No. __-____

IN THE
Supreme Court of the United States

DANIEL H. KING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether someone serving a sentence imposed by the District of Columbia whose physical custody was transferred to the Bureau of Prisons is "in the custody of the Bureau of Prisons" for purposes of 18 U.S.C. § 4248.

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Petitioner Daniel H. King respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's Opinion affirming the denial of Mr. King's motion under Federal Rule of Civil Procedure 60(b) is attached at Pet. App. 1a. The Fourth Circuit's Order denying his Motion for rehearing and rehearing en banc is attached at Pet. App. 3a.

JURISDICTION

The Fourth Circuit issued its opinion on August 28, 2018. Pet. App. 1a. It denied Mr. King's petition for rehearing and rehearing en banc on November 13, 2018. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

> In relation to a person who is in the custody of the Bureau of Prisons, . . . the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined.

18 U.S.C. § 4248(a).

STATEMENT OF THE CASE

Mr. Daniel King is not the typical Bureau of Prisons inmate. He was convicted and sentenced, not by a federal district court, but by the Superior Court of the District of Columbia. He served this sentence, with limited exception, in the Bureau of Prisons. He was physically present in the Bureau of Prisons in 2010 when the United States filed a certificate alleging that Mr. King was a sexually dangerous person under 18 U.S.C. § 4248.

After a hearing, the district court committed Mr. King. He appealed, and the Fourth Circuit affirmed the commitment. In 2016, Mr. King moved the district court, pro se, to vacate his commitment due to his status as a District of Columbia inmate. Two months later, the district court denied the motion in a docket text order relying on the Fourth Circuit's decision in *United States v. Savage*, 737 F.3d 304 (4th Cir. 2013). Mr. King appealed, pro se, and the Fourth Circuit affirmed the district court in an unpublished per curiam decision citing the reasons given by the district court. *See* Case No. 17-6181.

Mr. King, in October 2017, filed a motion with the district court pro se asking the court to vacate his commitment due to his status as a state prisoner. The

district court denied the motion, citing *Savage*, and Mr. King timely appealed pro se. The Fourth Circuit appointed the Office of the Federal Public Defender for the Eastern District of North Carolina to represent Mr. King on that appeal.

Mr. King acknowledged on appeal that the Fourth Circuit's opinion in *Savage* held that inmates serving a sentence imposed by the District of Columbia were in the legal custody of the Bureau of Prisons for purposes of Section 4248. He nonetheless contended that *Savage* was wrongly decided because inmates sentenced by the District of Columbia are in the physical, but not legal, custody of the Bureau of Prisons.

A panel of the Fourth Circuit, relying on *Savage*, affirmed the district court. Mr. King petition for rehearing and rehearing en banc, which the Fourth Circuit also denied.

This petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant review because this case presents an important question of federal law that should be decided by this Court. Sup. Ct. R 10(c). The United States certifies individuals under Section 4248 only in the Eastern District of North Carolina. Thus, no circuit split can develop on this question. This Court's review is the only way to correct the Fourth Circuit's erroneous holding in *Savage* and establish that individuals serving a sentence imposed by the District of Columbia are not in the legal custody of the Bureau of Prisons.

A. United States v. Savage was wrongly decided.

Savage holds "that D.C. offenders are in the legal custody of BOP for purposes of Section 4248." 737 F.3d at 309. This is wrong. As demonstrated below, "custody" for purposes of Section 4248 means legal, not physical, custody. And District of Columbia inmates are always in the legal custody of the District of Columbia—not the Bureau of Prisons. This Court should grant certiorari to overrule *Savage's* holding to the contrary.

1. Section 4248 requires the Bureau of Prisons to have legal, not merely physical custody over an individual in order to certify him.

Section 4248 grants the government the power to civilly commit only those individuals "in the custody of the Bureau of Prisons." 18 U.S.C. § 4248(a). The Fourth Circuit addressed the meaning of "in the custody of the Bureau of Prisons" in *United States v. Joshua,* 607 F.3d 379 (4th Cir. 2010). The respondent in Joshua argued that, as a Uniform Code of Military Justice inmate serving his sentence in the Bureau of Prisons, he was not "in the custody of the Bureau of Prisons" for purposes of Section 4248. *Id.* at 381.

