No. 24-5438

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BOWE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. 1254(1) to review, by petition for a writ of certiorari, the court of appeals' order denying petitioner's application for authorization to file a second motion under 28 U.S.C. 2255, in light of a statute providing that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application * * * shall not be the subject of a petition * * * for a writ of certiorari." 28 U.S.C. 2244(b)(3)(E).

2. Whether 28 U.S.C. 2244(b)(1) -- which provides that "[a] claim presented in a second or successive habeas corpus application under [S]ection 2254 that was presented in a prior application shall be dismissed," ibid. -- applies to a claim presented in a second or successive motion to vacate under 28 U.S.C. 2255.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-9a) is unreported but is available at 2024 WL 4038107.

JURISDICTION

The order of the court of appeals was issued on June 27, 2024. A petition for an initial hearing en banc was also denied on June 27, 2024. The petition for a writ of certiorari was filed on August 29, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), but for the reasons explained below (see pp. 12-21, infra), 28 U.S.C. 2244(b)(3)(E) withdraws the Court's statutory jurisdiction over this case.

STATEMENT

In 2009, following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2006). 08-cr-80089 Am. Judgment 1 (Apr. 10, 2009); see 08-cr-80089 Indictment 1-3 (Aug. 14, 2008). The district court sentenced petitioner to 288 months of imprisonment, to be followed by five years of supervised release. 08-cr-80089 Am. Judgment 2-3. Petitioner did not appeal.

In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his Section 924(c) conviction based on Johnson v. United States, 576 U.S. 591 (2015). The district court denied the motion. See 2017 WL 11680458 (S.D. Fla. July 25, 2017); 2017 WL 11680470 (June 19, 2017) (magistrate judge's report and recommendation). The court of appeals denied a certificate of appealability, 2017 WL 11680913 (Dec. 20, 2017), and this Court denied certiorari, 138 S. Ct. 1583 (2018) (No. 17-8179). In 2019, petitioner applied to the court of appeals for leave to file a second Section 2255 motion, based on United States v. Davis, 139 S. Ct. 2319 (2019). 19-12989 C.A. Doc. 1, at 7, 17-21 (Aug. 7, 2019). The court of appeals denied the pro se application. Pet. App. 16a-20a.

In 2022, after this Court's decision in United States v. Taylor, 142 S. Ct. 2015 (2022), petitioner again applied to the court of appeals for leave to file a second Section 2255 motion based on Davis. 22-12278 C.A. Doc. 1, at 8 (July 13, 2022). Petitioner also sought an initial en banc hearing on the application. 22-12278 C.A. Doc. 2 (July 15, 2022). The court of appeals denied an initial en banc hearing and denied petitioner's application. 22-12278 C.A. Doc. 3-2 (Aug. 3, 2022). In 2023, petitioner applied to this Court for an original writ of habeas corpus in this Court, which the Court denied. 144 S. Ct. 1170 (2024) (No. 22-7871).

In 2024, petitioner returned to the court of appeals, again applying for leave to file a second Section 2255 motion based on Davis, but acknowledging that his application was foreclosed by circuit precedent. 24-11704 C.A. Doc. 1, at 7-8 (May 28, 2024). Petitioner therefore again petitioned for an initial en banc hearing on his application, 24-11704 C.A. Doc. 2 (May 29, 2024), and alternatively moved the panel to certify to this Court the question resolved by that circuit precedent, 24-11704 C.A. Doc. 3 (May 29, 2024). The court of appeals denied an initial hearing en banc, 24-11704 C.A. Doc. 6-1 (June 27, 2024), dismissed the application for lack of jurisdiction, and denied the motion to certify, Pet. App. 1a-9a.

