No. 17-1362

In the
United States Court of Appeals
for the Seventh Circuit

JOSHUA E. SHEPHERD,
Petitioner-Appellant,

v.

STEPHEN JULIAN,
Warden, FCI Terre Haute,
Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of Indiana, Terre Haute Division.
No. 2:17-cv-00026—Hon. Larry J. McKinney, *Judge*.

BRIEF OF THE RESPONDENT

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JURISDICTIONAL STATEMENT

The Appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Whether the Court should dismiss Shepherd's claim as waived under the law of the case doctrine.

2. Whether Shepherd's claim is permissible under 28 U.S.C. § 2241.

3. Whether circuit-of-confinement or circuit-of-conviction law applies to the substance of Shepherd's claim.

4. Whether Kentucky Second-Degree Burglary is an ACCA predicate.

STATEMENT OF THE CASE

Introduction

At first blush, this case presents various tricky questions: whether to apply the law of the case regarding Joshua Shepherd's collateral waiver, whether this is a permissible "saving clause" case, whether to apply this Court's or the Sixth Circuit's law to the merits of Shepherd's petition, and whether Shepherd's state burglary convictions qualify under the Armed Career Criminal Act. Ultimately, however, the answer to the last question makes resolving the rest straightforward.

Earlier in this case, the government attempted to enter into a stipulation with Shepherd to remand the case for resentencing. Several of the positions the government took in that process, (D. 17, 20), stemmed from

a misunderstanding of the Department's view of the underlying burglary statute at issue. This brief corrects that mistake, and the answers to some of the remaining questions shift in turn.

In the end, this case is simple: the Sixth Circuit has now held that Kentucky second-degree burglary is an ACCA predicate. And this Court's jurisprudence dictates the same result. Shepherd is therefore entitled to no relief.

Charge, Plea, and Sentence

Joshua Shepherd's case originated in the Western District of Kentucky.[1] The details of the criminal conduct are not germane here.

Shepherd pleaded guilty to one count of possessing marijuana for intended distribution, one count of being a felon in possession of a firearm, and two counts of criminal forfeiture. *See* 18 U.S.C. §§ 922(g)(1), 924(d); 21 U.S.C. §§ 841(a)(1), 853(a); 28 U.S.C. § 2461.

His plea agreement included the following waiver provision, which articulated separate waivers of appeal and postconviction collateral challenge:

> The Defendant knowingly and voluntarily waives the right to directly appeal his conviction and the resulting sentence pursuant to Fed. R. App. P. 4(b) and 18 U.S.C. § 3742. However,

[1] Throughout this brief, the government will make the following references: (R. = District Court Docket Number); (D. = Court of Appeals Docket Number); (A. Br. = Appellant's Brief); (A. = Short Appendix); (B. = Separate Appendix).

> defendant shall maintain his right to appeal the sentence imposed only if the Court departs from the applicable advisory guideline range, *as determined by the Court*. Defendant expressly waives the right to contest or collaterally attack his conviction and the resulting sentence pursuant to 28 U.S.C. § 2255 or for any other reason.

(A. 8.)

At his change of plea hearing, the district court, Shepard, and counsel discussed the appeal waiver provision as follows:

> THE COURT: […] If they should convict you of any one of these charges, then you could appeal the conviction itself and the sentence to a higher court to see whether mistakes had been made, to see whether or not the sentence that I gave you was a reasonable one or not. This plea agreement, does it waive the right to appeal?
> MR. SHANNON: It does, Your Honor. The defendant does maintain his right to appeal should the Court depart in the sentencing.
> THE COURT: All right. In this plea agreement, Mr. Shepherd, there is – I guess there is a limited waiver of an appeal right. […]
> […]
> THE COURT: And if I find that he is an armed career criminal and sentence him accordingly, has he given up his right to appeal that finding?
> MR. LEE: No. My understanding was that we were not waiving that.
> THE COURT: Is that right?
> MR. SHANNON: Judge, in this instance, I think based on the language for departing from the advisory guidelines, I know it would still be within the guidelines, I believe that the United States is not seeking for a waiver of appeal on that issue, so they can [sic] appeal that.
> THE COURT: Okay. Now, the guideline application as set out in the plea agreement, is that -- it looks like you're finding that there is an -- are you agreeing to this?
> THE COURT: So I will be deciding all of those things at your sentencing hearing. And regardless of how they come out, your

> only recourse will be to appeal those things. You won't be able to say, well, I'll take my chances with a jury now, I want to take all of this back. Do you understand that?
> THE DEFENDANT: Yes, sir.
> THE COURT: Okay. So, essentially, you are agreeing no matter what the language is of this agreement that all of those things that I just talked about having to decide are things that you can appeal if I decide them against you,
> Mr. Lee, right?
> MR. LEE: Yes, Your Honor.
> THE COURT: Okay. And you agree with that?
> MR. SHANNON: Yes, Your Honor.

(A. 13–17.)

