No. 12-14989-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DAN CARMICHAEL MCCARTHAN,

Petitioner-Appellant,

v.

WARDEN, FCI ESTILL,

Respondent-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida, No. 5:09-cv-00110-WTH-PRL

EN BANC BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLANT

H. Eugene Lindsey III
Regional Vice Chair,
11th Circuit *Amicus* Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
KATZ, BARRON, SQUITERO, FAUST,
FRIEDBERG, ENGLISH & ALLEN, P.A.
2699 S. Bayshore Drive, 7th Floor
Miami, FL 33133
Telephone: (305) 856-2444
Facsimile: (305) 285-9227
hel@katzbarron.com

David C. Frederick
Counsel of Record
Jeffrey A. Love
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
dfrederick@khhte.com
jlove@khhte.com

Counsel for Amicus Curiae
National Association of Criminal Defense Lawyers

August 22, 2016

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-2, the following persons have an interest in the outcome of this case:

Bentley, A. Lee, III, United States Attorney;

Bodnar, Roberta, Assistant United States Attorney;

Castagna, Hon. William E., United States District Judge;

Fernandez, John E., Defendant's Trial Attorney;

Frederick, David C., counsel for *amicus curiae* National Association of Criminal Defense Lawyers;

Grandy, Todd, Assistant United States Attorney;

Hirsch, Lisa A., Assistant United States Attorney;

Hodges, Hon. William Terrell, United States District Judge;

Lindsey III, H. Eugene, Regional Vice Chair for *amicus curiae* National Association of Criminal Defense Lawyers;

Love, Jeffrey A., counsel for *amicus curiae* National Association of Criminal Defense Lawyers;

Matheney, Erik R., former Assistant United States Attorney;

McCarthan, Dan, Petitioner/Appellant;

Merryday, Hon. Steven D., United States District Judge;

Mora, S., Warden, FCI Estill;

National Association of Criminal Defense Lawyers;

O'Neill, Robert E., United States Attorney;

Rhodes, David P., Assistant United States Attorney, Appellate Div.;

Rhodes, Yvette, Assistant United States Attorney;

Rudenstine, Sonya, Petitioner/Appellant's Appellate Attorney;

Sweeney, Sara C., Assistant United States Attorney;

Scriven, Hon. Mary S., United States District Judge.

CORPORATE DISCLOSURE STATEMENT

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") is a non-profit entity. NACDL does not have a parent corporation, and no publicly held corporation owns 10 percent or more of the organization.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 29(g), NACDL respectfully moves for leave to participate in the oral argument in this case. *See* Unopposed Motion for Leave To Appear in Oral Argument (filed concurrently with this brief).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

* Authorities on which NACDL chiefly relies are marked with an asterisk.

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL has approximately 9,000 direct members in 28 countries and 90 state, provincial, and local affiliate organizations totaling as many as 40,000 attorneys, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the U.S. Constitution and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. To promote these goals, NACDL has frequently appeared as *amicus curiae* before this Court in cases concerning substantive criminal law and criminal procedure.

---

[1] NACDL represents that counsel for *amicus* authored this brief in its entirety and that no person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

This case presents a question concerning the proper interpretation of the savings clause of 28 U.S.C. § 2255(e). That issue is of vital importance to defense lawyers and criminal defendants. NACDL submits this *amicus* brief because it has concerns that an overly strict interpretation of the savings clause would be inconsistent with the text, structure, and history of Section 2255(e) and would raise grave constitutional concerns. *See* U.S. Const. art. 1, § 9, cl. 2. Any interpretation of the savings clause that would curtail federal prisoners' habeas corpus rights in a manner inconsistent with Congress's intent and the Constitution is contrary to the interests of NACDL and its members.

BACKGROUND

Generally speaking, a federal prisoner who seeks to challenge the legality of his detention must do so through the mechanism outlined in 28 U.S.C. § 2255. That provision usually allows a prisoner only one such petition. The so-called "savings clause" of Section 2255(e), however, allows certain federal prisoners to seek post-conviction habeas corpus relief—even if they have already brought one unsuccessful Section 2255 challenge—under 28 U.S.C. § 2241. Specifically, the savings clause allows courts to entertain a prisoner's second petition when Section 2255 would prove or has proven "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). It 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.

Id.