1. In 2008, petitioner organized the attempted robbery of an armed vehicle by formulating a plan for, and providing the

weapons and apparel used in, the robbery. Presentence Investigation Report (PSR) ¶ 38. Petitioner and three co-defendants then attempted to rob a Loomis armored vehicle carrying $560,000 in cash at a Wachovia Bank in West Palm Beach, Florida, while an armed Loomis security guard was servicing an ATM and the guard's partner remained in the vehicle. 08-cr-80089 Indictment 1-2; PSR ¶¶ 9-10. Petitioner carried and repeatedly fired a semi-automatic rifle during the attempted robbery, shooting and wounding both guards. PSR ¶¶ 10-12, 23, 31. One of the injured guards returned fire. PSR ¶¶ 10, 31. Petitioner and his co-defendants then fled the scene before taking any money, with petitioner fleeing on foot and firing his rifle as he ran. PSR ¶ 11.

A federal grand jury indicted petitioner on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and one count of discharging a firearm during and in relation to a crime of violence, namely, the first two offenses, in violation of 18 U.S.C. 924(c) (2006). 08-cr-80089 Indictment 1-3. Section 924(c) makes it unlawful for a person to "use[] or carr[y] a firearm" "during and in relation to any crime of violence," 18 U.S.C. 924(c)(1)(A) (2006), and requires a mandatory ten-year minimum sentence "if the firearm is discharged," 18 U.S.C. 924(c)(1)(A)(iii) (2006).

Petitioner pleaded guilty to all three counts pursuant to a plea agreement. For the attempted Hobbs Act robbery count, petitioner acknowledged that he knowingly and willfully attempted to rob a Loomis employee "by means of actual or threatened violence or fear of injury." 08-cr-80089 Plea Agreement 1 (Oct. 30, 2008). Petitioner also acknowledged in the plea agreement that he had violated Section 924(c) by "discharg[ing] one or more firearms" during and in relation to "a crime of violence." Id. at 1-2; see id. at 2-3 (acknowledging mandatory consecutive ten-year minimum).

The district court sentenced petitioner to 288 months of imprisonment -- 168 months on the Hobbs Act counts plus a consecutive sentence of 120 months on the Section 924(c) count -- to be followed by five years of supervised release. 08-cr-80089 Am. Judgment 2-3. Petitioner did not appeal.

2. In 2015, this Court held in Johnson v. United States, 576 U.S. 591, that the residual clause of the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA) is unconstitutionally vague. Id. at 594-597. This Court subsequently held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. Welch v. United States, 578 U.S. 120, 122, 130, 135 (2016).

In 2016, petitioner filed a Section 2255 motion to vacate his Section 924(c) conviction in light of Johnson. 16-cv-81002 D. Ct. Doc. 1, at 7, 17, 25-37 (June 16, 2016); 16-cv-81002 D. Ct. Doc.

7, at 2, 9-15, 34 (Aug. 15, 2016) (brief filed by counsel). One of Section 924(c)'s two alternative definitions of a predicate "crime of violence," 18 U.S.C. 924(c)(3)(B), uses language similar to the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii). The district court, adopting a magistrate judge's report and recommendation, denied petitioner's Section 2255 motion. 2017 WL 11680458; see 2017 WL 11680470 (report and recommendation).

The adopted report observed that even if Johnson invalidated one alternative "crime of violence" definition in Section 924(c)(3)(B), petitioner's conviction for attempted Hobbs Act robbery still qualified as a predicate "crime of violence" under the alternative definition of that term in Section 924(c)(3)(A), which defines the predicate offense to be a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A). See 2017 WL 11680470, at *4, *7-*8. The report reasoned that "attempted Hobbs Act robbery" qualified under that alternative elements-clause definition because it "categorically" requires the "'use, attempted use, or threatened use of physical force.'" Ibid. (quoting 18 U.S.C. 924(c)(3)(A)) (emphasis omitted). The district court did not discuss Hobbs Act conspiracy as a crime of violence, and the government opted not to rely on the conspiracy as a Section 924(c) predicate. See 16-cv-81002 D. Ct. Doc. 18, at 1 (Oct. 24, 2016).

The court of appeals denied a certificate of appealability, 2017 WL 11680913, and this Court denied certiorari, 138 S. Ct. 1583.

