No. 18-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GERALD ADRIAN WHEELER

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground cognizable on collateral review, with "second or successive" attacks limited to certain claims that indicate factual innocence or that rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. 2255(h). Under 28 U.S.C. 2255(e), an "application for a writ of habeas corpus [under 28 U.S.C. 2241] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained * * * unless it * * * appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

The question presented is whether a prisoner whose Section 2255 motion challenging the applicability of a statutory minimum was denied based on circuit precedent may later seek habeas relief on the ground that the circuit's interpretation of the relevant statutes has changed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

Miscellaneous:

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 886 F.3d 415. The order of the court of appeals denying rehearing (App., *infra*, 55a-62a) is reported at 734 Fed. Appx. 892. The order of the district court (App., *infra*, 36a-43a) is not published in the Federal Supplement but is available at 2015 WL 5726038.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2018. A petition for rehearing was denied on June 11, 2018 (App., *infra*, 55a). On August 29, 2018, the Chief Justice extended the time within which to file

a petition for a writ of certiorari to and including October 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in an appendix to this petition. App., *infra*, 63a-80a.

STATEMENT

Following a guilty plea in the United States District Court for the Western District of North Carolina, respondent was convicted of conspiracy to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(B)(ii), and 846; using or carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). App., *infra*, 96a; see C.A. App. 44-71. He was sentenced to 180 months of imprisonment, to be followed by 5 years of supervised release. App., *infra*, 97a-98a. His conviction and sentence were affirmed on appeal. See *id.* at 47a.

Respondent later filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, which the district court dismissed. App., *infra*, 46a-54a. The court of appeals affirmed. *Id.* at 44a-45a. The court of appeals subsequently denied respondent authorization to file a second or successive motion for relief under 28 U.S.C. 2255. See App., *infra*, 6a. Respondent then filed an application for habeas relief under 28 U.S.C. 2241, which the district court denied. App., *infra*, 36a-43a. The court of appeals vacated the district court's judgment and remanded. *Id.* at 1a-34a.

1. In 2006, law enforcement received information that respondent was selling cocaine from his home in

Charlotte, North Carolina. C.A. App. 398. When officers arrived at the home to execute a search warrant, respondent attempted to flee out a window. *Ibid.* The ensuing search of the home turned up a .45-caliber pistol under the pillow on respondent's bed, a safe containing a .32-caliber revolver, large amounts of cash, digital scales, 42.18 grams of cocaine, and 4.93 grams of cocaine base divided into three separate packages. *Id.* at 398-399. Another person under investigation told law enforcement that respondent had supplied him with cocaine and marijuana. *Id.* at 399. According to the informant, over an 18-month period, respondent had provided him with at least an ounce of cocaine on a monthly, and sometimes weekly, basis. *Ibid.*

A federal grand jury returned a superseding indictment charging respondent with multiple firearm and drug offenses. App., *infra*, 81a-93a. As relevant here, Count One of the indictment charged respondent with conspiracy to possess with intent to distribute 50 grams or more of cocaine base, 500 grams or more of cocaine, and a detectable amount of marijuana, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), and (b)(1)(B), and 846, see App., *infra*, 81a-82a; Count Six charged respondent with using or carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A), see App., *infra*, 85a; and Count Seven charged respondent with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), see App., *infra*, 85a-86a.

At the time, a defendant convicted of a drug-trafficking conspiracy involving 50 grams or more of cocaine base was subject to a statutory sentencing range of 10 years to life imprisonment, or 20 years to life imprisonment if he had committed the offense "after a

prior conviction for a felony drug offense ha[d] become final." 21 U.S.C. 841(b)(1)(A)(iii) (2006). A defendant convicted of a drug-trafficking conspiracy involving 500 grams or more of powder cocaine was subject to a statutory sentencing range of 5 to 40 years of imprisonment, or 10 years to life imprisonment if he had committed the offense "after a prior conviction for a felony drug offense ha[d] become final." 21 U.S.C. 841(b) (2006).

The government filed an information, pursuant to 21 U.S.C. 851, stating that respondent had a prior conviction that qualified as "a felony drug offense"—namely, a 1996 North Carolina conviction for possession of cocaine. App., *infra*, 94a-95a.[1] Then, as now, "felony drug offense" was defined as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44). At the time, circuit precedent instructed that respondent's 1996 cocaine-possession conviction qualified as a "felony drug offense," because "the maximum aggravated sentence that could be imposed for that crime upon a defendant with the worst possible criminal history" exceeded one year. *United States* v. *Harp*, 406 F.3d 242, 246 (4th Cir.) (emphasis omitted), cert. denied, 546 U.S. 919 (2005), overruled by *United States* v. *Simmons*, 649 F.3d 237, 241 (4th Cir. 2011) (en banc).

Respondent pleaded guilty pursuant to a plea agreement to Counts One, Six, and Seven of the superseding indictment. C.A. App. 44-71, 382-390. With respect to

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[1] The information also identified a 1998 North Carolina conviction for trafficking cocaine, App., *infra*, 94a, but that conviction was vacated before respondent pleaded guilty, see C.A. App. 48, 406.

the drug-trafficking conspiracy charged in Count One, respondent stipulated that his crime had involved between 500 grams and 2 kilograms of powder cocaine. *Id.* at 383. He further acknowledged that such a drug quantity, together with his prior criminal history as reflected in the information filed by the government under 21 U.S.C. 851, resulted in a statutory sentencing range of 10 years to life imprisonment. C.A. App. 382. In return for respondent's plea, the government agreed, among other things, to forgo the allegation that the drug-trafficking conspiracy had also involved 50 grams or more of cocaine base. As noted, a conviction involving that drug quantity would have exposed respondent to a term of imprisonment of 10 years to life even without any enhancement for a prior drug conviction, and to a term of 20 years to life with a prior-conviction enhancement. See 21 U.S.C. 841(b)(1)(A)(iii) (2006).

The district court sentenced respondent to 10 years of imprisonment for the drug-trafficking conspiracy in Count One. C.A. App. 95. The court also sentenced respondent to a consecutive term of 5 years of imprisonment on Count Seven, as required by 18 U.S.C. 924(c), and a concurrent term of 60 months of imprisonment on the felon-in-possession charge in Count Six. App., *infra*, 97a. Respondent did not challenge any of the applicable statutory penalties. See C.A. App. 75-77. On appeal from his sentence, his counsel filed an *Anders* brief identifying no meritorious issues, and the court of appeals affirmed. 329 Fed. Appx. 481.

2. Respondent later filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. C.A. App. 99-127. He argued, among other things, that his counsel had provided ineffective assistance by failing to object to the use of his 1996 North Carolina cocaine-

possession conviction to enhance his sentence on Count One. *Id.* at 117-118. He argued that, given his prior criminal record, the maximum sentence he could have received for that conviction under North Carolina law was eight months and that it therefore did not qualify as a conviction for a "felony drug offense." *Id.* at 117-118, 160.

The district court dismissed respondent's Section 2255 motion. App., *infra*, 46a-54a. As relevant here, the court concluded that respondent could not establish prejudice from his counsel's failure to challenge the use of his 1996 North Carolina conviction because any such challenge would have failed under then-governing circuit law. *Id.* at 50a-51a. The court relied on circuit precedent holding that, in determining whether a prior state conviction was "punishable by imprisonment for more than one year" within the meaning of "felony drug offense," 21 U.S.C. 802(44), the relevant metric was the statutory maximum for the crime, regardless of the particular defendant's prior criminal record. See App., *infra*, 51a (citing, *inter alia*, *Harp*, 406 F.3d at 246).

While respondent's appeal of the district court's decision was pending, the court of appeals issued an en banc decision in *Simmons*, *supra*, which overruled its prior precedent interpreting the definition of "felony drug offense." See 649 F.3d at 241. *Simmons* concluded that, when determining whether a particular prior drug conviction is "punishable by" a year or more in prison, 21 U.S.C. 802(44), what matters is the sentence to which a particular defendant was exposed, not the maximum sentence possible overall. 649 F.3d at 243-247. The court of appeals panel in respondent's case, however, denied a certificate of appealability and dismissed the appeal, on the ground that *Simmons* did not

apply retroactively to cases on collateral review. App., *infra*, 44a-45a, 49a.

3. Respondent later filed a second (pro se) Section 2255 motion, C.A. App. 247-251, 264-282, followed by a (counseled) request for permission from the court of appeals to pursue it, 13-220 C.A. Doc. 2, at 1 (Apr. 9, 2013). Under 28 U.S.C. 2255(h), the filing of a "second or successive" Section 2255 motion is contingent on certification by the court of appeals that it "contain[s]" newly discovered clear-and-convincing evidence of factual innocence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." The court of appeals denied respondent's request for authorization, which had been premised on the court's en banc statutory-interpretation decision in *Simmons*. 13-220 C.A. Doc. 5 (Apr. 15, 2013); see 13-220 C.A. Doc. 2, at 1.

After his request for a second collateral attack under Section 2255 was denied pursuant to Section 2255(h), respondent filed a habeas petition under 28 U.S.C. 2241. C.A. App. 295-309. The habeas petition sought relief on the same ground that he had proposed to raise in a second Section 2255 motion—namely, that in light of *Simmons*, his prior North Carolina cocaine-possession conviction had been erroneously classified as a conviction for a felony drug offense for purposes of applying a recidivist enhancement for his federal drug-conspiracy crime. *Id.* at 297-299. Shortly after respondent filed that habeas petition, the court of appeals issued a decision in which it allowed a prisoner to obtain relief on a *Simmons*-based claim in a first Section 2255 motion, on the ground that (contrary to what the unpublished opinion in respondent's case had stated) *Simmons* had announced a substantive legal rule that was retroactive on collateral

review. See *Miller* v. *United States*, 735 F.3d 141, 144-147 (4th Cir. 2013).

The cognizability of a habeas petition by a federal prisoner, however, is limited by 28 U.S.C. 2255(e). Section 2255(e) instructs that a federal prisoner's habeas petition "shall not be entertained if it appears that" the sentencing court "has denied him relief" on a Section 2255 motion, "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." Respondent did not dispute that he had previously been denied relief on a Section 2255 motion. But he argued, and the government agreed, that his particular habeas petition was cognizable under the "unless" clause of Section 2255(e), referred to as the "saving clause." The government observed that respondent's 10-year sentence on the drug-conspiracy count was within the 5- to 40-year term of imprisonment that would have been authorized even without the recidivism enhancement. C.A. App. 349. But it took the view that the imposition of a 10-year sentence against the backdrop of later-overturned precedent that identified 10 years as the statutory minimum was a "fundamental defect" that permitted resort to the saving clause. *Id.* at 339; see *id.* at 332-346.

The district court determined, however, that the savings clause did not apply to respondent's claim, citing the court of appeals' recent decision in *United States* v. *Surratt*, 797 F.3d 240 (4th Cir. 2015), which held that the saving clause did not allow a prisoner to raise a *Simmons*-based claim of sentencing error in a habeas petition. See App., *infra*, 40a-41a. The *Surratt* panel noted that a prior circuit decision, *In re Jones*, 226 F.3d 328 (4th Cir. 2000), had allowed a "narrow gateway" to habeas relief for certain federal prisoners who claimed that the limits

on second or successive Section 2255 motions rendered a Section 2255 motion "inadequate or ineffective to test the legality of a conviction." *Surratt*, 797 F.3d at 247. In particular, *Jones* had countenanced habeas relief for a prisoner whose conviction was valid under precedent that was controlling at the time of direct review and a first Section 2255 motion, if (1) new superseding precedent established that his conduct was not a crime and (2) that new precedent rested on nonconstitutional grounds that Section 2255(h) would not recognize as a proper basis for a further collateral attack. See *ibid.*; see also *Jones*, 226 F.3d at 333-334. The *Surratt* panel, however, reasoned that *Jones* should not be extended to *Simmons*-based sentencing errors, because doing so "would * * * erase the limitations on initial motions and 'second or successive' motions found in §§ 2255(f) and (h)." 797 F.3d at 251.

4. While respondent's appeal from the denial of his habeas petition was pending, the court of appeals granted rehearing en banc in *Surratt* and ultimately dismissed the case as moot after the President commuted Surratt's sentence. *United States* v. *Surratt*, 855 F.3d 218, 219 (4th Cir.) (en banc), cert. denied, 138 S. Ct. 554 (2017). In its subsequent decision in respondent's own appeal, the court departed from the vacated decision in *Surratt*. It held that respondent, whose statutory claim was barred by Section 2255(h)'s limitation on second-or-successive Section 2255 motions, could nevertheless rely on Section 2255(e)'s saving clause to raise it in a habeas petition. App., *infra*, 1a-34a.

At the outset, the court of appeals noted that the government no longer agreed, as it had in the district court, that the saving clause permitted respondent's claim. App., *infra*, 9a-10a. The government's brief on appeal

informed the court that the Solicitor General had reconsidered the government's position on the scope of the clause and had returned to the position that the government had taken before 1998, rather than the one advanced in the district court in this case. Under that original position—which accords with the Tenth Circuit's decision in *Prost* v. *Anderson*, 636 F.3d 578, 597 (2011) (Gorsuch, J.), cert. denied, 565 U.S. 1111 (2012), and the Eleventh Circuit's en banc decision in *McCarthan* v. *Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, cert. denied, 138 S. Ct. 502 (2017)—the saving clause does not authorize habeas petitions based on statutory claims that Section 2255(h) would otherwise preclude. App., *infra*, 10a; see Gov't C.A. Br. 25-53. Although the government recognized that the panel lacked the authority to overrule the circuit's prior interpretation of the saving clause in *Jones*, it asked the panel not to extend *Jones* to respondent's claim, which asserted an error only as to the applicable statutory-minimum sentence. See Gov't C.A. Br. 53-61. The court of appeals declined to view the government's defense of the district court's judgment as waived, on the ground that "the savings clause requirements are jurisdictional" and thus not waivable. App., *infra*, 16a; see *id.* at 10a-18a. The court identified "many reasons," including the language of Section 2255(e) and its similarity to other provisions that this Court "has deemed jurisdictional," *id.* at 14a, 15a, for construing the provision to be jurisdictional in nature. See *id.* at 10a-18a.

The court of appeals concluded, however, that its prior approach in *Jones*, which concerned a nonconstitutional challenge to a conviction, should also apply to a nonconstitutional challenge to a statutory minimum. App., *infra*, 19a-24a. The court adopted the view that

Section 2255 is inadequate or ineffective to test the legality of a prisoner's sentence when: (1) at the time of sentencing, settled law of the circuit or the Supreme Court established the legality of the sentence; (2) after the prisoner's direct appeal and first Section 2255 motion, the law was changed by a decision of statutory interpretation, which was deemed to apply retroactively on collateral review; (3) the prisoner is unable to satisfy the gatekeeping provisions of Section 2255(h)(2) for second or successive motions; and (4) due to the retroactive change in law, the sentence now presents an error sufficiently grave to be deemed a fundamental defect. *Id.* at 23a-24a.

The court of appeals further concluded that respondent's habeas petition was cognizable under that test. App., *infra*, 24a-32a. It observed, with respect to the first three requirements, that (1) at the time of sentencing, the district court's calculation of a higher statutory minimum based on respondent's prior North Carolina conviction was correct under controlling circuit precedent; (2) the contrary en banc *Simmons* decision was issued and made retroactive after respondent's direct appeal and Section 2255 motion; and (3) Section 2255(h)'s limitation on second or successive Section 2255 motions would bar respondent from seeking relief based on the nonconstitutional holding in *Simmons*. *Id.* at 24a-25a. The court of appeals then reasoned, with respect to the fourth requirement, that an erroneous statutory-minimum sentence was "sufficiently grave to be deemed a fundamental defect." *Id.* at 32a. The court rejected the government's argument that no fundamental defect had occurred because respondent could lawfully have received the same sentence for his drug conspiracy (10 years of

imprisonment) without an enhancement based on his prior North Carolina conviction. *Id.* at 29a-32a.

5. The court of appeals subsequently denied the government's petition for rehearing en banc, which had expressly requested that the court overrule *Jones*. App., *infra*, 55a; see Pet. for Reh'g 13-14. In a statement respecting denial of the petition, Judge Agee expressed his disagreement with the panel decision and his hope that this Court will "hear this case in a timely fashion to resolve the conflict separating the circuit courts of appeal nationwide on the proper scope of the § 2255(e) saving clause so that the federal courts, Congress, the Bar, and the public will have the benefit of clear guidance and consistent results in this important area of law." App., *infra*, 58a; see *id.* at 56a-58a. Judge Thacker also filed a statement that acknowledged the circuit conflict but argued that the panel decision was correct. *Id.* at 59a-62a.

The government moved to stay the mandate pending the filing and disposition of a potential petition for certiorari, but the court of appeals denied the motion. App., *infra*, 35a.