Shepherd was sentenced as an armed career criminal to fifteen years in prison and three years of supervised release. *See* 18 U.S.C. § 924(e); 21 U.S.C. § 841(b)(1)(D). The district court found Shepherd eligible for an ACCA enhancement based on three prior convictions for Kentucky second-degree burglary. (A. 27.)

At the sentencing hearing, Shepherd's counsel, counsel for the government, and the court discussed his appeal waiver again:

> THE COURT: Mr. Lee, you talk to him about whether he wishes to appeal and whether you have waived certain aspects of it. And if he is expressing an interest to do so, then either you file the notice of appeal or do something.
> MR. LEE: Our previous limitation with regard to the appeal would pertain to the armed career offender determination, so --
> THE COURT: You have a different take on it?
> MR. SHANNON: No, Your Honor. I believe just based on the way this came about, in fairness, that if he is going to appeal this armed career, the United
> States will be --

> THE COURT: Okay. So if you want to appeal the issues that you raised here today about whether the armed career offender statute applies, then you are free to do so. Is that everyone's understanding?
> MR. LEE: But, otherwise, there is no basis to appeal any other issue.
> MR. SHANNON: That's right.
> THE COURT: Okay. All right. Thank you.

(A. 29-30.) They did not discuss his waiver of collateral challenges.

Direct Appeal

Shepherd appealed. *See United States v. Shepherd*, Case No. 09-5507, D. 63-1 (6th Cir. May 4, 2011). In an unpublished opinion, the Sixth Circuit noted that Shepherd had not waived his right to appeal "issues relating to the calculation of his guideline range." (B. 3.) The court also evaluated a challenge to his ACCA status. (B. 3-4.)

The court noted that Shepherd "did not object to the presentence report insofar as it indicated that he had been convicted in 1997 of three felony counts of second-degree burglary." The court added that his convictions fit the "definition of burglary set out in *Taylor*[*v. United States*, 495 U.S. 575, 599 (1990)]." (B. 4 (citing *United States v. Maness*, 23 F.3d 1006, 1006-08 (6th Cir. 1994)). The court affirmed his conviction and sentence. (B. 5.)

Collateral Challenge Under § 2255

Shepherd filed a motion pursuant to 28 U.S.C. § 2255. (B.11.) The district court of conviction denied his claim, embracing the government's

argument that Shepherd's waiver of collateral challenges was more absolute than his appeal waiver and precluded his claims. (B. 12-15.)

Applying the plain terms of Shepherd's plea agreement, the court concluded that he had waived any collateral challenge to his sentence. (B. 13.) The court reviewed both the plea colloquy and the written plea agreement. (B. 13-14.) The court held that, although Shepherd had negotiated an exception to his appeal waiver, no such exception existed with respect to his collateral waiver. (*Id.*) The court dismissed his claim.

Shepherd appealed that decision too, but the Sixth Circuit declined to issue a certificate of appealability. (B. 25-26.) The court held that Shepherd had waived any right to collaterally challenge his sentence in his plea agreement: "Shepherd's plea agreement includes an express waiver of the right to collaterally attack his sentence under § 2255." (B. 25.) The court also deemed his claim substantively meritless. (B. 26.)

Shepherd subsequently sought permission to file successive § 2255 motions. The Sixth Circuit denied all of those requests. (B. 34-35.)

Proceedings Below: Shepherd's § 2241 Petition

In 2017, Shepherd filed a petition under 28 U.S.C. § 2241 in the Southern District of Indiana, the district of his confinement. (A.41.) He argued that Kentucky's burglary statute was overbroad under *Mathis* and

thus were not ACCA predicates. (A.42.) The district court dismissed the petition without requesting a response from the respondent. (A. 45; R. 3.)

This timely appeal followed.

SUMMARY OF THE ARGUMENT

Shepherd has three qualifying ACCA predicates and is therefore entitled to no relief. Although that main dish is what really matters here, this case is not a one-course meal.

First, Shepherd must show that he is entitled to circumvent his collateral challenge waiver, a showing he cannot make. While his colloquy with the district judge likely created real confusion, he cannot surmount the law of the case. The Sixth Circuit has already deemed his collateral waiver absolute; because his ultimate claim to relief fails in this Court, he cannot point to a miscarriage of justice, so the earlier decision governs.

Second, Shepherd must show that his claim fits through an exception this Court has carved out of the general bar to proceeding under § 2241. He can make that showing. The Department has recently adopted a very different view of the scope of § 2241, which could hypothetically preclude Shepherd's argument. However, consistent with the Department's approach in similar cases, the government does not here press for the sort of change in Circuit law that would be necessary to oppose Shepherd's claim on this ground.

The next course concerns which Circuit's law governs the ACCA-predicate question. The Court should apply its own law (*i.e.*, circuit-of-confinement law) to determine whether the Shepherd's petition actually has merit. Applying this Circuit's law makes sense because this Court's precedents bind the district court adjudicating the habeas petition and govern the actions of the warden named as respondent. In all events, the Court need not grapple with this question because the result is the same in either circuit.