Section 2255 itself "says precious little about what it means for the original motion to have been 'inadequate' or 'ineffective.'" *Williams v. Warden*, 713 F.3d 1332, 1340-41 (11th Cir. 2013). Drawing on the provision's text, its structure, and the sparse legislative history, this Court has correctly concluded that the savings clause covers (at least) instances in which binding circuit precedent forecloses a prisoner's sentencing-error challenge and a subsequent Supreme Court decision retroactively overturns that precedent. *See Bryant v. Warden*, 738 F.3d 1253, 1284 (11th Cir. 2013); *Gilbert v. United States*, 640 F.3d 1293, 1319 n.20 (11th Cir. 2011) (*en banc*); *Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999). In particular, the Court has deemed Section 2255 "inadequate or ineffective" to test the legality of a prisoner's detention when four factors are satisfied: (1) the petitioner claims he was erroneously sentenced above the statutory maximum, and that claim was squarely foreclosed by circuit precedent at the time of his initial Section 2255 proceeding; (2) a subsequent Supreme Court decision overturned that circuit precedent; (3) the Supreme Court decision applies retroactively on collateral review; and (4) the

prisoner demonstrates that his sentence exceeds the statutory maximum.[2] *See Bryant*, 738 F.3d at 1257.

Since *Bryant*, this Court has twice applied its four-factor "inadequate or ineffective" framework. In *Samak v. Warden*, 766 F.3d 1271 (11th Cir. 2014) (*per curiam*), the Court held that a petitioner could not seek habeas relief under the savings clause because he failed to satisfy the first factor: circuit precedent had not foreclosed his sentencing-error claim at the time of his first Section 2255 proceeding. *See id.* at 1275. Judge Pryor concurred in the *Samak* judgment but argued that the savings clause should reach only those instances "when [a prisoner] attacks the *execution* of his sentence"—for example, when the prisoner challenges the application of good time credits or a parole determination—"or when his sentencing court no longer exists." *Id.* at 1278 (Pryor, J., concurring) (emphasis added).

A panel of this Court again applied *Bryant*'s "jurisdictional test" in this case. *See McCarthan v. Warden*, 811 F.3d 1237, 1250 (11th Cir. 2016) (*per curiam*). The

---

[2] The *Bryant* Court also asked whether "the savings clause in § 2255(e) reaches [the petitioner's] pure § 924(e)-*Begay* error claim of illegal detention above the statutory maximum penalty [for his crime of conviction]." 738 F.3d at 1274. (Section 924(e) is the codified version of the Armed Career Criminal Act ("ACCA"). *See*18 U.S.C. § 924(e).) In other words, the Court asked whether the savings clause reaches claims that a prisoner was sentenced above the statutory maximum for his crime of conviction based on an erroneous finding that he had three previous convictions that qualified as predicate offenses under the ACCA. While the *Bryant* Court called this a fifth "factor," it is really a threshold question about whether the savings clause covers sentencing claims like McCarthan's and Bryant's. For the reasons stated in this brief, the answer is that it does.

Petitioner-Appellant, Dan McCarthan, sought savings-clause relief on the ground that two recent Supreme Court decisions—handed down years after he filed his first Section 2255 petition—rendered his sentence unlawful. Specifically, he argued that one of the three prior convictions on which the Government relied in securing a sentencing enhancement under the Armed Career Criminal Act ("ACCA")—a conviction for escaping from jail—was not actually a "violent felony" according to new Supreme Court precedent. As a result, he contended, the sentencing court had imposed a sentence above the statutory maximum. The district court denied that petition. *See id.* at 1243.

In affirming the lower court's denial, the panel held that McCarthan easily satisfied *Bryant*'s first three factors: this Court's own precedent had squarely foreclosed his challenge to his enhanced sentence in the first Section 2255 proceeding, and that precedent had since been reversed by a retroactively applicable Supreme Court decision. *See id.* at 1245-46. McCarthan, however, still had four "prior convictions that arguably qualified him for an ACCA enhancement." *Id.* at 1241. The parties "agree[d] that the 1987 Florida cocaine conviction was, and remains, a valid predicate conviction," *id.* at 1254, and the panel concluded (on *de novo* review) that McCarthan's two 1998 Georgia convictions for possession of cocaine with intent to distribute "arose out of a separate and distinct criminal episode," *id.* (quoting *United States v. Proch*, 637 F.3d 1262, 1265 (11th Cir. 2011)).

The Georgia convictions therefore counted as two separate convictions. So "even . . . assum[ing] that" the fourth—a 1994 Florida third-degree murder conviction—"is not a violent felony," the panel explained, McCarthan "still ha[d] three ACCA-qualifying convictions justifying his ACCA enhancement." *Id.* at 1256-57. Applying the fourth *Bryant* factor, the panel concluded that McCarthan could not show that his sentence definitely exceeded the allowable statutory maximum, so it denied his petition.

