

IN THE SUPREME COURT OF THE UNITED STATES

EZELL GILBERT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

28 U.S.C. 2255 (Supp. III 2009) provides that a federal prisoner who may seek relief under that provision may not apply for federal habeas corpus relief under 28 U.S.C. 2241 unless the remedy by motion under Section 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e) (Supp. III 2009). The questions presented are:

1. Whether petitioner is entitled to seek federal habeas corpus relief under Section 2241 based on his claim that intervening and retroactively applicable statutory-construction decisions establish that the district court misapplied the career-offender provisions of the then-mandatory federal Sentencing Guidelines.

2. Whether petitioner's motion under Federal Rule of Civil Procedure 60(b) seeking to reopen and amend his Section 2255 motion after it became final in order to raise a new claim attacking the validity of his career-offender sentence was an unauthorized second or successive collateral attack.

IN THE SUPREME COURT OF THE UNITED STATES

No. 11-6053

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A 1-41) is reported at 640 F.3d 1293. The panel opinion of the court of appeals (Pet. App. B 1-8) is reported at 609 F.3d 1159. The opinion of the court of appeals affirming petitioner's sentence on direct appeal (Pet. App. D 1-5) is reported at 138 F.3d 1371. The opinions of the district court denying petitioner's Federal Rule of Civil Procedure 60(b) motion to reopen his Section 2255 motion (Pet. App. C1 1-5), and declining to modify petitioner's sentence pursuant to 18 U.S.C. 3582(c) (Pet. App. C2 1-6), are unpublished, but are available at 2009 WL 981918 and 2009 WL 151108,

respectively.

JURISDICTION

The judgment of the en banc court of appeals was entered on May 19, 2011. The petition for a writ of certiorari was filed on August 17, 2011. 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 cocaine base (Count 1) and marijuana (Count 2) with intent to distribute it, both in violation of 21 U.S.C. 841(a)(1). He was sentenced as a career offender to 292 months of imprisonment on Count 1 and 120 months of imprisonment on Count 2, to run concurrently. The court of appeals affirmed petitioner's sentence, holding that petitioner's prior Florida conviction for carrying a concealed weapon (CCW) was a "crime of violence" for purposes of the career-offender guideline, Sentencing Guidelines § 4B1.1. Pet. App. D 1-5.

In 2003, the district court denied petitioner's Section 2255 motion for post-conviction relief. In 2009, petitioner filed a motion under Federal Rule of Civil Procedure 60(b) seeking to reopen his Section 2255 motion and to amend it by adding a challenge to his career-offender classification and sentence based

on United States v. Archer, 531 F.3d 1347, 1352 (2008), a later-issued Eleventh Circuit case holding that a Florida CCW conviction could no longer be classified as a "crime of violence" under this Court's decision in Begay v. United States, 553 U.S. 137 (2008). The district court dismissed petitioner's Rule 60(b) motion for lack of jurisdiction, holding that it was a second or successive Section 2255 motion. Pet. App. C1 1-5. A panel of the court of appeals vacated petitioner's sentence and remanded for resentencing. Id. at B 1-8. The en banc court of appeals vacated the panel opinion and affirmed petitioner's sentence. Id. at A 1-41.

1. On October 11, 1995, police officers observed petitioner engage in what appeared to be hand-to-hand drug sales while seated in a car. Officers stopped the car and asked petitioner for his license and registration. Petitioner opened the glove compartment to retrieve those documents, and a clear plastic bag containing a white rocky substance fell out. Following additional questioning, the officers arrested petitioner. A subsequent search of the car uncovered a bag of marijuana under the driver's seat. The substance in the bag that fell from the glove compartment was tested and determined to be crack cocaine. PSR paras. 6-9.

2. In December 1995, a federal grand jury in the Middle District of Florida returned an indictment charging petitioner with possession of cocaine base (Count 1) and marijuana (Count 2) with

intent to distribute it, both in violation of 21 U.S.C. 841(a)(1). Petitioner pleaded guilty to both counts, admitting that he intended to distribute "more than 50 grams of crack cocaine" and "more than 100 grams of marijuana." Doc. 31, at 9-11. Consistent with petitioner's admissions, the Presentence Investigation Report (PSR) determined that petitioner had possessed 67 grams of cocaine base and 111 grams of marijuana. PSR paras. 10, 15. The district court adopted those findings without objection (Doc. 51, at 4), resulting in statutory sentencing ranges of ten years to life imprisonment on Count 1, see 21 U.S.C. 841(b)(1)(A)(iii), and zero to ten years of imprisonment on Count 2, see 21 U.S.C. 841(b)(1)(D). PSR para. 15.

The PSR recommended that petitioner be sentenced as a career offender because he had "at least two prior felony convictions of either a crime of violence or a controlled substance offense," Sentencing Guidelines § 4B1.1(a)(3), i.e., a 1990 Florida conviction for possession with intent to distribute cocaine (PSR para. 28) and a 1994 Florida CCW conviction (PSR para. 31). PSR para. 24. The PSR calculated a then-mandatory career-offender Guidelines range of 292 to 365 months of imprisonment. See PSR paras. 27, 36, 64. Absent the career-offender enhancement, petitioner would have faced a mandatory Guidelines range of 151 to 188 months. PSR paras. 23, 35.

