No. 18-420

IN THE
SUPREME COURT OF THE UNITED STATES

United States of America,

Petitioner,

v.

Gerald Adrian Wheeler,

Respondent.

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

BRIEF IN OPPOSITION

Anthony Martinez
FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF NORTH CAROLINA
Joshua B. Carpenter
Appellate Chief
Counsel of Record
Ann L. Hester
Assistant Federal Public Defender
1 Page Avenue, Suite 210
Asheville, NC 28801
Telephone: (828) 232-9992
Email: Joshua_Carpenter@fd.org

QUESTION PRESENTED

28 U.S.C. § 2255 generally bars a prisoner from bringing a second or successive claim challenging his detention. But the statute's savings clause, Section 2255(e), allows a prisoner to file a second or successive claim (in the form of a petition for habeas corpus under Section 2241) when Section 2255 "appears to be inadequate or ineffective to test the legality of his detention."

After Gerald Wheeler's initial Section 2255 motion was denied, a retroactive decision of statutory interpretation made clear that Wheeler had been wrongly subjected to an enhanced mandatory minimum sentence.

The question presented is whether the savings clause of Section 2255(e) permits Wheeler to challenge his erroneous sentence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Everyone agrees that Gerald Wheeler's sentence is unlawful. But the Government maintains that a court cannot correct his sentence under any statute, including the savings clause of 28 U.S.C. § 2255—Section 2255(e).

Section 2255(e) allows a federal prisoner to file a habeas petition where the ordinary remedy for correcting sentences, Section 2255, does not adequately and effectively test the legality of the prisoner's detention.

The Government chose to file a petition for certiorari in a case that is among the worst possible vehicles to address the scope of Section 2255(e). Wheeler's original sentence is set to expire on October 23, 2019. If Wheeler is not resentenced, the case will likely become moot before any review could occur in this Court. And if he is resentenced, the Government's only interest in the case would be gaining the ability to send Wheeler back to prison for whatever few weeks might remain of his concededly unlawful sentence.

There is more. The Government agreed in the district court that Wheeler could challenge his sentence under the savings clause. Thus, this Court could find itself in the position of affirming the Fourth Circuit's judgment on the alternative ground that the Government waived its argument about the scope of Section 2255(e). Even if this Court were to reach the merits of the Government's argument, the Government is already urging the Court to resolve this case on narrow grounds that would only address the applicability of Section 2255(e) to mandatory minimum sentences and no other kind of case.

It would be one thing to accept these vehicle issues to address an issue that affects many people or to vindicate a substantial Government interest. But cases implicating the scope of the savings clause arise relatively infrequently. And the Government's interest here—continuing to incarcerate people who are detained based on an erroneous construction of a statute—hardly calls out for this Court's immediate intervention.

In any case, the court of appeals' decision was correct. Section 2255(e) provides that a federal prisoner may seek habeas relief under Section 2241 if the remedy provided by Section 2255 "is inadequate or ineffective to test the legality of his detention." Section 2255 does not permit Wheeler to raise his claim in a successive motion, and the court evaluated his first Section 2255 motion under incorrect law. Wheeler's case is exactly the kind of case that Congress allowed to proceed under Section 2255(e).

The petition for certiorari should be denied.

STATEMENT OF THE CASE

Wheeler's Plea and Sentencing

1. In 2006, Gerald Wheeler was indicted on one count of possession with intent to distribute cocaine under Sections 841(a)(1) and (b)(1)(B)(ii), among other counts and charges. Pet. 2-3. Based on the possession charge alone, Wheeler was subject to a five-year mandatory minimum sentence and a forty-year maximum. *Id.* 4. The Government, however, claimed that Wheeler was subject to a ten-year mandatory minimum because he had a

prior conviction for a "felony drug offense," 21 U.S.C. § 841(b)(1)(B)—a 1996 North Carolina conviction for drug possession. Pet. 4.

When Wheeler was sentenced, Fourth Circuit precedent defined the term "felony drug offense" to include any drug crime for which the maximum possible sentence for a hypothetical defendant was one year or more. *See United States v. Harp*, 406 F.3d 242, 246 (4th Cir. 2005). Under *Harp*, Wheeler's North Carolina conviction qualified as a predicate "felony" because a hypothetical defendant with "the worst possible criminal history" could have received up to fifteen months in prison. *Id.* But given Wheeler's criminal history category, he could not have received a sentence of a year or more. In fact, he received a sentence of six to eight months.

2. In the district court, Wheeler pled guilty to possession with intent to distribute and certain firearm charges. Pet. App. 46a-47a. His attorney stipulated that Wheeler was subject to the enhanced version of the drug possession charge that carried a ten-year mandatory minimum. 1 C.A. App. 75-76.[1] Absent that mandatory minimum, the advisory guidelines range would recommend a term of 57 to 71 months. Mot. for Expedited Resentencing at 4, *Wheeler v. United States*, No. 3:11-cv-00603 (W.D.N.C. filed June 28, 2018), ECF No. 29.[2] At sentencing, Chief Judge Conrad

[1] "C.A. App." refers to the joint appendix before the court of appeals.

[2] Unless stated otherwise, all electronic case files (ECFs) referenced in this document refer to the docket in *Wheeler v. United States*, No. 3:11-cv-00603 (W.D.N.C. Nov. 18, 2011).

recognized Wheeler's "remorseful attitude" and the "encouraging steps" Wheeler had taken towards rehabilitation. 1 C.A. App. 85. But he thought that he "[did]n't have any discretion" to avoid imposing the "harsh" sentence required by 21 U.S.C. § 841(b)(1)(B). 1 C.A. App. 85-86. Based on that provision, Chief Judge Conrad imposed a fifteen-year sentence, ten years of which were due to the "statutory mandatory minimum" of Section 841. *Id.*

Under the terms of that sentence, Wheeler is currently scheduled for release on October 23, 2019.[3] The First Step Act, Pub. L. No. 115-391 (2018), includes a provision modifying the calculation of earned-time credits that could move his projected release forward by three to four months. *See id.* § 102(b)(1) (amendments to fifty-four-day clause of 18 U.S.C. § 3624).

