No. 12-5768); *McKelvey* v. *Rivera*, 568 U.S. 1126 (2013)

(No. 12-5699); *Sorrell* v. *Bledsoe*, 565 U.S. 1229 (2012) (No. 11-7416). The same result is warranted here.

a. Section 2255(e) authorizes a prisoner to apply for a writ of habeas corpus only where "it also appears that the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." Accordingly, the circuits that permit a prisoner to seek habeas relief for a statutory-based claim do so only where such a request for relief cannot successfully be asserted under Section 2255. See, *e.g.*, *Reyes-Requena*, 243 F.3d at 900; *Jones*, 226 F.3d at 332; see pp. 25-26 & n.2, *supra*.

Petitioner, however, still may obtain relief under Section 2255. The court of appeals has authorized petitioner to file a second or successive Section 2255 motion challenging the sentencing court's reliance on his Florida escape conviction in light of this Court's invalidation of the ACCA's residual clause in in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Petitioner has filed such a motion, and proceedings on that motion have been stayed pending the outcome of this case. See p. 10, *supra*. Thus, petitioner may yet succeed under Section 2255 in establishing that his sentence is unlawful; if successful, petitioner's Section 2255 motion would give him the very relief that he presently seeks through his habeas application.

Petitioner contends (Pet. 24-25) that the pendency of his Section 2255 motion "presents no obstacle" to this Court's consideration of his habeas petition because "petitioner's *Chambers* and *Johnson* claims are discrete." Yet the relevant question under the saving clause is whether petitioner may adequately or effectively "test the legality of his detention" by motion under Section 2255. Given the pendency of petitioner's

Section 2255 motion—which seeks to invalidate the same ACCA predicate as does his habeas application—there can be no question that Section 2255 remains available to him for that purpose. A *Johnson*-based determination that the residual clause is too vague to encompass his escape conviction would be the same (from petitioner's perspective) as a *Chambers*-based determination that the residual clause would not encompass his escape conviction even if it were not unconstitutionally vague. Although petitioner suggests (Pet. 25) that this Court could grant him habeas relief under the saving clause as a means of mooting or sidestepping the question of his eligibility for relief under Section 2255, that suggestion cannot be squared with Congress's undisputed choice to make habeas relief available only where Section 2255 relief is not. Given that *Johnson* invalidated the ACCA's residual clause *in toto*, this Court should not authorize extraordinary measures simply to provide petitioner with the opportunity to argue that his escape conviction would not have fallen within that clause as a matter of statutory interpretation.

b. Review is also unwarranted here because petitioner would not be entitled to relief even if the courts below had jurisdiction over his habeas petition. Even if his escape conviction were not an ACCA predicate, he would remain subject to the ACCA by virtue of three other ACCA-qualifying prior convictions. See 18 U.S.C. 924(e).

As petitioner acknowledges (Pet. 23-24), the original court of appeals panel reached that very conclusion under then-valid circuit precedent permitting habeas relief based on intervening decisions of statutory construction. Pet. App. 183a-198a. The panel determined that petitioner had three prior convictions for "serious

drug offenses" within the meaning of the ACCA: a 1987 conviction under Florida law for possessing with intent to sell or deliver cocaine and two 1988 convictions under Georgia law for possessing with intent to distribute cocaine. *Id.* at 192a, 198a; see 18 U.S.C. 924(e)(2)(A)(ii). The PSR listed those three convictions, as well as petitioner's escape and third-degree murder convictions. PSR ¶¶ 31-34, 38. The PSR did not indicate which convictions it had relied upon in recommending an ACCA sentence, PSR ¶¶ 22, 43, 77, and the district court likewise did not specify which convictions it was relying upon in imposing such a sentence, Sent. Tr. 6-9.

The panel correctly recognized that its consideration of the validity of petitioner's sentence was not limited to any particular subset of his prior convictions, because petitioner had "forfeited any objection to the sentencing court's failure to identify the specific convictions supporting his ACCA enhancement" by failing to timely object to any lack of specificity in either the PSR or the district court's sentencing decision. Pet. App. 191a. In the absence of such an objection, the sentencing court could properly rely on all of petitioner's prior convictions to determine his sentence. See Fed. R. Crim. P. 32(i)(3)(A) (sentencing court "may accept any undisputed portion of the presentence report as a finding of fact"); see also *United States* v. *Beckles*, 565 F.3d 832, 844 (11th Cir. 2009) ("Facts contained in a PSI are undisputed and deemed to have been admitted unless a party objects to them before the sentencing court with specificity and clarity.") (citation and internal quotation marks omitted).

Furthermore, even apart from petitioner's forfeitures, he could not obtain habeas relief under this Court's precedents addressing a prisoner's eligibility

for collateral relief. This Court has recognized a narrow set of statutory claims based on intervening changes of judicial interpretation that are cognizable on collateral review in order to redress "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis*, 417 U.S. at 346 (citation omitted). In those "rare cases in which the Supreme Court has found post-conviction 'miscarriages of justice' to have occurred, it has relied on the actual innocence of the petitioner." *United States* v. *Foote*, 784 F.3d 931, 940 (4th Cir.), cert. denied, 135 S. Ct. 2850 (2015); see *Davis*, 417 U.S. at 346 ("'miscarriage of justice'" occurs where prisoner's "conviction and punishment are for an act that the law does not make criminal") (citation omitted). The courts of appeals that permit a prisoner to seek habeas relief based on an intervening statutory-interpretation decision have similarly allowed such relief under the theory that the prisoner was actually innocent of the underlying offense. See *Hill*, 836 F.3d at 594 ("[A] petitioner may test the legality of his detention under § 2241 through the § 2255(e) savings clause by showing that he is 'actually innocent.'") (quoting *Wooten*, 677 F.3d at 307); see, *e.g.*, *Stephens*, 464 F.3d at 898; *Jones*, 226 F.3d at 333 n.3, 334; *Barrett*, 178 F.3d at 48.

Petitioner below "argued that *Chambers* made him actually innocent of the [ACCA] sentencing enhancement." Pet. App. 4a (brackets and internal quotation marks omitted). But even assuming that a sentence imposed in excess of the statutory maximum is cognizable under the saving clause, petitioner cannot make the requisite showing that he is actually innocent of the ACCA enhancement. "'[A]ctual innocence,'" as this Court has explained, "means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623; see

Calderon v. *Thompson*, 523 U.S. 538, 559 (1998) ("The miscarriage of justice exception is concerned with actual as compared to legal innocence.") (brackets and citation omitted). As a result, "the Government is not limited to the existing record to rebut any showing that [the prisoner] might make," but instead may "present any admissible evidence of [the prisoner's] guilt even if that evidence was not presented during [the prisoner's] plea colloquy." *Bousley*, 523 U.S. at 624.

Petitioner is ineligible for relief under that standard: He has never disputed that his three prior drug convictions are ACCA predicates. Petitioner therefore cannot show that he is actually innocent of an ACCA-enhanced sentence. Because petitioner would not prevail on his habeas claim even if it were cognizable under the saving clause, this case is an inappropriate vehicle for addressing the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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