No. 16-___

IN THE

Supreme Court of the United States

JORGE CORTES-MORALES,

Petitioner,

v.

SUZANNE HASTINGS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Walter W. Davis
Counsel of Record
Jason T. Burnette
Ashley F. Heintz
Joel M. Langdon
William E. Eye
JONES DAY
1420 Peachtree St. N.E.,
Suite 800
Atlanta, GA 30309
(404) 581-8724
wwdavis@jonesday.com

DECEMBER 16, 2016

Counsel for Petitioner

QUESTION PRESENTED

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), enhances the mandatory minimum sentence for persons convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g) who have three previous convictions "for a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). A "serious drug offense" is one punishable by a "maximum term of imprisonment of ten years or more." 18 U.S.C. § 924(e)(2)(A)(ii). In *McNeill v. United States*, 563 U.S. 816 (2011), this Court held that an express legislative change that prospectively lowers the maximum sentence for a state drug offense to less than ten years does not disqualify the offense as an ACCA predicate. The Court explicitly noted that its holding did not reach "a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." *McNeill*, 563 U.S. at 825 n.1. The question presented is:

Whether an express legislative change that lowers the maximum sentence for a state drug offense to less than ten years and "makes that reduction available to defendants previously convicted and sentenced for that offense" disqualifies the offense as an ACCA predicate, notwithstanding a particular defendant's ineligibility for resentencing.

PARTIES TO THE PROCEEDING

All parties appear on the caption to the case on the cover page. Mr. Jorge Cortes-Morales was the Appellant below. Ms. Suzanne Hastings was the Appellee below.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES & CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mr. Jorge Cortes-Morales, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a–15a) is reported at 827 F.3d 1009. The order of the district court dismissing Mr. Cortes-Morales's 28 U.S.C. § 2241 habeas corpus petition (Pet. App. 16a–24a) is unreported but is available at 2013 WL 3868173.

JURISDICTION

The court of appeals entered a final judgment on June 27, 2016. Mr. Cortes-Morales timely filed a petition for rehearing en banc on August 11, 2016, which the court of appeals denied on September 20, 2016. Pet. App. 25a–26a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Armed Career Criminal Act, codified at 18 U.S.C. § 924(e), provides in pertinent part:

> (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 . . .
>
> (2)(A) [T]he term "serious drug offense" means . . . (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law.

STATEMENT OF THE CASE

In February 2006, Mr. Cortes-Morales was sentenced to seventeen-and-a-half years in prison following a conviction for being a felon in possession of a firearm under 18 U.S.C. § 922(g). Ordinarily, the maximum sentence for a § 922(g) offense is ten years. 18 U.S.C. § 924(a)(2). The sentencing court, however, concluded that Mr. Cortes-Morales had been convicted of three predicate offenses and applied a mandatory sentence enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). ACCA mandates a minimum sentence of fifteen years for an individual who violates § 922(g) and has three previous convictions "for a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). ACCA defines a "serious drug offense" as one punishable by a "maximum term of imprisonment of ten years or more." 18 U.S.C. § 924(e)(2)(A)(ii).

Three years after Mr. Cortes-Morales was sentenced for his federal § 922(g) offense, the New York Legislature retroactively reduced the maximum

sentences for his two predicate drug offenses to less than ten years. 2009 N.Y. Laws ch. 56, part AAA § 9. The following year, Mr. Cortes-Morales filed a § 2241 habeas petition *pro se* in the Southern District of Georgia, the district in which he was incarcerated, arguing that the retroactive sentence reductions disqualified his two drug offenses as ACCA predicates. Pet. App. 6a. The district court dismissed his petition on jurisdictional grounds under the Savings Clause. *Id.* At the district court's suggestion, Mr. Cortes-Morales sought resentencing from the New York courts on his prior state-law drug convictions, but the courts denied relief because he was no longer incarcerated in New York and his sentence was not longer than three years—prerequisites to be eligible for resentencing under New York law. Pet. App. 7a–8a; 2009 N.Y. Laws ch. 56, part AAA § 9.

Having found no relief in the New York courts, Mr. Cortes-Morales filed a second § 2241 petition *pro se* arguing that his ACCA-enhanced sentence violates federal law because his two prior drug convictions no longer qualify as ACCA predicates, notwithstanding his ineligibility for resentencing under New York law. Pet. App. 8a. The district court dismissed his petition on jurisdictional grounds under the Savings Clause. Pet. App. 9a. On appeal, the Eleventh Circuit assumed that the Savings Clause could reach a claim that retroactive sentencing amendments invalidated an ACCA-enhanced sentence, but held that because Mr. Cortes-Morales was not eligible for resentencing, the New York sentencing amendments were not "retroactive as to [him], and cannot serve as

the basis for invoking the Savings Clause." Pet. App. 11a–12a.

The district court had subject matter jurisdiction over Mr. Cortes-Morales's application for a writ of habeas corpus under 28 U.S.C. § 2241. The Eleventh Circuit Court of Appeals had appellate jurisdiction over the district court's dismissal of the application because it was a final decision appealable under 28 U.S.C. § 1291.

A. Factual Background

1. Mr. Cortes-Morales's Predicate Offenses

On December 26, 1990, police arrested Mr. Cortes-Morales in New York for selling approximately $20 worth of heroin. He pled guilty to the crime of attempted criminal sale of a controlled substance in the third degree under N.Y. Penal Law §§ 110.00, 220.39, a class C felony then carrying a maximum sentence of fifteen years. Pet. App. 3a.

On May 21, 1991, police arrested Mr. Cortes-Morales in New York for selling drugs. He pled guilty to criminal sale of a controlled substance in the third degree under N.Y. Penal Law § 220.39, a class B felony then carrying a maximum sentence of twenty-five years. On July 27, 1991, the court sentenced him to concurrent sentences of one-and-a-half to three years for both offenses. The following day, the court reduced the sentence for his class C offense to one to three years, still to run concurrently with his class B sentence. He completed both sentences in May 1994. *Id.*

On March 29, 1997, police arrested Mr. Cortes-Morales in Puerto Rico for unlicensed possession and

use of a firearm. *Id.* He pled guilty to aggravated assault under Article 95 of the 1974 Penal Code, codified at P.R. LAWS ANN. Tit. 33, § 4032 (1995). The judge sentenced Mr. Cortes-Morales to two years of probation, which was revoked on May 6, 1998, at which point he was sentenced to two years imprisonment. *Id.* He completed his sentence on February 18, 1999. Br. for Cortes-Morales at 14, *Cortes-Morales v. Hastings*, 827 F.3d 1009 (11th Cir. 2016) (No. 13-13659).

2. Mr. Cortes-Morales's Felon-In-Possession Conviction

On September 21, 2005, police executed a search warrant at Mr. Cortes-Morales's home and discovered drugs and two firearms. Federal authorities charged him with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), as enhanced by ACCA for having three separate predicate convictions "for a violent felony or a serious drug offense, or both." The indictment listed the two New York drug convictions and the Puerto Rico assault conviction, identified above. Mr. Cortes-Morales pled guilty on February 10, 2006, and the court sentenced him to 210 months in prison on August 29, 2006. Pet. App. 4a.

In 2007, Mr. Cortes-Morales filed a § 2255 habeas petition *pro se* with the district court in Puerto Rico, claiming his plea was involuntary, the conviction violated double jeopardy, and that he had received ineffective assistance of counsel. *Id.* The district court granted the petition in part, making his federal sentence run concurrently with a similar state court conviction, and rejected all other arguments. *Id.* The

U.S. Court of Appeals for the First Circuit affirmed. *Id.*

3. The New York Legislature's Drug Law Reforms

The drug laws under which Mr. Cortes-Morales was convicted—the New York Rockefeller Drug Laws—mandated intentionally harsh penalties for low-level drug crimes, including possession or sale of drugs. *See People v. Paulin*, 952 N.E.2d 1028, 1031 (N.Y. 2011); *People v. Broadie*, 332 N.E.2d 338, 344 (N.Y. 1975). When the laws were passed in 1973, "[i]t was thought that rehabilitation efforts had failed; that the epidemic of drug abuse could be quelled only by the threat of inflexible, and therefore certain, exceptionally severe punishment." *Broadie*, 332 N.E.2d at 344.

In 2004, the New York Legislature passed the first Drug Law Reform Act ("2004 DLRA"), 2004 N.Y. Laws ch. 738, which aimed to "reform the sentencing structure of New York's drug laws to reduce prison terms for non-violent drug offenders, provide retroactive sentencing relief and make related drug law sentencing improvements." N.Y. State Assembly Mem. in Supp. of Legislation at 3, 6 (2004), *reprinted in* Bill Jacket, 2004 A.B. 11895, ch. 738. The law reduced the maximum sentence for class B drug felonies from twenty-five to nine years and reduced the maximum sentence for class C drug felonies from fifteen to five-and-a-half years. 2004 N.Y. Laws ch. 738, § 36. While the law was retroactive as to class A-I felonies, 2004 N.Y. Laws ch. 738, § 36, it was not retroactive as to class B or C felonies. 2004 N.Y. Laws ch. 738, § 41 (d-1).

