No. 22-7871

IN THE SUPREME COURT OF THE UNITED STATES

IN RE MICHAEL BOWE, PETITIONER

ON PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant an original writ of habeas corpus based on petitioner's contention that the court of appeals erroneously denied his application for authorization to file a second motion under 28 U.S.C. 2255 collaterally attacking his conviction under 18 U.S.C. 924(c), where the motion contended that petitioner's sentence was invalid in light of United States v. Davis, 139 S. Ct. 2319 (2019), and petitioner had previously identified the same claim in a previous application to file a second Section 2255 motion.

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OPINIONS BELOW

Prior opinions of the court of appeals (Pet. App. 1a-4a, 32a-36a, 37a-41a) are unreported.

JURISDICTION

The petition for an original writ of habeas corpus was filed on June 23, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a) and 2241(a).

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 dis-

charging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). 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. 37a-41a.

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.

Pet. App. 5a-31a. The court of appeals denied an initial en banc hearing and denied petitioner's application. Id. at 1a-4a.

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 ¶¶ 9-11. 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). 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 vio-

lence," 18 U.S.C. 924(c)(1)(A), and requires a mandatory ten-year minimum sentence "if the firearm is discharged," 18 U.S.C. 924(c)(1)(A)(iii).

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. Johnson, 576 U.S. 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. 37a-41a. 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

41a (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, Pet. App. 32a-36a, 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), id. at 35a-36a.

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 Pet. App. 15a, 19a, 21a-22a, 24a (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 en banc consideration of his application and overrule that precedent. Id. at 24a-29a.

The court of appeals denied petitioner's request. Pet. App. 1a-4a. The court relied on Section 2244(b)(1)'s bar and dismissed the application based on its prior decisions in In re Baptiste and In re Bradford. Id. at 4a. The court also denied the request for initial hearing en banc. Ibid.

5. Petitioner acknowledges (Pet. 5) that he was precluded by 28 U.S.C. 2244(b)(3)(E) from filing a petition for a writ of certiorari to review the denial of authorization for the second Section 2255 petition. He did, however, file a petition 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). A magistrate judge has recommended that petitioner's motion to dismiss be granted and that the Section 2241 petition be dismissed for lack of jurisdiction. 22-cv-515 D. Ct. Doc. 12, at 3 (Aug. 29, 2023).

ARGUMENT

Petitioner contends (Pet. 15-18) that this Court should grant an original writ of habeas corpus based on his claim that the decision below erred in applying 28 U.S.C. 2244(b)(1) to a motion filed under Section 2255. Petitioner further contends (Pet. 12-15) that the courts of appeals are divided on whether Section 2244(b)(1)'s requirements apply to Section 2255 motions and argues (Pet. 22-24) that habeas relief directly from this Court is warranted because the Court will not likely be able to resolve the division of authority on a writ of certiorari. The government agrees 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. Petitioner, however, has not established that the extraordinary remedy of an original writ of habeas corpus from this Court is warranted in this case.

Under Rule 20.4(a) of the Rules of this Court, "[t]o justify the granting of a writ of habeas corpus," which the Court "rarely grant[s]," a petitioner must show both that "adequate relief cannot be obtained in any other form or from any other court" and that "exceptional circumstances warrant the exercise of the Court's discretionary powers." Here, however, petitioner's application would not meet Section 2255(h)'s requirements for a second Section 2255 motion even independent of the error that he asserts, and

this Court could review the division of authority about the application of Section 2244(b)(1) to a Section 2255 application in other ways. The habeas petition should therefore be denied.

1. As an initial matter, the government agrees with petitioner that the court of appeals erred in relying on Section 2244(b)(1) to deny petitioner's application for leave to file a second Section 2255 motion.

a. Section 2255 provides the general mechanism for a federal prisoner to obtain collateral review of his conviction or sentence. See 28 U.S.C. 2255(a). Subject to procedural limitations, such a prisoner may file a single motion under Section 2255 that asserts any ground eligible for collateral relief. See ibid.

Under 28 U.S.C. 2255(h), a federal prisoner may not file a second or successive Section 2255 motion without obtaining prefiling authorization from the court of appeals, "as provided in [S]ection 2244." Ibid. The court of appeals may grant authorization upon a prima facie showing that the proposed motion contains either "newly discovered evidence" that strongly indicates factual innocence, 28 U.S.C. 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," 28 U.S.C. 2255(h)(2). See 28 U.S.C. 2244(b)(3)(C). Authorization, when granted, vests the district court with jurisdiction that it would otherwise lack to entertain the successive motion. See Burton v. Stewart, 549

U.S. 147, 153 (2007) (per curiam) (concluding that similar authorization requirement in Section 2244(b)(3) for second or successive collateral attacks on state convictions is jurisdictional).