3. In 2019, this Court held in United States v. Davis, 139 S. Ct. 2319 (2019), that the "crime of violence" definition in Section 924(c)(3)(B) is itself unconstitutionally vague. Id. at 2336. Petitioner then applied to the court of appeals under 28 U.S.C. 2255(h) for authorization to file a second Section 2255 motion based on Davis. 19-12989 C.A. Doc. 1. Section 2255(h) allows a second or successive collateral attack under Section 2255 if a court of appeals panel "certifie[s] as provided in [S]ection 2244" that the motion "contain[s]" newly discovered persuasive evidence of innocence, as specified in Section 2255(h)(1), or a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," as specified in Section 2255(h)(2). 28 U.S.C. 2255(h)(1) and (2).

The court of appeals denied the application. Pet. App. 16a-20a. Like the district court's ruling denying petitioner's first Section 2255 motion, the court of appeals observed that, under circuit precedent, attempted Hobbs Act robbery remained a crime of violence under "[Section] 924(c)(3)(A)'s elements clause." Id. at 20a (citing United States v. St. Hubert, 909 F.3d 335, 351-352 (11th Cir. 2018), cert. denied, 139 S. Ct. 1394 (2019), and 140 S. Ct. 1727 (2020)).

4. In 2022, this Court held in United States v. Taylor, 142 S. Ct. 2015, that attempted Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A)'s elements clause. Id. at 2025-2026. Petitioner filed a pro se application to file a second Section 2255 petition based on Taylor. 22-12211 C.A. Doc. 1-1, at 8; 22-12211 C.A. Doc. 1-2, at 2, 7-9 (July 1, 2022). The court of appeals denied the application on the ground that Taylor was a statutory interpretation decision that did "not announce a new rule of constitutional law" and thus did not satisfy the statutory criteria in Section 2255(h)(2). 22-12211 Doc. 2-2, at 4-5 (July 15, 2022).

Two days before the court of appeals denied that application, petitioner filed another application in the court of appeals for authorization to file a second Section 2255 motion based on Davis. 22-12278 C.A. Doc. 1, at 8 (July 13, 2022). Petitioner acknowledged that under the court's precedent, Section 2244(b)(1) -- which provides that "[a] claim presented in a second or successive habeas corpus application under [28 U.S.C.] 2254 that was presented in a prior application shall be dismissed," 28 U.S.C. 2244(b)(1) -- would require dismissal of his new application because he had already applied for authorization to file a second Section 2255 motion raising a Davis claim. See 22-12278 C.A. Doc. 2, at 2, 6, 8-9, 11 (July 15, 2022) (citing In re Baptiste, 828 F.3d 1337, 1339-1340 (11th Cir. 2016), and In re Bradford, 830 F.3d 1273,

1276-1278 (11th Cir. 2016)). But he urged the court of appeals to grant initial en banc consideration of his application and overrule that precedent. Id. at 11-16. The court of appeals denied petitioner's request for initial hearing en banc and relied on Section 2244(b)(1)'s bar to dismiss the application based on its binding precedent in In re Baptiste and In re Bradford. Pet. App. 15a.

Petitioner filed an application for a writ of habeas corpus under 28 U.S.C. 2241 in the Southern District of Mississippi, the district of his confinement. 22-cv-515 D. Ct. Doc. 1 (Sept. 7, 2022). Petitioner later moved to voluntarily dismiss that petition in light of this Court's decision in Jones v. Hendrix, 599 U.S. 465 (2023). See 22-cv-515 D. Ct. Doc. 10 (June 28, 2023). The district court dismissed the petition. 22-cv-515 D. Ct. Docs. 13-14 (Feb. 8, 2024).

5. In 2023, petitioner petitioned this Court for an original writ of habeas corpus. See Pet. Habeas Pet., In re Bowe, No. 22-7871 (June 23, 2023). He argued that the court of appeals had erroneously applied 28 U.S.C. 2244(b)(1) to a motion filed under Section 2255, and that this Court's habeas review was warranted because the Court would be unlikely to resolve a circuit conflict about whether Section 2244(b)(1)'s requirements apply to Section 2255 motions, in part because 28 U.S.C. 2244(b)(3)(E)'s jurisdictional bar precluded him from obtaining certiorari review of the court of appeals' denial of authorization for the second Section

2255 petition. Pet. Habeas Pet. at 5, 12-18, 22-24, In re Bowe, supra.