3. Wheeler appealed. He urged his counsel to argue that his 1996 North Carolina conviction was not a valid predicate for the ten-year mandatory minimum. 1 C.A. App. 267. Instead, his counsel filed an *Anders* brief explaining that there were no meritorious grounds for appeal. His counsel believed that *Harp* foreclosed the mandatory minimum question. The Fourth Circuit affirmed his conviction and sentence. *See United States v. Wheeler*, 329 Fed. Appx. 481, 482 (4th Cir. 2009).

---

[3] *See* Bureau of Prisons Inmate Locator, www.bop.gov/inmateloc.

Postconviction Proceedings

1. In June 2010, Wheeler filed his first motion under Section 2255 challenging his sentence. Pet. App. 4a. Writing *pro se*, he raised precisely the legal claim that his lawyer had refused to make on direct appeal and that would later become the law of the Fourth Circuit. He argued that his 1996 North Carolina conviction was not a valid predicate for enhancing his sentence—and therefore that the district court had erred in subjecting him to a ten-year minimum. *Id.*[4]

Relying on *Harp*, the district court dismissed Wheeler's motion. It then denied Wheeler a certificate of appealability (COA). Pet. App. 4a-5a; *see* 28 U.S.C. § 2253(c).

2. Wheeler appealed the denial of the COA to the Fourth Circuit. By that point, this Court had instructed the Fourth Circuit to reconsider *Harp*. *See Simmons v. United States*, 561 U.S. 1001 (2010) (mem.). While Wheeler's appeal was pending, the Fourth Circuit applied this Court's decision in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), and held that *Harp* had incorrectly interpreted the meaning of "felony drug offense" under 28 U.S.C. § 841(b)(1)(B)(ii). *United States v. Simmons*, 649 F.3d 237, 241-44 (4th Cir. 2011) (en banc). The Fourth Circuit clarified that a state conviction constitutes a "felony drug offense" only if "the *particular* defendant's crime of

[4] Wheeler framed this contention in the context of an ineffective assistance of counsel claim.

conviction was punishable under North Carolina law by a sentence exceeding one year." *United States v. Valdovinos*, 760 F.3d 322, 326 (4th Cir. 2014) (discussing *Simmons*, 649 F.3d at 249).

Wheeler's North Carolina conviction had exposed him to at most eight months in prison. Thus, had he been sentenced under a correct interpretation of federal law, Wheeler would have been subject only to a five-year mandatory minimum. The Fourth Circuit nonetheless denied his appeal in a summary opinion, reasoning that *Simmons* was not retroactive. *United States v. Wheeler*, 487 Fed. Appx. 103, 104 (4th Cir. 2012).

3. Just nine months later, the Fourth Circuit recognized in a different case that *Simmons* "announced a substantive rule that is retroactively applicable." *Miller v. United States*, 735 F.3d 141, 146 (4th Cir. 2013). Wheeler accordingly filed a second Section 2255 motion. Pet. App. 6a-7a.

Writing *pro se*, he renewed the claims he had advanced in his initial 2255 motion, this time in light of the decisions in *Simmons* and *Miller*. That is, he again asserted that the ten-year mandatory minimum had been wrongly applied to him and that his 1996 North Carolina conviction was not a "felony drug offense" under 21 U.S.C. § 841. Pet. App. 6a-7a.

But when Wheeler's appointed counsel sought circuit court authorization for his second Section 2255 motion, the Fourth Circuit denied his request on the ground that his claim was neither one of "newly discovered evidence" nor a retroactive change in constitutional—as opposed to

statutory—law. *See* Pet. App. 6a-7a; *see also* 28 U.S.C. § 2255(h) (detailing requirements to obtain second or successive motion).

4. Later, represented by counsel, Wheeler presented the filing at issue here: a supplement to his second Section 2255 motion asserting a claim for relief under habeas corpus pursuant to 28 U.S.C. § 2241. 1 C.A. App. 295.

In response, the Government "concede[d] that [Wheeler] is entitled to resentencing." 1 C.A. App. 353. Applying the position the Government had followed since 1998, the Government explained that Wheeler could proceed under Section 2241 because Section 2255 is "inadequate or ineffective to test the legal validity" of a prisoner's detention when he "lacked a prior opportunity on direct review or an initial collateral attack to obtain relief." *See id.* 327-28, 332-33; *see also* Gov. Br. Opp. Cert. at 14, *McCarthan v. Collins*, No. 17-85 (U.S. filed Oct. 30, 2017) ("*McCarthan* BIO"). At the time Wheeler filed his initial Section 2255 motion, the Government continued, Fourth Circuit law "foreclosed [Wheeler's] argument." *See* 1 C.A. App. 333, 351-52. Furthermore, the Government underscored, "judicial error in the interpretation of a mandatory-minimum statute that result[ed] in an increased minimum punishment" affected the legality of Wheeler's detention. *Id.* 338, 350.

Despite the parties' agreement that Wheeler was entitled to file a habeas petition and receive relief, the district court denied the petition. Pet. App. 8a. Citing *United States v. Surratt*, 797 F.3d 240 (4th Cir. 2015), the district court reasoned that Wheeler's Section 2241 habeas petition was not

cognizable because Section 2255's savings clause applied only to prisoners whose convictions were invalid, and not to prisoners who—like Wheeler—claimed that their sentences were defective. *See* Pet. App. 8a.

5. Wheeler appealed to the Fourth Circuit. The Fourth Circuit stayed its consideration of Wheeler's appeal pending an expected en banc decision in *Surratt*. But *Surratt* became moot before the court released a decision. Pet. App. 8a.

The Government then abandoned its earlier support for Wheeler's habeas petition. In a court of appeals brief, the Government announced that it was reversing the interpretation of the savings clause that it had held since 1998, over several prior administrations. *See McCarthan* BIO 14.

The Fourth Circuit unanimously sided with Wheeler, vacated the district court's decision, and remanded for consideration of his habeas petition. Pet. App. 34a. The court of appeals began by observing that the Government's "about-face" on the savings clause was "distasteful" and potentially constituted a waiver. *Id.* 10a, 33a n.12. But the court of appeals thought it could not decide the case on that ground because it believed that the savings clause's requirements were "jurisdictional." *Id.* 16a-17a.