Five years later, the 2009 Drug Law Reform Act ("2009 DLRA") made the 2004 DLRA's remedial provisions retroactively available to "any person" convicted of a class B felony and persons convicted of class C felonies sentenced at the same time as a class B felony. 2009 N.Y. Laws ch. 56, part AAA § 9. To apply for resentencing under the statute, a person convicted of a class B felony must be "in the custody of the department of correctional services . . . serving an indeterminate sentence with a maximum term of more than three years." *Id.* "The purpose of the 2009 DLRA's generally retroactive nature with respect to Class B felonies was to bring sentences more in line with [New York's] present view of the seriousness of the crimes." *United States v. Calix*, No. 13 CR 582 (RPP), 2014 WL 2084098, at *12 (S.D.N.Y. May 13, 2014); *accord Paulin*, 952 N.E.2d at 1031 ("The purpose of the 2009 DLRA, like that of its predecessors . . . was to grant relief from what the Legislature perceived as the inordinately harsh punishment for low level non-violent drug offenders that the Rockefeller Drug Laws required.").

B. Course of Proceedings Below

In October 2010, Mr. Cortes-Morales filed a § 2241 habeas petition *pro se* in the Southern District of Georgia challenging the ACCA enhancement to his federal sentence. Pet. App. 6a. He filed under § 2241 because he had filed a habeas petition under § 2255 in 2007. *Supra* at 5. Although § 2255 generally bans second or successive motions, the Savings Clause of § 2255(e) permits a federal prisoner to file a petition under § 2241 if his initial § 2255 petition was "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

While Mr. Cortes-Morales's § 2241 petition was pending, this Court decided *McNeill v. United States*, 563 U.S. 816 (2011). The *McNeill* Court considered two North Carolina drug offense statutes that carried ten-year maximum sentences at the time of the defendant's conviction, but were subsequently amended to carry maximum sentences of thirty and thirty-eight months. *Id*. The *McNeill* Court held that when a sentencing amendment is prospective, the relevant maximum sentence to consider for ACCA purposes is that in place at the time of the predicate conviction. *Id*. at 818. The Court specifically noted that its holding did not reach cases where states lower the maximum penalty for a crime and allow the reduction to apply retroactively. *Id*. at 825 n.1 ("[T]his case does not concern a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense.").

Following *McNeill*, Mr. Cortes-Morales argued in his § 2241 proceedings that the 2009 DLRA made the 2004 DLRA sentence reductions retroactive for his drug crimes, such that his case fell within the exception noted in *McNeill*. Pet. App. 6a–7a. Without addressing *McNeill*, the district court denied the petition on the basis that it lacked jurisdiction and advised Mr. Cortes-Morales to petition the State of New York for resentencing. Pet. App. 7a. Mr. Cortes-Morales petitioned the New York courts for resentencing as to his class C felony, but the courts denied him resentencing because he was no longer incarcerated in New York and his maximum sentence was not longer than three years. Pet. App. 8a.

In 2013, having followed the district court's instructions to no avail, Mr. Cortes-Morales filed a second § 2241 petition arguing that his New York drug crimes no longer qualified as serious drug offenses under ACCA because the maximum sentence for each had been retroactively reduced to less than ten years. *Id*. The district court denied the petition, finding it lacked jurisdiction to hear the matter on the basis that Mr. Cortes-Morales did not satisfy the Savings Clause test of the Eleventh Circuit.[1] Pet. App. 9a.

On appeal, Mr. Cortes-Morales argued that the generally retroactive nature of the 2009 DLRA disqualified his New York drug convictions as ACCA predicates. Pet. App. 12a. He further argued that he was entitled to relief under the Savings Clause because the 2009 DLRA was not enacted until two years after his § 2255 petition, such that he never had an "[]adequate or []effective [opportunity] to test the legality of his detention" in light of the amendments. Pet. App. 10a. The panel assumed that the Savings Clause could reach a claim that retroactive state law amendments invalidated his ACCA-enhanced sentence. Pet. App. 11a.

---

[1] The district court denied Mr. Cortes-Morales's habeas petition under *Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999), the prevailing Savings Clause test at that time. Pet. App. 23a. Soon after the district court's decision, however, the Eleventh Circuit set forth a new Savings Clause test in *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253 (11th Cir. 2013). The Eleventh Circuit affirmed the district court on the basis that Mr. Cortes-Morales did not meet the *Bryant* test. Pet. App. 11a.

Nonetheless, the panel held that because Mr. Cortes-Morales was not eligible for individual resentencing, the 2009 DLRA was "not retroactive as to [him], and cannot serve as the basis for invoking the Savings Clause." Pet. App. 12a. On this basis, the Eleventh Circuit affirmed the decision of the district court.

REASONS FOR GRANTING THE PETITION

This case presents the question that the Court explicitly reserved in *McNeill*: whether an express legislative change that lowers the maximum sentence for a state drug offense to less than ten years and makes "that reduction available to defendants previously convicted and sentenced for that offense" disqualifies the offense as an ACCA predicate. *McNeill*, 563 U.S. at 825 n.1. Faced with that question, the Eleventh Circuit rejected Mr. Cortes-Morales's claim on the basis that the 2009 DLRA was "not retroactive as to [him]" because he "is not eligible for resentencing under the 2009 DLRA." Pet. App. 11a–12a.

The Eleventh Circuit's resolution of this question is not only wrong but also conflicts with (1) all lower courts to have addressed this precise issue, (2) the plain language of ACCA, and (3) well-settled Supreme Court precedent. First, without explanation, the decision below departs from the only three courts that have addressed whether a defendant's eligibility for resentencing controls the retroactivity of the 2009 DLRA for ACCA purposes. Second, the decision betrays the plain language of ACCA, which requires that courts defer to the State's judgment as to whether a drug offense is "serious." Third, by focusing on Mr. Cortes-Morales's individual

eligibility for resentencing, the decision contravenes long-standing Supreme Court precedent instructing courts to construe ACCA predicates based on the categorical definition of the state law offense, not the circumstances of a particular defendant. The Court of Appeals' contravention of this Court's precedent merits certiorari in itself, but the import of this case is amplified by prevalent drug-law reform at the state and federal level.

This case presents a question of exceptional importance. In an era of sentencing reform, the decision below concerns a recurring question of great significance to federal courts tasked with applying ACCA enhancements given that Congress chose to defer to state lawmakers' judgment about what crimes are "serious." Further, the case implicates grave constitutional concerns because the incarceration of prisoners like Mr. Cortes-Morales beyond the maximum sentence authorized by Congress violates both the separation of powers between the courts and Congress and the petitioner's due-process rights.

This case is a sound vehicle to address the question presented. Although the decision below stems from a habeas petition brought pursuant to the Savings Clause—itself a topic of confusion among circuit courts—this Court need not resolve that issue because the Eleventh Circuit assumed that the Savings Clause could reach a claim that a retroactive change in state law invalidated an ACCA-enhanced sentence. Pet. App. 11a. Whether upon remand the Eleventh Circuit would decide that the Savings Clause reaches Mr. Cortes-Morales's claim is of no moment here. Rather, this Court need only decide

the question presented: whether an express legislative change that retroactively lowers the maximum sentence for a state drug offense to less than ten years disqualifies the offense as an ACCA precedent, regardless of whether the circumstances of a particular defendant allow for actual resentencing. For the following reasons, this Court should grant the petition and answer the question presented in the affirmative.

I. THE DECISION BELOW CONFLICTS WITH LOWER COURT DECISIONS, THE PLAIN LANGUAGE OF ACCA, AND SUPREME COURT PRECEDENT

The decision below merits review by this Court for three reasons. *First*, the Eleventh Circuit's decision conflicts with every court to address this precise issue. *See Saxon v. United States*, No. 12 CR 320 (ER), 2016 WL 3766388 (S.D.N.Y. July 8, 2016); *Calix*, 2014 WL 2084098; *United States v. Jackson*, No. 13 Crim. 142 (PAC), 2013 WL 4744828 (S.D.N.Y. Sept. 4, 2013). *Second*, the decision is contrary to the plain language of ACCA, which requires that courts defer to the State's judgment as to whether a drug offense is "serious." *See* 18 U.S.C. § 924(e)(2)(A)(ii); *see also United States v. Rodriquez*, 553 U.S. 377, 388 (2008) ("Congress chose to defer to the state lawmakers' judgment."). *Third*, the panel's decision, which focused on Mr. Cortes-Morales's individual eligibility for resentencing, contravenes established Supreme Court precedent instructing courts to construe ACCA predicates based on the categorical definition of the state law offense, not the circumstances of a particular defendant. *See, e.g.*, *Rodriquez*, 553 U.S. at 389; *Taylor v. United States*, 495 U.S. 575, 600 (1990).

A. The Decision Below Conflicts with Recent Rulings of Lower Courts

The decision below conflicts with the only three courts that have addressed whether a defendant's eligibility for resentencing controls the retroactivity of the 2009 DLRA as to that defendant under ACCA. Those courts uniformly hold that it does not. Two of these decisions were rendered before the briefing and argument in the Eleventh Circuit. *See Calix*, 2014 WL 2084098; *Jackson*, 2013 WL 4744828. The third was issued shortly after the panel's decision. *See Saxon*, 2016 WL 3766388.

