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# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEVIN J. MCCORMICK,

*Petitioner-Appellant,*

*v.*

SANDRA BUTLER, Warden,

*Respondent-Appellee.*

No. 17-6331

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
No. 6:16-cv-00235—David L. Bunning, District Judge.

Argued: December 4, 2019

Decided and Filed: October 6, 2020

Before: GRIFFIN, STRANCH, and DONALD, Circuit Judges.

## COUNSEL

**ARGUED:** Kirti Datla, HOGAN LOVELLS US LLP, Washington, D.C., for Appellant. Kyle M. Melloan, UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, for Appellee. **ON BRIEF:** Kirti Datla, HOGAN LOVELLS US LLP, Washington, D.C., for Appellant. Kyle M. Melloan, Charles P. Wisdom, Jr., UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, for Appellee. Kevin J. McCormick, Manchester, Kentucky, pro se.

## OPINION

JANE B. STRANCH, Circuit Judge. The district court sentenced Petitioner Kevin McCormick under a provision of the Armed Career Criminal Act (ACCA), 18 U.S.C.

§ 924(e)(1), that does not apply to him. Under the misapplied enhancement, McCormick is serving a sentence that exceeds the maximum sentence prescribed by Congress for his offense. The district court incorrectly concluded that McCormick could not bring a habeas petition under 28 U.S.C. § 2241 to challenge his illegal sentence. We **REVERSE** the district court's denial of habeas relief, **VACATE** McCormick's sentence, and **REMAND** so that the district court may impose a sentence that does not exceed the statutory maximum.

## I. BACKGROUND

On November 22, 2011, a jury convicted McCormick of one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). That offense carries a maximum sentence of ten years. 18 U.S.C. § 924(a)(2). The district court sentenced McCormick under the ACCA, which imposes a fifteen-year mandatory minimum on defendants with three prior violent felony convictions. § 924(e)(1). The court based this enhancement on McCormick's several prior convictions for Kentucky third-degree burglary. The conduct related to these convictions occurred during one sixteen-day period, just after McCormick turned eighteen, and nineteen years before the sentencing at issue here.

In concluding that McCormick's Kentucky third-degree burglary offenses qualified as violent felony convictions, the court recognized that Kentucky's statute "punishes both conduct which is" generic burglary—an ACCA predicate—and "conduct which is not." **(R1. 67, Sentencing Memorandum Order, PageID 293–94)** McCormick's offenses did not categorically qualify as ACCA predicates. At the time of sentencing, however, our precedent allowed the district court to consider more than just the language of the Kentucky statute, including documents such as a plea colloquy, to decide whether a prior conviction was actually for generic burglary. The district court did so, examining more than just the Kentucky statute, to conclude that McCormick "pled guilty to each of the essential elements of [generic] burglary." **(*Id*. at PageID 294)**

McCormick's designation as an armed career criminal increased his offense level from 16 to 33; his guidelines range increased from 46–57 months to 235–293 months; and he became

subject to the ACCA's fifteen-year mandatory minimum sentence. 18 U.S.C. § 924(e)(1); U.S.S.G. § 4B1.4(a), (b)(3)(B) (2011); U.S.S.G. Sentencing Tbl. (2011).

The district court sentenced McCormick to the ACCA's fifteen-year mandatory minimum, varying downward from his 235- to 293-month guidelines range because McCormick's state convictions were all committed in a brief period almost twenty years earlier, just after McCormick turned eighteen. McCormick's conviction and sentence were affirmed on direct appeal. *United States v. McCormick*, 517 F. App'x 411 (6th Cir. 2013).

McCormick filed a pro se 28 U.S.C. § 2255 motion to vacate his sentence. Among other things, he argued that Kentucky's third-degree burglary statute did not qualify as an ACCA predicate after *Descamps v. United States*, 570 U.S. 254 (2013). Adopting the magistrate judge's report and recommendation that *Descamps* did not entitle McCormick to the relief requested, the district court denied a certificate of appealability. McCormick then petitioned this court for a certificate of appealability. While that application was pending, McCormick sought to file a second § 2255 motion, claiming that his burglary convictions no longer qualified as ACCA-predicate offenses in light of *Johnson v. United States*, which held the ACCA's so-called residual clause unconstitutional. 135 S. Ct. 2551 (2015).