Turning to the merits, the court unanimously held that "§ 2255(e) must provide an avenue for [Wheeler] to test the legality of [his] sentence[] pursuant to § 2241," the federal habeas statute. Pet. App. 21a. The court based its conclusion on prior Fourth Circuit precedent, which had held that "[Section] 2255 is inadequate and ineffective to test the legality of a

conviction" when "an individual is incarcerated for conduct that is not criminal but, through no fault of his own, has no source of redress." Pet. App. 19a (quoting *In re Jones*, 226 F.3d 328, 333-34 & n.3 (4th Cir. 2000)). The court recognized that Wheeler had "no source of redress" because his claim relied on a retroactive decision of statutory interpretation reversing the binding circuit precedent in place at the time of his conviction and first Section 2255 motion. Pet. App. 19a, 24a-25a.

Relying on the statutory text, the court of appeals held that the savings clause reaches illegal sentences in addition to illegal convictions. Pet. App. 20a-21a. The court reasoned that "[t]he savings clause pertains to one's 'detention'"—and is not limited to testing the legality of one's "conviction." *Id.* 20a. "[A]n illegally extended sentence" presents "a fundamental defect which inherently results in a complete miscarriage of justice." *Id.* 21a (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)). Thus, testing the legality of a prisoner's detention requires courts to address "fundamental sentencing errors" such as Wheeler's. *Id.* 21a. The Fourth Circuit remanded to the district court for further proceedings in accordance with its decision. *Id.* 34a & n.13.

6. When the Government petitioned for en banc review, Wheeler argued that his case "is a poor vehicle for en banc review because of the potential for [his] upcoming release to moot his claim." Resp. to Pet. for Reh'g En Banc at 14, *United States v. Wheeler*, No.16-6073 (4th Cir. May 31, 2018), ECF No. 59. The Court denied the Government's petition, with Judge Agee

noting that he chose not to "request[ ] a poll" regarding en banc review "[b]ecause of the potential that the case may become moot if Wheeler is released from incarceration in October 2019, as projected." Order at 2, *United States v. Wheeler*, No.16-6073 (4th Cir. May 31, 2018), ECF No. 60.

7. Two days after the Fourth Circuit issued its mandate, Wheeler filed an unopposed motion requesting to expedite the remand proceedings and to schedule a resentencing hearing. ECF No. 29. Several months later, after seeking and receiving an extension of the time in which to file a petition for certiorari, the Government filed its own motion asking the district court to expedite resentencing. ECF No. 30.

At the end of December, the district court scheduled a status conference for February 28, 2019, on the remand proceedings. ECF No. 31. The court requested that the parties address the "procedural implications" of the Government's dual filings in the district court and the Supreme Court—specifically, "the Government's Motion to Grant Habeas Petition and Expedite Resentencing . . . filed on November 7, 2018, subsequent to its Petition for Certiorari filed in the Supreme Court . . . arguing that the Fourth Circuit erred in applying the savings clause." *Id.* at 1.

REASONS FOR DENYING THE WRIT

I. This case is a bad vehicle to resolve the Government's question presented.

A. The Government's interest is speculative and this case may soon become moot.

The Government brings this case both too early and too late. Wheeler has yet to be resentenced, and his original prison term is going to expire soon. And even if Wheeler is resentenced, the Government's interest in this case would hardly merit this Court's review.

1. The Government is requesting interlocutory review despite conceding that it may never suffer an injury in this case. The Government has repeatedly asserted that Wheeler's current sentence, which is below the statutory maximum, may not change on remand. *See, e.g.*, U.S. C.A. Br. 57-58 (citing *United States v. Foote*, 784 F.3d 931, 941 (4th Cir. 2015)). Thus, "[u]ntil [Wheeler is] resentenced, it is impossible to know whether the Government will be able to show any colorable claim of prejudicial error." *Andrews v. United States*, 373 U.S. 334, 340 (1963).

Avoiding needless intervention is why this Court does "not issue a writ of certiorari to review" an interlocutory order "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893); *see also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

There is no reason why this case should be an exception. Allowing the district court to act on remand would not cause "extraordinary inconvenience" or "embarrassment," for "resentencing, while not costless, does not invoke the same difficulties as a . . . retrial does." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1348-49 (2016). If the Government is "injured" following resentencing, it can seek review of that judgment in the normal course.

2. If Wheeler is not resentenced, this case may become moot before this Court can review it. In the alternative scenario where Wheeler is resentenced, the Government's interest in this case could become non-existent. In either circumstance, granting certiorari would be a mistake.

a. A case that "may soon be rendered moot" is "not a suitable vehicle" for review. U.S. Br. Amicus Curiae at 8-9, *City of Cibolo v. Green Valley Special Util. Dist.*, No. 17-938, 2018 WL 6382969 (U.S. 2018).

This case is proceeding rapidly in that direction. As the Government has candidly recognized, "review by the Supreme Court is unlikely to occur until its October 2019 Term." ECF No. 30 at 2. The Government has alerted the sentencing court that if Wheeler is released as scheduled in October 2019, then the case "may well become moot." *Id.* at 3; *see Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998).

Wheeler asked the district court more than six months ago to expedite the proceedings on remand and schedule a resentencing hearing. ECF No. 29 at 1. After filing its petition before this Court, the Government filed its own motion asking the district court to expedite Wheeler's resentencing lest the

case "become moot." ECF No. 30 at 1, 3. But the district court has yet to take any action other than setting a status conference for late February. ECF No. 31 at 1. The court directed the parties to be prepared to address the "procedural implications" of the Government's decision to simultaneously request that the district court expedite resentencing and that this Court rule that no resentencing should occur. *Id.* If the status quo holds, Wheeler will be released from custody no later than October 23, 2019—and likely several months earlier than that based on the additional earned-time credit under the recently passed First Step Act.

The case could become moot sooner if Wheeler seeks to end the proceedings himself by moving to voluntarily dismiss his Section 2241 petition. His interest in this litigation will diminish considerably when he is transferred from a federal prison facility to a residential reentry center (i.e., a "halfway house") or to home confinement. Such a transfer could occur up to six months in advance of Wheeler's scheduled final release. *See* 18 U.S.C. § 3624(c)(1)-(2).

b. The Government's efforts to avoid mootness only highlight the absurdity of its interest in this particular case. The Government has suggested that Wheeler could receive the same sentence on remand even though that sentence would constitute a significant upward variance from the advisory guidelines range. If the court re-imposes the same sentence, the Government will lack "any colorable claim of prejudicial error." *Andrews*, 373 U.S. at 340.

