NO. 13-___

In the
Supreme Court of the United States

ALBERT WILLIAMS,

PETITIONER,

v.

WARDEN, FEDERAL BUREAU OF PRISONS,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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April 8, 2014

QUESTION PRESENTED

In most circumstances a federal prisoner may challenge the legality of his conviction or sentence only by filing a motion under 28 U.S.C. § 2255 in the appropriate sentencing court. Under 28 U.S.C. § 2255(e), however, Congress created an important exception to that rule: A federal prisoner may use the traditional habeas corpus remedy of 28 U.S.C. § 2241 to challenge the legality of his conviction or sentence if it "appears" that the remedy provided in § 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The courts of appeals have disagreed sharply over when the requirements of § 2255(e) are satisfied. The question presented is:

Under what circumstances may a federal prisoner use 28 U.S.C. § 2255(e) to seek relief under 28 U.S.C. § 2241 when an intervening and retroactively applicable statutory decision of this Court demonstrates that his sentence is unlawful?

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PETITION FOR WRIT OF CERTIORARI

This case presents an important, recurring question of federal habeas corpus law over which the courts of appeals are splintered. A federal prisoner ordinarily may challenge the legality of his conviction or sentence only by filing a motion under 28 U.S.C. § 2255 in the appropriate sentencing court. Under 28 U.S.C. § 2255(e), however, Congress created an exception to this rule: A federal prisoner may seek relief under the traditional habeas corpus remedy of 28 U.S.C. § 2241 if it "appears" that the remedy provided by § 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The question is under what circumstances is § 2255 "inadequate or ineffective," such that § 2255(e) opens a door to relief under § 2241.

No two courts of appeals have answered this question the same way. As the Eleventh Circuit recently observed, "[t]here is a deep and mature circuit split on the reach of" § 2255(e). *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1279 (11th Cir. 2013); *see also Brown v. Caraway*, 719 F.3d 583, 600–01 (7th Cir. 2013) (statement of Easterbrook, C.J.) (calling for this Court to resolve split of authority on § 2255(e)).

Several circuits, including the Eleventh Circuit here, have held that § 2255 may appear "inadequate or ineffective" when the prisoner's challenge is based on a new circuit-law-busting decision from this Court that narrows the scope of a criminal statute. This is known as the circuit-foreclosure test. *See* Pet. App. 21–22; *Morales v. Bezy*, 499 F.3d 668, 672 (7th Cir. 2007); *Reyes-Requena v. United States*, 243 F.3d 893,

904 (5th Cir. 2001); *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000).

These courts do not agree, however, on how that test should apply. In particular, they do not agree on the consequences of a circuit-law-busting decision if it does not *directly* overrule circuit precedent but instead merely rejects the lower courts' reasoning in a class of cases. In the Eleventh Circuit, the § 2255(e) door opens only when a decision of this Court "overturn[s] circuit precedent *specifically addressing* the claim [the prisoner] now asserts." Pet. App. 29 (emphasis added). In contrast, the Fifth and Seventh Circuits have taken a more lenient approach, holding that the circuit need not have previously rejected the exact claim the prisoner seeks to raise. *See Brown*, 719 F.3d at 595; *accord Garland v. Roy*, 615 F.3d 391, 397–98 (5th Cir. 2010). But the Fifth Circuit (unlike the Seventh and Eleventh Circuits) requires proof that the petitioner was effectively "convicted of a nonexistent offense," and it has refused to find § 2255(e) satisfied when the petitioner challenges only his sentence (not his conviction). *Wiwo v. Medina*, 491 F. App'x 482, 483 (5th Cir. 2012) (per curiam). The Fourth Circuit applies a variation of the circuit-foreclosure test but has not decided how on point earlier circuit law must be before a prisoner may rely on § 2255(e). *See In re Jones*, 226 F.3d at 333–34.

Other courts have rejected the circuit-foreclosure test and applied different approaches. The Second Circuit has concluded that § 2255 is "inadequate or ineffective" when "the failure to allow for collateral review would raise serious constitutional questions."

Triestman v. United States, 124 F.3d 361, 377 (1997). The Sixth Circuit requires allegations of actual innocence to invoke § 2255(e), *Wooten v. Cauley*, 677 F.3d 303, 307 (6th Cir. 2003), and has held that *no* sentencing claim can pass that test, *see, e.g.*, *Brown v. Hogsten*, 503 F. App'x 342 (6th Cir. 2012) (per curiam). The Third Circuit likewise permits only actual-innocence claims, *Okereke v. United States*, 307 F.3d 117 (3d Cir. 2002), but has not decided whether some sentencing errors are sufficiently serious to merit relief. The Ninth Circuit holds that § 2255(e) is satisfied when a petitioner claiming actual innocence has not had "an unobstructed procedural shot at presenting that claim." *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (internal quotation marks omitted).

The Tenth Circuit has said that all of its sister circuits are wrong. In its view, "so long as the petitioner had an opportunity to bring and test his claim," § 2255 is not "inadequate or ineffective"—even if "[t]he ultimate result may be . . . wrong as a matter of substantive law." *Prost v. Anderson*, 636 F.3d 578, 585 (10th Cir. 2011).

Despite the conflict in lower court decisions, the question presented has thus far evaded review. The Court has had few opportunities to consider this "messy field," *id.* at 594, in part because the government generally agrees that § 2255(e) permits claims like the one petitioner Albert Williams brought here. Indeed, although the government initially conceded that Williams's claim satisfied § 2255(e)'s requirements, the Eleventh Circuit refused to accept that concession because it

concluded—contrary to certain other circuits—that § 2255(e) is jurisdictional and thus not subject to waiver.

The widespread disagreement among the courts of appeals is pernicious because it produces arbitrary results: If Williams had been incarcerated in Illinois when this litigation began, the courts would have considered his claim on its merits and he may have received relief. Instead, this litigation began in Georgia, where he was then incarcerated, and as a result, no court has reached the merits of his claim. Not only is that result arbitrary, but the circuit split thwarts the uniform application of this Court's precedents clarifying the reach of criminal statutes. Williams (unlike others) has not been able to rely on this Court's retroactive decisions.

Finally, this case is an ideal vehicle to answer this pure question of law "of recurring and exceptional importance." Gov't Resp. to Pet. for Reh'g En Banc at 15, *Prost v. Anderson*, No. 08-1455 (10th Cir. Apr. 25, 2011). Although the disagreement among the lower courts has occurred in different ways along different axes, this Court can address and resolve all points of disagreement in this single case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is published at 713 F.3d 1332 and reproduced at Pet. App. 1. The court's order denying rehearing is unpublished and reproduced at Pet. App. 66. The magistrate judge's report and recommendation and the district court's order adopting the magistrate judge's report and recommendation dismissing petitioner's 28 U.S.C. § 2241 habeas petition are reproduced at Pet. App. 55, 63.

JURISDICTION

The court of appeals issued its opinion on April 11, 2013, *see* Pet. App. 1, and denied a timely petition for rehearing on January 8, 2014, *see* Pet. App. 66. Petitioner timely filed this petition on April 8, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Sections 2241, 2253, and 2255 of title 28 of the United States Code are reproduced at Pet. App. 72, 75, 76. The relevant provisions of sections 922 and 924 of title 18 of the United States Code are reproduced at Pet. App. 68, 70.

STATEMENT OF THE CASE

Williams alleges that he was unlawfully sentenced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), and that this Court's recent decision in *Begay v. United States*, 553 U.S. 137 (2008), and its progeny, make clear that his sentence is unlawful because it exceeds the statutory maximum. The question presented is whether 28 U.S.C. § 2255(e) permits him to bring a habeas corpus petition under 28 U.S.C. § 2241 to challenge the legality of his sentence.

A. Statutory Background

1. In 1948, Congress enacted 28 U.S.C. § 2255 to address the "practical problems that had arisen in the administration of the federal courts' habeas corpus jurisdiction." *United States v. Hayman*, 342 U.S. 205, 210 (1952). The general habeas corpus statute, now codified at 28 U.S.C. § 2241, permitted federal prisoners to seek collateral review of their convictions or sentences by filing a petition in the district in which they were confined. As a result, the "few" districts that are home to major federal prisons were "required to handle an inordinate number of habeas corpus actions," even though they were often located "far from the scene of the facts, the homes of the witnesses and the records of the sentencing court." *Id.* at 213–14. As a response to this problem, § 2255 provides that motions challenging the legality of a prisoner's conviction or sentence ordinarily must be filed in the sentencing court.

Section 2255 thus restricts the right of federal prisoners to proceed under § 2241's traditional

habeas remedy. *See* 28 U.S.C. § 2255(e) (a § 2241 petition "shall not be entertained" if the prisoner has failed to seek or has already been denied relief by a § 2255 motion). While § 2241 remains available to a federal prisoner to challenge the *execution* of his sentence, § 2255 is ordinarily the exclusive means by which a federal prisoner may challenge the *legality* of his conviction or sentence. *See, e.g.*, *Jiminian v. Nash*, 245 F.3d 144, 146–47 (2d Cir. 2001).

But § 2255(e) also contains an important exception. Under its "savings clause," a federal prisoner may petition for a writ of habeas corpus under § 2241 if "it . . . appears that [§ 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

2. The scope of § 2255(e) has become an issue of increasing importance. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which amended § 2255 to restrict the ability of prisoners to file successive § 2255 motions, except when a claim is based either (1) on new evidence demonstrating that "no reasonable factfinder would have found the movant guilty of the offense" or (2) on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h). But AEDPA left intact § 2255(e), which provides an escape hatch from these restrictions.

Unless ameliorated by § 2255(e), AEDPA's restrictions can be problematic when this Court issues decisions that narrow the reach of criminal statutes of broad applicability. *See, e.g.*, *Bailey v.*

United States, 516 U.S. 137 (1995) (narrowing the interpretation of "use" of a firearm under 18 U.S.C. § 924(c)); *Begay*, 553 U.S. 137 (narrowing the definition of violent felony under ACCA). Although the Court's substantive criminal-law decisions are typically made retroactively applicable, *see Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), they do not trigger the right to file a successive habeas corpus petition under § 2255(h). And, in those limited circumstances, denying a prisoner the right to challenge the legality of his conviction or sentence could raise serious constitutional concerns. *See Triestman v. United* States, 124 F.3d 361, 377 (2d Cir. 1997). A conviction for non-criminal conduct—*i.e.*, a conviction for conduct that this Court later determines is non-criminal—implicates the separation-of-powers principle that "it is only Congress, and not the courts, which can make conduct criminal." *Bousley v. United States*, 523 U.S. 614, 620–21 (1998). Similarly, sentences improperly imposed above the statutory maximum present the same concern, for "the power . . . to prescribe the punishments to be imposed upon those found guilty of [federal crimes] resides wholly with the Congress." *Whalen v. United States*, 445 U.S. 684, 689 (1980).

As the lower courts grappled with defining the contours of § 2255(e) in a post-AEDPA era, they rejected the argument that the phrase "inadequate or ineffective to test the legality of [a prisoner's] detention" should be limited to situations in which "*practical* considerations precluded a remedy in the sentencing court"—*e.g.*, when the court of conviction no longer exists. *In re Dorsainvil*, 119 F.3d 245, 250 (3d Cir. 1997); *see also Triestman*, 124 F.3d at 374–

76. But the courts also recognized the potential tension between § 2255(e)'s savings clause and § 2255(h)'s restrictions on successive motions. While § 2255(h) protects the finality of federal convictions, Congress reserved "savings clause" relief when § 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. § 2255(e). As courts concluded, "'inadequate or ineffective' must mean something, or Congress would not have enacted it in 1948 and reaffirmed it in" AEDPA. *Triestman*, 124 F.3d at 376.

Determining what that "something" is has proved difficult. As noted above, the lower federal courts have developed nearly eight different savings-clause tests.

3. This case is typical of the savings-clause litigation percolating in the federal courts—it involves a challenge to a sentence enhancement under ACCA, 18 U.S.C. § 924(e). ACCA imposes different sentencing requirements for felons found in possession of a firearm in violation of 18 U.S.C. § 922(g). If the individual has three prior convictions for a "violent felony" or a "serious drug offense," the Act imposes a mandatory-minimum sentence of 15 years' imprisonment (with no maximum). 18 U.S.C. § 924(e)(1). If those prerequisites are not satisfied, however, a violation of 18 U.S.C. § 922(g) carries a *maximum* penalty of 10 years' imprisonment. *See id.* § 924(a)(2).

A prior conviction qualifies as a "violent felony" under ACCA if it involves a "crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or

threatened use of physical force against the person of another" or (2) "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B).

Williams's challenge to his ACCA enhancement involves the "residual clause": crimes involving "conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B)(ii). This Court has issued several landmark decisions addressing the scope of that clause and clarifying ACCA's proper reach. Most significantly, in *Begay v. United States*, 553 U.S. 137, the Court determined that the residual clause captures only crimes that involve "purposeful, violent, and aggressive" conduct, like the acts specifically enumerated in the statute—"burglary, arson, extortion, and crimes involving the use of explosives." *Id.* at 144–45. Some individuals sentenced under a broader construction of ACCA have therefore received sentences that unlawfully exceed the statutory maximum for their crime of conviction. 18 U.S.C. § 924(a)(2).

B. Factual and Procedural Background

1. Williams was convicted in 1998, in the United States District Court for the Southern District of Florida, of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Pet. App. 3. At the time of his trial, the government identified six prior convictions that it then believed supported an ACCA sentence enhancement. *Id.* The government now contends that only three of his prior convictions—a 1989 conviction for burglary of a dwelling in the second degree, a 1990 conviction for burglary of a

dwelling in the second degree, and a 1986 conviction for robbery and aggravated assault—support the enhancement. Resp. in Opp'n to Habeas Pet. at 14–17, *Williams v. Warden*, No. 10-180, Dkt. No. 12 (S.D. Ga. Feb. 28, 2011). On the basis of the ACCA enhancement and his criminal history, the trial court sentenced Williams under the then-mandatory Guidelines to 293 months—nearly *25 years*—of imprisonment and almost *15 years* more than the statutory maximum for his crime of conviction. Pet. App. 3; *see also* 18 U.S.C. § 922(g); *id.* § 924(a)(2).

Williams did not object to his classification as an armed career criminal in the trial court or on direct appeal. Pet. App. 3–4. But after the Eleventh Circuit affirmed his conviction, Williams sought post-conviction relief in the sentencing court under § 2255, claiming that he had been denied effective assistance because, among other things, his attorney failed to object to the use of his prior burglary convictions as predicate offenses to support his sentence enhancement. *Id.* He argued that the Florida burglary statute under which he had been convicted encompassed conduct beyond "generic burglary," as defined in *Taylor v. United States*, 495 U.S. 575 (1990), because it broadly criminalized entry into non-dwelling places, and therefore that his burglary convictions did not constitute "violent felon[ies]" within the meaning of § 924(e). Pet. App. 4–5.

The sentencing court denied Williams's § 2255 motion and, along with the Eleventh Circuit, denied him a certificate of appealability. Pet. App. 4. On reconsideration, the Eleventh Circuit observed that the use of Williams's "1989 burglary conviction as a

predicate for the armed career criminal enhancement was arguably erroneous under *Taylor*," but mistakenly concluded that the error was "ultimately immaterial" because Williams's other prior convictions supported the enhancement. Pet. for Writ of Habeas Corpus at 17–18, *Williams v. Warden*, *supra*, Dkt. No. 1 (Nov. 29, 2010). (The government now concedes that those other prior convictions do not support the enhancement and that Williams has only three potentially qualifying prior convictions; if one of his convictions is disqualified, Williams's sentence unlawfully exceeds the statutory maximum. *See* Pet. App. 2–3; Resp. in Opp'n to Habeas Pet. at 13–18.) This Court denied certiorari. *Williams v. United States*, 543 U.S. 864 (2004).

After this Court's decisions in *Shepard v. United States*, 544 U.S. 13 (2005), *Begay*, 553 U.S. 137, and *Chambers v. United States*, 555 U.S. 122 (2009), which narrowed the application of ACCA, Williams filed several unsuccessful post-conviction proceedings—invoking Rule 60(b), § 2255(f), and § 2255(h)—to renew his challenge to his ACCA enhancement. Each was denied on procedural grounds. Pet. App. 4–6, 58–60.