In each case, the defendant, like Mr. Cortes-Morales, had served his sentence for a class B felony and was thus technically ineligible to be resentenced under the 2009 DLRA. *See, e.g.*, *Jackson*, 2013 WL 4744828, at *5–6. Each court held that, because of the "generally retroactive" nature of the sentence reductions as to class B felonies, the defendant's felonies no longer qualified as "serious drug offenses" for the purposes of ACCA, notwithstanding the defendant's ineligibility for resentencing. *See id*. at *6 ("Although Jackson is not now eligible for resentencing, in light of the 2009 DLRA's generally retroactive nature with respect to Class B felonies . . . Jackson's prior state law convictions do not qualify as predicate convictions for ACCA purposes.") (internal citation omitted); *Saxon*, 2016 WL 3766388, at *7–8; *Calix*, 2014 WL 2084098, at *14.

These—now three—well-reasoned decisions are the only other precedents that directly address the effect

of resentencing eligibility on retroactivity of ACCA predicate offenses.[2] In addressing that issue, each case carefully analyzed the *McNeill* footnote and reasoned that "*McNeill* does not require that [the defendant] be eligible for resentencing based upon the retroactive modification of the laws under which he was convicted." *Jackson*, 2013 WL 4744828, at *4. Rather, to fit within the question left open by *McNeill*, a subsequent change in law need only be "'*available to* defendants previously convicted and sentenced.'" *Id*. (emphasis added) (quoting *McNeill*, 563 U.S. at 825 n.1). Because the "2009 DLRA allows for the retroactive modification of sentences for Class B felonies, even if it does not do so for [the defendant] in particular," it is categorically "available to defendants previously convicted and sentenced." *Id*.

Nonetheless, the Eleventh Circuit accepted the Government's argument that this case turns on whether Mr. Cortes-Morales is eligible for resentencing on his New York drug crimes. Recognizing the contrary authority of *Jackson* and *Calix*, the panel merely stated "[t]hese decisions do

---

[2] All three cases took care to distinguish *Rivera v. United States*, 716 F.3d 685 (2d Cir. 2013), a Second Circuit decision that considered a related issue. *Rivera* held that, for ACCA purposes, the "retroactive aspects" of the 2009 DLRA did not apply "to a person whose sole drug-related offense was a class C felony." 716 F.3d at 690. *Rivera* is thus distinguishable from *Jackson*, *Calix*, *Saxon*—and the instant case—because Rivera contested a standalone class C felony, whereas the other defendants contested a class B felony. *Rivera* made clear that its holding was limited to "[i]ndividuals convicted *solely* of class C felonies. *Id*. at 688 (emphasis added).

not persuade us." Pet. App. 12a. The Eleventh Circuit provided no analysis for rejecting the reasoning of these decisions from the Southern District of New York. Moreover, its decision creates an intolerable circumstance leading to disparate outcomes for similarly situated defendants. All other courts to consider the issue avoided the absurd result of construing ACCA to provide relief for those who are still incarcerated but foreclose relief for those who have served their state sentence. Surely a defendant should not be "punished more harshly because he was sentenced prior to the 2009 DLRA, as compared to an identical defendant who committed precisely the same crime, but . . . remained incarcerated and therefore was eligible to apply for resentencing under the 2009 DLRA." *Jackson*, 2013 WL 4744828, at *6.

Thus, without explanation, the decision below departs from the well-reasoned decisions of other courts that have held that a defendant's resentencing ineligibility is immaterial to the application of the ACCA predicate offenses.

B. The Decision Below Conflicts with the Plain Language of ACCA

Congress, through the plain language of ACCA, requires courts to defer to the State's judgment as to whether a state drug offense is "serious." *See* 18 U.S.C. § 924(e)(2)(A)(ii); *see also Rodriquez*, 553 U.S. at 388 ("Congress chose to defer to the state lawmakers' judgment."). The decision below, however, disregards the New York Legislature's judgment as to the seriousness of certain drug crimes, evinced by its enactment of the 2004 and 2009 DLRAs.

ACCA defines a "serious drug offense" as:

> [A]n offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. § 924(e)(2)(A)(ii). Addressing a state law amendment that prospectively reduced the maximum sentence for a drug offense, the *McNeill* Court held that courts applying ACCA should "consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense." *McNeill*, 563 U.S. at 820. The Court expressly confined its decision to *prospective* sentence reductions, noting that in the prospective context, "[a] defendant's history of criminal activity—and the culpability and dangerousness that such history demonstrates—does not cease to exist when a State reformulates its criminal statutes." *Id*. at 823.

But the same does not hold true where a state law amendment *retroactively* reduces the maximum sentence for a drug offense. In such a context, the State is acknowledging that its previous sentencing regime was incommensurate with the "culpability and dangerousness" of the criminal offense at all times both before and after passage of the amendment. The Government admitted as much in *McNeill*, conceding, "[o]f course, if a State subsequently lowered the maximum penalty and made that reduction available to defendants previously sentenced as of the same date as the

defendant now at issue, the defendant could plausibly look to that reduced maximum as stating the law applicable to his previous conviction." Br. for U.S. at 18 n.5, *McNeill*, 563 U.S. 816 (2011) (No. 10-5258), 2011 WL 1294503, at *18. This is precisely what the New York Legislature did in enacting the 2009 DLRA, which, along with the 2004 DLRA, was designed "to ameliorate the harsh sentences previously mandated for non-violent drug offenders." *People v. Danton*, 895 N.Y.S.2d 669, 673 (N.Y. Sup. Ct. 2010). The retroactive nature of the 2009 DLRA "serves as the state's acknowledgement that the seriousness attached to the offense at the time of conviction was wrong." *Saxon*, 2016 WL 3766388, at *7.

Rather than follow the plain language of ACCA and defer to the New York Legislature's judgment as to the seriousness of the offenses at issue, the Eleventh Circuit instead conflated that judgment with the State's administrative decisions regarding resentencing. But the technical availability of resentencing is not coextensive with the State's judgment as to the seriousness of an offense—the former is laden with pragmatic concerns while the latter is a normative judgment. *See id.* at *6 ("[A]ny real world resentencing regime has to accommodate pragmatic issues of administration, such as eschewing the meaningless effort of providing a resentencing process for people who are no longer incarcerated."). In consideration of those concerns, the New York Legislature created procedures providing relief to those most heavily burdened by the "inordinately harsh punishment" of the old New York laws: "those who are in prison." *Paulin*, 952

N.E.2d at 1031. It does not follow that those who are no longer in prison committed a more serious offense.

In sum, the decision below betrays the plain language of ACCA by disregarding the State of New York's reasoned judgment concerning the seriousness of Mr. Cortes-Morales's drug offenses. Instead, the court of appeals substituted the State's pragmatic resentencing criteria for its judgment as to the normative seriousness of the offenses at issue.

C. The Decision Below Contravenes Supreme Court Precedent

The Eleventh Circuit's focus on whether Mr. Cortes-Morales can be resentenced under the 2009 DLRA contravenes the categorical approach this Court set forth over twenty-five years ago for construing ACCA. *See, e.g.*, *Rodriquez*, 553 U.S. at 389; *Taylor*, 495 U.S. at 600. Under a categorical approach, the inquiry would start and finish with a determination of the maximum term of imprisonment for the offenses issue—a class C felony from 1990 and a class B felony from 1991, Pet. App. 3a—not the circumstances of a particular defendant as they may relate to the availability of resentencing. That is not the inquiry the Eleventh Circuit undertook.

The Eleventh Circuit attempted to parry this criticism by dismissively stating that its "holding is not inconsistent with these Supreme Court's opinions, rendered in a different context, concerning how prior convictions are viewed for purposes of the ACCA." Pet. App. 13a. But that barren statement—the sum and total of the court's analysis on this point—fails to justify a departure from settled Supreme Court precedent instructing courts to

construe ACCA predicates based on the categorical definition of the state law offense—not the circumstances of a particular defendant.

In *Taylor*, this Court mandated a categorical approach that "look[s] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." 495 U.S. at 600. In *Rodriquez*, this Court adopted a narrow modification to the categorical approach, permitting courts to consider limited documents to determine if a recidivist enhancement applies to the "maximum term of imprisonment" for a potential "serious drug offense." 553 U.S. at 381, 387–89. In doing so, the Court reaffirmed that the requisite determination under ACCA is the State's judgment as to the seriousness of an offense. *Id.* at 388 ("Congress chose to defer to the state lawmakers' judgment.").

Without explanation, the Eleventh Circuit departed wholesale from *Taylor* and *Rodriquez*. Instead, the court focused on whether Mr. Cortes-Morales was individually eligible for resentencing—a determination that considers factors extraneous to the categorical approach mandated by the Court in *Taylor* and *Rodriquez*. Put simply, the court resolved the question on a technicality: that Mr. Cortes-Morales is *himself* not eligible for resentencing. Pet. App. 11a–12a ("Cortes-Morales is not eligible for resentencing under the 2009 DLRA. . . . The 2004 and 2009 DLRA are thus not retroactive as to Cortes-Morales.").

But the petitioner's individual eligibility for resentencing has no place in a categorical approach

because his eligibility is a happenstance produced by the sentence imposed on him for the state drug offenses. By the Eleventh Circuit's reasoning, Mr. Cortes-Morales would be entitled to relief from his federal sentence had he been sentenced to a longer period of incarceration or parole for his state offense—*i.e.*, if the crime was deemed to be *more* serious—so long as he met the "in custody" requirement for New York resentencing eligibility. Yet it would be absurd to consider Mr. Cortes-Morales's New York drug offense more serious because he completed a *shorter* sentence. *See McNeill*, 563 U.S. at 822 (construing ACCA to "avoid[] . . . absurd results").