Alternatively, if Wheeler is resentenced to a shorter term of incarceration, the Government could technically continue to litigate this case by seeking a reversal. For example, if Wheeler is released one month early, then the Government could seek a reversal of the one-month reduction.

But the Government's ability to reincarcerate Wheeler for the short period that would remain of a concededly erroneous sentence is not the kind of interest that warrants this Court's review—whatever the Government's abstract interest in the savings clause issue may be.

Worse, to secure that interest, the Government would have to keep Wheeler's liberty in a precarious state of uncertainty. Wheeler would be released only to have the possibility of returning to prison hang over him as this case waits to be resolved. In a nod to Orwell, the Government argues that keeping Wheeler's liberty in this state of limbo would vindicate the interest of "finality" in post-conviction proceedings. *See* Pet. 17.

B. This case will not allow this Court to decide the full scope of the savings clause.

This case is an especially poor vehicle for deciding the Government's question presented for two additional reasons. First, the Government has waived its argument as to the savings clause, so the Fourth Circuit's judgment can be affirmed on that alternative ground. Second, should this Court even reach the savings clause issue, the Government has already signaled that it will ask this Court to decide the case on narrow grounds that would leave the meaning of the statute uncertain in most other cases.

1.a. This Court cannot accept the Government's position on the scope of Section 2255(e) without first answering a different question: Whether the Government has waived reliance on the savings clause or whether Section 2255(e) is a jurisdictional restriction that cannot be waived.

But determining whether Section 2255(e) is a jurisdictional constraint does not, according to the Government, "independently warrant this Court's review." Pet. 28. Only three circuits—including the Fourth Circuit below—have been required to directly confront whether the savings clause restricts the jurisdiction of the federal courts.[5] And the question arises here only because of a rare circumstance: the Government changed a two-decades-old legal position midway through this litigation. Such a rarely litigated question is insignificant to the broader legal system.

However, although the jurisdictional issue is unimportant to the legal system writ large, it is essential to this case. *See Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015) ("This Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*.") (emphasis in original).

---

[5] For the opinions directly confronting this question, see Pet. App. 13a-14a; *Williams v. Warden*, 713 F.3d 1332, 1340 (11th Cir. 2013); *Harris v. Warden*, 425 F.3d 386, 388 (7th Cir. 2005). The other circuits have not taken a reasoned position on this issue. Circuits that have implied that Section 2255(e) is jurisdictional have done so only in "'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (quoting *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 91 (1998)). And their summary reasoning predates or fails to account for this Court's clear commands in *Arbaugh* and *Nz v. Thaler*, 565 U.S. 134 (2012), to exercise caution in classifying provisions as "jurisdictional." *See, e.g.*, *Cephas v. Nash*, 328 F.3d 98, 103 (2d Cir. 2003); *Hill v. Morrison*, 349 F.3d 1089, 1091 (8th Cir. 2003); *Harrison v. Ollison*, 519 F.3d 952, 961 (9th Cir. 2008); *Abernathy v. Wandes*, 713 F.3d 538, 557 (10th Cir. 2013) (failing to mention either *Arbaugh* or *Gonzalez*).

This Court has explained time and again that it "is not at liberty . . . to bypass, override, or excuse a State's deliberate waiver." *See Wood v. Milyard*, 566 U.S. 463, 466 (2012). When the Government conceded that Wheeler was "entitled to relief under the savings clause and § 2241" in the district court, 1 C.A. App. at 327-28, it waived its ability to say otherwise at a later proceeding. *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 n.1 (2017) (defining waiver as the "intentional relinquishment or abandonment" of a claim (internal citation omitted)). The only exception to this simple principle would be if the Government's waiver concerned a jurisdictional rule. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

b. It does not. A rule is jurisdictional only if Congress "clearly states" that it is. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (quoting *Arbaugh*, 546 U.S. at 515). Yet Congress chose not to use the term "jurisdiction" in Section 2255(e), which would have been the easiest way to indicate that the savings clause restricts the power of federal courts. Section 2241(e) offers a useful contrast. There, Congress unequivocally stated that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus" filed by an enemy combatant. 28 U.S.C. § 2241(e).[6]

Nor does the text of Section 2255 contain any other clear indication that Congress intended to constrain the federal courts' subject-matter

[6] Section 2241(e) was declared unconstitutional in *Boumediene v. Bush*, 553 U.S. 723, 776 (2008).

jurisdiction. While the phrase "shall not be entertained" is imperative language, this Court has long "rejected the notion that 'all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional.'" *Gonzalez*, 565 U.S. at 146 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 439 (2011)) (alteration in original).

The structure of the relevant statutes cuts the same way. In *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), the Court made clear that courts should presume that a provision is not jurisdictional when it "is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction." *Id.* at 164.

That presumption applies to the savings clause. An entirely different provision—Section 2241—supplies federal courts with subject-matter jurisdiction over writs of habeas corpus. That provision also tells courts precisely when their subject-matter jurisdiction runs out. 28 U.S.C. § 2241(e)(1)-(2). In contrast, Section 2255 does not even create jurisdiction to hear motions under that Section; 18 U.S.C. § 3231 does that. *Webster v. Caraway*, 761 F.3d 764, 768 (7th Cir. 2014), *vacated and reh'g en banc granted on other grounds*, 769 F.3d 1194 (7th Cir. 2014).[7]

Read in context, the savings clause of Section 2255(e) is best understood as a claim-processing rule, rather than a limit on the subject-

[7] 18 U.S.C § 3231 supplies subject-matter jurisdiction for criminal cases, and a Section 2255 motion is merely a new step in a criminal case. *Webster*, 761 F.3d at 768.

matter jurisdiction of the federal courts. *See Webster*, 761 F.3d at 768-69 (adopting this view of the savings clause).

c. The Government admits that the presence of the waiver issue in this case, and the accompanying risk that the case will be decided on that ground, would normally "weigh[] heavily against certiorari." Pet. 29. The Government's two 'solutions' for minimizing this risk only underscore that the looming waiver issue would cause problems at the merits stage.

