No. 19-401

IN THE
Supreme Court of the United States

LAMONT DEJUAN HIGGS

Petitioner,

v.

WARDEN WILSON,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LOCHLAN F. SHELFER
Counsel of Record
JOHN S. EHRETT
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
lshelfer@gibsondunn.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ARGUMENT

At the heart of the common-law tradition is a very straightforward principle: Prisoners should not be required to serve plainly unlawful sentences. That is true no matter the doctrine or statute under which a particular prisoner was sentenced. After all, it is difficult to conceive of a more egregious deprivation of liberty than forcing prisoners to endure terms of confinement that everyone agrees are illegal.

Lamont Higgs has a compelling claim that he is currently serving an unlawful sentence. And Congress, when it passed AEDPA, provided a means for such claims to be heard—a habeas petition filed under 28 U.S.C. § 2241, pursuant to the savings clause of 28 U.S.C. § 2255(e). But the Government, as it has in so many other cases, asserts otherwise; indeed, it urges the Court simply to pass on the issue altogether.

Yet the United States is well aware of the urgency and high stakes this case involves. Indeed, it has previously represented as much to this Court. Pet. at 23, 29, *United States* v. *Wheeler*, 139 S. Ct. 1318 (2019) (No. 18-420) (U.S. *Wheeler* Pet.). Nothing has changed: There is still a sharp division between the circuits over the availability of relief in the event of statutory sentencing errors, and this Court has the power to set that split aright.

I. ABSENT THIS COURT'S INTERVENTION, THE INTRACTABLE CIRCUIT SPLIT WILL CONTINUE TO DEEPEN.

Both sides in this case are well aware of the high stakes and persistent legal challenges surrounding this question. The Government readily admits that there is "a division of authority among the courts of

appeals on the scope of the saving clause for statutory claims." U.S. Br. in Opp. at 14. The Government also admits that its interpretation of Section 2255 leads to "harsh results"—results of such "undue severity" that they may even justify executive clemency. *Id.* at 14. Accordingly, the Government has previously sought this Court's "timely resolution" of this "entrenched conflict." U.S. *Wheeler* Pet. 23, 29.

But now, in multiple cases since *Wheeler*, the Government has shown that it is determined to keep the question from ever reaching this Court, rationalizing its shifting stance by repeatedly invoking the side issue of whether a claimant will "ultimately obtain relief" on his claim. U.S. Br. in Opp. at 1, *Lewis* v. *English*, 139 S. Ct. 1318 (2019) (No. 18-292); *see also* Br. in Opp. 16–20; U.S. Br. in Opp. at 9–10, *Quary* v. *English* (No. 19-5154) (Dec. 4, 2019); U.S. Br. in Opp. at 8–9, *Dyab* v. *English* (No. 19-5241) (Oct. 28, 2019); U.S. Br. in Opp. at 17–18, *Walker* v. *English* (No. 19-52) (Sept. 27, 2019); U.S. Br. in Opp. at 9–10, *Jones* v. *Underwood* (No. 18-9495) (Sept. 27, 2019). For the reasons discussed below, that is no basis for denying review. The crucial issue presented is whether Section 2255's saving clause *allows such claims to proceed*, not whether they will eventually succeed.

The legal questions in this case are crying out for the Court's definitive resolution. Absent a determination of the crucial interpretive question this case presents—whether prisoners may bring Section 2241 habeas claims where Section 2255 relief is unavailable, as in the case of statutory claims—there will continue to be a steady drumbeat of cases just like this one. The Court should intervene to settle the matter once and for all.

II. THIS CASE IS A PROPER VEHICLE FOR ADDRESSING WHETHER THE SAVING CLAUSE APPLIES TO STATUTORY SENTENCING ERRORS.

This case—particularly when paired with *Walker* v. *English*, No. 19-52 (U.S.)—is an ideal vehicle for addressing the deepening split between the circuits: Granting the *Walker* petition would allow the Court to consider the availability of saving clause relief in ACCA cases, and granting this petition would allow the Court to consider the availability of such relief in guidelines cases. The Government disagrees—but its arguments are meritless.