This Court denied the habeas application. Pet. App. 10a-11a. In a statement respecting the denial, Justice Sotomayor acknowledged the circuit conflict about the Section 2244(b)(1) bar and observed that "considerable structural barriers [exist] to this Court's ordinary review [of that conflict] via certiorari petition" in part because 28 U.S.C. 2244(b)(3)(E) "bars petitions for certiorari stemming from '[t]he grant or denial of an authorization by a court of appeals to file a second or successive application.'" Pet. App. 10a-11a (quoting 28 U.S.C. 2244(b)(3)(E)) (brackets in original). Justice Sotomayor nevertheless concluded that the Court's denial of petitioner's habeas application was appropriate, explaining that it was "questionable" whether petitioner satisfied the "demanding standard" for this Court's habeas review "because it [wa]s not clear that, absent [Section] 2244(b)(1)'s bar, the Eleventh Circuit would have certified his § 2255 motion." Ibid.

6. In 2024, petitioner returned to the court of appeals, again seeking leave to file a second Section 2255 motion based on Davis. 24-11704 C.A. Doc 1 (May 28, 2024). Petitioner "ack[n]owledge[d] that, because [the court of appeals had] previously denied him authorization based on Davis, [his] application was foreclosed by [the court's holding in] In re Baptiste" that "[Section] 2244(b)(1) applies to [second or successive] Section 2255 motions."

Id. at 8 (emphasis added). Petitioner therefore sought an initial en banc hearing on his Davis-based application, 24-11704 C.A. Doc. 2 (May 29, 2024), and "alternatively" moved the panel to certify the Section 2244(b)(1) question to this Court, 24-11704 C.A. Doc. 3, at 5 (May 29, 2024).

The court of appeals declined to grant an initial hearing en banc. 24-11704 C.A. Doc. 6-1 (June 27, 2024). A panel of the court also entered a separate order, Pet. App. 1a-9a, that again dismissed petitioner's application for lack of jurisdiction based on In re Baptise and In re Bradford, id. at 6a-7a, and that denied his certification motion, id. at 7a-9a. The panel observed that certification to this Court is "an extremely rare procedural device," which this Court "certainly does not encourage courts of appeal to try using." Id. at 8a. The panel stated that that the standard recently applied by this Court in rejecting petitioner's original habeas application "is no more demanding than the standard" for certification. id. at 8a-9a. And the panel declined to ask this Court "to accept a certified question from a court of appeals for only the fifth time in 78 years." Id. at 8a.

ARGUMENT

Petitioner seeks review (Pet. 11-17) of the court of appeals' view that the requirements of 28 U.S.C. 2244(b)(1) apply to a motion filed under 28 U.S.C. 2255. As the government recently explained to this Court in its response to petitioner's earlier

application for an original writ of habeas corpus, the government agrees with petitioner that Section 2244(b)(1) does not apply to Section 2255 motions, that the court of appeals erred in holding otherwise, and that the courts of appeals are divided on that issue. See Br. in Opp. at 10-13, In re Bowe, No. 22-7871 (Nov. 27, 2023).

This Court, however, lacks jurisdiction to grant this petition for certiorari. Congress has withdrawn the Court's statutory jurisdiction to review by certiorari denials by courts of appeals of authorizations to file such second-or-successive collateral attacks. 28 U.S.C. 2244(b)(3)(E). As petitioner recognized in his prior petition for an original habeas writ, 28 U.S.C. 2244(b)(3)(E) "prevents prisoners [like petitioner] from seeking certiorari review" of a court of appeals' "den[ial of] authorization to file a second or successive [Section] 2255 motion." Pet. Habeas Pet. at 5, In re Bowe, supra (June 23, 2023); see id. at 11, 23.

