NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES WARDELL QUARY - Petitioner

V.

N.C. ENGLISH, Warden - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JAMES WARDELL QUARY (PRO SE)
REG. NO. 04868-031
U.S. PENITENTIARY
P.O. BOX 1000
LEAVENWORTH, KS 66048

QUESTION PRESENTED

Federal criminal defendants are entitled to challenge the validity of their conviction and sentence by means of a direct appeal and a motion for post-conviction relief under 28 U.S.C. § 2255. Those efforts sometimes fail because erroneous circuit precedent interpreting a federal statute forecloses the defendant's legitimate claim for relief. This gives rise to an obvious injustice when a later decision by this Court or the circuit overturns the erroneous precedent. In those circumstances, the prisoner cannot again seek relief under Section 2255, which generally bars second or successive applications.

As the government has recognized, a deep circuit split has arisen over whether such a prisoner may file a petition for a writ of habeas corpus under 28 U.S.C. § 2241. Nine courts of appeals hold that such petitions are authorized by Section 2255(e), which allows a prisoner to pursue such habeas relief if the remedy provided by Section 2255 is "inadequate or effective to test the legality of his detention." Two other courts of appeals, including the **Tenth Circuit** below, hold that the prisoner may NOT use Section 2241, and thus that he has no way to challenge his unlawful detention.

THE QUESTION PRESENTED HERE IS:

May a federal prisoner file a petition for habeas corpus under 28 U.S.C. § 2241 in order to raise arugments that were foreclosed by binding (but erroneous) circuit precedent at the time of his direct appeal and original application for post-conviction relief under 28 U.S.C. § 2255, but which are meritorious in light of a subsequent decision overturning that erroneous precedent?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES:

IN THE SUPREME COURT OF THE UNITED STATES

JAMES WARDELL QUARY - Petitioner

V.

N.C. ENGLISH, Warden - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Petitioner, James Wardell Quary (hereinafter "Petitioner"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

On December 21, 2018, a panel of the Court of Appeals for the Tenth Circuit, entered its ruling affirming the dismissal of Petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2241. The opinion of the Tenth Circuit is reported at -F. App'x-, 2018 U.S. App. LEXIS 36138. The district court's order denying Petitioner's § 2241 is unreported, but available at 2018 U.S. Dist. LEXIS 158859.

JURISDICTION

The Court of Appeals entered its judgement on November 21, 2018, and denied Petitioner's petition for REHEARING EN BANC and petition for REHEARING by the panel on January 28, 2019. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. § 2241 and 2255, are reproduced in the Appendix to this petition.

INTRODUCTION

This case presents a deep and universally acknowledged circuit split over the availability of relief for federal prisoners who are currently serving sentences that are unlawful under non-constitutional decisions of this Court. The United States has repeatedly recognized that "a circuit conflict exists on the question presented," and that "given the significance of the issue..., this Court's review would be warranted in an appropriate case." U.S. BIO 11, 25, McCARTHAN v. COLLINS, No. 17-85, 2017 WL 4947338 (Oct. 30, 2017) ("McCARTHAN BIO"); see also U.S. Mot. to Stay Mandate 2-3, **UNITED STATES v. WHEELER**, No. 16-6073 (4th Cir. June 13, 2018) ("**WHEELER** Stay Mot.") (acknowledging circuit split and predicting that "[t]he Supreme Court is likely to grant a petitino for certiorari" **on this issue). THIS IS THAT CASE.**

Section 2255 of Title 28 of the U.S. Code provides for collateral review of federal convictions and sentences. 28 U.S.C. § 2255(a). Ordinarily, a federal prisoner subject to

Section 2255 may initiate such collateral review proceedings only once, and must do so within a year of receiving his sentence. See id. § 2255(f). That rule, however, is subject to several exceptions. First, Section 2255(h) allows a prisoner to file a "second or successive motion" under Section 2255 itself if a court of appeals determines that "newly discovered evidence" or a "new rule of constitutional law" has undermined the prisoner's conviction or sentence. Id. § 2255(h). Second, Section 2255(e) provides that if it "appears that the remedy by motion [under Section 2255] is **inadequate or ineffective** to test the legality of his detention," then the prisoner may make "[a]n application for a writ of habeas corpus" under 28 U.S.C. § 2241. Id. § 2255(e) (emphasis added).