REASONS FOR GRANTING THE PETITION

The decision below, in granting habeas relief to respondent based on his claim of statutory error, exacerbates a widespread circuit conflict about the availability of such relief under the saving clause of 28 U.S.C. 2255(e). It cements the Fourth Circuit's disagreement with the Eleventh Circuit's en banc decision in *McCarthan* v. *Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, cert. denied, 138 S. Ct. 502 (2017), and the Tenth Circuit's decision in *Prost* v. *Anderson*, 636 F.3d 578, 597 (2011) (Gorsuch, J.), cert. denied, 565 U.S. 1111 (2012), both of which recognize that the saving clause does not provide an alternative channel for second or

successive collateral attacks that Section 2255(h) would otherwise bar. And it is a novelty even among the circuits that have adopted analogous approaches to the saving clause, none of which has yet extended that approach to authorize the vacatur of a sentence that is within the correct statutory range on the ground that the statutory minimum was calculated erroneously.

The conflict on the scope of the saving clause has produced, and will continue to produce, divergent outcomes for litigants in different jurisdictions on an issue of great significance. Prior to 1998, the Department of Justice took the view that relief under the saving clause is unavailable for statutory claims. Following rulings by courts of appeals that "decline[d] to adopt the government's restrictive reading of the habeas preserving provision of § 2255," *Triestman* v. *United States*, 124 F.3d 361, 376 (2d Cir. 1997), see *In re Davenport*, 147 F.3d 605, 608-612 (7th Cir. 1998); *In re Dorsainvil*, 119 F.3d 245, 248-252 (3d Cir. 1997), the Department reconsidered its views, taking the position, including in the district court in this case, that an inmate can seek relief for a statutory-based claim of error under Section 2255(e). The Department has since reevaluated that change in position and has determined, in accord with *Prost* and *McCarthan*, that its original interpretation of Section 2255(e) was correct, and that a contrary reading would be insufficiently faithful to the statute's text and to Congress's evident purpose in limiting the circumstances in which a criminal defendant may file a second or successive petition for collateral review. As this case illustrates, however, the Department's change of position will not cause the conflict in the courts of appeals to resolve itself. Only this Court's intervention can provide the necessary clarity.

A. The Court Of Appeals Erred In Applying The Saving Clause To Respondent's Statutory Claim

The court of appeals adopted an interpretation of the saving clause, 28 U.S.C. 2255(e), that the statutory text cannot bear. The court's reading would put the clause directly at odds with other provisions that expressly limit the availability of collateral relief; would create an anomalous scheme in which statutory claims receive more favorable treatment than constitutional ones; and would resurrect many of the practical problems that led Congress to enact Section 2255 in the first place. The panel compounded its error by extending the saving clause to allow challenges that implicate only statutory minimums and do not suggest that the defendant is serving a sentence that the sentencing court lacked authority to impose.

1. Section 2255 provides the general mechanism for collateral review of the legality of a federal prisoner's conviction or sentence. See 28 U.S.C. 2255(a). Such a prisoner has a general right, subject to procedural limitations, to file a single motion under Section 2255 that asserts any ground eligible for collateral relief. See *ibid.* Unlike habeas petitions, which are filed in the district of the prisoner's confinement, Section 2255 motions are filed in the district of conviction (although the government often waives venue-based objections). See *Hill* v. *United States*, 368 U.S. 424, 427 (1962).

In 1996, Congress restricted the grounds on which federal prisoners may file second or successive Section 2255 motions through the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220. AEDPA limited the availability of successive Section 2255 motions to cases involving either (1) persuasive new evidence

that the prisoner was factually not guilty of the offense or (2) a new rule of constitutional law made retroactive by this Court to cases on collateral review. 28 U.S.C. 2255(h)(1) and (2); cf. *Tyler* v. *Cain*, 533 U.S. 656, 661-662 (2001) (interpreting the state-prisoner analogue to Section 2255(h)). AEDPA did not, however, provide for successive Section 2255 motions based on intervening statutory decisions.

A federal prisoner also may not rely on a statutory decision that postdates his first Section 2255 motion as a basis for seeking a writ of habeas corpus under 28 U.S.C. 2241. Under the saving clause of Section 2255(e), an inmate serving a sentence of imprisonment imposed by a federal court may seek habeas corpus relief only if the "remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). That language suggests a focus on whether a particular challenge to the legality of the prisoner's detention was *cognizable* under Section 2255, not on the likelihood that the challenge would have *succeeded* in a particular court at a particular time.

As the Eleventh Circuit explained in *McCarthan*, "'[t]o test' means 'to try,'" and "[t]he opportunity to test or try a claim * * * neither guarantees any relief nor requires any particular probability of success; it guarantees access to a procedure." 851 F.3d at 1086 (citation omitted). "In this way, the clause is concerned with process—ensuring the petitioner an opportunity to bring his argument—not with substance—guaranteeing nothing about what the opportunity promised will ultimately yield in terms of relief." *Prost*, 636 F.3d at 584 (emphasis omitted). A "motion under § 2255 could reasonably be thought 'inadequate or ineffective to test the legality of the prisoner's detention' if a class of argument were

categorically excluded, but when an argument is permissible but fails on the merits there is no problem with the adequacy of § 2255." *Brown* v. *Caraway*, 719 F.3d 583, 597 (7th Cir. 2013) (statement of Easterbrook, J., concerning the circulation under Seventh Circuit Rule 40(e)) (brackets omitted).

This case illustrates the point. On both direct and collateral review, respondent had the opportunity to raise, and be heard on, his claim that his 1996 North Carolina cocaine offense was not a "felony drug offense" for purposes of 21 U.S.C. 841. Although the circuit had adverse panel precedent on that issue, that did not foreclose respondent from pressing it—just as the defendant in *United States* v. *Simmons*, 649 F.3d 237, 241 (4th Cir. 2011) (en banc), who was successful in overturning that precedent, did. Indeed, respondent argued in his Section 2255 motion that his counsel was constitutionally ineffective for not raising that issue in the original criminal proceedings. Respondent was ultimately denied relief on that Section 2255 motion on the ground that *Simmons* was not retroactive, see App., *infra*, 44a-45a, but that, too, was an issue he could have pressed further, as the court of appeals' different retroactivity conclusion in *Miller* v. *United States*, 735 F.3d 141 (4th Cir. 2013), makes clear. The Section 2255 remedy was thus neither inadequate nor ineffective to "test" the legality of respondent's confinement. Cf. *Bousley* v. *United States*, 523 U.S. 614, 623 (1998) ("[F]utility cannot constitute cause [excusing a procedural default] if it means simply that a claim was unacceptable to that particular court at that particular time.") (citation and internal quotation marks omitted).

2. Treating Section 2255 as "inadequate or ineffective" to test the legality of respondent's detention would

place Section 2255(e) at cross-purposes with Section 2255(h). That provision allows "second or successive" motions under Section 2255 only when a prisoner relies on "newly discovered evidence" that strongly indicates his factual innocence, 28 U.S.C. 2255(h)(1), or a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," 28 U.S.C. 2255(h)(2). The logical inference from the language Congress drafted is that Congress intended Section 2255(h)(1) and (2) to define the *only* available grounds on which a federal inmate who has previously filed a Section 2255 motion can obtain further collateral review of his conviction or sentence. In other words, "[t]he saving clause does not create a third exception." *McCarthan*, 851 F.3d at 1090 (emphasis omitted).

In particular, the most natural reason for Congress to include the specific phrase "of constitutional law" in Section 2255(h)(2) was to make clear that second or successive motions based on new *non*-constitutional rules cannot go forward, even when the Supreme Court has given those rules retroactive effect. The Congress that enacted AEDPA could not have anticipated the exact statutory claims that have arisen in the ensuing two decades, but would necessarily have understood that statutory claims of some kind would be raised. It would be anomalous to characterize the Section 2255 remedy as "inadequate or ineffective" when the unavailability of Section 2255 relief in a particular case results from an evident congressional choice concerning the appropriate balance between finality and additional error correction.

Other provisions within Section 2255 reinforce the deliberateness of Congress's design. Under Section 2255(a), a prisoner in custody pursuant to a federal sentence of imprisonment may file an initial motion under Section

2255 "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution *or laws* of the United States." 28 U.S.C. 2255(a) (emphasis added); see *Davis* v. *United States*, 417 U.S. 333, 345-347 (1974) (relying in part on italicized language to conclude that Section 2255 includes nonconstitutional claims). The time limit for seeking Section 2255 relief likewise anticipates nonconstitutional claims, allowing a motion to be filed within one year after "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," 28 U.S.C. 2255(f)(3), without limitation to decisions of constitutional law. Section 2255(h), however, contains a similarly worded provision that *does* limit Section 2255 relief following a prior unsuccessful motion to claims relying on intervening decisions of "constitutional law" made retroactive by this Court. 28 U.S.C. 2255(h)(2). That contrast strengthens the inference that Congress deliberately intended to preclude statutory claims following an unsuccessful Section 2255 motion. See *Prost*, 636 F.3d at 585-586, 591; cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (Congress's choice of different language in nearby provisions of same statute presumed to be deliberate).

Even if Section 2255(e)'s saving clause could literally bear the reading adopted by the court of appeals, the clause should not be construed in a manner that would render AEDPA's restrictions on second or successive Section 2255 motions largely self-defeating. Although both Section 2241 and the saving clause were enacted substantially before the 1996 enactment of AEDPA's

restrictions on second or successive Section 2255 motions, the interpretive principle that related statutory provisions should be read, if possible, to form a coherent whole is not limited to provisions that were contemporaneously enacted. See, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) (referring to the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination").

3. The construction of the saving clause by the court of appeals has the practical effect of granting inmates greater latitude to pursue claims for collateral relief based on intervening statutory decisions than to pursue the constitutional claims that Section 2255(h)(2) specifically authorizes. The requirement that a second or successive Section 2255 motion must be certified by a court of appeals panel to satisfy AEDPA's strict requirements, 28 U.S.C. 2255(h), does not apply to a petition for habeas corpus that is allowed to proceed under the saving clause. And a petition for habeas corpus is not subject to AEDPA's one-year limitations period, 28 U.S.C. 2255(f), or to the AEDPA procedure for obtaining a certificate of appealability if relief is denied by the district court, 28 U.S.C. 2253(c)(1). An interpretation that would "permit[] federal prisoners to file habeas petitions based on an intervening change in statutory interpretation," by obviating the need for inmates like respondent to comply with AEDPA's requirements, thus "provides those prisoners with a *superior* remedy." *McCarthan*, 851 F.3d at 1091.

It is far-fetched to suppose that the Congress that enacted AEDPA in 1996 intended those results. There is likewise no evidence that the Congress that enacted the saving clause in 1948 intended it to protect federal inmates from a future Congress's adoption of restrictions,

like the ones that Section 2255(h) imposes, that redefine the point at which concern for finality should take precedence over the interest in additional error-correction. And even under the approach taken by *Prost* and *McCarthan*, the saving clause has meaningful work to do. The saving clause ensures that some form of collateral review is available if a federal prisoner seeks "to challenge the execution of his sentence, such as the deprivation of good-time credits or parole determinations." *McCarthan*, 851 F.3d at 1093; see *id.* at 1081. Such challenges are not cognizable under Section 2255, which is limited to attacks on the sentence, or the underlying conviction, itself. "The saving clause also allows a prisoner to bring a petition for a writ of habeas corpus when the sentencing court is unavailable," such as when a military court martial "has been dissolved." *Id.* at 1093; see *Prost*, 636 F.3d at 588.

Furthermore, with respect to challenges like this one, allowing an inmate's second collateral attack to proceed by way of habeas corpus subverts "the legislative decision of 1948" that is reflected in Section 2255—namely, that a federal inmate's collateral challenge to his conviction or sentence should, where possible, proceed before the original sentencing court. *Webster* v. *Daniels*, 784 F.3d 1123, 1149 (7th Cir. 2015) (en banc) (Easterbrook, J., dissenting). Congress created Section 2255 to channel post-conviction disputes about the legality of a conviction or sentence away from the district of confinement and into the district of conviction and sentencing. See *Hill*, 368 U.S. at 427-428; *United States* v. *Hayman*, 342 U.S. 205, 219 (1952). Allowing a federal inmate to bring claims in the district of his confinement "resurrects the problems that section 2255 was enacted to

solve, such as heavy burdens on courts located in districts with federal prisons." *McCarthan*, 851 F.3d at 1092.

4. The court of appeals' approach to the saving clause is particularly unsound as applied to the circumstances of this case, which involves only a claim that respondent's statutory-minimum sentence was miscalculated.

As even the court of appeals recognized, the saving clause cannot authorize *all* statutory claims that would otherwise be barred by Section 2255(h). See App., *infra*, 23a. The court has thus itself limited the set of cognizable claims to assertions of error "sufficiently grave" to be deemed a "fundamental defect." *Ibid.* (citations omitted); see *id.* at 23a n.7 (noting similar limitations in other circuits). This Court has long used similar terminology in holding, even before Congress adopted AEDPA, that relief for federal prisoners on collateral review should be limited to claims of "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis*, 417 U.S. at 346 (citation omitted).

An error in the calculation or application of a statutory-minimum sentence—if the sentence actually imposed is within the correct statutory range—is not a fundamental defect. It does not implicate any concern that a defendant has been convicted of conduct that the law does not make criminal. See, *e.g.*, *Davis*, 417 U.S. at 346. Nor does it suggest that the defendant's sentence was imposed "in excess of the authority of the court," *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 177 (1874).

This Court's pre-AEDPA decision in *United States* v. *Addonizio*, 442 U.S. 178 (1979), illustrates that a misapprehension that affects only the sentence imposed within the lawful statutory range is not "a fundamental defect which inherently results in a complete miscarriage of justice," *id.* at 185 (citation omitted). The Court there

found noncognizable a claim that a sentence was based on an erroneous expectation that the United States Parole Commission would continue its current policies. See *id.* at 179-181. The Court explained that the asserted error "affected the way in which the court's judgment and sentence would be performed but it did not affect the lawfulness of the judgment itself." *Id.* at 187. To the contrary, the sentence "was within the statutory limits" and thus "was and is a lawful one" under "all of the objective criteria—federal jurisdiction, the Constitution, and federal law." *Id.* at 186-187.

The same is true here. Respondent's 10-year sentence for drug conspiracy was well within the 5-to-40-year range that would have applied even in the absence of the recidivist enhancement that respondent has challenged. See pp. 4-5, *supra*. Respondent, moreover, benefitted from the government's agreement not to press its allegation that his offense in fact involved a quantity of cocaine base that would have exposed him to a nonrecidivist sentencing range of 10 years to life imprisonment—the same range that the district court here applied. See p. 5, *supra*; cf. *Bousley*, 523 U.S. at 624 (claim of actual innocence on collateral review must encompass more serious charges forgone in plea negotiations). Extension of the court of appeals' textually ungrounded saving-clause approach to these circumstances was therefore especially unwarranted.

5. The government recognizes that adherence to the statutory text may lead to "harsh results in some cases." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005). But courts are "not free to rewrite the statute that Congress has enacted." *Ibid.* Ultimately, "[i]t is for Congress, not this Court, to amend the statute" if the legislature believes that the narrowly drawn provisions found

in Section 2255(h) "unduly restrict[] federal prisoners' ability to file second or successive motions." *Id.* at 359-360. To that end, the Department of Justice is working on efforts to introduce legislation that would enable some prisoners to benefit from later-issued, non-constitutional rules announced by this Court. And, of course, in the interim such prisoners are entitled to seek executive clemency, one recognized ground for which is the undue severity of a prisoner's sentence. See Offices of the U.S. Att'ys, U.S. Dep't of Justice, *Justice Manual* §§ 9-140.112, 9-140.113 (Apr. 2018), https://www.justice.gov/pardon/about-office-0#s1 (standards for considering pardon and commutation petitions).

B. The Question Presented Warrants This Court's Review

An entrenched conflict exists in the courts of appeals on 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. Although meritorious challenges to a conviction or sentence on the basis of such decisions are unlikely to arise with great frequency, the issue is of great significance in such cases. Furthermore, the decision below—which extends the scope of potential relief under the saving clause further than any previous circuit decision—may proliferate the filing of saving-clause claims (even if they are not ultimately successful) and impose significant new litigation burdens. This case provides a good vehicle for addressing the saving clause's scope, and the Court should grant certiorari to do so.

1. The courts of appeals are divided about whether Section 2241 relief is available under the saving clause based on a retroactive decision of statutory construction. Nine circuits have held that such relief is available

in at least some circumstances.[2] Although those courts have offered varying rationales and have adopted somewhat different formulations, they generally agree that the remedy provided by 28 U.S.C. 2255(e) is "inadequate or ineffective to test the legality of [a prisoner's] detention" if (1) an intervening decision of this Court has narrowed the reach of a federal criminal statute, such that the prisoner now stands convicted of conduct that is not criminal; and (2) controlling circuit precedent squarely foreclosed the prisoner's claim at the time of his trial (or plea), appeal, and first motion under Section 2255. See, *e.g.*, *Reyes-Requena* v. *United States*, 243 F.3d 893, 902-904 (5th Cir. 2001); *In re Jones*, 226 F.3d 328, 333-334 (4th Cir. 2000); *Davenport*, 147 F.3d at 609-612.