Petitioner objected to the PSR's career-offender

recommendation. Doc. 42; Doc. 51, at 3. He argued that his Florida CCW conviction was not a "crime of violence" because it did not "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." Sentencing Guidelines § 4B1.2(a)(2). The district court overruled petitioner's objection, explaining that because the court of appeals had previously held that a Florida CCW conviction was a "violent felony" under the similarly worded provision of the Armed Career Criminal Act of 1984 (ACCA), see United States v. Hall, 77 F.3d 398, 401 (11th Cir. 1996), a CCW conviction was also a "crime of violence" under the career-offender guideline. Doc. 51, at 4-5; PSR Addendum 2 para. 3; see also United States v. Lee, 586 F.3d 859, 869 n.7 (11th Cir. 2009) (decisions interpreting the ACCA apply to the career-offender guideline).¹ Although the court stated that even a low-end career-offender sentence would be "too high," Doc. 51, at 4-5, it concluded that it could not impose a lower sentence and sentenced petitioner to 292 months of imprisonment on Count 1 and a concurrent term of 120 months of imprisonment on Count 2. Id. at 5-6.

¹ The ACCA mandates a 15-year minimum sentence and permits a maximum sentence of life for felons who possess a firearm and whose criminal history includes three or more prior convictions for a "violent felony" or "serious drug offense." See Logan v. United States, 552 U.S. 23, 27 (2007); Custis v. United States, 511 U.S. 485, 487 (1994). The ACCA defines a "violent felony" to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

The court of appeals affirmed petitioner's sentence (Pet. App. D 1-5), agreeing with the district court that, in light of Hall, "carrying a concealed weapon in violation of Florida law is a 'crime of violence' under U.S.S.G. 4B1.2." Id. at 3. This Court denied certiorari. 526 U.S. 1111 (1999).

3. In September 1999, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255(a), raising ineffective assistance of counsel, a challenge to the sufficiency of the evidence that the cocaine at issue was "crack cocaine," and a challenge to the district court's refusal to depart downward at sentencing. Doc. 63. Petitioner later amended his motion to add a Sixth Amendment challenge to the district court's drug quantity findings based on Apprendi v. New Jersey, 530 U.S. 466 (2000). Doc. 64.

In July 2003, the district court denied petitioner's amended Section 2255 motion. Doc. 84. Both the district court and the court of appeals denied petitioner's applications for a certificate of appealability. Doc. 93, 94; see 28 U.S.C. 2253(c).

4. a. On November 1, 2007, the United States Sentencing Commission published Amendment 706, which reduced by two levels the base offense level for most defendants who were sentenced based on the drug-quantity table applicable to crack cocaine offenses, Section 2D1.1. See U.S.S.G. Supp. App. C, Amdt. 706 (2007). On March 3, 2008, the Commission made that amendment retroactive. See

id., Amdt. 713.

b. In April 2008, this Court decided Begay, supra, in which it held that the ACCA's residual clause covers only crimes that "typically involve purposeful, violent, and aggressive conduct." 553 U.S. at 158 (citation omitted). Two months later, in June 2008, the Eleventh Circuit decided Archer, supra, in which it overruled its earlier decision in petitioner's case by holding that, in light of Begay, a Florida CCW conviction could no longer be deemed a "crime of violence" under Guidelines § 4B1.2 because it "does not involve[] aggressive, violent conduct" or "purposeful conduct." 531 F.3d at 1348, 1351.

c. In August 2008, the district court, acting sua sponte, entered an order directing the parties to file briefs addressing petitioner's entitlement, if any, to a sentence modification under 18 U.S.C. 3582(c) in light of Amendments 706 and 713. See generally Dillon v. United States, 130 S. Ct. 2683 (2010) (discussing Section 3582(c) motions in the context of Amendments 706 and 713). The government's filing asserted that petitioner was ineligible for a sentence modification because he had been sentenced under the career-offender guideline, not the crack cocaine guideline to which the amendment applied. Doc. 104. Petitioner's filing acknowledged that he had been sentenced under the career-offender guideline, but argued that he was entitled to a modification of his sentence because his career-offender

classification was no longer valid in light of Archer.

On January 21, 2009, the district court declined to modify petitioner's sentence in light of Amendments 706 and 713. Pet. App. C2 1-8. The court independently considered whether it could grant petitioner any form of collateral relief from his career-offender sentence in light of Archer, but concluded that even though "under the present interpretation of the law [petitioner] is no longer deemed a career offender and has served the time that would be required of him were he sentenced today," id. at 6, the court could not grant relief because petitioner had previously sought relief under Section 2255, and he could not file a successive Section 2255 motion.