The Government first proposes that this Court just ignore its "agreement in the district court with respondent's view" and proceed straight to the scope of the savings clause. Pet. 26. But that contradicts this Court's clear command that a court cannot override a party's waiver unless it concerns a jurisdictional rule. *See Wood*, 566 U.S. at 466. The Government understood this below, where it spent the first five pages of its brief trying to escape its waiver by arguing that the savings clause is jurisdictional. U.S. C.A. Br. 18-23.

The Government's next suggestion is to grant this case and add a second question presented on the jurisdictional issue. That would solve nothing. The Government's proposal seems to assume that even if this Court holds that the savings clause is non-jurisdictional, it could still issue an opinion adopting the Government's view of the scope of the savings clause. *See* Pet. 28.

But a holding that Section 2255(e) does not limit courts' subject matter jurisdiction would effectively end the case. There would be no need to remand

to the Fourth Circuit on the waiver issue, as the Government suggests, *see* Pet. 28, because there is no dispute that the Government waived below. As in *Wood*, it "deliberately steered the District Court away from the [savings clause] and toward the merits of [Wheeler's] petition." *Wood*, 566 U.S. at 474. In this scenario, any analysis of the savings clause would be "unnecessary to the decision in the case and therefore not precedential." *Obiter dictum*, Black's Law Dictionary (10th ed. 2014).

2. The Government is also wrong to claim that a ruling in its favor will definitively resolve "whether the saving clause allows a defendant who has been denied Section 2255 relief to challenge his *conviction or sentence* based on an intervening decision of statutory interpretation." Pet. 23 (emphasis added). The Government is already arguing that this Court should reverse the Fourth Circuit on narrower grounds specific to mandatory minimum errors that would leave the mine-run of savings clause cases unresolved.

This case thus risks becoming like a number of cases in recent terms in which this Court has granted certiorari to address potentially far-reaching questions, but has ultimately failed to fully resolve them, instead adopting narrow, fact-specific holdings. For example, in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), the petitioner's claim was sufficiently "far afield from the typical retaliatory arrest claim," that the Court quickly granted another case to decide the issue of whether probable cause defeats a Section 1983 claim. *Id.* at 1954; *see Nieves v. Bartlett*, No. 17-1174 (certiorari granted June 28, 2018). Another example is *Wood v. Allen*, 558 U.S. 290

(2010), a case about post-conviction relief. This Court granted certiorari "to address the relationship between §§ 2254(d)(2) and (e)(1)," but held that the factual circumstances of the case did not require it to do so. *Id.* at 293.

The Government has already telegraphed that it is seeking a similarly narrow resolution in this case. The Government's brief retreats from its broader position that claims based on intervening decisions of statutory interpretation can never be raised under the savings clause. It advances a fallback position that an "error in the calculation or application of a statutory-minimum sentence," Pet. 21-22, does not affect "the legality of [a prisoner's] detention," 28 U.S.C. § 2255(e). And it maintains that the facts of this case require only that narrow holding.

But the Government's fallback rule—that the savings clause does not apply to errors involving the calculation of mandatory minimum sentences—would resolve only a tiny sliver of the already small universe of Section 2241 cases. It would leave unanswered whether the savings clause applies in more commonly litigated contexts. As the Government has previously recognized, the bulk of Section 2241 litigation involves challenges to convictions, not sentences. *See* Gov. Br. Opp. Cert. at 25, *McCarthan v. Collins*, No. 17-85 (U.S. filed Oct. 30, 2017) (hereinafter "*McCarthan* BIO") ("[M]ost courts of appeals have squarely addressed the issue only in the context of a prisoner who challenges his conviction, rather than his sentence . . . ."). Within the narrow class of Section 2241 sentencing litigation, most challenges involve either a sentence that exceeds the properly calculated statutory maximum

(such as an Armed Career Criminal Act sentence)[8] or a sentence under the pre-*Booker* mandatory career-offender guidelines.[9]

Unless the Court would like to deal with the savings clause on multiple occasions, it should wait for a different case.

II. The savings clause issue is not important enough for the Court to grant review in this case.

The Government is wrong to assert that this Court's intervention is necessary here. Cases concerning the scope of the savings clause are rare. And even when they do arise, the Government's own actions reveal that pinning down the precise scope of the savings clause is not particularly important. In any event, if the Court were inclined to address the scope of the savings clause, there are other cases that do not raise all of the same vehicle issues as this case.

A. The scope of the savings clause does not warrant the Court's attention at this time.

1. Cases concerning the scope of the savings clause arise "relatively infrequently." *See McCarthan* BIO at 25; *see also* Pet. 23. And, as the Government itself has admitted, savings clause cases involving *sentences*, as opposed to convictions, are an even rarer breed. *See McCarthan* BIO 25.

---

[8] *See, e.g.*, *Brooks v. Wilson*, 733 Fed. Appx. 137, 138 (4th Cir. 2018) (per curiam); *Brown v. Rios*, 696 F.3d 638, 642-43 (7th Cir. 2012); *Bryant v. Warden*, 738 F.3d 1253, 1258-59 (11th Cir. 2013), *overruled by McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017).

[9] *See, e.g.*, *Lester v. Flournoy*, 909 F.3d 708, 709-710 (4th Cir. 2018); *Hill v. Masters*, 836 F.3d 591, 593 (6th Cir. 2016); *Brown v. Caraway*, 719 F.3d 583, 588 (7th Cir. 2013).

Compared with other recently-denied cases implicating the legality of prisoners' sentences, the legal issue here affects very few prospective litigants. *See, e.g.*, *Brown v. United States*, 139 S. Ct. 14, 14 (2018) (Sotomayor, J., dissenting from denial of certiorari) (noting that the issue potentially affected over 1,000 prisoners).

2. When this rarely-litigated issue does arise, the Government does not act as if it is especially important. More telling than the Government's current assertions about the "great significance" of the savings clause, Pet. 23, are the Government's repeated decisions not to appeal and to actively oppose certiorari in cases raising the scope of the savings clause.