2. In November 2010, Williams filed this § 2241 habeas petition in the United States District Court for the Southern District of Georgia, where he was then incarcerated. Pet. App. 5. Proceeding *pro se*, Williams alleged that 28 U.S.C. § 2255 was "inadequate and ineffective" because the law changed in his favor after he filed his first § 2255 motion. *Id.* Williams argued that his Florida second-degree burglary-of-a-dwelling convictions were not

qualifying predicate offenses because they were not convictions for "generic burglary." *See Taylor*, 495 U.S. at 599; *United States v. Adams*, 91 F.3d 114, 115 (11th Cir. 1996) (per curiam). He also argued that they did not satisfy the residual clause because, at the time of his convictions, Florida's burglary offense captured far more than just "violent" and "aggressive" conduct. *See Begay*, 553 U.S. at 144–45. Indeed, Florida law expansively construed the "curtilage" element of its burglary offense to criminalize entry into unenclosed spaces adjoining a dwelling, *Joyner v. State*, 303 So. 2d 60, 63 (Fla. Ct. App. 1974)—at the time, "stealing a car or stealing apples from a neighbor's backyard would be counted as a burglary under Florida's statute," *United States v. Pluta*, 144 F.3d 968, 975–76 (6th Cir. 1998).

Agreeing that the savings clause applies to "a defendant sentenced under ACCA whose predicate convictions are later categorically excluded from the scope of § 924(e)," the government conceded that Williams could use the savings clause to challenge his sentence under § 2241. Resp. in Opp'n to Habeas Pet. at 12; *see also* Pet. App. 6. But the government maintained that Williams was not entitled to relief on the merits. In the government's view, Williams had not shown that his sentence enhancement was erroneous under *Begay* and its progeny. Resp. in Opp'n to Habeas Pet. at 14–17.

Notwithstanding the government's concession, and without addressing the merits of Williams's claims, the district court dismissed his § 2241 petition under the erroneous belief that Eleventh Circuit law precluded a prisoner from using the

savings clause to challenge his *sentence*, rather than his *conviction*. Pet. App. 5–6, 16–17.

3. After appointing counsel and hearing argument, a split panel of the Eleventh Circuit affirmed the dismissal of Williams's § 2241 petition. The court of appeals first held that § 2255(e) was a "jurisdictional limitation," rejecting Williams's argument that the court could accept the government's concession that Williams had brought the type of claim to which the savings clause applied. Pet. App. 6, 9–15.

Turning to whether the savings clause applies to Williams's claims, the court held that a prisoner may use the savings clause only when an intervening and "retroactively applicable Supreme Court decision" overturns "circuit precedent that *squarely resolved* the claim so that the petitioner had no genuine opportunity to raise it at trial, on appeal, or in his first § 2255 motion." Pet. App. 21, 22 (emphasis added). And the court concluded that Williams failed to satisfy the test. It was not enough, the court asserted, that "the relevant Supreme Court precedent"—*Begay*—"may have altered the applicable legal test" for determining whether a state conviction qualified as a violent felony under ACCA's residual clause. Pet. App. 29. Rather, the Supreme Court decision must have "overturned circuit precedent *specifically addressing* the claim Williams now asserts—namely, that [his Florida burglary conviction] is not a violent felony" under 18 U.S.C. § 924(e). *Id.* (emphasis added). Because there was no such precedent then directly on point, the

Eleventh Circuit refused to address the merits of Williams's claim.

Judge Martin dissented. "[I]t is important that [Williams's] claim . . . be considered on the merits," she stressed, "because if he is right, he is serving a term of imprisonment that exceeds the maximum term authorized by Congress." Pet. App. 36. And in that case, "his sentence is unconstitutional" because "a federal defendant has a 'constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress.'" Pet. App. 37 (quoting *Whalen*, 445 U.S. at 690).

In Judge Martin's view, by requiring Williams to show that circuit law previously foreclosed his claims, the majority was "asking and answering the wrong jurisdictional question." Pet. App. 42. "The existence or nonexistence of circuit precedent which conflicts with *Begay* cannot operate to confer jurisdiction on this Court," she asserted. Pet. App. 42–43. Nor "can it decide the question of whether § 2255 is inadequate or ineffective." Pet. App. 43. What matters is whether Williams "was erroneously sentenced as an armed career criminal in light of *Begay*." Pet. App. 42.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because it presents an important and recurring question of federal law over which the courts of appeals are deeply divided. This petition is also an ideal vehicle for addressing this question because it will allow the Court to resolve all points of division on this issue among the lower courts.

I. The Court Should Grant Review To Resolve The Split In Authority Over When § 2255(e)'s Savings Clause Applies.

All the courts of appeals to decide the question presented—except the Tenth Circuit—agree that § 2255(e)'s savings clause applies to at least *some* claims that a prisoner is in custody in violation of the laws of the United States. They do not agree, however, on what types of claims § 2255(e) saves. As the Eleventh Circuit recently put it: "There is a deep and mature circuit split on the reach of the savings clause." *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1279 (11th Cir. 2013).

Three key differences among the circuits' conflicting approaches are deserving of this Court's attention. *First*, the courts disagree over whether circuit precedent must have foreclosed a prisoner's claim at the time of his appeal or first § 2255 motion—and for that matter, what it means for a claim to have been "foreclosed." *Second*, the courts are split over whether savings-clause relief is available only for true actual-innocence claims or whether a petitioner (like Williams here) may use § 2255(e)'s savings clause to allege that he is

innocent of a sentence enhancement that pushes his sentence beyond the statutory maximum. *Third*, the courts do not agree on whether they may accept the government's concession that the savings clause applies in certain cases or whether, instead, § 2255(e) restricts the court's subject-matter jurisdiction.

A. The Courts Of Appeals Apply Different Tests.

Broadly speaking, the courts of appeals are divided into three camps on the savings-clause issue: Four courts—the Fourth, Fifth, Seventh, and Eleventh Circuits—apply some variation of a circuit-foreclosure test, concluding that the savings clause permits a prisoner in at least some circumstances to obtain relief when this Court abrogates circuit precedent that foreclosed relief at the time of the prisoner's first § 2255 motion. The other courts of appeals that have authorized § 2255(e) relief apply some variation of an actual-innocence test, concluding that the savings clause may be used only when the prisoner is legally innocent of his offense. And the Tenth Circuit stands alone. It has rejected these different tests and held that the savings clause provides relief only when § 2255 applicants encounter unusual practical problems with the § 2255 remedy, like when the court of conviction no longer exists.

1. The Seventh Circuit was the first to articulate the circuit-foreclosure test. *In re Davenport*, 147 F.3d 605 (7th Cir. 1998) (Posner, C.J.). This test is borne of the premise that "the essential function [of habeas corpus] is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the

fundamental legality of his conviction and sentence." *Id.* at 609. The Seventh Circuit concluded that "[a] federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion." *Id.* at 611. For the law to have "changed after his first 2255 motion," the Seventh Circuit explained, the change must come from above—*i.e.*, from this Court—and cannot "be equated to a difference between the law in the circuit in which the prisoner was sentenced and the law in the circuit in which he is incarcerated." *Id.* at 611–12; *see also Morales v. Bezy*, 499 F.3d 668, 672 (7th Cir. 2007).

The Fourth, Fifth, and Eleventh Circuits have generally followed suit, adopting some version of the circuit-foreclosure test. *See Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000); *Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999). (The First Circuit appears to follow the Seventh Circuit's decision in *Davenport*, but it has not precisely articulated the circumstances in which the savings clause applies. *See Trenkler v. United States*, 536 F.3d 85, 99 (1st Cir. 2008).)

But these courts do not agree on what it means for a claim to be foreclosed at the time of the petitioner's first § 2255 motion. The Fifth and Seventh Circuits have taken the broadest view. In those circuits a claim is considered "foreclosed," and thus eligible for savings-clause relief, if it "falls within the scope of, and is excluded by, a prior

holding of a controlling case." *Garland v. Roy*, 615 F.3d 391, 398 (5th Cir. 2010); *accord Brown v. Caraway*, 719 F.3d 583, 595–96 (7th Cir. 2013). "The court need not have specifically considered and rejected the exact claim for it to be foreclosed, as long as the breadth of a prior holding was meant to encompass and preclude the argument." *Garland*, 615 F.3d at 398; *accord Brown*, 719 F.3d at 595–96.

In this case, the Eleventh Circuit adopted a much narrower understanding of "foreclosure." It held that "circuit law [must] squarely foreclose[]" the claim when it otherwise should have been raised. Pet. App. 21. It was not enough, the court concluded, that "the relevant Supreme Court precedent may have altered the applicable legal test." Pet. App. 29. Rather, that decision must have "overturned circuit precedent *specifically addressing* the claim [the prisoner] now asserts." *Id.* (emphasis added) (internal quotation marks omitted). It also did not matter whether the prisoner's first § 2255 motion was correctly decided in light of this Court's later decision. Pet. App. 31–33. The only relevant question was whether the prisoner's claim was squarely "foreclosed at the time by binding [circuit] precedent" that an intervening decision from this Court later "overruled or abrogated." Pet. App. 32–33. No other court has adopted such a narrow view of foreclosure in the savings-clause context.

2. In other courts of appeals, the focus of the savings-clause analysis is not on circuit foreclosure but on actual innocence. These courts permit petitioners claiming actual (legal) innocence to bring § 2241 petitions under § 2255(e)'s savings clause in

certain circumstances. They do not generally consider whether circuit precedent foreclosed relief at the time of the prisoner's first § 2255 motion; instead, they focus on whether the law has changed in some favorable way after the first § 2255 process ends.

For example, the Third Circuit has construed the clause to apply when necessary to avoid a "thorny constitutional issue"—namely, when an intervening decision from this Court gives rise to a situation in which a prisoner is denied an "opportunity to challenge his conviction" on the basis that the act he committed was not criminal—*i.e.*, a claim of actual legal innocence. *In re Dorsainvil*, 119 F.3d 245, 248, 251 (3d Cir. 1997). This was an "uncommon situation" in the Third Circuit's view, created in that instance by this Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995), which narrowed the interpretation of "use" of a firearm under 18 U.S.C. § 924(c) (relating to use of a firearm during a drug-trafficking crime). The Third Circuit concluded that § 2255 is "inadequate or ineffective" when "the gatekeeping provisions [of § 2255(h)] bar a successive [motion]" and the prisoner "can allege both that [this] Court, since his last petition, has interpreted the statute under which he was convicted in a new way and that his conduct was lawful under the statute as subsequently interpreted." *Dorsainvil*, 119 F.3d at 252–53 (Stapleton, J., concurring). The Third Circuit found it unnecessary to consider whether savings-clause relief might be available in other situations. *Id.* at 252 (majority opinion).

The Second Circuit has likewise concluded that § 2255 is "inadequate or ineffective" when the

prisoner "cannot, for whatever reason, utilize § 2255" and "the failure to allow for collateral review would raise serious constitutional questions." *Triestman v. United States*, 124 F.3d 361, 377 (1997). The Second Circuit "predicted that the types of cases raising such serious constitutional questions would be relatively few," and so far the court has "recognized only one: cases involving prisoners who (1) can prove actual innocence on the existing record, and (2) could not have effectively raised their claims of innocence at an earlier time." *Cephas v. Nash*, 328 F.3d 98, 104 (2d Cir. 2003) (internal quotation marks and brackets omitted).

Like the Second and Third Circuits, the Sixth and Ninth Circuits focus their savings-clause inquiry on actual innocence and the timing of the petitioner's claim. Under the Sixth Circuit's approach, savings-clause relief may be available to assert a claim based on a "new interpretation of statutory law" that was issued after the prisoner "had a meaningful time to incorporate the new interpretation into his direct appeals or subsequent motions." *Wooten v. Cauley*, 677 F.3d 303, 307–08 (6th Cir. 2012). Similarly, the Ninth Circuit asks whether the prisoner has had "an unobstructed procedural shot at presenting [his] claim." *Harrison v. Ollison*, 519 F.3d 952, 959 (9th Cir. 2008) (internal quotation marks omitted). In making that determination, the court considers whether (1) the "legal basis" for the prisoner's "claim did not arise until after he had exhausted his direct appeal and first § 2255 motion; and (2) whether the law changed in any way relevant to [his] claim after that first § 2255 motion." *Id.* at 960 (internal quotation marks omitted).

3. In *Prost v. Anderson*, 636 F.3d 578, the Tenth Circuit rejected all these different tests and denied savings-clause relief to a prisoner asserting an actual-innocence claim. Leaving open whether savings-clause relief might be available "to avoid serious constitutional questions"—and "whether, when, and how the application of § 2255(h)'s limits on second or successive motions might (ever) raise a serious constitutional question," *id.* at 594—the Tenth Circuit rejected the "circuit foreclosure" test, what it characterized as the Ninth Circuit's "novelty" test, and the Second and Third Circuits' serious-constitutional-questions test, *id.* at 589–93. Instead, the court concluded that savings-clause relief was reserved for situations in which "a petitioner's argument . . . could [not] have been tested in an initial § 2255 motion," *id.* at 584—for example, when the prisoner cannot "comply with § 2255's . . . venue mandate," *id.* at 588. Responding to criticism from Judge Seymour that the panel was creating a circuit split, *id.* at 599, 605, Judge Gorsuch observed: "Long before we arrived on the scene the circuits were already divided three different ways on how best to read the savings clause." *Id.* at 594.

B. The Courts Of Appeals Disagree Over Whether § 2255(e) Applies To Sentencing Claims.

There is also disagreement in the circuits over whether the savings clause applies to sentencing claims like the one asserted by Williams—namely, that the erroneous application of a statutory sentence enhancement resulted in a sentence exceeding the statutory maximum. *See Bryant*, 738 F.3d at 1281

(observing that circuits "are far from uniform as to whether sentencing claims can pass through the narrow savings-clause portal"). Some courts—like the Seventh and Eleventh Circuits—have squarely held that such claims fall within the ambit of § 2255(e). Others, like the Fifth and Sixth Circuits, have held that they do not.

Part of this disagreement stems from a lack of clarity about what, precisely, qualifies as an actual-innocence claim, and "whether a petitioner may ever be actually innocent of a noncapital sentence for the purpose of qualifying for [§ 2255(e)]." *Marrero v. Ives*, 682 F.3d 1190, 1193 (9th Cir. 2012). Although being "actually innocent" of a *sentence* is perhaps a curious concept, statutory sentence enhancements like ACCA are the functional equivalent of offenses. *Cf. Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) ("Any fact that, by law, increases the penalty for a crime" must be treated as "an 'element' of the offense."). If a prisoner is "innocent" of the facts supporting the enhancement, then he may not be punished in excess of what Congress has authorized for his crime of conviction. And once the period of confinement Congress authorized for his offense expires, the prisoner is, quite literally, being imprisoned for a nonexistent offense.

The Eleventh Circuit has described this problem—when a sentence unlawfully exceeds the statutory maximum—as a "fundamental defect" in the sentence. *Bryant*, 738 F.3d at 1281 (internal quotation marks omitted). That court, and the Seventh Circuit, have held that such claims are redressable under the savings clause. *See id.* at

1281–84; *Brown*, 719 F.3d at 587–88. The government agrees. Br. for the U.S. in Resp. to Pet. for Writ of Cert. at *19, *Persaud v. United States*, No. 13-6435, 2013 WL 7088877 (U.S. Dec. 20, 2013).

The Fifth and Sixth Circuits disagree and have held that sentencing claims are not within the scope of the savings clause. Without questioning whether there is a distinction to be drawn between sentence enhancements that are within the statutory maximum and those that exceed the statutory maximum, both circuits have denied savings-clause relief to petitioners who, like Williams, claimed they were erroneously sentenced under ACCA. *See Brown v. Hogsten*, 503 F. App'x 342 (6th Cir. 2012) (per curiam) ("[Petitioner's] reliance on *Begay* is misplaced, because it is a sentencing-error case, and claims of sentencing error may not serve as the basis for an actual innocence claim."); *Wiwo v. Medina*, 491 F. App'x 482, 483 (5th Cir. 2012) (per curiam) ("A claim of actual innocence of a career offender enhancement is not a claim of actual innocence of the crime of conviction and, thus, not the type of claim that warrants review under § 2241.").

