No. 18-7444

IN THE SUPREME COURT OF THE UNITED STATES

CHAD TALADA,
Petitioner,

v.

DAVID V. COLE,
Sheriff, Steuben County Jail
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY ARGUMENT

The Government simultaneously minimizes the general importance of the correct application of Section 2255(e)'s saving clause and the inter-circuit disagreement over the meaning of the clause's "inadequate or ineffective" language. According to the Government, the Court should rest assured that the courts of appeals have the essentials

relating to the scope of the clause well in hand. Br. in Opp. 14. The Government's concerns over the saving clause conflict have cooled considerably from when it petitioned this Court to grant a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to resolve a "widespread" and "entrenched" split on the scope of the saving clause in *United States v. Wheeler*, No. 18-420, Pet. at 12, 23 (Oct. 3, 2018). At that time, the Government asked this Court to intervene to "provide [ ] necessary clarity" because, although the Department of Justice repeatedly corrected its interpretation of the clause to foster a uniform interpretation, its efforts had not alleviated the conflict. *Id*. at 13. Despite the Department's efforts, the divide over the proper application of Section 2255's saving clause has worsened, rendering the conflict intolerable.

Regarding the conflict over district courts' authority to entertain actual innocence claims by way of Section 2255's saving clause, the Government offers no analysis. Nor does it wage a defense against Mr. Talada's contention that the Attorney General violated the Administrative Procedures Act [hereinafter APA], 5 U.S.C. § 553, when

he promulgated regulations making the criminal provisions of the Sexual Offender Registration and Notification Act [hereinafter SORNA] retroactive to sex offenders whose qualifying sex offenses pre-dated SORNA's enactment. Instead, the Government dismisses Mr. Talada's cause as "an unsuitable vehicle" because the lower courts failed to analyze the APA claim on its merits. Br. in Opp. 13. In doing so, the Government does not weigh in on either side of the disagreement or address the importance of the issue to Mr. Talada's core claim: that he is eligible for relief under Section 2255's saving clause because is actually innocent of the SORNA violation due to the Attorney General's APA violation.

Finally, the Government rolls out a list of alternative arguments as to why Mr. Talada's case is an unsuitable vehicle for this Court's review ranging from, first, a claim that Mr. Talada had no right to collateral review under the law of the case because the Fourth Circuit panel's summary rejection of his claim on direct appeal due to binding contrary circuit precedent constituted on-the-merits review and, second, a claim of waiver that is contradicted by the record below. Br. in Opp.

17-19. That these claims were never raised below is unsurprising as the claims are meritless.

This case presents an opportunity for the Court to offer needed guidance on the scope of Section 2255's saving clause at a time when even the Government has conceded that the Court's intervention is necessary to resolve a split it described as "widespread" and "entrenched." *Wheeler,* Pet. at 12, 23. Mr. Talada's case also provides a vehicle for the Court to address the savings clause vis-a-vis actual innocence claims and, finally, the conflict between the circuit courts of appeals over the validity of the SORNA interim rule.

I. As the Government Admitted in *Wheeler*, the Saving Clause Conflict is Intractable and will not be Resolved Absent this Court's Intervention.

In *Wheeler*, the Government charted the evolution of its interpretations of Section 2255's saving clause and acknowledged that its efforts to ameliorate the conflict over the clause's meaning had been unsuccessful. *Wheeler*, Pet. at 13. Prior to 1998, the Government believed that the clause was not available to address statutory claims.

Id. at 13. After 1998, the Department reversed its restrictive position in light of the contrary holdings by panels of the Second, Third and Seventh Circuit Courts of Appeals in *Triestman v. United States*, 124 F.3d 361, 376 (2d Cir. 1997), *In re Dorsainvil*, 119 F.3d 245, 248-252 (3d Cir. 1997), and *In re Davenport*, 147 F.3d 605 (7th Cir. 1998). *Wheeler*, at 13. Years later, when an Eleventh Circuit panel, in *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir.) (*en banc*), *cert. denied*, 138 S.Ct. 502 (2017), took a contrary position and aligned with the holding of a Tenth Circuit panel, in *Prost v. Anderson*, 636 F.3d 578, 597 (2011), the Government switched its position once again and returned to its restrictive pre-1998 interpretation of the clause. *Wheeler,* Pet. at 13.

By the time it sought certiorari in *Wheeler*, the Government recognized that the conflict between the circuit courts of appeals on the scope of the saving clause was "entrenched" and caused identical claims of litigants to be treated differently, "meaning that the cognoscibility 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."

Wheeler, Pet. at 25. Here, the cognoscibility of Mr. Talada's claim, that the Attorney General's rule relating to the retroactivity of SORNA was not properly promulgated, is directly related to where he is held in detention. A petitioner who is held within the jurisdiction of a circuit court of appeals that has ruled against the Government on this issue will be eligible for different treatment than one who is held where the interim rule has been upheld.

