No. 19-1365

# In the Supreme Court of the United States

RAMON HUESO, PETITIONER

*v.*

J. A. BARNHART, WARDEN

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

JEFFREY B. WALL
*Acting Solicitor General*
*Counsel of Record*
BRIAN C. RABBITT
*Acting Assistant Attorney General*
JENNY C. ELLICKSON
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground cognizable on collateral review, with "second or successive" attacks limited to certain claims that indicate factual innocence or that rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. 2255(h). Under 28 U.S.C. 2255(e), an "application for a writ of habeas corpus [under 28 U.S.C. 2241] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained * * * unless it * * * appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

The question presented is whether petitioner, a federal prisoner who previously filed an unsuccessful collateral attack under Section 2255, is entitled to a further collateral attack under Section 2241 based on his claim that a recent change in how the circuit of conviction determines the statutory minimum sentence for recidivist drug offenders requires that he be resentenced.

**ADDITIONAL RELATED PROCEEDINGS**

United States Court of Appeals (9th Cir.):

*Hueso* v. *United States*, No. 20-70413 (Mar. 10, 2020)

*United States* v. *Hueso*, No. 11-35855 (May 15, 2012)

*United States* v. *Hueso*, No. 12-35102 (Mar. 15, 2012)

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page



Statutes and guidelines:

# In the Supreme Court of the United States

No. 19-1365

RAMON HUESO, PETITIONER

*v.*

J. A. BARNHART, WARDEN

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-65a) is reported at 948 F.3d 324. The order of the district court (Pet. App. 66a-78a) is not published in the Federal Supplement but is available at 2018 WL 6172513.

## JURISDICTION

The judgment of the court of appeals was entered on January 9, 2020. The petition for a writ of certiorari was filed on June 8, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Alaska, petitioner was convicted of conspiracy to distribute and possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a) and 846. Pet. App.

10a, 69a, 79a-80a. The district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. *Id.* at 11a, 81a, 83a. The court of appeals affirmed. 420 Fed. Appx. 776.

After an unsuccessful attempt to vacate his sentence under 28 U.S.C. 2255, see Pet. App. 11a, and an unsuccessful petition for a writ of habeas corpus under 28 U.S.C. 2241, Pet. App. 11a, in 2018 petitioner filed a second petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Eastern District of Kentucky, 18-cv-176 Doc. 1 (June 8, 2018). The district court denied the petition, Pet. App. 66a-78a, and the court of appeals affirmed, *id.* at 1a-65a.

1. From 2007 through May 2008, petitioner supplied methamphetamine to co-conspirator Tova Weiss, who in turn distributed the drugs in Ketchikan, Alaska. Presentence Investigation Report (PSR) ¶ 30. Law-enforcement agents arrested petitioner and Weiss on May 6, 2008, midway through Weiss's sale of ten ounces of methamphetamine to an undercover agent. PSR ¶¶ 22-28.

A federal grand jury in the District of Alaska charged petitioner with conspiring to distribute and possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(b)(1)(A) (2006) and 21 U.S.C. 846; and possessing with intent to distribute 50 grams or more of methamphetamine, in violation of 18 U.S.C. 2, 21 U.S.C. 841(a)(1), and 21 U.S.C. (b)(1)(A) (2006). Indictment 2-3. The district court later dismissed the possession-with-intent count on the government's motion, 09-cr-48 Doc. 27, at 1 (Oct. 5, 2009), and petitioner proceeded to trial.

At the time of petitioner's offense, the default statutory sentencing range for conspiring to distribute 50 grams or more of methamphetamine was ten years to life imprisonment, but was 20 years to life imprisonment if the offender had a "a prior conviction for a felony drug offense." 21 U.S.C. 841(b)(1)(A) (2006); see 21 U.S.C. 846. "The term 'felony drug offense'" was defined to include "an offense that is punishable by imprisonment for more than one year under any law * * * of a State * * * that prohibits or restricts conduct relating to narcotic [and certain other] drugs." 21 U.S.C. 802(44) (2006); accord 21 U.S.C. 802(44).

Before trial, the government filed an information under 21 U.S.C. 851, stating that petitioner was subject to an enhanced statutory minimum sentence of 20 years of imprisonment based on a prior "felony drug offense." 21 U.S.C. 841(b)(1)(A) (2006). See 09-cr-48 D. Ct. Doc. 25, at 1-2 (Oct. 2, 2009). The information identified two 2006 Washington drug convictions, both violations of Washington Revised Code § 69.50.4013(1) (2004), as the basis for the enhancement. See 09-cr-48 D. Ct. Doc. 25, at 1-2. Although the information described the two convictions as "possession of methamphetamine with intent to sell" and "possession of cocaine with intent to sell," *ibid.* (capitalization omitted), the government later acknowledged a "clerical error" and clarified that the convictions were for "'possession'" of each drug, rather than "'possession with intent to sell,'" 10-30017 Gov't C.A. Br. 25 (Sept. 2, 2010). Under Washington Revised Code § 69.50.4013 (2004), petitioner's prior drug offenses each carried a maximum penalty of five years of imprisonment, while the state sentencing guidelines set a presumptive maximum term of six months of imprisonment, and petitioner had received concurrent terms

of 40 days of imprisonment. Pet. App. 10a-11a (citing Wash. Rev. Code §§ 69.50.4013(2), 9A.20.021(1)(c) (2004)).