Two courts of appeals have held that a prisoner may invoke the saving clause to pursue a claim where his sentence exceeds the applicable maximum under a statute or under a mandatory Sentencing Guidelines regime. See, *e.g.*, *Brown* v. *Rios*, 696 F.3d 638, 640-641 (7th Cir. 2012); see also *Hill* v. *Masters*, 836 F.3d 591, 595-596, 598-600 (6th Cir. 2016) (authorizing habeas petition by prisoner sentenced as career offender under mandatory Sentencing Guidelines regime, where prisoner's underlying assault conviction no longer qualified as "crime of

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[2] See *United States* v. *Barrett*, 178 F.3d 34, 50-53 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); *Triestman*, 124 F.3d at 375-378 (2d Cir.); *Dorsainvil*, 119 F.3d at 251-252 (3d Cir.); *In re Jones*, 226 F.3d 328, 333-334 (4th Cir. 2000); *Reyes-Requena* v. *United States*, 243 F.3d 893, 902-904 (5th Cir. 2001); *Wooten* v. *Cauley*, 677 F.3d 303, 306-307 (6th Cir. 2012); *Davenport*, 147 F.3d at 609-612 (7th Cir.); *Stephens* v. *Herrera*, 464 F.3d 895, 898 (9th Cir. 2006), cert. denied, 549 U.S. 1313 (2007); *In re Smith*, 285 F.3d 6, 7-8 (D.C. Cir. 2002); see also *Abdullah* v. *Hedrick*, 392 F.3d 957, 960-964 (8th Cir. 2004) (discussing majority rule without expressly adopting it), cert. denied, 545 U.S. 1147 (2005).

violence" following *Descamps* v. *United States*, 570 U.S. 254 (2013)). And the court of appeals in this case held that the saving clause applies to a prisoner who claims that his sentence, while within the correct statutory sentencing range, resulted from the improper application of a statutory minimum. See App., *infra*, 19a-24a.

In contrast, two courts of appeals have determined that Section 2255(e) categorically does not permit habeas relief based on an intervening decision of statutory interpretation. In *Prost*, the Tenth Circuit denied habeas relief on the ground that Section 2255 was not inadequate or ineffective even though circuit precedent likely would have foreclosed the prisoner's claim in his initial Section 2255 motion. 636 F.3d at 584-585, 590. The Eleventh Circuit's en banc decision in *McCarthan* reached a similar conclusion. See 851 F.3d at 1079-1080. That en banc determination by the Eleventh Circuit, and the denial of en banc review in this case, make clear that the conflict will not resolve without this Court's intervention.

2. Although cases in which a prisoner challenges his conviction or sentence on the basis of an intervening decision of statutory interpretation have not arisen with great frequency, the government has recognized that, "given the significance of the issue in the small set of cases in which it does arise, this Court's review would be warranted in an appropriate case." Br. in Opp. at 25, *McCarthan*, *supra* (No. 17-85). The disparate treatment of identical claims is particularly problematic because habeas petitions are filed in a prisoner's district of confinement, see p. 14, *supra*, meaning that the cognizability of the same prisoner's claim may depend on where he is housed by the Bureau of Prisons and may change if the prisoner is transferred. Only this Court's

intervention can ensure nationwide uniformity as to the saving clause's scope.

This case presents an opportune vehicle for resolving the conflict in the courts of appeals. The government has opposed petitions for certiorari in cases in which the petitioners would not have been eligible for relief even in circuits that have allowed some statutory challenges to a conviction or sentence under the saving clause. See, *e.g.*, U.S. Br. in Opp. at 21-22, *Venta* v. *Jarvis*, 138 S. Ct. 648 (2018) (No. 17-6099). In this case, in contrast, the court of appeals vacated the denial of respondent's habeas petition based on a broad interpretation of the saving clause—a result it could not have reached on the Tenth or Eleventh Circuit's construction.

Furthermore, if the Court were ultimately to reject the Tenth and Eleventh Circuits' construction, the breadth of the court of appeals' holding here would enable the Court to provide guidance about the range of challenges that the clause might allow. As previously noted, the government argued below that even if the saving clause is construed to permit some statutory claims, it should not extend to a prisoner who challenges only the calculation or application of a statutory minimum in the context of a sentence that is within the correct statutory range. See p. 10, *supra*.

3. The government's agreement in the district court with respondent's view of the saving clause does not pose an obstacle to review of the question presented. The district court ultimately denied relief and entered judgment in favor of the government, and neither the court of appeals nor this Court would be required to treat the government's position in the district court as dispositive. See, *e.g.*, *United States* v. *Koons*, 850 F.3d 973 (8th Cir. 2017) (affirming district court judgments

finding defendants ineligible for postconviction sentence reductions where government had consistently maintained defendants were eligible), aff'd, 138 S. Ct. 1783 (2018) (affirming court of appeals judgment, which government defended).

In any event, the court of appeals was correct in its determination that Section 2255(e)'s limitations are jurisdictional and that it was therefore required to address the availability of relief irrespective of the parties' positions. As the court of appeals explained, a "plain reading of" Section 2255(e)'s directive that habeas petitions "'shall not be entertained'" unless the saving clause applies "demonstrates that Congress intended to, and unambiguously did strip the district court of the power to act unless the savings clause applies." App., *infra*, 15a (brackets, citation, ellipsis, and internal quotation marks omitted). The limiting language in Section 2255(e) also "parallels language the Supreme Court has deemed jurisdictional." *Ibid.*; see *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003) (holding requirements for issuing a certificate of appealability to be jurisdictional because Congress specified that "an appeal may not be taken to the court of appeals" unless the requirements are met) (quoting 28 U.S.C. 2253(c)(1)). And it would be highly anomalous for Congress to impose jurisdictional limits on second or successive collateral attacks under Section 2255(h), see *Burton* v. *Stewart*, 549 U.S. 147, 149 (2007) (per curiam) (construing parallel limitations on second or successive collateral attacks on state judgments as jurisdictional), while imposing only nonjurisdictional limits on habeas petitions that prisoners might file as a substitute for such collateral attacks.

But even if this Court has doubts about whether the court of appeals correctly decided the jurisdictional issue, and also views the government's position in the district court as a potential independent basis for granting relief to respondent even if Section 2255(e) would otherwise bar his claim, it should not deny certiorari. Instead, the Court should grant certiorari on the question presented and add the question whether Section 2255(e) is jurisdictional. That latter question would not independently warrant this Court's review, as eight other courts of appeals are in accord with the decision below, and only one court of appeals has reached a contrary conclusion.[3] But adding it would allow the Court to address the broadly significant question of the saving clause's scope and then, if necessary, address whether the decision below identified a proper basis for rejecting respondent's alternative request that the case be decided on grounds of governmental acquiescence. If this Court were to agree with respondent's interpretation of the saving clause, it would have no need to address respondent's alternative argument. If the Court instead were to conclude that Section 2255(e) precludes claims

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[3] See App., *infra*, 13a-14a & n.5; compare *Cephas* v. *Nash*, 328 F.3d 98, 105 (2d Cir. 2003); *Gardner* v. *Warden Lewisburg USP*, 845 F.3d 99, 102 (3d Cir. 2017); *Christopher* v. *Miles*, 342 F.3d 378, 385 (5th Cir.), cert. denied, 540 U.S. 1085 (2003); *United States* v. *Peterman*, 249 F.3d 458, 462 (6th Cir.), cert. denied, 534 U.S. 1008 (2001); *Hill* v. *Morrison*, 349 F.3d 1089, 1091 (8th Cir. 2003); *Harrison* v. *Ollison*, 519 F.3d 952, 961 (9th Cir.), cert. denied, 555 U.S. 911 (2008); *Abernathy* v. *Wandes*, 713 F.3d 538, 557 (10th Cir. 2013), cert. denied, 572 U.S. 1063 (2014); and *Williams* v. *Warden*, 713 F.3d 1332, 1338-1340 (11th Cir. 2013), cert. denied, 135 S. Ct. 52 (2014), with *Harris* v. *Warden*, 425 F.3d 386, 388 (7th Cir. 2005), cert. denied, 546 U.S. 1145 (2006).

like respondent's, but that its limitations are in fact non-jurisdictional, the Court could then remand for the lower courts to address in the first instance the effect of the government's initial acquiescence to relief in this case.

Any potential for the judgment below to ultimately be reinstated on other grounds, which would normally be a factor weighing heavily against certiorari, should not be the overriding factor here. If the Court denies certiorari in this case, it is unclear when it will have another opportunity to resolve the important question of the saving clause's scope. Although the scope question is at issue in other pending cases, the government is not currently aware of any case that could soon be presented to this Court, that presents a situation in which the government opposed relief in the district court, and that would also be an optimal vehicle in other respects. Given the need for timely resolution of the issue, the Court should grant certiorari in this case and address it now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2018

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-6073

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GERALD ADRIAN WHEELER, A/K/A BAY-BAY,
DEFENDANT-APPELLANT

Argued: Jan. 25, 2018
Decided: Mar. 28, 2018

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Robert J. Conrad, Jr., District Judge.
(3:06-cr-00363-RJC-3; 3:11-cv-00603-RJC)

Before: KING, FLOYD, and THACKER, Circuit Judges

Vacated and remanded by published opinion. Judge Thacker wrote the opinion, in which Judge King and Judge Floyd joined.

THACKER, Circuit Judge:

In the district court, Gerald Wheeler ("Appellant") sought to have his habeas corpus petition heard on the merits by means of the "savings clause" per 28 U.S.C. § 2255(e). The savings clause provides that an individual may seek relief from an illegal detention by way of a traditional 28 U.S.C. § 2241 habeas corpus petition,

if he or she can demonstrate that a § 2255 motion is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The district court denied Appellant's savings clause request and dismissed his § 2241 petition.

But Appellant satisfies the requirements of the savings clause as dictated by our decision in *In re Jones*, 226 F.3d 328 (4th Cir. 2000), because a retroactive change in the law, occurring after the time for direct appeal and the filing of his first § 2255 motion, rendered his applicable mandatory minimum unduly increased, resulting in a fundamental defect in his sentence. We thus vacate the district court's judgment and remand with instructions that Appellant's § 2241 petition be considered on the merits.

I.

A.

Conviction, Sentence, and Direct Appeal

In September 2006, a grand jury in the Western District of North Carolina returned a multi-defendant superseding indictment charging Appellant with conspiracy to possess with intent to distribute at least 50 grams of crack cocaine and 500 grams of powder cocaine, in violation of 21 U.S.C. § 841(b)(1)(B) ("Count One"); possession with intent to distribute at least 5 grams of crack cocaine ("Count Five"); using and carrying a firearm during and in relation to a drug trafficking crime ("Count Six"); and being a felon in possession of a firearm ("Count Seven"). The Government also filed an information pursuant to 21 U.S.C. § 851, seeking an enhanced penalty based on Appellant's 1996 North Carolina conviction for possession of

cocaine (the "1996 Conviction").[1] On April 17, 2007, Appellant pled guilty to Counts One, Six, and Seven of the indictment. His plea agreement provided that as to Count One, "Due to . . . the [§ 851 information], Defendant is facing not less than ten years imprisonment up to a maximum of life imprisonment." Plea Agreement, *United States v. Wheeler*, No. 3:06-cr-363 (W.D.N.C. filed April 3, 2007), ECF No. 66 at 1.

In March 2008, the district court sentenced Appellant to 120 months of imprisonment, the statutory mandatory minimum, on Count One.[2] In so doing, it determined that the 1996 Conviction was a "felony drug offense," and as a result, Appellant's enhanced statutory range was 10 years to life in prison. *See* 21 U.S.C. § 841(b)(1)(B) ("If any person commits . . . a [§ 841(b)(1)(B)] violation after a prior conviction for a *felony drug offense* has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . ." (emphasis supplied)); *id.* § 802(44) (defining "[f]elony drug offense" as "an offense that is punishable by imprisonment for more than one year under any [state] law . . . that prohibits or restricts conduct relating to narcotic drugs"). Without the 1996 Conviction, Appellant's United States Sentencing Guidelines ("Guidelines") range would have been 70-87 months, and his statutory sentencing range would have been

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[1] The information also cited a 1998 conviction for cocaine trafficking, but that conviction was later overturned and is not at issue in this appeal.

[2] Appellant also received a concurrent 70 month sentence on Count Seven and a consecutive 60 month sentence on Count Six, for a total sentence of 180 months.

5 to 40 years. The district court noted, "[T]he sentence that is required to be imposed upon you is a harsh sentence. It's a mandatory minimum sentence. I don't have any discretion in that area." J.A. 85-86.[3] We affirmed Appellant's conviction and sentence. *See United States v. Wheeler*, 329 F. App'x 481 (4th Cir. 2009) (per curiam).

B.

First § 2255 Motion

On June 29, 2010, Appellant filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. He alleged that his counsel was ineffective for, inter alia, failing to argue that the 1996 Conviction did not qualify to enhance his sentence. *See* J.A. 116-17 ("[C]ounsel in this matter[] allowed an error to proceed uncorrected . . . . The term of [the 1996 Conviction] didn't exceed one year[;] the maximum punishment that he could receive was[] eight months . . . .").

The district court dismissed the § 2255 motion on March 17, 2011, and denied a certificate of appealability ("COA"), explaining that Appellant's argument was foreclosed by this court's decision in *United States v. Harp*, 406 F.3d 242 (4th Cir. 2005), and this court's panel decision in *United States v. Simmons*, 635 F.3d 140 (4th Cir. 2011). *See* J.A. 204. Those decisions held, "[T]o determine whether a conviction is for a crime punishable by a prison term exceeding one year [under North Carolina law], . . . we consider the maximum *aggravated* sentence that *could be imposed* for that crime upon a defendant with the worst possible

[3] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

criminal history." *Harp*, 406 F.3d at 246 (second emphasis supplied); *see also Simmons*, 635 F.3d at 146. Thus, the district court reasoned that although Appellant received a sentence of six to eight months for the 1996 Conviction, "his offense was punishable by imprisonment for more than a year" because it was a Class I felony, which carries a maximum sentence of 15 months. J.A. 204. Thus, "[a]ny challenge [to the 1996 Conviction] made by Petitioner's counsel would have failed." *Id.*

Appellant filed a pro se motion to reconsider, again contending that the 1996 Conviction did not qualify as a felony drug offense. And again, the district court denied the motion. Appellant filed a notice of appeal on April 14, 2011, and a motion for COA with this court on August 3, 2011.

While the motion for COA was pending, this court, sitting en banc, overturned the panel decision in *Simmons*. *See United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc) (hereinafter "*Simmons*"). We determined that "in deciding whether a sentencing enhancement was appropriate under the Controlled Substances Act, a district court could no longer look to a hypothetical defendant with the worst possible criminal history. Instead, . . . a sentencing court may only consider the maximum possible sentence that the *particular* defendant could have received." *United States v. Kerr*, 737 F.3d 33, 37 (4th Cir. 2013) (emphasis in original) (discussing *Simmons*, 649 F.3d at 246-47 & n.9). Thus, what matters is the potential maximum sentence to which a defendant is exposed, not the highest possible sentence. *See Simmons*, 649 F.3d at 243 (relying on *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010)). As a result, we vacated Simmons's sentence

because the state court "never made the recidivist finding necessary to expose Simmons to a higher sentence," *id.*, and the Government was "precluded from establishing that a conviction was for a qualifying offense" under the Controlled Substances Act, *id.* (quoting *United States v. Rodriquez*, 553 U.S. 377, 389 (2008)).

Nonetheless, we denied Appellant's motion for COA and dismissed his appeal of his first § 2255 petition because, at that time, *Simmons* did not apply retroactively on collateral review. *See United States v. Wheeler*, 487 F. App'x 103 (4th Cir. 2012) (per curiam) (citing *United States v. Powell*, 691 F.3d 554 (4th Cir. 2012)).

C.

Second § 2255 Motion/
§ 2241 Petition

In late 2011, Appellant filed a second § 2255 motion pro se, alleging that he was "actually innocent" of the § 851 enhancement based on *Simmons*, the 1996 Conviction is not a felony drug offense, and *Simmons* should apply retroactively. J.A. 248-49. Indeed, under *Simmons*, the maximum punishment to which Appellant was exposed for the 1996 Conviction was eight months, which would render that conviction nonqualifying as a felony drug offense under § 841(b)(1)(B).

In April of 2013, Appellant, now represented by counsel, filed a request for authorization to file the second § 2255 motion, along with an Alternative Petition, which included a request for relief pursuant to 28 U.S.C. § 2241.[4] *See* J.A. 295-309 (the "§ 2241 Peti-

[4] Section 2241 provides, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and

tion"). He sought review of the § 2241 Petition by way of the § 2255(e) savings clause, contending, "[Section] 2255 has never provided an avenue for [Appellant] to challenge his unlawful sentence. [Section] 2255 relief is—and always has been—foreclosed for him on the [*Simmons*] issue presented in this Petition . . . ." *Id.* at 302.