With those courses out of the way, the main issue is whether Shepherd's prior burglary is "generic burglary" and thus an ACCA predicate. Under Seventh Circuit law, it is. And under Sixth Circuit law, it is.

Kentucky second-degree burglary categorically qualifies as the ACCA-enumerated violent felony of burglary. Kentucky defines that offense as entering or remaining unlawfully in a dwelling with the intent to commit a crime, Ky. Rev. Stat. Ann. § 511.030, and defines "dwelling" as a "building which is usually occupied by a person lodging therein," *id.* § 511.010(2). The structure of Kentucky's definitions statute and relevant Kentucky Supreme Court decisions indicate that the word "building" in that definition carries only its ordinary meaning, *i.e.*, the same one used in *Taylor*. The crime is therefore generic, and Shepherd remains subject to the sentencing mandates of the ACCA.

The Court should affirm.

ARGUMENT

I. The Court Should Enforce Shepherd's Collateral Waiver

A. Standard of Review

This Court reviews the enforceability of a plea agreement waiver *de novo*. *United States v. Chapa*, 602 F.3d 865, 868 (7th Cir. 2010).

Waivers of the right to collateral review are generally enforceable. Limited exceptions include "cases in which the plea agreement was involuntary, the district court relied on a constitutionally impermissible factor (such as race), the sentence exceeded the statutory maximum, or the defendant claims ineffective assistance of counsel in connection with the negotiation of the plea agreement." *Keller v. United States*, 657 F.3d 675, 681(7th Cir. 2011). "Plea agreements are contracts," and "their content and meaning are determined according to ordinary contract principles." *United States v. Hallahan*, 756 F.3d 962, 974 (7th Cir. 2014) (citation and quotation marks omitted).

B. Given His Interactions with the Court of Conviction, Shepherd's Waiver of Direct Appeal Included an Exception Permitting Him to Challenge his Sentence

The direct appeal waiver in Shepherd's plea agreement read as follows:

> Defendant is aware of his right to appeal his conviction and that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. The Defendant knowingly and voluntarily

> waives the right to directly appeal his conviction and the resulting sentence pursuant to Fed. R. App. P. 4(b) and 18 U.S.C. § 3742. However, defendant shall maintain his right to appeal the sentence imposed only if the Court departs from the applicable advisory guideline range, as determined by the Court.

(A. 8.)

As Shepherd highlights, (A. Br. 5-6), the parties discussed the exception to his appellate waiver at his plea and sentencing. (A. 30.) Shepherd is correct, and the Sixth Circuit agreed on direct review, that his appeal waiver was modified by those discussions. That decision was limited to his direct appeal waiver.

C. But the Law of the Case Dictates that Shepherd Has Waived His Current Claim

Shepherd's plea agreement contained a separate waiver covering collateral challenges. That waiver, which followed his appeal waiver, read as follows:

> Defendant expressly waives the right to contest or collaterally attack his conviction and the resulting sentence pursuant to 28 U.S.C. § 2255 or for any other reason.

(R. 16, at 45.)

When Shepherd filed his initial § 2255 motion, the district court of conviction held that he could not pursue any collateral challenges to his conviction and sentence in light of that absolute language. (B. 25.) The Sixth Circuit affirmed that view. (B. 26.)

It is therefore the law of the case that Shepherd has waived the claim he now pursues.[2] The "law of the case" doctrine applies in postconviction proceedings such as this one. *See Peoples v. United States*, 403 F.3d 844, 847 (7th Cir. 2005). Under the doctrine,

> [A]n initial federal determination controls in subsequent rounds of review if "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application."

Id. (quoting *Sanders v. United States*, 373 U.S. 1, 15 (1963)). As the last aspect of the doctrine indicates, in circumstances not present here, a case may proceed notwithstanding a prior federal determination: "it's not as if the law of the case doctrine were a straitjacket that might cause a miscarriage of justice." *White v. United States*, 371 F.3d 900, 902 (7th Cir. 2004).

The Sixth Circuit's (and district of conviction's) holding that Shepherd waived any collateral challenges is the law of the case. (B. 26.) First, the question is the same: did he waive all collateral challenges? The district court of conviction and the Sixth Circuit answered that question directly. That Shepherd might muster new arguments on the claim now does not

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[2] The position the government took on this question in the parties' original but rejected stipulation was driven by a mistaken view that Shepherd was entitled to relief from his mandatory minimum sentence. The government's position on the law of the case changed along with its position on Shepherd's ultimate entitlement to relief.

change that. *See Peoples*, 403 F.3d at 847-48. This Court takes a broad view of whether a claim was presented before: "presented is presented." *Id.*

Second, the prior determination was on the merits. Shepherd's district court of conviction straightforwardly held that he waived all collateral challenges. The Sixth Circuit plainly upheld that conclusion, finding Shepherd's claim "waived." (B. 26.) Although unpublished, those decisions were persuasive.

Finally, enforcing the law of the case here would not work a miscarriage of justice. As discussed below, *see infra* Part III, Shepherd is not ultimately entitled to relief. In other words, even if he was confused about any distinction between his appeal and collateral attack waivers, that confusion has no material impact now.

