

No. 18-292

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In the  
Supreme Court of the United States

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DETRIC LEWIS,

*Petitioner,*

v.

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

*Respondent.*

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

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**SUPPLEMENTAL BRIEF FOR PETITIONER**

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## ARGUMENT

Petitioner Detric Lewis submits this supplemental brief pursuant to this Court's Rule 15.8 to advise the Court of his views on the brief in opposition to certiorari and reply brief supporting certiorari in *United States v. Wheeler*, No. 18-420. Simply put, those filings confirm that this Court should grant certiorari in *this* case, either on its own or together with *Wheeler*.

1. Lewis's petition for certiorari (filed on September 4, 2018) laid out a strong argument that (1) the courts of appeals are intractably divided on the proper interpretation of Section 2255(e)'s savings clause; (2) the Tenth Circuit's position on that question is deeply flawed and leads to harsh results, and (3) this case offers an ideal vehicle for the Court to conclusively resolve the issue. Pet. 1-4, 11-28.

In response, the Government conceded the circuit split and agreed that the question presented is ripe for immediate resolution by this Court. BIO 1-2, 4. But it nonetheless opposed review here and asserted that the Court should instead grant its later-filed petition for certiorari in *Wheeler* (Oct. 3, 2018). *Id.*

Lewis's reply brief pointed out that *Wheeler* is an inferior vehicle for this Court to address the Section 2255(e) issue, for multiple reasons. For one thing, Lewis emphasized *Wheeler's* interlocutory posture—and the clear potential for the case to become moot in the coming months. Pet. Reply 8-9. Lewis also highlighted the threshold problem posed by the Government's affirmative concession, in district court, that *Wheeler's* habeas petition is cognizable under Section 2255(e). *Id.* at 9-10. Lewis noted that the Government thereby waived the Section 2255(e)

argument it now advances in this Court—and that the waiver, if given effect by the Court, would almost certainly prevent the Court from resolving the Section 2255(e) question on which the circuits are divided. *Id.*

2. After Lewis filed his reply brief in this case, Wheeler filed his opposition to certiorari (on January 14, 2019), and the Government filed its *Wheeler* reply brief (on January 30, 2019). Both of these subsequent filings reinforce—and in fact *strengthen*—the arguments Lewis has advanced for granting review in this case instead of *Wheeler*.

*First*, it is now clear that both Wheeler and the Government *agree* that the interlocutory posture and mootness problem pose a serious impediment to this Court’s review in *Wheeler*. *See Wheeler* BIO 11-14; *Wheeler* Pet. Reply 7-10. Indeed, the Government’s reply brief takes the extraordinary step of asking the Court to defer consideration of its *own* petition, indefinitely, until the *Wheeler* district court both (1) holds a preliminary hearing at the end of February 2019, and (2) later eventually resentences Wheeler. *Wheeler* Pet. Reply 10. The Government has no idea how long this process will take, and neither does anyone else.<sup>1</sup> And the Government and Wheeler agree that the case will be become moot if Wheeler is

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<sup>1</sup> The district court has made clear it has no interest in expediting the *Wheeler* resentencing proceedings, despite Wheeler’s victory in the Fourth Circuit. As the Government’s *Wheeler* reply brief explains (at 8-9), the Fourth Circuit issued its mandate and remanded the case to the district court at the end of June 2018. Wheeler immediately filed a motion to expedite his resentencing, and the Government filed its own motion to expedite in November 2018. The district court has scheduled a preliminary hearing for February 28, 2019, but has not yet scheduled an actual resentencing hearing. *Id.*

given the same sentence he received before *or* is not released before his current, erroneous sentence ends in October 2019 (or potentially even sooner). *Wheeler* BIO 11, 13; *Wheeler* Pet. Reply 9-10 & n.\*.

Needless to say, the bizarre wait-and-see procedure proposed by the Government's reply is precisely why this Court disfavors review of interlocutory petitions in the first place. By contrast, Lewis's case has been litigated to a final judgment, and there is no chance it will become moot pending review.<sup>2</sup> Indeed, this case has been properly teed up for certiorari and resolution since November 2018. Nothing would prevent this Court from resolving the question presented if it grants review.

*Second*, Wheeler's brief in opposition and the Government's reply confirm the existence of a robust debate over a threshold waiver question that could easily prevent the Court from deciding the Section 2255(e) savings-clause question in that case. The parties vigorously contest whether Section 2255(e)'s limitation on habeas review is jurisdictional, and thus whether the Government had the right to switch positions mid-litigation and embrace the restrictive interpretation of Section 2255(e) that it now advances here. *See Wheeler* BIO 14-19; *Wheeler* Pet. Reply 5-7.

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<sup>2</sup> Lewis is serving a 188-month sentence and will not be released for nearly five more years unless this Court acts. As explained in the petition, that sentence is unlawful under *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016). Pet. 7-8, 10. If Lewis had been sentenced at the equivalent place within a *properly* calculated Guidelines range, he would have received a sentence of 120 months, and would almost be a free man. *Id.* at 5-6.

Notably, the Government acknowledges the complexity of this issue (which has spawned its own circuit split) and even suggests that the Court might wish to add an additional question presented to the Government's petition. *Wheeler* Pet. Reply 7. But as Wheeler points out, the waiver issue provides a basis why he should win at the threshold. And if Wheeler is right that Section 2255(e) is a non-jurisdictional claims-processing rule, this Court would not (and perhaps could not) go on to decide the merits of the Section 2255(e) issue. *Wheeler* BIO 14-19.

By contrast, Lewis's petition presents none of these difficulties. The Section 2255(e) issue is squarely presented, and there is no danger that the Court would fail to reach and decide it if certiorari is granted.<sup>3</sup>

3. For the reasons noted above, this case is an excellent vehicle for certiorari—and *Wheeler* is not. The best and most straightforward course is therefore for this Court to grant review here and deny the *Wheeler* petition in light of its obvious vehicle problems. There is no sense in which *Wheeler* is, or could become, a superior vehicle to this one, and thus no reason to wait to see whether *Wheeler* becomes an

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<sup>3</sup> The Government's brief in opposition asserts (at 5) that Lewis cannot ultimately obtain relief on the merits because errors in applying the Sentencing Guidelines are never cognizable on collateral review. That assertion is mistaken, but in any event that distinct issue is *not* before the Court in this case and would pose no impediment to the Court's resolving the Section 2255(e) issue if it grants review. *See* Pet. Reply 4-8 (explaining that Government's alternative argument has nothing to do with Section 2255(e), was not pressed or passed upon below, should not be addressed in first instance by this Court, and is wrong).

even *worse* vehicle (which is essentially what the Government suggests).

Alternatively, if this Court concludes that for some reason it wants to grant certiorari in *Wheeler*, it should grant *both* petitions. Doing so would preserve its ability to answer the Section 2255(e) question even if (1) *Wheeler* becomes moot between now and a decision, or (2) the waiver problem prevents the Court from addressing the merits of the Section 2255(e) dispute in *Wheeler*. Under this scenario, the parties could coordinate a briefing schedule and oral argument plan that is efficient, allows all perspectives to be heard, and ensures that the Court will be able to resolve the case and provide the “greatest degree of clarity” to lower courts—precisely what the Government claims to want. *Wheeler* Pet. Reply 2.

\* \* \*

At bottom, Lewis and the Government agree that the Section 2255 question presented in this case is of “great significance” and that this Court should resolve it as soon as possible. *Wheeler* Pet. Reply 10 (quoting *Wheeler* Pet. 23)). This case offers the ideal vehicle for doing so.



**CONCLUSION**

The petition for certiorari should be granted.

Respectfully submitted,

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