Despite the Government's best efforts over the last 20 years to foster uniformity on the scope of Section 2255's saving clause, inter-circuit disagreement has persisted and, over the last ten years, has intensified. "The conflict on the scope of the saving clause has produced, and will continue to produce, divergent outcomes for litigants in different jurisdictions on an issue of great significance." *Wheeler,* Pet. at 13.

This Court must step in to offer needed guidance on this important question even if the Government's concerns over the disagreement have dissipated.

II. Those, Like Mr. Talada, who were Convicted of SORNA Violations under the Interim Rule are Innocent or Guilty Based Purely on their District of Conviction.

The Government avoids comment on the disagreement between the circuit courts of appeals over the validity of the interim rule although it has persisted for nearly ten years and has resulted in starkly different treatment of criminal defendants nationwide by virtue of where they were convicted. The interim rule has been superseded several times by later specifications but it is still the subject of litigation. Those, like Mr. Talada, who were convicted of SORNA violations under the interim rule many years ago are still subject to the penalties associated with these convictions and are under terms of supervised release or imprisonment. The Court should take this opportunity to resolve the outstanding interim rule conflict.

The Government is not in a position to resolve this conflict. Its position on guilt or innocence of a SORNA violation has understandably varied based on the location of the district of conviction in order to be consistent with binding circuit authority. Where the interim rule has been found to be invalid, courts - and even the Government - have

concluded that defendants' SORNA convictions should be vacated because these defendants are actually innocent. *See, e.g.*, *United States v. Dayman*, 07-CR-27-H-DWM, Document 46 (D. Mont. 2012); *Pendleton v. United States*, 08-CR-59 (GMS), 13-CV-127(GMS), 2016 WL 402857, 2016 U.S. Dist. LEXIS 11857 (D. Del. 2016); *Anderson v. United States*, 07-CR-168 (S.D. OH 2010); *Logel v. United States*, 08-CR-83, 10-CV-224 (E.D. TN 2010); and *Sipple v. United States*, 09-CR-31 (S.D. OH 2010).

Nor has the advent of later specifications eliminated the need for this Court's guidance. In 2017, the conflict intensified when the District of Columbia Circuit Court of Appeals determined that the interim rule was invalid. As a result of this unresolved conflict, criminal defendants previously convicted of a SORNA violation under the interim rule are eligible for collateral relief from their convictions purely based on the geographic location of their district of conviction. The very same conduct is viewed as innocent in some places and criminal in other places.

This disagreement between the circuit courts of appeals has produced, and will continue to produce, starkly different outcomes for

litigants within different jurisdictions on a fundamentally important issue: whether those SORNA offenders whose convictions were subject to the interim rule are actually innocent of a SORNA violation. The Court should grant certiorari in order to resolve this significant conflict.

III. Mr. Talada's Case is an Excellent Vehicle for the Court's Review.

A. Mr. Talada is Not Barred from Collateral Review by the Law of the Case Because He has Never Received On-the-Merits Review of His Claim.

The Government argues that, under the law of the case and the holding of *Sanders v. United States*, 373 U.S. 1 (1963), he is barred from relitigating his SORNA claim because he received an adverse determination of the claim on its merits in his direct appeal to the Fourth Circuit Court of Appeals. Br. in Opp. at 20. This position is a departure from the one it has taken throughout the case below: that Mr. Talada's *only* relief was by way of Section 2255 regardless of the Fourth Circuit panel's summary affirmance of his conviction. Now the Government argues for the first time that, because Mr. Talada was unsuccessful in the direct appeal of his claim, the prior determination

was on the merits and bars him from relitigating the claim at all. Br. in Opp. at 20.

The Government's argument should be rejected. A panel of the Fourth Circuit Court of Appeals summarily affirmed his conviction without engaging in any analysis of his claim. Instead it noted that it was constrained to deny the claim because of adverse circuit precedent. Under these circumstances, the law of the case doctrine should not be applied because the review was not on the merits.

The Government is correct that a defendant may not relitigate a claim on collateral review that was previously determined on its merits against him where reaching the merits on collateral review does not serve the ends of justice. *Sanders*, 373 U.S. at 15. It previously advanced this argument in *Linder v. United States*. Brief in Opposition, *Linder v. United States*, 588 U.S. 1047 (2009) (No. 08-1575) (Mem.). However, it conceded there, as it should here, that the "[a]pplication of [the] bar [ ] depends on a prior ruling on the merits." *Id*. at 10 (internal citation omitted). The Government incorrectly construes Mr. Talada's

direct appeal to the Fourth Circuit Court of Appeals as review on the merits. The panel conducted no analysis of Mr. Talada's claim; it was foreclosed from granting relief due to adverse precedent.