This Court granted *en banc* review to determine whether the savings clause allows a petitioner like McCarthan to bring a Section 2241 petition. NACDL submits that it does.

SUMMARY OF THE ARGUMENT

The savings clause establishes that a federal prisoner may petition for relief under Section 2241 if his initial Section 2255 petition was "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Section 2255(e)'s plain text, then, suggests that "the touchstone of the savings clause," *Bryant*, 738 F.3d at 1263, is whether the prisoner had a "genuine opportunity . . . to raise his [claim] in an 'adequate and effective' fashion," *id.* at 1282. Accordingly, the proper inquiry in cases like McCarthan's is not whether a petitioner will ultimately succeed on his Section 2241 petition. Instead, question is whether he had an adequate and effective

opportunity to challenge his ACCA-enhanced sentence during his initial Section 2255 proceeding.

The *Bryant* Court suggested that a prisoner lacks such an opportunity when four conditions are satisfied: (1) when binding circuit precedent at the time of the prisoner's initial Section 2255 proceeding squarely foreclosed his claim that he was erroneously sentenced above the statutory maximum; (2) Supreme Court precedent later overturns that circuit precedent; (3) the Supreme Court decision applies retroactively on collateral review; and (4) the prisoner can show that his sentence should have fallen below the statutory maximum the sentencing court actually applied. *See* 738 F.3d at 1257.

While *Bryant*'s savings-clause analysis was largely correct, it went a half-step too far by considering what it labeled the fourth factor: a prisoner's likelihood of success on the merits in determining whether he had an adequate opportunity to test the legality of his conviction at an earlier proceeding. If a prisoner satisfies the first three *Bryant* factors—binding circuit precedent that was later overturned by a retroactive Supreme Court decision erroneously foreclosed his challenge—he has necessarily shown that he did not have such an opportunity. The fourth factor, meanwhile, says nothing about whether a prisoner had a "genuine opportunity" to raise his claim during his first Section 2255 proceeding. What is more, that question is a *merits* inquiry, and it is not relevant at the jurisdictional stage.

McCarthan's case is illustrative: the question whether his sentence now exceeds the statutory maximum—that is, whether the sentencing court actually erred in calculating his sentencing enhancement—says nothing about whether his Section 2255 proceeding was adequate and effective to test the legality of that sentence. Instead, the first three *Bryant* factors alone demonstrate that he did not have a genuine opportunity to challenge his sentence during his initial Section 2255 proceeding. Indeed, erroneous circuit court precedent functionally prevented him from challenging a sentence the Supreme Court later said may never have been legal. This Court's precedent rendered McCarthan's sentencing-error arguments utterly futile, and he therefore necessarily missed out on a "genuine opportunity" to challenge his illegal sentence in his initial proceeding. For that reason, he should be allowed to bring his Section 2241 petition pursuant to the savings clause.

If the *Bryant* Court got the test basically right, NACDL submits, the rule proposed in the *Samak* concurrence is entirely inconsistent with the savings clause's text and history. The savings clause expressly allows prisoners who have been "denied relief" under Section 2255 to pursue a Section 2241 petition where the initial Section 2255 petition was "inadequate or ineffective" to test the legality of their detention. 28 U.S.C. § 2255(e). And challenges to one's sentence are naturally challenges to one's detention. Furthermore, because the concurrence's interpretation forsakes prisoners who have been denied an adequate and effective

opportunity to test the legality of their detention due to practical difficulties, it does not comport with the history of the savings clause.

ARGUMENT

I. SECTION 2255 RELIEF IS "INADEQUATE OR INEFFECTIVE" IF THE PETITIONER DOES NOT HAVE A "GENUINE OPPORTUNITY" TO CHALLENGE HIS SENTENCE

The weight of appellate authority suggests that a Section 2255 proceeding is "inadequate or ineffective" if the petitioner lacks a "genuine opportunity" to challenge his sentence. The text, structure, and history of the statute confirm that view. The question before this Court, therefore, is this: under what circumstances is the process provided to a prisoner in an initial Section 2255 proceeding "inadequate or ineffective to test the legality of [his] detention"? That is, under what circumstances is an "opportunity" to challenge a sentence not "genuine"?