Although this court denied Appellant's request for authorization to file the second § 2255 motion, *see* Order, *In re Wheeler*, No. 13-220 (4th Cir. filed April 15, 2013), ECF No. 5, we did not address the § 2241 Petition, which remained pending in district court. Four months later, we held that *Simmons* applies retroactively on collateral review. *See Miller v. United States*, 735 F.3d 141 (4th Cir. 2013).

The district court then stayed Appellant's § 2241 Petition pending resolution of our panel decision in *United States v. Surratt*, No. 14-6851. On July 31, 2015, a divided panel of this court held that a petitioner who received a sentence of life without parole based on a prior conviction rendered nonqualifying after *Simmons* and *Miller* could not pass through the savings clause and have his § 2241 petition heard on the merits. *See United States v. Surratt*, 797 F.3d 240, 269 (4th Cir. 2015), *reh'g en banc granted*, Dec. 2, 2015. The majority in *Surratt* distinguished our decision in *In re Jones*, which granted savings clause relief after setting forth a three part test based on the legality of a pris-

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any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a). It also states, "The writ of habeas corpus shall not extend to a prisoner unless," inter alia, "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

oner's conviction, but not his sentence. *See* 226 F.3d 328, 333-34 (4th Cir. 2000).

Following that decision, the district court lifted the stay of Appellant's case, dismissed the § 2255 motion as second or successive without authorization, and denied the § 2241 Petition because it did not meet the requirements of the savings clause as set forth in *Surratt*. The court reasoned, "[Appellant] does not challenge the legality of his conviction . . . . Because [his] challenge is confined to the legality of his *sentence* the § 2241 petition will be denied." J.A. 363 (emphasis supplied).

After Appellant filed a notice of appeal, this court voted to rehear *Surratt* en banc, thereby vacating the panel decision, *see* 4th Cir. Local Rule 35(c) ("Granting of rehearing en banc vacates the previous panel judgment and opinion . . . ."), and held Appellant's appeal in abeyance pending that en banc decision. However, ultimately the en banc court concluded that Surratt's appeal was moot after President Obama commuted his sentence. *See United States v. Surratt*, 855 F.3d 218, 219 (4th Cir. 2017). Appellant's case was then removed from abeyance. We now address the district court's decision that Appellant did not meet the savings clause requirements de novo, unbound by this court's panel decision in *Surratt*. *See Fontanez v. O'Brien*, 807 F.3d 84, 86 (4th Cir. 2015); Local Rule 35(c).

II.

In his § 2241 Petition, Appellant lodges a claim for relief from an alleged illegal sentence and explains he was entitled to have that claim heard by virtue of the savings clause. Section 2255(e) provides a means for

petitioners to apply for a traditional writ of habeas corpus pursuant to § 2241. It states:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention*.

28 U.S.C. § 2255(e) (emphasis supplied).

Appellant raises two main arguments as to why he is entitled to a merits determination of the § 2241 Petition. First, he contends the savings clause is not jurisdictional and therefore, because the Government argued in the district court that Appellant satisfied the savings clause, it has waived any such challenge and precluded the courts from considering the issue. Second, Appellant argues that he can satisfy the requirements of the savings clause.

A.

The Jurisdictional Argument

On the jurisdictional argument, we first address the Government's shifting position in this case. In the district court, the Government took the position that Appellant met the savings clause requirements and was entitled to relief. *See, e.g.*, Gov't's Resp. to Pet'r's Mot. to Vacate, Correct, or Set Aside Sentence, *United States v. Wheeler*, No. 3:11-cv-603 (W.D.N.C. filed Nov. 29, 2013), ECF No. 14 at 1-2 ("[T]he Government agrees that [Appellant] is entitled to relief under the savings

clause and § 2241 and recommends that this Court resentence him."). Indeed, the Government argued that "when a defendant was sentenced to an enhanced mandatory-minimum sentence based on a conviction that qualified under pre-*Simmons* decisional law, and *Simmons* was decided after the time for direct review and an initial collateral attack," and when a prisoner demonstrates that a second or successive § 2255 motion is not available, "th[e] procedural requirement [of the savings clause] is met." *Id.* at 7-8. Further, it contended, "Imposing a mandatory-minimum sentence based on the defendant's prior conviction, when that conviction is legally ineligible to justify the mandatory term, is a fundamental error." *Id.* at 11. But now, on appeal, the Government has done an about-face, arguing that Appellant fails to satisfy the requirements of the savings clause.

1.

A party is not permitted to waive subject matter jurisdiction. *See Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004) (en banc). Therefore, our first task is to determine whether the requirements of the savings clause are jurisdictional. In *Rice v. Rivera*, we held that if a petitioner cannot satisfy the savings clause requirements, his or her § 2241 petition "must be dismissed for lack of jurisdiction." 617 F.3d 802, 807 (4th Cir. 2010) (per curiam). Appellant classifies this decision as a "drive-by jurisdictional ruling" with no precedential effect, and argues that the savings clause is not actually jurisdictional. *See* Appellant's Br. 2 (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503 (2006)). Therefore, he

contends, the Government is able to waive the savings clause requirements.

Even assuming *Rice* lacks precedential effect, we hold that the savings clause is a jurisdictional provision. For years, the Supreme Court "endeavored . . . to bring some discipline to the use of the term 'jurisdictional.'" *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (internal quotation marks omitted). It "pressed a stricter distinction between truly jurisdictional rules, which govern a court's adjudicatory authority, and nonjurisdictional claim-processing rules, which do not." *Id.* (internal quotation marks omitted). The Court ultimately set forth the following instruction, also known as the "clear statement" principle: "A rule is jurisdictional if the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional. But if Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional." *Id.* at 141-42 (alterations, citations, and internal quotation marks omitted).

This does not mean that Congress "must incant magic words," *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (internal quotation marks omitted), like, for example, the word "jurisdiction." Rather, "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Id.* "We consider context, including this Court's interpretations of similar provisions in many years past, as probative of" Congress' intent. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153-54 (2013) (internal quotation marks omitted).

2.

We thus turn to the Supreme Court's interpretation of similar provisions. The Court has held that § 2253(c)(1) "is a jurisdictional prerequisite" because it "mandates that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals . . . .'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting 28 U.S.C. § 2253(c)(1)). The Court explained that this provision "requires a threshold inquiry into whether the circuit court may entertain an appeal." *Id.* (internal quotation marks omitted). In contrast, the Court has held § 2253(c)(2) and § 2253(c)(3) to be nonjurisdictional. Subsection (c)(2) provides that a COA may issue upon "a substantial showing of the denial of a constitutional right" and subsection (c)(3) provides that the COA "shall indicate which specific issue or issues satisfy the showing required by [subsection (c)(2)]." Because those provisions "do[] not speak in jurisdictional terms or refer in any way to the jurisdiction of the appeals courts," but rather, "reflect[] a threshold *condition* for the *issuance* of a COA," *Thaler*, 565 U.S. at 143 (emphases supplied) (alterations and internal quotation marks omitted), they are not jurisdictional provisions. *See also Arbaugh*, 546 U.S. at 503, 516 (holding that Title VII's definition of "employer," which requires the defendant to have "fifteen or more employees," was actually "an element of a plaintiff's claim for relief, not a jurisdictional issue").

Similarly, in *Kwai Fun Wong*, the Supreme Court explained that "procedural rules, including time bars, cabin a court's power only if Congress has clearly stated as much." 135 S. Ct. at 1632 (alterations and internal

quotation marks omitted). In that case, the Court decided that the statute of limitations set forth in the Federal Tort Claims Act ("FTCA") was not jurisdictional. Section 2401(b) of the FTCA states, "A tort claim against the United States *shall be forever barred unless* it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing" a notice of final agency denial. 28 U.S.C. § 2401(b) (emphasis supplied). Despite this emphatic language, the Court stated that statutes of limitations are "quintessential claim-processing rules" that normally "do not deprive a court of authority to hear a case . . . even when the time limit is important . . . and even when it is framed in mandatory terms, . . . however emphatically expressed those terms may be." *Kwai Fun Wong*, 135 S. Ct. at 1632 (alterations, citations, and internal quotation marks omitted). And while "a provision governing the time to appeal in a civil action qualifies as jurisdictional [if] Congress sets the time," a "time limit not prescribed by Congress ranks as a mandatory claim-processing rule." *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 17 (2017).

Our sister circuits have split on the jurisdictional issue at hand. Appellant cites to *Harris v. Warden*, wherein the Seventh Circuit concluded, "Sections 2241 and 2255 deal with remedies; neither one is a jurisdictional clause. []Jurisdiction to resolve claims under § 2255, which technically are motions in the criminal prosecution, comes from 18 U.S.C. § 3231[.]" 425 F.3d 386, 388 (7th Cir. 2005). In contrast, the Eleventh Circuit has held that § 2255(e) "speaks in imperative terms regarding a district court's power to entertain a

particular kind of claim" and is therefore jurisdictional in nature. *Williams v. Warden*, 713 F.3d 1332, 1340 (11th Cir. 2013). Many other circuits have sided with the Eleventh Circuit view, if by implication.[5]

3.

We side with the Eleventh Circuit majority view for many reasons. First, "there is a clear expression of congressional intent." *Williams*, 713 F.3d at 1338. Section 2255(e) states that a § 2241 petition "shall not be entertained" if certain circumstances are present, "unless" another condition is present. 28 U.S.C. § 2255(e). Thus it "commands the district court not to entertain a § 2241 petition that raises a claim ordinarily cognizable in the petitioner's first § 2255 motion except in . . . exceptional circumstance[s]." *Williams*, 713 F.3d at 1338

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[5] *See Abernathy v. Wandes*, 713 F.3d 538, 557 (10th Cir. 2013) ("[W]hen a federal petitioner fails to establish that he has satisfied § 2255(e)'s savings clause test—thus, precluding him from proceeding under § 2241—the court lacks statutory jurisdiction to hear his habeas claims." (footnote omitted)); *Wooten v. Cauley*, 677 F.3d 303, 306 (6th Cir. 2012) (analyzing whether "[t]he use of the savings clause to establish jurisdiction" makes the proposed § 2241 petition subject to § 2255's statute of limitations); *Harrison v. Ollison*, 519 F.3d 952, 961 (9th Cir. 2008) ("Because Harrison has not established that his petition is a legitimate § 2241 petition brought pursuant to the escape hatch of § 2255, we do not have jurisdiction under § 2241 to hear his appeal."); *Hill v. Morrison*, 349 F.3d 1089, 1091 (8th Cir. 2003) (the savings clause "provides the court of incarceration as having subject matter jurisdiction over a collateral attack on a conviction or sentence"); *Cephas v. Nash*, 328 F.3d 98, 105 (2d Cir. 2003) ("[W]here . . . petitioner invokes § 2241 jurisdiction to raise claims that clearly could have been pursued earlier . . . then the savings clause of § 2255 is not triggered and dismissal of the § 2241 petition for lack of jurisdiction is warranted.").

(alterations and internal quotation marks omitted). Indeed, a "plain reading of the phrase 'shall not entertain'" demonstrates that "Congress intended to, and unambiguously did strip the district court of the power to act . . . unless the savings clause applies." *Id.* at 1339.

Second, the language at issue parallels language the Supreme Court has deemed jurisdictional. In *Miller-El*, the Court focused on the phrase "unless [a COA is issued] an appeal may not be taken." 537 U.S. at 336. It held that this phrase "mandates" that until a COA has been issued, the courts of appeals "lack jurisdiction to rule on the merits of [habeas] appeals." *Id.* Like this language, which strips a court of power to entertain an appeal unless a prerequisite is met, the savings clause language also strips the sentencing court of power to entertain a habeas corpus petition unless a prerequisite—i.e., a determination that a § 2255 motion is inadequate or ineffective to test the legality of one's detention—is met.

Third, the language is unlike the provisions the Supreme Court has labeled nonjurisdictional. In *Thaler*, the Court addressed the requirements for a COA: it may be issued upon "a substantial showing of the denial of a constitutional right," and must indicate "which specific issue or issues satisfy" that showing. 565 U.S. at 143 (quoting § 2253(c)(2), (c)(3)). These provisions do not address the appellate court's power to entertain an appeal, but rather, list the criteria a proper COA should possess. Thus, the language of § 2253(c)(2) and (c)(3) "does not . . . refer in any way to the jurisdiction of the appeals courts," as "[a] defective COA is not equivalent to the lack of any COA." *Id.*

The savings clause is different—it does not concern criteria for a successful § 2241 petition; rather, it provides whether that petition may be entertained to begin with. Moreover, the provision at issue does not fit neatly with the other nonjurisdictional provisions. Unlike *Hamer*, this case involves a statute and not a rule; unlike *Kwai Fun Wong*, the savings clause does not provide a time limitation; and unlike *Arbaugh*, it is not an element of a claim for relief.

Finally, we find *Harris* to be unpersuasive. *Harris* reasoned that jurisdiction to resolve § 2255 claims derives from another statute, which gives district courts exclusive jurisdiction "of all offenses against the laws of the United States." 18 U.S.C. § 3231; *see Harris*, 425 F.3d at 388. But the savings clause concerns jurisdiction to entertain a § 2241 habeas corpus petition, and, in any event, *Harris* was decided before *Thaler*, *Sebelius*, and *Kwai Fun Wong* and failed to examine the language of the savings clause in the context the Court directed in those cases. Further, the Seventh Circuit itself has sent mixed signals about the savings clause's jurisdictional quality. *Compare Harris*, 425 F.3d at 388, *with Garza v. Lappin*, 253 F.3d 918, 921 (7th Cir. 2001) ("If Garza can show that his petition fits under this narrow exception [in the savings clause], then . . . the district court had jurisdiction to consider his habeas petition . . . ."). Therefore, we decline Appellant's invitation to follow *Harris*.

Because the savings clause requirements are jurisdictional, we must reject Appellant's waiver argument. Though the Government's change of position is a "distasteful occurrence[]" and is "not to be encouraged, its

about-face is irrelevant to our resolution of" this appeal. *Rice*, 617 F.3d at 806-07.

B.

The Savings Clause Requirements

We turn now to whether Appellant has satisfied the jurisdictional requirements of the savings clause—that is, whether § 2255 is inadequate or ineffective to test the legality of Appellant's detention.

At the outset, it is well established that § 2255 "was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus [under § 2241]." *Davis v. United States*, 417 U.S. 333, 343 (1974). Indeed, "the sole purpose [of § 2255] was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum." *Id.* at 344 (internal quotation marks omitted) (emphasis supplied).

We also acknowledge that Congress has bestowed "the courts broad remedial powers to secure the historic office of the writ." *Boumediene v. Bush*, 553 U.S. 723, 776 (2008). It is "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Id.* at 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)). Habeas corpus is "above all, an adaptable remedy," and its "precise application and scope change[] depending upon the circumstances." *Id.* We are thus entrusted with ensuring Appellant has a meaningful opportunity to demonstrate that he is entitled to relief from his allegedly erroneous sentence.

1.

The Jones *Test*

In our seminal decision *In re Jones*, we determined that Byron Jones satisfied the requirements of the savings clause. *See* 226 F.3d at 329-30. Jones was convicted of four counts of using a firearm during a drug offense pursuant to 18 U.S.C. § 924(c)(1), based on a search of his apartment that uncovered crack cocaine, as well as four firearms found in a locked closet. *See id.* at 330. However, after Jones filed his first § 2255 motion, the Supreme Court decided *Bailey v. United States*, 516 U.S. 137 (1995), which rendered Jones's convictions invalid. *See id.* at 330. Specifically, *Bailey* held that the Government must prove active employment of a firearm in order to convict a defendant for using a firearm under § 924(c)(1). *See id.* (citing *Bailey*, 516 U.S. at 143). Therefore, Jones's conduct underlying his convictions was no longer illegal. *See id.* at 330, 334. Unable to file a second or successive § 2255 motion because *Bailey* was a statutory (not a constitutional) decision,[6] Jones attempted to file a § 2241 claim for relief by using the savings clause portal. *See id.* at 329-30.

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[6] In order to file a second or successive § 2255 motion, a petitioner must demonstrate that his motion contains "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense"; or "a new rule of *constitutional law*, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h) (emphasis supplied).

In analyzing Jones's claim, we set forth three elements that must be present for a petitioner to satisfy the savings clause:

> [Section] 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

Jones, 226 F.3d at 333-34. *Jones* added, "[C]ourts [allowing § 2241 review of *Bailey* claims] have focused on the more *fundamental defect* presented by a situation in which an individual is incarcerated for conduct that is not criminal but, through no fault of his own, has no source of redress." *Id.* at 333 n.3 (emphasis supplied). We then found that *Jones* satisfied all three elements above and granted his request to file a § 2241 petition via the savings clause.

2.