Petitioner now contends (Pet. 18-23) that Section 2244(b)(3)(E) applies only to certiorari petitions from state prisoners. That contention is incorrect, and the Court has repeatedly denied certiorari in cases presenting similar contentions. Rose v. United States, 581 U.S. 966 (2017) (No. 16-7156); Hammons v. United States, 577 U.S. 1069 (2016) (No. 15-6110); McNealy v. United States, 566 U.S. 957 (2012) (No. 11-7366); Modena v. United States, 541 U.S. 983 (2004) (No. 03-6458); McFarland v. United States, 532 U.S. 996

(2001) (No. 00-8138). The Court should follow the same course here.

1. Congress has provided that decisions by courts of appeals denying a federal prisoner authorization to file a second or successive Section 2255 motion are not subject to certiorari review. 28 U.S.C. 2244(b)(3)(E), 2255(h). This Court therefore lacks statutory jurisdiction to grant petitioner's certiorari petition.

a. As part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, Congress divested federal district courts of jurisdiction to entertain "second or successive" collateral attacks by state and federal prisoners. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). First, Section 2244(b)(2) -- like the parallel provision for federal prisoners in Section 2255(h) -- permits a state prisoner to seek leave from a court of appeals to file a second or successive habeas-corpus petition if his claim relies on (A) a "new rule of constitutional law" made "retroactive to cases on collateral review by [this] Court," or (B) newly discovered evidence that establishes that, "but for constitutional error, no reasonable factfinder would have found the [defendant] guilty." 28 U.S.C. 2244(b)(2)(A) and (B).

Section 2244(b)(3) then contains five subparagraphs regulating the procedure for obtaining authorization to file a second or

successive application. It provides that an order authorizing a second or successive application must be sought from the court of appeals, 28 U.S.C. 2244(b)(3)(A); that the application must be determined by a three-judge panel, 28 U.S.C. 2244(b)(3)(B); that the application must make a prima facie showing that the requirements in subsection (b)(2) have been satisfied, 28 U.S.C. 2244(b)(3)(C); that the court of appeals must grant or deny authorization within 30 days of the filing of the application, 28 U.S.C. 2244(b)(3)(D); and that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. 2244(b)(3)(E).

Second, Section 2255(h), which applies to federal prisoners, states that a second or successive Section 2255 motion "must be certified as provided in [S]ection 2244 by a panel of the appropriate court of appeals" to satisfy substantive criteria that parallel the grounds set forth in Section 2244(b)(2) for second or successive petitions filed by state prisoners -- i.e., new evidence establishing actual innocence, or a new rule of constitutional law made retroactive to cases on collateral review by this Court. 28 U.S.C. 2255(h)(1) and (2). The manner in which Section 2244 specifies that a "panel of the appropriate court of appeals" will "certif[y]" a second or successive collateral attack (ibid.)

includes Section 2244(b)(3)(E)'s preclusion on further review of the panel's decision. As petitioner recognized in his prior petition for an original writ of habeas corpus from this Court, "[Section] 2244(b)(3)(E) prevents prisoners from seeking certiorari review" of a court of appeals' "den[ial of] authorization to file a second or successive [Section] 2255 motion." Pet. Habeas Pet. at 5, In re Bowe, supra; see id. at 23 ("[U]nder § 2244(b)(3)(E), federal prisoners cannot seek certiorari from those [gatekeeping] rulings."); see also id. at 11.

b. Petitioner now contends (Pet. 18-19) that Section 2244(b)(3)(E)'s bar applies only to "a habeas corpus application [filed by a state prisoner], not a motion to vacate [filed by a federal prisoner] under Section 2255." Pet. 18. According to petitioner (Pet. 19), Section 2255(h)'s requirement that "[a] second or successive motion must be certified as provided in [S]ection 2244," 28 U.S.C. 2255(h), means that Section 2255 incorporates for federal prisoners only the first four requirements in Section 2244(b)(3)(A) to (D), not Section 2244(b)(3)(E)'s restriction on certiorari jurisdiction. Petitioner states (Pet. 19) that subparagraph (E)'s jurisdictional bar is not part of the "certification" process that Section 2255(h) because it concerns "only the availability of appellate review" from the certification decision. Subparagraph (E), however, is a key part of the certification procedure because it identifies its ultimate decision-

maker: Congress intended for certification decisions to be made by a single panel of three appellate judges, for the decisions to be made quickly, and for their certification decisions generally to be final. 28 U.S.C. 2244(b)(3)(A)-(E).