d. On January 28, 2009, petitioner filed a motion pursuant to Federal Rule of Civil Procedure 60(b) seeking to "reopen" his Section 2255 motion and "amend" it by adding a claim that he had been erroneously classified and sentenced as a career offender in light of Begay and Archer. The district court denied petitioner's motion. Pet. App. C1 1-5. The court concluded that petitioner's motion was, in substance, an unauthorized successive Section 2255 motion, not a valid Rule 60(b) motion, because it asserted a claim for relief from judgment in the underlying criminal case, rather than attacking the integrity of the judgment denying the Section 2255 motion. Id. at 2-3 (citing Gonzalez v. Crosby, 545 U.S. 524, 530 (2005)). The district court concluded that it therefore lacked

jurisdiction over petitioner's Rule 60(b) motion because he had not obtained authorization to file a successive Section 2255 motion. Id. at 3-4.²

The court further rejected petitioner's alternative argument that it construe his "motion to reopen" as a petition for a writ of habeas corpus under 28 U.S.C. 2241. "Typically," the court explained, "a federal prisoner must collaterally attack the validity of a federal conviction or sentence through a motion under [Section] 2255." Pet. App. Cl 4. "Under limited circumstances, however, [Section] 2255 allows a federal prisoner to file a habeas petition pursuant to Section 2241." Ibid. Specifically, a Section 2241 habeas petition may be brought when "the remedy by [Section 2255] motion is inadequate or ineffective to test the legality of

² Petitioner requested that, in the event the district court denied his motion, it transfer the application to the court of appeals under 28 U.S.C. 1631 to allow that court to consider whether to authorize petitioner to file a successive Section 2255 motion. The district court granted that request, Pet. App. Cl 5, and transferred the motion. The record does not indicate that the court of appeals ever ruled upon that application, but the court of appeals had previously (and correctly) concluded that Congress has not authorized federal prisoners to file a successive Section 2255 motion on the basis of intervening decisions of statutory interpretation. See 28 U.S.C. 2255(h) (Supp. III 2009) (court of appeals may authorize a successive Section 2255 motion only if it certifies that the motion is based on either (1) newly discovered evidence that establishes, under the clear-and-convincing standard, that no reasonable factfinder would have found the prisoner guilty of the offense; or (2) a new rule of constitutional law that was previously unavailable and that this Court has made retroactive to cases on collateral review); see also In re Blackshire, 98 F.3d 1293, 1294 (11th Cir. 1996) (denying authorization to file a successive Section 2255 motion based on an intervening decision of statutory interpretation).

his detention." 28 U.S.C. 2255(e) (Supp. III 2009); see Pet. App. C1 4. Relying on the Eleventh Circuit's decision in Wofford v. Scott, 177 F.3d 1236 (1999), the district court explained that Section 2255 is "inadequate or ineffective" "only" when "(1) the petitioner's claim is based on a retroactively applicable Supreme Court decision; (2) the holding of that decision established that the petitioner was convicted of a nonexistent offense; and (3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised at the petitioner's trial, appeal, or first [Section] 2255 motion." Ibid. (quoting Wofford, 177 F.3d at 1244) (internal quotation marks omitted). The court concluded that petitioner "cannot meet the second prong of the Wofford test" because "Begay and Archer do not render 'non-existent' the offense for which petitioner was convicted." Id. at 4-5.

5. A three-judge panel vacated the district court's order and remanded for resentencing. Pet. App. B 1-8. The panel agreed that the pertinent question was whether petitioner was entitled to seek habeas corpus relief, and, to decide that question, the court asked whether petitioner had shown that Section 2255 was "inadequate or ineffective" to test the legality of his detention. Id. at 4. The panel also agreed that the answer to that question was to be guided by the three-part Wofford test. Ibid. The court explained that the Wofford test was formulated after review of the decisions of

other circuits finding Section 2255 "inadequate or ineffective" in the wake of this Court's decision in Bailey v. United States, 516 U.S. 137 (1995). In Bailey, the Court narrowly interpreted "use" of a firearm "during and in relation to a drug trafficking crime" under 18 U.S.C. 924(c)(1) to require proof that the defendant "active[ly] employ[ed] * * * the firearm." Id. at 139, 144. The court rejected the lower courts' more expansive interpretation of the statute that mere possession of a firearm constituted "use." Prisoners who were convicted of "using" a firearm under the now-repudiated pre-Bailey "possession" theory of use thus had been convicted "for an act that the law does not make criminal," Davis v. United States, 417 U.S. 333, 346 (1998), by virtue of the precept that, "under our federal system, it is only Congress, and not the courts, which can make conduct criminal." Bousley v. United States, 523 U.S. 614, 620-621, 626 (1998). Those prisoners who had already sought collateral relief under Section 2255, however, could not seek successive collateral relief because Bailey involved neither new evidence of actual innocence nor a new retroactive rule of constitutional law. See 28 U.S.C. 2255(h). Accordingly, the courts of appeals that considered the issue concluded that the categorical, structural limitations on the filing of a successive Section 2255 motions could render Section 2255 inadequate or ineffective. Those limitations could operate to deprive a prisoner, through no fault of his own, of a reasonable

procedural opportunity to seek redress for an error as fundamental as a conviction for a non-existent offense that manifested itself when this Court issued a new, retroactive decision of statutory construction that abrogated lower-court precedent expansively construing a federal criminal statute. Pet. App. B 4-5.