The *Bryant* Court provided one answer, and the logic behind that answer is sound: a petitioner is denied a genuine opportunity to test the legality of his detention (or, in this case, his sentence) when the habeas court was unwilling or unable to consider his argument. The *Bryant* Court, however, strayed from that logic in one important way: by asking a repeat petitioner to prove a question more appropriate for the merits stage. That requirement—embodied in *Bryant*'s fourth factor—is inconsistent with the savings clause, and it has no place in the Section 2255 inquiry. Applying a pared-down version of the *Bryant* test, it is clear that

McCarthan never had an adequate and effective chance to test the legality of his sentence. Accordingly, this Court should reverse the panel's decision and grant him that opportunity.

A. The Weight of Appellate Authority Suggests That a Section 2255 Proceeding Is "Inadequate or Ineffective" If the Petitioner Lacks a "Genuine Opportunity" To Challenge His Sentence

One federal court of appeals has interpreted the savings clause to mean that a prisoner need only have a formal "chance to test his sentence or conviction." *Prost v. Anderson*, 636 F.3d 578, 587 (10th Cir. 2011). By the Tenth Circuit's reading (which is shared by at least one member of this Court), a prisoner may invoke the savings clause only if he was never able to appear before a habeas court to present his argument at all. *See id.*; *see also Samak*, 766 F.3d at 1283-86 (Pryor, J., concurring) (concluding that "'*to test* the legality of his detention' means only to have the opportunity to *raise an argument* about the legality of his detention" (emphasis added)).[3]

Every other court of appeals to have decided this issue, by contrast, has concluded that a Section 2255 proceeding may sometimes be "inadequate or

[3] While the *Samak* concurrence's approach differs in some ways from the Tenth Circuit's, *see Samak*, 766 F.3d at 1295, it agrees that the savings clause guarantees nothing more than a formal chance—no matter how futile—to present one's argument, *see id.* at 1283-86.

ineffective" even though it supplies a prisoner a formal chance to test the legality of his sentence.[4]

Courts in this Circuit agree: they have noted that "the touchstone of the savings clause," *Bryant*, 738 F.3d at 1263, is not whether a petitioner had a formal opportunity to make his argument, but rather whether the process he received in his initial Section 2255 proceeding was "inadequate or ineffective." That process is inadequate or ineffective, in turn, if the petitioner did not have a "genuine opportunity" to challenge his conviction or sentence. *See Williams*, 713 F.3d at 1347 (quoting *In re Davenport*, 147 F.3d at 611); *see also Bryant*, 738 F.3d at 1282 (noting that the question is whether petitioner "had a procedural opportunity to raise his [claim] in an 'adequate and effective' fashion").

B. The Savings Clause's Text, Structure, and History Confirm the Majority View

The majority view is consistent with the statute's text, structure, and history. Although Section 2255 itself "says precious little about what it means for the original motion to have been 'inadequate' or 'ineffective,'" *Williams*, 713 F.3d at 1340-41, the plain text makes one thing clear: the savings clause guarantees something more

---

[4] *See, e.g.*, *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997); *In re Jones*, 226 F.3d 328 (4th Cir. 2000); *Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir. 2001); *Martin v. Perez*, 319 F.3d 799 (6th Cir. 2003); *In re Davenport*, 147 F.3d 605 (7th Cir. 1998); *Alaimalo v. United States*, 645 F.3d 1042 (9th Cir. 2011); *Bryant v. Warden*, 738 F.3d 1253 (11th Cir. 2013).

than a mere formal chance to challenge one's sentence or conviction. A prisoner may access Section 2241 if Section 2255 has proven "inadequate or ineffective" to test the legality of his detention. *See* 28 U.S.C. § 2255(e). "[I]nadequate" means "insufficient," *Merriam Webster's New International Dictionary* 1254 (2d ed. 1934), and "ineffective" means "incapable of producing the intended effect." *Id.* at 1271. By its terms, then, the savings clause guarantees a "sufficient" opportunity to challenge one's sentence—an opportunity that is "capable of producing the intended effect." This has to be more than a mere formal chance to stand up in court. After all, a guarantee of an empty, formalistic process would not ensure that that process is capable of producing the intended effect—a reduction of the petitioner's sentence.

The habeas statute's structure confirms that the savings clause provides a prisoner more than a formal chance to test his conviction or sentence. Indeed, the savings clause expressly includes within its ambit prisoners who were already denied relief under Section 2255. It states: "An application for a writ of habeas corpus . . . shall not be entertained if it appears that the applicant has failed to apply for relief . . . *or that such court has denied him relief*, unless it also appears that [Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e) (emphasis added). If the savings clause guaranteed nothing more than a mere formal chance to appear at an initial Section 2255 proceeding, then it would never apply to a petitioner who was denied Section 2255 relief. Any interpretation of the savings

clause that guarantees only a formal opportunity to challenge one's detention—and not an opportunity that is "sufficient"—cannot be correct.

