No. 21-763

In The Supreme Court of the United States

JOHN FORREST HAM, JR.,

Petitioner,

v.

WARDEN M. BRECKON.

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

REPLY BRIEF FOR PETITIONER

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The Government agrees that Petitioner Ham is serving an unlawful sentence. The Government acknowledges a deep circuit split on the question presented. And the Government offers no merits defense of the court of appeals' rejection of Ham's 28 U.S.C. § 2255(e) saving-clause claim (which it supported below). That confluence of factors demands this Court's review—as the Government told the Court just three Terms ago (albeit in a case with serious threshold defects absent here). Since then, jurists confronting the same *Mathis*-based fact pattern presented in this case have called on this Court to provide desperately needed guidance addressing the inconsistent application of section 2225(e)'s saving clause.

Yet the Government now opposes further review based on two purported vehicle problems. Neither withstands scrutiny. The contention that Ham "likely would not be entitled to relief under any circuit's view of the saving clause" (BIO 13) is refuted by the Government's own position below, by the Fourth Circuit's discussion of the competing tests, and by any reasonable examination of the cases that foreclosed Ham's sentencing claim when he filed his initial section 2255 motion. And the assertion that Ham might receive the same sentence on remand is not only wildly speculative and legally irrelevant, but also undermined by the Government's explicit recognition below that Ham's current unlawful sentence represents a "grave" and "fundamental defect."

This Court should grant the Petition.

I. THE GOVERNMENT ACKNOWLEDGES AN ENTRENCHED CIRCUIT CONFLICT ON A QUESTION OF UNDISPUTED IMPORTANCE

1. The Government recognizes that a fully developed "circuit conflict exists on the general scope of the savings clause." BIO 9. By the Government's count, three courts of appeals have held that section 2255(e)'s saving clause "categorically does not permit habeas relief based on an intervening decision of statutory interpretation," while "the other nine regional courts of appeals" have held "that, in at least some circumstances, the saving clause *** allows a federal prisoner to file a habeas petition *** based on an intervening and retroactive decision of statutory construction." BIO 10-11. Accordingly, *every* court of appeals in which habeas petitions may be litigated has passed upon the scope of the saving clause.

Beyond that "broader circuit conflict," the Government recognizes a more specific conflict arising from the particular fact pattern of this case. BIO 11. In contrast to the three courts of appeals (Eighth, Tenth, and Eleventh Circuits) that categorically bar federal prisoners from proceeding under section 2255(e) in light of intervening decisions, four courts of appeals (Fourth, Sixth, Seventh, and Ninth Circuits) "have held that a prisoner may be entitled to habeas relief if an intervening decision of statutory interpretation, made retroactive on collateral review, has since established that the prisoner has been *sentenced*" unlawfully. *Id.* (emphasis added).

Those four circuits, however, have "offered varying rationales and adopted somewhat different

formulations" for invoking the saving clause—even while addressing the same intervening decision of this Court (*Mathis v. United States*, 136 S. Ct. 2243 (2016)). BIO 11-12; *see* Pet. App. 27a-28a. Critically, the Fourth Circuit alone—under *Wheeler v. United States*, 886 F.3d 415 (4th Cir. 2018), and the published decision below—"requir[es] that the intervening statutory decision have changed settled substantive law" through a "new rule." BIO 12-13; *see* Pet. 12-16; Pet. App. 28a ("[U]nlike the *Wheeler* test, there is no requirement of a substantive change in law" in the other circuits.).

The Fourth Circuit's additional requirement—absent in the Sixth, Seventh, and Ninth Circuits—makes all the difference for habeas petitioners like Ham. The latter three circuits have applied the same intervening decision (*Mathis*) to the same underlying conviction (an unlawfully enhanced felon-in-possession conviction under 18 U.S.C. § 922(g)(1)), yet reached opposite results (granting resentencing relief) because they all employ a less demanding legal test: "merely *** that *Mathis* could not have been invoked, whether as foreclosed by circuit precedent or otherwise," in the initial section 2255 petition, without any requirement of a change in settled law. Pet. App. 28a ("[N]one of these out of circuit tests equate to *Wheeler*[.]"); *see* Pet. 15-16.