For these reasons, the Court should enforce Shepherd's collateral waiver under the law of the case doctrine.

II. Pursuant to This Court's Precedent, Shepherd May Proceed Under § 2241

A. Standard of Review

This Court reviews the denial of a § 2241 petition *de novo*. *Hill v. Werlinger*, 695 F.3d 644, 648 (7th Cir. 2012).

B. This Court's Jurisprudence Permits Claims Like Shepherd's To Proceed Under § 2241

In general, "§ 2255 is the exclusive means for a federal prisoner to attack his conviction [or sentence]." *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003) (per curiam). However, in a "narrow class of cases," *id.*, a federal prisoner may seek traditional habeas corpus relief under § 2241 if § 2255's motion remedy "is inadequate or ineffective to test the legality of his detention," 28 U.S.C. § 2255(e). The "saving clause" in 28 U.S.C. § 2255(e) authorizes a federal prisoner to file a § 2241 petition where the remedy under § 2255 is "inadequate or ineffective to test the legality of his detention." *Poe v. LaRiva*, 834 F.3d 770, 772 (7th Cir. 2016); 28 U.S.C. § 2255(e).

To invoke the saving clause and obtain collateral relief pursuant to § 2241, a federal prisoner must show: (1) that he relies on a new statutory-interpretation case rather than a constitutional case; (2) that he relies on a retroactive decision that he could not have invoked in his first § 2255 motion; and (3) that the alleged sentencing error was grave enough to be deemed a miscarriage of justice. *Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013) (citing *Davenport*, 147 F.3d 605, 611 (7th Cir. 1998)); *Montana v. Cross*, 829 F.3d 775, 783 (7th Cir. 2016).

1. Shepherd Relies on a Statutory Interpretation Case

Shepherd challenges his sentence under *Mathis v. United States*, ––– U.S. –––, 136 S. Ct. 2243, 2247, 2251 (2016). *Mathis* interpreted the enumerated-offense clause within ACCA. 18 U.S.C. § 924(e)(2)(B)(ii). Because *Mathis* is a statutory-interpretation case, it satisfies the first requirement of the saving clause. *See United States v. Shands*, 2:17-CV-61, 2017 WL 2581336, at *2 (E.D. Ky. May 11, 2017) (citing *Dawkins v. United States*, 829 F.3d 549, 551 (7th Cir. 2016)); *see also Caraway*, 719 F.3d at 586.

2. Shepherd Relies on a Rule that Applies Retroactively

Mathis applies retroactively because decision's divisibility rule is not "new." Defendants may invoke decisions on collateral review if those decisions merely clarify old rules. *See Whorton* v. *Bockting*, 549 U.S. 406, 414-416 (2007) (decision that clarifies existing law (and thereby reaffirms an "old rule") "applies . . . on collateral review"); *Chaidez* v. *United States*, 568 U.S. 342, 347 (2013) ("[W]hen we apply a settled rule . . . a person [may] avail herself of the decision on collateral review.").

In *Mathis*, the Supreme Court went out of its way to explain that the conclusion was compelled by the Court's precedents. *See* 136 S. Ct. at 2247, 2251. Accordingly, *Mathis* has retroactive effect.

It is equally clear that, even though *Mathis* is "old" in that sense, Shepherd could not have relied on it in the way he attempts to now at the

time of his sentencing or earlier collateral challenge. The Sixth Circuit decisions denying him relief relied on law from that Circuit that precluded his claims. (*See* B. 4.) Post-*Mathis*, the Sixth Circuit revised its view in *Stitt*, prompting Shepherd's argument here. (A. Br. 25.) (As will become clear, the Sixth Circuit subsequently revised its view further, and not to Shepherd's benefit.)

Alternatively, if *Mathis* is "new," then it announced a new substantive rule because it "narrow[ed] the scope of a criminal statute by interpreting its terms." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). As a new substantive rule under that analysis, it would still apply retroactively. *See id.*; *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion).

For these reasons, and again without jumping to the merits, Shepherd's claim meets the second "saving clause" requirement.

3. The Type of Error Shepherd Claims Would Be Sufficiently Grave to Warrant Relief Under § 2241

The type of claim Shepherd raises falls within the parameters this Court outlined in *Brown v. Rios*, 696 F.3d 638, 640-641 (7th Cir. 2012). In *Rios*, the Court held that collateral relief under § 2241 is available to address a "fundamental defect" in a conviction or sentence, which extends to prisoners who are subject to terms of imprisonment that exceed the range prescribed by

Congress. *See id.*; *see also Hill v. Masters*, 836 F.3d 591, 595-596, 599-600 (6th Cir. 2016); *Caraway*, 719 F.3d at 587–88.

Shepherd's argument is that he does not have sufficient predicates to qualify under ACCA and therefore that his statutory maximum is ten years. Under that argument, his sentence of fifteen years in prison exceeds that maximum, meaning his claim meets the final saving clause requirement.