This case concerns the scope of the "inadequate or ineffective" exception. Nine circuits have held that if circuit precedent required the district court to hold the prisoner's detention lawful at the time of his original Section 2255 motion --even though the detention was in fact **unlawful**-- that is sufficient to make it "appear[] that the remedy by motion is inadequate or ineffective to test the legality of his detention" within the meaning of 28 U.S.C. § 2255(e). Those circuits therefore hold that the hypothetical prisoner can press his claim for relief in a petition for a writ of habeas corpus under 28 U.S.C. § 2241.

Two other circuits, however, hold that a motion that the district court was required (wrongly) to reject does NOT "appear[]... inadequate or ineffective" under Section 2255(e),

because the prisoner could have filed his motion with the district court, **lost**, appealed, **lost**, and then sought discretionary review from the EN BANC court of appeals or this Court. In their view, therefore, Section 2255(e) prohibits a court from entertaining the prisoner's petition for a writ of habeas corpus filed under Section 2241. In those circuits, the hypothetical prisoner is left with no avenue of relief --even though his detention is undeniably unlawful.

This issue frequently arises and is exceptionally important. Under the **Tenth** and Eleventh Circuit's **minority approach,** prisoners within those circuits --unlike identically situated prisoners in the rest of the country-- will serve years of additional time in prison based on convictions and sentences that are indisputably contrary to law. And they will serve that time even though they have never had a full and fair opportunity to challenge the legality of their detention before a court empowered to grant them the relief they are due. Both the government and the lower courts have acknowledged that this Court's intervention is needed to resolve the split. See, e.g., **UNITED STATES v. WHEELER**, --F. App'x--, 2018 WL 2947929, at *1-2 (4th Cir. 2018) (statements regarding denial of rehearing en banc discussing split); **McCARTHAN** BIO 25 (acknowledging the split and that this Court's review of the question presented is "appropriate," but objecting to the petition as an unsuitable vehicle).

Until recently, the government recognized that the majority

approach --the one rejected in the decision below-- was also the correct approach. The government reversed its position last year, as a result of the most recent change in presidential administration. See, e.g., **UNITED STATES v. WHEELER**, 886 F.3d 415, 434 n.12 (4th Cir. 2018) (noting that "the government cannot identify any principled reason for its turnabout").

This case directly implicates the entrenched circuit conflict, and is an **ideal vehicle for resolving it.** In the decision below, the Tenth Circuit held that even though binding circuit precedent at the time of Petitioner's initial Section 2255 motion would have required the district court to reject his (meritorious) challenge to his sentence, Section 2255(e) nevertheless prohibits Petitioner from seeking review through a petition for habeas corpus now that the illegality of his sentence has become apparent. As a result, Petitioner will serve an **extra five-years in prison.**

This Court should grant review, establish a NATIONWIDE STANDARD on this important federal question, and provide prisoners like Petitioner herein, with a means to challenge their plainly unlawful detention.

STATEMENT OF THE CASE

Petitioner herein, was convicted in March of 1997 of federal drug and firearm offenses. He was sentenced to a total term of life plus five-years consecutive. His convictions were affirmed on direct appeal. **UNITED STATES v. QUARY**, 188 F.3d 520 (1999). The five consecutive years that he received were based on a

firearm offense. See, 18 U.S.C. § 924(c).

Thereafter, Petitioner filed a motion to vacate or correct sentence under 28 U.S.C. § 2255 that was denied by the District Court. "Because his arguments fl[ied] in the face of well-accepted precedent," this Honorable Tenth Circuit denied him certificate of appealability. UNITED STATES v. QUARY, 60 Fed. Appx. 188, 2003 WL 256900 (10th Cir. 2003).

In August 2015, the district court granted Petitioner's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2) and reduced his life sentence to a 360-month sentence, resulting in a total sentence of 420-months' imprisonment including the consecutive term **for the firearm offense.**

Almost two years later, Petitioner filed another § 2255 motion. He argued that the motion was not a second or successive because his sentence reduction constituted a new judgment. The district court rejected this argument --and determined that Petitioner's motion was a second or successive motion for which he needed authorization.