Just last year, the Government declined to pursue several possible appeals. In May, the District of Oregon allowed a petitioner to file a habeas petition via the savings clause to challenge the erroneous imposition of a 15-year mandatory minimum under the Armed Career Criminal Act ("ACCA"). *McCullen v. Ives*, No. 3:17-cv-1260-JE, 2018 WL 2164867 (D. Or. May 10, 2018). The District of Arizona did the same. *Smith v. Martinez*, No. CV 17-18-TUC-JAS, 2018 WL 558996 at *14-*15 (D. Ariz. Jan. 5, 2018) (report and recommendation), *adopted*, 2018 WL 526898 (D. Ariz. Jan. 24, 2018). Yet the Government did not appeal either decision to the Ninth Circuit.

Similarly, in *Brooks v. Wilson*, 733 Fed. Appx. 137 (4th Cir. 2018) (per curiam), the Fourth Circuit extended *Wheeler* to a case involving an erroneous ACCA sentence. But the Government declined the opportunity to seek certiorari, or even en banc review.

Even after filing the petition for certiorari in this case, the Government settled other cases involving the savings clause by agreeing to resentencing, rather than seeking review in the court of appeals or this Court. For example, in *United States v. Williams*, "[t]he parties . . . reached an agreement to settle the appeal with an amended judgment entered by stipulation in the district court, reducing Mr. Williams's sentence to 120 months." *See* Appellant Mot. for Remand at 3-4, *United States v. Williams*, No. 18-35012 (9th Cir. filed Dec. 20, 2018), ECF No. 24; *see also* Amended J. at 1, *United States v. West*, No. 5:10-cr-34 (E.D. Ky. Nov. 9, 2018), ECF No. 81 (amended judgment, which the government declined to appeal, reducing sentence pursuant to habeas relief granted via savings clause).

Moreover, last Term, the Government successfully opposed certiorari in a case squarely presenting the proper scope of the savings clause. It focused its opposition on "case-specific factors" indicating that this Court's review might not make a difference for the petitioner. *See McCarthan* BIO 27-32. If "it is unclear when [this Court] will have another opportunity to resolve the important question of the saving clause's scope," Pet. 29, that is a circumstance entirely of the Government's own making.

3. The Government is also wrong to claim that this issue is important because the Fourth Circuit's rule will somehow result in a "proliferat[ion]" of new savings clause cases, Pet. 23. The Fourth Circuit's decision below merely extended its well-established holding in a prior case, which provided access to the savings clause for prisoners whose convictions are called into question by

an intervening decision of statutory interpretation. *See In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000). The Fourth Circuit's modest extension of that case is not likely to cause a flood of new claims.

Indeed, nine circuits have some variation of the Fourth Circuit's rule, and the Government has offered no evidence that any of them have experienced a flood of claims. With respect to sentencing claims in particular, the Seventh Circuit (since 2012) and the Sixth Circuit (since 2016) have followed rules that closely resemble the one articulated by the Fourth Circuit below. *See* Pet. 23-24 (collecting authorities). Elsewhere, the Government has recognized the demanding nature of these courts' threshold for relief under the savings clause. The Government is currently opposing certiorari in another case about the savings clause on the ground that the petitioner would not meet *any* circuit's test for relief under the provision. *See* Gov. Mem. Opp. Cert. at 5-8, *Delancy v. Pastrana*, No. 18-5773 (U.S. filed Nov. 26, 2018).

4. Finally, the prospect that Congress will partially resolve the question presented counsels against granting certiorari. *See United States v. Microsoft*, 138 S. Ct. 1186, 1188 (2018) (dismissing case as moot in light of intervening legislation). The Government asserts that it "is working on efforts to introduce legislation that would enable some prisoners to benefit from later-issued, non-constitutional rules announced by this Court." Pet. 23. Such legislation would further reduce the number of people for whom the Government's question presented is practically significant.

That prospect is far from hypothetical. Congress recently passed legislation that dramatically reduces the number of persons for whom the decision below will be relevant. Under the First Step Act of 2018, prisoners sentenced before August 2010 may be eligible for resentencing if they committed an offense covered by the Fair Sentencing Act of 2010. *See* First Step Act § 404(b), Pub. L. No. 115-391 (2018). After surveying Federal Public Defender offices in North Carolina, respondent's counsel is aware of only six prisoners with a claim raising the same issue as respondent's. Strikingly, of those six, at least four should be eligible for a resentencing under the First Step Act.

Since the petition for certiorari was filed, the number of people for whom the Government's question presented is practically significant has shrunk dramatically. And the petition itself provides reason to think that that number will decrease further still.

B. This Court will see other cases involving the scope of the savings clause.

Even if the Court deems the Government's question presented worthy of review in principle, it should wait for a more appropriate vehicle to address it. The Government's contention that this case presents the only "optimal" vehicle for the foreseeable future, Pet. 29, is not accurate.

Consider *Brooks v. Wilson*, where the Fourth Circuit extended *Wheeler* to provide relief from an erroneous sentence under the ACCA. 733 Fed. Appx. 137, 138 (4th Cir. 2018) (per curiam). When the defendant in that case is

resentenced, the Government will be free to seek en banc review and then, if necessary, certiorari.

That case presents none of the vehicle problems found here. The defendant was released on pre-judgment bond, so mootness is not a concern. *See* Mem. Order at 4-5, *Brooks v. Wilson*, No. 3:16-cv-00857 (E.D. Va. June 15, 2018), ECF No. 27. The defendant never raised a waiver argument because the Government took its current position in the district court. Resp. at 1-2, *Brooks v. Wilson*, No. 3:16-cv-00857 (E.D. Va. Nov. 6, 2016), ECF No. 10. And the defendant challenged an ACCA sentence that exceeds the properly calculated statutory maximum, so there is no risk of the Government retreating to its fallback argument—about errors involving mandatory minimum sentences—that would not resolve the mine run of savings clause cases. *See Brooks v. Wilson*, No. 3:16-cv-00857, 2017 WL 6046128, at *1 (E.D. Va. Dec. 6, 2017).

There will be others. In *Lester v. Flournoy*, 909 F.3d 708 (4th Cir. 2018), the Fourth Circuit joined the Sixth and Seventh Circuits in permitting a petitioner to rely on the savings clause to challenge the erroneous application of a pre-*Booker* enhancement under the career-offender guideline. *See id.* at 714. *Lester* and *Brooks* are suitable vehicles that have emerged from the Fourth Circuit alone. Alternative vehicles will no doubt arise in other circuits as well.