Throughout Section 2244, when Congress intended to refer only to a state prisoner's petition for a writ of habeas corpus, it said so expressly. See 28 U.S.C. 2244(b)(1) ("a second or successive habeas corpus application under section 2254"), (b)(2) (same), (c) ("a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court"), and (d)(1) (similar). But in the certification subparagraphs -- Section 2244(b)(3)(A) through (E), Congress used only the term "a second or successive application," or "a second or successive application permitted by this section." Petitioner accordingly appears to acknowledge (Pet. 19) that the first four subparagraphs, 28 U.S.C. 2244(A)-(D), are applicable to certification requests by both state and federal prisoners, as provisions "governing the certification determination by the court of appeals." There is no sound basis for treating the fifth subparagraph, Section 2244(b)(3)(E), as uniquely inapplicable.

Indeed, every court of appeals to have considered the application of Section 2244(b)(3)(E) -- which bars not only petitions for writs of certiorari but also rehearing petitions within the court of appeals itself -- to federal prisoners has recognized

that its prohibitions apply to Section 2255 cases. In re Clark, 837 F.3d 1080, 1082-1083 & n.3 (10th Cir. 2016) (per curiam) (citing cases); see, e.g., In re Baptiste, 828 F.3d 1337, 1340 (11th Cir. 2016); Pagan-San Miguel v. United States, 736 F.3d 44, 46 n.1 (1st Cir. 2013) (per curiam); In re Sonshine, 132 F.3d 1133, 1134 (6th Cir. 1997); Triestman v. United States, 124 F.3d 361, 367 (2d Cir. 1997), abrogated in part on other grounds, Jones v. Hendrix, 599 U.S. 465, 477 (2023) ; United States v. Lorentsen, 106 F.3d 278, 279 (9th Cir. 1997). As the Tenth Circuit has explained, "the text" of "[Section] 2255(h) explicitly incorporates the certification process in [Section] 2244" and "[Section] 2244(b)(3)(E) is part of th[at] certification process." Clark, 837 F.3d 1083 & n.3; see Triestman, 124 F.3d at 367 (explaining that "it is logical to assume that Congress intended to refer to all of the [relevant] subsections of Section 2244," "including * * * [Section] 2244(b)(3)(E)").

c. Petitioner asserts (Pet. 19-21) that the Court has interpreted Section 2244(b)(3)(E) narrowly by preserving this Court's ability to review claims that a motion filed by a federal or state prisoner does not fit within the specialized, term-of-art meaning of the phrase "second or successive." See, e.g., Magwood v. Peterson, 561 U.S. 320, 330-333 (2010); Gonzalez v. Crosby, 545 U.S. 524, 532-536 (2005); Castro v. United States, 540 U.S. 375, 379-381 (2003). But petitioner does not identify text

relevant to his case that carries a term-of-art meaning or should otherwise be narrowly construed.

Moreover, this Court has never suggested that the certiorari provision in Section 2244(b)(3)(E) should be read to apply only to state prisoners. To the contrary, the Court's decisions suggest that Section 2244(b)(3)(E) also applies to federal prisoners. For instance, in Hohn v. United States, 524 U.S. 236 (1998), which involved certiorari review of the denial of a certificate of appealability to a federal prisoner challenging the denial of his Section 2255 petition, the Court contrasted the "the absence of" a "limitation to certiorari review of denials of applications for certificates of appealability" with Section 2244(b)(3)(E)'s "clear limit on this Court's [certiorari] jurisdiction to review denials of motions to file second or successive petitions." Id. at 249-250.