Whether Jones *Applies to Sentencing*

Here, in denying Appellant's savings clause request and dismissing his § 2241 Petition, the district court explained,

> In the present case, Petitioner does not challenge the legality of his conviction. Instead, he moves the Court for an order vacating his sentence that was enhanced based on the finding that he had a predication [sic] North Carolina felony drug convic-

> tion. Because Petitioner's challenge is confined to the legality of his sentence the § 2241 petition will be denied.

J.A. 363 (citing *Jones*, 226 F.3d at 333-34). There is no doubt that *Jones* is still good law in this circuit, and the district court interpreted that decision narrowly. However, Appellant invites us to construe *Jones* more broadly to pertain to alleged sentencing errors.

The Government concedes that *Jones* may be read to encompass "certain serious sentencing errors," Gov't's Br. 55, and we agree. *Jones* did not address whether an erroneously imposed sentence is sufficient to invoke the savings clause or whether it could also be a "fundamental defect," as it had no occasion to do so. 226 F.3d at 333 n.3. However, *Jones* also does not preclude such a reading. To the contrary, *Jones* stated, "Section 2255 . . . was not intended to limit the rights of federal prisoners to collaterally attack their convictions *and sentences*," suggesting that the savings clause encompasses challenges to one's sentence. *Id.* at 332 (emphasis supplied).

Including sentencing errors within the ambit of the savings clause also finds support in the statutory language. The savings clause pertains to one's "detention," and Congress deliberately did not use the word "conviction" or "offense," as it did elsewhere in § 2255. *See* 28 U.S.C. § 2255(h)(1) (referencing "the offense"); *id.* § 2255(f)(1) (referencing "conviction"). *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclu-

sion." (alteration and internal quotation marks omitted)). Detention necessarily implies imprisonment. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment [is freedom] from government custody, *detention*, or other forms of physical restraint." (emphasis supplied)). Thus, "[t]he text of the [savings] clause . . . does not limit its scope to testing the legality of the underlying criminal conviction." *Brown v. Caraway*, 719 F.3d 583, 588 (7th Cir. 2013).

In addition, the Supreme Court has long recognized a right to traditional habeas corpus relief based on an illegally extended sentence. *See Nelson v. Campbell*, 541 U.S. 637, 643 (2004) ("[T]he 'core' of habeas corpus" has included challenges to "the duration of [the prisoner's] sentence."). Indeed, one purpose of traditional habeas relief was to remedy statutory, as well as constitutional, claims presenting "a fundamental defect which inherently results in a complete miscarriage of justice" and "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is present." *Davis*, 417 U.S. at 346 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). But if we held that a prisoner was foreclosed from seeking collateral relief from a fundamentally defective *sentence*, and "through no fault of his own, has no source of redress," this purpose would remain unfulfilled. *Jones*, 226 F.3d at 333 n.3. Therefore, we readily conclude that § 2255(e) must provide an avenue for prisoners to test the legality of their sentences pursuant to § 2241, and *Jones* is applicable to fundamental sentencing errors, as well as undermined convictions.

3.

The New Savings Clause Test for Erroneous Sentences

Having decided that prisoners are able to challenge their allegedly illegal sentences in a § 2241 petition, and that § 2255(e) contemplates such a challenge, we must establish savings clause criteria tailored to that situation. To begin, *Jones* contemplates a change in "substantive law" that renders noncriminal the conduct by which a prisoner was convicted. Although *Bailey* was a Supreme Court case, *Jones* did not make savings clause relief dependent on a Supreme Court decision, nor does the savings clause dictate such a requirement. Indeed, the *Jones* test itself, at step one, contemplates that at the time of one's conviction, the "settled law of this circuit or the Supreme Court" established the legality of that conviction, and then, at step two, it signals a change in that substantive law. 226 F.3d at 333-34.

We see no need to read the savings clause as dependent only on a change in Supreme Court law. The majority in the vacated *Surratt* opinion surmised that only a Supreme Court decision can "open the door to successive relief" because § 2255(h), which pertains to second or successive § 2255 motions, requires "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." *Surratt*, 797 F.3d at 259 (quoting 28 U.S.C. § 2255(h)(2)). But this argument cuts the other way. Congress could have made savings clause relief dependent *only* on changes in Supreme Court constitutional law by using the identical language in § 2255(e), but it did not. This is underscored by the fact that Congress anticipated the savings clause would apply to prisoners who had already been "denied . . . relief" by the sentencing court,

sweeping in those prisoners filing a successive § 2255 motion. *Id.* § 2255(e). Therefore, to honor the tradition of habeas corpus and language and context of the provision, we conclude a change in this circuit's controlling law will suffice.

Next, that change in law must have been made retroactive on collateral review. Otherwise, the prisoner would not be able to "test the legality of his detention" in a § 2241 proceeding, which is the ultimate goal of the savings clause. 28 U.S.C. § 2255(e). And the retroactive change in law could not have occurred before direct appeal or the initial § 2255 petition. This is in harmony with *Jones* and honors the savings clause's requirement that the § 2255 motion be inadequate or ineffective. Third, the petitioner must otherwise be unable to meet the requirements of § 2255(h)(2) for second or successive § 2255 motions. This corresponds with *Jones*'s requirement that the petitioner be unable to satisfy the gatekeeping provisions of § 2255, *see* 226 F.3d at 334, and it also honors the savings clause's mandate that prisoners may only resort to the savings clause where the other avenues for remedy in § 2255 are ineffective. Finally, the sentencing error must be "sufficiently grave," *Hill v. Masters*, 836 F.3d 591, 595 (6th Cir. 2016), so as to be deemed a "fundamental defect," *Jones*, 226 F.3d at 333 n.3.[7]

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[7] The Third, Fifth, Sixth, and Seventh Circuits have also applied a fundamental defect or miscarriage of justice standard to determine whether prisoners satisfy the savings clause. *See Hill*, 836 F.3d at 595; *Brown*, 719 F.3d at 586-87; *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *In re Davenport*, 147 F.3d 605, 609-11 (7th Cir. 1998); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997).

Taking all this into account, we conclude that § 2255 is inadequate and ineffective to test the legality of a sentence when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect. *See Jones*, 226 F.3d at 333-34 & n.3; *Hill*, 836 F.3d at 595; *Brown*, 719 F.3d at 586.

4.

Applying the New Savings Clause Test to Appellant's Case

a.

The First Three Requirements of the New Savings Clause Test

First, it is undisputed that at the time Appellant was sentenced in February 2008, his sentence was legal pursuant to *Harp*. Second, the en banc *Simmons* decision, which abrogated *Harp*, was decided August 17, 2011, and was made retroactive on collateral review by *Miller* on August 21, 2013. This all occurred after Appellant's direct appeal, filed March 2008, and his first § 2255, filed June 2010. Although Appellant actually raised a *Simmons* type claim in his first § 2255 on ineffective assistance of counsel grounds, the *Simmons* en banc decision itself could not have been invoked at that time because it did not exist. *See Boumediene*,

553 U.S. at 779 ("[T]he privilege of habeas corpus entitles the prisoner to a *meaningful* opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." (emphasis supplied) (internal quotation marks omitted)). In addition, Appellant is unable to satisfy the requirements of § 2255(h)(2) because *Simmons* was a statutory decision and was not made retroactive by the Supreme Court.

b.

The Fourth Requirement of the New Savings Clause Test: Fundamental Defect

Finally, we address whether the increase in Appellant's mandatory minimum is an error sufficiently grave to be deemed a fundamental defect. When Appellant never should have been subject to an increase in the first place, the error is grave. Without the 1996 Conviction, Appellant's statutory minimum would have been five years—half of the sentence to which he was subjected. An increase in the congressionally mandated sentencing floor implicates separation of powers principles and due process rights fundamental to our justice system.

i.

In the federal system, "defining crimes and fixing penalties are legislative, not judicial, functions." *United States v. Evans*, 333 U.S. 483, 486 (1948) (footnote omitted). Congress alone can set maximum and minimum terms of imprisonment, *see id.*, and those limits define legal boundaries for the punishment for a particular crime. *See Williams v. New York*, 337 U.S. 241, 247 (1949) ("A sentencing judge" determines the "type

and extent of punishment" within "fixed statutory or constitutional limits"); *Hunter v. Fogg*, 616 F.2d 55, 61 (2d Cir. 1980) ("If in fact the legislature has circumscribed the judge's discretion by specifying a mandatory minimum sentence, fundamental fairness requires that the defendant be so informed."). Therefore, consistent with the "constitutional principle of separation of powers," a defendant has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress," and a violation of that principle can "trench[] particularly harshly on individual liberty." *Whalen v. United States*, 445 U.S. 684, 689-690 (1980).

In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), an Oklahoma sentencing jury—pursuant to instructions based on a then-effective habitual offender statute—imposed a mandatory 40 year sentence upon the defendant, Flynn Hicks. *See id.* at 344-45. After Hicks's sentence was handed down, the habitual offender statute was declared unconstitutional in another case. *See id.* at 345. Had the jury been correctly instructed, they could have imposed a sentence of ten years or more in Hicks's case. *See id.* at 346. Hicks then sought to have his sentence set aside on appeal, but the state appellate court denied his request, explaining that Hicks was not prejudiced "since his sentence was within the range of punishment that could have been imposed in any event." *Id.* at 345. The Supreme Court, however, found a due process violation because Hicks had a "substantial and legitimate expectation that he w[ould] be deprived of his liberty only to the extent determined by the [sentencing body] in the exercise of its statutory discretion." *Id.* at 346. Too here, without the 1996 Conviction, the district court's statutory discretion would have

been expanded by a much lower mandatory minimum —one that, in fact, fell below the applicable Guidelines range of 70-87 months.

Similarly, in *United States v. Tucker*, the Supreme Court considered whether a sentence of 25 years of imprisonment for armed bank robbery (the maximum term authorized by statute), which was clearly based on two prior convictions that were later deemed constitutionally invalid, should be vacated. 404 U.S. 443, 444-45 (1972). The Ninth Circuit had vacated the sentence and remanded for resentencing because "there was a reasonable probability that the defective prior convictions may have led the trial court to impose a heavier prison sentence than it otherwise would have imposed." *Id.* at 445-46 (internal quotation marks omitted). The Supreme Court affirmed, explaining, "[W]e deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude." *Id.* at 447. It continued, "[T]his prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." *Id.* (quoting *Townsend v. Burke*, 334 U.S. 736 (1948)). Likewise, here, the district court assumed the 1996 Conviction is sufficient to double Appellant's statutory minimum. But it is decidedly not.

In light of these decisions, it is not surprising that the Supreme Court later recognized, "It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Alleyne v. United States*,

133 S. Ct. 2151, 2160 (2013);[8] *see Almendarez-Torres v. United States*, 523 U.S. 224, 245 (1998) (recognizing that mandatory minimums can lead to "a *minimum* sentence of imprisonment more than twice as severe as the *maximum* the trial judge would otherwise have imposed" (emphases in original) (internal quotation marks omitted)). This court has also recognized the fundamental problem with an incorrectly designated statutory sentencing benchmark. We have suggested that an "erroneously-imposed sentencing floor is problematic" when it comes to habeas cognizability under § 2255(a), which requires a fundamental defect resulting in a miscarriage of justice. *United States v. Newbold*, 791 F.3d 455, 460 n.6 (4th Cir. 2015) (holding that an erroneous sentence above the statutory maximum is cognizable on initial § 2255 review). Specifically, an erroneous mandatory minimum "create[s] the mistaken impression that the district court had no discretion to vary downward from the low end of [the defendant's] range." *Id.* And in this case, the district court noted that the mandatory minimum was "harsh," but its "hands [we]re tied" because it was confined by the 120 month sentencing floor. J.A. 85. We similarly find no merit in the notion that Appellant could have been assigned the same sentence even with the correct

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[8] *Alleyne* bars "judicial factfinding that increases the mandatory minimum sentence for a crime," 133 S. Ct. at 2155, but the Court left undisturbed the "narrow exception to this general rule for the fact of a prior conviction," *id.* at 2160 n.1; *see Almendarez-Torres*, 523 U.S. 224, 226 (1998) (A "penalty provision" that "authorizes a court to increase the sentence for a recidivist" based on a prior conviction "does not define a separate crime."). Nonetheless, the Court's recognition of the relationship between the floor of the sentence and penalty afforded cannot be ignored.

mandatory minimum, as the Supreme Court has roundly rejected that argument in *Hicks*, explaining, "[s]uch an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law." *Hicks*, 447 U.S. at 346.[9]

ii.

We are also unpersuaded by the Government's implication that any sentence that falls at or below the statutory maximum does not present a fundamental defect. Indeed, two of our sister circuits have found a fundamental defect sufficient to satisfy the savings clause where the prisoner's erroneous sentence fell beneath the statutory maximum.

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[9] The Government cites to our decision in *United States* v. *Foote*, 784 F.3d 931 (4th Cir. 2015), for the proposition that this court may be reluctant to find a fundamental defect where "even if we vacate and remand, the same sentence could be legally imposed." Gov't's Br. 58 (quoting *Foote*, 784 F.3d at 941 (alteration omitted)). But *Foote* is inapposite. In *Foote*, we held that only errors presenting "a fundamental defect which inherently results in a complete miscarriage of justice" are cognizable on § 2255 collateral review, and a Guidelines career offender designation later nullified by *Simmons* was not one of those errors. *Id.* at 932 (internal quotation marks omitted). This was because "Appellant was (and on remand, would again be) sentenced under an *advisory* Guidelines scheme requiring individualized analysis of the sentencing factors set forth in 18 U.S.C. § 3553(a)." *Id.* at 941 (emphasis in original). The fact that the Guidelines were advisory, and did not carry the weight and effect of a statute, was central to our decision. *See id.* at 942 (noting that the Guidelines are "stripped . . . of legal force" (internal quotation marks omitted)). In contrast, here, we have an increase to the floor of the permissible statutory sentence, which invokes fundamental constitutional principles, not a change in an advisory range.

In *Brown v. Caraway*, the Seventh Circuit held that "a petitioner may utilize the savings clause to challenge the misapplication of the career offender Guideline, at least where, as here, the defendant was sentenced in the pre-*Booker* era,"[10] where the sentence was nonetheless below the statutory maximum. 719 F.3d at 588 (footnote omitted). Brown challenged his 360 month sentence on the grounds that one of his predicate convictions was not a crime of violence under *Begay v. United States*, 553 U.S. 137 (2008), and thus, he was not a career offender. *See id.* at 586. The career offender designation changed his mandatory Guidelines range from 262-327 months to 360 months to life, but his sentence of 360 months was still under the statutory maximum of life imprisonment. *See id.* at 585-86. The court nonetheless held that this increase amounted to a miscarriage of justice and a fundamental sentencing defect because the "period of incarceration exceeded that permitted by law." *Id.* at 587 (alteration and internal quotation marks omitted).

Although the sentence was imposed at a time when the Guidelines were mandatory, critically, the Seventh Circuit relied on its prior decision in *Narvaez v. United States*, which held that the petitioner, erroneously classified as a career offender but sentenced under the statutory maximum, experienced a fundamental sentencing defect and miscarriage of justice. 674 F.3d 621, 629 (7th Cir. 2011). *Narvaez* reasoned, "The fact that Mr. Narvaez's sentence falls below the applicable statutory-maximum sentence is not alone determinative of whether a miscarriage of justice has occurred."

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[10] *See United States v. Booker*, 543 U.S. 220 (2005) (holding that the Guidelines are not mandatory provisions).

Id. It explained, "to increase, dramatically, the point of departure for his sentence is certainly as serious as the most grievous misinformation that has been the basis for granting habeas relief." *Id.* (citing *Tucker*, 404 U.S. at 447). Thus the *Brown* court, in relying on *Narvaez*, made clear that although Brown's resulting sentence was higher than the high end of the mandatory Guidelines range, this was not the only reason the defect was fundamental for purposes of § 2255(e). In the Seventh Circuit's view, an increase in one's sentencing benchmark is equally grave.

In *Hill v. Masters*, the Sixth Circuit too addressed a savings clause request from a pre-*Booker*, erroneously imposed career offender enhancement which increased the prisoner's mandatory Guidelines sentencing range from 235-293 months to 292-365 months. *See* 836 F.3d at 593. But Hill's statutory maximum sentence was life imprisonment, so his resulting sentence of 300 months was still within the statutory range. *See id.* at 596. *Hill* explained that "[s]erving a sentence imposed under mandatory guidelines (subsequently lowered by retroactive Supreme Court precedent) shares similarities with serving a sentence imposed above the statutory maximum. Both sentences are beyond what is called for by law [and] raise a fundamental fairness issue." *Id.* at 599. In so holding, *Hill* relied on *Brown* and Chief Judge Gregory's dissenting opinion in this court's *Surratt* panel decision, which reasoned that although Surratt's life sentence did not exceed the statutory maximum, it was nonetheless a fundamental defect. *See id.* (citing *Surratt*, 797 F.3d at 270 (Gregory, J., dissenting)). As part of the fundamental defect analysis, *Hill* explained that had the career offender enhancement "been properly considered under

now-applicable Supreme Court precedent, Hill would not have been treated as a career offender, and the sentencing court would have been required to impose a sentence within a lesser range." *Id.* Thus, like the Seventh Circuit, the Sixth Circuit also recognizes the fundamental significance of a proper sentencing range. We agree with our sister circuits' view—and the view of Chief Judge Gregory's dissent in *Surratt*—that a sentencing error need not result in a sentence that exceeds statutory limits in order to be a fundamental defect.[11]

For all of these reasons, we hold that Appellant also meets the third requirement of the savings clause—that his sentence now presents an error sufficiently grave to be deemed a fundamental defect.