Based on a close reading of the text, the Fourth Circuit correctly held that "custody" as used in Section 4248 refers solely to legal custody and does not refer to physical custody. *Id.* at 386-87. The Fourth Circuit concluded that "[t]he statutory language 'in the custody of the Bureau of Prisons' therefore requires the BOP to have ultimate legal authority over the person's detention." *Id.* at 388. Turning to the specific case of Mr. Joshua, the Fourth Circuit noted that the question of whether "'the BOP attended to his daily needs and may even have transferred him

among facilities to further its own interest'" only addressed the physical custody over him and did not affect the operative question of his legal custody. *Id.* at 390 (quoting *United States v. Hernandez-Arenado*, 571 F.3d 662, 667 (7th Cir. 2009)). Instead of focusing on the day-to-day physical custody of Mr. Joshua, the Court examined the legal relationship between Bureau of Prisons, the Army, and Mr. Joshua and concluded that the Army retained ultimate authority over his detention. Therefore, Section 4248 did not apply to Mr. Joshua, and the proceedings against him must be dismissed. *Id.* at 389.

2. The District of Columbia has ultimate legal authority over District of Columbia Offenders; the Bureau of Prisons has physical custody over them.

In determining that the Army, not the Bureau of Prisons, had ultimate legal authority over Mr. Joshua, the Fourth Circuit relied, in part, on the fact that the Army retained clemency authority over him. *Id.* at 390. The Army, to put it simply, maintained the key to the prison cell. The ultimate question of whether Mr. Joshua would stay or go resided, not in the Bureau of Prisons, but in the United States Army. The Army, therefore, had ultimate legal authority over Mr. Joshua.

Mr. King is similarly situated to Mr. Joshua. The District of Columbia Courts, not the Bureau of Prisons or the Attorney General, maintain control over his sentence. For example, if the United States Parole Commission determines that a prisoner will "live and remain at liberty without violating the law, and that his immediate release is not incompatible with the welfare of society, but he has not served his minimum sentence" it may apply to the D.C. Court for a reduction of the

prisoner's minimum sentence. D.C. Code § 24-401c. The D.C. Court, not the Bureau of Prisons or the Attorney General, has jurisdiction to reduce the individual's sentence. *Id.* And the District of Columbia maintains this ultimate authority without regard to the individual's physical custody.

In addition, the power to grant and deny parole for people convicted of D.C. Code violations was transferred from the D.C. Board of Parole to the United States Parole Commission in 1998. District of Columbia law continues to determine the parole eligibility date, mandatory release date, and full term date for D.C. Code offenders, and the United States Parole Commission must apply District of Columbia parole laws and regulations in making its parole decisions. *See* United States Department of Justice, Parole Commission: Frequently Asked Questions, available at https://www.justice.gov/uspc/frequently-asked-questions#q51 (Last visited February 7, 2019). Thus, the District of Columbia–not the Bureau of Prisons or the Attorney General–holds the key to Respondent's prison cell and has ultimate legal authority over him.

In contrast to this ultimate legal authority retained by the District of Columbia, the Bureau of Prisons had physical custody over Mr. King at the time of his certification. In 1997, the National Capital Revitalization and Self-Government Improvement Act of 1997 mandated the closure of the Washington D.C. prison, Lorton Correctional Complex, resulting in all D.C. Code offenders convicted of a felony being housed by the BOP. *See* D.C. Code § 24-101(b).

This housing arrangement provides that for "[f]elons sentenced pursuant to the D.C. Official Code" the "Bureau of Prisons shall be responsible for the *custody*, care, subsistence, education, treatment and training of such persons. *Id* (emphasis added). Applying basic statutory interpretation demonstrates that the use of "custody" in this statute refers to physical custody, not legal custody. Specifically, "[T]he maxim noscitur a sociis is invoked when a string of statutory terms raises the implication that the words grouped in a list should be given related meaning. It provides that several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Worden v. Suntrust Banks, Inc.*, 549 F.3d 334, 346 n.9 (4th Cir. 2008)(internal citations and quotation omitted). In this statute, all of the terms following the term custody: "care, subsistence, education, treatment and training" relate solely to physical custody, not legal custody. Further, none of these terms would be possible without physical custody. Thus, textual construction requires that "custody" for purposes of D.C. Code § 24-101(b) means physical custody and not legal custody.