C. An Opportunity To Challenge a Sentence Is Not Genuine If the Challenge Would Have Been Futile

The question before the Court, then, is this: in the context of a collateral challenge to a sentencing enhancement, under what circumstances is the process provided to a prisoner in an initial Section 2255 proceeding "inadequate or ineffective to test the legality of [his] detention"? 28 U.S.C. § 2255(e). That is, under what circumstances is an "opportunity" to challenge a sentence "insufficient" or "[in]capable of producing the desired effect"?

The *Bryant* Court suggested one such circumstance: when binding circuit precedent squarely foreclosed a prisoner's claim that he was erroneously sentenced above the statutory maximum, retroactive Supreme Court precedent later overturns that circuit precedent, and the prisoner can show that his sentence exceeds the statutory maximum. *See* 738 F.3d at 1257. The Court reasoned that Section 2255 is inadequate in those circumstances because reviewing courts cannot and will not entertain challenges that are futile under circuit court precedent. *See id.* at 1274-75. Indeed, as the *Williams* Court observed, when an erroneous circuit court precedent squarely forecloses the petitioner's claim, "stare decisis would make [the Court] unwilling . . . to listen to [the petitioner]," and the petitioner therefore has "no genuine opportunity" to raise his claim. 713 F.3d at 1347. The Seventh Circuit has

agreed: when erroneous circuit precedent forecloses "*any* judge [from] listen[ing] to an argument later proved sound *and* retroactive *and* cognizable in postconviction proceedings," the Section 2255 process has failed the petitioner and he must be allowed another chance. *In re Davenport*, 147 F.3d at 611.

This is the correct logic: if the habeas court would not have been willing to listen to the petitioner's argument, then Section 2255 was inadequate and the petitioner was never provided with a genuine shot to challenge his erroneous sentence. But the *Bryant* Court went on to apply an additional filter: it asked whether the petitioner definitely would have prevailed had he been allowed to make his argument to the habeas court. That question does not emanate from the logic behind *Bryant* (or *Williams* or *Davenport*): that Section 2255 is inadequate if the petitioner never had a genuine opportunity to make his argument.

In fact, *Bryant*'s reasoning reveals that whether a prisoner would have succeeded on the merits of his challenge is irrelevant to determining whether he had a genuine opportunity to make the claim in the first place. The correct question, *see supra* p. 6, is whether the opportunity afforded the petitioner was adequate and effective—that is, "sufficient"—to test the legality of his sentence. If the habeas court was unwilling to listen because of binding circuit precedent, as this Court has reasoned, then the prisoner's opportunity was insufficient. *See supra* pp. 6-7. The *Bryant* analysis, in other words, should have stopped at the third factor.

The correct test, then, might be framed as follows: Section 2255 is "inadequate or ineffective" to test the legality of a prisoner's detention if: (1) binding circuit precedent at the time of the prisoner's initial Section 2255 proceeding squarely foreclosed his claim that he was erroneously sentenced above the statutory maximum authorized by Congress; (2) a subsequent Supreme Court decision overturns that circuit precedent; and (3) that decision is retroactively applicable on collateral review.

That is all the text requires. A proceeding may be inadequate to test the legality of a sentence even if, in hindsight, it turns out that the sentence was, in fact, legal. Indeed, this Court has explained that a procedure is not inadequate simply because it reaches an erroneous answer. *See Williams*, 713 F.3d at 1348. Conversely, just because a court gets the answer right does not mean it has afforded adequate or effective process.[5]

---

[5] The Seventh Circuit's decision in *Brown v. Rios*, is consistent with NACDL's approach. *See* 696 F.3d 638 (7th Cir. 2012). In *Brown*, the Seventh Circuit determined that a prisoner was erroneously barred by circuit court precedent from challenging the legality of his ACCA-enhanced sentence. *See id.* at 639-41. Only after resolving the jurisdictional inquiry and concluding that the defendant "can use the habeas corpus statute to challenge the legality of his sentence" did the Seventh Circuit proceed to the "merits issue": whether the prisoner had any other convictions that qualified as predicate offenses under the ACCA. *Id.* at 640, 643.