The pressing need for this Court's intervention is not debatable. Indeed, the Government sought further review in *Wheeler* precisely because "the [saving-clause] issue is of great significance." Pet. 23, *United States v. Wheeler*, No. 18-420 ("*Wheeler* Pet."). As then explained, [t]he conflict on the scope of the saving clause has produced, and will continue to produce,

divergent outcomes for litigants in different jurisdictions," and "[t]he disparate treatment of identical claims is particularly problematic because *** the cognizability of the same prisoner's claim may depend on where he is housed by the Bureau of Prisons." *Id.* at 13, 25 (citation omitted). Coupled with the reality that "[o]nly this Court's intervention can ensure nationwide uniformity as to the saving clause's scope," *id.* at 13, this Petition indisputably satisfies the two most important criteria for this Court's review: an entrenched circuit conflict on an issue of exceptional importance.

2. Although admitting that it has deemed the broader saving-clause issue to be cert-worthy, BIO 11, and despite supporting Ham's bid for saving-clause relief in both the district court and the court of appeals, the Government now claims this case does not warrant further review. But the Government nowhere contends that the proper interpretation of the saving clause has somehow become less important to federal prisoners serving unlawful sentences, or that the courts of appeals have resolved their disagreement in the past three years. Instead, the Government suggests that this Court should deny review here because it denied the Government's petition in *Wheeler*. That suggestion fails on multiple levels.

a. *Wheeler* was far from the proffered high-water mark of certiorari petitions on the scope of the saving clause. Because Wheeler already had served the vast majority of his original 15-year sentence, and was all but certain to be released in due course before this Court would complete its review, the specter of mootness loomed large over the petition. *See* Reply 9-10, *United States v. Wheeler*, No. 18-420 ("*Wheeler*

Reply") (agreeing that dispute could "have no continuing practical effect and would, in the government's view, be moot"). In addition, because the Government failed to obtain a stay of the Fourth Circuit's judgment allowing Wheeler to invoke the saving clause, the Government urged the Court to hold the (interlocutory) petition pending further proceedings on remand, *id.* at 10, which ultimately resulted in Wheeler's release eight months early and a new appeal by the Government, Resp't Mar. 1, 2019 Ltr. 1-2, *United States v. Wheeler*, No. 18-420.

If that were not enough, the Government changed its merits position in the Fourth Circuit, *see* 886 F.3d at 422-426, 434 & n.12 (describing "about-face" as "particularly distasteful"), leading Wheeler to suggest waiver as an alternative ground for affirmance. The Government, in turn, responded that the Court should simply "add" a second question presented concerning "whether section 2255(e) is jurisdictional"—even though that "question would not independently warrant this Court's review." *Wheeler* Pet. 28.

None of *Wheeler*'s barriers to review is present here. Accordingly, the denial of certiorari in *Wheeler* does not portend—much less dictate—the same result now.[1]

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[1] The same is true of the petitions associated with the cases in the Government's unadorned string cite. BIO 12. All but one petition sought review of an unreported decision. Half were filed by *pro se* petitioners. Nearly as many concerned challenges to convictions, not sentences. Many presented low-hanging vehicle issues (*e.g.*, no intervening decision, release from prison, lack of Government briefing below). One was even voluntarily dismissed without a Government response.

b. In any event, the Government is wrong that *Wheeler* is the relevant benchmark. Since this Court denied review in 2019, judges have continued to join the chorus requesting that "th[is] Court *** step in," adding "that sooner may be better than later." *Wright v. Spaulding*, 939 F.3d 695, 710 (6th Cir. 2019) (Thapar, J., concurring); *see Allen v. Ives*, 976 F.3d 863, 868 (9th Cir. 2020) (Fletcher, J., concurring in denial of petition for rehearing en banc) ("[T]he Supreme Court should grant certiorari—in this or in some other case—to resolve the circuit split."); *see also Chazen v. Marske*, 938 F.3d 851, 866 (7th Cir. 2019) (Barrett, J., concurring) (appreciating that "litigants and district courts [need] better guidance").

Notably, as here, each of those recent decisions concerned whether this Court's intervening decision in *Mathis* triggers section 2255(e)'s saving clause. The conflicting decision below thus crystalizes post-*Wheeler* an especially square conflict in this area of the law. Pet. 14-16.

c. The Government also tries some misdirection, describing Ham as challenging "the Fourth Circuit's application of its own saving-clause precedent to its own prior decisions." BIO 12-13. Yet Ham plainly does not seek review of any case-specific evaluation of whether there was a change in settled substantive law. Quite the opposite, Ham's argument is that such a requirement should not exist at all as a matter of law. Pet. 18-22.