More fundamentally, "whenever possible, statutes should be read in harmony and not in conflict." *Shumate v. Patterson*, 943 F.2d 362, 365 (4th Cir. 1991)(internal citation omitted). Reading § 24-101(b) to impart legal custody to the Bureau of Prisons would conflict with § 24-401c which, as discussed above, retains legal custody of D.C. Code Offenders in the District of Columbia. Instead, § 24-101(b) and 24-401c can and should be read in harmony. The Bureau of Prisons and

the Attorney General had physical custody over Mr. King, and the District of Columbia had legal custody over him.

3. The District of Columbia's separate and distinct legal status supports the conclusion that the Bureau of Prisons did not have legal custody of Mr. King at the time of certification.

As noted above, proper interpretation of the law relating to District of Columbia inmates in the Bureau of Prisons demonstrates that Mr. King was not "in the custody of the Bureau of Prisons" at the time of certification. Closer examination of the District of Columbia's status in relation to the federal government supports this conclusion.

First, the *Joshua* court relied in part on the fact that military and civilian criminal justice and penal systems are "separate as a matter of law," noting that

> Congress has enacted numerous federal criminal statutes, codified mostly in Title 18, that are applicable to civilians and military personnel alike. Unlike states' criminal laws arising from a plenary power to legislate for the general welfare, federal criminal statutes are somewhat limited because they must derive from Congress's powers specifically enumerated by Article I, Section 8. By contrast, the UCMJ contains broader criminal prohibitions applicable to military personnel, codified in Title 10, that derive from Congress's constitutional authority "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art I, § 8, cl. 14; Accordingly, while a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community.

607 F.3d at 383 (internal quotations omitted).

District of Columbia law and Federal law operate as distinct legal entities. The "numerous federal criminal statutes" discussed in *Joshua* apply to District of

Columbia residents and non-District-of-Columbia residents alike. In contrast, the District of Columbia Code "contains broader criminal prohibitions" applicable to the territory of the District of Columbia "that derive from Congress's constitutional authority" "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States." *Id.*; U.S.Const., Art. I, § 8, cl. 17. "Accordingly, while a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal," the District of Columbia Code "essays more varied regulation of a much larger segment of the activities of the more tightly knit" District of Columbia community. *Joshua*, 607 F.3d at 383.

Over the years, the courts have recognized this distinction. "In many respects the District is an entity separate and apart from the general federal system, the powers of Congress over the District being in the nature of those of a state legislature." *Gilstrap v. Clemmer*, 284 F.2d 804, 808 (4th Cir. 1960). The District of Columbia's "relationship has been characterized as analogous to that of state to national government for certain purposes." *See Milhouse v. Levi*, 548 F.2d 357, 360 n.6 (D.C. Cir. 1976). "Moreover, the Rules of Evidence enacted by Congress to govern actions brought in the local District of Columbia courts have been deemed inapplicable to the federal courts sitting therein due to the distinct and independent nature of the two court systems." *Id.* Further, "District of Columbia prisoners are not to be equated with federal prisoners, nor are their rights necessarily the same." *Curry-Bey v. Jackson*, 422 F.Supp. 926, 931 (D.D.C. 1976). "When the Attorney

General takes custody of persons and designates their place of confinement pursuant to an order of the local Superior Court of the District of Columbia he acts in a non-federal capacity." *Milhouse*, 548 F.2d at 360 n.5.

Thus, just as in *Joshua*, the separate nature of the criminal systems supports the conclusion that a D.C. Code offender differs in kind from a Bureau of Prisons inmate serving a sentence for a violation of a general federal criminal statute. The authority over him derives from the District of Columbia, and it remains in the District of Columbia throughout his criminal sentence. It never vests in the Bureau of Prisons or the Attorney General, notwithstanding the decision to have the Bureau of Prisons administer physical custody over that offender.

Section 4248 itself supports this conclusion. The statute states that, after commitment,

> The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility

18 U.S.C. § 4248(d). The statute further states that the term "State" includes the District of Columbia. 18 U.S.C. § 4247(a)(3).

The District of Columbia operates, for purposes of Section 4248, as a state. The Attorney General does not have plenary legal authority over a committed District of Columbia inmate, but must subordinate his legal authority to the entity with ultimate power over that inmate–the District of Columbia. If and only if the

District of Columbia refuses to exercise such authority does the Attorney General obtain full legal custody of the committed individual.