Properly applied here, the categorical approach—looking at the maximum term of imprisonment for the offenses—reveals maximum terms of imprisonment that fall short of the ten years required by ACCA to qualify as a "serious drug offense" because of the retroactive 2009 DLRA. *See* 2004 N.Y. Laws ch. 738, § 36 (reducing the maximum sentence for class B felonies from twenty-five to nine years and reducing the maximum sentence for class C drug felonies from fifteen to five-and-a-half years); 2009 N.Y. Laws ch. 56, part AAA § 9 (making the 2004 DLRA's resentencing guidelines applicable to persons previously convicted of class B felonies and certain class C felonies).

II. THE EFFECT OF RETROACTIVE CHANGES TO STATE LAW ON ACCA-ENHANCED SENTENCES IS A RECURRING QUESTION OF EXCEPTIONAL IMPORTANCE

The decision below presents a question of exceptional importance that merits review by this Court. The question left open by *McNeill*—the effect of retroactive changes to state law on ACCA-enhanced sentences—is important for two reasons. *First*, in an era of sentencing reform for low-level drug offenders, the issue has broad and recurring significance for federal courts tasked with applying ACCA enhancements and federal prisoners sentenced to ACCA-enhanced terms. *Second*, the possibility that defendants like Mr. Cortes-Morales are serving sentences above the maximum authorized by Congress without legal recourse raises grave constitutional concerns.

A. The Question Presented Is of Exceptional Importance in an Era of Drug Reform

In the wake of a decades-long "War on Drugs," federal and state lawmakers are seeking legislative changes to reduce the fiscal and human costs of mass incarceration. *See, e.g.*, U.S. Sentencing Commission, *Amendment to the Sentencing Guidelines* (2014), https://goo.gl/txRoaB (reducing sentencing levels associated with drug quantity in the U.S. Sentencing Guidelines and providing retroactive relief to over 40,000 currently imprisoned offenders); 2009 N.Y. Laws ch. 56, part AAA. In 2015 alone, lawmakers in

at least thirty states have proposed or enacted drug law reforms, some of which have retroactive effect.[3] *See The State of Sentencing 2015: Developments in Policy and Practice*, THE SENTENCING PROJECT (2016), https://goo.gl/il14C4. Such reforms are in part a reaction to overly harsh punishments for low-level drug crimes. *See, e.g.*, *People v. Sosa*, 963 N.E.2d 1235, 1239 (N.Y. 2012) (explaining that the New York Legislature sought to alleviate the "extraordinary public costs, both human and economic, [of] the extended incarceration of low-level drug offenders").

As states continue to amend sentences for low-level drug offenders, the question presented will recur for courts tasked with applying ACCA enhancements, because "Congress chose to defer to state lawmakers'

---

[3] *See, e.g.*, DEL. CODE ANN. tit. 11, § 4214(f) (2016) ("[B]eginning January 1, 2017, any person sentenced as an habitual criminal prior to the date of enactment of this section shall be eligible to petition the Superior Court for sentence modification after the person has served a sentence of incarceration equal to any applicable mandatory sentence. . . . For the purposes of this subsection, the 'applicable mandatory sentence' shall be calculated by reference to the penalties prescribed for the relevant offense or offenses by this Code *as of the date of enactment of this section*.") (emphasis added); Justice Reinvestment Act, 2016 Md. Laws Ch. 515, § 5-609.1(a) (S.B. 1005) ("Notwithstanding any other provision of law and subject to subsection (c) of this section, a person who is serving a term of confinement that includes a mandatory minimum sentence imposed on or before September 30, 2017, for a violation of §§ 5-602 through 5-606 of this subtitle may apply to the court to modify or reduce the mandatory minimum sentence as provided in Maryland Rule 4–345, regardless of whether the defendant filed a timely motion for reconsideration or a motion for reconsideration was denied by the court.").

judgment" about what crimes are "serious," the proxy for seriousness being maximum sentences. *Rodriquez*, 553 U.S. at 388; 18 U.S.C. § 924(e)(2)(A)(ii). As maximum sentences are altered, courts will ultimately require guidance from this Court, which currently provides direction only in the case of prospective, rather than retroactive, amendments.

McNeill underscores the importance of the issue. There, as noted above, the Court held that, for *prospective* amendments, the maximum sentence at the time of the predicate conviction is the relevant determination of the offense's seriousness. *McNeill*, 563 U.S. at 825. Significantly, *McNeill* specified that its decision "[did] not concern a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." *Id*. at 825 n.1.

Because of this uncertainty, defendants lack fair notice of whether their prior offenses will qualify as ACCA precedents. Only last term, this Court struck down an indeterminate ACCA provision and noted that the "prohibition of vagueness in criminal statutes . . . appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Johnson v. United States*, 135 S. Ct. 2551, 2556–57 (2015). This same concern applies here where defendants, some of whom may be contemplating plea bargains, are uncertain whether they are subject to an ACCA enhancement. A defendant cannot make an informed decision without

knowing whether a mandatory minimum sentence applies.[4]

The divergent rulings of the Eleventh Circuit and courts within the Southern District of New York prove that courts and defendants lack sufficient guidance on the effect of retroactive sentencing amendments on ACCA predicates. Absent this Court's resolution of these divergent rulings, courts and defendants will struggle to determine whether prior state offenses qualify as ACCA predicates.

B. The Decision Below Raises Significant Constitutional Concerns

The decision below raises two significant constitutional concerns. *First*, it violates the separation of powers between the judiciary and legislature by affirming a sentence that exceeds the maximum term authorized by Congress. *Second*, it violates due process because Mr. Cortes-Morales 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 (1980).

1. The decision below violates the separation of powers between the courts and Congress

That defendants like Mr. Cortes-Morales are serving sentences above the maximum authorized by Congress violates bedrock separation-of-powers

---

[4] FED. R. CRIM. P. 11(b)(1)(I) ("[T]he court must inform the defendant of, and determine that the defendant understands . . . any mandatory minimum penalty.").

principles. For nearly 200 years, this Court has acknowledged that "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). When a federal court approves a sentence beyond that authorized by Congress, it transgresses congressional authority and violates the separation-of-powers principle that "the power . . . to prescribe the punishments to be imposed upon those found guilty of [federal crimes] resides wholly with the Congress." *Whalen*, 445 U.S. at 689.

Currently, Mr. Cortes-Morales is serving an ACCA-enhanced sentence of 210 months, which exceeds the maximum sentence for a § 922(g) offense by more than seven years. 18 U.S.C. § 924(a)(2) (prescribing a maximum sentence of 10 years for a § 922(g) offense). On the view of the question presented as resolved by the courts of the Southern District of New York, Mr. Cortes-Morales lacks three predicate convictions to support an ACCA enhancement. Accordingly, he is sentenced beyond the extent authorized by Congress. The substantial possibility that the Eleventh Circuit's decision violates the separation of powers by affirming a sentence beyond the congressional maximum further warrants this Court's review.

2. The decision below violates Mr. Cortes-Morales's due-process rights

By the same rationale, the decision below violates Mr. Cortes-Morales's due-process rights. A federal criminal defendant has a "constitutional right to be deprived of liberty as punishment for criminal

conduct only to the extent authorized by Congress." *Whalen*, 445 U.S. at 690. The decision below violates Mr. Cortes-Morales's liberty interest under the Due Process clause to the extent it subjects him to detention in excess of the maximum authorized by Congress. Pet. App. 11a. [5]

III. THIS CASE IS A SUITABLE VEHICLE TO ANSWER THE QUESTION LEFT OPEN BY *MCNEILL*

A. The Decision Below Squarely Presents the Question *McNeill* Left Open

As noted at the outset, the *McNeill* Court held that the relevant determination of an offense's seriousness for ACCA purposes is the maximum sentence at the time of the predicate conviction. 563 U.S. at 825.

---

[5] The decision below may also work an unconstitutional suspension of the writ of habeas corpus, which protects the right of persons to petition the courts to challenge the legality of their detention. *See* U.S. Const. art. I § 9 cl. 2; *Boumediene v. Bush*, 553 U.S. 723, 745 (2008). Coupled with § 2255's ban on successive petitions, the decision below forecloses relief under the only remaining avenue for Mr. Cortes-Morales to test the legality of his detention—the Savings Clause. Other courts have been careful not to interpret the Savings Clause to implicate this "thorny constitutional issue." *See, e.g.*, *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997) ("Were no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent as a result of a previously unavailable statutory interpretation, we would be faced with a thorny constitutional issue."); *Triestman v. United States*, 124 F.3d 361, 377 (2d Cir. 1997) (construing the Savings Clause "to provide that habeas corpus remains available to federal prisoners when § 2255 is not available and when the failure to allow for some form of collateral review would raise serious constitutional questions").

But the Court explicitly reserved the question of how to determine a "serious drug offense" where "a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." 563 U.S. at 825 n.1. The decision below squarely presents the question *McNeill* left open.