5.

The Government's Position in this Case

Finally, we address the Government's reliance on the Eleventh Circuit's recent decision in *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc). In *McCarthan*, a divided en banc court concluded that a petitioner could not proceed through the savings clause portal where controlling circuit precedent, overturned by a Supreme Court case, changed in such a way that one of the petitioner's prior convictions no longer qualified him for a sentencing enhancement under the Armed Career Criminal Act. *See id.* at 1080. The Eleventh Circuit rejected its longstanding five part test similar to the one we established in *Jones*, and instead analyzed each term

[11] We make no decision regarding whether an erroneous sentence above the statutory maximum is a fundamental defect for purposes of the savings clause, as those facts are not presented to us today.

of the text of the savings clause. *See id.* at 1085-90. Ultimately, the court set a high bar for "test[ing] the legality" of one's conviction, explaining that McCarthan could have "presented his claim and won relief in the Supreme Court" but chose not to do so. *Id.* at 1087. It also reasoned that "[a]dverse circuit precedent" does not make the filing of a first § 2255 motion "inadequate or ineffective." *Id.*

The Government's reliance on *McCarthan* is inapt because the *McCarthan* court explicitly rejected a test similar to the *Jones* test, which the circuit had used for years. Only then could it proceed to analyze the full text of the savings clause anew, unrestrained by such a test. Here, however, *Jones* remains good law, a point the Government concedes in its brief—despite spending over 20 pages arguing why it was wrongly decided. And notably, though the Government claims it changed positions in this case because of the *McCarthan* decision, which "offer[s] a far more extensive textual analysis than any prior circuit decision," Gov't's Br. 30, it fails to acknowledge that the 2011 Tenth Circuit opinion in *Prost v. Anderson*, written by then-Judge Gorsuch, provides a textual analysis just as thorough, if not more so. *See* 636 F.3d 578 (10th Cir. 2011). It is curious then that the Government chose now—literally in the middle of Appellant's case—to completely change course. It appears the timing of *McCarthan* was nothing more than a convenient escape hatch.[12]

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[12] The Government's about-face is particularly distasteful in this case wherein the Government cannot identify any principled reason for its turnabout. It was not until oral argument that the Assistant to the Solicitor General attributed this change of position to "new leadership in the [Justice] Department." Oral Arg. at

6.

Conclusion

In sum, we hold that § 2255 is an inadequate and ineffective means to test the legality of Appellant's detention, which is based on a sentence issued with an erroneously increased mandatory minimum. Therefore, the district court erred in dismissing Appellant's § 2241 Petition. Appellant may pass through the savings clause portal and have the § 2241 petition addressed on the merits.[13]

III.

For the foregoing reasons, we vacate and remand.

VACATED AND REMANDED

12:47-50, *United States v. Wheeler*, No. 16-6073 (4th Cir. Jan. 25, 2018), http://www.ca4.uscourts.gov/oralargument/listen-to-oral-arguments.

[13] According to the Bureau of Prisons Inmate Locator, Appellant is currently detained at Bennettsville FCI in Bennettsville, South Carolina. The district court should first decide whether it can hear the § 2241 Petition on the merits, or whether it should transfer to the district of confinement, the District of South Carolina. *See United States v. Poole*, 531 F.3d 263, 270 (4th Cir. 2008) ("When § 2255 'appears . . . inadequate or ineffective to test the legality of his detention,' . . . a federal prisoner may seek habeas relief from the court *in the district of his confinement* under § 2241." (quoting 28 U.S.C. § 2255(e)) (emphasis supplied)).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-6073
(3:06-cr-00363-RJC-3)
(3:11-cv-00603-RJC)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GERALD ADRIAN WHEELER, A/K/A BAY-BAY,
DEFENDANT-APPELLANT

Filed: June 18, 2018

ORDER

Upon consideration of submissions relative to the motion to stay mandate, the court denies the motion.

Entered at the direction of the panel: Judge King, Judge Floyd, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

3:11-cv-00603-RJC
(3:06-cr-00363-RJC-3)

GERALD ADRIAN WHEELER, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Filed: Sept. 30, 2015

ORDER

THIS MATTER is before the Court on consideration of Petitioner's *pro se* Subsequent Motion to Vacate, Set Aside or Correct Sentence filed pursuant to 28 U.S.C. § 2255, Petitioner's Supplemental Response in Support of the § 2255 Motion to Vacate, filed through counsel, and the Government's Response. (Doc. Nos. 2, 10, and 14). For the reason that follow, Petitioner's Section 2255 motion will be DISMISSED and his alternative claims for relief will DENIED.

I. BACKGROUND

On April 17, 2007, Petitioner pleaded guilty pursuant to a written plea agreement to one count of conspiracy to possess with intent to distribute crack cocaine, and powder cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A) (Count One); one

count of possession of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c) and 2 (Count Six); and one count of possession of a firearm by a felon, in violation 18 U.S.C. § 922(g)(1) (Count Seven). (3:06-cr-00363), Doc. No. 39: Superseding Indictment; Doc No. 66: Plea Agreement).[1]

On February 28, 2008, Petitioner was sentenced to a term of 120-months on Count One, a concurrent term of 70-months on Count Seven, and a mandatory, consecutive term of 60-months on Count Six for a total term of 180-months' imprisonment. (Id., Doc. No. 108: Judgment). Petitioner's judgment was affirmed on appeal. United States v. Wheeler, 329 F. App'x 481 (4th Cir. 2009) (unpublished).

On June 29, 2010, Petitioner filed a Section 2255 motion raising grounds of ineffective assistance of trial counsel. In an Order filed on March 17, 2011, the Court dismissed his § 2255 motion as being without merit and the Fourth Circuit dismissed his appeal. (3:10-cv-00289), Doc. No. 5: Order). United States v. Wheeler, 487 F. App'x 103 (4th Cir. 2012) (unpublished).

Petitioner, proceeding *pro se*, filed the present § 2255 motion this time contending that his sentence for Count One was improperly enhanced because the predicate conviction that the Government identified in the § 851 notice did not subject him to more than one year in prison. Petitioner cites the Fourth Circuit's *en banc* decision in United States v. Simmons, 649 F.3d 237

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[1] Prior to the entry of Petitioner's guilty plea, the Government filed notice of its intention to seek enhanced penalties, pursuant to 21 U.S.C. § 851, based a prior felony drug conviction which was sustained in Mecklenburg County Superior Court. (Id., Doc. No. 31).

(4th Cir. 2011). (3:11-cv-00603), Doc. No. 2: Subsequent Motion to Vacate). In Simmons, the Fourth Circuit held that in order for a prior felony conviction to serve as a predicate offense to enhance a sentence under federal law, the individual defendant must have been convicted of an offense for which *that* defendant could be sentenced to a term exceeding one year under North Carolina law. Simmons, 649 F.3d at 243 (emphasis added) (examining North Carolina's Structured Sentencing Act). In reaching this holding, the Simmons Court expressly overruled United States v. Harp, 406 F.3d 242 (4th Cir. 2005), which held that in determining "whether a conviction is for a crime punishable by a prison term exceeding one year [under North Carolina law] we consider the maximum aggravated sentence that could be imposed for that crime upon a defendant with the worst possible criminal history." Id. (quoting Harp, 406 F.3d at 246) (emphasis omitted).

Petitioner's counsel filed a Supplemental Motion to Vacate in which he renews his argument that the holding in Simmons entitles him to relief, this time contending that he is entitled to sentencing relief from his 120-month sentence pursuant to a 28 U.S.C. § 2241. Alternatively, Petitioner argues that he should be entitled to sentencing relief through either a writ of *coram nobis* or *audita querla*. (Id., Doc. No. 10). The Government has filed a response noting that Petitioner is not entitled to relief under § 2255 because he has not obtained authorization to filed a successive petition, but joins Petitioner in contending that relief under § 2241 is appropriate. (3:11-cv-00603, Doc. No. 14: Government's Response at 1-2).

II. STANDARD OF REVIEW

Pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings, sentencing courts are directed to promptly examine motions to vacate, along with "any attached exhibits and the record of prior proceedings" in order to determine whether a petitioner is entitled to any relief. The Court has considered the record in this matter and applicable authority and concludes that this matter can be resolved without an evidentiary hearing. See Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970).

III. DISCUSSION

A. Section 2255 Motion

The Antiterrorism and Effective Death Penalty Act (AEDPA) provides, in relevant part, that "[a] second or successive motion [under Section 2255] must be certified as provided in Section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

28 U.S.C. § 2255(h).

Petitioner has provided no evidence that he has secured the necessary authorization to file a second, successive motion under Section 2255. Accordingly, this Court is without jurisdiction to consider his claim for

relief under Section 2255. See In re Vial, 115 F.3d 1192, 1194 (4th Cir. 1997); United States v. Winestock, 340 F.3d 203, 205 (2003).

B. Section 2241

Petitioner contends through counsel that he is entitled to sentencing relief pursuant to a writ of habeas corpus under 28 U.S.C. § 2241. A petitioner seeking to attack his conviction or sentence must file a motion under § 2255 unless this remedy "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). "It is beyond question that § 2255 is not inadequate or ineffective merely because an individual is unable to obtain relief under that provision." In re Jones, 226 F.3d 328, 333 (4th Cir. 2000) (internal citations omitted). The Fourth Circuit has concluded that the remedy under § 2255 is "in adequate or ineffective" only when:

> (1) at the time of conviction settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not of one of constitutional law.

Id. at 333-34.

See also United States v. Surratt, Jr., 797 F.3d 240 (4th Cir. 2015) (applying Jones and denying § 2241 re-

lief from mandatory life sentence based on now invalid North Carolina felony conviction under Simmons).[2]

In the present case, Petitioner does not challenge the legality of his conviction. Instead, he moves the Court for an order vacating his sentence that was enhanced based on the finding that he had a predication North Carolina felony drug conviction. Because Petitioner's challenge is confined to the legality of his sentence the § 2241 petition will be denied.

C. *Coram nobis* and *audita querela*

Finally, Petitioner seeks relief through a writ of error *coram nobis* or a writ of *audita querela*. (3:11-cv-00603, Doc. No. 10: Supplemental Motion to Vacate at 11-13). C*oram nobis* relief is only available when all other avenues of relief are inadequate and where the defendant is no longer in custody. Wilson v. Flaherty, 689 F.3d 332, 339 (4th Cir. 2012); United States v. Akinsade, 686 F.3d 248, 252 (4th Cir. 2012). Here, Petitioner is in custody, rendering *coram nobis* relief unavailable.

Similarly, *audita querela* relief is only available to "plug a gap in the system of federal postconviction remedies," United States v. Johnson, 962 F.2d 579, 583 (7th Cir. 1992). Petitioner's claim does not fall within such a gap.

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[2] Disposition of this case was stayed pending resolution of the Surratt appeal by the Fourth Circuit.

IV. CONCLUSION

IT IS, THEREFORE, ORDERED that:

1. Petitioner's Subsequent Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 is **DISMISSED** as successive. (Doc. No. 2).

2. Petitioner's motion for relief pursuant to 28 U.S.C. § 2241 is **DENIED**.

3. Petitioner's petitions for writs of *coram nobis* and *audita querela* are **DENIED**.

IT IS FURTHER ORDERED that pursuant to Rule 11(a) of the Rules Governing Section 2255 Cases, the Court declines to issue a certificate of appealability as Petitioner has not made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 474, 484 (2000) (holding that when relief is denied on procedural grounds, a petitioner must establish both that the correctness of the dispositive procedural ruling is debatable, and that the petition states a debatably valid claim of the denial of a constitutional right).

The Clerk is directed to close this civil case.

SO ORDERED.

Signed: Sept. 30, 2015

/s/ ROBERT J. CONRAD, JR.
ROBERT J. CONRAD, JR.
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-6643

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GERALD ADRIAN WHEELER, A/K/A BAY-BAY,
DEFENDANT-APPELLANT

Submitted: Oct. 26, 2012
Decided: Nov. 7, 2012

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.
Robert J. Conrad, Jr., Chief District Judge.
(3:06-cr-00363-RJC-3; 3:10-cv-00289RJC)

Before: MOTZ, KING, and SHEDD, Circuit Judges.

Dismissed by unpublished per curiam opinion.

PER CURIAM:

Gerald Adrian Wheeler seeks to appeal the district court's order denying relief on his 28 U.S.C.A. § 2255 (West Supp. 2012) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). When the district court

denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. Slack, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Wheeler has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We note that Wheeler's claim for retroactive application of the Supreme Court's opinion in Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010), and our opinion in United States v. Simmons, 649 F.3d 237, 241-45 (4th Cir. 2011) (en banc), fails in light of our recent opinion in United States v. Powell, 691 F.3d 554 (4th Cir. 2012). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

No. 3:10cv289
No. 3:06cr363

GERALD A. WHEELER, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Filed: Mar. 17, 2011

ORDER

THIS MATTER comes before the Court for an initial review of Petitioner's Motion to Vacate, Set Aside, or Correct Sentence (Doc. No. 1), filed June 29, 2010.

PROCEDURAL HISTORY

On September 28, 2006, Petitioner was named in four counts of a nineteen count Superseding Bill of Indictment. (Crim. Case No. 3:06cr363: Doc. No. 39.) Count One charged Petitioner with conspiracy to possess with intent to distribute cocaine, cocaine base, and marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Count Five charged Petitioner with possession of cocaine base with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(b) and 18 U.S.C. § 2. Count Six charged Petitioner with knowingly using and

carrying a firearm during and in relation to a drug trafficking crime and possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c). Count Seven charged Petitioner with having been previously convicted of one or more crimes punishable by imprisonment for a term exceeding one year and knowingly possessing firearms affecting commerce in violation of 18 U.S.C. § 922(g). On April 3, 2007, the parties filed a plea agreement with this Court. (Crim. Case No. 3:06cr363: Doc. No. 66.) On April 17, 2007, pursuant to the terms of the plea agreement, Petitioner entered a guilty plea at his Rule 11 hearing to Counts One, Six, and Seven. (Crim. Case No. 3:06cr363: Doc. No. 69.) On February 28, 2008, this Court sentenced Petitioner to 120 months' imprisonment on Count One with 60 months' consecutive on Count Six, and 70 months' concurrent on Count Seven. (Crim. Case No. 3:06cr363: Doc. No. 115.) The Court entered Judgment on March 13, 2008. (Crim. Case No. 3:06cr363: Doc. No. 108.)

On March 6, 2008, Petitioner filed a Notice of Appeal. (Crim. Case No. 3:06cr363: Doc. No. 104.) Petitioner's appellate counsel filed an Anders[1] brief stating there were no meritorious issues for appeal but arguing that this Court incorrectly applied 18 U.S.C. § 924(c)(1)(A) to sentence Petitioner because he was already subject to the higher 120 month mandatory minimum sentence pursuant to 21 U.S.C. §§ 841(a)(1), (b)(1)(B) for Count One. Petitioner filed a pro se brief reiterating the same issue. On May 21, 2009, the United States Court of Appeals for the Fourth Circuit affirmed, by unpublished opinion, Petitioner's sentence

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[1] Anders v. California, 363 U.S. 738 (1967)

and conviction. United States v. Wheeler, 329 F. App'x 481 (4th Cir. 2009)(unpublished).

On June 29, 2010, Petitioner timely filed the instant Motion to Vacate, Set Aside, or Correct Sentence. (Doc. No. 1.) In his Motion to Vacate Petitioner alleges that his counsel was ineffective: (1) for failing to challenge the erroneous use of a prior state conviction as a predicate offense for § 851; (2) for allowing Petitioner to be unconstitutionally sentenced with regard to Count Seven; and (3) for failing to challenge his § 924(c) conviction for lack of a factual basis.

LEGAL ANALYSIS

I. INITIAL REVIEW AUTHORITY

Pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings, sentencing courts are directed to promptly examine motions to vacate, along with "any attached exhibits and the record of prior proceedings . . . " in order to determine whether a petitioner is entitled to any relief on the claims set forth therein. In the event it is determined that a petitioner is not entitled to relief, the reviewing Court must dismiss the motion.