The jury found petitioner guilty on the conspiracy count. Pet. App. 69a. At sentencing in the federal case, petitioner did not dispute that his Washington drug convictions were prior convictions for a felony drug offense that triggered an enhanced statutory minimum sentence of 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A) (2006). Pet. App. 11a. The district court sentenced petitioner to 20 years of imprisonment, to be followed by ten years of supervised release. *Id.* at 81a, 83a.

The court of appeals affirmed. 420 Fed. Appx. 776. Petitioner did not dispute on appeal that his prior Washington convictions were for "felony drug offense[s]" within the meaning of 21 U.S.C. 841(b)(1)(A) (2006), arguing only (as relevant here) that the government had failed to comply with the notice requirements of 21 U.S.C. 851. See 10-30017 Pet. C.A. Br. 21-23 (July 1, 2010). The court of appeals rejected that argument, finding the government's Section 851 information "sufficient to give [petitioner] clear notice of the crime the government intended to use as the basis for its request for an enhanced sentence, despite the information's errors and omissions." 420 Fed. Appx. at 776.

2. Petitioner later filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, raising again some of the claims that he had pressed on direct appeal and also claiming that he had received ineffective assistance of trial counsel. 09-cr-48 D. Ct. Doc. 100, at 1 (Sept. 14, 2011). The district court denied the motion, *id.* at 3, and denied a certificate of appealability, 09-cr-48 D. Ct. Doc. 109 (Jan. 30, 2012). The court of appeals

also denied a certificate of appealability. 11-35855 C.A. Order (May 15, 2012).

In 2013, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Eastern District of Kentucky, the district in which he was confined. Pet. App. 11a. As relevant here, petitioner contended that *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010), and *United States* v. *Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc), established that his prior Washington drug convictions were not "felony drug offenses" and that his statutory minimum sentence thus should have been ten years of imprisonment, rather than 20 years. Pet. App. 11a-13a. The court denied the petition, determining in part that circuit precedent precluded petitioner from challenging an alleged sentencing error in a Section 2241 petition. *Id.* at 13a (citing *Hueso* v. *Sepanek*, No. 13-cv-19, 2013 WL 4017117, at *5 (E.D. Ky. Aug. 6, 2013)).

Approximately three years later, the Sixth Circuit stated in *Hill* v. *Masters*, 836 F.3d 591 (2016), that a defendant may properly bring a habeas petition under Section 2241 if (1) the defendant was sentenced under "the mandatory guidelines regime" that predated *United States* v. *Booker*, 543 U.S. 220 (2005); (2) the defendant is foreclosed from filing a successive petition under 28 U.S.C. 2255; and (3) "a subsequent, retroactive change in statutory interpretation by the Supreme Court reveals that a previous conviction is not a predicate offense for a career-offender enhancement." *Hill*, 836 F.3d at 599-600.

3. In 2018, petitioner filed a second petition for a writ of habeas corpus under 28 U.S.C. 2241 in the

Eastern District of Kentucky. 18-cv-176 D. Ct. Doc. 1.[1] As relevant here, petitioner again contended that *Carachuri-Rosendo* and *Simmons* established that he was ineligible for an enhanced sentence under Section 841(b)(1)(A) on the theory that those cases established that his prior Washington drug convictions were not "punishable by imprisonment for more than one year." 21 U.S.C. 802(44) (2006). See Pet. App. 70a-71a; 18-cv-176 D. Ct. Doc. 1, at 7. Petitioner also argued that, in light of *Hill* v. *Masters*, the district court had jurisdiction to entertain his habeas petition under the so-called "saving clause" in 28 U.S.C. 2255(e). 18-cv-176 D. Ct. Doc. 1-1, at 7-9. Ordinarily, a federal prisoner may seek post-conviction relief only by motion under 2255; a habeas petition under Section 2241 "shall not be entertained." 28 U.S.C. 2255(e). But the saving clause creates an exception when it "appears that the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." *Ibid.*