Put another way, Ham is *not* challenging the Fourth Circuit's determination that the substantive law remained unchanged by *Mathis* (though all parties agreed below it had changed). Pet. App. 14a-

27a (Part II.A). Instead, Ham takes issue with the Fourth Circuit's rejection of a saving-clause test from the Sixth, Seventh, and Ninth Circuits that, "unlike the *Wheeler* test," imposes "no requirement of a substantive change in law" in the first place. *Id.* at 27a-28a (Part II.B). Application of the test from those other circuits would provide an independent basis for granting saving-clause relief here and render unnecessary the Fourth Circuit's change-in-law analysis.

II. THE GOVERNMENT'S ILLUSORY VEHICLE ARGUMENTS DO NOT WITHSTAND SCRUTINY

Despite an entrenched conflict on an important question of law and a court of appeals decision that it does not defend on the merits, the Government concocts two (exceptionally weak) vehicle arguments. Neither holds up.

1. The Government asserts that "this case does not squarely implicate th[e] conflict because petitioner likely would not be entitled to relief under any circuit's view of the saving clause." BIO 13. That is flatly incorrect and, in any event, would not affect this Court's resolution of the proper legal test.

The Government's contention is based on its newfound assertion that Ham "cannot satisfy th[e] requirement" in the Sixth, Seventh, and Ninth Circuits that "erroneous precedent foreclosed his claim." BIO 13. But the Government made the exact opposite representation to the court of appeals: "There is no dispute" that "at the time of sentencing, settled law of this circuit *** established the legality of [Ham's] sentence." Gov't C.A. Br. 10 (quoting *Wheeler*,

886 F.3d at 429); *see id.* ("At the time of [Ham's] sentencing, the settled law of this circuit was that his burglary *** conviction[] qualified as [an] ACCA predicate[]."). It is thus untrue that "[t]he government's briefs in the lower courts did not address th[is] separate requirement in *Wheeler* and other cases." BIO 15 n.*.

Nor did the Fourth Circuit make its "own determination" that *pre*-Mathis circuit precedent "did not foreclose [Ham's] present argument." BIO 15; *see* Pet. App. 14a ("This case boils down to an analysis of prong two of the *Wheeler* test"—*i.e.*, whether there has been a "change" in law—and thus the decision "do[es] not consider the other three prongs."). On the contrary, the Fourth Circuit explicitly acknowledged that it "ha[s] binding precedent that runs contrary to the change Petitioner asks us to make." Pet. App. 27a n.9.

The Fourth Circuit was right to suggest that pre-*Mathis* circuit law foreclosed Ham's *Mathis* claim—a conclusion that would unequivocally entitle Ham to a new sentence in the Sixth, Seventh, and Ninth Circuits. At the time Ham filed his original section 2255 motion, it was settled in the Fourth Circuit that, when state statutes "define burglary broadly to encompass enclosures other than 'a building or structure,'" circuit precedent "permit[ted] the sentencing court to go beyond the mere fact of conviction" to determine whether the particular burglary at issue qualifies as a predicate ACCA offense. *United States v. Foster*, 662 F.3d 291, 293 (4th Cir. 2011) (holding that Virginia burglary statute was divisible because, like South Carolina's burglary definition, it encompasses not only buildings but also

automobiles and watercrafts). Consistent with that view, the Fourth Circuit repeatedly held (incorrectly) that South Carolina's burglary statute is divisible. *E.g., United States v. McLeod*, 808 F.3d 972, 976 (4th Cir. 2015) (second-degree burglary); *United States v. Hall*, 495 F. App'x 319, 327 (4th Cir. 2012) (third-degree burglary); *United States v. Hickman*, 358 F. App'x 488, 489 (4th Cir. 2009) (per curiam) (third-degree burglary); *see also* Pet. App. 22a (South Carolina's second-degree burglary statute contains "same definition of 'building' as third degree burglary"). Confirming as much, the Fourth Circuit would later acknowledge that its (existing) "approach in *Foster* [and *Hickman*, *Hall*, and *McLeod*] *** does not survive the Supreme Court's decision in *Mathis*." *Castendet-Lewis v. Sessions*, 855 F.3d 253, 263 (4th Cir. 2017).