As discussed above, the New York Legislature enacted the 2009 DLRA, which "subsequently lower[ed] the maximum penalty applicable to" Mr. Cortes-Morales's offenses and categorically made those reductions "available to defendants previously convicted and sentenced for [those] offense[s]." *Id.* Under these circumstances, the relevant determination of an offense's seriousness is the reduced maximum sentence applicable to Mr. Cortes-Morales's prior New York drug crime convictions: nine years for his class B conviction and five-and-a-half years for his class C conviction. 2009 N.Y. Laws ch. 56 part AAA § 9 (reducing the maximum sentence for Class B felonies to nine years; reducing the maximum sentence for Class C felonies to five-and-a-half years).

That Mr. Cortes-Morales is not eligible to be resentenced under state law for his New York drug crimes is not an obstacle to resolving the question left open in *McNeill*. Indeed, the issue of an individual defendant's eligibility for resentencing brings into sharper focus the legal and practical considerations arrayed on either side of that question. For example, the categorical approach mandated by this Court in *Taylor* and *Rodriquez* will not only inform the Court's resolution of the broader retroactivity question, but

also the relevance of administrative constraints that may apply only to particular defendants. Likewise, it is fair to evaluate concerns about expanding relief retrospectively in the context of those same administrative constraints—even if, in our view, they are ultimately irrelevant to the question whether a retroactively reduced maximum sentence precludes an offense from being considered as an ACCA predicate. In any event, Mr. Cortes-Morales is not seeking to be resentenced on crimes for which he is ineligible for resentencing under state law. Rather, Mr. Cortes-Morales is seeking relief from his ACCA-enhanced 18 U.S.C. § 922(g) federal conviction.

B. This Court Should Not Wait for a Circuit Split to Mature

Admittedly, the conflict between the Eleventh Circuit's decision in this case and the decisions of the Southern District of New York does not constitute a circuit split. Of course, an actual circuit split is not a prerequisite for this Court's review.[6] Moreover, immediate review, even in the absence of a conflicting decision by another court of appeals, is appropriate here for at least three reasons.

---

[6] SUP. CT. R. 10(c) (providing that the Court may grant certiorari where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court"). *See, e.g.*, *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (granting certiorari "to resolve an apparent conflict with this Court's precedents").

First, it appears that the Federal Government has chosen not to seek review from the federal appellate court that will have the most frequent opportunities to consider the effect of New York's drug-law reforms on ACCA-enhanced sentences—the Second Circuit. Indeed, the Government declined to appeal *Jackson* and *Calix* to the Second Circuit.[7] If that tactic is carried out in every other circuit where a district court rules in favor of the defendant, a circuit split will never develop, and meanwhile defendants will continue to serve enhanced sentences beyond the statutory maximum prescribed by Congress.

Second, this Court need not wait for a circuit split because the reasoning of *Jackson*, *Calix*, and *Saxon* provides a sufficient basis for resolving the question presented. As noted above, these three decisions carefully parsed the language of *McNeill* and the 2009 DLRA and concluded that, to fit within the question left open by *McNeill*, a subsequent change in law need only be "available to defendants previously convicted and sentenced." The three decisions uniformly hold that (1) the 2009 DLRA categorically makes resentencing "available to defendants previously convicted and sentenced," and

---

[7] The petitioner in *Saxon* recently appealed the district court decision. Notice of Prisoner Appeal, No. 16-2736 (2d Cir. Aug. 8, 2016), Dkt. 1. The district court found that trial counsel's failure to challenge Saxon's ACCA enhancement constituted "deficient performance," but held the error did not establish prejudice for the purposes of the two-prong ineffective-assistance-of-counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Saxon appeals the decision as to the prejudice prong.

(2) a defendant's individual resentencing ineligibility under state law is immaterial to the applicability of ACCA predicate offenses under federal law.

Third, the absence of a circuit split on this question does not indicate it is of little interest to the courts of appeals. Although no other circuit court has yet ruled on the matter squarely presented here, two have raised the question. In *United States v. Whindleton*, the First Circuit raised *sua sponte* whether the 2009 DLRA disqualified a defendant's class B drug conviction as an ACCA predicate. *See* 797 F.3d 105 (1st Cir. 2015). Because the defendant failed to raise the argument, however, the First Circuit declined to consider the issue further. *Id*. at 109 n.3. And in *Rivera*, the Second Circuit noted that the 2009 DLRA "expanded opportunities for resentencing," but "did not apply to a person whose sole drug-related offense was a class C felony." *Rivera*, 716 F.3d at 690.

C. The Savings Clause Is Not a Bar to Review

The decision below stems from the dismissal of a § 2241 petition brought pursuant to the Savings Clause of § 2255(e). Pet. App. 16a. Mr. Cortes-Morales filed under § 2241 because he had filed a habeas petition under § 2255 in 2007. Section 2255 limits the ability of a prisoner to file successive petitions but permits a federal prisoner to file a petition under § 2241 if the initial § 2255 petition was "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Mr. Cortes-Morales argued, and the Eleventh Circuit assumed without deciding, that because his petition under

§ 2255 predated the enactment of the 2009 DLRA, the initial petition was "inadequate or ineffective to test the legality of his detention." Pet. App. 11a ("[W]e assume, without deciding, that Cortes-Morales is right that the Savings Clause may reach a claim that a retroactive change in New York's sentencing laws invalidated his sentence.").

Although the Savings Clause is a topic of confusion among circuit courts,[8] the Savings Clause issue is not an impediment to review because the court below assumed that the Savings Clause could reach Mr. Cortes-Morales's claim. Whether upon remand the Eleventh Circuit would decide that the Savings

---

[8] Questions regarding the scope of the Savings Clause have engendered divergent approaches in the courts of appeals. The Eleventh Circuit questioned the propriety of its own Savings Clause test, articulated in *Bryant*, 738 F.3d 1253, in the decision below. Pet. App. 15a (W. Pryor, J., concurring) ("*Bryant* is a monster of our creation, untethered to the text . . . [t]he en banc Court should overrule *Bryant* sooner rather than later."). Other circuit courts of appeals have adopted varying interpretations of the Savings Clause. The Fourth, Eighth, and D.C. Circuits interpret the Savings Clause to reach claims that prisoners are actually innocent of their conviction, not their sentence. *See*, *e.g.*, *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000); *Abdullah v. Hedrick*, 392 F.3d 957, 963 (8th Cir. 2004); *In re Smith*, 285 F.3d 6, 7–8 (D.C. Cir. 2002). The Sixth and Seventh Circuits interpret the Savings Clause to reach claims that the court imposed a sentence exceeding the statutory maximum. *See, e.g.*, *Brown v. Rios*, 696 F.3d 638, 644 (7th Cir. 2012); *Gibbs v. United States*, 655 F.3d 473, 478 (6th Cir. 2011). The Second and Third Circuits construe the Savings Clause liberally to avoid "thorny constitutional issue[s]." *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997); *see also Triestman v. United States*, 124 F.3d, 361, 377 (2d Cir. 1997).

Clause does in fact reach Mr. Cortes-Morales's claim is of no moment here. *See, e.g.*, *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 67 (2009) ("assum[ing] without deciding" that court of appeals correctly resolved issue whether *Heck* barred § 1983 claim before proceeding to answer due process question); *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992) (declining to consider regulatory takings question that was merely "*related* to" or "*complementary* to" physical takings question).

Because the Eleventh Circuit resolved the question on the basis that "the 2004 DLRA and 2009 DLRA are . . . not retroactive as to Cortes-Morales," Pet. App. 12a, this Court need only review the question presented: whether an express legislative change that lowers the maximum sentence for a state drug offense to less than ten years and makes that reduction available to defendants previously convicted and sentenced for that offense disqualifies the offense as an ACCA predicate, notwithstanding the petitioner's ineligibility for resentencing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Walter W. Davis
Counsel of Record
Jason T. Burnette
Ashley F. Heintz
Joel M. Langdon
William E. Eye
JONES DAY
1420 Peachtree St. N.E.,
Suite 800
Atlanta, GA 30309
(404) 581-8724
wwdavis@jonesday.com

DECEMBER 16, 2016

Counsel for Petitioner

APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-13659

D.C. Docket No. 2:13-cv-00057-LGW-JEG

JORGE CORTES-MORALES,

Petitioner-Appellant,

versus

SUZANNE R. HASTINGS,

Respondent-Appellee.

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

(June 27, 2016)

Before WILLIAM PRYOR, ANDERSON, and PARKER,* Circuit Judges.

PER CURIAM:

This appeal involves an effort by petitioner Jorge Cortes-Morales, convicted and sentenced for being a felon in possession of a firearm, to invalidate his sentence on the ground that he no longer qualifies for a mandatory sentencing enhancement. Cortes-Morales brings this petition pursuant to 28 U.S.C. § 2241 seeking to obtain the benefit of revised New York sentencing laws, enacted in 2004 and 2009, which had the effect of retroactively lowering the penalties for certain drug offenders. He argues that, as a consequence of these reductions, he no longer qualifies for a mandatory sentencing enhancement as an armed career criminal under 18 U.S.C. § 924(e). Cortes-Morales sought similar relief in an earlier § 2241 petition and the district court held that he could receive relief in federal court only if he first obtained a resentencing in New York courts. After trying and failing to secure such a resentencing, Cortes-Morales now seeks relief once again under the same theory. The district court below determined that it lacked jurisdiction to hear the claim. Because Cortes-Morales admits that he is not eligible for resentencing under the revised New York sentencing laws, we affirm the judgment of the district court.