C. The Courts Of Appeals Disagree Over Whether § 2255(e) Limits The Court's Subject-Matter Jurisdiction.

Adding to the confusion in the lower courts, the Eleventh Circuit's recent decision sharpens a further conflict over whether the savings clause is a non-waivable jurisdictional limit. The Seventh Circuit has held that the savings clause is not jurisdictional. *See Harris v. Warden*, 425 F.3d 386 (7th Cir. 2005) (Easterbrook, J.). "Sections 2241 and 2255 deal with

remedies," the court explained—"neither one is a jurisdictional clause." *Id.* at 388. Accordingly, although in *Harris* it was "far from clear" to the court that the savings clause applied to the prisoner's claim, the district court nonetheless had subject-matter jurisdiction over his habeas petition. *Id.* The Seventh Circuit has thus accepted the government's concession that the savings clause applies in cases involving claims of ACCA error. *See, e.g.*, *Brown v. Rios*, 696 F.3d 638, 640–41 (7th Cir. 2012).

In this case, in contrast, the Eleventh Circuit refused to accept the government's concession that the savings clause applied to Williams's claim. Pet. App. 9–15. Instead, the court concluded that Congress had expressed a clear intent to impose a jurisdictional limitation when it provided that "a § 2241 habeas petition 'shall not be entertained . . . unless it . . . appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.'" Pet. App. 10 (quoting 28 U.S.C. § 2255(e)). That language, the court explained, "speaks in imperative terms of what class of cases the district court has the power to hear, not what the petitioner himself must allege or prove in order to state a claim." *Id.* The court therefore believed it was powerless to accept the government's concession.

Most of the other circuits have treated the savings clause as jurisdictional, although many of those decisions are the type of "'drive-by jurisdictional ruling[s]'" the Court has recognized "should be accorded 'no precedential effect.'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006); *see also, e.g.*, *Abernathy v. Wandes*, 713 F.3d 538, 557

(10th Cir. 2013) ("[W]hen a federal petitioner fails to establish that he has satisfied § 2255(e)'s savings clause test . . . the court lacks statutory jurisdiction to hear his habeas claims."); *Rice v. Rivera*, 617 F.3d 802, 807 (4th Cir. 2010) (per curiam) (holding that "the district court lacked jurisdiction" over the habeas petition because petitioner failed to satisfy the savings-clause test); *Hill v. Morrison*, 349 F.3d 1089, 1091 (8th Cir. 2003) ("If § 2255 was adequate or effective, then the district court properly concluded that it lacked jurisdiction to entertain [petitioner's] claims."); *Christopher v. Miles*, 342 F.3d 378, 379 (5th Cir. 2003) (concluding that petitioner's claim failed to satisfy the savings-clause test and therefore remanding "with orders to dismiss [the] petition for lack of jurisdiction"); *Cephas*, 328 F.3d at 104 (asserting that if petitioner cannot show that § 2255 is inadequate or ineffective, "the district court must either dismiss the habeas petition for lack of jurisdiction or recast it as a § 2255 motion"); *Okereke v. United States*, 307 F.3d 117, 120–21 (3d Cir. 2002) (concluding that because § 2255 was not inadequate or ineffective, district court lacked jurisdiction to consider petition); *United States v. Peterman*, 249 F.3d 458, 462 (6th Cir. 2001) (same); *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000) (per curiam) (characterizing the question whether petitioner had "properly invoked the savings clause" as "the decisive jurisdictional question").

Whether § 2255(e) imposes a jurisdictional restriction is an issue "of considerable practical importance." *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). Although the government's position in these cases has generally been uniform during the

last five years, the courts have been anything but uniform in how they approach the savings clause. Were courts free to accept the government's concession, perhaps some of the absurdities of this conflict—produced largely by the happenstance of where a particular prisoner is housed within the federal prison system—could be ameliorated.

II. The Court Should Grant Review Because The Eleventh Circuit's Approach Is Contrary To This Court's Precedent.

The version of the savings-clause test adopted by the court below is inconsistent with this Court's separation-of-powers jurisprudence. Moreover, the lower court's holding that § 2255(e) limits its subject-matter jurisdiction is at odds with other recent jurisprudence and will exacerbate the absurd results its test invites by eliminating the ability of courts to accept and take action on the government's position. Indeed, this Court recently GVR'd in a similar case on the basis of the Solicitor General's confession of error—a potentially meaningless exercise if § 2255(e) is jurisdictional. *See* Order, *Persaud v. United States*, No. 13-6435 (Jan. 27, 2014).

A. The Eleventh Circuit's Analysis Invites Separation-of-Powers Problems and Produces Inexplicable Results.

The Eleventh Circuit's "squarely foreclosed" test leaves a petitioner like Williams, who has never had a court consider the merits of his *Begay* claim, without access to any remedy. But if Williams is right—if, in light of this Court's decision in *Begay*, his prior burglary convictions are not violent felonies

for purposes of ACCA—then he is serving a term of imprisonment that exceeds the maximum Congress authorized by nearly 15 years. Indeed, he has already served 6 years more than the 10-year maximum sentence for his crime of conviction. *See* 18 U.S.C. § 924(a)(2).

That raises an important separation-of-powers issue. "[T]he power to . . . prescribe the punishments to be imposed upon those found guilty of [federal crimes] resides wholly with the Congress." *Whalen v. United States*, 445 U.S. 684, 689 (1980). "If a federal court exceeds its own authority by imposing . . . punishments not authorized by Congress"—including, for example, a sentence exceeding the statutory maximum—"it violates . . . the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." *Id.*

The Eleventh Circuit's answer to this problem will produce arbitrary results. The availability of the savings clause, and the opportunity to benefit from a retroactively applicable decision like *Begay*, will depend not on whether a petitioner attempted to raise the claim in his first § 2255 motion, but on whether the circuit court happened to have decided a case "squarely resolv[ing]" that specific claim at the time of his trial, appeal, or first § 2255 motion. Pet. App. 22, 29–30. Under the Eleventh Circuit's test, a petitioner who is the first to raise a specific issue will not be entitled to use the savings clause if a retroactively applicable decision of this Court later overturns the erroneous circuit precedent established by his own case. But the very next petitioner whose

claim is now squarely foreclosed by circuit precedent—regardless of whether he asserts and exhausts the claim—will get the benefit of the intervening decision of this Court. The availability of the savings clause should not turn on such a happenstance of timing.

B. The Eleventh Circuit's Jurisdictional Analysis Is At Odds With *Arbaugh* And Its Progeny.

The Court should also grant review because the Eleventh Circuit's jurisdictional holding misapplies this Court's precedents. A rule is jurisdictional only "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." *Arbaugh*, 546 U.S. at 515. In applying this clear-statement rule, the Court has cautioned that "[n]ot all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional." *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 81 (2009) (internal quotation marks omitted).

Because § 2255(e) speaks in imperative terms ("shall") and contains "jurisdictional language" ("shall not be entertained"), the Eleventh Circuit concluded that it is "jurisdictional" and not subject to waiver or concession. Pet. App. 13. But even statutes that use the word "jurisdiction" are not necessarily *jurisdictional*. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 163–64 (2010). And there is nothing magical about the language "shall not be entertained," for the same language appears in 28 U.S.C. § 2462—a statute of limitations, which this Court has recognized is not typically of jurisdictional

significance. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132–33 (2008). Instead, to determine whether a statutory requirement operates as a jurisdictional limitation, this Court focuses on the provision's plain text, structure, and history. *Reed Elsevier*, 559 U.S. at 163–67.

Nothing in the text, structure, or history of § 2255(e) demonstrates that Congress "rank[ed] [its] statutory limitation on coverage as jurisdictional." *Arbaugh*, 546 U.S. at 516. Indeed, far from providing the requisite clear statement, § 2255(e) says nothing at all about jurisdiction. *Compare Gonzalez v. Thaler*, 132 S. Ct. 641, 649 (2012) (holding that although the "failure to obtain a COA is jurisdictional" under 28 U.S.C. § 2253(c)(1), failing to meet the substantive requirements for obtaining a COA under § 2253(c)(2) and (3) is not). This is not surprising because—unlike the "appeal" provisions in 28 U.S.C. § 2253—§ 2255 is generally *not* a jurisdictional statute; instead, it is a remedial statute that prescribes, among other things, a statute of limitations, § 2255(f), and a right to relief, § 2255(a). *See Harris*, 425 F.3d at 388. Although § 2255 creates a cause of action, it is 28 U.S.C. § 1331 that confers jurisdiction. *See, e.g.*, *Lizardo v. United States*, 619 F.3d 273, 274 n.1 (3d Cir. 2010); *Harris*, 425 F.3d at 388.

The history of similar provisions confirms that § 2255(e) does not have a jurisdictional sweep. Courts have historically treated restrictions on "second or successive" habeas petitions as procedural defenses—not jurisdictional requirements. *See* 2 *Federal Habeas Corpus Practice and Procedure*

§ 28.3[c][i], at 1592 (6th ed. 2011). If Congress intended to overrule this long-standing understanding of abuse-of-the-writ principles, it had to do so more clearly. *See Arbaugh*, 546 U.S. at 515 & n.11; *cf. INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (applying "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction").

III. The Court Should Grant Review Because The Issue Presented Is An Important And Recurring One.

As the government has previously recognized, the issue presented by this case "is of recurring and exceptional importance." Gov't Resp. to Pet. for Reh'g En Banc at 15, *Prost v. Anderson*, No. 08-1455 (10th Cir. Apr. 25, 2011). The importance of the issue is underscored by the substantial liberty interests at stake and how dramatically different the results can be under different circuits' tests. This case presents an ideal vehicle to address these issues because the Court may reach and resolve every facet of the circuit confusion on this issue—*all three* points of dispute are presented here.

1. Every circuit split has the potential to create unfair and arbitrary results, but this one is worse than most. In almost half the circuit courts, Williams likely would have been able to present the merits of his *Begay* claim in a § 2241 petition—at the very least, only two courts squarely foreclose the relief Williams seeks. Had he been incarcerated in a facility in Indiana or Connecticut instead of Georgia when he first petitioned for relief, he might have

been released years ago (for he has already served more than the 10-year maximum sentence for his crime of conviction). Whether Williams can obtain relief turns on nothing more than where the Bureau of Prisons decides to locate him.

Moreover, there is no likelihood that the conflict will resolve itself. Because a claim based on a statutory-interpretation decision cannot be raised in a successive § 2255 motion, the issue of the savings clause's applicability will arise whenever this Court rejects a lower court's expansive interpretation and narrows the scope of a federal criminal statute—as it has done many times in recent years. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358 (2010) (mail fraud); *Carr v. United States*, 560 U.S. 438 (2010) (Sex Offender Registration and Notification Act); *United States v. Santos*, 553 U.S. 507 (2008) (money laundering); *Watson v. United States*, 552 U.S. 74 (2007) (use of firearm); *Cleveland v. United States*, 531 U.S. 12 (2000) (mail fraud); *Jones v. United States*, 529 U.S. 848 (2000) (arson). Of particular relevance here, in recent years this Court has issued a series of decisions rejecting the lower courts' expansive interpretation of the term "violent felony" under ACCA. *See, e.g.*, *Johnson v. United States*, 559 U.S. 133 (2010); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay*, 553 U.S. 137.

Because the lower courts do not agree on when § 2255(e) applies, they necessarily also do not agree on when and how these decisions construing the reach of criminal statutes should apply retroactively. Courts taking the narrowest view of the savings clause—the Tenth Circuit, for example—effectively

refuse to apply *Begay* and its progeny uniformly to benefit prisoners erroneously sentenced under an expansive, unlawful construction of that statute.

2. Petitions implicating each of the three points of division in this circuit split are rare, due in no small part to the government's decision generally to side with petitioners (like Williams) on the threshold procedural issue. Indeed, that was true in a comprehensive recent Eleventh Circuit decision addressing the savings clause in which the court held that a petitioner could use the savings clause to challenge a sentence that exceeds the statutory maximum. *See Bryant*, 738 F.3d 1253. The government did not file a petition for a writ of certiorari in that case, however, and the time for doing so has expired.

3. Although (as in *Bryant*) the government agreed below that Williams's claim was the type of claim for which the savings clause opens a door to relief under § 2241, it disagreed with Williams on the merits of his ACCA claim. No court has considered the merits of that claim, and it presents, at the very least, a serious issue that will never be considered by the lower courts unless and until this Court grants review.

Williams contends that two of his three allegedly ACCA-qualifying offenses—his 1989 and 1990 convictions for "burglary of a dwelling" in the second degree under Florida law—are not violent felonies within the meaning of ACCA. This Court's decision in *Taylor v. United States*, 495 U.S. 575, 599 (1990), makes plain that Williams's convictions were not for "generic burglary" for purposes of a § 924(e)

enhancement. *See United States v. Adams*, 91 F.3d 114, 115 (11th Cir. 1996) (per curiam). For these offenses to fall within the residual clause of § 924(e) and satisfy *Begay*, however, Florida law at the time of his convictions must have narrowly construed the "curtilage" element in its burglary statute. This was the "key premise" in *James v. United States*, 550 U.S. 192 (2007), which held that a later Florida burglary conviction satisfied the residual clause. But Florida law did not narrowly construe "curtilage" in 1989 and 1990, when Williams was convicted—that narrow definition would not come until five years later, in *State v. Hamilton*, 660 So. 2d 1038 (Fla. 1995). Decisional law before and after the Florida Supreme Court's 1995 decision in *Hamilton* demonstrates that Florida prosecuted mere acts of trespass as burglary at the time of Williams's convictions. *See, e.g.*, *J.E.S. v. State*, 453 So. 2d 168 (Fla. Ct. App. 1984) (theft of bicycle from a driveway was burglary); *Martinez v. State*, 700 So. 2d 142, 144 n.2 (Fla. Ct. App. 1997) (recognizing that *J.E.S.* was no longer good law after *Hamilton*). As the Sixth Circuit observed, "stealing a car or stealing apples from a neighbor's backyard would be counted as a burglary under Florida's statute." *United States v. Pluta*, 144 F.3d 968, 975–76 (6th Cir. 1998). And conduct amounting to no more than criminal trespass is not a violent felony under ACCA. *See United States v. McFalls*, 592 F.3d 707, 715 (6th Cir. 2010) (holding that burglary offense that could be committed by entering "uninhabitable sheds up to 200 yards from a generic dwelling" did not satisfy residual clause).

Williams received a nearly 25-year sentence for being a felon in possession of a firearm because, at

that time, it appeared that his criminal history made him a violent felon under ACCA. But the number of Williams's prior offenses do not match their severity. Indeed, in keeping with the broad understanding of Florida law at the time, one of his burglary offenses involved theft of an automobile from a driveway, and the degree of his charge reflects that he was unarmed. Ex. C. to Reply in Supp. of Pet. at 29, *Williams v. Warden*, *supra*, Dkt. No. 16-3 (Mar. 21, 2011); Ex. A. to Resp. in Opp'n to Habeas Pet. at 2, *Williams v. Warden*, *supra*, Dkt. No. 12-1 (Feb. 28, 2011); *see* Fla. Stat. § 810.02(3). Williams has presented a serious claim that the lower courts should have considered.

In other circuits, like the Second and the Seventh Circuits, Williams's claim would likely have been reviewed on its merits. Instead, the Eleventh Circuit fashioned yet another construction of § 2255(e)—this time, one that essentially closes the door the savings clause opens in other circuits for petitioners like Williams. It is time for this Court to clean up this "messy field." *Prost*, 636 F.3d at 594.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-13306

D.C. Docket No. 2:10-cv-00180-LGW-JEG

ALBERT WILLIAMS,

Petitioner-Appellant,

versus

WARDEN,
FEDERAL BUREAU OF PRISONS,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(April 11, 2013)

Before: MARCUS and MARTIN, Circuit Judges
and GOLD,* District Judge

Albert Williams appeals the dismissal of his 28 U.S.C. § 2241 petition for habeas corpus, claiming that his 293-month sentence for a violation of 18 U.S.C. § 922(g)(1) and the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e), was improper because he did not have the three violent felony predicates required to apply the ACCA enhancement. Without that enhancement, a

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* Honorable Alan S. Gold, United States District Judge for the Southern District of Florida, sitting by designation.