On June 23, 2016, before we resolved McCormick's two pending requests for relief, the Supreme Court decided *Mathis v. United States*, which explicated the "categorical approach." 136 S. Ct. 2243, 2248 (2016). Under *Mathis*, courts must rely solely on the text of a state statute to determine whether past convictions qualify as ACCA predicates where the state statute is divisible, *i.e.*, where the statute defines only one crime, with one set of elements, but lists alternative factual means by which a defendant can satisfy those elements. *Id.* at 2250. The Government does not contest that based on *Mathis*, the categorical approach applies to Kentucky's burglary statute, and McCormick's prior convictions for Kentucky third-degree burglary no longer qualify as ACCA predicates.

Eventually, we denied both McCormick's motion to file a successive § 2255 based on *Johnson* and his application for a certificate of appealability in his initial § 2255, which argued, in part, that the enhancement did not apply to him based on *Descamps*. In the order explaining

why McCormick was not entitled to relief under *Johnson*, we noted that McCormick may be entitled to relief under *Mathis*. Taking this cue, McCormick filed a pro se § 2241 petition seeking relief based on *Mathis*. He argued that the 28 U.S.C. § 2255(e) savings clause authorized him to seek relief from his unlawful sentence through a § 2241 petition. The district court denied McCormick's petition because it concluded that McCormick could not seek § 2241 relief through the savings clause. This appeal followed.

## II. ANALYSIS

We review de novo a district court's judgment denying a habeas corpus petition filed under 28 U.S.C. § 2241. *Hill v. Masters*, 836 F.3d 591, 594 (6th Cir. 2016). When a federal prisoner collaterally attacks the validity of his sentence, rather than the conditions of his confinement, he must ordinarily proceed under § 2255, not § 2241. However, "on a successive challenge to a *conviction*, a petitioner may test the legality of his detention under § 2241 through the § 2255(e) savings clause by showing that he is 'actually innocent.'" *Id.* at 594 (quoting *Wooten v. Cauley*, 677 F.3d 303, 307 (6th Cir. 2012)). Where a petitioner asserts factual innocence based on a change in law, he may show that § 2255 provides an "inadequate or ineffective" remedy by proving "(1) 'the existence of a new interpretation of statutory law,' (2) 'issued after the petitioner had a meaningful time to incorporate the new interpretation into his direct appeals or subsequent motions,' (3) that is retroactive, and (4) applies to the petition's merits such that it is 'more likely than not that no reasonable juror would have convicted' the petitioner." *Id.* at 594–95 (quoting *Wooten*, 677 F.3d at 307–08).

*Hill v. Masters* adopted a three-part test to apply when the target of a § 2241 petition is a sentencing enhancement rather than a conviction. *Id.* at 595. Where a petitioner seeks to challenge his sentence through § 2241 after intervening caselaw demonstrates that the sentencing court misapplied a sentencing enhancement, we held that the petitioner must show, "(1) a case of statutory interpretation, (2) that is retroactive and could not have been invoked in the initial § 2255 motion, and (3) that the misapplied sentence presents an error sufficiently grave to be deemed a miscarriage of justice or a fundamental defect." *Id.* If a petitioner proves these elements, he has demonstrated that a § 2255 motion is otherwise "inadequate or ineffective to

test the legality of his detention" and may proceed through the savings clause and employ § 2241. *See id.* at 594.

In *Wright v. Spaulding*, a panel of this court questioned whether the test adopted in *Hill* was part of *Hill*'s holding, noting that the parties in *Hill* had "agreed upon" the test articulated in *Hill*. 939 F.3d 695, 704 (6th Cir. 2019) (quoting *Hill*, 836 F.3d at 595). To be sure, "questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Wright*, 939 F.3d at 702 (quoting *Rinard v. Luoma*, 440 F.3d 361, 363 (6th Cir. 2006)).

Although the parties in *Hill* agreed that the petitioner had "established the first and second conditions for satisfying the requirements of the savings clause and employing § 2241," whether Hill could have invoked the retroactive case of statutory interpretation upon which he relied in his initial § 2255 motion was not a question that merely lurked in the record. This court does not blindly accept parties' agreement on essential elements of legal tests even if analysis of an element becomes less relevant when the parties do not dispute that the element is satisfied. Put another way, parties cannot stipulate their way around § 2255(e)'s requirement that to file a § 2241 petition, a § 2255 motion must have been deemed "inadequate or ineffective" as a matter of law. *See, e.g.*, *Neuens v. City of Columbus*, 303 F.3d 667, 670 (6th Cir. 2002) ("Issues of law are the province of courts, not of parties to a lawsuit, individuals whose legal conclusions may be tainted by self-interest."); *id.* at 671 ("The parties themselves may not stipulate to legal conclusions."); *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 404 (6th Cir. 2019) (same). Though the parties in *Hill* did agree on the applicable statement of the law, it was our court that chose to adopt the test. 836 F.3d at 595. We explained that our circuit had no published case law on the issue, carefully analyzed caselaw from our sister circuits, and decided upon the "test that applies in this factual context." *Id.* at 595, 597–99.