The district court denied petitioner's second Section 2241 petition. Pet. App. 66a-78a. The court explained that circuit precedent established that "[a] federal prisoner generally may not use a § 2241 petition to challenge the enhancement of his sentence." *Id.* at 71a (citing *United States* v. *Peterman*, 249 F.3d 458, 461 (6th Cir. 2001)). Although *Hill* v. *Masters* had "articulated a very narrow exception to this general rule," the court found that petitioner's Section 2241 claims did not satisfy the requirements of that exception because, as rel-

---

[1] Petitioner was subsequently relocated to Moshannon Valley Correctional Center in Philipsburg, Pennsylvania. See Fed. Bureau of Prisons, U.S. Dep't of Justice, *Find an Inmate*, https://www.bop.gov/inmateloc (search for record for register 35937-086).

evant here, petitioner "was sentenced in 2010 * * * under a discretionary guidelines regime." *Id.* at 72a. The court further determined, based on Ninth Circuit precedent, that petitioner had "failed to show that the maximum sentence he faced with respect to his prior Washington State convictions was anything other than the maximum five-year term provided by Washington statutory law." *Id.* at 78a; see *id.* at 75a-78a.

4. While petitioner's appeal from the denial of his second Section 2241 petition was pending in the Sixth Circuit, the Ninth Circuit concluded in *United States* v. *Valencia-Mendoza*, 912 F.3d 1215 (2019), that when determining whether a defendant's prior conviction qualifies as a "felony" that is "'punishable' by more than one year" of imprisonment under Sentencing Guidelines § 2L1.2, comment. (n.2) (2015), "the [sentencing] court must examine both the elements and the sentencing factors that correspond to the crime of conviction." 912 F.3d at 1222 (emphasis omitted). The court of appeals acknowledged that it had previously held otherwise, but it concluded that those earlier holdings were "'clearly irreconcilable'" with this Court's decisions in *Carachuri-Rosendo* and *Moncrieffe* v. *Holder*, 569 U.S. 184 (2013). *Valencia-Mendoza*, 912 F.3d at 1219 (citation omitted). The Ninth Circuit further held that Valencia-Mendoza's 2007 conviction for possession of cocaine, in violation of Washington Revised Code § 69.50.4013 (2007), was, "as actually prosecuted and adjudicated," "punishable under Washington law by no more than six months in prison." *Valencia-Mendoza*, 912 F.3d at 1224.

5. The court of appeals affirmed the denial of petitioner's second Section 2241 petition, rejecting petitioner's contention that *Valencia-Mendoza* entitled him

to habeas relief. Pet. App. 1a-33a. Although it recognized that *Valencia-Mendoza* "undercut" the district court's substantive analysis of petitioner's Section 2241 claim, the court of appeals declined to "opine on the merits of [petitioner's] claim that his state convictions are not 'felony drug offenses,'" observing that "'[d]iverse viewpoints' exist on this 'difficult question.'" *Id.* at 13a-14a (citation omitted). It instead explained that Section 2255(e)'s saving clause did not authorize a third collateral attack, in the form of a habeas petition, based on the Ninth Circuit's revised interpretation of the relevant statutes.

Citing *Hill* v. *Masters*, the court of appeals acknowledged that it has "allow[ed] new habeas petitions even if a later Supreme Court decision affects only a prisoner's sentence, not just the prisoner's conviction." Pet. App. 3a. The court declined, however, "to go further still" and hold that "prisoners barred from filing a second § 2255 motion may seek habeas relief under § 2241 based on new decisions from the *circuit courts*, not just the *Supreme Court*." *Ibid.* The court of appeals explained that "a new statutory decision from a circuit court" does not "suffice to show § 2255's inadequacy" for purposes of the Section 2255(e) saving clause and determined that the saving clause instead requires, at a minimum, "a Supreme Court decision that adopts a new interpretation of a statute after the completion of the initial § 2255 proceedings." *Id.* at 16a-17a; see *id.* at 18a-31a.

The court of appeals explained that the unavailability of habeas relief based on a new circuit statutory-interpretation decision "follows both from § 2255's text and structure and from the backdrop against which Congress enacted § 2255(h)'s limits in 1996." Pet. App. 17a;

see *id.* at 17a-31a. The court observed that Section 2255(h) allows prisoners to file a second Section 2255 motion "only if the Supreme Court adopts a new rule of constitutional law." *Id.* at 3a (citing 28 U.S.C. 2255(h)(2)). "We would write this limit out of the statute," the court stated, "if we held that new rules from the circuit courts (whether of statutory or constitutional law) could render § 2255 'inadequate or ineffective' and trigger the right to a second round of litigation under § 2241." *Ibid.*; see *id.* at 17a-25a. The court of appeals further observed that allowing circuit decisions to satisfy Section 2255(e)'s saving clause would, at a minimum, "trigger a difficult 'choice-of-law question'" regarding which circuit precedent a court should apply when evaluating a Section 2241 claim. *Id.* at 26a (citation omitted); see *id.* at 25a-28a.