§ 922(g)(1) offense carries a ten-year maximum sentence. At issue is whether the savings clause of 28 U.S.C. § 2255(e) allowed the district court to entertain Williams's § 2241 petition and, if it did, whether Williams's 1989 and 1990 burglary convictions are proper ACCA predicates.

Notwithstanding the bar on second or successive § 2255 motions, § 2255's savings clause permits a court to entertain a § 2241 habeas petition challenging the legality of a prisoner's detention when the prisoner's "remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). At the time of Williams's direct appeal and first § 2255 motion, there was no circuit precedent that foreclosed him from raising the claim that his burglary convictions should not count as violent felonies, and in fact he did raise it. In these circumstances, his direct appeal and first collateral attack were not inadequate or ineffective to test the legality of his detention, and the savings clause does not apply. We conclude that the district court lacked subject-matter jurisdiction to entertain Williams's § 2241 petition and, therefore, affirm.

I.

Williams has an extensive criminal history, of which four incidents are relevant to this appeal. In 1986, he pleaded guilty to one count of robbery and two counts of aggravated assault stemming from a single incident. In 1989, he pleaded *nolo contendere* to burglary of a dwelling, a second-degree felony pursuant to Fla. Stat. § 810.02. In 1990, he again

committed burglary of a dwelling; this time, he pleaded guilty to the offense.

Finally, the criminal offense that led to the sentence now before us occurred in 1997, when Miami police officers investigating suspected narcotics activity encountered Williams. After a brief conversation, Williams drew a gun on the officers, who disarmed him.

Williams was indicted in the U.S. District Court for the Southern District of Florida for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Before trial, the government filed a notice of intent to seek the penalty enhancement authorized by the Armed Career Criminal Act, which imposes a minimum sentence of fifteen years and a maximum of life imprisonment for a violation of § 922(g)(1) by a person who has three prior convictions for a violent felony or a serious drug offense. Williams was tried and convicted of the § 922(g)(1) offense in 1998.

Williams's Presentence Investigation Report ("PSR") recommended applying the ACCA enhancement based on his robbery and burglary convictions. Applying this enhancement, the PSR determined that Williams had an offense level of 33 and a criminal history category of VI. Under the then-mandatory Sentencing Guidelines, his guideline range was 235 to 293 months. During his sentencing, Williams did not object to the ACCA enhancement based on the theory that his prior offenses did not qualify as violent felonies. He received a prison sentence of 293 months. On direct appeal, he also did not raise an objection to the ACCA enhancement. This Court affirmed Williams's conviction and

sentence. *United States v. Williams*, 182 F.3d 936 (11th Cir. 1999) (unpublished table op.).

Several failed collateral attacks followed. Williams first sought postconviction relief pursuant to 28 U.S.C. § 2255, arguing that he received ineffective assistance of counsel because his attorney had failed to object to the use of Williams's burglary convictions as predicate offenses to support the ACCA enhancement. He also argued that the Florida crime of burglary of a dwelling fell outside the definition of violent felony because it encompassed conduct beyond "generic burglary" as the Supreme Court had defined it in *Taylor v. United States*, 495 U.S. 575 (1990). The postconviction court denied Williams relief and a certificate of appealability ("COA"). This Court also denied him a COA and denied his motion for reconsideration on March 23, 2004, noting that the use of the "1989 burglary conviction . . . was arguably erroneous under *Taylor*," but concluding that any possible error was immaterial because Williams's other prior convictions could support the enhancement. The Supreme Court denied certiorari. *Williams v. United States*, 543 U.S. 864 (2004).

After the Supreme Court decided *Shepard v. United States*, 544 U.S. 13 (2005), which limited the materials a district court could consult to determine whether a prior conviction was a violent felony under the ACCA, Williams twice unsuccessfully sought Rule 60(b) relief from the denial of his § 2255 motion. In both instances, the district court concluded that it lacked subject-matter jurisdiction to entertain Williams's claim—which asserted, through the lens

of ineffective assistance of counsel, that his Fla. Stat. § 810.02 burglary convictions were not violent felonies in light of *Taylor* and *Shepard*—because Williams was effectively seeking a second § 2255 motion. Williams then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the U.S. District Court for the Eastern District of North Carolina. That petition, which reiterated his *Taylor* and *Shepard* claims, was also unsuccessful.

After the Supreme Court decided *Begay v. United States*, 553 U.S. 137 (2008), Williams filed still another § 2255 motion. Williams argued that, under *Begay*, his burglary offenses did not qualify as violent felonies, and that therefore his sentence exceeded the ten-year statutory maximum for his crime of conviction. The district court concluded that it could not entertain this second or successive motion because Williams had not moved this Court for authorization pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), which deprived it of subject-matter jurisdiction. Williams did not appeal this decision.

In November 2010, Williams again collaterally attacked his sentence, filing the instant § 2241 petition in the U.S. District Court for the Southern District of Georgia. Williams contended that, pursuant to the savings clause of § 2255(e), the district court could hear his § 2241 petition and hence decide the *Begay* claim that he had raised in his second § 2255 motion.

The district court, relying on our *en banc* decision in *United States v. Gilbert*, 640 F.3d 1293 (11th Cir. 2011), dismissed Williams's petition because it interpreted *Gilbert* as holding that the

savings clause does not authorize any challenge to a prisoner's sentence, only challenges based on actual innocence. Williams timely appealed, and this Court appointed him counsel.

The government initially conceded both before the district court and on appeal that the savings clause applied to the kind of claim Williams sought to bring in his § 2241 petition. Nonetheless, at oral argument we asked the parties to brief whether the district court had subject-matter jurisdiction to entertain his petition pursuant to the savings clause. *See Wofford v. Scott*, 177 F.3d 1236, 1245 (11th Cir. 1999) ("[T]he only sentencing claims that may conceivably be covered by the savings clause are those based upon a retroactively applicable Supreme Court decision overturning circuit precedent."). Williams asserted that the savings clause issue was nonjurisdictional and thus we should accept the government's initial concession and go to the merits of his claim. Moreover, he said, this Court's ACCA precedents—while not specifically addressing the issue of whether Florida burglary of a dwelling was a violent felony—did foreclose his sentencing claim prior to *Begay*. In response, the government argued that Williams failed to satisfy *Wofford*'s requirement that his claim be based upon a retroactively applicable Supreme Court decision overturning circuit precedent. The government said that there was no controlling circuit precedent that foreclosed Williams's claim during his direct appeal and that, in any case, none of the Supreme Court's subsequent ACCA decisions cast doubt on whether Fla. Stat. § 810.02 is a violent felony. Thus, the savings clause did not permit Williams's § 2241 petition.

II.

Whether a prisoner may bring a 28 U.S.C. § 2241 petition under the savings clause of § 2255(e) is a question of law we review *de novo*. *Sawyer v. Holder*, 326 F.3d 1363, 1365 n.4 (11th Cir. 2003). The applicability of the savings clause is a threshold jurisdictional issue, and we "cannot reach . . . questions" that "the district court never had jurisdiction to entertain." *Boone v. Sec'y, Dep't of Corr.*, 377 F.3d 1315, 1316 (11th Cir. 2004). If the savings clause does permit Williams's § 2241 petition, the substantive issue—whether his prior convictions qualify as violent felonies under the Armed Career Criminal Act—is also a question of law we review *de novo*. *United States v. Canty*, 570 F.3d 1251, 1254 (11th Cir. 2009).

A.

Williams contends that the savings clause of § 2255(e) permits him to file a § 2241 habeas petition to raise the claim that his sentence exceeds the statutory maximum authorized by 18 U.S.C. § 924. He argues, at bottom, that the Supreme Court's recent run of ACCA cases, most notably *Begay v. United States*, 553 U.S. 137 (2008), should lead us to conclude that his 1989 and 1990 burglary convictions are not violent felonies. *Begay* held that the ACCA's residual clause should encompass only those "crimes that are roughly similar, in kind as well as in degree of risk posed, to the [enumerated crimes] themselves." *Id.* at 143. To test whether a state offense satisfies these conditions, a court must determine whether the crime involves "purposeful, violent, and aggressive conduct." *Id.* at 144–45

(internal quotation marks omitted). According to Williams, his 1989 and 1990 burglary convictions posed a lesser degree of risk than the ACCA's enumerated crimes because the Florida statute encompassed conduct analogous to mere criminal trespass. Therefore, Williams avers, he was not properly subject to the ACCA enhancement that led to a sentence in excess of the otherwise applicable ten-year statutory maximum.

But Williams has already challenged the characterization of his burglary convictions as violent felonies under the ACCA, and hence the application of the ACCA enhancement to his sentence. He cannot raise this claim again in a second or successive § 2255 motion. Section 2255's savings clause dictates the narrow circumstances in which the district court could have heard and decided Williams's claim:

> An 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, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e) (emphasis added). Thus, in order for the savings clause to apply, Williams must demonstrate that his direct appeal and first § 2255 motion were "inadequate or ineffective" tests of his claim.

Before we consider that question, however, we must determine whether the savings clause is a jurisdictional provision. As the Federal Rules of Civil Procedure state, "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3); *accord Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented."); *id.* ("Subject-matter jurisdiction can never be waived or forfeited."). This threshold question is particularly important because the government conceded in the district court, and initially on appeal, that the savings clause applies to Williams's claim. If the savings clause is not jurisdictional, then we may proceed directly to the merits on the basis of this concession; however, we cannot accept this concession if the savings clause limits the district court's subject-matter jurisdiction to entertain a § 2241 petition. *See W. Peninsular Title Co. v. Palm Beach Cnty.*, 41 F.3d 1490, 1492 n.4 (11th Cir. 1995) ("Parties may not stipulate jurisdiction."). After thorough review, we hold that the savings clause does indeed impose a subject-matter jurisdictional limit on § 2241 petitions. Given the importance of the issue and the relative dearth of authority, we explain this holding at some length.

The Supreme Court recently has taken an active role in more precisely delineating what statutory prerequisites to suit qualify as jurisdictional—a boundary not always neatly policed in the past. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) ("This Court, no less than other courts, has

sometimes been profligate in its use of the term ['jurisdictional']."). In *Arbaugh*, the Court established that a requirement for bringing suit is jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional," and, conversely, that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction nonjurisdictional in character." *Id.* at 515–16. Thus, whether a statutory limitation is jurisdictional is essentially based on whether there is a clear expression of congressional intent to make it so.

In this case, Congress expressed its clear intent to impose a jurisdictional limitation on a federal court's ability to grant a habeas petitioner what is effectively a third bite at the apple after failing to obtain relief on direct appeal or in his first postconviction proceeding. The savings clause states that a § 2241 habeas petition "*shall not be entertained* . . . unless it . . . appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." § 2255(e) (emphasis added). Based on the text alone, which speaks in imperative terms of what class of cases the district court has the *power* to hear, not what the petitioner himself must allege or prove in order to state a claim, we are compelled to conclude that the savings clause is a limitation on jurisdiction. It commands the district court not to "entertain[]" a § 2241 petition that raises a claim ordinarily cognizable in the petitioner's first § 2255 motion except in the exceptional circumstance where the petitioner's first motion was "inadequate" or "ineffective" to test his claim. The provision does everything but use the term "jurisdiction" itself, and

there is no magic in that word that renders its use necessary for courts to find a statutory limitation jurisdictional in nature. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) ("Congress, of course, need not use magic words in order to speak clearly on this point."); *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003) (holding to be jurisdictional 28 U.S.C. § 2253(c)(1), which provides "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals"). As we have explained before, "[a] jurisdictional defect is one that strips the court of its power to act and makes its judgment void." *McCoy v. United States*, 266 F.3d 1245, 1249 (11th Cir. 2001) (internal quotation marks and alterations omitted); *accord Henderson*, 131 S. Ct. at 1202 ("[A] rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity. . . ."). A plain reading of the phrase "shall not entertain" yields the conclusion that Congress intended to, and unambiguously did strip the district court of the power to act—that is, Congress stripped the court of subject-matter jurisdiction—in these circumstances unless the savings clause applies.

Indeed, when we read the provision in its broader context, the savings clause's limitation on § 2241 jurisdiction complements another jurisdictional limitation designed to promote finality of federal criminal judgments. In general, a federal prisoner seeking to challenge the legality of his conviction or sentence has two bites at the apple: one on direct appeal, and one via a § 2255 motion. In the interests of finality, the law generally bars prisoners from filing second or successive § 2255 motions,

except when "certified as provided in section 2244[(b)(3)(A)] by a panel of the appropriate court of appeals to contain" either "newly discovered evidence" of actual innocence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *See* 28 U.S.C. § 2255(h); *Gilbert*, 640 F.3d at 1309. This bar on second or successive motions is jurisdictional. *See United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005) ("Without authorization, the district court lacks jurisdiction to consider a second or successive petition." (citing *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003)). It would make little sense for that provision to be jurisdictional in nature but for the savings clause to be nonjurisdictional, since both the savings clause and the certification of second motions pursuant to §§ 2255(h) and 2244(b)(3)(A) are designed to give prisoners a limited opportunity to mount a *second* postconviction challenge that Congress has otherwise denied them through the statutory bar on second or successive motions.

A comparison of the savings clause to the provisions at issue in *Arbaugh* and *Miller-El* confirms the jurisdictional nature of the savings clause. In *Arbaugh*, the Supreme Court addressed whether Title VII's definition of the term "employer," which required the defendant to have "fifteen or more employees," *see* 42 U.S.C. § 2000e(b), established a jurisdictional requirement or was merely a part of a plaintiff's substantive claim. 546 U.S. at 503. Notably, this definition was part of a section titled "Definitions," 42 U.S.C. § 2000e, which never referred

to a court's ability to entertain a claim but merely defined terms used in the rest of the statute. Jurisdiction over Title VII actions existed under a distinct provision, 42 U.S.C. § 2000e-5(f)(3), and under the general federal-question jurisdiction of 28 U.S.C. § 1331. *See Arbaugh*, 546 U.S. at 505–06. Given this statutory scheme, the Court had little difficulty concluding that "the threshold number of employees . . . is an element of a plaintiff's claim for relief, not a jurisdictional issue." *Id.* at 516. A clear statement regarding a court's power to hear a Title VII action was decidedly lacking in that provision.

In *Miller-El*, on the other hand, the Court held that the COA requirement of 28 U.S.C. § 2253(c)(1) did establish a subject-matter jurisdictional limit. *See* 537 U.S. at 335–36 ("Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA. . . . This is a jurisdictional prerequisite because the COA statute mandates that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. . . .'" (alterations in original) (quoting § 2253(c)(1)); *see also Gonzalez*, 132 S. Ct. at 649 (characterizing § 2253(c)(1) as "'clear' jurisdictional language"). The savings clause, unlike the definition of employer at issue in *Arbaugh*, is housed in a section of the statute that concerns jurisdiction and is framed in jurisdictional language. Moreover, just like § 2253(c)(1), § 2255(e) speaks in imperative terms regarding a district court's power to entertain a particular kind of claim.

Although the courts of appeals have not addressed this issue at length, the great weight of authority also suggests that the savings clause is jurisdictional in nature. In a Fourth Circuit case, for example, the government failed to contest the savings clause's applicability in the district court, then raised the issue for the first time on appeal. *See Rice v. Rivera*, 617 F.3d 802, 806 (4th Cir. 2010). The Fourth Circuit described this change-of-heart as a "distasteful occurrence[]" but explained that the government's "about-face [wa]s irrelevant to [its] resolution of" what that court termed a "jurisdictional issue." *Id.* at 806–07; *accord id.* at 807 ("Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." (alteration and internal quotation marks omitted)). Thus, the Fourth Circuit considered the savings clause issue and ultimately held that the district court lacked jurisdiction over Rice's § 2241 petition because he failed to satisfy the conditions needed to render his § 2255 motion inadequate or ineffective to test the legality of his detention. *See id.* at 807–08. Several other courts of appeals have taken this position, or implied that the savings clause is jurisdictional in nature. *See Wooten v. Cauley*, 677 F.3d 303, 306 (6th Cir. 2012) (analyzing whether "[t]he use of the savings clause to establish jurisdiction" renders the resulting § 2241 petition subject to § 2255's statute of limitations); *Harrison v. Ollison*, 519 F.3d 952, 961 (9th Cir. 2008) ("Because Harrison has not established that his petition is a legitimate § 2241 petition brought pursuant to the escape hatch of § 2255, we do not

have jurisdiction under § 2241 to hear his appeal."); *Hill v. Morrison*, 349 F.3d 1089, 1091 (8th Cir. 2003) (the savings clause "provides the court of incarceration as having subject matter jurisdiction over a collateral attack on a conviction or sentence"); *Cephas v. Nash*, 328 F.3d 98, 105 (2d Cir. 2003) ("[W]here . . . petitioner invokes § 2241 jurisdiction to raise claims that clearly could have been pursued earlier . . . then the savings clause of § 2255 is not triggered and dismissal of the § 2241 petition for lack of jurisdiction is warranted."); *Garza v. Lappin*, 253 F.3d 918, 921 (7th Cir. 2001) ("If Garza can show that his petition fits under this narrow exception [in the savings clause], then . . . the district court had jurisdiction to consider his habeas petition. . . .").[1]

In short, in enacting § 2255(e), Congress clearly restricted the subject-matter jurisdiction of the federal courts.