C. The Department Has Reconsidered—And Substantially Narrowed—Its View of the Availability of Relief Under § 2241

For informational purposes only, the government notes a recent change in the Department's position relating to the § 2241 gatekeeping question.

1. The Context for the Department's Revised View

In the mid-1990s, the Department of Justice first considered whether a criminal defendant who previously had sought and been denied collateral relief by motion under 28 U.S.C. § 2255 may seek a writ of habeas corpus under 28 U.S.C. § 2241 if an intervening decision of statutory interpretation establishes that his conviction or sentence was legally improper. In 1996, Congress restricted the grounds on which federal prisoners may file second or successive § 2255 motions by enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220. AEDPA limited the availability of successive § 2255 motions to cases involving either (1) persuasive new evidence that the prisoner was not guilty

of the offense, or (2) a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review. 28 U.S.C. § 2255(h); *cf. Tyler v. Cain*, 533 U.S. 656, 661-62 (2001) (interpreting the state-prisoner analogue to § 2255(h)). AEDPA did not, however, provide for successive § 2255 motions based on intervening statutory decisions.

In the immediate aftermath of AEDPA's enactment, the Department argued that § 2241 relief is unavailable even as to defendants whose conduct had been rendered wholly non-criminal. *See generally*, *e.g.*, U.S. Br., *In re Triestman*, No. 96-2563, 1996 WL 33485392 (2d Cir.) (filed Dec. 19, 1996). But the Department changed course after several courts of appeals—most notably, this Court—rejected that view. *See In re Davenport*, 147 F.3d 605, 608-12 (7th Cir. 1998); *In re Dorsainvil*, 119 F.3d 245, 248-52 (3d Cir. 1997); *Triestman*, 124 F.3d 361, 373-80 (2d. Cir. 1997).

Following *Davenport*, the government changed positions in cases where the availability of habeas relief was necessary "to ensure review of claims of factual [*i.e.*, actual] innocence that were not available when the earlier [§ 2255] motion was filed." U.S. Br. in Opp. at 10, *Ferreira v. Holt*, 532 U.S. 975 (2001) (No. 00-7317). More recently, the Department expanded on that view, supporting the availability of habeas relief for defendants who had received sentences in excess of the statutory maximum.

2. The New View, In Brief

The Department has reconsidered the issue. The Department now believes the statutory text compels the view that habeas relief is not available to a defendant who, after having being denied § 2255 relief, seeks to assert a statutory challenge to his conviction or sentence (even where prior circuit precedent prevented the defendant's claim from succeeding under § 2255).

Reconsideration was prompted in part by the Eleventh Circuit's decision in *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1083-84 (11th Cir. 2017) (en banc), *cert. denied,* 138 S. Ct. 502 (Dec. 4, 2017); *see also Prost v. Anderson*, 636 F.3d 578, 584-94 (10th Cir. 2011). Following *McCarthan*, the Department determined that its prior interpretation of § 2255 was insufficiently faithful to the statute's text and to Congress's evident purpose in limiting the circumstances in which a criminal defendant may file a second or successive petition for collateral review.

A complete articulation of the Department's revised view can be found in the Solicitor General's brief filed with the Supreme Court in *McCarthan v. Collins*, No. 17-85 (U.S. Br. filed Oct. 30, 2017). The Department's revised argument is set forth in brief below:

Under the saving clause, a prisoner serving a sentence of imprisonment imposed by a federal court may seek habeas corpus relief only if "the remedy

by motion [under § 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). That language suggests a focus on whether a particular challenge to the legality of the prisoner's detention was *cognizable* under § 2255, not on the likelihood that the challenge would have succeeded in a particular court at a particular time.

"'To test' means 'to try,'" and "[t]he opportunity to test or try a claim . . . neither guarantees any relief nor requires any particular probability of success; it guarantees access to a procedure." *McCarthan*, 851 F.3d at 1079 (citation omitted). "In this way, the clause is concerned with process—ensuring the petitioner an *opportunity* to bring his argument—not with substance—guaranteeing nothing about what the *opportunity* promised will ultimately yield in terms of relief." *Prost*, 636 F.3d at 584. As Judge Easterbrook has explained, "[a] motion under § 2255 could reasonably be thought 'inadequate or ineffective to test the legality of [the prisoner's] detention' if a class of argument were categorically excluded, but when an argument is permissible but fails on the merits there is no problem with the adequacy of § 2255." *Caraway*, 719 F.3d at 597 (Easterbrook, C.J., concerning circulation under Circuit Rule 40(e)) (brackets in original). Thus, even where relief was foreclosed by circuit precedent when the defendant filed his first § 2255 motion, the existence of that precedent is not sufficient to render § 2255 inadequate or ineffective.

This reading is supported by § 2255(h), which reflects Congress's determination that, once a federal prisoner has pursued one § 2255 motion, his conviction or sentence should be subject to further collateral attack only in extremely limited circumstances. *See Prost,* 636 F.3d at 583-584. AEDPA's statute of limitations, § 2255(f)(3), also bolsters this reading of the saving clause. Although § 2255(f)(3) refers to intervening Supreme Court decisions, unlike § 2255(h), it is not limited to constitutional claims. That contrast strengthens the inference that Congress deliberately excluded statutory claims from § 2255(h)'s limited authorization to file second or successive motions for § 2255 relief. *See Prost,* 636 F.3d at 585-586.