On June 29, 2018, Petitioner filed his petition under 28 U.S.C. § 2241, arguing that he was now being **illegally detained,** because the "Aiding and Abetting" jury instruction was deficient in light of **ROSEMOND v. UNITED STATES**, 134 S.Ct. 1240 (2014), as it did not require a finding that Petitioner had **"ADVANCED KNOWLEDGED"** that his confederates would use a firearm during the drug trafficking crime. Petitioner invoked

the savings clause of § 2255(e) under **UNITED STATES v. WHEELER**, 886 F.3d 415 (4th Cir. March 28, 2018); **HILL v. MASTERS**, 836 F.3d 591 (6th Cir. 2016); and **BROWN v. CARAWAY**, 719 F.3d 583 (7th Cir. 2013); arguing that § 2255 is "inadequate or ineffective" to test the legality of his detention.

On September 18, 2018, the District Court held that absent **EN BANC** reconsideration or a superseding **CONTRARY DECISION** by the Supreme Court, it was still bound by the precedent held in **PROST v. ANDERSON**, 636 F.3d 578 (10th Cir. 2011), and thus DISMISSED Petitioner's § 2241 without prejudice.

On November 21, 2018, the Tenth Circuit Court of Appeals **affirmed** Petitioner's Appeal, thus concluding that "[o]ne panel of the court cannot overrule circuit precedent." UNITED STATES v. WALLING, 936 F.2d 469, 472 (10th Cir. 1991), and "[a]bsent an intervening Supreme Court or En Banc decision justifying such action, we lack the power to overrule [a prior panel decision]." (quoting BERRY v. STEVINSON CHEVROLET, 74 F.3d 980, 985 (10th Cir. 1996).

As a result, Petitioner is now serving an indisputably unlawful sentence. He has not yet received any fair adjudication of his challenge to the career-offender designation. And unless this Court intervenes, he never will.

REASONS FOR GRANTING THE WRIT

As the government has previously recognized, the question

presented in this case **cries out for consideration** by this Court. The courts of appeals are intractably divided, and the upshot of the minority rule applied by the Tenth and Eleventh Circuits is that certain prisoners --including Petitioner-- will be unjustly imprisoned for years beyond what is authorized by law.

Denying federal prisoners the right to pursue unquestionably meritorious challenges to their detention directly undermines the fairness and integrity of the judicial system. See, e.g., **ROSALES-MIRELES v. UNITED STATES**, 138 S.Ct. 1897, 1908 (2018) ("[W]hat reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?" (citation omitted)). Unsurprisingly, therefore, a substantial majority of the courts of appeals have concluded that Congress did not intent to achieve that preserves result. In their view, Section 2255(e) allows such prisoners to seek habeas relief under Section 2241 if a decision from this Court or the court of appeals overturns erroneous circuit precedent that barred a challenge to the prisoner's detention in his direct appeal and original Section 2255.

Neverthess, the Tenth and Eleventh Circuits have expressly rejected that majority approach and concluded that Section 2255(e) bars habeas petitions even in circumstances where erroneous circuit precedent made it a foregone conclusion that any Section 2255 motion the petitioner filed would have been

(and that such denial would have been unheld on appeal). They have held that Section 2255 is not "inadequate or ineffective" in that circumstance --even if the motion was indisputably doomed to failure under binding precedent-- because of the theoretical and remote possibility of discretionary EN BANC or CERTIORARI REVIEW.

The government has acknowledged that the courts of appeals are intractably divided on this question. See, e.g. McCARTHAN BIO 11 (recognizing that "a circuit conflict exists on the question presented"). It has recognized, too, that the question is deeply important and warrants review, because it means that federal prisoners in the Tenth and Eleventh Circuits will spend years serving indisputably unlawful prison sentences, while identically situated prisoners in the rest of the country will be released. See, e.g., **WHEELER** Stay Mot. 2-3 ("The subject of the circuit split... qualifies as an 'important matter'" under this Court's Rule 10 because "it affects the rights of federal prisoners across the country, in a way that depends on where they are housed."). And this case is an excellent vehicle in which to resolve the conflict. The petition should be granted.