B.

The remaining issue boils down to whether Williams has demonstrated that his claim is the kind of claim covered by the savings clause's limited grant of jurisdiction. On its surface, the provision allows prisoners to pursue claims through a § 2241 petition if their original § 2255 motion was "inadequate or ineffective to test the legality of [their] detention," 28 U.S.C. § 2255(e), but the statute says precious little about what it means for the original motion to have

[1] Williams cites as contrary authority a Seventh Circuit case, *Brown v. Rios*, 696 F.3d 638 (7th Cir. 2012). In *Brown*, however, the Seventh Circuit simply accepted the government's concession that the savings clause applied, *see* 696 F.3d at 641, and never considered whether it was a jurisdictional limitation.

been "inadequate" or "ineffective." In two major cases, this Court has substantially limited the types of claims to which the savings clause applies: first in *Wofford*, 177 F.3d 1236, and most recently in our *en banc* decision in *Gilbert*, 640 F.3d 1293.

As an initial matter, the district court erred in relying on *Gilbert* to dismiss Williams's petition.[2] According to the district court, *Gilbert* held that "a petitioner is foreclosed from challenging his sentence, rather than his conviction, using 28 U.S.C. § 2255(e)'s savings clause." However, *Gilbert* never established so categorical a limitation on the savings clause. Rather, *Gilbert* addressed—and explicitly limited its holding to—circumstances where a federal prisoner sought to attack a potential misapplication of the Sentencing Guidelines that resulted in a higher sentence, but one that remained within the statutory maximum. *See* 640 F.3d at 1295 (framing the question as "whether a federal prisoner can use a habeas corpus petition to challenge his sentence" when "the sentence the prisoner is attacking does not exceed the statutory maximum"). We held that such challenges to guideline determinations do not fall within the ambit of the savings clause. *Id.* at 1323. In a footnote, *Gilbert* specifically limited its holding from applying to "pure *Begay* errors, by which we mean errors in the application of the 'violent felony' enhancement, as defined in 18 U.S.C. § 924(e)(2)(B),

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[2] We can, however, "affirm the judgment of the district court on any ground supported by the record, regardless of whether that ground was relied upon or even considered by the district court," *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1309 (11th Cir. 2012), and ultimately do so here.

resulting in a higher statutory minimum and maximum sentence under § 924(e)." *Id.* at 1319 n.20. In *Gilbert*, "we ha[d] no occasion to decide" how to treat these pure *Begay* errors and held only that "the savings clause does not apply to sentencing errors that do not push the term of imprisonment beyond the statutory maximum." *Id.*; *accord id.* at 1323 ("Nor do we decide if the savings clause . . . would permit . . . a § 2241 petition claiming that [the prisoner] was sentenced to a term of imprisonment exceeding the statutory maximum."). Williams's claim is that the district court erroneously applied the ACCA enhancement, which increased his sentence to 293 months, well beyond the otherwise applicable ten-year statutory maximum. Since *Gilbert* expressly reserved the issue of whether the savings clause applied to this species of claim, the district court committed legal error by reading *Gilbert* as disposing of Williams's § 2241 petition.

In fact, it is not *Gilbert*, but rather our earlier savings clause decision in *Wofford*, that is fatal to Williams's attempt to pass through the savings clause. In *Wofford*, a prisoner sought and was denied § 2255 relief on a variety of claims; he then sought permission to file a second § 2255 motion advancing several new challenges to his sentencing. *See* 177 F.3d at 1237–38. After several failed attempts at obtaining certification to file a second § 2255 motion, Wofford filed a petition for a writ of habeas corpus pursuant to § 2241, arguing that the savings clause allowed him to pursue his sentencing arguments because § 2255 foreclosed any other avenue for raising those claims. *Id.* at 1238.

To divine the meaning of the savings clause, the panel in *Wofford* canvassed the decisions of our sister circuits, several of which had permitted § 2241 petitions via the savings clause in the wake of the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995). *See Wofford*, 177 F.3d at 1242–45. In *Bailey*, the Supreme Court had restricted the meaning of a federal criminal statute, 18 U.S.C. § 924(c)(1), which meant that some prisoners, who were convicted under the broader interpretation of that statute, were then imprisoned for conduct the law no longer rendered criminal. *See id.* at 1242. By the time *Wofford* was decided, the Second, Third, and Seventh Circuits had all held that the savings clause permitted prisoners to claim actual innocence based on *Bailey* in a § 2241 petition, although each court relied on a different rationale. *See id.* at 1242–44. The panel in *Wofford* approved of the Seventh Circuit's approach in *In re Davenport*, 147 F.3d 605 (7th Cir. 1998), which held that when "a Supreme Court decision has changed the law of a circuit retroactively in such a way that a prisoner stands convicted for a nonexistent offense, and the prisoner had no reasonable opportunity for a judicial remedy of that fundamental defect before filing the § 2241 proceeding," then the savings clause permitted the petition. *See Wofford*, 177 F.3d at 1244 (citing *In re Davenport*, 147 F.3d at 611).

Wofford approved of the *Davenport* approach because it addressed and harmonized two serious concerns that are in some tension with one another. On the one hand, "the essential function of habeas corpus is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the

fundamental legality of his conviction and sentence," and it may be necessary to apply the savings clause to some claims inadequately addressed in a first § 2255 motion in order to "satisfy the Constitution['s Suspension Clause, U.S. Const. art. I, § 9, cl. 2.]" *Id.* (internal quotation marks omitted). On the other hand, letting the savings clause apply too broadly would eviscerate the statutory bar on second or successive motions, which was intended to limit most prisoners to one clean shot at postconviction relief. *Id.* (if "the § 2241 remedy is available whenever the AEDPA restrictions on second or successive motions bar a § 2255 motion," then that "would nullify the [bar's] limitations" (internal quotation marks omitted)). After all, the savings clause cannot simply mean that every § 2255 motion that appears to have been incorrectly decided based on subsequent Supreme Court precedent may be revisited through a § 2241 habeas petition; if it did, then the bar on second or successive motions would effectively be written out of the statute, and the savings clause would swallow up the specific allowance for a second motion when the basis of the challenge is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *See* 28 U.S.C. § 2255(h)(2).[3]

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[3] As we see it, the dissent brushes aside this problem, claiming that "[t]he correct question to ask is whether Mr. Williams was erroneously sentenced as an armed career criminal in light of *Begay*," and that "[t]he existence or nonexistence of circuit precedent which conflicts with *Begay*" is meaningless. Dissenting Op. at [App-42–43]. According to the dissent, when an intervening Supreme Court precedent reveals that a prisoner's sentence exceeds the statutory maximum, the

Yet by the same token, the circumstances delineated in § 2255(h)(1) and (2) cannot be the only instances in which the § 2255 remedy is inadequate; if that were true, then it would be the savings clause that was rendered meaningless. If possible, we try to avoid interpreting a statute in such a way that any part of it becomes mere surplusage. *See United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991).

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prisoner's claim assumes a uniquely powerful constitutional dimension that means we must entertain it notwithstanding the statutory bar on second or successive motions. *See* Dissenting Op. at [App-37, 44–46].

The dissent's position, however, ignores the language and structure of 28 U.S.C. § 2255. The statute covers a whole host of claims, expressly including claims "that the sentence was in excess of the maximum authorized by law," *id.* § 2255(a), but nonetheless bars a second or successive motion advancing those claims unless they are based upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," *id.* § 2255(h)(2). There is not the slightest indication in the statutory text that the type of error Williams alleges—a sentence in excess of the statutory maximum—is or should be treated as warranting an exception to the bar on second or successive motions. Nonetheless, the dissent maintains that, at least for this kind of claim, all Williams needed was *Begay* itself—a decision based on statutory interpretation of the ACCA rather than constitutional law, and one which the Court itself did not make retroactively applicable. In taking this position, the dissent effectively seeks to rewrite § 2255 to put one type of claim enumerated in § 2255(a) on a different footing from all the other claims the statute covers. We are obliged, however, to obey the language as Congress wrote it, and Congress applied the same bar on second or successive motions to all the claims enumerated in § 2255(a).

Drawing from *Davenport*, *Wofford* described two different kinds of challenges to which the savings clause applies that are *not* covered by § 2255(h). First, the panel opined in dicta that "[t]he savings clause of § 2255 applies to a claim when: 1) that claim is based upon a retroactively applicable Supreme Court decision; 2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense; and, 3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal, or first § 2255 motion." *Wofford*, 177 F.3d at 1244. This category covers actual innocence challenges akin to the post-*Bailey* § 2241 petitions permitted by several other courts of appeals; when a Supreme Court decision subsequent to conviction means that a petitioner's offense conduct is no longer criminal, the savings clause gives him an avenue to seek relief. Also in dicta, the panel in *Wofford* noted a second circumstance to which the savings clause might apply: when "a 'fundamental defect' in sentencing" occurred and "the petitioner had not had an opportunity to obtain judicial correction of that defect earlier." *Id.* (quoting *In re Davenport*, 147 F.3d at 611). This interpretation of the savings clause harmonizes that provision with the bar on second or successive motions while also avoiding constitutional questions under the Suspension Clause.

The panel in *Wofford* did not define what qualified as a fundamental defect. Rather, the panel said: "It is enough to hold, as we do, that the only sentencing claims that may conceivably be covered by the savings clause are those based upon a

retroactively applicable Supreme Court decision overturning circuit precedent." *Id.* at 1245. Because Wofford's sentencing claims did not "rest upon a circuit law-busting, retroactively applicable Supreme Court decision," and he had "had a procedural opportunity to raise each of his claims . . . at trial or on appeal," the panel in *Wofford* concluded that the savings clause could not apply to his claims. *Id.*

Wofford's holding establishes two necessary conditions—although it does not go so far as holding them to be sufficient—for a sentencing claim to pass muster under the savings clause. First, the claim must be based upon a retroactively applicable Supreme Court decision. The second, and equally essential, condition is that the Supreme Court decision must have overturned a circuit precedent that squarely resolved the claim so that the petitioner had no genuine opportunity to raise it at trial, on appeal, or in his first § 2255 motion. *Wofford* resolves the issue in this appeal because Williams cannot show that this Circuit's law foreclosed him from raising an objection to the treatment of his two Florida burglary convictions as violent felonies under the ACCA.[4]

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[4] The dissent disagrees with our reading of *Wofford*. The dissent says that Williams's claim is not a sentencing claim, *see* Dissenting Op. at [App-38 n.2], and thus cannot fall within *Wofford*'s holding that "the only sentencing claims that may conceivably be covered by the savings clause are those based upon a retroactively applicable Supreme Court decision overturning circuit precedent." 177 F.3d at 1245. The dissent also suggests that *Wofford* does not apply to these circumstances, and that we have mistaken its dicta for its holding. According to the dissent, the requirement of circuit-

busting Supreme Court precedent "does not apply to someone serving a sentence beyond what the statute allows." Dissenting Op. at [App-38–39]; *accord id.* at [App-41–43].

In the first place, we are hard-pressed to imagine a more quintessential sentencing claim than the one Williams has presented: that his 293-month sentence was the product of an erroneous application of the Armed Career Criminal Act, which is—and which this Court has always treated as—a "sentencing enhancement" statute. *See, e.g.*, *United States v. Robinson*, 583 F.3d 1292, 1293 (11th Cir. 2009). The dissent even quotes language from our *en banc* opinion in *Gilbert* that makes this point abundantly clear. As we explained in *Gilbert*, if "pure *Begay* errors" fell within the savings clause, it would be because they were "*sentencing claims* . . . where there was a fundamental defect in sentencing." 640 F.3d at 1319 n.20 (emphasis added). Indeed, it is difficult to understand why *Gilbert* would bother to confine its holding to "sentencing errors that do not push the term of imprisonment beyond the statutory maximum," *id.*, if all sentencing errors that pushed the term of imprisonment beyond the statutory maximum were not sentencing claims at all.

As for the claim that *Wofford* is inapplicable or that we were applying mere dicta from that case, the principle we apply comes from this part of the opinion: "It is enough to *hold*, as we do, that the only sentencing claims that may conceivably be covered by the savings clause are those based upon a retroactively applicable Supreme Court decision overturning circuit precedent." *Wofford*, 177 F.3d at 1245 (emphasis added). This passage plainly is holding. The panel in *Wofford* described it as holding, and it was the very basis upon which the panel disposed of the petitioner's claim. Wofford could demonstrate neither an intervening Supreme Court precedent nor an overruled circuit precedent, *see id.*, and therefore he failed to satisfy the two necessary conditions for a sentencing claim to be covered by the savings clause. Nor did the panel in *Wofford* confine its holding to the circumstance where a petitioner challenges a sentence below the statutory maximum. Indeed, *Davenport*, the case upon which the panel in *Wofford* relied, rejected a petitioner's attempt to utilize the savings clause to

No Eleventh Circuit precedent squarely held that burglary of a dwelling, as defined in Fla. Stat. § 810.02, was a violent felony for ACCA purposes during Williams's direct and collateral attacks. In *United States v. Hill*, 863 F.2d 1575, 1581–82 (11th Cir. 1989), a panel of this Court had held that § 810.02 was a "burglary" under the ACCA's enumerated felonies clause and thus was categorically a violent felony. *Taylor v. United States*, 495 U.S. 575 (1990), however, abrogated *Hill*. *Taylor* held that, for a state law offense to qualify as a burglary under the enumerated felonies clause, the offense had to require entry into an actual building or structure; thus, the Court held that a Missouri burglary statute, which criminalized entry of

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challenge an ACCA enhancement that raised his sentence above the otherwise applicable statutory maximum. *See In re Davenport*, 147 F.3d at 607.

The dissent's interpretation of *Wofford* stems from its misreading of this Court's subsequent descriptions of *Wofford*'s holding. As a shorthand, panels of this Court or the Court sitting *en banc* have characterized *Wofford* as holding "simply that the savings clause does not cover sentence claims that could have been raised in earlier proceedings." *Gilbert*, 640 F.3d at 1319; *see also Turner v. Warden Coleman FCI (Medium)*, No. 10-12094, ___ F.3d ___, 2013 WL 646089, at *3–4 (11th Cir. Feb. 22, 2013). What this shorthand means is that the petitioner must point to then-binding circuit precedent, subsequently overruled by the Supreme Court, that barred his claim during his earlier proceedings. Otherwise, there was nothing preventing him from raising his claim on direct appeal or in his first § 2255 motion. *See Wofford*, 177 F.3d at 1245 ("[H]is claims are sentencing claims, none of which rest upon a circuit law-busting, retroactively applicable Supreme Court decision. Wofford had a procedural opportunity to raise each of his claims and have it decided either at trial or on appeal.").

locations other than a structure, was not categorically a burglary for ACCA purposes. *See id.* at 599. Since Fla. Stat. § 810.02 defines dwelling to include *both* the structure and its surrounding curtilage, *Taylor* rendered it impossible to hold that § 810.02 was categorically a violent felony under the ACCA's enumerated felonies clause. After *Taylor* abrogated *Hill*, therefore, it was an open question in this Circuit whether § 810.02 might categorically constitute a violent felony not under the ACCA's enumerated felonies clause but rather under the so-called residual clause, which covers crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii). *See James v. United States*, 550 U.S. 192, 201 (2007). Indeed, Williams does not suggest that *Hill* controlled the outcome of his case.