Because the government does not in this case advance an argument for a change in Circuit law along those lines, the government will not take further space to articulate that position here.

III. Because Kentucky Second-Degree Burglary Constitutes Generic Burglary, Shepherd's Claim Cannot Succeed

A. Standard of Review

This Court reviews the denial of a § 2241 petition *de novo*. *Hill*, 695 F.3d at 648.

B. The Law of the Circuit of Confinement Governs This Question

The Court should apply its own law to determine whether the Shepherd's petition actually has merit. This Circuit's law binds the district

court adjudicating the habeas petition and governs the actions of the warden who is the respondent in this case.

Section 2241 claims at bottom concern the lawfulness of a prisoner's confinement. It would be anomalous to conclude that a prisoner is being held unlawfully if the law of the circuit of confinement says that the detention is lawful. In other words, this Court's opinion as to whether Shepherd is lawfully confined is what matters to prisoners confined in this Circuit.

It is true that district courts in this Circuit have offered pragmatic reasons that support applying circuit-of-conviction law. *See Hernandez v. Gilkey*, 242 F. Supp. 2d 549, 554 (S.D. Ill. 2001); *see also Roberts v. Watson*, No. 16-CV-541, 2017 WL 6375812, at *2 (W.D. Wis. Dec. 12, 2017). In the Department's view, however, the more relevant considerations is that the key players bound by this Circuit's law on confinement (which is of course what § 2241 concerns) are the district court, the warden, and the prisoner, all of whom are in this Circuit.

In all events, the Court need not resolve this thorny issue because the result is the same in either the Seventh Circuit or Sixth Circuit.

C. The Question: Is Kentucky Second-Degree Burglary Generic Burglary?

The ACCA enumerates burglary as one of several "violent felonies" that can enhance a defendant's felon-in-possession sentence. 18 U.S.C. §§

924(e)(1), (e)(2)(B) (ii). But a state burglary offense constitutes "burglary" under the ACCA if the state burglary statute describes the "generic" version of the crime. *Descamps v. United States*, 570 U.S. 254, 257 (2013). Generic burglary "contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). The Court applies a "categorical approach," focusing "on whether the elements of the crime of conviction sufficiently match the elements of generic burglary." *Mathis*, 136 S. Ct. at 2248.

In Kentucky, "[a] person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling." Ky. Rev. Stat. § 511.030(1). The corresponding definitions section provides:

> The following definitions apply in this chapter unless the context otherwise requires:
> (1) "Building," in addition to its ordinary meaning, means any structure, vehicle, watercraft or aircraft:
> (a) Where any person lives; or
> (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation.
> ***
> (2) "Dwelling" means a building which is usually occupied by a person lodging therein.
> (3) "Premises" includes the term "building" as defined herein and any real property.

Id. § 511.010.

The central question in this case is whether § 511.030(1) counts as "generic burglary."

D. Under Sixth Circuit Law, Kentucky Second-Degree Burglary Is Generic Burglary

Although Seventh Circuit law should govern here, the government begins with the Sixth Circuit because that Court has now directly answered the exact question at issue here. *See United States v. Malone*, 889 F.3d 310, 313 (6th Cir. 2018). This Court should follow *Malone*'s persuasive approach.

The *Malone* Court concluded that Kentucky second-degree burglary is generic burglary because the statute applies only to buildings in the ordinary sense and otherwise checks off generic burglary's elements. The Court's reasoning: "dwelling" in §511.030(1) encompasses only "buildings" as *Taylor* understood the term, and does not incorporate the broader "building" definition in Kentucky's separate definitional statute, § 511.010(1).

Central to the Court's conclusion was comparative statutory construction: The definition of "premises" explicitly includes § 511.010(1)'s special "building" definition, expressly tagging the term "as defined herein." Ky. Rev. Stat. § 511.010(3). So "premises" can include "vehicle[s], watercraft, or aircraft. By contrast, the definition of "dwelling" unequivocally does not include that specialized definition. *See id.* at 312-13. And Kentucky's

second-degree burglary provision does not contain the words "premises" or "building," just the unproblematic term "dwelling." *See id.*

Shepherd's attempt to include "churches" as "dwellings" goes out by the same exit as the defendant's argument in *Malone*. (A. Br. 37-38.) Churches are not dwellings (though they may be "premises"). Indeed, much of Shepherd's argument is predicated on an erroneous assumption that § 511.010(1)'s specialized definition of "building" applies to "dwellings" for second-degree burglary purposes.

In other words, Shepherd's argument depends mostly on what he calls the "twin unruly phrases" of the statute—the "vehicles" phrase and the "churches" phrase. (A. Br. 36.) But, as *Malone* explains, those phrases are not part of Kentucky second-degree burglary at all but apply only to separate sections of the criminal code. With that clarified, most of Shepherd's argument falls away.