The panel held that petitioner's claim satisfied the Wofford test. The court found that "Begay and Archer apply retroactively" to cases on collateral review because those decisions announced a substantive interpretation of a federal statute. Pet. App. B 5. The court further concluded that "circuit law squarely foreclosed" petitioner's claim -- that a Florida CCW conviction is not a "crime of violence." Id. at 2, 5. According to the court, the determinative issue was the second Wofford criterion, *i.e.*, whether petitioner had shown that he had been convicted of a "non-existent offense." Id. at 5. The court of appeals concluded that he had, reasoning that petitioner's claim was "like a Bailey claim" in that it asserted an error of "fundamental dimension," *i.e.*, being convicted and sentenced for the "non-existent offense" of "being a career offender with only one prior [predicate] felony." Ibid. "For federal sentencing purposes," the court explained, "the act of being a career offender is essentially a separate offense, with separate elements (two felony convictions; for violent felonies), which must be proved, for which separate and additional punishment is provided." Id. at 6.

Having determined that Section 2255 was "inadequate or ineffective," the court allowed petitioner to seek habeas corpus relief. Turning to the merits of petitioner's claim, the court concluded that petitioner was entitled to habeas relief because he was "actually innocent of his sentence enhancement." Pet. App. B 7; see also id. at 6 (petitioner is "innocent of the statutory 'offense' of being a career offender"). Accordingly, the court vacated the judgment and remanded the case to the district court for resentencing. Id. at 8.

6. The en banc court of appeals vacated the panel opinion and affirmed petitioner's sentence. Pet. App. A 1-41. Like the panel, the en banc court focused on the Wofford criteria to determine whether petitioner was entitled to seek habeas relief under Section 2241, and its analysis centered on the question whether petitioner had been convicted of a "non-existent offense." The court concluded that he had not, for three principal reasons.

First, the court held that nothing in Begay or Archer established that "the crimes for which [petitioner] was convicted, possessing crack cocaine with intent to distribute and possessing marijuana with intent to distribute," did not "exist" (in the sense that they had not been proscribed by Congress), as was true after Bailey. Pet. App. A 25. Second, the court rejected petitioner's argument that he had been convicted of a different "non-existent" offense, namely, the "offense of being a career offender with only

one qualifying predicate offense." Ibid. The court explained that Guidelines enhancements, such as the career-offender enhancement, are not elements of a crime. Ibid. ("A defendant who is convicted and then has the [Section] 4B1.1 career offender enhancement, or any other guidelines enhancement, applied in the calculation of his sentence has not been convicted of being guilty of the enhancement. If guidelines enhancements were crimes, they would have to be charged in the indictment and proven to the jury beyond a reasonable doubt.").

Third, the court acknowledged that its decision in Wofford suggested, in dicta, that Section 2255 could in theory be deemed inadequate or ineffective to the extent it deprived a prisoner who had been convicted of a valid offense from having any opportunity to raise a claim of a "fundamental defect in sentencing," Pet. App. A 24-25 & n.20, but it concluded that the Guidelines error of which petitioner complained was not an error of "fundamental" proportions. Ibid.; see also id. at 27. In that regard, the court noted the government's concession that a sentencing error that results in a sentence "longer than the statutory maximum" for the underlying offense would qualify as a fundamental defect, cognizable and redressable under Section 2241 if Section 2255 is inadequate. Id. at 13. But the court expressly declined to decide that issue because petitioner's sentence "did not exceed the statutory maximum" for his crime, ibid., which, by virtue of the

quantity of crack cocaine involved, was life imprisonment. Id. at 14. The court thus concluded that "the savings clause does not apply to sentencing claims, at least not those where the sentence imposed was within the statutory maximum." Id. at 21.

The court rejected the suggestion that its holding violated the Suspension Clause. Pet. App. A 22-24 (citing Felker v. Turpin, 518 U.S. 651 (1996)). It also distinguished this Court's recognition of an actual-innocence exception for certain capital sentencing errors in Sawyer v. Whitley, 505 U.S. 333 (1992), on numerous grounds, including that petitioner "fail[ed] to meet the exception's requirement that but for the claimed error he would not have been statutorily eligible for the sentence he received." Pet. App. A 27.

Finally, the court rejected petitioner's request to have his first Section 2255 motion reopened under Federal Rule of Civil Procedure 60(b). The court noted that petitioner sought to add a new claim for relief, rather than attacking the integrity of the denial of his earlier Section 2255 motion. Pet. App. A 28. According, the court explained, under Gonzalez v. Crosby, 545 U.S. 524 (2005), his motion "is the equivalent of a second or successive motion and is barred by [Section] 2255(h)." Pet. App. A 28-29.

Chief Judge Dubina concurred specially, noting that, although he was a member of the original panel, he was now persuaded that petitioner's "Guidelines claim does not fall within the savings

clause of 28 U.S.C. [Section] 2255." Pet. App. A 29. Judge Tjoflat, joined by Judge Edmondson, concurred, expressing agreement with the reasons for denying petitioner relief, but declining to join certain sections of the opinion. Ibid.