Williams was convicted in 1998, and his direct appeal and first 28 U.S.C. § 2255 motion were decided between 1998 and March 23, 2004, when a panel of this Court denied his motion for reconsideration of this Court's denial of a COA. Only after both Williams's direct appeal and his collateral attack did this Court decide *United States v. James*, 430 F.3d 1150 (11th Cir. 2005), *aff'd*, 550 U.S. 192, and *United States v. Matthews*, 466 F.3d 1271, 1275–76 (11th Cir. 2006), which held that attempted burglary and burglary of a dwelling under Florida law are violent felonies pursuant to the ACCA's residual clause.[5] In short, no Circuit precedent on the

[5] Arguably, these results naturally followed from an earlier decision, but that decision also postdated Williams's collateral attack and thus cannot help his case. On May 12, 2004—

books during Williams's collateral attack foreclosed his argument and rendered his § 2255 motion an ineffective test of his claims.

Williams offers two alternate readings of *Wofford*. First, he argues that there is another route through the savings clause: that he is "entitled to a remedy under the familiar miscarriage of justice standard." As Williams puts it, quoting *Davis v. United States*, 417 U.S. 333, 346–47 (1974), "[t]here is 'no room for doubt' that, when a subsequent interpretation of a statute demonstrates that an individual is being incarcerated for 'an act the law does not make criminal,' there has been 'a complete miscarriage of justice' for which there should be habeas relief." This argument misses twice. First, to the extent that Williams asserts he was convicted of an act that the law does not make criminal—i.e., a "nonexistent offense," the phrase used in *Wofford*—he misinterprets that phrase. *Wofford* used the phrase "nonexistent offense" in reference to the savings clause cases decided in the wake of *Bailey*. *Bailey*, which narrowed the meaning of 18 U.S.C. § 924(c)(1), meant that some prisoners' convictions were based on conduct no longer covered by the statute as interpreted by the Supreme Court—that is, they were actually innocent. *See Wofford*, 177 F.3d at 1242. Indeed, in *Gilbert*, we characterized this line of cases as holding that the savings clause permitted

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notably, after we denied his final attempt to obtain a COA—a panel of this Court held, in *United States v. Gunn*, 369 F.3d 1229, 1238 (11th Cir. 2004), that attempted burglary of a dwelling was a crime of violence for purposes of the Sentencing Guidelines under a residual clause effectively identical to that in the ACCA.

prisoners "to bring their *Bailey* actual innocence claims in a § 2241 petition." *See* 640 F.3d at 1319. But Williams is not asserting that he is "actually innocent" of either his possession of a firearm offense or his underlying burglary offenses, nor could he. Rather, he is asserting only legal innocence: that his burglary convictions should not have been considered violent felonies under the ACCA. *Cf. McKay v. United States*, 657 F.3d 1190, 1197–1200 (11th Cir. 2011) (claim that a prior conviction did not qualify as a "crime of violence," for purposes of the career offender enhancement under U.S.S.G. § 4B1.1, was a claim "of legal, rather than factual, innocence"); *United States v. Pettiford*, 612 F.3d 270, 284 (4th Cir. 2010) (no actual innocence excuse for procedural default where the claim was that the prisoner's assault conviction was not a violent felony under the ACCA; the claim was a "legal argument that this conviction should not have been classified as a 'violent felony'" and thus was "not cognizable as a claim of actual innocence").

Moreover, *Davis* itself decided a different issue: whether a claim "unsuccessfully litigated . . . on direct review" could be "assert[ed] on collateral attack." 417 U.S. at 342. The Supreme Court held that, where a precedent later establishes that the prisoner was convicted and punished "for an act that the law does not make criminal," he may seek collateral relief in his *first* § 2255 motion despite losing the issue on direct appeal. *See id.* at 346–47. *Davis* did not address whether the savings clause permits what is effectively a *second* or successive motion under the miscarriage of justice standard.

If the miscarriage of justice standard is inapplicable (and we think it is plainly inapplicable), Williams concedes that his claim must meet *Wofford*'s two conditions for challenging a sentence. He maintains, however, that his first § 2255 motion was ineffective because *Begay* altered the test we once applied to determine whether a state conviction qualified as a violent felony under the ACCA's residual clause. In other words, according to Williams, *Begay* was the "circuit law-busting, retroactively applicable Supreme Court decision" that *Wofford* demands. *See* 177 F.3d at 1245. In this vein, he points to several of our decisions that *Begay* abrogated. *See, e.g.*, *United States v. Hall*, 77 F.3d 398, 401–02 (11th Cir. 1996). As he puts it, "[t]he weight of this wall of unfavorable, broad decisions" deprived him of an opportunity to obtain a reliable judicial determination of his claim.

The government reads *Wofford* differently, however, and urges us to conclude that "Williams cannot meet his burden, under *Wofford*, of demonstrating that his challenge to the burglary convictions that supported his armed career criminal designation is based on a retroactively applicable Supreme Court decision that has overturned circuit precedent," for two separate and independent reasons. The government points out that "[t]here was no controlling circuit law that would have foreclosed [Williams's] claims at time of his direct appeal in 1999." Moreover, there has been no Supreme Court decision that would alter this Court's treatment of Fla. Stat. § 810.02 as a violent felony. To the contrary, "the Supreme Court's decision in *James* . . . has essentially resolved the issue Williams has

raised and it has resolved this issue in favor of the [government.]" Thus, the government maintains that the savings clause does not apply to Williams's claim. We agree with the first of the government's two points.

Williams's argument misapprehends the scope of the Supreme Court's relevant ACCA decisions and what we mean when we speak of "circuit law-busting" Supreme Court precedent. Invoking *Begay* alone would not be enough to establish jurisdiction over Williams's petition under the savings clause. *Wofford* does not require merely that the relevant Supreme Court precedent may have altered the applicable legal test. When we evaluate whether *Begay* was "circuit-law busting" in the savings clause context, we must find that *Begay* "overturned circuit precedent" specifically addressing the claim Williams now asserts—namely, that Fla. Stat. § 810.02 is not a violent felony for ACCA purposes. *See Wofford*, 177 F.3d at 1245. The reason the panel in *Wofford* imposed this requirement is that, if an issue had not been decided against a petitioner's position by prior precedent at the time of his first § 2255 motion, then that motion would have been an adequate procedure for testing his claim. The courts would have heard the claim and decided its merits, unlike in the case where adverse precedent already existed and thus "*stare decisis* would make us unwilling . . . to listen to him." *In re Davenport*, 147 F.3d at 611. In this case, there was no adverse precedent at the time of Williams's § 2255 motion that would have made us unwilling to listen to his claim.

Begay is not circuit law-busting in *Wofford*'s sense of the term. In *Begay*, the Supreme Court considered whether a New Mexico DUI offense was a violent felony for ACCA purposes. 553 U.S. at 139. *Begay* established that the proper test for determining which state law offenses qualified as violent felonies under the ACCA's residual clause was whether the crime involved "purposeful, violent, and aggressive conduct." *Id.* at 144–45 (internal quotation marks omitted). Applying this novel test to New Mexico's DUI offense, the Supreme Court concluded that it was not a violent felony. *See id.* at 148.

Begay changed the analytical framework for determining whether a given state offense is a violent felony at a high level of abstraction by crafting its "purposeful, violent, and aggressive" test. It did not abrogate all of this Court's pre-*Begay* violent felony jurisprudence. Thus, it is not at all clear that *Begay* would have abrogated any circuit precedent holding § 810.02 was a violent felony. But in any case, we need not dwell on that question because, at the time of Williams's first § 2255 motion, there was no circuit precedent for *Begay* to bust.[6] None of the cases

[6] We note in passing that the Supreme Court recently has substantially circumscribed the reach of *Begay* so that its similar-in-kind requirement no longer applies to intentional crimes like Fla. Stat. § 810.02. In *Sykes v. United States*, the Court clarified that the central inquiry under the ACCA's residual clause, at least for intentional crimes, is whether the offense "presents a serious potential risk of physical injury to another" comparable to the risk posed by the ACCA's enumerated crimes. 131 S. Ct. 2267, 2273 (2011); *accord id.* at 2275–76 (distinguishing *Begay*'s analysis as applying to strict

Williams cites are apposite because they concern criminal statutes other than Fla. Stat. § 810.02. *United States v. Wilkerson*, for instance, held that conspiracy to commit robbery under Florida law was a violent felony. *See* 286 F.3d 1324, 1325–26 (11th Cir. 2002); *see also United States v. Gay*, 251 F.3d 950, 954 (11th Cir. 2001) (felony escape); *United States v. Patton*, 114 F.3d 174, 176–77 (11th Cir. 1997) (conveyance of a weapon in federal prison); *United States v. Hall*, 77 F.3d 398, 401–02 (11th Cir. 1996) (carrying a concealed firearm). The most that Williams can demonstrate with this "wall of broad, unfavorable decisions" is that, at the time of his first § 2255 motion, the courts addressing his claim arguably reached an incorrect outcome. But, as we have explained, simply because a procedurally adequate test may get the answer wrong—and it is by no means clear that the answer was wrong in this case—cannot mean that a petitioner is entitled to utilize the savings clause to have his claim reevaluated still again in light of novel Supreme Court precedent. *See Gilbert*, 640 F.3d at 1307–09; *Wofford*, 177 F.3d at 1244. Williams has to show that

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liability, negligence, and recklessness crimes, and noting that "[i]n many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk"). We have recognized that *Sykes*'s comparative risk inquiry, not *Begay*'s "purposeful, violent, and aggressive" formulation, applies when the offense in question involves "knowing or intentional conduct." *United States v. Chitwood*, 676 F.3d 971, 979 (11th Cir. 2012). In any event, Williams cannot claim either *Begay* or *Sykes* is circuit law-busting in light of our determination that there was no circuit precedent for the Supreme Court's decisions to bust.

the test was not procedurally adequate because erroneous circuit precedent foreclosed his argument.

This he cannot do. Williams himself raised an objection to the use of his burglary convictions as ACCA predicates in his first § 2255 motion, but this argument was rejected by the district court. Subsequently, the district court denied him a COA on this claim, as did this Court. Williams then moved for reconsideration of that denial, but this Court denied that motion on March 23, 2004. The order denying reconsideration noted that "the use of appellant's 1989 burglary conviction as a predicate for the armed career criminal enhancement was arguably erroneous under *Taylor*," but characterized the claim as "ultimately immaterial" because Williams had three other convictions, including the 1990 burglary, that qualified him for the ACCA enhancement. Thus, Williams's first § 2255 motion was not "inadequate or ineffective to test the legality of his [ACCA enhancement]," *see* 28 U.S.C. § 2255(e)—in fact, his first motion did test that very issue. Whether that test yielded the right answer is a different matter, and one that is not dispositive of the question of whether Williams now may pursue relief through the savings clause. *See Gilbert*, 640 F.3d at 1308 ("the savings clause would eviscerate the second or successive motions bar," and no subsequent motion or petition "could be dismissed without a determination of the merits of the claims [it] raise[s]" if the savings clause allowed all wrongfully decided claims in a first § 2255 motion to be revived in a § 2241 petition); *Wofford*, 177 F.3d at 1244. Rather, what is dispositive is that his claim was not foreclosed at the

time by binding Eleventh Circuit precedent that *Begay* overruled or abrogated.[7]

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[7] The dissent mainly says that *Wofford* is inapplicable. However, the dissent also suggests that Williams has satisfied *Wofford*'s conditions because he was foreclosed from raising his claim in his direct appeal and first § 2255 motion. Dissenting Op. at [App-45–46]. However, the dissent ignores *Wofford*'s holding, which limits the savings clause's applicability to only those claims "based upon a retroactively applicable Supreme Court decision overturning circuit precedent." 177 F.3d at 1245. Williams has identified the Supreme Court case, *Begay*, but he has not identified *any* circuit precedent, overruled by *Begay*, that held that Fla. Stat. § 810.02 was a violent felony under the ACCA's residual clause. Nor does the dissent cite to such a case; nor, finally, can we find one.

As we see it, the dissent's mistake is to conflate Williams's lack of success on the merits of his first § 2255 motion with the idea that Williams was foreclosed from even raising the claim. Plainly, his claim was not foreclosed. But if we follow the dissent's reasoning to its ultimate conclusion, every § 2255 motion that a panel of this Court comes to believe, years later, is wrongly decided could be revived under § 2241 by virtue of the savings clause. This view is unsustainable because it is wholly inconsistent with the bar on second or successive motions, *see* 28 U.S.C. § 2255(h); indeed, it would eviscerate the bar. *Wofford*'s holding makes sense precisely because it acknowledges the force of that bar while also preserving a meaningful role for the savings clause. *See* 177 F.3d at 1244. At all events, we are bound by this Court's precedent.

Finally, we note that the district court denied Williams's claim not by relying on circuit precedent that held that his Fla. Stat. § 810.02 offense was categorically a violent felony under the ACCA's residual clause. Rather, the court found, based on the PSR, that Williams's burglaries were "'generic' burglaries . . . which involved an unlawful entry into a building or other structure" and therefore were violent felonies under the ACCA's *enumerated felonies* clause. This holding had nothing to do with the ACCA's *residual* clause, which was the subject of *Begay*, but

In addressing a virtually identical fact pattern to the one presented in this case, the Seventh Circuit held that the savings clause did not permit a prisoner to file a § 2241 petition to challenge his ACCA predicate felonies when no circuit precedent had prevented him from doing so during his direct appeal or first § 2255 motion. *Hill v. Werlinger*, 695 F.3d 644 (7th Cir. 2012). In that case, Hill was convicted in 1999 of possession of a firearm by a convicted felon and was sentenced under the ACCA. *Id.* at 645–46. The district court found three predicate felonies, one for attempted murder and two for aggravated battery. *Id.* at 646. Hill later filed a § 2255 motion challenging his indictment as defective and arguing that his trial counsel was ineffective; that motion was denied. *See id.* Much later, Hill filed a § 2241 petition challenging the characterization of one of his aggravated battery convictions as a violent felony in light of the Supreme Court's holding in *Johnson v. United States*, 559 U.S. 133 (2010). *See Hill*, 695 F.3d at 646–49. Like Williams, Hill's § 2241 petition argued that he had been sentenced above the statutory maximum because one of his prior convictions no longer qualified as a violent felony under a subsequent Supreme Court precedent.

The Seventh Circuit rejected Hill's attempt to utilize the savings clause because, in its view, Hill could not "show that a § 2255 remedy [wa]s inadequate or ineffective" since he "failed to show that his claim could not have been presented in his direct appeal or § 2255 motion." *Id.* at 648. "[T]he fact

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rather was a direct application of the Supreme Court's holding in *Taylor*.

that a position is novel does not allow a prisoner to bypass section 2255. Only if the position is foreclosed (as distinct from not being supported by—from being, in other words, novel) by precedent is a § 2255 remedy inadequate." *Id.* (internal quotation marks and alteration omitted). In such circumstances, where "Hill ha[d] not argued that binding precedent foreclosed his claim" but only that "before *Johnson*, the law was unclear regarding what amount of force was necessary to constitute a 'violent felony' under the ACCA," the "lack of clarity in the law before *Johnson* did not prevent Hill from bringing his claim either in a direct appeal or in his § 2255 motion." *Id.* at 649. The Seventh Circuit held that the savings clause did not apply in such circumstances, *id.*, and the logic of *Hill* applies with equal force to Williams's case. As Williams himself concedes, "this Court had never specifically applied its pre-*Begay* test to Florida's 1989 'burglary of a dwelling' law," and this concession is fatal to his § 2241 petition.

In short, Williams had an adequate and reasonable opportunity to test the legality of his detention both on direct appeal and in his first § 2255 motion, and he took that opportunity. While his claim that his Florida burglary convictions could not qualify as ACCA violent felonies was novel at the time of his first § 2255 petition, it was not foreclosed by our precedent. Thus, we conclude that he cannot now raise that claim once again in a § 2241 petition. The district court lacked subject-matter jurisdiction to entertain the matter. Accordingly, we affirm the dismissal of the petition.

AFFIRMED.

MARTIN, Circuit Judge, dissenting:

Because I believe the federal courts are not only authorized, but obligated to address the merits of a claim like that asserted by Albert Williams here, I respectfully dissent from the majority opinion.