The court of appeals accordingly determined that the saving clause in Section 2255(e) did not permit petitioner to bring a Section 2241 claim based on the Ninth Circuit's decision in *Valencia-Mendoza* or the Fourth Circuit's decision in *Simmons*. Pet. App. 31a. The court also reasoned that *Carachuri-Rosendo* could not establish the inadequacy of petitioner's Section 2255 remedies because this Court issued *Carachuri-Rosendo* while petitioner's direct appeal was still pending, "well before" petitioner filed his first Section 2255 motion. *Id.* at 32a. "Indeed," the court of appeals stated, "if [petitioner] had timely raised his claim" under *Carachuri-Rosendo* on direct appeal or in his first Section 2255 motion, "the Ninth Circuit may well have found that its earlier decisions conflicted with this 'higher intervening authority' in his case, not in Valencia-Mendoza's case." *Ibid.*

Judge Moore filed a dissenting opinion. Pet. App. 34a-65a. Judge Moore stated that, in her view, petitioner "should not be foreclosed from" seeking habeas relief under Section 2241 and, if allowed to proceed with such a claim, "would almost certainly prevail based on the intervening change in law." *Id.* at 34a.

**ARGUMENT**

Petitioner renews his contention (Pet. 23-24) that the saving clause in 28 U.S.C. 2255(e) permits a federal prisoner to challenge the applicability of a statutory-minimum sentence in a petition for a writ of habeas corpus under 28 U.S.C. 2241 based on an intervening circuit decision of statutory interpretation, and asserts (Pet. 11-24) a circuit conflict on that issue. Further review is unwarranted. The court of appeals correctly determined that petitioner is not entitled to saving-clause relief here. And this Court recently denied a petition for a writ of certiorari filed by the government seeking review of the circuit conflict on the scope of the saving clause. See *United States* v. *Wheeler*, 139 S. Ct. 1318 (2019) (No. 18-420). The same considerations that would have supported denial of the petition in *Wheeler* would apply here as well. In addition, the petition here would be an unsuitable vehicle in which to address the issue because petitioner would not be entitled to relief even in the circuits that have given the saving clause the most prisoner-favorable interpretation. And the petition here presents a complicated scenario, which courts of appeals have not fully addressed, in which a prisoner seeks to rely on a change in the law in one circuit to obtain habeas relief in another.

1. The court of appeals correctly determined that petitioner cannot seek habeas relief under 28 U.S.C. 2241 for his statutory claim.

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.* In 1996, Congress passed and the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220, which restricted the grounds on which federal prisoners may file second or successive Section 2255 motions. AEDPA limited the availability of such motions to cases involving either (1) persuasive new evidence that the prisoner was factually not guilty of the offense or (2) a new rule of constitutional law made retroactive by this Court to cases on collateral review. 28 U.S.C. 2255(h); cf. *Tyler* v. *Cain*, 533 U.S. 656, 661-662 (2001) (interpreting the state-prisoner analogue to Section 2255(h)). AEDPA did not, however, provide for successive Section 2255 motions based on intervening statutory decisions.

That omission does not imply that a prisoner may seek relief based on an intervening statutory decision through a writ of habeas corpus under 28 U.S.C. 2241 instead. Under the saving clause of Section 2255(e), a prisoner may seek habeas relief only if the "remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). That language indicates a focus on whether a particular challenge to the legality of the prisoner's detention was *cognizable* under Section 2255, not on the likelihood that the challenge would have *succeeded* in a particular court at a particular time.

As the Eleventh Circuit explained in *McCarthan* v. *Director of Goodwill Industries-Suncoast, Inc.*, 851

F.3d 1076 (en banc), cert. denied, 138 S. Ct. 502 (2017), "'[t]o test' means 'to try,'" and "[t]he opportunity to test or try a claim * * * neither guarantees any relief nor requires any particular probability of success; it guarantees access to a procedure." *Id.* at 1086 (citation omitted). "In this way, the clause is concerned with process —ensuring the petitioner an opportunity to bring his argument—not with substance—guaranteeing nothing about what the opportunity promised will ultimately yield in terms of relief." *Prost* v. *Anderson*, 636 F.3d 578, 584 (10th Cir. 2011) (Gorsuch, J.) (emphases omitted), cert. denied, 565 U.S. 1111 (2012).