III. The court of appeals' decision is correct.

The Fourth Circuit correctly concluded that the savings clause, Section 2255(e), allows a federal prisoner to file a petition for habeas corpus where, as here, (a) his conviction or sentence suffers from a fundamental defect; and (b) he is barred from saying so in a second or successive motion under Section 2255 because the defect was revealed by a retroactive decision of statutory interpretation.

A. The text supports the court of appeals' interpretation of the savings clause.

1.a. Section 2255(e) generally bars federal prisoners from filing habeas corpus petitions. But Congress excepted a single class of prisoners from this general rule: prisoners for whom the "remedy by motion" provided by Section 2255 "is inadequate or ineffective to test the legality of [their] detention." 28 U.S.C. § 2255(e).

A challenge to the "legality" of a conviction or sentence includes claims of error that rise to the level of a "fundamental defect which inherently results in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346 (1974). That standard is met only if the prisoner can show that he (a) was convicted for conduct that is not a crime or (b) received a sentence that was not authorized by law. *See Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004); *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016) ("A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." (quoting *Hill v. United*

States, 368 U.S. 424, 428 (1962))). Congress singled out these kinds of claims for special treatment under the savings clause.

Intervening decisions of statutory interpretation can sometimes reveal fundamental defects of this kind. Consider a person who threw a fish overboard and was convicted of obstructing an investigation by destroying a "tangible object" before this Court decided *Yates v. United States*, 135 S. Ct. 1074 (2015). That person can no longer be legally detained under 18 U.S.C. § 1519 because this Court has clarified that destroying a fish never constituted a violation of that statute. *See Yates*, 135 S. Ct. at 1081.

The same thing happens when an intervening decision of statutory interpretation clarifies that certain facts never justified imposing a mandatory minimum sentence. After all, "any fact that increases the mandatory minimum is an 'element'" of a distinct crime. *Alleyne v. United States*, 570 U.S. 99, 103 (2013). Thus, wrongfully imposing a mandatory minimum sentence results in a person being incarcerated for a distinct offense of which he was never convicted. It follows that a provision defining the penalties for that distinct offense does not authorize his detention. And it makes no difference if the sentencing ranges of the two distinct offenses happen to overlap.

Of course, changes in statutory interpretation do not always, or even usually, grant access to habeas corpus. Suppose that a prisoner claims that the trial court violated 18 U.S.C. § 3553(d) by failing to provide him adequate notice that the court would require him to notify certain persons of his

conviction under 18 U.S.C. § 3555. That prisoner could not satisfy Section 2255(e) because, even if his claim is true, it would not establish that his conviction or sentence suffers from a fundamental illegality. This Court has explained that procedural or evidentiary errors merely "raise the possibility" of illegal convictions or sentences. *Schriro*, 542 U.S. at 352. The savings clause requires more. A prisoner is entitled to file a petition under the savings clause only if he can show that his conviction or sentence *cannot* be legal.

b. When a prisoner brings a claim pointing out a fundamental defect affecting "the legality of his detention," the savings clause contains simple instructions. The court must decide whether, at that moment, the remedy provided by Section 2255 is up to the task of testing that claim—or whether that statute "*is* inadequate or ineffective" for doing so. 28 U.S.C. § 2255(e) (emphasis added).

If the Section 2255 remedy proves "inadequate or ineffective" to test the claim when it is brought, then a prisoner can bring the claim in a petition for habeas corpus. After all, the question is whether Section 2255 "is" inadequate or ineffective. And provisions that are "expressed in the present tense" must be interpreted "at the time the suit is filed." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003). That is all the more true when the very same provision also uses the past tense. Section 2255(e) does so. It explicitly provides that a prisoner can file a habeas petition after a "court has denied [the petitioner] relief" in the past. 28 U.S.C. § 2255(e). Thus, the savings

clause makes clear that whenever Section 2255 closes its doors to a challenge to the legality of a detention, habeas corpus fills the gap.[10]

The Government's argument to the contrary rewrites the language in the statute in the past tense. The Government insists that access to habeas is foreclosed if "[t]he Section 2255 remedy *was* . . . neither inadequate nor ineffective to 'test' the legality of respondent's confinement" because the prisoner *had* a prior opportunity "to raise, and be heard on" a legal argument. Pet. 16 (emphasis added). If Congress had wanted to write the statute that way, it would have done so.

c. Wheeler could not test the legality of his detention under Section 2255 on the day he filed his habeas petition. Wheeler wished to assert that the facts found by his sentencing court were incapable of meeting the precondition of his mandatory minimum sentence, namely, a prior felony drug conviction. If accepted, Wheeler's argument would conclusively establish that the mandatory minimum provision of 21 U.S.C. § 841(b)(1)(B)(viii) does not supply the legal basis for his detention. But Section 2255(h) prevented Wheeler from even raising this argument in a successive motion because it was premised on a new decision of statutory—as opposed to constitutional—interpretation. The Fourth Circuit was therefore correct to conclude that

---

[10] That is not to say that a prisoner is entitled by the savings clause to endlessly bring the same claim, or a claim that could have been successfully brought before. Procedural tools like the abuse of the writ doctrine would apply here. *See Sanders v. United States*, 373 U.S. 1, 25 (1963).

Section 2255(e) authorized Wheeler to bring his argument in the form of a habeas corpus petition instead.

2. The same conclusion follows even if the savings clause requires an assessment of the adequacy or effectiveness of the *initial* Section 2255 motion. The Government suggests that Section 2255's remedy is not "inadequate or ineffective" so long as a prisoner had the ability to raise a legal claim in court at some point in the past. Pet. 16. But that contravenes the common-sense meaning of the word "ineffective." Everyone would understand a math test to be "ineffective" to assess a student's math skills if it were graded against an answer key riddled with math errors (e.g., two plus two equals five). Nor would complaining about the incorrect answer key fix the inadequacy of the test—unless the test were regraded against an accurate answer key.

So too here. The Fourth Circuit was correct to hold that a first petition under Section 2255 is "ineffective" if it is judged against the wrong law. That is exactly what happens when a court relies on a decision of statutory interpretation that is later overturned. "Adequacy" is not satisfied merely by letting litigants in the door.