The majority is correct that Mr. Williams has made "[s]everal failed collateral attacks" on his Armed Career Criminal Act (ACCA) sentence.[1] Majority Op. at [App-3–4]. Despite the failure of his repeated attacks, Mr. Williams perseveres in asserting that the prior convictions relied upon in sentencing him resulted in a sentence beyond that allowed by law. Aside from the District Court's review of his initial § 2255 motion, every court approached by Mr. Williams has declined to accept his case for consideration.

For Mr. Williams especially, it is important that his claim now be considered on the merits. That is because if he is right, he is serving a term of imprisonment that exceeds the maximum term authorized by Congress. The crime for which he was convicted carries a maximum sentence of 10 years imprisonment. 18 U.S.C. §§ 922(g)(1), 924(a)(2) (2006). Only if a defendant has already been convicted of three violent felonies or serious drug offenses does the ACCA provide for a mandatory *minimum* sentence of 15 years. *Id.* § 924(e)(1). Mr. Williams was sentenced to 293 months of

[1] I have attached a chart delineating each of Mr. Williams's attempts to attack his sentence, as well as the treatment he got from both the trial court in the district where he filed and our Court.

incarceration (more than 24 years) and says that his sentence should have been capped at 10 years (120 months), because he did not have three prior convictions for a violent felony or a serious drug offense as required for the enhanced sentence.

While the Constitution permits sentencing courts "wide discretion in determining what sentence to impose," *United States v. Tucker*, 404 U.S. 443, 446, 92 S. Ct. 589, 591 (1972), it is clear that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause," *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 1204 (1977) (plurality opinion). If Mr. Williams was wrongly convicted of being an armed career criminal because of an error of law, his sentence is unconstitutional. It certainly must be true that if a defendant is sentenced to more than the maximum term authorized by law, he has been deprived of due process. The Supreme Court has held that a federal defendant has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." *Whalen v. United States*, 445 U.S. 684, 690, 100 S. Ct. 1432, 1437 (1980).

The majority says that we do not have jurisdiction to consider Mr. Williams's claim because he has already filed more than the one habeas action he is permitted by law. In doing so, the majority recognizes that the so-called "savings clause," 28 U.S.C. § 2255(e) (2006), allows for a second or successive habeas claim where a prisoner has already asked for habeas, if the remedy he received "is inadequate or ineffective to test the legality of his

detention." *Id.* However, the majority says that Mr. Williams is not now entitled to the relief offered by § 2255's saving clause because he "cannot show that this Circuit's law foreclosed him from raising an objection to the treatment of his two Florida burglary convictions as violent felonies under the ACCA." Majority Op. at [App-22–23]. I cannot agree that this is a sufficient reason to conclude that the savings clause does not apply to Mr. Williams's case.

The majority is quite right when it concludes that *Gilbert* expressly declined to decide the issue presented by Mr. Williams's case—whether "the savings clause in § 2255(e) would permit a prisoner to bring a § 2241 petition claiming that he was sentenced to a term of imprisonment exceeding the statutory maximum." *Gilbert v. United States*, 640 F.3d 1293, 1323 (11th Cir. 2011) (en banc). However, the majority misreads our precedent when it says that Mr. Williams, or any other petitioner sentenced to more time than the statute permits, must satisfy *Wofford*'s three-part test before he is entitled to the protection of the savings clause of § 2255.[2] Majority Op. at [App-17–22]. Setting aside for the moment the

[2] The majority refers to *Wofford*'s three-factor test as dicta, *see* Majority Op. at [App-21–22], but nonetheless insists that *Wofford*'s test survives in the form of "two necessary conditions." I can in no way distinguish the majority's "two necessary conditions" from *Wofford*'s three-factor test. This Court has been clear that what *Wofford* actually held was "the savings clause does not cover sentence claims that could have been raised in earlier proceedings." *Gilbert*, 640 F.3d at 1319. As I see it, Mr. Williams's case does not present a "sentence claim" but rather a claim that his continued detention violates the statute under which it was imposed.

constitutional concerns, a straightforward reading of *Wofford* and *Gilbert* demonstrates that *Wofford*'s threshold test is dicta that does not apply to someone serving a sentence beyond what the statute allows.

In contrast to Mr. Williams, Mr. Wofford did not claim that he was sentenced above the statutory maximum. In fact he was not. Mr. Wofford was indicted for "conspiracy to possess with intent to distribute cocaine, possession with intent to distribute cocaine, possession of a firearm in relation to a drug trafficking crime, and being a felon in possession of a firearm." *Wofford*, 177 F.3d at 1237. He "pleaded guilty to the conspiracy and felon in possession of a firearm counts. . . . [and] was subsequently sentenced to a 300-month term of incarceration on the conspiracy count and a concurrent 60-month term of incarceration on the felon in possession of a firearm count." *Id.* Obviously, a 60-month concurrent term of incarceration does not exceed the 10 year statutory maximum for being a felon in possession of a firearm. *See* 18 U.S.C. §§ 922(g)(1), 924(a)(2). Since this court's *Wofford* opinion did not address a claim that a petitioner's sentence was above the statutory maximum, anything it said about this type of claim is dicta. It is well established that a decision of this Court cannot extend further than the facts and circumstances of the case in which it arises. *See, e.g.*, *Watts v. BellSouth Telecomms. Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003) ("Whatever their opinions say, judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced."); *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000); *United States v. Eggersdorf*, 126 F.3d

1318, 1322 n.4 (11th Cir. 1997). *Wofford*'s dicta therefore cannot constrain our analysis of a case in which a prisoner sits in prison beyond the time the statute allows. *Gilbert* itself confirms this.

In *Gilbert*, this Court held that "the savings clause does not authorize a federal prisoner to bring in a § 2241 petition a claim . . . that the sentencing guidelines were misapplied in a way that resulted in a longer sentence not exceeding the statutory maximum." 640 F.3d at 1323. Neither party to Mr. Williams's appeal disputes that *Gilbert* expressly did not "decide if the savings clause in § 2255(e) would permit a prisoner to bring a § 2241 petition claiming that he was sentenced to a term of imprisonment exceeding the statutory maximum." *Id.* Thus, *Gilbert* made clear that the holding in *Wofford* was limited to sentencing claims other than those like the one Mr. Williams asserts here.

Gilbert explained that "*Bailey* actual innocence claims are what the *Wofford* panel had in mind when it stated that the savings clause would permit a prisoner to bring a § 2241 petition claiming that a retroactively applicable, circuit law-busting decision of the Supreme Court established that he had been convicted of a nonexistent crime." *Id.* at 1319 (citing *Wofford*, 177 F.3d at 1242–45). The en banc court clarified "[t]hat statement was, however, only *dicta* because all of Wofford's claims were sentencing claims, 'none of which rested upon a circuit law-busting, retroactively applicable Supreme Court decision.'" *Id.* (alterations omitted) (citing *Wofford*, 177 F.3d at 1245) (emphasis added). *Gilbert* made clear that the actual holding of *Wofford* "is simply

that the savings clause does not cover sentence claims that could have been raised in earlier proceedings." *Id.* (citing *Wofford*, 177 F.3d at 1244–45).

Indeed, the *Gilbert* opinion expressly acknowledged that "[t]he *Wofford* opinion also contains *dicta* that the savings clause 'may conceivably' apply to some sentencing claims in some circumstances where there has been a fundamental defect in sentencing that the prisoner had no opportunity to have corrected before the end of his § 2255 proceeding." *Id.* at 1319 n.20 (emphasis added). The *Gilbert* en banc majority speculated that the *Wofford* panel "may have had in mind . . . pure *Begay* errors, by which we mean errors in the application of the 'violent felony' enhancement as defined in 18 U.S.C. § 924(e)(2)(B), resulting in a higher statutory minimum and maximum sentence under § 924(e)." *Id.* The *Gilbert* court acknowledged that "[a] *Begay* error in the classification of a prior conviction that was used to impose an enhanced sentence under § 924(e) would necessarily have resulted in the defendant being sentenced to a term of imprisonment that exceeded what would have been the statutory maximum without the error." *Id.* Based on this, *Gilbert* observed that "a pure *Begay* error would fit within the government's concession that the savings clause applies to errors that resulted in a sentence beyond the statutory maximum that would have applied but for the error." *Id.* However, because Mr. Gilbert claimed only that he was wrongly classified as a career offender under the Guidelines, the en banc court concluded "we have no occasion to decide whether what the *Wofford* dicta conceived

might be the law, and what the government concedes should be the law, is actually the law." *Id.*

In putting *Wofford* to the use it does, the majority also ignores an earlier panel of this court which held that *Wofford*'s threshold test does not apply to a defendant raising a pure *Begay* error. Not long ago, that panel observed that, "[s]itting en banc . . . we recently retreated from the purported three-factor test enumerated in *Wofford*, calling it 'only dicta,' and explaining that '[t]he actual holding of the *Wofford* decision . . . is simply that the savings clause does not cover sentence claims that could have been raised in earlier proceedings." *Turner v. Warden Coleman FCI (Medium)*, No. 10-12094, ___ F.3d ___, ___, 2013 WL 646089, *7 (11th Cir. Feb. 22, 2013).

Given that *Wofford*'s threshold test is dicta, at least as it relates to sentences imposed above the statutory maximum, it is not binding on this panel. Therefore, I dissent from the majority's application of that test to conclude that this Court lacks jurisdiction to consider a claim that a defendant was sentenced above the maximum authorized by Congress. By applying *Wofford*'s threshold test to Mr. Williams's pure *Begay* error claim, the majority is asking and answering the wrong jurisdictional question. The correct question to ask is whether Mr. Williams was erroneously sentenced as an armed career criminal in light of *Begay*. If he was, the federal courts never had jurisdiction to sentence him above the 10 year maximum allowed by law. The existence or nonexistence of circuit precedent which conflicts with *Begay* cannot operate to confer jurisdiction on this

Court. Neither can it decide the question of whether § 2255 is inadequate or ineffective.

Nevertheless, the majority is not willing here to examine the merits of Mr. Williams's claim that he was sentenced to more time than allowed by the statute because he cannot identify preexisting precedent from this Court that foreclosed his claim that he was wrongly classified as an armed career criminal at the time of his direct appeal or initial § 2255 motion. Majority Op. at [App-21–24]. But again, the preexistence or nonexistence of circuit precedent has no bearing on the fundamental defect in a defendant's armed career criminal classification once a retroactively applicable Supreme Court decision demonstrates that the defendant was sentenced to longer than the statute allows. If Mr. Williams is right, and *Begay* establishes that two of his Florida burglaries do not count as "violent felonies" under the ACCA, then Mr. Williams was *never* an armed career criminal. *Begay* did not change the meaning of the ACCA that may have prevailed in this Court or the district courts, but instead provided "an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 & n.12, 114 S. Ct. 1510, 1519 & n.12 (1994); *see also Bunkley v. Florida*, 538 U.S 835, 840–42, 123 S. Ct. 2020, 2022–24 (2003); *Fiore v. White*, 531 U.S. 225, 226, 121 S. Ct. 712, 713 (2001) (holding a defendant's conviction and continued incarceration violates due process where it is based on conduct that a criminal statute, as properly interpreted, does not prohibit). The issue is not whether Mr. Williams may no longer

be considered an armed career criminal, but rather whether he was ever an armed career criminal to begin with. If Mr. Williams can show that he was never an armed career criminal in light of *Begay*, then his continued incarceration violates due process and § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

I certainly accept that "the point where finality holds its own against error correction is reached not later than the end of the first round of collateral review" for claims of sentencing error where a defendant is serving a sentence below the term of imprisonment allowed by the statute. *Gilbert*, 640 F.3d at 1312. But concerns about finality do not trump the principle that "a defendant may not receive a greater sentence than the legislature has authorized." *United States v. DiFrancesco*, 449 U.S. 117, 139, 101 S. Ct. 426, 438 (1980); *see also United States v. Bushert*, 997 F.2d 1343, 1350 n.18 (11th Cir. 1993) ("It is both axiomatic and jurisdictional that a court of the United States may not impose a penalty for a crime beyond that which is authorized by statute.").

For us to sanction the incarceration of a prisoner for a period longer than Congress has authorized violates important separation-of-powers principles. "[T]he power of punishment is vested in the legislative, not in the judicial, department," and "[i]t is the legislature, not the Court, which is to . . . ordain [the] punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Indeed, a sentence beyond the maximum provided by law is void because federal courts have no authority to

impose a punishment that the legislature has not authorized it to impose. *See Chapman v. United States,* 500 U.S. 453, 465, 111 S. Ct. 1919, 1927 (1991) (holding that a defendant is "eligible for, and the court may impose, whatever punishment is authorized by statute for his offense"); *see also Harmelin v. Michigan*, 501 U.S. 957, 975, 111 S. Ct. 2680, 2691 (1991) (Scalia, J.) ("There were no common-law punishments in the federal system. . . ."); *Jones v. Thomas*, 491 U.S. 376, 383, 109 S. Ct. 2522, 2526 (1989) (explaining that the federal habeas petitioner in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), was entitled to habeas relief because his sentence of imprisonment and a fine "obviously exceeded that authorized by the legislature" where the crime that he was convicted of carried a punishment of imprisonment *or* a fine). *Cf. United States v. Bass*, 404 U.S. 336, 348, 92 S. Ct. 515, 523 (1971) (noting "the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should") (quotation marks omitted).

At the time Mr. Williams filed his first § 2255 motion—long before *Begay* authoritatively interpreted § 924(e)(2)(B)—he claimed he was not properly sentenced as an armed career criminal because his convictions for burglary under Florida law were not "violent felon[ies]" as that term is used in the ACCA. Thus, although the majority says there was no binding circuit precedent foreclosing Mr. Williams's claim on direct appeal or in his first § 2255 petition, he has certainly been treated as though there was. Indeed, to see that his argument was foreclosed, we need look no further than the fact

that our Court denied Mr. Williams a certificate of appealability (COA) when he raised the issue of whether his prior convictions qualified as predicate offenses for 18 U.S.C. § 924(e) in his first § 2255 petition for habeas relief.[3] *Williams v. United States*, No. 03-15325 (11th Cir. Jan. 27, 2004). In doing so, we certainly appeared to endorse the District Court's conclusion that his claim was without "factual or legal support."[4] *Williams v. United States*, No. 1:00-cv-02452 (S.D. Fla. Jan. 29, 2003) (adopting the Magistrate Judge's Report and Recommendation "in its entirety," and denying Mr. Williams's § 2255 petition). We then went on to deny Mr. Williams's motion for reconsideration of this argument. *Williams v. United States*, No. 03-15325 (11th Cir. Mar. 23, 2004). And now in this iteration of Mr. Williams's attempts to have us consider whether he is serving a sentence beyond that allowed by law, the majority imposes a new hurdle, grasped from

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[3] He raised this issue in the context of an ineffective assistance of counsel claim—i.e., his lawyer was ineffective for failing to argue that his prior burglary convictions did not qualify as predicate offenses for 18 U.S.C. § 924(e).

[4] Given that neither the District Court nor this Court viewed any of Mr. Williams's § 2255 claims as sufficient to satisfy the low threshold for obtaining a COA, it seems odd to say that his claims were not previously foreclosed. The well-worn standard for obtaining a COA under 28 U.S.C. § 2253(c)(2), is that "a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that . . . includes showing that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483–84, 120 S. Ct. 1595, 1603–04 (2000) (quotation marks omitted).

Wofford, which never ruled on this type of claim. Since *Begay* was decided by the United States Supreme Court no court has ever evaluated Mr. Williams's prior convictions under the standards it announced.

As the majority has recognized—and both the government and Mr. Williams agree—the District Court was mistaken when it concluded that Mr. Williams was "foreclosed from challenging his sentence . . . using 28 U.S.C. § 2255(e)'s savings clause" by this Court's decision in *Gilbert*. Doc. 24 at 2. Insofar as the issue he now raises was not decided by this Court in *Gilbert*, I would reverse the District Court's order and remand for consideration (for the first time) of the question of whether Mr. Williams's 1989 and 1990 Florida burglary convictions are violent felonies under the ACCA's residual clause, and under the analysis provided in *Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1581 (2008). *See Okongwu v. Reno*, 229 F.3d 1327, 1330–31 (11th Cir. 2000) (remanding case for consideration of issues not reached where the District Court improperly dismissed for lack of jurisdiction). If Mr. Williams can demonstrate to the District Court that he was erroneously classified as an armed career criminal, he is entitled to habeas relief under § 2241.