District of Columbia inmates, therefore, are similarly situated to the citizens of the several states. The Bureau of Prisons and the Attorney General have ultimate legal authority over them if and only if they violate a generally applicable federal criminal statute. If, as in the case with Mr. King, an individual violates the D.C. Code and is subsequently housed in the Bureau of Prisons, he exists there as a contractual boarder, not subject to the ultimate legal authority of the Bureau of Prisons. This Court should grant certiorari to overrule *Savage* and apply this understanding of Section 4248 going forward.

B. This case is a proper vehicle for addressing the question presented.

The procedural posture of this case may make it superficially appear that it is not an appropriate vehicle for certiorari. Specifically, because Mr. King had already raised this question in a prior motion and had it rejected, one could argue that the law of the case doctrine would apply to bar any relief. However, closer examination shows that this Court can easily reach the legal question presented by avoiding the law of the case doctrine and construing his second motion under Federal Rule of Civil Procedure 60.

1. The law of the case doctrine does not make this case an improper vehicle.

In 2016, Mr. King moved the district court, pro se, to vacate his commitment on grounds similar to those raised in this appeal. The district court denied the motion in a docket text entry. Mr. King appealed pro se, and the Fourth Circuit

affirmed in a one-paragraph unpublished per curiam decision citing the district court's reasoning. One could thus potentially argue that the first appeal established the law of the case regarding this issue, barring this appeal. This Court should decline to apply the law of the case here because (1) the initial motion and appeal were made pro se, (2) neither the district court nor the Fourth Circuit provided in depth reasoning in those opinions, and (3) possible en banc proceedings in *United States v. Welsh* may overrule the law upon which the first appeal relied.

"The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009)(internal quotation omitted). Accordingly, "once the decision of an appellate court establishes the law of the case, it must be followed in all subsequent proceedings in the same case in the trial court . . . ." *Id.* (internal quotation omitted).

The law of the case doctrine is "an amorphous concept," not a rigid rule of law. *Pepper v. United States*, 562 U.S. 476, 506 (2011)(internal quotation omitted). It is meant to "direct[] a court's discretion," not to "limit a tribunal's power." *Id.* (internal quotation omitted). As such, the courts have recognized several specific exceptions to the law of the case: "(1) a subsequent trial producing substantially different evidence; (2) a change in applicable law; or (3) clear error causing manifest injustice." *Carlson v. Boston Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017)(internal quotations omitted); *see also Pepper*, 562 U.S. at 506-07.

The law of the case, in other words, operates as a discretionary shield meant to prevent courts and litigants from having to spend resources on frivolous re-litigation. It is not a sword designed to prevent meritorious claims from receiving careful consideration in the first place.

This Court should exercise its discretion to decline to apply the law of the case against Mr. King for three reasons. First, Mr. King's first motion and appeal were filed pro se. Neither the district court nor the Fourth Circuit had the opportunity to consider the issue after full briefing by counsel. Additionally, applying the law of the case based on a pro se motion and appeal unfairly penalizes a pro se party for raising an argument without fully understanding the complexity of the rules related to procedural bars.

Second, because the *Savage* panel opinion controlled the first motion and appeal, neither the trial court nor the panel of the Fourth Circuit had the power to address the merits of Mr. King's argument. Thus, the district court resolved the motion in a docket text entry, and the Fourth Circuit summarily affirmed. The parties and the courts did not, therefore, spend many resources addressing the argument. Addressing these arguments on the merits by granting this petition would not be unduly burdensome.

2. This Court should construe Mr. King's motion as a motion made under Rule 60(b). Under that standard, this Court can then address the question presented in this petition.

Mr. King moved to vacate his commitment based on his status as a District of Columbia inmate. His motion did not indicate the rule or statute under which he

requested the relief. The district court nonetheless addressed the legal merits of the motion, holding that, under *Savage*, Mr. King was in Bureau of Prison's custody for purposes of Section 4248.

The district court correctly chose to address the legal merits of Mr. King's motion because courts have a "responsibility to construe pro se filings liberally." *Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017). Liberally construed, Mr. King made his motion under Federal Rule of Civil Procedure 60(b) for "Relief from a Judgment or Order." That rule states, in relevant part, that

> the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(4)-(6).

To the extent this Court views Mr. King's motion under Rule 60(b)(4), the appellate courts review the district court's decision de novo; to the extent it views it under Rule 60(b)(5) or (b)(6), they review the district court's decision for an abuse of discretion. A mistake of law is an abuse of discretion. Thus, regardless of whether this Court construes Mr. King's motion under Rule 60(b)(4), (5), or (6), it can address de novo the question presented.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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