This case is illustrative. On both direct review and in his initial motion under Section 2255, petitioner had the opportunity to raise, and be heard on, his claim that his Washington drug convictions are not "felony drug offense[s]" under 21 U.S.C. 841(b)(1)(A) (2006). Whether or not the Ninth Circuit had adverse panel precedent on that point, it did not foreclose petitioner from pressing the issue. Cf. *Bousley* v. *United States*, 523 U.S. 614, 623 (1998) ("[F]utility cannot constitute cause [to excuse a procedural default] if it means simply that a claim was unacceptable to that particular court at that particular time.") (citation and internal quotation marks omitted). Indeed, the defendant in *United States* v. *Valencia-Mendoza*, 912 F.3d 1215 (2019), persuaded a panel of the Ninth Circuit to set aside the prior circuit precedent that petitioner contends (Pet. 4) foreclosed his current claim that his Washington convictions are not felony drug offenses. See *Valencia-Mendoza*, 912 F.3d at 1222. In reaching that decision, the Ninth Circuit concluded that those earlier cases were "irreconcilable" with this Court's intervening decision in *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010). *Valencia-*

*Mendoza*, 912 F.3d at 1222. Nothing prevented petitioner from pressing the same argument in his first Section 2255 motion, which petitioner filed after this Court issued *Carachuri-Rosendo*. See Pet. App. 32a.

b. Treating the remedy in Section 2255 as "inadequate or ineffective" to test the legality of petitioner's confinement would place Section 2255(e) at cross-purposes with Section 2255(h). The latter provision allows "second or successive" motions under Section 2255 only when a prisoner relies on "newly discovered evidence" that strongly indicates his 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," 28 U.S.C. 2255(h)(2), neither of which encompasses petitioner's claim here. The logical inference from the language Congress drafted is that Congress intended subsections (h)(1) and (2) to define the *only* available grounds on which a federal inmate who has previously filed a Section 2255 motion can obtain further collateral review of his conviction or sentence. "The saving clause does not create a third exception." *McCarthan*, 851 F.3d at 1090 (emphasis omitted).

In particular, the most natural reason for Congress to have included the specific phrase "of constitutional law" in Section 2255(h)(2) was to make clear that second or successive motions based on new *non*constitutional rules cannot go forward, even when this Court has given those rules retroactive effect. The Congress that enacted AEDPA could not have anticipated the exact statutory claims that have arisen in the ensuing two decades, but necessarily would have understood that statutory claims of some kind would be raised. It would be anomalous to characterize the Section 2255 remedy as "inadequate or ineffective" when the unavailability of

Section 2255 relief in a particular case results from an evident congressional choice concerning the appropriate balance between finality and additional error correction.

Other provisions within Section 2255 reinforce the deliberateness of Congress's design. Under Section 2255(a), a federal prisoner may file an initial motion under Section 2255 "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution *or laws* of the United States." 28 U.S.C. 2255(a) (emphasis added); see *Davis* v. *United States*, 417 U.S. 333, 345-347 (1974). The time limit for seeking Section 2255 relief likewise anticipates nonconstitutional claims, allowing a motion to be filed within one year after "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," 28 U.S.C. 2255(f)(3), without limitation to decisions of constitutional law. See *Dodd* v. *United States*, 545 U.S. 353, 357 (2005).

Section 2255(h), however, contains a similarly worded provision that *does* limit Section 2255 relief following a prior unsuccessful motion to claims relying on intervening decisions of "constitutional law" made retroactive by this Court. 28 U.S.C. 2255(h)(2). That contrast strengthens the inference that Congress deliberately intended to preclude statutory claims following an initial unsuccessful Section 2255 motion. See *Prost*, 636 F.3d at 585-586, 591; cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (presuming that Congress's choice of different language in nearby provisions of the same statute is deliberate). Petitioner's reading of the saving clause would allow such statutory claims precisely when—indeed,

precisely *because*—Section 2255(h) does not. That reading would render AEDPA's restrictions on second or successive motions largely self-defeating. Cf. *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) (referring to the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination").

In contrast, the Tenth and Eleventh Circuits' interpretation of the statute respects the balance Congress struck between finality and error-correction, while still leaving the saving clause with meaningful work to do. For example, the saving clause ensures that some form of collateral review is available if a federal prisoner seeks "to challenge the execution of his sentence, such as the deprivation of good-time credits or parole determinations." *McCarthan*, 851 F.3d at 1093; see *id.* at 1081. Such challenges are not cognizable under Section 2255, which is limited to attacks on the sentence or the underlying conviction. "The saving clause also allows a prisoner to bring a petition for a writ of habeas corpus when the sentencing court is unavailable," such as when a military court martial "has been dissolved." *Id.* at 1093; see *Prost*, 636 F.3d at 588.

c. Petitioner's reading of the saving clause would also have the practical effect of granting federal inmates greater latitude to pursue claims for collateral relief based on intervening statutory decisions than to pursue the constitutional claims that Section 2255(h)(2) specifically authorizes. For example, the requirement that a second or successive Section 2255 motion be certified by the court of appeals to ensure compliance with the strictures of subsection (h), see 28 U.S.C. 2244(b)(3), does not apply to a petition for a writ of habeas corpus

under the saving clause. And a habeas petition is subject neither to AEDPA's one-year limitations period, 28 U.S.C. 2255(f), nor to AEDPA's procedure for obtaining a certificate of appealability if relief is denied by the district court, 28 U.S.C. 2253(c)(1). Petitioner's interpretation of the statute thus provides "a *superior* remedy" to prisoners with purely statutory claims than to those with constitutional claims. *McCarthan*, 851 F.3d at 1091. The Congress that enacted AEDPA in 1996 could not have intended that result when it enacted a provision designed to *limit* the availability of postconviction relief by redefining the point at which finality concerns outweigh any interest in additional error-correction.