For these reasons, I respectfully dissent.

MR. WILLIAM'S HABEAS FILINGS

Filing	**Relevant Issue(s) Raised**	**Disposition**
First § 2255 Petition (S.D. Fla. July 2000)	•Mr. Williams's counsel was ineffective for having failed to object to the use of his Florida burglary convictions as predicate offenses for ACCA enhancement because Florida's burglary statute encompasses conduct beyond "generic burglary" as defined by the Sup. Ct. in *Taylor v. United States*, 495 U.S. 575 (1990)	•Dist. Ct. denied relief, determining that "no factual or legal support existed for . . . an objection" that Mr. Williams's Florida burglary convictions were not predicate offenses for ACCA enhancement, and denied Williams's request for a COA, No. 1:00-cv-2452 (S.D. Fla. Jan. 29, 2003) •11th Cir. denied Williams's request for a COA

		• 11th Cir. denied Williams's motion for reconsideration, observing that "[a]lthough the use of appellant's 1989 burglary conviction as a predicate for the armed career criminal enhancement was arguably erroneous under *Taylor* . . . that point is ultimately immaterial," No. 03-15325 (11th Cir. Mar. 23, 2004) • Sup. Ct. denied Williams's petition for certiorari, 543 U.S. 864 (2004), *reh'g denied*, 543 U.S. 1083 (2005)

First Rule 60(b) Motion (S.D. Fla. Apr. 2005)	•Dist. Ct.'s denial of Williams's § 2255 motion was erroneous under *Shepard v. United States*, 544 U.S. 13 (2005)	•Dist. Ct. denied relief without consideration of the merits and denied Williams's request for a COA •11th Cir. denied Williams's request for a COA •Sup. Ct. denied Williams's petition for certiorari, 547 U.S. 1141 (2006), *reh'g denied,* 548 U.S. 932 (2006)
Application to File Second/ Successive § 2255 Petition (11th Cir. Jan. 2006)	•Dist. Ct. enhanced Williams's sentence based on factual findings not admitted by Williams •Dist. Ct. violated Williams's right to due process by failing to use	•11th Cir. denied application, determining that Williams's claims did not satisfy gatekeeping criteria of 28 U.S.C. § 2244(b)(2), No. 06-10627

	reliable documents in determining that he had qualifying prior convictions for ACCA enhancement	(11th Cir. Feb. 10, 2006)
Second Rule 60(b) Motion (S.D. Fla. June 2006)	•Dist. Ct. erred under *Taylor* and *Shepard* in determining that Williams qualified for ACCA enhancement	•Dist. Ct. denied relief without consideration of the merits and denied Williams's request for a COA •11th Cir. denied Williams's request for a COA, denied Williams's motion for reconsideration, and denied Williams's motion to proceed *in forma pauperis*

First § 2241 Petition (E.D.N.C. July 2007)	•Dist. Ct. erred under *Taylor* and *Shepard* in determining that Williams qualified for ACCA enhancement	•Dist. Ct. dismissed petition upon government's motion because Williams "failed to satisfy [§ 2255's] gatekeeping provision," No. 5:07-hc-2143 (E.D.N.C. Feb. 19, 2008) •4th Cir. summarily affirmed in unpublished opinion
First § 2255(f)(3) Petition (S.D. Fla. Sept. 2010)	•Dist. Ct. erred in applying ACCA enhancement because under the Sup. Ct.'s analysis in *Begay v. United States*, 553 U.S. 137 (2008), Williams had only two ACCA qualifying convictions	•Dist. Ct. denied relief without consideration of the merits

Instant § 2241 Petition (S.D. Ga. Nov. 2010)	•Dist. Ct. erred in applying ACCA enhancement because Williams's Florida burglary convictions are not ACCA predicate offenses under *Begay*	•Dist. Ct. dismissed, determining that under *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc), "a petitioner is foreclosed from challenging his sentence, rather than his conviction, using 28 U.S.C. § 2255(e)'s savings clause." Doc. 24 at 1–2. •11th Cir. rejects Dist. Ct.'s *Gilbert* analysis but affirms dismissal, determining that § 2255(e) establishes jurisdictional limitations on § 2241 petitions and

		that Williams's claim does not fall within those limitations because no Circuit precedent foreclosed him from raising his claim in his initial habeas petition, No. 11-13306 (11th Cir. argued Jan. 15, 2012)

Appendix B

June 15, 2011

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

ALBERT WILLIAMS,

Petitioner,

v.

ANTHONY HAYNES, Warden, and FEDERAL BUREAU OF PRISONS,

Respondents.

CIVIL ACTION NO.: CV210-180

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Albert Williams ("Williams"), an inmate currently incarcerated at the Federal Correctional Complex in Adelanto, California, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Respondent filed a Response, and Williams filed a Traverse. For the reasons which follow, Williams' petition should be **DISMISSED**.

STATEMENT OF THE CASE

On December 18, 1997, a federal grand jury sifting in the Southern District of Florida returned an indictment charging Williams with possession of a firearm in and affecting commerce, having previously been convicted of a felony offense, in violation of 18 U.S.C. § 922(g)(1). Before trial, the United States filed a notice of intent to rely on several of Mr.

Williams' previous convictions to enhance his potential sentence pursuant to the Armed Career Criminal Act, 18. U.S.C. § 924(e) ("ACCA"). Following a jury trial, Williams was convicted on the sole count of the indictment.

The presentence investigation report ("PSI") prepared by the Probation Office concluded that Williams qualified as an "armed career criminal" based on his prior convictions for burglary and robbery, and that Williams was therefore subject to the enhanced sentencing provisions of 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4. The application of 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4 exposed Williams to a fifteen-year mandatory minimum sentence, and a statutory maximum sentence of life imprisonment. The PSI determined that, pursuant to U.S.S.G. § 4B1.4, Williams was to be assigned a total offense level of 33 and criminal history category of VI, yielding, a Guidelines imprisonment range of 235 to 293 months.

Although Williams filed objections to certain calculations contained in the PSI, he did not object to his classification as an armed career criminal. Williams also raised no objection to the PSI's recitation of the facts surrounding his previous convictions. On June 22, 1998, the district court adopted the findings of the PSI over Williams' objections and sentenced Williams to 293 months' imprisonment. Williams appealed his conviction, arguing that the district court erred in several of its evidentiary rulings. Williams did not advance any argument on appeal concerning his sentence or that he was erroneously classified as an armed career

criminal. The Eleventh Circuit Court of Appeals affirmed Williams' conviction in an unpublished opinion. *United States v. Williams*, 182 F.3d 936 (11th Cir. 1999) (table op.).

On July 7, 2000, Williams, through counsel, filed a motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. The motion alleged that Williams was denied effective assistance of counsel because his trial counsel: 1) relied upon a legally untenable theory of defense before the jury and before the district court in arguing a motion to dismiss .the indictment; 2) stipulated that Williams had previously been convicted of a felony and had possessed a gun; 3) failed to fully investigate and present a justification defense; 4) failed to lodge objections to the Government's evidence and to the prosecutor's opening and closing arguments; 5) failed to recommend that Williams plead guilty; and 6) failed to object to the use of Williams' prior burglary convictions as two of the three predicate offenses for the enhancement of his sentence. Williams also argued that the scope of the Florida burglary statute under which he had been convicted encompassed conduct beyond the "generic burglary" the Supreme Court had held, required for ACCA's sentence enhancement in *Taylor v. United States*, 495 U.S. 575 (1990).

The district court held a hearing on the § 2255 motion on February 8, 2002. On September 16, 2003, the district court denied Williams' § 2255 motion. Williams filed a notice of appeal, which the district court construed as an application for certificate of appealability pursuant to 28 U.S.C. § 2253 and

denied. Williams then filed a motion for reconsideration of that order, which the district court also denied. Williams filed a. motion for certificate of appealability in the 'Eleventh Circuit, but this was denied. Williams' motion for reconsideration of that order was denied on March 23, 2004, after which Williams, now acting *pro se,* filed a petition for certiorari in the United States Supreme Court. 'The Supreme Court denied both Williams' petition for certiorari, *Williams v. United States*, 543 U.S. 864 (2004), and Williams' subsequent petition for rehearing. *Williams v. United States*, 543 U.S. 1083 (2005).

Williams then filed a motion "to amend the ruling" on his § 2255 motion pursuant to FED. R. CIV. P. 60(b) and *Shepard v. United States*, 544 U.S. 13 (2005). The district court denied the Rule 60(b) motion. Williams filed both a motion for reconsideration of that order, and a notice of appeal. The district court denied the motion for reconsideration and, again construing Williams' notice of appeal as an application for certificate of appealability, denied that as well. Williams then filed an application for certificate of appealability in the Eleventh Circuit Court of Appeals. This was denied, as was Williams' subsequent motion for reconsideration. Once again, Williams filed a petition for certiorari in the Supreme Court. The Supreme Court again denied certiorari and rehearing. *Williams v. United States*, 547 U.S. 1141 (2006) (certiorari); *Williams v. United States*, 548 U.S. 932 (2006) (rehearing).

Williams next filed a second Rule 60(b) motion in the trial court, again arguing that his classification as an armed career criminal violated *Taylor* and *Shepard*. The district court denied the motion. Williams filed both a notice of appeal and an application for certificate of appealability. The district court denied the application for certificate of appealability, and the Eleventh Circuit Court of Appeals denied, the notice of appeal after it was construed as yet another application for certificate of appealability. Williams filed another motion for reconsideration of the Court of Appeals' decision, together with a motion to proceed *in forma pauperis*. The Eleventh Circuit denied both motions. While this litigation was pending in the Eleventh Circuit, Williams filed in the trial court a "motion to amend presentence report," in which Williams argued that he should not have received a two-level enhancement under the Sentencing Guidelines for brandishing a gun. The district court denied this motion.

Williams next filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Eastern District of North Carolina. In that petition, Williams continued to pursue his *Taylor* and *Shepard* claims. The petition was dismissed upon the government's motion by order dated February 19, 2008. Williams appealed to the Fourth Circuit Court of Appeals, which affirmed in an unpublished opinion.

Next, Williams filed a "motion pursuant to 28 U.S.C. § 2255(f)(3)" in his § 2255 case in the Southern District of Florida, arguing that under *Begay v. United States*, 553 U.S. 137 (2008), only two of his

prior convictions are properly counted toward "armed career criminal" status, and that he is therefore entitled to resentencing without the ACCA enhancement. This motion was denied by the trial court and Williams did not appeal that decision.

Finally, Williams filed the instant action—a second petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. In it, Williams asserts that he does not qualify as an armed career criminal under *Begay*, and should be resentenced without the applicable sentencing guidelines enhancement.

DISCUSSION AND CITATION OF AUTHORITY

Ordinarily, an action in which an individual seeks to collaterally attack his conviction should be filed under 28 U.S.C. § 2255 in the district of conviction. 28 U.S.C. § 2255(a); *Sawyer v. Holder*, 326 F.3d 1363, 1365 (11th Cir. 2003). However, in those instances where a § 2241 petition attacking custody resulting from a federally imposed sentence is filed, those § 2241 petitions may be entertained where the petitioner establishes that the remedy provided under 28 U.S.C. § 2255 "is inadequate or ineffective to test the legality of his detention." *Wofford v. Scott*, 177 F.3d 1236, 1238 (11th Cir. 1999).

To successfully use a § 2241 petition to circumvent the procedural restrictions of a § 2255 motion, a petitioner must satisfy the requirements of § 2255(e)—the "savings clause." The savings clause of § 2255:

> applies to a claim when: 1) that claim is based upon a retroactively applicable Supreme Court decision; 2) the holding of

> that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense; and 3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal, or first § 2255 motion.

Wofford, 177 F.3d at 1244.

"[T]he savings clause of § 2255(e) does not permit a prisoner to bring in a § 2241 petition a guidelines miscalculation claim that is barred from being presented in a § 2255 motion by the second or successive motions bar of § 2255(h)." *Gilbert v. United States*, No. 09-12513, __ F.3d ___, 2011 WL 1885674, at *17 (11th Cir. 2011). "A defendant who is convicted and then has the § 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." *Id.* at *25.

"[F]or claims of sentence error, at least where the statutory maximum was not exceeded, the point where finality holds its own against error correction is reached not later than the end of the first round of collateral review." *Id.* at 16. "[T]he savings clause does not apply to sentencing claims . . . where the sentence imposed was within the statutory maximum." *Id*. at 18.

Williams "is attacking his sentence rather than his conviction, for the armed career criminal act is a sentence-enhancement statute" *Id.* at *19 (quoting *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998)). The

savings clause does not apply to Williams' claim, as the sentence imposed (293 months) was within the statutory maximum (life), and Williams was not convicted, of being guilty of the sentence enhancement.

CONCLUSION

Based on the foregoing, it is my **RECOMMENDATION** that Williams' § 2241 petition be **DISMISSED.**

SO REPORTED and **RECOMMENDED,** this 15th day of June, 2011.

/s/
JAMES E. GRAHAM
UNITED STATES MAGISTRATE JUDGE

Appendix C

July 5, 2011

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

ALBERT WILLIAMS,

Petitioner,

v.

ANTHONY HAYNES, Warden, and FEDERAL BUREAU OF PRISONS,

Respondents.

CIVIL ACTION NO.: CV210-180

ORDER

After an independent and *de novo* review of the record, the undersigned concurs with the Magistrate Judge's Report and Recommendation, to which Objections have been filed. In his Objections, Williams reiterates that he believes his sentence was improperly enhanced under 18 U.S.C. § 924(e). He claims this enhancement exceeds the statutory maximum of ten years proscribed for a violation of 18 U.S.C. § 922(g). Based on the Supreme Court's holding in *Begay v. United States*, 553 U.S. 137 (2008), Williams claims his prior convictions for cocaine possession and aggravated assault should not count as violent felonies contributing toward his armed career criminal status.

As discussed in *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011), and in the Magistrate Judge's

Report, arguing that one's sentencing enhancement under 18 U.S.C. § 924(e) is invalid in a § 2241 motion, is an attack on a sentence—not an attack on a conviction. The Eleventh Circuit has concluded that a petitioner is foreclosed from challenging his sentence, rather than his conviction, using 28 U.S.C. § 2255(e)'s savings clause. *Id.* The Magistrate Judge was correct in finding it unnecessary to examine the merits of Williams' petition.

Williams' Objections to the Magistrate Judge's Report and Recommendation are without merit. The Report and Recommendation of the Magistrate Judge is adopted as the opinion of the Court. Williams' 28 U.S.C. § 2241 Petition is **DISMISSED.**

SO ORDERED, this 5 day of July, 2011.

/s/
LISA GODBEY WOOD, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

ALBERT WILLIAMS,

Petitioner,

v.

ANTHONY HAYNES, Warden, and FEDERAL BUREAU OF PRISONS,

Respondents.

CASE NUMBER: CV210-180

JUDGMENT IN A CIVIL CASE

* * *

Decision by Court. This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that in accordance with the Order of the Court entered July 6, 2011, adopting the Report and Recommendation of the Magistrate Judge, judgment is hereby entered dismissing the petition for writ of habeas corpus filed pursuant to 28 U.S.C. Section 2241. This case stands closed.

Approved by:
/s/

July 6, 2011
Date

Scott L. Poff
Clerk

/s/
(By) Deputy Clerk

Appendix E

January 8, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-13306-FF

ALBERT WILLIAMS,

Petitioner-Appellant,

versus

WARDEN,
FEDERAL BUREAU OF PRISONS,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: MARCUS and MARTIN, Circuit Judges and GOLD,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bane (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

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* Honorable Alan S. Gold, United States District Judge for the Southern District of Florida, sitting by designation.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

Appendix F

18 U.S.C. § 922(g)

Unlawful Acts

* * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * *

18 U.S.C. § 924(a)(2) & (e)

Penalties

(a)

* * *

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

* * *

(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a

maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * *

28 U.S.C. § 2241

Power to Grant Writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign

state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United

States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2253

Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2255

Federal Custody; Remedies on Motion Attacking Sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(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 this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) 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; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.