*Hill* started from the recognized legal premise that "a habeas petition may be brought pursuant to § 2241 when a sentence exceeds the maximum prescribed by statute." *Id.* at 596. As we explained, "[t]o deny relief where a sentence enhancement exceeds the statutory range set by Congress would present separation-of-powers concerns." *Id.* (citing *Jones v. Thomas*, 491 U.S. 376, 381 (1989)). We reasoned that "[s]erving a sentence imposed under mandatory guidelines

(subsequently lowered by retroactive Supreme Court precedent) shares similarities with serving a sentence imposed above the statutory maximum." *Id.* at 599. Because both sentences "are beyond what is called for by law" and both "raise a fundamental fairness issue," *Hill* authorized the petitioner to bring a § 2241 petition to challenge a miscalculated sentence imposed under mandatory guidelines. *Id.*

Turning to *Hill*'s application to this case, the parties do not dispute that *Mathis* is a retroactive case of statutory interpretation. We agree. *Sutton v. Quintana*, No. 16-6534, 2017 WL 4677548, at *2 (6th Cir. July 12, 2017) (order) (describing why *Mathis* is a case of statutory interpretation that applies retroactively). In *Hill*, the petitioner relied successfully on *Descamps*, which clarified when courts could apply the modified categorical approach. 836 F.3d at 595. Comparably, the Supreme Court in *Mathis* provided a "new interpretation" of the ACCA as required by *Hill*. *Hill*, 836 F.3d at 595 (quoting *Wooten*, 677 F.3d at 307–08); *see Mathis*, 136 S. Ct. at 2248. *Mathis* applies retroactively because "an old rule applies both on direct and collateral review." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). Although *Mathis* represents an intervening change in controlling jurisprudence—before *Mathis*, courts in this circuit were permitted to apply the modified categorical approach to divisible criminal statutes—the case ultimately expanded an old and "essential rule governing ACCA cases" that "[a]ll that counts under the Act . . ." are "'the elements of the statute of conviction.'" *Mathis*, 136 S. Ct. at 2251 (quoting *Taylor v. United States*, 495 U.S. 575, 601 (1990)). What changed under *Mathis*, as under *Descamps*, is when courts may apply the modified categorical approach. *Id.* at 2248.

The Government does not contest that, under *Mathis*, McCormick's Kentucky third-degree burglary convictions do not qualify as ACCA predicates, which means that the ACCA enhancement was erroneously applied. As a result, McCormick's fifteen-year sentence exceeds the ten-year statutory maximum for his offense. When a sentence "exceeds the maximum prescribed by statute," it is obvious that "the misapplied sentence presents an error sufficiently grave to be deemed a miscarriage of justice or a fundamental defect." *Hill*, 836 F.3d at 595–96.

The Government does contest, however, whether McCormick could have invoked *Mathis* in his initial § 2255 motion, noting that the Court decided *Mathis* on June 23, 2016, while McCormick's application for a certificate of appealability on his initial § 2255 motion pended

before this court. It argues that McCormick did not raise *Mathis* during the six months after it was issued and before we ruled. The Government's position overlooks a critical point: petitioners must show that the intervening case "could not have been invoked in *the initial § 2255 motion.*" *Hill*, 836 F.3d at 595 (emphasis added). McCormick's initial § 2255 motion was denied by the district court on March 10, 2016, three months before the Court issued *Mathis*. Lacking access to a time machine, McCormick did not have an opportunity to invoke *Mathis* before the district court ruled on his initial § 2255 motion.

Even if McCormick had learned of *Mathis* and tried to supplement his application for a certificate of appealability, the Government would surely have argued that the *Mathis* issue was not properly before us because it had not been raised in McCormick's underlying § 2255 motion. *See Caldwell v. United States*, 651 F.2d 429, 434 (6th Cir. 1981) ("Since [certain claims] were not presented below, they are not properly before this court, and cannot be addressed on appeal."); *see also Chandler v. Jones*, 813 F.2d 773, 777 (6th Cir. 1987) ("We do not reach the merits of this issue since it is not properly before this court. [Petitioner] did not assert this claim in his petition for the writ of habeas corpus.").