"[O]nce the court of appeals grants authorization, the district court must determine whether the petition does, in fact, satisfy the requirements for filing a second or successive motion before the merits of the motion can be considered." United States v. Murphy, 887 F.3d 1064, 1067 (10th Cir.) (citation omitted), cert. denied, 139 S. Ct. 414 (2018). Section 2255(h) cross-references the procedures in "section 2244," which specifies that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." 28 U.S.C. 2244(b)(4). Accordingly, if the motion does not satisfy the statutory requirements for a second or successive collateral attack, then the court must dismiss the motion. If the motion does satisfy the statutory requirements, then the court addresses the merits of the motion along with any applicable defenses.

Petitioner contends (Pet. 15-18), and the government agrees, that Section 2244(b)(1) does not of its own force impose an additional limitation on second or successive Section 2255 motions. By its terms, Section 2244(b)(1) 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." 28 U.S.C. 2244(b)(1). Section 2254, in turn, provides a federal statutory remedy for "person[s] in custody pursuant to the judgment of a State court." 28 U.S.C. 2254(a) and (b)(1). "The requirement of custody pursuant to a state-court judgment distinguishes § 2254 from other statutory provisions authorizing relief from constitutional violations -- such as § 2255, which allows challenges to the judgments of federal courts." Magwood v. Patterson, 561 U.S. 320, 333 (2010). Section 2254 has no application to Section 2255 motions, which must be filed by federal prisoners "in custody under sentence of a court established by Act of Congress." 28 U.S.C. 2255(a). Because Congress thus limited Section 2244(b)(1) to successive habeas applications by state prisoners, Section 2244(b)(1) does not, in itself, directly apply to federal prisoners who file successive Section 2255 motions.

As petitioner observes (Pet. 12-13), the courts of appeals are divided on that issue. The decision below accords with decisions from several other courts of appeals that have stated that Section 2244(b)(1) applies to Section 2255 motions. See Avery v. United States, 140 S. Ct. 1080, 1080 (2020) (Kavanaugh, J., respecting the denial of certiorari) (citing decisions from the Second, Third, Fifth, Seventh, and Eighth Circuits). Petitioner also correctly observes (Pet. 13-14) that the Fourth, Sixth, and Ninth Circuits have recently taken the view that Section 2244(b)(1)

applies directly only to applications filed by state prisoners. See In re Graham, 61 F.4th 433, 438-441 (4th Cir. 2023); Jones v. United States, 36 F.4th 974, 981-984 (9th Cir. 2022); Williams v United States, 927 F.3d 427, 434-436 (6th Cir. 2019). That division of authority is still nascent and developing as courts of appeals have considered the question after Avery v. United States, supra, and Justice Kavanaugh's opinion in that case, and held that Section 2244(b)(1) does not apply to federal prisoners.

2. The court of appeals' erroneous application of Section 2244(b)(1)'s requirements to Section 2255 motions does not warrant an original writ of habeas corpus from this Court in this case, because petitioner cannot meet Rule 20.4(a)'s requirements for such extraordinary relief. Cf. Felker v. Turpin, 518 U.S. 651, 665 (1996). Even independent of 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). Nor is an original writ of habeas corpus necessary for this Court to consider the division of authority concerning Section 2241(b)(1), because that question may be presented to this Court in other ways.

As previously discussed, Section 2255(h) incorporates the certification procedures in Section 2244, which requires that a panel of the court of appeals determine whether a federal prisoner has made a "prima facie showing" (28 U.S.C. 2244(b)(3)(C)) that, as relevant here, his second or successive Section 2255 motion

"contain[s] * * * 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)(2). See p. 10, supra. "'To contain' means 'to consist of wholly or in part,' to 'comprise,' or to 'include.'" Donnell v. United States, 826 F.3d 1014, 1016 (8th Cir. 2016) (quoting Webster's Third New International Dictionary 491 (2002)). Thus, "[t]he new rule must have a nexus to the right asserted in the motion," ibid.; a right that does not in fact apply in the circumstances of a particular claimant is not enough, see ibid.; see also Murphy, 887 F.3d at 1067 ("A motion 'contains' a new rule of constitutional law, as required by § 2255(h)(2), if the claim for which authorization is sought 'relies on' the new rule.") (citation omitted).