Judge Pryor concurred. Pet. App. A 30-33. He wrote separately to respond to the assertion of two dissenting judges that the denial of habeas corpus relief to petitioner amounted to an unconstitutional suspension of the writ of habeas corpus. Ibid. In Judge Pryor's view, the Suspension Clause protects access to the writ of habeas corpus as it existed in 1789, and, in 1789, habeas corpus was not available to persons validly convicted of a crime by a court of competent jurisdiction. Id. at 31-32. Judge Pryor also disputed the dissenting judges' assertion that the denial of petitioner's habeas corpus petition meant that "the Great Writ is dead," explaining that the federal judiciary has "steadfastly * * * protected the writ and ensured that it remains available to those who would have been entitled to it in 1789." Id. at 32.

Judges Barkett, Martin, and Hill dissented. Pet. App. A 33-41. Judge Barkett stated that the denial of savings clause relief in this case amounted to an unconstitutional suspension of the writ of habeas corpus. Id. at 34. Judge Martin concluded that the majority's interpretation of the savings clause was too narrow and should not preclude a prisoner such as petitioner from obtaining relief. Id. at 34-39. Judge Hill stated that the majority's

reliance on finality concerns was misplaced because, in his view, petitioner has "never had a meaningful opportunity for a reliable determination of his claim." Id. at 41.

ARGUMENT

Petitioner contends (Pet. 19-30) that the savings clause of Section 2255(e) authorizes him to obtain habeas corpus relief pursuant to 28 U.S.C. 2241 based on a retroactive change in the law under which he would no longer qualify as a career offender under the Sentencing Guidelines. Petitioner further contends (Pet. 30-33) that the court of appeals erred in treating his Rule 60(b) motion to reopen and amend his prior Section 2255 motion as a second or successive motion under Section 2255 that is barred by statute. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. a. Before 1948, a federal prisoner could collaterally attack his conviction or sentence by way of a petition for a writ of habeas corpus brought under the general federal habeas corpus statute, 28 U.S.C. 2241. See United States v. Hayman, 342 U.S. 205, 211-213 (1952). These filings unduly burdened the district courts whose territorial jurisdiction encompassed major penal institutions, because a writ of habeas corpus acts on the prisoner's jailer and must be filed in the district of the

prisoner's confinement. See Rumsfeld v. Padilla, 542 U.S. 426, 447 (2004); Wales v. Whitney, 114 U.S. 564, 574 (1885). The district of confinement is often located "far from the scene of the facts, the homes of the witnesses and the records of the sentencing court," Hayman, 342 U.S. at 213-214, which caused administrative problems for habeas courts attempting to resolve such petitions.

In 1948, Congress responded favorably to a proposal by the Judicial Conference "to alleviate the burden of habeas corpus petitions filed by federal prisoners in the district of confinement," United States v. Addonizio, 442 U.S. 178, 185 (1979), by creating a substitute postconviction remedy for federal prisoners. Codified at 28 U.S.C. 2255 (Supp. III 2009), this new statutory "motion" procedure diverts federal prisoner collateral attacks away from the inconvenient district of confinement and channels them into "the more convenient jurisdiction of the sentencing court," Hayman, 342 U.S. at 219, while still "afford[ing] federal prisoners a remedy identical in scope to federal habeas corpus," Davis, 417 U.S. at 343. The 1948 legislation also generally prevents a prisoner covered by Section 2255 from raising challenges to his conviction or sentence by way of habeas corpus under Section 2241. The statute states that federal district courts "shall not * * * entertain[]" a federal prisoner's application for a writ of habeas corpus unless "the remedy by motion [under Section 2255] is inadequate or ineffective

to test the legality of [the prisoner's] detention." 28 U.S.C. 2255(e) (Supp. III 2009). This provision is known as the habeas corpus savings clause.

The savings clause was dormant for several decades. During that time, neither Section 2255 nor this Court's decisions generally precluded successive motions for collateral relief. Rather, some cases recognized that intervening decisions authoritatively interpreting a federal criminal statute justified Section 2255 relief, including successive collateral relief under Section 2255, if the interpretation revealed a fundamental miscarriage of justice such as being convicted for "an act that the law does not make criminal." Davis, 417 U.S. at 346; see Sanders v. United States, 373 U.S. 1, 16-17 (1963) (allowing successive Section 2255 motion when necessary to avoid a miscarriage of justice).

In 1996, Congress greatly restricted federal prisoners' ability to seek successive Section 2255 relief in the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, Tit. I, § 105, 110 Stat. 1220. AEDPA limited the availability of successive Section 2255 relief 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 this Court to cases on collateral review. See 28 U.S.C. 2255(h) (Supp. III 2009); cf. Tyler v. Cain, 533 U.S. 656, 661 (2001).

The AEDPA did not, however, provide for successive Section 2255 motions based on intervening statutory decisions, even though such relief had been available under prior law. The significance of this omission became particularly apparent following Bailey v. United States, 516 U.S. 137 (1995). Before Bailey, many courts of appeals held that a defendant's possession of a firearm during and in relation to a drug crime constituted "use" of a firearm within the meaning of 18 U.S.C. 924(c). This Court rejected that interpretation in Bailey, holding that the "use" element required proof that the firearm had been actively employed and that passive possession was not "use." 516 U.S. at 144-146. Some defendants convicted of "using" a firearm under the lower courts' pre-Bailey definition of "use" thus had been convicted of conduct that the law did not cover (*i.e.*, "using" a firearm based on evidence of his passive possession). See Bousley, 523 U.S. at 620.

