No. 19-52

In the Supreme Court of the United States

ALFRED J. WALKER,

Petitioner,

v.

N.C. ENGLISH,
WARDEN, USP-LEAVENWORTH,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Government agrees that the proper interpretation of Section 2255(e) is exceptionally important. It concedes the existence of the intractable 9-2 circuit split. It does not deny that the Court would conclusively resolve the issue if it grants certiorari, nor that the question warrants urgent attention. Indeed, the Government's certiorari petition in *United States v. Wheeler* asserted (at 29) that the Court's "timely resolution" of the Section 2255(e) issue was imperative "now." 139 S. Ct. 1318 (2019) (No. 18-420). That was over a year ago—and nothing has changed.

Despite all this, the Government nonetheless opposes certiorari. But none of the considerations it identifies holds water. The fact that the Court denied review in *Wheeler*—a case riddled with obvious vehicle problems—is no reason to do the same here. And the Government's grab bag of asserted "complications" is just a misplaced attempt to kick up dirt and confuse things. The choice-of-law issue the Government flags is neither part of (nor precedent to) Walker's question presented, and Walker is plainly entitled to relief on the merits under *Mathis v. United States*, 136 S. Ct. 2243 (2016).

Unless this Court intervenes, prisoners like Walker will languish in prison for *years* beyond what Congress has authorized, without ever receiving a fair hearing on their meritorious claims. That manifestly unjust result contradicts Section 2255(e), which is why Walker's case would come out differently in most federal circuits. The deep split and high stakes make this exactly the kind of case the Court should grant.

A. The Traditional Certiorari Criteria Are Satisfied

This case easily satisfies the Court's standard criteria for review. There is a universally acknowledged, intractable 9-2 circuit split over the question presented. *See* Pet. 13-17. Distinguished judges—including most recently Judge Thapar—have repeatedly acknowledged the need for this Court to address the Section 2255(e) issue. *Id.* at 15-17; *Wright v. Spaulding*, --- F.3d. ---, 2019 WL 4493487, at *10, 13 (6th Cir. 2019) (concurring). As Judge Thapar emphasized, "sooner may be better than later," because (1) "[t]he circuits are already split"; (2) "[t]he rift is unlikely to close on its own"; (3) "the vagaries of the prison lottery [now] dictate how much postconviction review a prisoner gets"; (4) "[l]ike cases are not treated alike"; and (5) the confusion over what Section 2255(e) means makes it harder for Congress to act. *Id.* at *13.

The Government acknowledges the deep split and agrees that the Tenth Circuit's rule creates "harsh results" for petitioners like Walker, who are unlawfully imprisoned for years on end. BIO 12-14. Indeed, the Government has rightly characterized this sort of outcome as a "complete miscarriage of justice." Principal En Banc Br. 26, *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017).

The Government has also recognized the urgency of resolving the Section 2255(e) issue. In *Wheeler*, the Government argued (at 29) that the "great significance" of the question presented requires "timely resolution"—"now." And in a separate brief filed a few weeks ago, the Government confirmed that

it "continues to believe that the issue . . . merits this Court's consideration in an appropriate case." BIO 10, *Jones v. Underwood*, No. 18-9495 (Sept. 27, 2019). This is that case.

B. The *Wheeler* Certiorari Denial Is No Reason To Deny Review Here

The Government's main justification for opposing certiorari is this Court's denial of its *Wheeler* petition, which it interprets as a sign that the Court prefers to leave the circuit split unresolved forevermore. BIO 14-15. But that interpretation makes little sense. *Wheeler* was plagued by a series of vehicle problems making the case an exceedingly poor candidate for review. Among other things: (1) a threshold waiver issue created the risk that this Court lacked jurisdiction to resolve the Section 2255(e) question; (2) the petition was interlocutory and could have become moot in ongoing lower court proceedings; and (3) once Wheeler was released, the Government was in the bizarre posture of seeking to *re*-imprison him to serve out the final eight months of a sentence that the Government *itself* conceded was unlawful. *See Wheeler* BIO 7, 11-15; *Wheeler* Resp. Ltr. 1-2 (Mar. 1, 2019); *Wheeler* U.S. Ltr. 1 (Feb. 28, 2019); *see also Wheeler* Pet. 8, 21-23, 28.

In these unique circumstances, it's no wonder the Court denied review. And that denial says nothing about what the Court should do in this case. Here—unlike in *Wheeler*—there is no threshold jurisdictional issue, and the decision below is final. And Walker's petition cleanly presents the circuit split in a case where almost *six years* of his life are at stake. This case is a far better vehicle than *Wheeler*.