[A]. THERE IS A UNIVERSALLY ACKNOWLEDGED, DEEP, AND INTRACTABLE CIRCUIT SPLIT OVER THE QUESTION PRESENTED

The circuit split here is as clear as they come.

Nine courts of appeals hold that were circuit precedent would

have required the district court and appellate panel to reject --erroneously-- an argument about the legality of the prisoner's detention at the time of his original Section 2255 motion, that Section 2255 motion is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e); see UNITED STATES v. BARRETT, 178 F.3d 34, 51-52 (1st Cir. 1999); cert. denied, 528 U.S. 1176 (2000); TRIESTMAN v. UNITED STATES, 124 F.3d 361, 363 (2nd Cir. 1997); **UNITED STATES v. WHEELER**, 886 F.3d 415, 434 (4th Cir. 2018); REYES-REQUENA v. UNITED STATES, 243 F.3d 893, 904 (5th Cir. 2001); MARTIN v. PEREZ, 319 F.3d 799, 805 (6th Cir. 2003); IN RE DAVENPORT, 147 F.3d 605, 611 (7th Cir. 1998); ALAIMALO v. UNITED STATES, 645 F.3d 1042, 1047 (9th Cir. 2011); IN RE SMITH, 285 F.3d 6, 8 (D.C. Cir. 2002).

The rationale adopted by those courts is straightforward and tracks basic common sense: When binding circuit precedent renders a Section 2255 motion futile, that motion is "inadequate or ineffective" because the judges adjudicating the motion will necessarily reject it --regardless of the judges' own views on the legality of the prisoner's detention. See, e.g., IN RE DAVENPORT, 147 F.3d at 610-11.

In those nine circuits, if and when that erroneous circuit precedent is **overruled** by a subsequent decision by this Court or the court of appeals, therefore, the prisoner has the right to challenge the legality of his detention under 28 U.S.C. § 2241. That allows the prisoner to take advantage of the intervening decision and receive a fair adjudication of whether he is lawfully imprisoned.

Many of the cases addressing the question presented in those majority jurisdictions have involved defendants whose **convictions** have been undermined by subsequent precedent. See, e.g., REYES-REQUENA, 243 F.3d at 904. But at least three courts of appeals --the Fourth, Sixth, and Seventh Circuits-- have also applied the majority rule to cases, like this one, in which the legal error infected the defendant's **sentence.** See, **WHEELER**, 886 F.3d at 432-33 (holding that Section 2255 is inadequate or ineffective to test the legality of a sentence and noting that "[w]e agree with our sister circuits' view... that a sentencing error need not result in a sentence that exceeds statutory limits in order to be a fundamental defect" (citing HILL v. MASTERS, 836 F.3d 591, 599 (6th Cir. 2016); BROWN v. CARAWAY, 719 F.3d 583, 587 (7th Cir. 2013)); see also McCARTHAN v. DIRECTOR OF GOODWILL INDUS. - SUNCOAST, INC, 851 F.3d 1076, 1097 (11th Cir.) (en banc) ("[T]he Seventh Circuit has extended the savings clause to **all sentencing errors....**"), cert. denied, 138 S.Ct. 502 (2017).

On the other side of the split, meanwhile, the Tenth and Eleventh Circuits hold that even where circuit precedent precludes a given argument, the fact that the defendant is free to include that (sure-to-lose) argument in a Section 2255 motion makes Section 2255 "[]adequate" and "[]effective" because of the possibility of **en banc or certiorari review.** See, McCARTHAN, 851 F.3d at 1086; PROST v. ANDERSON, 636 F.3d 578, 590-91 (10th Cir. 2011), cert. denied, 565 U.S. 1111 (2012). As a result, those circuits will **NOT** allow a prisoner to invoke Section 2241

to challenge his unlawful detention, even after this Court or the circuit at issue later makes clear that the precedent foreclosing the initial challenge was erroneous. In the Tenth and Eleventh Circuits, therefore, the procedural bar operates to keep the prisoner behind bars --even though his conviction or sentence is indisputably illegal, and even though the prisoner has never had a fair hearing on his claim.