A federal prisoner pursuing his first Section 2255 motion was eligible to obtain relief from his pre-Bailey passive-possession conviction under Section 924(c). But a prisoner who had already completed a round of Section 2255 review before Bailey was barred by the AEDPA from seeking successive Section 2255 relief because a claim under Bailey would not satisfy either of the conditions in 28 U.S.C. 2255(h) for filing a successive Section 2255 motion. Such prisoners instead argued that the categorical unavailability of successive Section 2255 relief based on intervening decisions of

statutory interpretation rendered Section 2255 "inadequate or ineffective" and triggered its savings clause, thus allowing them to file a habeas corpus petition under Section 2241. The courts of appeals to consider that issue generally agreed that Section 2241 relief was available. See Wofford v. Scott, 177 F.3d 1236, 1241-1244 (11th Cir. 1999) (summarizing decisions from the Second, Third and Seventh Circuits so holding); Reyes-Requena v. United States, 243 F.3d 893, 903 (5th Cir. 2001) (agreeing with these decisions). Although the courts offered varying rationales and adopted slightly different formulations, they generally agreed that the statutory remedy provided by Section 2255 is "inadequate or ineffective to test the legality of [a prisoner's] detention" when three conditions are met: (1) the prisoner seeks to raise a claim based on an intervening, retroactive decision of this Court; (2) that decision narrowed the reach of a federal criminal statute in a way that establishes that the prisoner stands convicted of conduct that is not criminal; and (3) controlling circuit precedent had squarely foreclosed the prisoner's claim at the time of the prisoner's trial, appeal, and first motion under Section 2255. See ibid.³ In addition, the government has taken the position that a

³ But see Prost v. Anderson, 636 F.3d 578 (10th Cir. 2011) (divided decision rejecting the "'erroneous circuit foreclosure' test" adopted by other circuits and holding that a prisoner may not "resort to the savings clause and [Section] 2241" if "the legality of his detention could have been tested in an initial [Section] 2255 motion"), petition for cert pending, No. 11-249 (filed Aug. 24, 2011). The government disagrees with the Tenth Circuit's

prisoner may invoke the savings clause and Section 2241 to pursue a claim that his sentence exceeds the applicable statutory maximum in light of a retroactively applicable decision of this Court that postdates his sentencing, direct appeal, and initial Section 2255 motion. See Br. in Opp. at 11-13 & nn.3-4, Dority v. Roy, No. 10-8286 (filed May 16, 2011); Pet. App. A 13 (noting the government's concession).

b. In this case, the en banc court applied its prior savings clause decision in Wofford and concluded that petitioner had not satisfied its three-part test and thus was not entitled to seek Section 2241 relief. The court agreed with the parties that the first and third Wofford requirements had been satisfied, and it focused its analysis on the second requirement. The court then held that petitioner had not satisfied that requirement because he had not been convicted of a non-existent offense within the meaning of the post-Bailey precedents. Unlike the situation in Bailey, nothing in Begay or Archer calls into question Congress's intent to proscribe petitioner's primary conduct in distributing illegal drugs. See 21 U.S.C. 841(a). And career offender status under the Sentencing Guidelines is not a separate offense. For this reason,

interpretation of the savings clause in Prost, and it acquiesced in Prost's petition for rehearing en banc, while emphasizing that Prost's Section 2241 petition should fail on the merits. On May 26, 2011, the court of appeals denied Prost's petition for rehearing en banc by an evenly divided vote of 5-to-5, and Prost's petition for a writ of certiorari is now pending. See Prost v. Anderson, No. 11-249 (filed Aug. 24, 2011).

petitioner's claim (Pet. 22-23) that the decision in this case conflicts with the Seventh Circuit's decision in Davenport is incorrect, because the court there held that a prisoner convicted under a pre-Bailey possession theory of "use" had been convicted of conduct that Congress had not made criminal. 147 F.3d at 609-610. Petitioner, by contrast, can make no such claim.

The en banc court correctly noted that, in dicta, Wofford reserved the possibility that the savings clause might apply to fundamental sentencing errors, which the court here suggested may be an error that "necessarily * * * resulted in the defendant being sentenced to a term of imprisonment that exceeded what would have been the statutory maximum without the error." Pet. App. A 25 n.20. The court then declined to decide that question because petitioner did not assert an error that resulted in a sentence in excess of the statutory maximum. As the court explained, notwithstanding the error in applying the career-offender guideline, petitioner remained eligible, as he was at the time of sentencing, for imposition of any sentence up to life imprisonment, the statutory maximum sentence fixed by Congress for his crimes. The court then held that "the savings clause does not apply to sentencing errors that do not push the term of imprisonment beyond the statutory maximum." Pet. App. A 25 n.20. That decision is correct and does not conflict with any decision of this Court or

any other court of appeals.⁴

i. A conviction for conduct that Congress has not made criminal involves a fundamental defect redressable under Section 2255, see Davis, 417 U.S. at 346, or under Section 2241, if Section 2255 is "inadequate or ineffective," see, e.g., Davenport, 147 F.3d at 607-610, because it implicates the prohibition against federal common-law crimes, i.e., the separation-of-powers principle that "it is only Congress, and not the courts, which can make conduct criminal." Bousley, 523 U.S. at 620-621. A sentencing error that results in a sentence that exceeds the statutory maximum provided by Congress for the offense raises similar concerns; it implicates the related separation-of-powers principle that "the power of punishment is vested in the legislative, not in the judicial department." United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); see ibid. ("It is the legislature, not