D. McCarthan Never Had a "Genuine Opportunity" To Challenge His Sentence

The facts of McCarthan's case highlight the distinction between those chances that are sufficient and those that are not. When he was sentenced, McCarthan had on his record five prior convictions that arguably qualified as ACCA-predicate offenses: (1) a 1987 Florida conviction for possession of cocaine with intent to sell or deliver; (2) a 1988 Georgia conviction for possession of cocaine with intent to distribute; (3) a second 1988 Georgia conviction for possession of cocaine with intent to distribute; (4) a 1992 Florida conviction for escape; and (5) a Florida third-degree murder conviction. It was undisputed at the time of McCarthan's initial Section 2255 proceeding that his Florida drug conviction and one of his Georgia drug convictions qualified as predicate offenses under the ACCA. *See McCarthan*, 811 F.3d at 1254, 1257. And this Court's then-binding precedent clearly held that his escape conviction also qualified. *See United States v. Gay*, 251 F.3d 950 (11th Cir. 2001) (*per curiam*). At the time, this Court had not decided whether McCarthan's third-degree murder conviction qualified as a predicate offense.[6] And it was (and remains) unclear whether his second Georgia drug conviction was a separate offense from the first; if not, it would not qualify for purposes of the ACCA. *See McCarthan*, 811 F.3d at 1254 (citing 18 U.S.C. § 924(e)).

---

[6] Indeed, the panel assumed it was not for purposes of its analysis. *See McCarthan*, 811 F.3d at 1256.

But these questions about the third-degree murder and the second Georgia drug convictions were not presented in McCarthan's initial Section 2255 proceeding. McCarthan did not address them because the court had no reason to decide them; it had already determined—on the basis of its erroneous precedent—that three of McCarthan's prior convictions qualified him for an enhanced sentence under the ACCA. It was therefore unwilling—or, more precisely in this case, unable—to listen to him. Much like Bryant, McCarthan had no opportunity to adequately or effectively test the legality of his enhanced sentence.

In short, given that erroneous circuit precedent clearly established that three of McCarthan's prior convictions were ACCA-qualifying at the time of his initial Section 2255 proceeding, he was left with no way to adequately or effectively challenge his sentencing enhancement. Like the petitioners in *Williams*, *Bryant*, and *Davenport*, then, McCarthan had no "genuine opportunity" to challenge the basis for his sentence, and his initial Section 2255 proceeding was therefore "inadequate or ineffective" for purposes of the savings clause.

II. THE SAVINGS CLAUSE OPENS THE DOOR TO SENTENCING CHALLENGES, NOT JUST CHALLENGES TO THE EXECUTION OF A SENTENCE OR WHEN THE SENTENCING COURT NO LONGER EXISTS

Concurring in the *Samak* decision, one member of this Court suggested that the savings clause is available in just two situations: where (1) the prisoner seeks to challenge the execution of his sentence (for example, the application of good time

credits or parole determinations), or (2) the prisoner's sentencing court no longer exists. *See Samak*, 766 F.3d at 1278 (Pryor, J., concurring). That narrow reading of the savings clause is inconsistent with the provision's language and purpose.[7]

To begin with, the savings clause's reference to challenges to one's "detention" can naturally be understood to include challenges to one's sentence. A prisoner held pursuant to an erroneously lengthy sentence—even one that was imposed according to the law prevailing at the time—is being unconstitutionally imprisoned (that is, detained) for longer than Congress authorized. *See United States v. DiFrancesco*, 449 U.S. 117, 139, 101 S. Ct. 426, 438 (1980) ("[A] defendant may not receive a greater sentence than the legislature has authorized."). The prisoner in *Bryant*, for instance, had been held for almost twelve years when it turned out that

---

[7] Other circuits have determined that Section 2255 relief may prove "inadequate or ineffective"—and, therefore, that a prisoner may invoke the savings clause—when a prisoner seeks to challenge his erroneous sentence. *See Brown*, 696 F.3d at 644 (granting savings clause relief for a petitioner erroneously sentenced under the ACCA, the same sentencing statute at issue here); *Marrero v. Ives*, 682 F.3d 1190, 1194 (9th Cir. 2012) ("[A] petitioner may qualify for the escape hatch if he received a sentence for which he was statutorily ineligible."). The Second and Third Circuits would likely agree, as they have held that the savings clause is available when its unavailability would raise "serious constitutional questions." *Poindexter v. Nash*, 333 F.3d 372, 378 (2d Cir. 2003); *see also In re Dorsainvil*, 119 F.3d at 248 (seeking to avoid "thorny constitutional issue[s]"). The First, Sixth, Eighth, and D.C. Circuits, meanwhile, have left open the door to savings-clause relief for erroneous sentences, though they have not held that the clause definitely applies. *See Trenkler v. United States*, 536 F.3d 85, 99 (1st Cir. 2008); *United States v. Peterman*, 249 F.3d 458, 462 (6th Cir. 2001); *Abdullah v. Hendrick*, 392 F.3d 957, 960 (8th Cir. 2004); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002).

his sentence should have ended after year ten. *See Bryant*, 738 F.3d at 1293. When he prevailed in his Section 2241 proceeding, he was released *from detention*. A challenge to Bryant's sentence thus *was* a challenge to his detention.