Following such directive, this Court has reviewed Petitioner's Motion to Vacate and the pertinent record evidence. As hereafter explained, such review establishes that Petitioner is not entitled to any relief on his claims.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Petitioner's ineffective assistance of counsel claims are governed by the holding in Strickland v. Washing-

ton, 466 U.S. 668, 687-91 (1984). In Strickland, the Supreme Court held that in order to succeed on an ineffective assistance of counsel claim, a petitioner must establish that counsel's performance was constitutionally defective to the extent it fell below an objective standard of reasonableness, and that he was prejudiced thereby, that is, there is a reasonable probability that but for the error, the outcome would have been different. In making this determination, there is a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. Id. at 689; Fields v. Attorney General of Md., 956 F.2d 1290, 1297-99 (4th Cir. 1992). Petitioner bears the burden of proving Strickland prejudice. Fields, 956 F.2d at 1297. If the petitioner fails to meet this burden, a "reviewing court need not consider the performance prong." Id. at 1290.

Moreover, a defendant who alleges ineffective assistance of counsel following the entry of a guilty plea has an even higher burden to meet. Hill v. Lockhart, 474 U.S. 52, 53-59 (1985). When a Petitioner challenges a conviction entered after a guilty plea, in order to establish the requisite prejudice, such a petitioner must show that "there is a reasonable probability that but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial." Hooper v. Garraghty, 845 F.2d 471, 475 (4th Cir. 1988), cert. denied, 488 U.S. 843 (1988). Claims of ineffective assistance of counsel at sentencing after a guilty plea, however, require a petitioner to establish that a reasonable probability exists that absent the alleged error, the results of the proceeding would have been different. United States v. Mayfield, 320 Fed. App'x 190, 191 (4th Cir. 2009).

B. § 851 Predicate Offense

Petitioner alleges that he received ineffective assistance of counsel because his counsel failed to challenge the application of an § 851 enhancement to his case. Petitioner's § 851 Notice listed two prior state court convictions—a1996 state conviction for possession of cocaine and a 1998 conviction for trafficking in cocaine —as the basis for an enhanced sentence. (Crim. Case No. 3:06cr363: Doc. No. 31.)

Petitioner's claim fails because, at a minimum, he cannot establish that he was prejudiced. At Petitioner's Rule 11 Hearing, his counsel informed the Court that one of those two convictions Petitioner's 1998 cocaine trafficking conviction—had been vacated. (Crim. Case No. 3:06cr363: Doc. No. 116 at 6.) Petitioner's vacated 1998 cocaine trafficking conviction was not used as a predicate offense. As such, Petitioner's argument with regard to his 1998 prior state conviction is moot.

Petitioner also argues that his 1996 possession of cocaine conviction was erroneously used to enhance his sentence. More specifically, Petitioner alleges that because he received a sentence of six to eight months' imprisonment, it could not qualify as a predicate offense. Petitioner is mistaken. Under 21 U.S.C. § 841(b), a person who violates §§ 841(a) and 841(b)(1)(B) is liable for an enhanced penalty if the violation occurs "after a prior conviction for a felony drug offense has become final." § 841(b)(1)(B). "Felony drug offense" is defined as an "offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country . . . ." 21 U.S.C. § 802(44). Petitioner was convicted of Felony Possession of Cocaine. This offense is a Class I felony.

N.C. Gen. Stat. § 90-95(d)(2). According to the North Carolina Structured Sentencing Act, the maximum sentence that can be imposed for a Class I felony is 15 months. N.C. Gen. Stat. § 15A-1340.17. Consequently, Petitioner's 1996 Felony Possession of Cocaine conviction is a felony drug offense for § 841(b)(1)(B) purposes. The fact that Petitioner received a sentence of 6 to 8 months is immaterial—his offense was punishable by imprisonment for more than a year. United States v. Harp, 406 F.3d 242, 246 (4th Cir. 2005) (noting that a court must consider the maximum sentence that could be imposed for the crime and not the sentence actually imposed); accord United States v. Simmons, ___ F.3d ___, 2011 WL 546425, at *5 (4th Cir. Feb. 16, 2011) ("As we concluded in Harp, the statute requires us to examine whether the statutory offense, not the particular defendant's conduct, is 'punishable' by more than one year of imprisonment. To do so, we look to the maximum aggravated sentence that could be imposed upon a defendant with the worst criminal history category for that offense in order to define how that offense is 'punishable.'"). Therefore, any challenge made by Petitioner's counsel would have failed, and Petitioner cannot establish that he was prejudiced.

C. Felony Possession of a Firearm by a Felon

Petitioner also alleges that his counsel was ineffective for allowing him to enter a guilty plea to Count Seven of the Superceding Indictment. More specifically, Petitioner alleges that he could not be guilty of violating 18 U.S.C. § 922(g) because the prior convic-

tions[2] listed to qualify him as a felon were not proper predicate offenses.

Again, Petitioner cannot establish that he was prejudiced, because any challenge on this basis would have failed. One of the predicate convictions listed in Count Seven was Petitioner's 1999 state Felony Possession of a Firearm by a Felon, which is a Class G felony. See N.C. Gen. Stat. § 14-415.1. This conviction was punishable by up to 38 months' imprisonment[3] and therefore qualifies as a predicate conviction for § 922(g) purposes. See 18 U.S.C. §§ 922(g) and 921(a)(20). Because at least one of the convictions listed in Count Seven qualifies as a predicate conviction for § 922(g) purposes, Petitioner's counsel was not ineffective for failing to challenge Petitioner's § 922(g) conviction on this basis.

D. § 924(c) Conviction

Petitioner also alleges that counsel was ineffective[4] for allowing him to plead guilty to an 18 U.S.C. § 924(c) violation. Petitioner asserts that the factual basis, as set forth in the pre-sentence report, does not support a conviction under § 924(c).

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[2] Count Seven of the Superceding Indictment listed three possible prior felonies to support a § 922(g) conviction.

[3] N.C. Gen. Stat. § 15A-1340.17.

[4] To the extent Petitioner intended to raise this claim outside the context of ineffective assistance of counsel, such claim would be procedurally defaulted as he did not raise this issue on appeal. Claims that could have been raised on appeal, but were not, are procedurally defaulted. See Bousley v. United States, 523 U.S. 614, 621-22 (1998) (habeas review is an extraordinary remedy and will not be allowed to do service for an appeal).

The presentence report sets forth that, as officers were executing a search warrant based upon information that Petitioner was selling cocaine from the address to be searched, Petitioner jumped out a window. (Doc. No. 2-3 at ¶ 6). Officers proceeded to locate a .45 caliber pistol under the pillow on Petitioner's bed and a safe in the bedroom containing a .32 caliber revolver, $ 1,679.00 in cash, 42.18 grams of cocaine, and 4.93 grams of cocaine base. (Doc. No. 2-3 at ¶ 6). Officers also found drug paraphernalia including digital scales. (Doc. No. 2-3 at ¶ 6). Such facts are sufficient to establish a factual basis for a § 924(c) charge. See United States v. Lomax, 293 F.3d 701, 705 (4th Cir. 2002) (setting forth various ways a defendant engaged in drug trafficking may use his possession of a firearm to advance his drug trafficking); see also United States v. Milbourne, 129 F. App'x 861, 868-69 (4th Cir. 2005) (reasonable juror could find § 924(c) violation where gun discovered during execution of search warrant was located between mattress and box spring across from closet containing drugs); United States v. Stevens, 380 F.3d 1021, 1027 (7th Cir. 2004) (evidence sufficient to support § 924(c) conviction where firearms were found in same bedroom with drugs and drug paraphernalia, guns were easily accessible, one firearm was loaded and had a round chambered, and extra bullets were found in the same drawer). The undisputed facts are sufficient to support Petitioner's admission under oath that he possessed the firearms in furtherance of a drug trafficking offense, and his counsel was not ineffective for "allowing" Petitioner to plead guilty to the § 924(c) charge.

CONCLUSION

The Court's initial review of the Petitioner's Motion to Vacate and the relevant record evidence conclusively shows that Petitioner has failed to establish that he is entitled to relief under 28 U.S.C. § 2255. Therefore, Rule 4(b) of the Rules Governing Section 2255 Proceedings requires this Court to dismiss the instant Motion to Vacate.

IT IS, THEREFORE, ORDERED that

1. Petitioner's Motion to Vacate, Set Aside, or Correct Sentence (Doc. No. 1) is **DISMISSED**; and

2. It is further ordered that pursuant to Rule 11(a) of the Rules Governing Section 2254 and Section 2255 Cases, this Court declines to issue a certificate of appealability as Petitioner has not made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong)(citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

SO ORDERED.

Signed: Mar. 16, 2011

/s/ ROBERT J. CONRAD, JR.
ROBERT J. CONRAD, JR.
Chief United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-6073
(3:06-cr-00363-RJC-3)
(3:11-cv-00603-RJC)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GERALD ADRIAN WHEELER, A/K/A BAY-BAY,
DEFENDANT-APPELLANT

Filed: June 11, 2018

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

Entered at the direction of Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

Statement of Circuit Judge Agee respecting denial of petition for rehearing en banc:

The issues in this case are of significant national importance and are best considered by the Supreme Court at the earliest possible date in order to resolve an existing circuit split that the panel decision broadens even farther. Because of the potential that the case may become moot if Wheeler is released from incarceration in October 2019, as projected, I have not requested a poll of the Court upon the petition for rehearing en banc in order to expedite the path for the Government to petition for certiorari to the Supreme Court.

The opinion in this case casts 28 U.S.C. § 2255(e) in a way that rewrites the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")—a valid congressional act that falls squarely within Congress' power to define the scope of the writ. As a consequence, federal prisoners who are detained in this Circuit pursuant to a valid and final criminal judgment may evade the careful limitations placed by Congress upon the writ of habeas corpus in § 2255(h) and, most likely, § 2255(f) as well. These prisoners may now file § 2241 petitions challenging their sentences whenever circuit court precedent changes, so long as a given majority decides the change created a fundamental sentencing defect. Among the circuits that have addressed the question of the reach of the § 2255(e) saving clause, we stand alone in this most expansive view.

Only two circuits permit a sentencing-based claim to proceed via the saving clause: the Sixth and Seventh. *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016); *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013). The opinion

here relies on these cases in error, however, because none gives the expansive reference to "fundamental defect" that is put forth here. In short, even those few circuits that have opened the saving clause portal to sentencing-based claims have only opened it wide enough to allow for a claim that the prisoner is being, or at some point will be, detained by the warden beyond the time legally authorized by Congress for his offense of conviction.[5]

In addition, the opinion in this case—as well as the positions taken in the Sixth and Seventh Circuit—directly and irreconcilably split with the opinions of the Tenth and Eleventh Circuits.[6] *See McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017), *cert. denied* 128 S. Ct. 502 (2017); *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011). In particular,

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[5] The Court also points to the Third and Fifth Circuits as having adopted a "fundamental defect" analysis that it purports to apply in this case. But those Circuits have only adopted a saving clause analysis in the context of actual innocence of the offense of conviction, akin to the factual basis of our decision in *In re Jones*, 226 F.3d 328 (4th Cir. 2000). *See In re Davenport*, 147 F.3d 605, 609-11 (7th Cir. 1998) (raising an actual innocence claim based on *Bailey v. United States*, 516 U.S. 137 (1995)); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997) (same). That situation differs in a markedly substantive way from the sentencing-based claim at issue in this case.

[6] This circuit split is set out in detail in the majority opinion in the since-vacated case *United States v. Surratt*, 797 F.3d 240 (4th Cir. 2015). The panel decision in *Surratt* reached the opposite conclusion that this case reaches. That decision was vacated by the grant of rehearing en banc, *see* 4th Cir. Local Rule 35(c), but before a decision by the en banc court, President Obama commuted Surratt's sentence. The en banc appeal was thus rendered moot and the full Court did not decide the merits of the case. *United States v. Surratt*, 855 F.3d 218 (4th Cir. 2017).

McCarthan examined § 2255(e) and adopted the statutory view already held by the Tenth Circuit, and the Supreme Court denied certiorari in that case.

The Court's opinion now adds yet another layer to the already "deep and mature circuit split on the reach of the savings clause" of 28 U.S.C. § 2255(e). *Bryant v. Warden*, 738 F.3d 1253, 1279 (11th Cir. 2013), overruled by *McCarthan*, 126 S. Ct. at 502. It construes that provision more broadly than the text, context, or purpose of the statutory provisions allow and far more broadly than any other circuit court that has considered the question. The Supreme Court should hear this case in a timely fashion to resolve the conflict separating the circuit courts of appeal nationwide on the proper scope of the § 2255(e) saving clause so that the federal courts, Congress, the Bar, and the public will have the benefit of clear guidance and consistent results in this important area of law.

Statement of Judge Thacker on Petition for Rehearing En Banc:

When this court decided *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc), and rendered it retroactive in *Miller v. United States*, 735 F.3d 141 (4th Cir. 2013), it became clear that the mandatory minimum for Gerald Wheeler's sentence was **double** what it should have been. But Wheeler was left with a conundrum—how could he test the legality of his detention? He had already filed a direct appeal and motion pursuant to 28 U.S.C. § 2255, and he could not meet the requirements to file a second or successive motion because his mandatory minimum was not increased by a new rule of constitutional law made retroactive by the Supreme Court. *See* § 2255(h)(2). Yet he was nonetheless sentenced under the mistaken understanding that ten years was as low as the sentencing court could go. Indeed, that was precisely the sentence he received. The district court recognized this sentence was "harsh," but believed that its "hands [we]re . . . tied." J.A. 85.[1]

The savings clause, set forth in § 2255(e), allows a court to entertain a traditional § 2241 petition for habeas corpus if "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [the prisoner's] detention." This circuit, *see In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000), as well as nine other circuits,[2] interpret the savings clause to provide

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[1] "J.A." refers to the Joint Appendix filed by the parties in this case, *United States v. Wheele*r, No. 16-6073.

[2] These decisions provide varying tests and analyses. *See Hill v. Masters*, 836 F.3d 591, 594-95 (6th Cir. 2016); *Alaimalo v. United States*, 645 F.3d 1042, 1047-49 (9th Cir. 2011); *Abdullah v. Hedrick*,

an opportunity for prisoners to demonstrate they are being held under an erroneous application or interpretation of statutory law. Two circuits, however, read the clause so narrowly that the savings clause may only be satisfied under the limited circumstances when the sentencing court is unavailable,[3] "practical considerations" prevent the prisoner from filing a motion to vacate, or a prisoner's claim concerns "the execution of his sentence." *McCarthan v. Director of Goodwill Indus.*, 851 F.3d 1076, 1092-93 (11th Cir. 2017) (en banc); *see also Prost v. Anderson*, 636 F.3d 578, 587-88 (10th Cir. 2011).

To adopt the minority view and deny Wheeler the chance to test the legality of his detention under the circumstances at hand would fly in the face of the Supreme Court's pronouncement that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)). Indeed, the Government itself has admitted "the terms 'inadequate or ineffective' are properly understood to include legal barriers to relief," and "Con-

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392 F.3d 957, 963-64 (8th Cir. 2004); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *United States v. Barrett*, 178 F.3d 34, 52 (1st Cir. 1999); *In re Davenport*, 147 F.3d 605, 611-12 (7th Cir. 1998); *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248, 251 (3d Cir. 1997).

[3] For example, the savings clause would apply if the sentencing court "has been dissolved," such as after court martial proceedings have concluded. *McCarthan v. Director of Goodwill Indus.*, 851 F.3d 1076, 1093 (11th Cir. 2017) (en banc).

gress specifically chose the words 'inadequate or ineffective' over other terminology that would have covered only practical difficulties." Gov't Supp. Br., *United States v. Surratt*, No. 14-6851 (filed Feb. 2, 2016), ECF No. 103 at 32-33 (citing *Sanders v. United States*, 373 U.S. 1, 15-17 (1963), and *Swain v. Pressley*, 430 U.S. 372 (1977)).

Moreover, the test set forth in *Wheeler* is not the floodgate opener my good colleague describes. He claims, "[P]risoners may now file § 2241 petitions challenging their sentences whenever circuit court precedent changes, so long as a given majority decides the change created a fundamental sentencing defect." Agee, J., Statement at 2. To be sure, prisoners may file habeas petitions for a variety of ill-conceived reasons. But under *Wheeler*, the jurisdictional requirements of the savings clause are curtailed; these requirements are not satisfied unless the change in precedent occurs after a prisoner's direct appeal and first § 2255 motion, *and* if the change in precedent is made retroactive on collateral review, *and* if the sentencing error presents a fundamental defect. It is rare that a petitioner will meet all requirements of the *Wheeler* test.

At the heart of the *Wheeler* test is the requirement that the retroactive change in precedent creates a fundamental defect. This is crucial to narrow savings clause application to situations like the one at hand—an increase in a mandatory minimum—which involves due process and separation of powers implications. Congress alone can set maximum and minimum terms of imprisonment, and those limits define legal boundaries for the punishment for a particular crime. *See United States v. Evans*, 333 U.S. 483, 486 (1948); *see also Al-*

leyne v. United States, 133 S. Ct. 2151, 2160 (2013) ("It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime."); *Williams v. New York*, 337 U.S. 241, 247 (1949) ("A sentencing judge" determines the "type and extent of punishment" within "fixed statutory or constitutional limits").