Furthermore, allowing an inmate's second or successive collateral attack to proceed by way of habeas corpus subverts "the legislative decision of 1948" that is reflected in Section 2255—namely, that a federal inmate's collateral challenge to his conviction or sentence should, where possible, proceed before the original sentencing court. *Webster* v. *Daniels*, 784 F.3d 1123, 1149 (7th Cir. 2015) (en banc) (Easterbrook, J., dissenting). Congress created Section 2255 to channel postconviction disputes about the legality of a conviction or sentence away from the district of confinement and into the district of conviction and sentencing. See *Hill* v. *United States*, 368 U.S. 424, 427-428 (1962); *United States* v. *Hayman*, 342 U.S. 205, 219 (1952). Allowing a federal inmate to bring claims in the district of his confinement "resurrects the problems that section 2255 was enacted to solve, such as heavy burdens on courts located in districts with federal prisons." *McCarthan*, 851 F.3d at 1092.

Although adherence to the statutory text may lead to "harsh results in some cases," courts are "not free to

rewrite the statute that Congress has enacted." *Dodd*, 545 U.S. at 359. The Department of Justice has accordingly supported efforts to introduce legislation that would enable some prisoners to benefit from later-issued, non-constitutional rules announced by this Court. And, of course, in the interim such prisoners are entitled to seek executive clemency, one recognized ground for which is "undue severity" of a prisoner's sentence. U.S. Dep't of Justice, *Justice Manual* § 9-140.113 (Apr. 2018).

2. Petitioner correctly identifies (Pet. 11-16) a division of authority among the courts of appeals on the scope of the saving clause for statutory claims. As noted above, the Tenth and Eleventh Circuits have correctly determined that habeas relief under the saving clause is unavailable based on a retroactive rule of statutory construction. See *McCarthan*, 851 F.3d at 1086; see also *Prost*, 636 F.3d at 590-591. By contrast, nine courts of appeals—including the Sixth Circuit—would permit such relief in some circumstances. See Pet. 12-14; Pet. App. 8a-9a; Gov't Pet. at 24 n.2, *Wheeler*, *supra* (No. 18-420). The more expansive view of the saving clause in those circuits generally requires a prisoner to demonstrate a "material change in the applicable law" since his initial Section 2255 motion that undermines his conviction—for example, by indicating that his conduct was not in fact a crime on a ground that previously was foreclosed by controlling precedent. *Alaimalo* v. *United States*, 645 F.3d 1042, 1047-1048 (9th Cir. 2011) (citation omitted); see, *e.g.*, *Triestman* v. *United States*, 124 F.3d 361, 379 (2d Cir. 1997) (similar). At least three of the nine circuits, including the Sixth Circuit, have extended that concept to encompass not just claims challenging the conviction, but also some claims challenging

the sentence—for example, when a statutory minimum is no longer applicable. See *United States* v. *Wheeler*, 886 F.3d 415, 427-428 (4th Cir. 2018), cert. denied, 139 S. Ct. 1318 (2019) (No. 18-420); *Hill* v. *Masters*, 836 F.3d 591, 595-596 (6th Cir. 2016); *Brown* v. *Rios*, 696 F.3d 638, 640-641 (7th Cir. 2012).[2] Those circuits generally require the sentencing error to be "sufficiently grave to be deemed a miscarriage of justice or a fundamental defect." *Hill*, 836 F.3d at 595; see *Brown* v. *Caraway*, 719 F.3d 583, 586 (7th Cir. 2013). The Sixth Circuit additionally "requires a Supreme Court decision," rather than a circuit decision, "that adopts a new interpretation of a statute after the completion of the initial § 2255 proceedings." Pet. App. 17a.

But notwithstanding that circuit conflict and its importance, this Court recently declined to review the issue when it was raised in the government's petition for a writ of certiorari in *Wheeler*, *supra* (No. 18-420), last year. The division of authority that petitioner identifies on whether the saving clause is ever available for statutory claims precluded by Section 2255(h) has not meaningfully changed since that time. The court of appeals in this case viewed its decision as consistent with circuit precedent. See Pet. App. 16a-17a. The circuit conflict therefore does not warrant this Court's review any more than it did before. And this Court has recently denied other petitions for writs of certiorari that sought review of the conflict. See, *e.g.*, *Higgs* v. *Wilson*, 140 S. Ct. 934 (2020) (No. 19-401); *Walker* v. *English*, 140

---

[2] A Ninth Circuit panel recently adopted a similar view, see *Allen* v. *Ives*, 950 F.3d 1184 (2020), but the government has filed a petition for rehearing en banc from that decision. As of September 11, 2020, that en banc petition remains pending in the court of appeals. See Docket, *Allen* v. *Ives*, No. 18-35001 (9th Cir.).