Nor does this narrow reading comport with the savings clause's purpose, as indicated by its legislative history. While the legislative history tells us little about the reach of the savings clause, *see Wofford*, 177 F.3d at 1241, one thing is clear: Congress envisioned that Section 2241 would be available *at least* when practical considerations precluded a remedy in the sentencing court. Indeed, an earlier draft of the bill that was the forerunner to Section 2255 originally singled out such concerns:

> No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, *unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons*.

United States v. Hayman, 342 U.S. 205, 216 n.23, 72 S. Ct. 263, 270 n.23 (1952) (quoting H.R. 4233 and S. 1451, 79th Cong., 1st Sess. § 2 (1945)) (emphasis added). Congress ultimately amended the bill, replacing the "practicable" language with the "inadequate or ineffective" standard that prevails today. As this Court has explained, however, the new language "is broader than the old 'practicable' problems language, which suggests [that] the new language was intended to cover *more* than just

practical problems." *Wofford*, 177 F.3d at 1241 (emphasis added); *see id.* at 1240 (explaining that Congress contemplated "the expense of transporting the prisoner to the district where he was convicted" and the incentive for prisoners "to file baseless motions in order to have a 'joy ride' away from the prison at Government expense" (quoting S. Rep. No. 80-1526, at 3 (1948))).

An exclusive focus on challenges to sentence execution and sentences imposed by courts that no longer exist would not even cover those practical problems—*e.g.*, where a prisoner could not be present to challenge the substance of his sentence—let alone whatever else Congress envisioned the savings clause would reach. That reading cannot be correct. Congress's intent for the savings clause to cover "more than just practical problems" demonstrates that whatever the exact contours of the savings clause, it was *never* meant to cover only situations where the prisoner seeks to challenge the execution of his sentence or where his sentencing court no longer exists. *See id.*

It is also irrelevant that Section 2241 claims are brought against prison wardens whereas Section 2255 claims are brought against prosecutors. *See Samak*, 766 F.3d at 1281 (Pryor, J., concurring) (reasoning that a defendant who challenges the legality of his *sentence* must sue the United States Attorney under Section 2255 because the remedy for such claims (resentencing) "is not the kind of remedy we would expect a warden to oversee"). Federal courts have the authority to "dispose

of [Section 2241 petitions] as law and justice require." 28 U.S.C. § 2243. And the Supreme Court has interpreted that "law and justice" authority to confer broad remedial powers on the federal courts. *See In re Bonner*, 151 U.S. 242, 261, 14 S. Ct. 323, 327 (1894) ("The court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus."). For example, the Supreme Court has held that federal courts may remedy, in a petition for habeas corpus, the imposition of a sentence above that authorized by statute. *See Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873). And, importantly, the remedial powers of the federal courts include the authority to *grant forms of relief "short of release."* *Wilkinson v. Dotson*, 544 U.S. 74, 85, 125 S. Ct. 1242, 1250 (2005) (Scalia, J., concurring) (emphasis added). Indeed, where a prisoner challenges one of several consecutive sentences, the court may invalidate the challenged sentence even though the prisoner remains in custody to serve the others. *See id.* (citing *Peyton v. Rowe*, 391 U.S. 54, 67, 88 S. Ct. 1549, 1556 (1968)); *see also Preiser v. Rodriguez*, 411 U.S. 475, 498, 93 S. Ct. 1827, 1840 (1973)) ("[S]eeking immediate release *or a speedier release*" from confinement is "the heart of habeas corpus." (emphasis added)). Arguments like McCarthan's are thus the type habeas courts are empowered to hear, no matter whether the defendant is the warden.

III. NACDL'S PROPOSED TEST WOULD NOT RAISE POLICY CONCERNS

Advocates of a stricter interpretation of the savings clause have suggested that such a reading is more consistent with the interests of finality and administrability of criminal sentences. Neither concern, however, should displace the defendant's legitimate interests in serving a sentence only as long as permitted under law.