Similarly, in Castro v. United States, the Court raised sua sponte the question whether Section 2244(b)(3)(E) barred the writ of certiorari filed by Castro, a federal prisoner. Castro v. United States, 537 U.S. 1170 (2003) (granting certiorari). Although the Court ultimately found the provision inapplicable by its terms because Castro was not seeking authorization to file a second or successive application, Castro, 540 U.S. at 379-380, the Court left undisturbed the consensus view of the courts of appeals -- which had been briefed by the government, see U.S. Br. at 13-15,

Castro v. United States, No. 02-6683 -- that the bar on filing rehearing or certiorari petitions applies to requests for certification of second or successive Section 2255 motions.

Most recently, in her statement respecting the Court's denial of petitioner's habeas petition earlier this year, Justice Sotomayor agreed, explaining that "AEDPA * * * bars petitions for certiorari stemming from '[t]he grant or denial of an authorization by a court of appeals to file a second or successive application.'" Pet. App. 11a (quoting 28 U.S.C. 2244(b)(3)(E)) (brackets in original). Petitioner provides no sound basis to conclude otherwise.

d. Petitioner suggests (Pet. 21-23) that serious questions would arise under the Exceptions Clause, see U.S. Const. Art. III, § 2, if this Court were deprived of jurisdiction to settle the circuit conflict on Section 2244(b)(1). But this case does not implicate that issue. As the government explained in its response to petitioner's petition for an original writ of habeas corpus, there are other ways for the Court to review the underlying issue on which petitioner seeks this Court's review, about the applicability of Section 2244(b)(1) to his Section 2255 motion. Br. in Opp. at 16-17, In re Bowe, supra. That issue can arise, as it did in Avery v. United States, 140 S. Ct. 1080, 1080 (2020) (Kavanaugh, J., dissenting), in the context of a district court invoking Section 2254(b)(1) to dismiss a claim that passed through the court of appeals' initial screen. Alternatively, this Court could review

the question upon certification by a court of appeals. 28 U.S.C. 1254(2); Sup. Ct. R. 19; Felker, 518 U.S. at 666 (Stevens, J., concurring); id. at 667 (Souter, J., concurring). And an original habeas petition remains an available avenue for review in an appropriate case. See In re Bowe, 144 S. Ct. at 1171 (statement of Sotomayor, J., respecting the denial of certiorari).

Petitioner's inability to obtain review through such procedural options reflects the weakness of his ultimate claim for relief. As the government explained in its response to the original habeas petition, even apart from Section 2244(b)(1)'s relitigation bar, petitioner's application to file a second Section 2255 motion fails to satisfy the requirements of Section 2255(h) because his claim for relief does not rely on the Court's constitutional holding in Davis, but on this Court's statutory holding in United States v. Taylor, 142 S. Ct. 2015 (2022). See Br. in Opp. 14-16, In re Bowe, supra. Moreover, petitioner's plea agreement admitted the actual violence of his crimes, and petitioner's offense conduct would support the same sentence even if he were resentenced following a vacatur of his Section 924(c) conviction. Id. at 18. Thus, as Justice Sotomayor recognized when the Court denied petitioner's habeas petition, the facts of petitioner's case make it at best "[un]clear" whether the court of appeals "would have certified his [Section] 2255 motion" as raising

an arguable constitutional claim even "absent" the court's reliance on "[Section] 2244(b)(1)'s bar." Pet. App. 11a.

e. Finally, petitioner suggests (Pet. 25-26) that this Court's review is warranted because, even if the Court concludes that it has "no jurisdiction" to review a court of appeals' gatekeeping order under Section 2244(b)(3)(E), the Court's decision on that ground would also effectively "resolve the underlying Section 2244(b)(1) conflict" about whether Section 2244(b)(1) applies to federal prisoners. Section 2241(b)(1)'s text, however, is materially different from Section 2244(b)(3)(E)'s because it refers specifically to "a second or successive habeas corpus application under [S]ection 2254," 28 U.S.C. 2244(b)(1), while Section 2244(b)(3)(E) employs the more general language "a second or successive application," 28 U.S.C. 2244(b)(3)(E). A jurisdictional ruling against petitioner by this Court under Section 2244(b)(3)(E) thus would not resolve the underlying Section 2244(b)(1) question, let alone resolve it in petitioner's favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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