This split has been widely acknowledged, including by courts and the government. The decision below, for example, expressly recognized that the Tenth Circuit's approach contradicts the one embraced by the Sixth Circuit in **HILL**, 836 F.3d at 594-95, and the Seventh Circuit in **IN RE DAVENPORT**, 147 F.3d at 610. In **PROST** itself, the Tenth Circuit recognized that the court's rejection of the erroneous-circuit-foreclosure rule would create a circuit split. See, **PROST**, 636 F.3d at 592-93 (recognizing conflict with, **inter alia**, IN RE DAVENPORT, 147 F.3d at 610, and REYES-REQUENA, 243 F.3d at 904). And in **McCARTHAN**, the Eleventh Circuit stated that the approach it was taking was different from the one employed by "most of our sister circuits." 851 F.3d at 1097.

Courts on the majority side of the split have recognized it, too. Last two years, for example, the Third Circuit explained that "[n]ine of our sister circuits agree... that the saving clause permits a prisoner to challenge his detention" based on "a change in statutory interpretation," while "[t]wo circuits see things differently, holding that an intervening change in

statutory interpretation cannot render § 2255 inadequate or ineffective." BRUCE v. WARDEN LEWISBURG USP, 868 F.3d 170, 179-80 (3rd Cir. 2017). And in **WHEELER**, Judge Agee's statement respecting denial of the government's petition for rehearing EN BANC noted the **"existing circuit split"** on an issue "of significant national importance" that is "best considered by the Supreme Court at the earliest possible date." **UNITED STATES v. WHEELER**, --F. Appx.--, 2018 WL 2947929, at *1 (4th Cir. 2018) (Statement Respecting Denial of Rehearing En Banc of Agee, J.).

The government itself has repeatedly declared that the circuit split over the question presented is real and warrants this Court's review. In requesting a stay of the mandate in **WHEELER** (a case argued in the Fourth Circuit by an attorney from the Office of the Solicitor General), the government explained that the interpretation of Section 2255(e) is the **"subject of [a] CIRCUIT SPLIT"** and **"qualifies as an 'important matter'"** within the meaning of this Court's Rule 10(a) because it "affects the right of federal prisoners across the country, in a way that depends on where they are housed." **WHEELER**, Stay Mot. 2-3. And in its brief opposing certiorari in **McCARTHAN** -- a case, like this one, involving a challenge to the prisoner's sentence-- the government acknowledge that a "circuit conflict exists on the question presented" and that the "SIGNIFICANCE" of the issue means that "this Court's review would be warranted in an appropriate case." **McCARTHAN** BIO 11, 25. We agree.

In **McCARTHAN**, the government successfully urged the Court

to deny review in McCARTHAN because of significant vehicle problems, including most notably the fact that the prisoner had a separately pending Section 2255 motion that allowed him to "test the legality of his detention" on other grounds. See, McCARTHAN BIO 28-29. No such obstacles exists here.

[B]. THE MINORITY RULE IS WRONG, AS THE GOVERNMENT HAS PREVIOUSLY RECOGNIZED

Certiorari is also warranted because the interpretation of Section 2255(e) adopted by the Tenth and Eleventh Circuits is mistaken.

[1] In Section 2255(e), Congress provided that the availability of habeas review for a federal prisoner depends on whether Section 2255 "appears... inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). In circumstances where erroneous circuit precedent forecloses a valid argument at the time a prisoner files his Section 2255 motion, the only way a prisoner can obtain redress through that Section 2255 motion is if the EN BANC court of appeals or this Honorable Court makes a discretionary decision to grant review.

Those procedural vehicles for discretionary review are not "[]adequate or []effective to test the legality of his detention." Id. Most importantly, they do not require Article III judges to actually consider the legality of the individual prisoner's sentence or conviction. Indeed, those mechanisms for discretionary

review are designed to give courts the opportunity to resolve issues of systemic importance, and they are not intended to be used to correct errors in individual cases.