These common-sense intuitions match the meaning of the text at the time it was written. In 1948, as today, the word "test" meant a "subjection to conditions that show the real character of a person or thing in a certain particular." *Merriam Webster's New International Dictionary* 2609 (2d ed. 1944). An ineffective test is one that cannot reliably "show the real character"

of a "thing in a certain particular." Here, that thing is a "detention" and the particular character is its "legality." *See* 28 U.S.C. § 2255(e). Just like an effective math test does not guarantee a passing grade, an effective test of a detention implies no particular outcome. Effectiveness does, however, require not only that the test *occur*, *cf.* Pet. 15, but that the test reliably distinguish legal detentions from illegal ones.

B. The statute's structure and drafting history also support the court of appeals' conclusion.

The robust tradition of challenging the substantive basis of a prisoner's detention in habeas proceedings at the time Section 2255(e) was enacted supports the Fourth Circuit's interpretation of the savings clause.

1. The court of appeals was correct to understand the text of the savings clause in light of the broader scheme of Section 2255 at the time it was enacted. When it was written in 1948, Section 2255 reformed the system of collateral relief by changing the venue for post-conviction challenges. But Section 2255 provided federal prisoners protections "identical in scope to federal habeas corpus." *Davis*, 417 U.S. at 343.

Nothing was more central to the protections Congress sought to preserve than allowing prisoners to challenge whether the statute under which they were convicted or sentenced authorized their detention. In a number of cases beginning in the late 1800s, the Court made clear that federal courts lacked jurisdiction to sentence a defendant to a term longer than what was provided for by statue. *See, e.g.*, *Ex parte Lange*, 85 U.S. (18

Wall.) 163, 175-76 (1873); *Ex parte Siebold,* 100 U.S. 371, 376 (1879); *Ex parte Yarbrough* (The Ku-Klux Cases), 110 U.S. 651, 654 (1884); *In re Bonner,* 151 U.S. 242, 256, 258 (1894); *In re Gregory,* 219 U.S. 210, 213-14 (1911). At the time, such jurisdictional violations were the sole basis for granting habeas corpus relief. *Ex parte Siebold*, 100 U.S. at 375. Thus, when Congress set out to reform the habeas system in 1948, protecting prisoners' ability to challenge the authorization for their detention would have been of principal concern.

2. The Government argues that the Fourth Circuit should have jettisoned the original meaning of Section 2255(e) based on Congress's purpose in passing Section 2255(h) nearly forty years later. Pet. 17. The Fourth Circuit properly declined that invitation. "Words must be given the meaning they had when the text was adopted." Antonin Scalia & Brian Garner, *Reading Law* 78 (1st ed. 2012).

Nor are the federal courts at liberty to change the text of Section 2255(e) because the Government feels that it works at "cross-purposes" with Section 2255(h). Pet. 17. Courts may not "revise legislation" simply because "the text as written creates an apparent anomaly." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). When Congress enacted Section 2255(h), it chose to leave the savings clause entirely unaltered. The meaning of the savings clause did not change merely because Congress inserted another provision into the same section of the U.S. Code in 1996.

C. The Government's interpretation raises serious constitutional problems.

Courts traditionally "shun an interpretation" of a statute "that raises serious constitutional doubts." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). The Fourth Circuit's construction of the savings clause avoids the serious constitutional problems that arise from the Government's "extreme" and "unorthodox" interpretation of the savings clause, which allows the Government to continue to detain a person who was convicted or sentenced based on an error of statutory interpretation. U.S. Supp. Reply 1-4, *United States v. Surratt*, No. 14-6851 (4th Cir. Mar. 9, 2016), BL No. 118.

In fact, the language of Section 2255(e) demands the statute be interpreted to avoid constitutional problems. In *Swain v. Pressley*, 430 U.S. 372 (1977), this Court held that a District of Columbia remedy with identical text to Section 2255 would be "inadequate or ineffective" if it fell below constitutional minimums. *Id.* at 381.

The Due Process Clause of the Fifth Amendment guarantees a "constitutional right to be deprived of liberty as punishment for criminal conduct *only* to the extent authorized by Congress." *Whalen v. United States*, 445 U.S. 684, 690 (1980) (emphasis added). When a court subjects a person to a sentence or conviction that goes beyond what a statute has authorized, it violates the person's due process right to be detained only pursuant to Congressional enactments.

Further, "the separation of powers prohibits a court from imposing criminal punishment beyond what Congress meant to enact." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (citing *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)). When a court detains a person under an erroneous interpretation of the text Congress has written, it "exact[s] a penalty that has not been authorized by any valid criminal statute." *Id.*

The Suspension Clause guarantees that a judicial remedy is available for these kinds of constitutional violations unless Congress has suspended the writ. U.S. Const. art. I, § 9, cl. 2. Convictions or sentences premised on erroneous statutory interpretations present "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Davis*, 467 U.S. at 333. And even if those errors were not always cognizable in habeas corpus, this Court has assumed that the Suspension Clause "refers to the writ as it exists today." *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 300-05 (2001).

This Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), further underscores the serious constitutional problems posed by an interpretation of Section 2255(e) that purports to forbid courts from remedying unauthorized detentions. In *Montgomery*, this Court rejected Louisiana precedent that prevented state courts from entertaining a prisoner's claims that his detention was unauthorized. *Id.* 731-32. It explained that, when a person makes a credible showing that their detention is unauthorized, the court must entertain the prisoner's request for relief. *Id.*

This Court also made clear that detentions are unauthorized when they are in violation of substantive rules of law, including decisions interpreting the scope of criminal statutes. A new rule of substantive criminal law makes a person's conviction or sentence "not just erroneous but contrary to law, and as a result, void." *Id.* at 731. In these circumstances, a court must correct the illegal convictions and sentences; the court "has no authority to leave [them] in place." *Id.*

The Government's interpretation of the savings clause departs from the text and history of the statute only to produce dramatic constitutional problems. The Fourth Circuit was right to adopt an interpretation that avoids them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: January 14, 2019

Respectfully submitted,

Anthony Martinez
FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF NORTH CAROLINA

Joshua B. Carpenter
Appellate Chief
Counsel of Record
Ann L. Hester
Assistant Federal Public Defender
1 Page Avenue, Suite 210
Asheville, NC 28801
Telephone: (828) 232-9992
Email: Joshua_Carpenter@fd.org