⁴ Although the decision in this case does not conflict with the Seventh Circuit's post-Bailey decision in Davenport, there is some tension between the decision in this case and the reasoning (but not the holding) of the Seventh Circuit's more recent decision in Narvaez v. United States, 641 F.3d 877 (2011). In Narvaez, the court of appeals concluded that a misapplication of the mandatory career-offender guideline presented a cognizable claim for collateral relief under 28 U.S.C. 2255 and merited such relief on the grounds that the error in applying the Guidelines resulted in a fundamental miscarriage of justice. Id. at 882-883. In so ruling, the Seventh Circuit analogized this error to the error found to warrant Section 2241 relief in Davenport. Ibid. That tension does not warrant review here for at least two reasons. Navarez did not involve the savings clause, and that decision is not yet final. The government filed a petition for rehearing en banc in Narvaez, and the court ordered Narvaez to file a response. The petition and the response remain pending.

the Court, which is to define a crime, and ordain its punishment."). Federal courts do not have the authority to impose a sentence without legislative authorization. See, e.g., Chapman v. United States, 500 U.S. 453, 465 (1991) ("[A] person who has been * * * convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense.") (emphasis added). This Court, accordingly, has granted habeas corpus relief to a federal prisoner whose sentence was beyond statutory limits. See Ex parte Lange, 85 U.S. (18 Wall.) 163, 176, 178 (1874). For similar reasons, the government has acknowledged the possibility of savings clause relief for such errors.

An erroneous Guidelines sentence does not implicate these concerns, however, because the ultimate sentence imposed remains firmly within the limits authorized by Congress. A defendant's range under the Sentencing Guidelines provides direction and advice for the sentencing court, but neither expands nor contracts the statutory sentencing range to which the defendant's crime exposes him. An error in applying the Guidelines -- whether in the career offender context or in any of the myriad other Guidelines enhancements, see Pet. App. A 16-17 -- therefore is not a fundamental defect warranting collateral relief. Cf. Sun Bear v. United States, 644 F.3d 700, 705-706 (8th Cir. 2011) (en banc) (holding that a misapplication of the mandatory career-offender guideline did not involve a fundamental error redressable in an

initial collateral attack under Section 2255 because the sentence was not "in excess of that authorized by law"). And for similar reasons, it does not justify the extraordinary resort to the habeas savings clause when Section 2255 would otherwise bar a successive application for collateral relief.

This Court's decision in United States v. Addonizio, 442 U.S. 178 (1979), is instructive. In Addonizio, the Court held that a claim of sentencing error based on the Parole Commission's post-sentencing adoption of its release guidelines, which affected the sentencing court's expectation of the time the defendant would actually serve in custody, did not present a fundamental error cognizable under Section 2255 because the actual sentence imposed was "within statutory limits" and the error "did not affect the lawfulness of the judgment itself," but only how the judgment would be performed. Id. at 187. Although Addonizio predates the adoption of the federal Sentencing Guidelines, its reliance on the fact that the actual sentence was "within statutory limits" supports the conclusion that an error in applying the Sentencing Guidelines is not a fundamental error redressable under Section 2255 or in a habeas corpus savings clause petition.

ii. The fact that the Guidelines are no longer mandatory, see United States v. Booker, 543 U.S. 220 (2005), reinforces that conclusion. If petitioner were to be resentenced today without the career-offender enhancement, he would have a reduced Sentencing

Guidelines range. But after Booker, that range would be “merely advisory.” United States v. Jackson, 573 F.3d 398, 400 (7th Cir. 2009). And under advisory Guidelines, a sentencing court may impose any term of imprisonment up to the authorized statutory maximum. See United States v. Ashqar, 582 F.3d 819, 825 (7th Cir. 2009) (“So long as the Guidelines are advisory, the maximum a judge may impose is the statutory maximum.”), cert. denied, 130 S. Ct. 1722 (2010). Thus, the sentencing court could, in theory, reject the advisory Guidelines range entirely and impose the statutory maximum sentence, subject only to deferential abuse-of-discretion review for unreasonableness. See Gall v. United States, 552 U.S. 38, 51 (2007); see also United States v. Wise, 556 F.3d 629, 632-633 (7th Cir. 2009) (deferring to the district court’s decision to vary upward from the advisory Guidelines range and impose the statutory maximum sentence). The court could also impose the same sentence for his crime that he initially received, irrespective of his advisory Guidelines range. See Pet. App. A 12 (detailing petitioner’s criminal record as “an eight time drug and weapons felon” and observing that “[a] sentencing judge could easily decide to vary significantly upwards from the advisory guidelines range in view of” the 18 U.S.C. 3553(a) factors). Because the identical sentence could validly be reimposed at an advisory Guidelines resentencing, petitioner’s claim of error does not amount to a fundamental defect justifying habeas corpus relief. Cf. Sun Bear,