C. The Asserted "Complications" Are Illusory

The Government also identifies a series of alleged "complications" that (it says) might affect this Court's resolution of Walker's case on the merits, all stemming from the fact that Walker was convicted in the Eighth Circuit but is now imprisoned in the Tenth. BIO 15-18. This Court should not be distracted by the Government's efforts to create confusion.

1. The fact that Walker is imprisoned in a different circuit from where he was convicted is not unusual. Rather, it is a run-of-the-mill consequence of standard Bureau of Prisons (BOP) procedures for processing federal inmates. BOP designates where a prisoner will be housed based on a set of criteria, none of which is directly tied to the district or circuit in which he is convicted and sentenced.[1]

For that reason, prisoners often serve their time in circuits other than where they were convicted. Indeed, the Section 2255(e) issue frequently arises in cases—like this one—where the prisoner's circuits of conviction and confinement differ. *See, e.g., Hahn v. Moseley*, 931 F.3d 295, 298 (4th Cir. 2019); *Stephens v. Herrera*, 464 F.3d 895, 896 (9th Cir. 2006); *Martin v. Perez*, 319 F.3d 799, 802 (6th Cir. 2003); *Dority v. Roy*, No. 09-CV-57, 2010 WL 796248, at *1 (E.D. Tex. Mar. 8, 2010). There is no reason to let the circuit split fester in this large class of cases.

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[1] *See* BOP, Inmate Security Designation and Custody Classification, (Sept. 4, 2019), https://www.bop.gov/policy/progstat/5100_008cn.pdf.

2. Virtually all of the Government's alleged "complications" turn on the premise that the Tenth Circuit might believe that Walker was properly sentenced under its decision in *United States v. Phelps*, 17 F.3d 1334 (10th Cir.), *cert. denied*, 513 U.S. 844 (1994), whereas his sentence is plainly unlawful under the Eighth Circuit's en banc decision in *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018). BIO 15-18. For the reasons noted below (at 8-10), *Phelps* is no longer good law, and the Tenth Circuit would not apply it. But it doesn't matter, because any disagreement between the Eighth Circuit and the Tenth would not complicate this Court's resolution of the question presented in any way.

The Government says a potential conflict might matter because Walker will ultimately need to establish a "fundamental defect" or "miscarriage of justice," and that question will need to be addressed under either Eighth or Tenth Circuit law (or both). BIO 16. It claims that this Court will thus be "*require[d]* . . . to decide as a *threshold* matter" whether Eighth or Tenth Circuit law applies to the "fundamental defect"/"miscarriage of justice" question. *Id.* (emphasis added).

This choice-of-law issue is a red herring. The requirement that a prisoner establish a "fundamental defect" or "miscarriage of justice" is an *additional* requirement of habeas corpus relief that applies—across the board—to anyone seeking relief for a non-constitutional error under Sections 2254, 2255, or 2241. *See, e.g.*, *Reed v. Farley*, 512 U.S. 339, 353-55 (1994). Neither the Tenth Circuit nor the district court expressly addressed this additional requirement when they rejected Walker's petition on the separate ground that his Section 2255 remedy

was not "inadequate or ineffective" insofar as it formally allowed him to seek relief (albeit in a futile motion foreclosed by then-binding adverse Eighth Circuit precedent). *See* Pet. App. 2a-4a, 6a-12a.

Walker's petition seeks reversal of the Tenth Circuit's decision, which rested exclusively on that ground. To the extent the Government believes there are alternative grounds on which it can prevail, it can advance those arguments at the merits stage. But this Court would likely decline to address them in the first instance, per its usual practice. Either way, though, any new argument the Government might make based on the "fundamental defect"/"miscarriage of justice" requirement is not logically antecedent to—and thus would not interfere with—this Court's resolution of Walker's question presented.

3. In any event, the Government's musing that Tenth Circuit law *might* potentially apply to the "fundamental defect"/"miscarriage of justice" inquiry is misguided, which is perhaps why the Government fails to affirmatively endorse that view. In fact, the substantive law of the Section 2255 circuit (here, the Eighth Circuit) governs the Section 2255(e) analysis. That follows from the language of Section 2255(e), which requires an inquiry into whether the prisoner's "remedy *by [Section 2255] motion* is inadequate or ineffective to test the legality of his detention" (emphasis added). Section 2255(e) focuses the inquiry on whether the prisoner's Section 2255 motion is adequate or effective to test the legality of his detention. Whether such a motion is adequate will necessarily depend on whether relief is foreclosed under the law of the circuit governing that motion—not some other circuit's law under which no Section 2255 motion would ever be adjudicated.