Where erroneous circuit precedent was in effect at the time of the initial Section 2255 motion, therefore, it is intirely possible that every single jurist to consider the prisoner's case --the district court judge, the court of appeals panel, the En Banc panel, and all nine Justices of this Court-- would conclude that his detention is unlawful, and yet also deny him relief. Specifically:

* The district judge and appellate panel could conclude that his sentence was incorrect but that they were bound by the existing circuit precedent;

* All of the court of appeals judges voting on the petition for rehearing En Banc might conclude that the sentence was illegal, but that En Banc review was not "necessary to secure or maintain uniformity of the court's decisions" and not warranted because the case did not "involve[] a question of exceptional importance," Fed. R. App. P. 35(a); and

* All nine Justices of this Court could conclude that his sentence is unlawful, but that certiorari is unwarranted because there is no "conflict with the decision below did not "so far depart[] from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

The fact that **every single jurist** in that chain could conclude that the prisoner's detention is unlawful --and yet the prisoner could still be properly denied relief-- necessarily means that in that circumstance, Section 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

[2] The Tenth Circuit acknowledged that the "ONLY" way a defendant could obtain relief through a Section 2255 motion in the face of binding circuit precedent would be through en banc or certiorari review. See, QUARY v. ENGLISH, 2018 U.S. App. LEXIS 36138 (10th Cir. Dec. 21, 2018). Saying that prisoners like Petitioner herein, would face an "uphill battle" is a gross understatement: In 2012, the Courts of Appeals granted less than three percent of the motions for en banc rehearing that they entertained, and this Honorable Supreme Court granted review in just 0.9 percent of the cases in which parties petitioned for certiorari, see **The Supreme Court - The Statistics, 126 Harv. L. Rev. 388, 395 (2012).** A prisoner should NOT have to win the lottery in order to obtain a fair hearing on his claim ... especially when years of freedom are at stake.

The more fundamental problem with the Tenth Circuit's analysis, though, is that it focuses on what arguments "the petitioner [had] an opportunity to **bring,**" rather than on whether the Section 2255 motion would in any real-world sense "test the legality of his detention," 28 U.S.C. § 2255(e). And once one focuses on the question posed by Section 2255(e)'s text, it becomes clear that where relief through a Section 2255 motion depends on discretionary considerations wholly separate from the question of "legality," the Section 2255 motion is not "[]adequate or []effective" for the purpose that matters. Id.

[3] Until recently, the government agreed that the bare possibility of discretionary review that might overrule

otherwise binding circuit precedent is not enough to make Section 2255 adequate and effective to test the legality of a federal prisoner's detention. In briefs filed with this Court, it has repeatedly criticized **PROST's** "overly restrictive interpretation of Section 2255(e) that departs from the other circuits to have addressed the issue." U.S. BIO 20-21, WILLIAM v. HASTINGS, No. 13, 1221, 2014 WL 3749512 (July 30, 2014); see also U.S. BIO 17, ABERNATHY v. COZZA-RHODES, No. 13-7723 (Mar. 7, 2014); U.S. BIO 12-13, PRINCE v. THOMAS, No. 12-10719 (Aug. 12, 2013); U.S. BIO 14, BLANCHARD v. CASTILLO, No. 12-7894 (Mar. 26, 2013); U.S. BIO 9-10, JONES v. CASTILLO, No. 12-6925 (Feb. 21, 2013); U.S. BIO 12, 14-15, McCORVEY v. YOUNG, No. 12-7559 (Feb. 1, 2013); U.S. BIO 1-11, YOUREE v. TAMEZ, No. 12-5678 (Dec. 17, 2012); U.S. BIO 11-12 & n.1, SORRELL v. BLEDSOE, No. 11-7416 (Jan. 17, 2012).

The government elaborated on those views at lenght in a 2016 filing in the Fourth Circuit signed by Deputy Solicitor General Dreeben. There, it argued that "[t]he savings clause in Section 2255(e) preserves the fundamental purposes of habeas corpus by allowing review of a narrow category of claims that warrant relief even after the defendant has completed direct appeal and a prior collateral attack." U.S. Reh'g Supp. Br.11, UNITED STATES v. SURRATT, No. 14-6851 (4th Cir. Feb. 2, 2016) ("SURRATT Reh'g. Supp. Br.").