"[C]aselaw corroborates this conclusion." *Malone*, 889 F.3d at 313. The Kentucky Supreme Court has stated that the statutory definitions of "building" and "dwelling" "indicat[e] that 'building' encompasses a broader category of structures than 'dwelling." *Soto v. Commonwealth*, 139 S.W.3d 827, 869 (Ky. 2004); *see Malone*, 889 F.3d at 313. Likewise, that Court also concluded that "every dwelling is a building, but every building is not a dwelling." *Colwell v. Commonwealth*, 37 S.W.3d 721, 726 (Ky. 2000).

In a coda, the *Malone* Court explained why engaging in the finre points of the "mobile structure" debate raging since *Mathis* is not necessary in a case like this:

> Because a "dwelling" is a "building" only in the ordinary sense, § 511.030's elements—knowingly entering or remaining unlawfully, in a "dwelling," with the intent to commit a crime—match generic burglary's. *See Descamps*, 570 U.S. at 257; *Taylor*, 495 U.S. at 598. That the Supreme Court recently granted certiorari to consider whether generic burglary can include burglary of a mobile structure used for overnight accommodation is beside the point; our interpretation of § 511.010 obviates that question in this case. *See United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (en banc), *cert. granted*, —— U.S. ——, 2018 WL 1901589 (U.S. Apr. 23, 2018) (No. 17-765).

Malone, 889 F.3d at 313.

In short, the Sixth Circuit has made it clear beyond cavil that Kentucky second-degree burglary is an ACCA predicate.

E. Under Seventh Circuit Law, Kentucky Second-Degree Burglary Is Generic Burglary

In its earlier memorandum in this case, the government took the position that *Smith v. United States*, 877 F.3d 720 (7th Cir. 2017) did not necessarily dictate that Kentucky second-degree Burglary was an ACCA predicate. That was wrong.

Smith accords with *Malone*. More broadly, *Smith* applies *Taylor* in a manner that renders Kentucky second-degree burglary an inescapably proper ACCA predicate.

On a basic level, *Smith* held that the Illinois offense of residential burglary "includes the element of entering a 'building or other structure'" for purposes of *Taylor* because the crime does not cover unoccupied vehicles. 877 F.3d at 722-23. But the decision reflects a broader principle: Courts should take seriously *Taylor*'s focus on common state laws and the Model Penal Code when assessing whether a crime is "generic." 877 F.3d at 724-25.

Specifically, any analysis of "generic burglary" should treat "*Taylor*'s definition of generic burglary [a]s a compact version of standards found in many states' criminal codes." *Id.* at 725. Moreover, courts should recognize the Model Penal Code's functional definition of burglary's locational element: "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." *Id.* (quoting ALI, *Model Penal Code* § 221.0(1)); *see also United States v. Stitt*, 860 F.3d 854, 879 (6th Cir. 2017) (Sutton, J., dissenting) (observing that "form follows function" and "it is impossible for *any* definition of burglary to avoid functional considerations"), *cited in Smith*, 877 F.3d at 724.

Under *Smith* (and *Taylor*), Kentucky second-degree burglary is generic burglary. The Kentucky statute at issue prohibits burglary in "the generic sense in which the term [was] used in the criminal codes of most States" at the time of *Taylor*. *Taylor*, 495 U.S. at 598; *see Smith*, 877 F.3d at 724. It is

comparable to or narrower than all but a small handful of state burglary statutes in existence at the time of the ACCA's 1986 amendments. Like the Kentucky statute at issue here, those statutes would have covered a nonpermanent or mobile structure that had been adapted or was regularly used for overnight accommodation.[3]