---

* Honorable Barrington D. Parker, Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

I. BACKGROUND

A. Predicate Offenses and ACCA Conviction

The origins of this case date back to December 26, 1990, when Cortes-Morales was arrested in Brooklyn, New York for the sale of heroin and subsequently charged with criminal sale of a controlled substance. Cortes-Morales pled guilty to attempted criminal sale of a controlled substance in the third degree under N.Y. Penal Law §§ 110.00, 220.39, a class C felony. At the time of his guilty plea, the maximum sentence in New York for a class C felony was fifteen years. The plea agreement provided for one day in jail and five years of probation.

On May 21, 1991, Cortes-Morales was again arrested in Brooklyn for selling drugs and pled guilty to criminal sale of a controlled substance in the third degree under N.Y. Penal Law § 220.39, a class B felony. At the time of his guilty plea, the maximum sentence in New York for a class B felony was twenty-five years. The court sentenced Cortes-Morales to concurrent sentences of one-and-a-half to three years for both the 1990 class C felony and the 1991 class B felony. He was subsequently resentenced for the 1990 class C felony to a concurrent sentence of one to three years. Cortes-Morales completed those sentences in May 1994.

In 1997, Cortes-Morales was arrested in Puerto Rico for unlawful possession and use of a firearm, and he pled guilty to a state charge of aggravated assault. Cortes-Morales was ultimately sentenced to two years' imprisonment, though he was released before completing his sentence.

In September 2005, Puerto Rican authorities executed a search warrant of Cortes-Morales's home and discovered firearms and drugs. Federal authorities subsequently charged him with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), as enhanced by the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The ACCA provides a mandatory statutory minimum of fifteen years for any individual who violates 18 U.S.C. § 922(g) and has three predicate convictions "for a violent felony or a serious drug offense, or both." *Id.* § 924(e)(1). A "serious drug offense" is one punishable by a "maximum term of imprisonment of at least ten years." *Id.* § 924(e)(2)(A)(ii). Absent the mandatory ACCA enhancement, Cortes-Morales's maximum sentence would have been ten years. *Id.* § 924(a).

Because there was no dispute that he was an armed career criminal, Cortes-Morales pled guilty to the charge, agreed to a prison term of 240 months, and waived his right to file a direct appeal. The district court in Puerto Rico sentenced him to 210 months' imprisonment.

In 2007, Cortes-Morales filed a § 2255 habeas petition *pro se*, claiming that his plea was involuntary, the conviction violated double jeopardy, and he had received ineffective assistance of counsel. The district court partially granted the petition, ordering that Cortes-Morales's federal prison term should run concurrently with a sentence he received on similar charges in Puerto Rico, but denied the petition in all other respects. The U.S. Court of Appeals for the First Circuit affirmed.

B. New York Sentencing Amendments

In 2004, the New York legislature passed the Drug Law Reform Act of 2004 (the "2004 DLRA"), 2004 N.Y. Laws ch. 738, to "reform the sentencing structure of New York's drug laws to reduce prison terms for non-violent drug offenders, provide retroactive sentencing relief and make related drug law sentencing improvements." *Rivera v. United States*, 716 F.3d 685, 688 (2d Cir. 2013) (internal quotation marks omitted) (quoting N.Y. State Assembly Mem. in Supp. of Legislation at 3, 6 (2004), *reprinted in* Bill Jacket, 2004 A.B. 11895, ch. 738). Among other things, the 2004 DLRA lowered the maximum sentences for class B felonies to nine years and for class C felonies to five-and-a-half-years. 2004 N.Y. Laws ch. 738, § 36 (codified at N.Y. Penal Law § 70.70). Though the 2004 DLRA allowed defendants convicted of class A-I felonies to seek resentencing, it did not permit defendants convicted of class B or C felonies to do the same. *Id.* § 41(d-1).

In 2009, however, New York passed the 2009 Drug Law Reform Act (the "2009 DLRA"), allowing individuals convicted of class B felonies the opportunity to obtain resentencing under the lowered maximum sentences. 2009 N.Y. Laws ch. 56, parts AAA § 9 (codified at N.Y. Crim. Proc. § 440.46). In order to qualify for resentencing, a defendant must be "serving an indeterminate sentence with a maximum term of more than three years." *Id.* The 2009 DLRA also provides that defendants convicted simultaneously of a class B and C felony may apply for resentencing for both felonies. *Id.* There is no dispute that Cortes-Morales is ineligible for resentencing under these provisions because he is

neither "serving an indeterminate sentence" in New York nor sentenced to a "maximum term of more than three years."

C. Cortes-Morales's First § 2241 Petition

In October 2010, Cortes-Morales filed a § 2241 habeas petition *pro se* in the Southern District of Georgia (where he is incarcerated). His principal argument was that his 1990 class C felony no longer qualified as an ACCA predicate conviction because it was merely for an attempted sale. The district court erroneously concluded that this Court's decision in *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011), foreclosed relief for prisoners seeking habeas review of sentencing defects. In March 2012, after Cortes-Morales moved for reconsideration, the court recognized its error and granted reconsideration, but nonetheless denied the petition, concluding that Cortes-Morales's class C felony properly qualified as an ACCA predicate conviction.

Cortes-Morales moved a second time for reconsideration. This time, he argued that because several New York courts had permitted resentencing pursuant to the 2009 DLRA and because he was eligible for such resentencing, he no longer had the necessary predicates for the ACCA enhancement. Specifically, Cortes-Morales argued:

> [C]ritical to the disposition of the pending habeas petition [are] three decisions from New York Court's identifying the groups of defendants that are eligible for sentence reductions under New York Drug Resentencing Law of 2009. Suffice it to say, Morales falls within the exception noted by the Government

> as the state lowered the maximum penalty applicable to the offense and made that reduction applicable to defendants' previously convicted and sentenced for that offense. Morales is so [situated].

Motion for Reconsideration at 2–3, *Cortes-Morales v. Haynes*, No. 2:10-cv-159-LGW-JEG (S.D. Ga. Mar. 22, 2012), ECF No. 28. The district court, hearing this argument for the first time, held:

> Cortes-Morales argues that recent decisions by the State of New York render his previous convictions under New York law improper predicate offenses under the Armed Career Criminal Act. Cortes-Morales was sentenced under federal law, not New York law. These recent decisions arising out of New York, which provide relief under New York laws, would not provide him with his requested relief in his 28 U.S.C. § 2241 petition. Cortes-Morales should petition the State of New York for a determination of whether his previous convictions under State law still qualify as felony convictions. Should Cortes-Morales be entitled to his relief in State court, he could then petition the District of Puerto Rico, the federal court in which he was sentenced, for permission to file a second or successive motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

Cortes-Morales v. Haynes, No. 2:10-cv-159-LGW-JEG, slip op. at 1–2 (S.D. Ga. June 29, 2010).

Following the district court's instructions, Cortes-Morales sought resentencing in New York court.

That court concluded that he was ineligible for resentencing because (1) he was not incarcerated in New York at the time of his motion, (2) he was not convicted of a class B felony offense,[1] and (3) his maximum sentence was not longer than three years.

D. Proceedings Below

Undeterred, Cortes-Morales filed a second § 2241 petition, arguing again that the 2004 DLRA and the 2009 DLRA reduced the maximum sentence for his drug convictions, and, consequently, his drug convictions were no longer "serious drug offenses" within the meaning of the ACCA. After Cortes-Morales's first petition, the Supreme Court clarified that for purposes of the ACCA, a federal sentencing court must "consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense." *McNeill v. United States*, 563 U.S. 816, 131 S. Ct. 2218, 2221–22 (2011). However, the Court did not consider "a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." *Id.* at 2224 n.1. Accordingly, Cortes-Morales can succeed on the merits of his claim only if the New York sentencing reductions apply retroactively.

---

[1] It is unclear whether this was a proper basis for denying Cortes-Morales relief, as he was convicted of a class B felony, and the 2009 DLRA makes clear that individuals convicted simultaneously of class B and C felonies are eligible for resentencing. In any event, there is no dispute Cortes-Morales was otherwise ineligible for resentencing.

But the district court, adopting the magistrate's recommendation, did not reach the merits of Cortes-Morales's claim, holding that it lacked jurisdiction to consider his claim because Cortes-Morales had failed to meet the Savings Clause test articulated by this Court in *Bryant v. Warden*, *FCC Coleman-Medium*, 738 F.3d 1253 (11th Cir. 2013). On appeal, Cortes-Morales, ably assisted by assigned counsel, argues that the 2009 DLRA's generally retroactive effect entitled him to relief under the Savings Clause, even though he is not eligible for resentencing in New York.

II. STANDARD OF REVIEW

Whether a prisoner may bring a § 2241 petition under the Savings Clause of § 2255 is a question of law reviewed *de novo* by this Court. *Bryant*, 738 F.3d at 1262.

III. DISCUSSION

A. Savings Clause

An individual incarcerated for a federal crime may ordinarily collaterally challenge the validity of his or her conviction or sentence only by filing a habeas corpus petition pursuant to 28 U.S.C. § 2255. By contrast, petitions under the more general provisions of § 2241 may typically be used only to challenge the execution, as opposed to the validity, of a sentence. *See Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1352 n.1 (11th Cir. 2008) (citing 28 U.S.C. § 2255(e)). Once an initial habeas petition under § 2255 has been filed and denied, the grounds for filing a second or successive motion are narrow. In that event, a prisoner must show either that (1) there

is newly discovered evidence showing actual innocence, or (2) the Supreme Court has announced a new retroactive rule of constitutional law that was previously unavailable to the petitioner. 28 U.S.C. § 2255(h).