1. The Government claims that this petition should be denied just like the *Wheeler* and *Lewis* petitions that presented similar claims. *See United States* v. *Wheeler*, 139 S. Ct. 1318 (2019) (No. 18-420); *Lewis* v. *English*, 139 S. Ct. 1318 (2019) (No. 18-292). But *Wheeler* involved an interlocutory posture, as well as mootness and waiver issues, that are not at issue here. Supplemental Br. at 1, 3, *Lewis* v. *English*, 139 S. Ct. 1318 (2019) (No. 18-292). And this Court's discretionary decision not to take up *Lewis* is no reason for the Court to decline to address this recurring problem—which will continue to return, time and again, to the Court's doorstep.

2. The Government stakes out a position fully endorsing the narrow views of the Tenth and Eleventh Circuit in *Prost* and *McCarthan*—demanding that litigants make arguments unsupported by controlling authority in the hope that jurisprudential lightning will strike and the law will change. *Prost* v. *Anderson*, 636 F.3d 578, 580–82 (10th Cir. 2011); *McCarthan* v.

Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1087 (11th Cir. 2017) (en banc). Here, the Government asserts that, just as the petitioner in *United States* v. *Hinkle*, 832 F.3d 569 (5th Cir. 2016), presented arguments that later led to his release, notwithstanding the contemporaneous state of the law, petitioner here should have done the same. Br. in Opp. 10. That claim fails for at least two reasons.

First, the Government's assertion neglects the inconvenient fact that the Government itself represented in *Hinkle* that the arguments that the *Hinkle* petitioner raised in the district court (pre-*Mathis*) were different from those the petitioner pursued on appeal—which, post-*Mathis*, ultimately proved successful. *Hinkle*, 832 F.3d at 573. The Government's representation in the instant case—that the *Hinkle* petitioner presented in the district court a then-futile argument that was eventually vindicated—cannot be squared with its assertion in *Hinkle* that the petitioner had actually changed his argument between the district and appellate courts.

Second, and perhaps more importantly, the petitioner in *Hinkle* was successful in having his sentence vacated only because *Mathis* happened to be decided during the pendency of his appeal. It is overwhelmingly likely that absent *Mathis*, the *Hinkle* appeal would have been denied as flatly frivolous—especially given that, in a recent term, the Fifth Circuit granted fewer than five percent of the petitions for rehearing en banc it entertained. U.S. Court of Appeals, Fifth Circuit, Clerk's Annual Report July 2017-June 2018, at 31 (2018), http://www.ca5.uscourts.gov/docs/default-source/default-document-library/2018-annual-report-public.pdf?sfvrsn=2.

The success of the *Hinkle* petitioner was, in short, no more than blind luck. In the overwhelming majority of cases, similarly situated prisoners will have no opportunity to prevail on their Hail Mary claims.

3. The Government spends five pages (at 16–20) arguing that petitioner would not prevail on his claim for relief even if he were able to seek relief under Section 2241. That is wholly irrelevant to whether this petition merits review. Petitioner is not asking this Court to decide whether his habeas claim is meritorious, apart from the question whether his claim is barred by Section 2255. At issue is whether he can raise that claim *at all*—and if so, how. He need not prove to a certainty that his claim would be successful.

Curiously, the Government asserts in passing that petitioner would not be entitled to relief because "[e]very court of appeals to consider the issue has determined that a claim that a sentencing court erroneously computed an advisory guidelines range is not cognizable on collateral review," Br. in Opp. 18—even though the entire premise of its merits arguments is that "adverse circuit precedent alone does not prevent a prisoner from pressing an issue," *id*. at 9. The Government cannot have it both ways: Either the state of current circuit law is relevant to the analysis of whether relief is available, or it is not relevant at all. Moreover, this is not an issue that the Fifth Circuit has yet confronted, and thus petitioner is in no way foreclosed from seeking this relief in any event; and the Court should not preemptively assume how the Fifth Circuit would decide an unsettled issue of law.