S. Ct. 910 (2020) (No. 19-52); *Quary* v. *English*, 140 S. Ct. 898 (2020) (No. 19-5154); *Jones* v. *Underwood*, 140 S. Ct. 859 (2020) (No. 18-9495); *Dyab* v. *English*, 140 S. Ct. 847 (2020) (No. 19-5241).

3. In any event, even if the conflict warranted review in an appropriate case, this is not a suitable vehicle because petitioner would not be entitled to relief even in the circuits that have adopted the most prisoner-favorable interpretation of the saving clause. Those circuits generally have granted relief only when a prisoner can show (1) that his claim was foreclosed by (erroneous) precedent at the time of his sentencing, direct appeal, and initial motion under Section 2255; and (2) that an intervening decision, made retroactive on collateral review, has since established that he is in custody for an act that the law does not make criminal, has been sentenced in excess of an applicable maximum under a statute or under a mandatory sentencing guidelines regime, or has received an erroneous statutory minimum sentence. See, *e.g.*, *Hill*, 836 F.3d at 595-596, 598-600; *Rios*, 696 F.3d at 640-641; see also *Reyes-Requena* v. *United States*, 243 F.3d 893, 902-904 (5th Cir. 2001). Petitioner cannot satisfy those requirements.

Petitioner contends (Pet. 4, 6-7) that, at the time of his sentencing, his present claim was foreclosed by Ninth Circuit precedent holding that a court should "look to the state's statutory maximum sentence and not the maximum sentence available under the state sentencing guidelines" when determining whether a prior conviction for a state drug offense was punishable by more than one year of imprisonment. *United States* v. *Rosales*, 516 F.3d 749, 758 (9th Cir.) (citing *United States* v. *Murillo*, 422 F.3d 1152, 1153-1154 (9th Cir. 2005)), cert. denied, 553 U.S. 1095 (2008); see also

*Murillo*, 422 F.3d at 1153-1154; *United States* v. *Rios-Beltran*, 361 F.3d 1204, 1208-1209 (9th Cir. 2004). But when a panel of the Ninth Circuit reversed the Ninth Circuit's position on that issue in *Valencia-Mendoza*, it found that the rule established by those earlier cases was "irreconcilable" with this Court's 2010 decision in *Carachuri-Rosendo*. *Valencia-Mendoza*, 912 F.3d at 1222. And as the court of appeals observed here, this Court decided *Carachuri-Rosendo* "well before [petitioner] filed his § 2255 motion in June 2011," and petitioner thus could have himself relied on *Carachuri-Rosendo* in that motion or even "on the direct appeal in his criminal case, which was decided in March 2011." Pet. App. 32a.

Accordingly, if petitioner had raised his current claim in his first Section 2255 motion, "the Ninth Circuit may well have found that its earlier decisions conflicted with this 'higher intervening authority' in his case, not in Valencia-Mendoza's." Pet. App. 32a (quoting *Valencia-Mendoza*, 912 F.3d at 1219). Petitioner thus has not shown that his current claim was foreclosed by binding precedent at the time of his direct appeal and first Section 2255 motion. Indeed, as petitioner acknowledges (Pet. 9), his Section 2241 claim originally rested on *Carachuri-Rosendo* and *United States* v. *Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc), which was itself decided while his Section 2255 proceedings were pending, and is, in any event, not controlling precedent outside the Fourth Circuit. Under these circumstances, his reliance on *Valencia-Mendoza* as intervening law that eliminates a preexisting obstacle to relief is misplaced.

This Court has denied petitions for writs of certiorari in cases in which the petitioners would not have been eligible for relief even in circuits that have allowed some

statutory challenges to a conviction or sentence under the saving clause. See, *e.g.*, Gov't Br. in Opp. at 12-14, *Dyab*, *supra* (No. 19-5241); Gov't Br. in Opp. at 21-22, *Venta* v. *Jarvis*, 138 S. Ct. 648 (2018) (No. 17-6099); Gov't Br. in Opp. at 24-27, *Young* v. *Ocasio*, 138 S. Ct. 2673 (2018) (No. 17-7141). The Court should follow the same course here.