Petitioner's claim does not satisfy that requirement. Petitioner contends (Pet. 5, 19-20) that he should have been allowed to file a second Section 2255 motion based on United States v. Davis, 139 S. Ct. 2319 (2019), which held that Section 924(c)(3)(B)'s definition for a "crime of violence" predicate for a Section 924(c) offense is unconstitutionally vague. But the record indicates that Davis was not the source of error in his case, because petitioner's Section 924(c) conviction relied on the elements-based "crime of violence" definition in Section 924(c)(3)(A) -- which defines a predicate "crime of violence" to include an 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) -- not the unconstitutionally vague definition in Section 924(c)(3)(B), which turns on whether an offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B).

Petitioner's indictment described petitioner's attempted Hobbs Act robbery in terms analogous to Section 924(c)(3)(A)'s -- namely, as an attempt to obtain property from the person or presence of a Loomis employee, against the employee's will, by means of "actual or threatened force, violence, or fear of injury to said person," 08-cr-80089 Indictment 2 -- not Section 924(c)(3)(B)'s. Petitioner's plea agreement also 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. And because petitioner pleaded guilty without arguing that his Section 924(c) conviction was potentially invalid and then did not appeal that conviction, the record does not disclose any rationale for classifying attempted Hobbs Act robbery as a crime of violence under Section 924(c)(3)(B) or otherwise.

Petitioner's claim for relief thus relies not on Davis's constitutional holding, but instead this Court's recent conclusion in United States v. Taylor, 142 S. Ct. 2015 (2022), that attempted Hobbs Act robbery is not a crime of violence under the Section

924(c)(3)(A) definition. But Taylor was a statutory-interpretation case, and any Taylor-based statutory-interpretation claim that petitioner might now assert would not provide a valid constitutional basis for a second or successive Section 2255 motion. See 28 U.S.C. 2255(h)(2). And even if the record were less conclusive about whether petitioner's conviction rested on Section 924(c)(3)(A) or (B), that would not "show that exceptional circumstances warrant the exercise of the Court's discretionary powers," Sup. Ct. R. 20.4(a), so as to support an original habeas petition. The court of appeals has regularly rejected collateral attacks by prisoners who cannot show that their challenges to their Section 924(c) convictions rest on a provision invalidated by Johnson or Davis, see, e.g., Beeman v. United States, 871 F.3d 1215, 1222, 1224 (11th Cir. 2017), cert. denied, 139 S. Ct. 1168 (2019). This Court has repeatedly denied petitions for writs of certiorari from prisoners seeking to relax their burden of making that showing. See, e.g., Br. in Opp. at 7 n.1, Sanders v. United States, 142 S. Ct. 460 (2021) (No. 20-8053) (citing cases).

The possibility that this Court may resolve the circuit conflict concerning Section 2244(b)(1)'s application to Section 2255 petitions in a future case further undermines petitioner's claim to exceptional circumstances. The parties agree (see Pet. 5) that this Court would not be able to review a panel's denial of authorization to file a second or successive Section 2255 motion

on Section 2255(b)(1) grounds. See 28 U.S.C. 2244(b)(3)(E). But the issue could arise -- as it did in Avery -- in the context of a district court invoking Section 2544(b)(1) to dismiss a claim that passed through the court of appeals' initial screen. Alternatively, a prisoner could seek this Court's review by asking the court of appeals to certify the question to this Court. See 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).

3. Petitioner's alternative suggestion (Pet. 24 n.2) that the Court construe his habeas petition as a request for a writ of mandamus likewise provides no basis for review of his case. This Court has explained that a writ of mandamus will not issue unless three conditions are satisfied: the petitioner must demonstrate that he has "no other adequate means to attain the relief he desires," the petitioner "satisf[ies] [his] burden of showing that his right to issuance of the writ is clear and indisputable," and the court furthermore decides "in the exercise of its discretion" that it is "satisfied that the writ is appropriate under the circumstances." Cheney v. United States District Court for the District of Columbia, 542 U.S. 367, 380-381 (2004) (citation, brackets, and internal quotation marks omitted). Here, for reasons discussed above, petitioner cannot show that he is "indisputabl[y]" entitled to relief.

Nor is this case an appropriate one for any form of extraordinary relief -- whether by mandamus or by an original habeas writ. Petitioner seeks relief in circumstances in which it has regularly been denied, see p. 16, supra; where his plea agreement admitted the actual violence of his crimes, 08-cr-80089 Plea Agreement 1; and where the circumstances would support the same sentence even if he were resentenced following a vacatur of his Section 924(c) conviction, see Dean v. United States, 581 U.S. 62 (2017) (allowing consideration of Section 924(c) penalty in determining sentence for other offenses). The Court should accordingly decline to grant the petition, however it is characterized.

CONCLUSION

The petition for an original writ of habeas corpus should be denied.

Respectfully submitted.

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