Although the Government claims the choice-of-law issue is "undeveloped," the reality is that the Fourth Circuit and virtually every district court addressing the issue have recognized that the law of the Section 2255 circuit—*not* the law of the Section 2241 circuit—governs the Section 2255(e) adequacy inquiry. *See, e.g.*, *Hahn*, 931 F.3d at 301; *Eames v. Jones*, 793 F. Supp. 2d 747, 749-50 (E.D.N.C. 2011); *Hernandez v. Gilkey*, 242 F. Supp. 2d 549, 554 (S.D. Ill. 2001); *Burgess v. Williams*, No. 4:18-cv-2643, 2019 WL 2641902, at *2 (N.D. Ohio June 27, 2019); *Van Hoorelbeke v. United States*, No. 0:08-3869, 2010 WL 146289, at *4 (D.S.C. Jan. 8, 2010); *Chaney v. O'Brien*, No. 7:07CV00121, 2007 WL 1189641, at *3 (W.D. Va. Apr. 23, 2007). As the court explained in *Hernandez*, applying the law of the Section 2255 circuit—where the prisoner was convicted and sentenced—is "reasonable" and "consistent," and it avoids the "arbitrary" result of having a prisoner's entitlement to relief turn on where BOP chooses to house him. 242 F. Supp. 2d at 554.

The Government has not identified a single case holding that the substantive law of the circuit of *confinement* governs a Section 2241 petition in these circumstances. The only circuit case that comes close is *Chazen v. Marske*, but there the court applied circuit-of-confinement law only because both parties affirmatively agreed to it. --- F.3d. ---, 2019 WL 4254295, at *7 (7th Cir. 2019). Notably, Judge Barrett's concurrence said she was "skeptical" of that approach, because "[a]pplying the law of the circuit of confinement risks recreating some of the problems that § 2255 was designed to fix." *Id.* at *12 (relying on *Hernandez*). Indeed, the Solicitor General has previously recognized (albeit implicitly) that the law

of the Section 2255 circuit governs the Section 2255(e) issue in these circumstances. *See* BIO 5-6, 7-8, *Dority v. Roy*, No. 10-8286, 2011 WL 2177302 (May 2011).

For these reasons, the merits of Walker's habeas petition—including whether or not his sentence was marred by a "fundamental defect" or "miscarriage of justice"—will ultimately be adjudicated under Eighth Circuit law. And there is no dispute that under that court's decision in *Naylor*, 887 F.3d at 406-07, Walker's sentence here exceeds the statutory maximum and counts as a miscarriage of justice. Hence, even if the "miscarriage of justice" issue were a "threshold" question (and it is not), it would be an easy one that poses no barrier to this Court's review.

4. Even if Tenth Circuit law governs the Section 2241 inquiry, *Phelps* would not control. That decision is plainly wrong in light of *Mathis* and the subsequent Missouri cases that the Eighth Circuit relied upon in *Naylor*. Tellingly, the Government does not (1) endorse *Phelps*; (2) dispute *Naylor*; or (3) deny that Walker's sentence is unlawful in light of *Mathis*.

Walker's prior conviction was for second-degree burglary under Missouri Revised Statute § 569.170. That provision criminalizes burglary of a "building or inhabitable structure," *including* any "ship, trailer, sleeping car, airplane, or other vehicle . . . : (a) [w]here any person . . . carries on business or other calling; or (b) [w]here people assemble for purposes of business, government, education, religion, entertainment or public transportation." *See Naylor*, 887 F.3d at 401 (quoting Mo. Rev. Stat. §§ 569.170, 569.010(2) (1979)).

In *Naylor*, the Eighth Circuit applied *Mathis* and correctly held that Section 569.170 is indivisible as to

the phrase "building or inhabitable structure," which sets out alternative *means* of committing the same crime of second-degree burglary. *Id.* at 399-406; *see also id.* at 407-08 (Colloton, J., concurring). The court relied on decisions from the Missouri Supreme Court and Courts of Appeals "characteriz[ing] these alternatives as part of a single element." *Id.* at 407 (Colloton, J.); *see also id.* at 401-04. Because Section 569.170's "inhabitable structure" prong includes burglary of various vehicles, Walker's conviction was not for generic burglary. *Id.* at 400; *id.* at 407, 408 (Colloton, J.).