4. Petitioner errs in asserting (Pet. 20-21) that this case is "a far better vehicle for review" than *Wheeler*, *supra* (No. 18-420). Pet. 20. Petitioner contends (Pet. 20) that *Wheeler* presented potential mootness concerns because of the possibility that the defendant there would complete his prison sentence before this Court could complete its review. But in fact the district court in *Wheeler* ordered the defendant released approximately eight months before his term of imprisonment would have expired, thereby ensuring that the controversy would remain live. See Letter from Noel J. Francisco, Solicitor Gen., to Scott S. Harris, Clerk of Court at 1, *Wheeler*, *supra* (Feb. 28, 2019); see also Letter from Joshua B. Carpenter to Scott S. Harris, Clerk of Court at 1, *Wheeler*, *supra* (Mar. 1, 2019) (respondent's letter acknowledging that "concerns of potential mootness" would "no longer be present").

Petitioner's case, moreover, presents complications that *Wheeler* did not. There, the Fourth Circuit allowed relief under the saving clause based on its *own* updated circuit law making unambiguously clear that, as a statutory matter, the sentencing court had erroneously applied a statutory minimum. See *Wheeler*, 886 F.3d at 429 (extending the availability of saving-clause relief to prisoners relying on a "change in this circuit's controlling law"). Here, however, petitioner identifies no Sixth Circuit decision establishing that his enhanced sentence

is unlawful, and as the court of appeals noted, its "cases point in opposite directions on the merits of [petitioner's] claim." Pet. App. 27a (comparing *United States* v. *Rockymore*, 909 F.3d 167, 170-171 (6th Cir. 2018), with *United States* v. *Montgomery*, 893 F.3d 935, 940-941 (6th Cir. 2018)); see also *United States* v. *Pruitt*, 545 F.3d 416, 423 (6th Cir. 2008) (addressing related question in context of sentencing guidelines). Petitioner now principally relies on the Ninth Circuit's decision in *Valencia-Mendoza*. But nothing requires the Sixth Circuit to agree with that decision. Cf. *United States* v. *Geozos*, 870 F.3d 890, 901 (9th Cir. 2017) (disagreeing with the Eleventh Circuit's conclusion that Florida robbery is a violent felony under the ACCA's "'elements clause'") (citation omitted), abrogated by *Stokeling* v. *United States*, 139 S. Ct. 544 (2019).

That wrinkle is important for two reasons. First, it would require this Court to decide as a threshold matter whether, to establish the "miscarriage of justice" or "fundamental defect" required for saving-clause relief on the basis of a change in circuit precedent, *Hill*, 836 F.3d at 595, a habeas applicant must demonstrate the unlawfulness of his detention under the law of the circuit of conviction, the law of the circuit of confinement, or both. As the court of appeals recognized, that is an underdeveloped issue in the courts of appeals that could complicate this Court's review of the question presented here. Pet. App. 26a ("When a court of confinement hears a claim in a § 2241 petition, should it apply its precedent or the circuit precedent from the sentencing court?"); compare, *e.g.*, *Hahn* v. *Moseley*, 931 F.3d 295, 301 (4th Cir. 2019) (applying the law of the circuit of conviction when the government did not argue otherwise), with, *e.g.*, *Chazen* v. *Marske*, 938 F.3d 851, 860

(7th Cir. 2019) (reserving the question but applying the law of the circuit of confinement because the government agreed to it).

Second, petitioner's entitlement to relief depends on a view of the saving clause expansive enough to encompass the right to ask the Sixth Circuit to decide an issue that it has not yet addressed—namely, whether Washington drug convictions like petitioner's constitute "felony drug offense[s]" for purposes of Section 841(b)(1)(A). See Pet. App. 14a. It is not clear that any circuit would privilege prisoners convicted out-of-circuit over prisoners convicted in-circuit by allowing them to invoke the saving clause to obtain merits review in the first instance of an unsettled statutory issue. Cf. *Hahn*, 931 F.3d at 301 (allowing such relief when the government did not contest the availability of relief on that ground). Indeed, the Seventh Circuit has explained that saving-clause relief is categorically unavailable "[w]hen there is a circuit split" because "there is no presumption that the law in the circuit that favors the prisoner is correct, and hence there is no basis for supposing him unjustly convicted." *In re Davenport*, 147 F.3d 605, 612 (1998). Similar reasoning would also have force when no circuit conflict has yet developed, but the circuit decision on which a petitioner relies is subject to reasonable dispute. The court of appeals evidently believed that *Valencia-Mendoza* is such a decision because it declined to "opine on the merits of [petitioner's] claim that his state convictions are not 'felony drug offenses,'" observing that "'[d]iverse viewpoints' exist on this 'difficult question.'" Pet. App. 14a (citations omitted).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
*Acting Solicitor General*
BRIAN C. RABBITT
*Acting Assistant Attorney General*
JENNY C. ELLICKSON
*Attorney*

SEPTEMBER 2020