The Government cites several unpublished cases to support its claim that McCormick cannot seek relief through the savings clause because he could have raised *Mathis* while his application for a certificate of appealability in his initial § 2255 pended before this court. In each of those cases, however, the prisoner had the opportunity to raise an intervening case of statutory interpretation in an initial § 2255 motion before the district court, not in a supplemental filing attached to an application for a certificate of appealability. *See Parrish v. Kizziah*, No. 18-5085, 2018 U.S. App. LEXIS 23540, at *4 (6th Cir. Aug. 21, 2018) (order) (noting that the case of statutory interpretation was decided while petitioner's direct appeal was pending before any § 2255 motion was filed, meaning it "could have been invoked in his initial § 2255 motion."); *Davis v. Kizziah*, No. 7:18-CV-91-REW, 2019 WL 2067219, at *3 (E.D. Ky. May 10, 2019) ("*Mathis* issued . . . more than a month before Davis moved to supplement his then-pending § 2255 motion and more than six months before the trial court denied § 2255 relief."); *see also Kinzer v. United States*, No. 17-5117, 2017 WL 7311838, at *2 n.1 (6th Cir. Aug. 9, 2017)

(order) (finding that a prisoner had an opportunity to amend his § 2255 motion with a *Mathis* argument before that motion was denied by the district court).

In *Wright*, the court declined to allow a petitioner to rely on the savings clause based on the panel's finding that the petitioner had an earlier opportunity to invoke a *Mathis* claim. 939 F.3d at 705. The panel acknowledged that the petitioner could not have specifically invoked *Mathis* in his initial § 2255 motion because the case had yet to be decided, but nevertheless found that the petitioner could have earlier invoked the substance of his *Mathis* claim (*i.e.*, that "properly analyzed under the categorical approach, the Maryland crime he was convicted of in 1989 was not an ACCA-predicate 'serious drug offense' because the maximum penalty for that crime was less than ten years in prison"). *Id.* There, the petitioner had not raised any argument with the district court that his ACCA predicate offenses were not properly analyzed under the categorical approach. *Id.* To the contrary, here, McCormick's initial § 2255 motion argued that Kentucky's third-degree burglary statute did not qualify as an ACCA predicate because *Descamps* clarified when courts could apply the modified categorical approach. McCormick has demonstrated that he could not have invoked his *Mathis* claim earlier because our precedents allowed what *Mathis* has clarified is forbidden. *See, e.g.*, *United States v. Brumback*, 614 F. App'x 288, 292 (6th Cir. 2015) ("Since the Supreme Court issued *Descamps*, we have held that Kentucky's third-degree burglary statute is divisible."); *United States v. Walker*, 599 F. App'x 582, 583 (6th Cir. 2015) (same); *see also United States v. Prater*, 766 F.3d 501, 510 (6th Cir. 2014) (rejecting the argument that New York's third-degree burglary statute, which is analogous to Kentucky's statute, was "an 'indivisible' statute'").

The reason this court considers whether a petitioner had the opportunity to invoke a new, retroactive case of statutory interpretation in his initial § 2255 motion is that "whether a misapplied enhancement results in a miscarriage of justice should not depend on whether the new statutory interpretation was announced before or after a prisoner filed a first § 2255 petition, when the timing of the decision invalidating the enhancement is beyond the prisoner's control." *Hill*, 836 F.3d at 597. It is also a well settled principle that "however inartfully pleaded," "vague" or "conclusory," courts construe pro se habeas petitions liberally. *Franklin v. Rose*, 765 F.2d 82, 84–85 (6th Cir. 1985) (citations omitted). We do not hold pro se parties to the same or

more stringent standards that those imposed on lawyers. *Id.* And it follows that we do not require pro se incarcerated petitioners to figure out new arguments for overturning our precedent at an earlier stage before they are later allowed to invoke a newly decided, retroactive case of statutory interpretation showing that what was once permissible under our case law is now forbidden. In *Hill* this rule played out. The petitioner relied on an intervening case of statutory interpretation, which was retroactive but announced no new rule. Hill had insisted through direct and collateral appeals that the career offender enhancement did not apply to him, but it was not until 2013 that the Supreme Court issued *Descamps*, stating the precise legal principle that proved him right. That case "did not invent the categorical approach," *Wright*, 939 F.3d at 705, but it was nonetheless a retroactive change in statutory interpretation that proved Hill's sentence to be unlawful. The same is true here.