First, finality in sentencing is not—and never has been—inviolate. *See, e.g.*, *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (holding that the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies retroactively, despite the sheer number of cases that would be reopened). Indeed, Congress has identified dozens of situations in which fairness and concerns of the justice system's integrity must trump finality. These provisions are too numerous to need recounting, but it is worth noting that Section 2255 itself contains at least one: Section 2255(h), which provides that "second or successive motion[s] must be certified" where there is either "newly discovered evidence . . . sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense" or "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). Similarly, by providing an avenue of relief under the savings clause for petitioners who have already had one Section 2255 petition denied, Congress has made the explicit determination that finality must yield

in cases where the prisoner was not afforded an adequate and effective opportunity to challenge the legality of his detention. McCarthan's is one of those cases.

Indeed, denying relief in cases like McCarthan's undercuts the aims of finality rather than serving them. Finality acts to foster "confidence in the integrity of our procedures." *Custis v. United States*, 511 U.S. 485, 497, 114 S. Ct. 1732, 1739 (1994). But denying relief to prisoners held pursuant to erroneous sentences who have never had a meaningful opportunity to ask for relief casts the judicial system in an unflattering light—as an institution unwilling to correct its own mistakes and concerned solely with bureaucratic certitude. *See id.* And while there is no doubt that "revisiting and retesting convictions five or ten years old"—as McCarthan asks this Court to do—can entail some degree of "[a]nxiety and immobility . . . accompanied by other social costs," *Prost*, 636 F.3d at 583, such anxiety pales in comparison to that experienced by those who must pay with years of their lives for mistakes the courts have made, and by those who live in a society that abides that kind of inequity.

Second, NACDL's reading of Section 2255(e) has the virtue of being easy to administer—easier, in fact, than the test that presently prevails. Whereas this Court's current reading of the savings clause requires courts to determine at the jurisdictional stage which qualifying convictions are "valid"—witness the difficulties the panel encountered in this very case attempting to discern whether

McCarthan's two Georgia convictions were truly separate, *see McCarthan*, 811 F.3d at 1254-56—NACDL's formulation presents two simpler, related inquiries: First, at the time of the prisoner's initial Section 2255 proceeding, how many of his convictions were closed to meaningful challenge? If the answer is three or more, the court would then ask whether the Supreme Court has abrogated the precedent behind enough of the convictions to call the sentence into question. If so, then the court could not have entertained the petitioner's potentially valid sentencing challenge, and Section 2255 was inadequate and ineffective to test the legality of his sentence. This simplified analysis alleviates (at least in part) the burden placed on judges at this stage.

Moreover, this simplification would not cause a deluge of Section 2241 petitions. Instead, it would ensure that the savings clause remains the "narrow . . . portal" Congress meant it to be. *Bryant*, 738 F.3d at 1281. In fact, the only new prisoners this construction covers are those in McCarthan's position: those with four or more potentially ACCA-qualifying convictions, three or more of which binding circuit precedent had squarely identified as ACCA-qualifying at the time of the initial Section 2255 hearing, and at least one of which the Supreme Court has since called into doubt. Moreover, the most common convictions—by virtue of that very commonality—will likely have already been squarely identified as qualifying. Indeed, had McCarthan's two Georgia drug convictions been clearly separate

offenses, the government could have argued that they were squarely covered just as his Florida drug offense was during his initial Section 2255 proceeding, and he would not be able to seek habeas relief through the savings clause today. But because they were not and an error in this Court's precedent prevented McCarthan from adequately and effectively testing the legality of his detention during his initial Section 2255 proceeding, the savings clause appropriately leaves the door open for consideration of the merits of a habeas petition under Section 2241.

CONCLUSION

For the foregoing reasons, the Court should construe Petitioner-Appellant's Section 2241 petition as a petition for review pursuant to the savings clause, and it should grant that petition.

Dated: August 22, 2016

Respectfully Submitted,

/s/ David C. Frederick

David C. Frederick
Counsel of Record
Jeffrey A. Love
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
dfrederick@khhte.com
jlove@khhte.com

H. Eugene Lindsey III
Regional Vice Chair,
11th Circuit *Amicus* Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
KATZ, BARRON, SQUITERO, FAUST, FRIEDBERG, ENGLISH & ALLEN, P.A.
2699 S. Bayshore Drive, 7th Floor
Miami, FL 33133
Telephone: (305) 856-2444
Facsimile: (305) 285-9227
hel@katzbarron.com

Counsel for Amicus Curiae
National Association of Criminal Defense Lawyers

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,158 words, excluding the parts of the brief exempted by Fed. R. Ap. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ David C. Frederick
David C. Frederick

August 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ David C. Frederick
David C. Frederick