III. SECTION 2241 IS THE APPROPRIATE CHANNEL FOR CHALLENGING STATUTORY SENTENCING ERRORS.

On the merits, the Government unsurprisingly asserts that Section 2255 presents the only proper mechanism by which a federal prisoner may obtain collateral review of his conviction or sentence, whether his claims involve constitutional or statutory questions. Br. in Opp. 8–10. To support that reading, the government theorizes that Section 2255(h)—which provides that "second or successive" motions under Section 2255 are permitted only where there is newly discovered evidence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"—represents Congress's intent to bar all other collateral review of a federal inmate's conviction or sentence. *Id*. at 10–11.

But as petitioner has pointed out from the start, notably absent from the Government's opposition—and its extended attempt to discern the intent of the Congress that passed AEDPA—is any serious effort to reckon with what purpose Section 2255's saving clause *actually serves*. After all, it is a cardinal rule of superfluity that Congress does not write statutory provisions that "have no consequence." *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 174 (2012).

The Government's cramped interpretation of the interplay between Sections 2255(e) and 2255(h) would effectively render the saving clause a dead letter. But the text of Section 2255(e) is perfectly clear: Where "a prisoner who is authorized to apply for relief by motion pursuant to this section"—that is, a prisoner

seeking to obtain collateral review—files a habeas petition, a second or successive petition "shall not be entertained . . . *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*" 28 U.S.C. § 2255(e) (emphasis added). That is to say, when a motion under Section 2255, taking into account Section 2255(h)'s specific limitations on constitutional challenges, is inadequate or ineffective for a prisoner to contest his detention, a second or successive petition brought via an alternative channel—here, Section 2241—is the appropriate process for seeking collateral relief. The Government's argument to the contrary transforms the saving clause into a meaningless surd.

To be sure, the Government does include (at 12) the halfhearted suggestion—drawn from *McCarthan*—that the saving clause exists to permit a prisoner "to challenge *the execution* of his sentence, such as the deprivation of good-time credits or parole determinations." 851 F.3d at 1093 (emphasis added). But this is pure eisegesis—an attempt to read words into the text that simply are not there. The saving clause does not refer to testing "the legality of the execution of his detention" or the "legality of the circumstances of his detention" but to testing "*the legality of his detention*" full stop. 28 U.S.C. § 2255(e).

Nor does it help the Government to suggest that the saving clause applies only "to challenge the execution of [a] sentence, such as the deprivation of good-time credits or parole determination," Br. in Opp. 12 (quoting *McCarthan*, 851 F.3d at 1093). As petitioner has explained from the first, the *logic* of *McCarthan* (and *Prost*) cuts the other direction: Why not simply require a petitioner to press an (admittedly hopeless)

jurisdictional argument in his first appeal? *McCarthan* and *Prost*—like the Government's position in the instant case—are rife with irreconcilable internal tensions.

At bottom, the Government represents that it is simply arguing for "adherence to the statutory text," but this is a textualism of pure convenience. If the Congress that enacted AEDPA had *truly* intended for the Government's severe interpretation to control, and for Section 2255(h) to slam shut the doors on any claims like petitioner's, the saving clause of Section 2255(e) would never have been written into the statute in the first place. The Government's quarrel is not properly with petitioner—nor with any of the numerous other litigants who have raised this same claim—but rather with the Congress who enacted statutory language the Government prefers not to reckon with.

* * *

At bottom, the Government is essentially asking this Court to dodge the crucial statutory question at the heart of this case and numerous others: What does the saving clause of Section 2255(e) actually accomplish? Congress surely does not write, and the President does not enact, effectively meaningless words. This Court should, as Congress plainly contemplated, give full effect to the procedural safeguards provided in Sections 2255 and 2241.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari alongside the petition for certiorari in *Walker*.

Respectfully submitted.

LOCHLAN F. SHELFER
Counsel of Record
JOHN S. EHRETT
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
lshelfer@gibsondunn.com

Counsel for Petitioner

December 23, 2019