The Tenth Circuit's contrary holding in *Phelps* does not survive *Mathis*. There, this Court expressly *rejected* the Eighth and Tenth Circuit's prior view that "when a statute happens to list various means by which a defendant can satisfy an element," the usual categorical approach does not apply and courts must decide whether a defendant committed generic burglary by looking to the actual facts of his offense. 136 S. Ct. at 2251 & n.1. *Mathis* also overturned erroneous Tenth Circuit precedent "reject[ing] state-law inquiries into whether juror unanimity is required on a statutory alternative" as part of the divisibility analysis. *Mathis* U.S. Cert. Br. 17, 2015 WL 9855126 (Dec. 17, 2015); *see Mathis*, 136 S. Ct. at 2256.

By overturning these key aspects of Tenth Circuit precedent, *Mathis* fatally undermined *Phelps*. The Tenth Circuit has never conducted the close analysis of Missouri law required by *Mathis*. Indeed, *Phelps* contained no independent analysis at all. *Phelps* simply deferred to the Eighth Circuit's now-discredited view that Section 569.170 covers only generic burglary. 17 F.3d at 1341. If and when the

Tenth Circuit is called upon to address a Section 569.170 conviction, it will defer to *Naylor*, just as *Phelps* previously deferred to earlier Eighth Circuit precedent.

5. The Government also asserts that Walker's "entitlement to relief depends on a view of the saving clause expansive enough to encompass the right to ask the Tenth Circuit to reconsider its prior decision in *Phelps*." BIO 17. Not so: As explained, Eighth Circuit law governs all substantive aspects of his Section 2241 petition. *Phelps* has no bearing on his ultimate entitlement to relief. *See supra* at 5-10.

In any event, the Government offers no reason why—assuming Tenth Circuit law *does* eventually play a role—Walker should be foreclosed from pointing out that *Phelps* is inconsistent with *Mathis*, *Naylor*, and relevant Missouri caselaw. The Government cites no authority supporting the bizarre proposition that a court should apply obsolete circuit precedent when adjudicating a Section 2241 petition. And although the Government notes that "[n]o circuit has indicated that it would authorize saving-clause relief" in similar circumstances where it would need to overturn circuit precedent, BIO 17, that's because virtually all courts apply the substantive law of the circuit of *conviction*. *See supra* at 7.

6. Most egregiously, the Government errs when it twice invokes *In re Davenport*, 147 F.3d 605 (7th Cir. 1998), for the proposition that a circuit split between the circuits of conviction and confinement categorically "precludes saving-clause relief" and makes such relief "unavailable." BIO 17. The Government blatantly mischaracterizes what *Davenport* held.

To be clear: *Davenport* did *not* say that saving-clause relief is unavailable whenever the circuits of conviction and confinement disagree. Rather, the court first explained that a "change of law" is required to trigger Section 2241 relief, 147 F.3d at 611, and it then held that the fact that the law is different between the circuits of conviction and confinement is not *itself* a qualifying "change in law," *id.* at 612. By omitting key portions of the sentences it quotes, the Government twists this holding into a categorical rule foreclosing relief whenever there is a disagreement between the circuits. Anyone interested in *Davenport* should compare its actual language to the Government's cherry-picked snippets.[2]

The Government has been castigated for "grossly misinterpret[ing]" and "misrepresent[ing]" *Davenport* to similar ends in a previous case. *See Eames*, 793 F. Supp. 2d at 749-50. And multiple courts have cited *Davenport* to support the conclusion that the substantive law governing a Section 2241 petition is the law of the circuit of conviction, *not* confinement. *See, e.g., Hahn*, 931 F.3d at 300-01; *Eames*, 793 F. Supp. 2d at 749-50; *Hernandez*, 242 F. Supp. 2d at 554. That is almost precisely the *opposite* of what the Government claims. *Davenport* does not undermine Walker's case for review in any way.

7. Finally, the Government concludes its kitchen-sink opposition to certiorari by noting that

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[2] The Government's mischaracterization erroneously implies that the Seventh Circuit would reject Walker's claim because of the purported *Naylor*/*Phelps* split. Instead, that court would likely apply Eighth Circuit precedent and treat *Naylor* as the relevant "change in law" for Section 2241 purposes. *See Chazen*, 2019 WL 4254295, at *12 (Barrett, J., concurring).

none of the choice-of-law issues were briefed or argued below. That's true—but only because the lower courts summarily rejected Walker's petition without ever addressing his substantive arguments at all. The fact that those courts repeatedly refused to give Walker a fair hearing on his meritorious claim is no reason for this Court to do the same.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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