The Government also argues that McCormick is not entitled to bring a habeas petition pursuant to § 2241 because he was sentenced under advisory guidelines. This is irrelevant, however, because "a habeas petition may be brought pursuant to § 2241 when a sentence exceeds the maximum prescribed by statute." *Hill*, 836 F.3d at 596. And as we have explained, "[t]o deny relief where a sentence enhancement exceeds the statutory range set by Congress would present separation-of-powers concerns." *Id.* (citing *Jones*, 491 U.S. at 381); *see also Sutton*, 2017 WL 4677548, at *2 (applying *Hill* to a sentence calculated under post-*Booker* standards where petitioner's sentence exceeded the ten-year maximum he would have faced absent the erroneous imposition of the ACCA enhancement).

In *Hill*, we authorized a § 2241 petition challenging the legality of detention based on a claim of actual innocence of being an armed career criminal, then addressed the facts specific to Hill. Hill had been sentenced under pre-*United States v. Booker*, 543 U.S. 220 (2005), mandatory guidelines, which was relevant because the district court had erroneously applied an ACCA enhancement; the miscalculated sentence, however, still did not partake of the core problem of exceeding the statutory maximum for the offense. *Hill*, 836 F.3d at 596–97. Therefore, the degree of the sentence's defectiveness depended on whether Hill was sentenced under the mandatory guidelines regime pre-*Booker*. As *Hill* explained, "[s]erving a sentence imposed under mandatory guidelines (subsequently lowered by retroactive Supreme Court

precedent) shares similarities with serving a sentence imposed above the statutory maximum." *Id.* at 599.

Here, we have the separation-of-powers problem from which the *Hill* test is derived. *Id.* at 596 (citing *Jones*, 491 U.S. at 381 (noting the importance of "the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments" in the multiple-punishments context); *United States v. Penson*, 526 F.3d 331, 336 (6th Cir. 2008) (vacating and remanding a sentence that exceeded the statutory maximum)). When the district court subjected McCormick to the ACCA's sentencing enhancement, it was required to impose at least the ACCA's mandatory minimum fifteen-year sentence. Whether McCormick's sentence was handed down under pre- or post-*Booker* guidelines was thus of no moment because in either situation the sentencing court lacked the discretion to vary downward from that mandatory minimum. McCormick's sentence was above the maximum sentence authorized by Congress for his offense. Significantly, the misapplied ACCA enhancement not only increased McCormick's sentence above the statutory maximum for his offense but also moved his Guidelines range from 46–57 months to 235–293 months. McCormick's fifteen-year sentence is more than three times the upper limit of his appropriate guidelines range. Given the time he has served under an erroneous sentence, the district court may find that McCormick is entitled to release after resentencing.

In *Hill*, the savings clause avoided a miscarriage of justice by preventing the petitioner from serving "an enhanced sentence as a career offender, bearing the stigma of a 'repeat violent offender' and all its accompanying disadvantages," where he in fact lacked the predicate felonies to justify such a characterization. 836 F.3d at 600. Here, the situation is more dire, and *Hill* applies with equal force: unless McCormick can seek relief through the savings clause, he will serve a sentence five years beyond the statutory maximum authorized by Congress.

Because McCormick could seek relief from his now invalid sentence through the § 2255(e) savings clause regardless of whether he was sentenced under mandatory or advisory guidelines, we need not address the open question of whether the exception recognized in *Hill* applies to sentences calculated under post-*Booker* advisory guidelines. *See, e.g.*, *Neuman v. United States*, No. 17-6100, 2018 WL 4520483, at *2 n.1 (6th Cir. May 21, 2018) (order)

("[W]e need not here address whether *Hill* is limited to career-offender enhancements imposed under the pre-*Booker* mandatory guidelines"); *Muir v. Quintana*, No. 17-6050, 2018 WL 4276133, *2 (6th Cir. April 26, 2018) (order) (applying *Hill* to a sentence calculated under post-*Booker* standards); *Sutton*, 2017 WL 4677548, *2 (same).

Taken together, McCormick has identified a case of statutory interpretation that is retroactive and could not have been invoked in his initial § 2255 motion; applying *Mathis*, McCormick's sentence was erroneously enhanced under ACCA, creating an error sufficiently grave to be deemed a miscarriage of justice. McCormick can therefore seek relief from his now invalid sentence pursuant to § 2241 through the § 2255(e) savings clause.

## III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's order denying McCormick's § 2241 petition, **VACATE** his sentence, and **REMAND** for resentencing.