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[3] See Ala. Code § 13A-7-1(2) (LexisNexis Supp. 2017) (defining "dwelling"); *id.* § 13A-7-5(a) (LexisNexis 2015) (first-degree burglary of a "dwelling"); Alaska Stat. § 11.46.300 (2016) (first-degree burglary of a "dwelling"); *id.* § 11.81.900(a)(22) (defining "dwelling"); Ark. Code Ann. § 5-39-101(8)(A) (Supp. 2017) (defining "residential occupiable structure"); *id.* § 5-39-201(a) (2013) (burglary of a "residential occupiable structure"); Conn. Gen. Stat. Ann. § 53a-100(a)(2) (West 2012) (defining "dwelling"); *id.* § 53a-102 (second degree burglary of a "dwelling"); Del. Code Ann. tit. 11, § 825(a)(1) (2015) (second-degree burglary of a "dwelling"); *id.* § 826 (first-degree burglary of a "dwelling"); *id.* § 829(b) (defining "[d]welling"); Ga. Code Ann. § 16-7-1(b) (Supp. 2017) (first-degree burglary of a "dwelling house" or other "structure designed for use as the dwelling of another"); Haw. Rev. Stat. Ann. § 708-800 (LexisNexis 2016) (defining "[b]uilding" and "[d]welling"); *id.* § 708-810 (first-degree burglary of a "building" or "dwelling"); 720 Ill. Comp. Stat. Ann. 5/2-6 (West 2016) (defining "dwelling"); *id.* 5/19-3 (West Supp. 2017) (residential burglary); Kan. Stat. Ann. § 21-5111(k) (Supp. 2016) (defining "[d]welling"); *id.* § 21-5807(a)(1) and (b)(1) (burglary of a "[d]welling" and aggravated burglary of a "[d]welling"); Me. Rev. Stat. Ann. tit. 17-A, § 2(10) and (24) (Supp. 2017) (defining "[d]welling place" and "[s]tructure"); *id.* § 401(1)(A) and (B)(4) (burglary of a "structure" or "dwelling place"); Mich. Comp. Laws Ann. § 750.110a(1)(a) (West 2004) (defining "[d]welling"); *id.* § 750.110a(2) and (3) (first- and second-degree home invasion of a "dwelling"); N.Y. Penal Law § 140.00(3) (McKinney 2010) (defining "dwelling"); *id.* § 140.30 (first-degree burglary of a "dwelling"); N.D. Cent. Code §§ 12.1-05-12(2), 12.1-22-06(1) (2012) (defining "[d]welling"); *id.* § 12.1-22-02(1) (treating burglary of a "building or occupied structure" as a different class of felony if it occurs in a "dwelling"); Or. Rev. Stat. § 164.205(2) (2017) (defining "[d]welling"); *id.* § 164.225 (first-degree burglary of a "dwelling"); S.C. Code Ann. § 16-11-310(2) (2015) (defining "[d]welling"); *id.* § 16-11-311 (first-degree burglary of a "dwelling"); Tenn. Code Ann. § 39-14-401 (2014) (defining "[h]abitation"); *id.* §

The Kentucky burglary statute also "approximates [the definition] adopted by the drafters of the Model Penal Code." *Taylor*, 495 U.S. at 598 n.8; *Smith*, 877 F.3d at 724-25. All of the locations covered by the statute would be considered "occupied structure[s]" under the Model Penal Code. *See* Model Penal Code §§ 221.0(1), 221.1(1) & cmt. 3(b) (1980). Furthermore, in criminalizing the burglary of mobile and nonpermanent dwellings, the statute recognizes that burglary's "inherent potential for harm to persons," *Taylor*, 495 U.S. at 588, is not limited solely to the invasion of "dwellings" that are certain kinds of homes.

This Court's more recent decision in *United States v. Franklin*, 884 F.3d 331 (7th Cir. 2018), is not to the contrary. The Wisconsin burglary statute the Court addressed in *Franklin* covers vehicles that are not living quarters. The Kentucky statute does not sweep so broadly. The structure of Kentucky's definitions statute, as *Malone* explains, makes it different than Wisconsin's statute. And, unlike Wisconsin, Kentucky courts have taken a straightforwardly functional view of the locational element, treating

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39-14-403 (aggravated burglary of a "habitation"); Tex. Penal Code Ann. § 30.01(1) (West Supp. 2017) (defining "[h]abitation"); *id.* § 30.02(a) and (d)(1) (first-degree burglary of a "habitation"); Utah Code Ann. § 76-6-201(2) (LexisNexis 2017) (defining "[d]welling"); *id.* § 76-6-202(2) (second-degree felony burglary of a "dwelling"); W. Va. Code Ann. § 61-3-11(a)-(b) (LexisNexis 2014) (burglary of a "dwelling house"); *id.* § 61-3-11(c) (defining "dwelling house").

"dwellings" as buildings intended to be used for accommodation. *See, e.g.*, *Cochran v. Commonwealth*, 114 S.W.3d 837, 839 (Ky. 2003).

In short, *Smith* advances an interpretation of generic burglary, stemming from *Taylor*, that includes Shepherd's Kentucky burglary convictions. Applying *Taylor* as *Smith* did, the "dwelling" locational element in Kentucky second-degree burglary does not render the crime non-generic. Because Kentucky's second-degree burglary statute also includes unlawful-entry and intent-to-commit-a-crime elements, the offense sufficiently corresponds with *Taylor*'s definition of generic burglary.

Kentucky second-degree burglary is categorically a violent felony under the ACCA. Accordingly, under Seventh Circuit law and Sixth Circuit law, Shepherd's petition should be dismissed.

CONCLUSION

For the reasons stated above, this Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE IN ACCORDANCE WITH FED. R. APP. P. 32(a)(7)(C)

The foregoing BRIEF OF THE RESPONDENT complies with the type volume limitations required under Fed. R. App. P. 32(a)(7)(B)(i) in that there are not more than 13,000 words or 1,300 lines of text using monospaced type in the brief, that there are 6,616 words typed in Microsoft Word word-processing this 30th day of May, 2018.

s/ Bob Wood
Bob Wood
Chief, Appellate Division

CERTIFICATE OF SERVICE

I certify that on May 30, 2018, I electronically filed the foregoing BRIEF OF THE RESPONDENT with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I further certify that all participants in the case are registered in CM/ECF and service will be accomplished by the CM/ECF system to the following:

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