All of this explains why, on direct appeal, Ham's counsel filed an *Anders* brief "finding no meritorious grounds for appeal," and the Fourth Circuit identified "no meritorious issues for appeal" in rejecting Ham's *pro se* argument "that the district court erred by designating him as an armed career criminal." *United States v. Ham*, 438 F. App'x 183, 184-185 (4th Cir. 2011) (per curiam). Likewise, the district court denied Ham's initial section 2255 motion on the ground that there was "no basis" for his counsel to have argued that his prior state conviction was not a violent felony under the ACCA. Pet. App. 6a-7a.

Ignoring those cases, the Government points out that "the Fourth Circuit had determined, consistent with *Mathis*, that statutes listing alternative means of committing an offense rather than alternative elements, were indivisible." BIO 13-14 (citing

Omargharib v. Holder, 775 F.3d 192, 196 (4th Cir. 2014); *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013); *United States v. Cabrera-Umanzor*, 728 F.3d 347, 353 (4th Cir. 2013)). But each of the cited decisions, far less instructive than the on-point decisions discussed above, was issued *after* Ham's initial section 2255 motion was filed and denied.

Even if there were some question on that downstream issue, this case would still merit review. Were this Court to endorse the Sixth, Seventh, and Ninth Circuits' test, at a minimum remand would be warranted so that the Fourth Circuit could resolve whether its own precedent foreclosed Ham's claim at the time of his initial section 2255 motion (as it previously had concluded). This Court need not prejudge that issue.

2. As a last-ditch effort, the Government contends that review is unwarranted because Ham might receive the same aggregate sentence on remand. That contention is both highly speculative and legally immaterial—not to mention at odds with its position below. As the Government told the court of appeals, "[t]he 235-month sentence [Ham] is serving on the § 922(g)(1) count now exceeds the statutory maximum applicable to him, which is an error sufficiently grave to be deemed a fundamental defect." Gov't C.A. Br. 11. "If a defendant faces punishment beyond that provided by statute *** , it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened" unlawfully. *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000). Such a defect in "the fundamental legality" of Ham's detention "would raise substantial constitutional concerns if unaddressed."

Br. for *Amicus Curiae* Howard University School of Law Civil Rights Clinic 3; *see* Pet. 20-23.

Everyone agrees on the two facts that actually matter: Ham's current sentence is unlawful because it was based on a 15-year *minimum* under the ACCA, instead of the 10-year statutory *maximum* that would apply without the improper enhancement. And if the saving clause provides jurisdiction here, the district court would be required to lower Ham's sentence on the felon-in-possession count by at least 115 months—and would be free to impose a sentence that is at least 55 months lower in the aggregate (even assuming his sentences on the other two counts were not lowered).[2] That is plainly enough for this Court's review.

The Government obfuscates these undisputed facts by emphasizing that the district court would be "authorized" to impose a *higher* sentence on remand under the current Guidelines. But that new and extreme prediction rests on a dubious worst-case scenario. The Government assumes, for example, that the district court would reverse its prior decision that Ham's two sentences on the felon-in-possession and

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[2] Ham is presently serving 319 months of imprisonment for his three convictions: 235 months on the felon-in-possession count, as unlawfully enhanced under the ACCA; 180 months for a carjacking count, running concurrently; and 84 months on a section 924(c) count, to run consecutively. *See* Pet. App. 4a-5a. Absent the unlawful ACCA enhancement, the statutory maximum sentence for Ham's felon-in-possession conviction (120 months) would be less than the sentence running concurrently for his carjacking conviction. Accordingly, if his sentence for the carjacking and section 924(c) convictions remained unchanged, his new term of imprisonment would total 264 months—*i.e.*, 55 months less than his present term.

carjacking counts are "to run concurrently," BIO 5, and would insist instead that those two sentences run consecutively. The Government's conjecture also omits any role for new evidence that would support a further reduction in Ham's sentence on remand. *Contra Pepper v. United States*, 562 U.S. 476, 490 (2011) ("[W]hen a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing *** [to] support a downward variance from the advisory Guidelines range.").

In any event, as the Government previously told this Court when seeking review on the scope of the saving clause, the critical interests in seeking "resolution of a deeply entrenched circuit conflict that 'is of great significance' and in obtaining review of an erroneous legal rule" eclipse any speculation that remand might not result in a substantially different sentence. *Wheeler* Reply 10. The same goes here.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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