644 F.3d at 705 (misapplication of mandatory career-offender guideline did not justify Section 2255 relief because "the same 360-month sentence could be reimposed" at an advisory Guidelines resentencing).

c. Petitioner can point to no holding of another court of appeals that conflicts with the decision below in its denial of relief under the savings clause for a Sentencing Guidelines error. He contends (Pet. 24-30), however, that this Court's review is warranted to provide "guidance" about the scope and contours of the "actual innocence" exception set forth in Sawyer v. Whitley, 505 U.S. 333 (1992). As petitioner notes (Pet. 24-29), the courts of appeals have reached different conclusions about Sawyer's scope. This case does not implicate any of those disagreements, however, because the court of appeals concluded that petitioner would not be entitled to relief even if each of those disagreements were resolved in petitioner's favor. Further review of that issue therefore unwarranted.

In Sawyer, this Court addressed whether a state prisoner sentenced to death could file a successive petition for a writ of habeas corpus raising a claim that, as a result of a constitutional error at his capital sentencing hearing, he was "actually innocent" of his death sentence. Although this Court recognized the semantic difficulty of extending the concept of "actual innocence" to sentencing determinations, see 505 U.S. at 340, it concluded that

a prisoner who could demonstrate that he was statutorily ineligible for the death penalty as a result of a constitutional error that occurred at his sentencing hearing was entitled to have the merits of his claim considered. Id. at 347-348. As petitioner notes (Pet. 25-28), the lower courts are divided on the questions of (1) whether Sawyer's exception is limited to capital sentences, cf. Dretke v. Haley, 541 U.S. 386, 392-394 (2004) (noting disagreement), and (2) whether the exception applies only to claims involving constitutional error (Pet. 26-28).

There is a substantial question whether Sawyer's exception, regardless of its contours, even survived the subsequent enactment of AEDPA, which limits successive collateral attacks to those that allege actual innocence "of the underlying offense." 28 U.S.C. 2244(b)(2)(B)(ii). The courts of appeals that have considered the issue have held that the "offense" language excludes Sawyer-type claims alleging actual innocence of a "sentence." In re Webster, 605 F.3d 256, 258-259 & n.4 (5th Cir. 2010) (citing cases). In this case, however, the court of appeals held that, even assuming that Sawyer survived AEDPA, and "even if" Sawyer was "not limited to death sentences," and "even if" Sawyer "reached non-constitutional claims," petitioner "still would fail to meet the exception's requirement that but for the claimed error, he would not have been statutorily eligible for the sentence he received." Pet. App. A 27 (emphasis added). The court explained that

petitioner's drug convictions rendered him "statutorily eligible for a sentence of between 10 years and life," ibid.; see 21 U.S.C. 841(b)(1)(A), and therefore, even if the error in applying the career-offender guideline were "undone," petitioner remained statutory eligible to receive the identical sentence, Pet. App. A 27. In short, the court of appeals correctly concluded that petitioner was not entitled to seek postconviction habeas corpus relief because he was not statutorily ineligible for his sentence, and therefore, the error was not a fundamental one justifying relief. That decision is entirely consistent with Sawyer's focus on statutory sentencing eligibility.

2. Petitioner further contends (Pet. 30-33) that, "under all the facts and circumstances of [his] case," the court of appeals erred in treating his Rule 60(b) motion to reopen and amend as a second or successive Section 2255 motion. Further review of that claim is unwarranted.

In Gonzalez v. Crosby, 545 U.S. 524 (2005), this Court held that a state prisoner could not use Rule 60(b) to evade the limitations on second or successive collateral attacks by adding new grounds for relief or attacking the federal court's earlier rejection of a claim on the merits. Instead, the Court held that a Rule 60(b) motion would be proper only if it sought to raise a defect in the integrity of the prior federal-court judgment. Id. at 532. In this case, the court of appeals held that, even though

Gonzalez involved a Rule 60(b) motion by a state prisoner, "the standard announced in Gonzalez applies to federal cases as well." Pet. App. A 28. In so holding, the court "join[ed] every other circuit that has addressed the issue." Ibid. Petitioner does not challenge that ruling; instead, he merely argues that the court erred in applying the Gonzalez standard to the particular facts of his case. Petitioner is incorrect. As the court of appeals explained, petitioner's motion was not a valid Rule 60(b) motion under Gonzalez because the motion "sought to assert or reassert a claim for relief," rather than "pointing out a defect in the integrity of the earlier Section 2255 motion proceeding in his case." Pet. App. A 28-29. Indeed, as petitioner admitted, his motion sought to raise a challenge to the legality of the judgment in the underlying criminal case, not the Section 2255 case, thus rendering it a second or successive collateral attack. The court of appeals' case-specific interpretation of petitioner's Rule 60(b) motion presents no issue meriting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2011