"The text of Section 2255(e)," the government wrote, "readily encompasses more than a mere procedural opportunity to

raise a claim. The habeas savings clause applies when Section 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention, and those words embrace '[t]he essential function of habeas corpus," which 'is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.'" Id. at 29-30 (alterations in original) (citations omitted). "A defendant whose claim is foreclosed by controlling circuit law cannot readily 'test' his claim" because "[t]he district and circuit courts are bound by the precedent, and only rare and discretionary action by the en banc court or the Supreme Court can alter the law." Id. at 30.

The government recognized that the Tenth Circuit had reached a different understanding in **PROST**, but it concluded, correctly, that "**PROST's** analysis is refuted by Section 2255(e)'s text, when read as a whole." Id. at 32. In particular, it noted that while **PROST** had held that Section 2255(e) bars habeas review so long as a defendant has had an **opportunity** to press his claim in an earlier Section 2255 proceeding, Section 2255(e) expressly applies to some circumstances in which a "court had denied [the prisoner] relief." 28 U.S.C. § 2255(e); SURRATT, Reh'g Supp. Br. 31-32. As the government explained, that shows that "Section 2255(e) itself... contemplates cases where, even after a prisoner has sought and been denied relief from an existing sentencing court, the statutory remedy proves to be inadequate or ineffective to test the legality of his detention." SURRATT Reh'g Supp. Br. 32. In other words, merely having the opportunity to try and lose is not enough.

In 2017, following the change in Administration, the government embraced the Tenth Circuit's interpretation of Section 2255(e) that it had **previously criticized** as "overly restrictive" and inconsistent with the statute's text and structure. See, e.g., **UNITED STATES v. WHEELER**, 886 F.3d 415, 434 n.12 (4th Cir. 2018) (stating that "[i]t was not until oral argument that the Assistant to the Solicitor General attributed the change of position to 'new leadership in the [Justice] Department,'" and further noting that "the Government cannot identify any principled reason for its turnabout" (alteration in original) (citation omitted)).

[4] This case provides a perfect illustration of the deficiencies in the Tenth Circuit's approach. Following **ROSEMOND v. UNITED STATES**, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014), it is clear that Petitioner's **Conviction** under 18 U.S.C. § 924(c) is now **INVALID.** Yet, at the time of Petitioner's conviction and first motion under Section 2255, binding Tenth Circuit precedent left "no legal basis" for Petitioner's argument that the district court's jury instruction **WAS ERRONEOUS** because it did not require the jury to find that Petitioner had **"ADVANCE KNOWLEDGE"** that a firearm would be used or present.

Regardless, neither the district court considering his Section 2255 motion in the first instance nor the **Tenth Circuit** panel considering that motion on appeal would have had any authority to grant him relief. The only way for Petitioner to vindicate his right to a lawful conviction and sentence would

have been to appeal to the discretion of the **EN BANC** Tenth Circuit or to this Honorable Supreme Court. In the real world, that sort of **"HAIL MARY"** is not an adequate or effective means of testing the legality of his detention. Petitioner has NEVER received a fair hearing on his argument, and **--unless this Honorable Court intervenes--, HE NEVER WILL.**

[C] THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT, AND THIS CASE OFFERS AN IDEAL VEHICLE IN WHICH TO RESOLVE IT

---

[1] The question presented here is"significant" and warrants this Court's review, as the government itself has repeatedly acknowledged. See, **McCARTHAN** BIO 25 ("This Court's review would be warrant in an appropriate case."); **WHEELER** Stay Mot. 2-3 ("The Supreme Court is likely to grant a petition for certiorari [to resolve the issue].").

Most importantly, it directly implicates the core purpose of habeas corpus --protecting liberty by ensuring that no person is confined in prison unless convicted and sentenced in accordance with law. The majority rule advances this core principle by allowing federal prisoners to take advantage of new legal rules announced by this Court or a Court of Appeals overturning circuit precedent and thereby making clear that their detention is unlawful. The minority rule, by contrast, ensures that federal prisoners will remain incarcerated even when it is indisputable that their detention is contrary to law.