This Court, however, has recognized that a prisoner may file a petition under § 2241 challenging the *validity* of his conviction or sentence if his § 2255 motion was "inadequate or ineffective" to test the validity of his conviction or sentence. *See Bryant*, 738 F.3d at 1263. This conclusion stems from the so-called "Savings Clause" of § 2255, which provides:

> 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).

We have formulated a test for determining inadequacy or ineffectiveness where a petitioner claims he was sentenced above the statutory maximum. In *Bryant*, we held that in such circumstances, a prisoner may file a § 2241 petition challenging the validity of his sentence only if (1) during the pendency of the § 2255 petition, circuit precedent squarely foreclosed the argument being made in the § 2241 petition, (2) subsequent to the § 2255 petition, the Supreme Court overturned that

circuit precedent, (3) the new Supreme Court rule applies retroactively on collateral review, (4) the effect of the retroactive rule is that the prisoner has been sentenced above the statutory maximum authorized by Congress, and (5) the Savings Clause reaches the kind of claim raised by the petitioner. 738 F.3d at 1274. The chief benefit of the Savings Clause is that, contrary to § 2255(h)'s narrow grounds for filing a successive petition, a retroactive change in Supreme Court law that is not of a constitutional dimension can nonetheless provide relief to a prisoner. But the Savings Clause is a threshold jurisdictional inquiry—if a petitioner cannot satisfy the Savings Clause test, we lack jurisdiction to hear a § 2241 petition challenging the validity of a conviction or sentence. *See McCarthan v. Warden, FCI Estill*, 811 F.3d 1237, 1250 (11th Cir. 2016).

Cortes-Morales concedes that he cannot meet this test—there is no retroactive Supreme Court case on point. He urges us, however, to adopt an expanded view of the Savings Clause, permitting its invocation where a retroactive change in state law renders a conviction or sentence invalid.

B. Cortes-Morales Cannot Meet the Savings Clause

For purposes of this appeal, we assume, without deciding, that Cortes-Morales is right that the Savings Clause may reach a claim that a retroactive change in New York's sentencing laws invalidated his sentence. Even under Cortes-Morales's proposed view of the Savings Clause, however, his petition fails.

There is no dispute that Cortes-Morales is not eligible for resentencing under the 2009 DLRA. The

New York court offered three reasons for denying Cortes-Morales's motion to be resentenced, none of which he has challenged in this appeal.[2] The 2004 DLRA and 2009 DLRA are thus not retroactive as to Cortes-Morales, and cannot serve as the basis for invoking the Savings Clause.

Cortes-Morales directs us to two district court opinions from the Southern District of New York holding that a defendant may be ineligible for the ACCA sentencing enhancement by virtue of the 2009 DLRA, even if he is ineligible for resentencing under the 2009 DLRA, because a strict reading of the 2009 DLRA violates the spirit and remedial purpose of the law. *See United States v. Calix*, No. 13-cr-582, 2014 WL 2084098 (S.D.N.Y. May 13, 2014); *United States v. Jackson*, No. 13-cr-142, 2013 WL 4744828 (S.D.N.Y. Sept. 4, 2013). These decisions do not persuade us to grant Cortes-Morales relief. We need not guess at the legislature's intent in affording only a subset of drug offenders an opportunity to be resentenced. The Supreme Court has instructed that "Congress chose [in the ACCA] to defer to the state lawmaker's judgment," *United States v. Rodriquez*, 553 U.S. 377, 388 (2008), and such deference is appropriate where, as here, the state legislature has made a clear, reasoned judgment about which offenders are most in need of relief—Cortes-Morales does not fall within that class of offenders. And even were we persuaded to consider the statute's purpose, the New York Court

---

[2] The Government argues that Cortes-Morales is ineligible for resentencing for a number of other reasons as well. Because there is no dispute that Cortes-Morales does not qualify for resentencing under the 2009 DLRA, we need not consider those arguments.

of Appeals has already recognized that because "[b]y the plain text of the statute, its benefits were limited to those 'in the custody of the department of correctional services,'" it follows that "the Legislature recognized that the burden of 'inordinately harsh punishment' falls most heavily on those who are in prison." *People v. Paulin*, 952 N.E.2d 1028, 1032 (N.Y. 2011). We therefore defer to the New York legislature's judgment that Cortes-Morales, as a person not in the custody of New York's department of correctional services, is not among the class of defendants the 2009 DLRA is designed to benefit.

Nor is Cortes-Morales benefitted by his invocation of Supreme Court precedent instructing courts to employ a categorical approach when determining enhancements under the ACCA. *See Taylor v. United States*, 495 U.S. 575, 602 (1990). The Supreme Court in *Taylor* did not suggest that courts must ignore the particular circumstances of the defendant, but rather held only that courts are limited to the "fact of conviction and the statutory definition of the prior offense" when determining whether a prior conviction mandates a sentencing enhancement. *Id.* Indeed, the Court later made clear that some aspects of the particular defendant's conduct are relevant, holding that courts must take into account whether a state's recidivist statute imposed a higher sentencing maximum for the defendant in question. *Rodriquez*, 553 U.S. at 382–83. Our holding is not inconsistent with these Supreme Court's opinions, rendered in a different context, concerning how prior convictions are viewed for purposes of the ACCA.

Because Cortes-Morales is not eligible for resentencing under the 2009 DLRA, he cannot satisfy

even his view of the Savings Clause. We thus lack jurisdiction and may not reach the merits of his claim.

IV. CONCLUSION

We **AFFIRM** the judgment of the district court dismissing the petition.

WILLIAM PRYOR, Circuit Judge, concurring:

I join the majority opinion in full. Even assuming that the savings clause—as "interpreted" by this Court in *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253 (11th Cir. 2013)—reaches retroactive amendments to state legislation, the Drug Law Reform Act of 2009 is not retroactive for prisoners like Cortes-Morales.

I write separately to reiterate that the five-part test we cooked up in *Bryant* is "indefensible as a matter of textual interpretation." *Samak v. Warden, FCC Coleman-Medium*, 766 F.3d 1271, 1276 (11th Cir. 2014) (W. Pryor, J., concurring). Because *Bryant* is a monster of our creation, untethered to the text, I see no principled basis for determining its ultimate reach. If "circuit-busting precedent" opens the door to untimely, successive attacks on a prisoner's sentence, *see Bryant*, 738 F.3d at 1276, then why not retroactive amendments to state legislation? Until *Bryant* is overruled, we will continue to grapple in the dark to answer these types of questions. The en banc Court should overrule *Bryant* sooner rather than later.

APPENDIX B

2013 WL 3868173

Only the Westlaw citation is currently available.

United States District Court,
S.D. Georgia,
Brunswick Division.

Jorge CORTES–MORALES, Petitioner,

v.

Suzanne R. HASTINGS, Warden, Respondent.

Civil Action No. CV213–057.

|

July 24, 2013.

Attorneys and Law Firms

Jorge Cortes–Morales, Jesup, GA, pro se.

R. Brian Tanner, U.S. Attorney's Office, Savannah, GA, for Respondent.

ORDER

LISA GODBEY WOOD, Chief Judge.

Petitioner Jorge Cortes–Morales ("Cortes–Morales"), filed Objections to the Magistrate Judge's June 28, 2013, Report which recommended that Cortes–Morales's 28 U.S.C. § 2241 be dismissed. In his Objections, Cortes–Morales argues that he does in fact satisfy the savings clause of 28 U.S.C. § 2255.

After an independent and *de novo* review of the record, the undersigned concurs with the Magistrate

Judge's Report and Recommendation. As discussed in *Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999), and in the Magistrate Judge's Report, a motion under § 2255 is inadequate or ineffective, thus triggering the availability of § 2241 relief, only when a three-part test is met. When a prisoner's claim "1) [ ] 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 [,]" then the prisoner may pursue relief under § 2241. *Wofford*, 177 F.3d at 1244.

Cortes–Morales cites *Carachuri–Rosendo v. Holder*, — U.S. —, 130 S. Ct. 2577, 177 L.Ed.2d 68 (2010), as applicable Supreme Court precedent. *Carachuri–Rosendo* does not meet the *Wofford* test.[1] *Carachuri–Rosendo* does not de-criminalize the conduct for which Cortes–Morales was convicted. Neither can Cortes–Morales demonstrate that *Carachuri–Rosendo* overturned binding, contrary circuit precedent that precluded him from raising his claim on a previous occasion. Because Cortes–Morales fails to identify a new, retroactively applicable Supreme

---

[1] The *Carachuri–Rosendo* decision examined the meaning of "aggravated felony" in connection with removal proceedings under the Immigration and Nationality Act. — U.S. —, 130 S. Ct. 2577, 177 L.Ed.2d 68. Additionally, *Carachuri–Rosendo* does not apply retroactively to cases on collateral review. *See Fields v. Warden. FCC Coleman–USP 1*, 484 F. App'x 425, 427 (11th Cir. 2012); *Bennett v. Haynes*, 2012 WL 385629 (S.D. Ga. Jan. 19, 2012).