A litigant who faces an appellate panel that is constrained from granting relief due to adverse circuit precedent "has no true day in court on his claim or defense." John McCoid, *Inconsistent Judgments*, 48 WASH. & LEE L. REV. 487, 513 (1991). "To the extent that a court applies the rules of stare decisis in a way that makes it impossible, practically speaking, for a litigant to convince a court to overrule erroneous precedent, the court deprives that litigant of a hearing on the merits of her claim." Amy C. Barrett, *Stare Decisis and Due Process*, 74 COLO. L. REV. 1011, 1014-1015 (2003).

Regardless of the persuasiveness of Mr. Talada's arguments to the Fourth Circuit panel, that panel was constrained to deny him relief due to prior adverse precedent. Unlike a first-in-time litigant, who ordinarily receives the only shot of on-the-merits review of a legal issue, later litigants, like Mr. Talada, face the "very strong presumption in the

federal courts [ ] that precedent will stand." *Id*. at 1019; *see Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

Under these circumstances, the Fourth Circuit Panel that was powerless to grant Mr. Talada relief due to binding precedent did not review his claim on the merits. As a result the law of the case doctrine should not be applied to bar his claim here.

B. Mr. Talada did not Waive his Right to Appeal.

The Government also responds to the petition by arguing, for the first time, that Mr. Talada waived his right to bring any collateral attack of his 2009 conviction – including the claims he had expressly retained the right to appeal. Br. in Opp. at 21-24. However, there are three problems with the government's claim. First, in both the Southern District of West Virginia and in the Western District of New York, the plea agreements affirmatively provided that Mr. Talada retained the right to challenge his SORNA claim. Second, the record fails to show that Mr. Talada knowingly and intelligently waived his right to pursue

the same claims in a collateral attack of his 2009 conviction. And third, the record shows that the District Court advised Mr. Talada that he had a right to appeal the judgment which, under Fourth Circuit law, would circumscribe any claim that the plea agreement included a waiver. *See United States v. Manigan*, 592 F.3d 621, 628 (4th Cir. 2010).

The government is correct that the written plea agreement contained an appellate waiver pertaining to his guilty plea and his conviction. See *United States v. Talada*, No. 08-cr-269, Docket Item 40, at 4 (S.D. W.Va. June 11, 2009). However, Mr. Talada also preserved his right to challenge the District Court's denial of his motion to dismiss the indictment:

> Notwithstanding the waiver of appeal provision of paragraph ten of this plea agreement, pursuant to Fed. R.Crim.P. 11(a)(2), Mr. Talada reserves the right, in a timely appeal from the final judgment in this case, to have the United States Court of Appeals for the Fourth Circuit review the District Court's order denying defendant's Motion to Dismiss, should the District Court deny the defendant's Motion to Dismiss that is currently pending before it. If Mr. Talada prevails on appeal, he may withdraw his plea under this agreement, and this agreement shall be void.

Id. at 4-5 (conditional plea). Mr. Talada's direct appeal and subsequent petition for a writ of certiorari were based on this preserved right.

Mr. Talada's plea agreement in the Western District of New York permits him to collaterally attack his conviction for failure to register as a sex offender based on the retroactivity of SORNA:

> The defendant reserves the right to collaterally attack in a separate proceeding his conviction for failure to register as a sex offender based on the retroactivity of the SORNA statute. The government reserves the right to oppose any such proceeding or action filed by the defendant.

See *United States v. Talada*, No. 15-cr-6117, Docket Item 19, at 7 (W.D.N.Y. Sept. 3, 2015). Thus, it was always the government's intention to allow Mr. Talada to pursue his challenges to SORNA.

The government's argument must also be rejected because, at sentencing, the District Court advised Mr. Talada that, without qualification, he had a right to appeal the Court's judgment:

> Mr. Talada, you have the right to appeal the judgment of this Court. Any Notice of Appeal must be filed with the Clerk not more than ten days from the date of the entry of the judgment order. If you desire counsel on appeal and you're unable to retain counsel, the appropriate court will

> review a financial affidavit filed by you to determine whether or not to appoint counsel.

United States v. Talada, No. 08-cr-269, Docket Item 57, at 23 (S.D. W.Va Dec. 7, 2009) (transcript of Oct. 19, 2009, sentencing proceedings). Immediately after advising Mr. Talada about his right to appeal, the Court asked counsel whether there were "any other matters we need to take up in this case?" *Id.* at 24. The prosecutor, "No, Your Honor." *Id.* If the Court's assessment was incorrect, the Government made no attempt to correct the Court about the appellate waiver.

Based on the record below, Mr. Talada retained his right to appeal. This is demonstrated by his original 2009 plea agreement, the transcript of his sentencing and confirmed by the government's late-minted 2015 plea agreement. For these reasons, the Government's claims of waiver should be rejected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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