This unwarranted disparity in approach affects large numbers of federal prisoners. This Court regularly issues decisions narrowing overly broad interpretations given to federal criminal statutes and sentencing provisions by the courts of appeals. See, e.g., MATHIS v. UNITED STATES, 136 S.Ct. 2243, 2257 (2016); **ROSEMOND v. UNITED STATES**, 572 U.S. 65, 82-83 (2014); DESCAMPS v. UNITED STATES, 570 U.S. 254, 276-78 (2013); SKILLING v. UNITED STATES, 561 U.S. 358, 368 (2010); CARR v. UNITED STATES, 555 U.S. 122, 129-30 (2009); UNITED STATES v. SANTOS, 553 U.S. 507, 523-24 (2008); BEGAY v. UNITED STATES, 553 U.S. 137, 148 (2008); WATSON v. UNITED STATES, 552 U.S. 74, 80-83 (2007). Frequently, those decisions make it clear that substantial numbers of federal prisoners are serving **UNLAWFUL SENTENCES**, either because they were sentenced for conduct that was not in fact a crime or because they were sentence to unlawfully extended terms.

In the nine courts of appeals that follow the majority rule, those prisoners **ARE ABLE TO SECURE RELEASE** from their unquestionably illegal sentences. However, in the Tenth and Eleventh Circuits, many of them cannot: If the prisoner has already filed a Section 2255 motion and that motion has been adjudicated, or if the time for filing a Section 2255 motion has already passed, then under **PROST** and **McCARTHAN** the prisoner has **NO MECHANISM** by which to secure release from his unlawful sentence. Instead, he will remain incarcerated, directly contrary to Congress's intent in the underlying criminal statute or sentencing provision.

Given the circuit split, what makes the difference between whether a prisoner is released from an illegal sentence or forced to continue to serve it is the Federal Bureau of Prisons' choice of where the prisoner is housed. That is because the proper venue for a petition for a writ of habeas corpus under Section 2241 is the district in which a prisoner is incarcerated, rather than the district in which he was sentenced. Compare 28 U.S.C. § 2241(a), (d), with id. § 2255(a). As a result, two individuals with identical terms --on the same day and in the same courtroom-- could end up serving vastly different sentences if one of them is incarcerated in a federal prison in the Fourth Circuit and the other in the TENTH. This Court **SHOULD NOT ALLOW** such dramatic differences in the availability of relief from unlawful detention to persist based on the arbitrary happenstance of where a particular prisoner is detained.

[2] In light of all the foregoing, the government itself has recognized that "review [of the question presented] would be warranted in an approriate case." **McCARTHAN** BIO 25. **THIS IS SUCH A CASE.**

There can be no serious dispute that **before ROSEMOND**, Petitioner's sentencing court would have been **required** to reject his argument that the court's jury instruction was erroneous because it did not require the jury to find that Petitioner had **"ADVANCED KNOWLEDGED"** that a firearm would be used or present. See, **UNITED STATES v. WISEMAN**, 172 F.3d 1196, 1217 (10th Cir. 1999). Nor can there be any serious dispute that **[after]**

ROSEMOND, Petitioner's conviction under 18 U.S.C. § 924(c) is **invalid.** That in itself renders Petitioner's conviction and sentence unlawful. See, e.g., **PEUGH v. UNITED STATES**, 569 U.S. 530, 541 (2013).

As this Honorable Supreme Court has emphasized, "the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' **and that 'provide opportunities for error correction.'"** Id. at 1908 (emphasis added) (citation omitted). In Section 2255(e), Congress sought to **ensure** just that. But the district court's reliance on the TENTH CIRCUIT'S **MISUNDERSTANDING** of that provision denied Petitioner any adequate or effective means of correcting the indisputable error in his § 924(c) conviction and sentence.

Thus, this case therefore presents an ideal opportunity for this Court to resolve the entrenched confusion over Sections 2241 and 2255. By Granting review, this Court can restore the vital safeguard against unlawful detention that Congress intended, and that justice demands.

CONCLUSION

The petition for a writ of certiorari should be GRANTED.

Respectfully submitted,

James Quary

James Wardell Quary (PRO SE)
Reg. No. 04868-031
U.S. Penitentiary
P.O. BOX 1000
Leavenworth, KS 66048