Court decision that establishes that he was convicted for a nonexistent offense or that he was foreclosed from raising these claims in his previously-filed motions, his claims cannot be brought pursuant to § 2241. Simply put, Cortes–Morales has not satisfied the requirements of § 2255's savings clause. *See Wofford*, 177 F.3d at 1244; *see also Dean v. McFadden*, 133 F. App'x 640, 642 (11th Cir. 2005) (noting that all three requirements of the *Wofford* test must be satisfied before section 2255's savings clause is satisfied).

Cortes–Morales's Objections to the Magistrate Judge's Report and Recommendation are without merit and are **overruled**. The Report and Recommendation of the Magistrate Judge is adopted as the Opinion of the Court. Cortes–Morales's petition is **DISMISSED**. The Clerk of Court is directed to enter the appropriate judgment of dismissal.

SO ORDERED.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

JAMES E. GRAHAM, United States Magistrate Judge.

Petitioner Jorge Cortes–Morales ("Cortes–Morales"), an inmate currently incarcerated at the Federal Correctional Institution in Jesup, Georgia, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Respondent filed a Response, and Cortes–Morales responded with a Traverse. Respondent followed with a Reply. For the reasons which follow, Cortes–Morales' petition should be **DISMISSED**.

STATEMENT OF THE CASE

Cortes–Morales was convicted, after pleading guilty in the District of Puerto Rico, of being a felon and armed career criminal in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e), or the Armed Career Criminal Act ("ACCA"). Based on these convictions, Cortes–Morales faced a sentence of 210 to 262 months' imprisonment. The Honorable Jose A. Fuste sentenced Cortes–Morales to 210 months' imprisonment. (Doc. No. 9–5). No direct appeal was filed, and the judgment became final on October 2, 2006.

Cortes–Morales filed a motion pursuant to 28 U.S.C. § 2255. The District of Puerto Rico Court granted the petition for the limited purpose of amending the judgment to impose a concurrent federal sentence. (Doc. No. 9–7). The remaining portions of the petition regarding double jeopardy were denied and unsuccessfully appealed to the First Circuit Court of Appeals. (Doc. No. 9–9).

Cortes–Morales then filed a section 2241 petition in this Court asserting that, under current law, he no longer had the three requisite prior convictions to be sentenced under the ACCA. (Case. No. CV210–159). Cortes–Morales specifically contended that a 1991 conviction from New York for the attempted criminal sale of a controlled substance no longer qualifies under the ACCA as a "serious drug offense". Chief Judge Lisa Godbey Wood adopted the undersigned's Report and Recommendation and dismissed Cortes–Morales' petition. (*Id.* at Doc. No. 22). Cortes–Morales filed a motion for reconsideration, which was granted for the limited purpose of examining whether Cortes–Morales presented a meritorious sentencing

claim. (*Id.* at Doc. No. 24). Ultimately, Chief Judge Wood concluded Cortes–Morales "was not sentenced improperly under the ACCA," and denied his petition. (*Id.* at Doc. No. 27, p. 3).

Cortes–Morales filed a second motion for reconsideration, again contending that his prior conviction did not qualify as a "serious drug offense" under the ACCA. (Case. No. CV210–159, Doc. No. 28). Cortes–Morales argued that in light of recent decisions from the State of New York, his convictions no longer qualified as viable ACCA offenses. This Court denied Cortes–Morales' motion. (*Id.* at Doc. No. 30). Cortes–Morales' appeal to the Eleventh Circuit Court of Appeals was dismissed. (*Id.* at Doc. No. 41).

In the instant petition, Cortes–Morales reiterates his argument that his 1991 New York conviction does not serve as an ACCA predicate offense. Cortes–Morales claims the conviction is not or was not punishable by more than ten years' imprisonment and does not qualify as a "serious drug offense"; that he is therefore "actually innocent" of his federal sentence; and that he should be sentenced to a shorter term of imprisonment. Cortes–Morales cites to *Begay v. United States*, 533 U.S. 137 (2008), and *Carachuri–Rosendo v. Holder*, —U.S. —, 130 S. Ct. 2577, 177 L.Ed.2d 68 (2010), in support of his petition. Respondent contends that Cortes–Morales has not satisfied the savings clause and thus cannot bring his claims pursuant to § 2241.

DISCUSSION AND CITATION TO 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; *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). Section 2255 provides:

> An application for a writ of habeas corpus [pursuant to 28 U.S.C. § 2241] 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 supplied). The petitioner bears the initial burden of presenting evidence that affirmatively shows the inadequacy or ineffectiveness of the § 2255 remedy. *Ramiro v. Vasquez*, 210 F. App'x 901, 904 (11th Cir. 2006).

Cortes–Morales' action is styled as a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Cortes–Morales asserts that under current law, *Begay*, and *Carachuri–Rosendo*, his underlying convictions for attempted sale of a controlled substance and sale of a controlled substance "can no longer be considered 'serious drug offenses' because the offenses are not punishable by a term exceeding ten years." (Doc. No. 1, p. 4). Cortes–Morales argues

he is "entitled to resentencing, without attribution of the enhanced Armed Career Criminal Act enhancements." (*Id.* at p. 5)

To successfully use a § 2241 petition to circumvent the procedural restrictions of a § 2255 motion, a petitioner must satisfy the savings clause of § 2255. 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.

Cortes–Morales cites to *Begay* and *Carachuri–Rosendo* in his Petition and Traverse as standing for the contention that he is "actually innocent of the underlying Armed Career Criminal sentence." (Doc. No. 1, p. 2). Cortes–Morales provides citations to these cases, but provides no meaningful explanation as to how either case serves to support his arguments. Nonetheless, neither *Begay* nor *Carachuri–Rosendo* aid Cortes–Morales in satisfying § 2255's savings clause as retroactively applicable Supreme Court cases. In addition, Cortes–Morales fails to present evidence that he was convicted of a non-existent offense, as the cases cited do not de-criminalize the conduct for which he was convicted. Cortes–Morales does not set forth any *Begay*- or *Carachuri–Rosendo*–

based arguments that he could not raise during sentencing, on appeal, or in a § 2255 motion.[2]

Nor has Cortes–Morales shown that his claims were foreclosed on a previous occasion. Cortes–Morales' instant petition raises nearly identical arguments to those he has unsuccessfully presented to this Court in his previous § 2241 petition. In addition, Cortes–Morales has not demonstrated that these arguments were foreclosed at the time of his previous § 2255 petition. Cortes–Morales has not satisfied the requirements of § 2255's savings clause. *See Wofford*, 177 F.3d at 1244; *see also Dean v. McFadden*, 133 F. App'x 640, 642 (11th Cir. 2005) (noting that all three requirements of the *Wofford* test must be satisfied before section 2255's savings clause is satisfied). Because Cortes–Morales has not satisfied the requirements of § 2255's savings clause, he cannot "open the portal" to argue the merits of his claim. *See Wofford*, 177 F.3d at 1244 & n. 3; *see also Dean*, 133 F. App'x at 642.

Cortes–Morales cannot circumvent the requirements for § 2255 motions by styling his petition for habeas corpus as being filed pursuant to

---

[2] The Supreme Court held in *Begay* that a DUI offense did not constitute a "violent felony" within the meaning of the ACCA. 553 U.S. 1581. The *Carachuri–Rosendo* decision examined removal proceedings under the Immigration and Nationality Act. — U.S. —, 130 S.Ct. 2577, 177 L.Ed.2d 68. Additionally, *Carachuri–Rosendo* does not apply retroactively to cases on collateral review. *See Fields v. Warden, FCC Coleman–USP 1*, 484 F. App'x 425, 427 (11th Cir. 2012); *Bennett v. Haynes*, 2012 WL 385629 (S.D. Ga. Jan. 19, 2012). Neither case affects any sentencing enhancement Cortes–Morales may have received pursuant to the ACCA.

§ 2241. "[W]hen a federal prisoner's claims fall within the ambit of § 2255, the prisoner is subject to that section's restrictions." *Medberry v. Crosby*, 351 F.3d 1049, 1061 (11th Cir. 2003). Mathews is doing nothing more than "attempting to use § 2241 ... to escape the restrictions of § 2255." *Wofford*, 177 F.3d at 1245.

CONCLUSION

Based on the foregoing, it is my **RECOMMENDATION** Cortes–Morales' petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2241, be **DISMISSED**.

SO REPORTED and **RECOMMENDED**, this *28th* day of June, 2013.

All Citations

Not Reported in F.Supp.2d, 2013 WL 3868173

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

September 20, 2016

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 13-13659-GG

Case Style: Jorge Cortes-Morales v. Suzanne Hastings

District Court Docket No: 2:13-cv-00057-LGW-JEG

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Eleanor M. Dixon, GG/lt
Phone #: (404) 335-6172

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 13-13659-GG

JORGE CORTES-MORALES,

Petitioner - Appellant,

versus

SUZANNE R. HASTINGS,

Respondent - Appellee.

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: WILLIAM PRYOR, ANDERSON, and PARKER,* Circuit Judges.

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 banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are **DENIED**.

ENTERED FOR THE COURT:

s/ Hon. Barrington D. Parker, Jr.
ORD-42

---

* Honorable Barrington D. Parker, Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 13-13659

District Court Docket No.
2:13-cv-00057-LGW-JEG

JORGE CORTES-MORALES,

Petitioner - Appellant,

versus

SUZANNE R. HASTINGS,

Respondent - Appellee.

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: June 27, 2016
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch