No. 18-292

In the Supreme Court of the United States

DETRIC LEWIS,

Petitioner,

v.

N.C. ENGLISH,
WARDEN, USP-LEAVENWORTH,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

ARGUMENT

The Government does not deny that the proper interpretation of Section 2255(e)'s saving clause is exceptionally important. It does not deny that the question presented has given rise to a deep and intractable 9-2 circuit split. It does not deny that this case presents a clean vehicle in which the Court could consider and conclusively resolve that question. And it does not deny that the question is worthy of this Court's immediate attention. Indeed, the Government's certiorari petition in *United States v. Wheeler*, No. 18-420—filed four weeks *after* this petition—asserts (at 29) that the Court's "timely resolution" of the Section 2255(e) issue is imperative.

On the merits, the Government concedes that its interpretation of Section 2255(e) inevitably leads to "harsh results." *Wheeler* Pet. 22 (citation omitted). That is an understatement. Here, unless this Court allows him to challenge his sentence under Section 2241, Detric Lewis will languish in prison *for nearly six extra years*, all because the sentencing court applied now-discredited circuit precedent. This case exemplifies the injustice of the Government's theory.

Despite agreeing with Lewis on so many key points, the Government nonetheless urges this Court to deny certiorari. It does so for a single reason: Its belief that Lewis could not ultimately obtain relief because Sentencing Guidelines errors are not cognizable on collateral review as a matter of law. That is wrong, but it is also beside the point: The scope of habeas review of sentencing errors is not at issue in this appeal. The Tenth Circuit refused to consider the merits of Lewis's habeas petition because of its mistaken interpretation of Section 2255(e)—*not*

because it agreed with the Government's theory that Guidelines errors can never give rise to habeas relief. The only question presented here is the Section 2255(e) issue. If the Court resolves that issue in Lewis's favor, it may (and should) remand the case for the lower courts to consider the Government's alternative argument in the first instance.

The Government appears to assume that this Court will eventually grant review in *Wheeler*—a case in which the opposition has not even been filed. But this case is a far superior vehicle for resolving the common question presented. Not only is *Wheeler* interlocutory, but it contains a threshold obstacle that might prevent the Court from ever reaching the Section 2255(e) issue dividing the circuits. And the Government has elsewhere acknowledged that this Court could not decide *Wheeler* for at least a year. This case presents an opportunity to resolve this important question right away. No one would benefit from further delay.

This case—not *Wheeler*—is the ideal vehicle for resolving the entrenched confusion over Section 2255(e). Even the Government's perfunctory "memorandum" offers only a half-hearted objection to that. Lewis's petition should be granted.

A. The Government Agrees The Question Presented Warrants Immediate Review

The Government acknowledges that the proper interpretation of 28 U.S.C. § 2255(e)'s saving clause warrants this Court's immediate attention.

Lewis's petition explains that there is currently a "universally acknowledged, deep, and intractable" circuit split over the question presented in this case. Pet. 13 (capitalization altered); *see also id.* at 13-17.

The Government agrees, describing the same split as "widespread" and "entrenched." *Wheeler* Pet. 12, 23; *see also* BIO 1-2, 4.

The Government's *Wheeler* petition emphasizes (at 13) that the circuit conflict has ongoing significance, as it "has produced, and will continue to produce, divergent outcomes for litigants in different jurisdictions." It also argues that "[t]he disparate treatment of identical claims is particularly problematic because habeas petitions [under 28 U.S.C. § 2241] are filed in a prisoner's district of confinement," which "mean[s] that the cognizability of the same prisoner's claim may depend on where he is housed by the Bureau of Prisons and may change if the prisoner is transferred." *Id.* at 25. Lewis's petition makes those identical points. Pet. 25-26.

The Government and Lewis likewise concur that the scope of the saving clause is an issue of "great significance." *Wheeler* Pet. 13, 23; *see also id.* at 28; Pet. 24-26. Lewis explains this is because the minority rule embraced by the Government is deeply unjust, keeping federal prisoners incarcerated long after a lawfully imposed sentence would have ended. Pet. 25. The Government does not dispute that conclusion, and in fact concedes that its approach inevitably leads to "harsh results" that Congress should eliminate. *Wheeler* Pet. 22-23 (citation omitted).

Finally, the parties are united on the urgency of certiorari review. The Government emphasizes that "[o]nly this Court's intervention can provide the necessary clarity" and "ensure nationwide uniformity as to the saving clause's scope." *Id.* at 13, 25-26. And it also endorses "timely resolution" of the question

presented—"now." *Id.* at 29. Lewis wholeheartedly agrees.

B. This Case Is A Better Vehicle Than *Wheeler*

Given the parties' clear agreement on the need for this Court to settle the meaning of Section 2255(e), the only real question is whether the Court should do so here or in *Wheeler*. The Government opposes review here based on its assertion that Lewis's Section 2241 claim will eventually fail for reasons apart from Section 2255(e). That assertion is both premature and incorrect. And the Government's preference for *Wheeler* ignores multiple vehicle problems that would inhibit—or at the very least significantly delay—this Court's resolution of the question presented there. By contrast, this case is ideally suited for review right now.

1. The Government's Alternative Cognizability Theory Is No Reason To Deny Review

The Government's only argument against granting this petition is its claim that Lewis cannot obtain relief on the merits because errors in applying the Sentencing Guidelines are *never* cognizable on collateral review. BIO 5. That flawed theory has nothing to do with the proper interpretation of Section 2255(e), and it provides no basis for denying review.

a. At the outset, it is worth emphasizing that the Government is *not* asserting that if the Court grants Lewis's petition, it could or should avoid resolving the proper scope of Section 2255(e) in this case. Instead, the Government is just asserting that Lewis's habeas petition might ultimately be denied for a *different* reason, wholly *apart* from the limitations imposed by

Section 2255(e). BIO 5. The Government's alternative theory that Guidelines errors are never cognizable on collateral review applies regardless of whether that review proceeds under Section 2241 or Section 2255.

That theory is also entirely new to this case. It was not raised or addressed below. Both lower courts rejected Lewis's petition solely because, under Tenth Circuit precedent, he could not show his Section 2255 remedy was "inadequate or ineffective to test the legality of his detention," as required by Section 2255(e). Pet. App. 6a, 10a-13a (citation omitted).

If this Court grants review, it will not need to address the Government's alternative theory in the first instance. Rather, the Court can and should simply resolve the Section 2255(e) question presented in the petition.

If Lewis prevails, the Court can then remand the case for further proceedings. *That* will be the proper time for the Government to advance its alternative theory, and for the lower courts to consider it after full briefing. Whether that theory has merit should not affect this Court's decision on certiorari.

b. In any event, the Government's alternative theory is mistaken. In recent years, lower courts have fiercely debated the cognizability of Guidelines errors on collateral review, with distinguished judges lining up on both sides. This Court should not short-circuit the ongoing debate or preemptively assume Lewis's habeas petition will fail on remand.

Indeed, the better view is that an error in applying the Sentencing Guidelines *is* a valid basis for collateral relief in appropriate circumstances. Non-constitutional errors are cognizable on collateral

review when they constitute a "fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (citation omitted). Common sense suggests that this standard is satisfied here.

Due to binding circuit precedent in effect at the time of sentencing, Lewis was erroneously treated as a career offender under U.S.S.G. § 4B1.1. Lewis then had no meaningful way to challenge that designation. Indeed, the Fifth Circuit rejected his ineffective-assistance claim because his counsel had "*no legal basis* on which to object to the enhancement." Pet. App. 23a (emphasis added). Because of the erroneous designation, Lewis's Guidelines minimum skyrocketed upwards *nearly six years*—from 120 months to 188 months. Pet. 5-6. And the court pegged Lewis's sentence to the Guidelines when imposing his 188-month sentence. *Id.*

Lewis is thus serving an extra 68 months—almost six years—in prison based on an erroneous career-offender designation that he had "no legal basis" (Pet. App. 23a) to challenge at sentencing. That twisted result cannot be squared with basic principles of fairness or due process. Collateral review exists to correct this sort of severely prejudicial error.

This Court's precedent supports that conclusion. In *Johnson v. United States*, 544 U.S. 295, 302-03, 311 (2005), the Court implicitly recognized that Section 2255 can be used to attack a Guidelines career-offender designation triggered by a prior conviction that has since been vacated. For similar reasons, Section 2255 is also available to attack career-offender designations resting on prior convictions that never should have triggered such designations—as a matter of law—in the first place.

More generally, this Court has repeatedly recognized that the Guidelines are "the lodestone of sentencing," *Peugh v. United States*, 569 U.S. 530, 544, 541 (2013), and thus that Guidelines errors "seriously affect the fairness, integrity, and public reputation of judicial proceedings," *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1911 (2018). In one context, the Tenth Circuit (which would address Lewis's case on remand) has held that an error satisfying that latter standard would constitute a "miscarriage of justice." *United States v. Hahn*, 359 F.3d 1315, 1327, 1329 (10th Cir. 2004). That court has also expressly assumed that a Guidelines error that lengthens the defendant's sentence by 57 months would be cognizable on collateral review because of the "magnitude" of the harm. *United States v. Talk*, 158 F.3d 1064, 1069-70 (10th Cir. 1998), *cert. denied*, 525 U.S. 1164 (1999). Scholarly commentators have endorsed that same basic conclusion.[1]

The Government notes that four circuits hold that Guidelines errors are not cognizable on collateral review. BIO 5. But each of the relevant decisions was "extremely close and deeply divided." *United States v. Foote*, 784 F.3d 931, 939 (4th Cir.), *cert. denied*, 135 S. Ct. 2850 (2015). Two were *en banc* reversals of panel decisions holding that Guidelines errors *can* be cognizable on collateral review; three were issued over vigorous dissents; and the fourth expressly

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[1] *See, e.g.*, Kirby J. Sabra, *Miscarriage of Justice: Post-*Booker *Collateral Review of Erroneous Career Offender Sentence Enhancements*, 96 Boston Univ. L. Rev. 261 (2016); Matthew Benjamin Rosenthal, *Miscarriage of Justice: The Cognizability of § 2255 Claims for Erroneous Career Offender Sentences*, 50 Georgia L. Rev. 1309 (2016).

rejected the result reached by a prior panel of the same court.[2] Of the 37 federal judges involved in the decisions cited in footnote 2, 17 agreed that Guidelines errors *are* cognizable in appropriate circumstances.

In short, Lewis has a strong argument that the undisputed error in his case is cognizable. The Government's alternative theory is controversial and unresolved in the Tenth Circuit. It provides no basis for denying review of the entirely independent Section 2255(e) question raised in Lewis's petition.

2. *Wheeler* Is An Inferior Vehicle

The Government is also wrong to assume that *Wheeler* is a superior vehicle for resolving the Section 2255(e) question. In fact, *Wheeler* suffers from three defects that make this case far more attractive.

First, the Fourth Circuit's decision is interlocutory, and further proceedings could moot the Government's appeal to this Court. Wheeler prevailed on the Section 2255(e) issue, but his habeas petition was remanded and he is currently awaiting a district court decision on the merits. If Wheeler wins on the merits, he will be resentenced and the Government's certiorari petition will remain live. But

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[2] *See Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014) (5-4 *en banc* decision overturning 3-0 panel decision, 727 F.3d 1076 (11th Cir. 2013)), *cert. denied*, 135 S. Ct. 1836 (2015); *Sun Bear v. United States*, 644 F.3d 700, 705 (8th Cir. 2011) (6-5 *en banc* decision overturning 3-0 panel decision, 611 F.3d 925 (8th Cir. 2010)); *Hawkins v. United States,* 706 F.3d 820 (7th Cir. 2013) (2-1 panel decision, followed by 5-4 denial of *en banc* rehearing, 725 F.3d 680 (7th Cir. 2013), *cert. denied*, 571 U.S. 1197 (2014)); *Foote*, 784 F.3d at 942, 935 (4th Cir. 2015) (3-0 panel decision rejecting reasoning of 2-1 panel in *Whiteside v. United States*, 748 F.3d 541, 551 (4th Cir. 2014)).

if he loses or receives the same sentence, that petition will become moot. So too if Wheeler's resentencing drags on until he finishes serving his current sentence in October 2019. *See* ECF No. 30, at 3, No. 3:11-cv-603-RJC (W.D.N.C. Nov. 7, 2018) ("*Wheeler* Mot.") (Government's acknowledgment that its appeal to this Court could become moot).

This Court ordinarily will "not issue a writ of certiorari to review . . . an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case." *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893). That policy makes especially good sense when the case is proceeding in the lower courts, because "[s]ubstantial progress toward a final decision creates the possibility that the issues before the Supreme Court will become moot." Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 4.18, at 285 (10th ed. 2013). No reason exists to depart from that general rule in *Wheeler*, especially because the Court can review the exact same question presented in *this* case—an appeal from a final judgment that raises no mootness concerns whatsoever.

Second, *Wheeler* contains a threshold waiver problem that could prevent this Court from resolving the merits of the Section 2255(e) issue. In the district court, the Government *affirmatively conceded* that Wheeler's petition was cognizable under Section 2255(e) because he lacked an "[]adequate" and "[]effective" means of challenging his conviction due to the existence of adverse circuit precedent. *United States v. Wheeler*, 886 F.3d 415, 422-23 (4th Cir. 2018). On appeal, the Government flip-flopped to its new position. *Id.*; *see* Pet. 21-23. But the flop came

too late: Having already conceded the Section 2255(e) issue in the district court, the Government waived the right to contest that issue later.

If this Court grants certiorari, Wheeler will surely argue that the Court must enforce the Government's original concession and affirm on that threshold basis. Whether Wheeler is right turns on a tricky question of its own—whether Section 2255(e)'s limitation on habeas review is jurisdictional (and therefore non-waiveable). As the Government acknowledges, there is a circuit split on that question, and the Seventh Circuit has held that Section 2255(e) is *not* jurisdictional and therefore *can* be waived. *Wheeler* Pet. 28; *Harris v. Warden*, 425 F.3d 386, 388 (7th Cir. 2005) (Easterbrook, J.), *cert. denied*, 546 U.S. 1145 (2006).

Granting certiorari in *Wheeler* will thus inevitably provoke a messy threshold dispute over waiver and jurisdictionality. Recognizing as much, the Government suggests (at 28) that the Court can add an additional question to its own case. That's a clear tip-off that *Wheeler* is an imperfect vehicle for review. Indeed, if this Court ended up adopting the Seventh Circuit's jurisdictionality analysis, it would almost certainly rule against the Government without considering the merits of the Section 2255(e) issue at all—leaving intact the 9-2 split that the Government says should be resolved "now." No such threshold problem exists here.[3]

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[3] The *Wheeler* petition asserts (at 28-29) that this Court could resolve the merits of the Section 2255(e) issue *first*, and only later consider whether that provision is jurisdictional and whether to enforce the Government's initial concession. But that would be a strange sequence in which to consider the issues,

Finally, Wheeler is an inferior vehicle because it will inevitably prevent this Court from resolving the Section 2255(e) issue for at least a year.

The Government took its time in bringing *Wheeler* to this Court. It filed its petition on October 3, 2018—189 days after the panel decision, 114 days after the denial of rehearing, and 29 days after Lewis filed his own petition. As a result of that delay, this Court is unlikely to consider whether to grant certiorari until mid-February 2019. As the Government has acknowledged, even if the Court grants certiorari, "*any review by [this] Court is unlikely to occur until its October 2019 Term*." *Wheeler* Mot. 2 (emphasis added).

This Court should not wait for *Wheeler*. Everyone agrees that the Section 2255(e) issue is pressing, important, and should be resolved "*now*." *Wheeler* Pet. 29 (emphasis added); *id.* (stressing need for "timely resolution"); *see also* Pet. 1-4, 24-26. As Judge Agee has explained, the issue is "best considered by the Supreme Court at the *earliest possible date*." *United States v. Wheeler*, 734 F. App'x 892, 893 (4th Cir. 2018) (emphasis added) (respecting denial of rehearing).

This case presents the best opportunity for the Court to definitively interpret Section 2255(e) and resolve a circuit split that all agree deserves immediate attention. Ultimately that may explain why the Government has only half-heartedly opposed the petition in this case, relying on only one ground that presents no actual obstacle to review. The Court

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because the waiver question poses a threshold issue that potentially obviates any need to resolve the Section 2255(e) question at all.

should seize the opportunity to settle the Section 2255(e) issue here and now.

CONCLUSION

The petition for certiorari should be granted.[4]

Respectfully submitted,

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[4] If this Court concludes that *Wheeler* is a better vehicle for review of the Section 2255(e) issue, it should hold this case and then either grant plenary review (if *Wheeler* becomes moot); GVR (if the Fourth Circuit's *Wheeler* decision is affirmed); or deny (if that decision is reversed).