Therefore, consistent with the "constitutional principle of separation of powers," a defendant has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress," and a violation of that principle can "trench[] particularly harshly on individual liberty." *Whalen v. United States*, 445 U.S. 684, 689-90 (1980); *see also Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (criminal defendant has a "substantial and legitimate expectation" that he can only be deprived of his liberty "to the extent determined by the [sentencing body] in the exercise of its statutory discretion"). In this case, Wheeler should only have been deprived of his liberty for, at a minimum, five years, but he received **double** that time. It does not matter that Wheeler may have received the same ten year sentence on remand. The Supreme Court has roundly rejected that argument. *See Hicks*, 447 U.S. at 346 ("Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.").

For these reasons, *Wheeler* provides an avenue through which prisoners may take advantage of an opportunity Congress explicitly intended—to "test the legality of their detention" where § 2255 is otherwise "inadequate or ineffective." § 2255(e).

APPENDIX G

1. 21 U.S.C. 841(a) and (b) (2006) provides:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from

the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance contain-

ing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenyl-ethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised

release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the

defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the

defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a

term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) PENALTIES FOR DISTRIBUTION.—

(A) IN GENERAL.—Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) DEFINITION.—For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

2. 28 U.S.C. 2241 provides:

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

3. 28 U.S.C. 2255 provides:

Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral

attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

4. N.C. Gen. Stat. § 90-95(a)-(d) (Supp. 1995) provides:

Violations; penalties.

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance.

(b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

(1) A controlled substance classified in Schedule I or II shall be punished as a Class H felon;

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon, but the transfer of less than 5 grams of marijuana for no renumeration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(c) Any person who violates G.S. 90-95(a)(2) shall be published as a Class I felon.

(d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90.95(a)(3) with respect to:

(1) A controlled substance classified in Schedule I shall be punished as a Class I felon;

(2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony. If the controlled substance is phencyclidine, or cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine), the violation shall be punishable as a Class I felony.

(3) A controlled substance classified in Schedule V shall be guilty of a Class 2 misdemeanor;

(4) A controlled substance classified in Schedule VI shall be guilty of a Class 3 misdemeanor, but any sentence of imprisonment imposed must be suspended and the judge

may not require at the time of sentencing that the defendant serve a period of imprisonment as a special condition of probation. If the quantity of the controlled substance exceeds one-half of an ounce (avoirdupois) of marijuana or one-twentieth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, the violation shall be punishable as a Class 1 misdemeanor. If the quantity of the controlled substance exceeds one and one-half ounces (avoirdupois) of marijuana or three-twentieths of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be punishable as a Class I felony.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Docket No. 3:06CR363-C
18 U.S.C. § 2, 18 U.S.C. § 922(a)(6), 18 U.S.C. § 922(g),
18 U.S.C. § 924(a)(6), 18 U.S.C. § 924(c),
18 U.S.C. § 931, 21 U.S.C. § 846, 21 U.S.C. § 846(a)(1),
21 U.S.C. § 841(b)(1)(B)

UNITED STATES OF AMERICA

v.

(1) ANTHONY WAYNE ELLIS, (2) DEMOIA OMAR DAVIS, A/K/A "MOE", (3) GERALD ADRIAN WHEELER, A/K/A "BAY-BAY", (4) SAVANNAH LITTLE

[Filed: Sept. 28, 2006]

SUPERSEDING BILL OF INDICTMENT

THE GRAND JURY CHARGES

COUNT ONE

In or about January 2005 continuing through the present, in Mecklenburg County, within the Western District of North Carolina, and elsewhere,

(1) Anthony Wayne Ellis
(2) Demoia Omar Davis
a/k/a/ "Moe"
(3) Gerald Adrian Wheeler
a/k/a Bay-Bay

did knowingly and intentionally combine, conspire, confederate and agree with each other and with others known and unknown to the Grand Jury, to possess with intent to distribute one or more controlled substances, that is, a mixture and substance containing a detectable amount of cocaine, a mixture and substance containing a detectable amount of cocaine base commonly referred to as "crack," both Schedule II controlled substances, and a quantity of marijuana, a Schedule I controlled substance, violations of Title 21, United States Code, Sections 841(a)(1).

Said offense involved at least 50 grams of a mixture and substance containing a detectable amount of cocaine base, commonly referred to as "crack."

Said offense involved at least 500 grams of a mixture and substance containing a detectable amount of cocaine.

All in violation of Title 21, United States Code, Sections 846 and 841(a)(1) and (b)(1)(A).

COUNT TWO

In or about August 6, 2005, in Mecklenburg County, within the Western District of North Carolina, and elsewhere,

(1) ANTHONY WAYNE ELLIS

having been previously convicted of one or more crimes punishable by imprisonment for a term exceeding one year, that is: Felony Burglary, in Mecklenburg County

Superior Court, on or about October 12, 2004; did knowingly possess the following firearm in and affecting interstate and foreign commerce, that is, a Ruger 9mm pistol; a Romania 7.62 AK47 assault rifle and 12 gauge Mossberg shotgun.

All in violation of Title 18, United States Code, Section 922(g)(1) and 924(e).

COUNT THREE

In or about September 5, 2005, in Mecklenburg County, within the Western District of North Carolina, and elsewhere,

(1) ANTHONY WAYNE ELLIS

during and in relation to a drug trafficking crime, that is, conspiracy to possess with the intent to distribute one or more controlled sustances, that is cocaine base, commonly known as "crack," cocaine and marijuana, violations of Title 21, United States Code, Section 841(a)(1), as charged in Count one of this indictment, for which he may be prosecuted in a court of the United States, did knowingly and unlawfully use and carry firearms, and, in furtherance of such drug trafficking crime, did possess one or more of the following firearms that is: a Smith and Wesson .38 caliber revolver and Ruger 9mm pistol.

All in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT FOUR

On or about September 5, 2005, in Mecklenburg County, within the Western District of North Carolina, and elsewhere,

(1) ANTHONY WAYNE ELLIS

having been previously convicted of one or more crimes punishable by imprisonment for a term exceeding one year, that is: Felony Burglary, in Mecklenburg County Superior Court, on or about October 12, 2004; did knowingly possess the following firearm in and affecting interstate and foreign commerce, that is, a Smith & Wesson .38 caliber revolver and Ruger 9mm pistol.

All in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

COUNT FIVE

On or about March 15, 2006, in Mecklenburg County, within the Western District of North Carolina and elsewhere,

(3) GERALD ADRIAN WHEELER
a/k/a "Bay-Bay"

did knowingly and intentionally possess with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of cocaine base, commonly known as "crack," a Schedule II controlled substance, and did aid and abet other persons known and unknown to the Grand Jury.

Said offense involved at least 5 grams of a mixture and substance containing a detectable amount of cocaine base, commonly referred to as "crack."

All in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B) and Title 18, United States Code, Section 2.

COUNT SIX

On or about March 15, 2006, in Mecklenburg County, within the Western District of North Carolina and elsewhere,

(3) GERALD ADRIAN WHEELER
a/k/a "Bay-Bay"

during and in relation to a drug trafficking crime, that is, conspiracy to possess with the intent to distribute one or more controlled substances, that is cocaine base, commonly known as "crack," cocaine and marijuana, violations of Title 21, United States Code, Section 841(a)(1), as charged in Counts One and Five of this indictment, for which he may be prosecuted in a court of the United States, did knowingly and unlawfully use and carry firearms, and in furtherance of such drug trafficking crime, did possess one or more of the following firearms that is: a Taurus .45 caliber pistol and a Clerke .32 caliber revolver.

All in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT SEVEN

On or about March 15, 2006, in Mecklenburg County, within the Western District of North Carolina and elsewhere,

(3) GERALD ADRIAN WHEELER
a/k/a "Bay-Bay"

having been previously convicted of one or more crimes punishable by imprisonment for a term exceeding one year, that is: Felony Possession of Cocaine, in Mecklenburg County Superior Court, on or about July 3, 1996; Felony Trafficking Cocaine, in Mecklenburg

County Superior Court, on or about November 14, 1998; and Felony Possession of Firearm By Felon, in Mecklenburg County Superior Court, on or about July 2, 1999; did knowingly possess one or more of following firearms in and affecting interstate and foreign commerce, that is, a Taurus .45 caliber pistol and a Clerke .32 caliber revolver.

All in violation of Title 18, United States Code, Section 922(g)(1).

COUNT EIGHT

On or about March 18, 2006, in Mecklenburg County, within the Western District of North Carolina and elsewhere,

(2) DEMOIA OMAR DAVIS
a/k/a "Moe"

did knowingly and intentionally possess with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of cocaine base, commonly known as "crack," a Schedule II controlled substance, and did aid and abet other persons known and unknown to the Grand Jury.

Said offense involved at least 5 grams of a mixture and substance containing a detectable amount of cocaine base, commonly referred to as "crack."

All in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B) and Title 18, United States Code, Section 2.

COUNT NINE

On or about March 18, 2006, in Mecklenburg County, within the Western District of North Carolina, and elsewhere,

(2) DEMOIA OMAR DAVIS
a/k/a "Moe"

during and in relation to a drug trafficking crime, that is, conspiracy to possess with the intent to distribute one or more controlled substances, that is cocaine base, commonly known as "crack," cocaine and marijuana, violations of Title 21, United States Code, Section 841(a)(1), as charged in Counts one and Eight of this indictment, for which he may be prosecuted in a court of the United States, did knowingly and unlawfully use and carry a firearm, and, in furtherance of such drug trafficking crime, did possess said firearm that is: a Taurus .357 magnum.

All in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT TEN

On or about July 26, 2006, in Mecklenburg County, within the Western District of North Carolina, and elsewhere,

(1) ANTHONY WAYNE ELLIS

did knowingly and intentionally possess with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance, and did aid and abet other persons known and unknown to the Grand Jury.

All in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C) and Title 18, United States Code, Section 2.

COUNT ELEVEN

On or about July 26, 2006, in Mecklenburg County, within the Western District of North Carolina and elsewhere,

(1) ANTHONY WAYNE ELLIS

during and in relation to a drug trafficking crime, that is, conspiracy to possess with the intent to distribute one or more controlled substances, that is cocaine base, commonly known as "crack," cocaine and marijuana, violations of Title 21, United States Code, Section 841(a)(1), as charged in Counts One and Ten of this indictment, for which he may be prosecuted in a court of the United States, did knowingly and unlawfully use and carry firearms, and, in furtherance of such drug trafficking crime, did possess one or more of the following firearms that is: a Remington 12 gauge shotgun; a Bushmaster 5.56mm assault rifle and Springfield Armory 9mm pistol.

All in violation of Title 18, United States Code, Section 924(c).

COUNT TWELVE

On or about July 26, 2006, in Mecklenburg County, within the Western District of North Carolina, and elsewhere,

(1) ANTHONY WAYNE ELLIS

having been previously convicted of one or more crimes punishable by imprisonment for a term exceeding one

year, that is: Felony Burglary, in Mecklenburg County Superior Court, on or about October 12, 2004; did knowingly possess the one or more of the following firearms in and affecting interstate and foreign commerce, that is, a Remington 12 gauge shotgun; a Bushmaster 5.56mm assault rifle and Springfield Armory 9mm pistol.

All in violation of Title 18, United States Code, Section 922(g)(1) and 924(e).

COUNT THIRTEEN

On or about July 26, 2006, in Mecklenburg County, within the Western District of North Carolina, and elsewhere,

(1) ANTHONY WAYNE ELLIS

having been previously convicted of a felony that is a crime of violence, that is: Felony Burglary, in Mecklenburg County Superior Court, on or about October 12, 2004, did knowingly purchase, own and possess body armor, that is, a Riot Bullet Resistant Vest.

All in violation of Title 18, United States Code, Section 931(a)(1).

COUNTS FOURTEEN AND FIFTEEN

On or about April 9, 2006, in Mecklenburg County, within the Western District of North Carolina and elsewhere, the defendant

(4) SAVANNAH LITTLE

in connection with her acquisition of the following firearms from licensed gun dealers (at local gun shows in Mecklenburg County), all described more particularly below, knowingly made false and fictitious written statements to each licensed gun dealer described be-

low, which statements were likely to deceive each licensed gun dealer described below, which statements were likely to deceive each licensed gun dealer as to a fact material to the lawfulness of such sale of each firearm to the defendant under chapter 44 of Title 18, in that the defendant represented that the gun was for herself, rather than for her boyfriend, **ANTHONY WAYNE ELLIS**, who she knew could not possess a firearm because he had previously been convicted a crime punishable by more than one year imprisonment, each such acquisition being a separate violation of Title 18, United States Code, Sections 922(a)(6) and 924(a)(2):

COUNT	**DATE**	**FIREARM**	**LICENSED DEALER**
14	4/9/2006	Bushmaster .223 caliber assault rife	Jerry T. Hardesty Guns Morehead City, NC
15	4/9/2006	Remington 12 gauge shotgun	Village Pawn Shop Wadesboro, NC

COUNT SIXTEEN

On or about September 22, 2006, Mecklenburg County, within the Western District of North Carolina and elsewhere,

(2) DEMOIA OMAR DAVIS
a/k/a "Moe"

did knowingly and intentionally possess with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of cocaine base, commonly known as "crack," a Schedule II con-

trolled substance, and did aid and abet other persons known and unknown to the Grand Jury.

All in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C) and Title 18, United States Code, Section 2.

COUNT SEVENTEEN

On or about September 22, 2006, in Mecklenburg county, within the Western District of North Carolina, and elsewhere,

(2) DEMOIA OMAR DAVIS
a/k/a "Moe"

during and in relation to a drug trafficking crime, that is, possession with the intent to distribute cocaine base, commonly known as "crack," a violation of Title 21, United States Code, Section 841(a)(1), as charged in Count Sixteen of this indictment, for which he may be prosecuted in a court of the United States, did knowingly and unlawfully use and carry a firearm, and, in furtherance of such drug trafficking crime, did possess said firearm that is: a .38 caliber Taurus revolver.

All in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT EIGHTEEN

On or about September 22, 2006, in Mecklenburg County, within the Western District of North Carolina, and elsewhere,

(2) DEMOIA OMAR DAVIS
a/k/a "Moe"

having been previously convicted of one or more misdemeanor crimes of domestic violence, that is: Assault on a Female, in Mecklenburg County District Court, on or about April 26, 2006; Assault on a Female, in Mecklenburg County District Court, on or about August 7, 2006; did knowingly possess the following firearm in and affecting interstate and foreign commerce, that is a .38 caliber Taurus revolver.

All in violation of Title 18, United States Code, Section 922(g)(9).

COUNT NINETEEN

On or about September 22, 2006, in Mecklenburg County, within the Western District of North Carolina, and elsewhere,

(2) DEMOIA OMAR DAVIS
a/k/a "Moe"

having been previously convicted of one or more misdemeanor crimes of domestic violence, that is: Assault on a Female, in Mecklenburg County District Court, on or about April 26, 2006; Assault on a Female, in Mecklenburg County District Court, on or about August 7, 2006; did knowingly possess one or more of the following firearms in and affecting interstate and foreign commerce, that is, a .38 caliber Smith & Wesson handgun; a Mossberg shotgun; a 9mm Springfield Arms handgun; a Savage, Mark II Bolt Action .22 caliber rifle.

All in violation of Title 18, United States Code, Section 922(g)(9).

A TRUE BILL:
[REDACTED]

GRETCHEN C.F. SHAPPERT
UNITED STATES ATTORNEY

/s/ ILLEGIBLE
for C. NICKS WILLIAMS
ASSISTANT UNITED STATES ATTORNEY

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Docket No. 3:06CR363-1-C
UNITED STATES OF AMERICA

v.

(3) GERALD ADRIAN WHEELER, A/K/A "BAY-BAY"

Filed: Sept. 20, 2006

NOTICE OF INTENTION TO SEEK ENHANCED PENALTIES TITLE 21 U.S.C. § 851

NOW COMES the United States of America, by and through Gretchen C.F. Shappert, United States Attorney for the Western District of North Carolina, and hereby gives notice of its intention to seek enhanced penalties by virtue of the Defendant's prior felony drug convictions as follows:

1. Felony Possession of Cocaine, in Mecklenburg County Superior Court, on or about July 3, 1996;
2. Felony Trafficking Cocaine, in Mecklenburg County Superior Court, on or about November 14, 1998;

Respectfully submitted, this 20th day of Sept., 2006.

RESPECTFULLY SUBMITTED, this the 20th day of Sept. 2006.

GRETCHEN C. F. SHAPPERT,
United States Attorney
s/ Karen S. Marston
Assistant United States Attorney
Karen S. Marston Bar:
State of North Carolina/25311
Attorney for the Plaintiff
227 West Trade Street, Suite 1650
Charlotte, North Carolina 28202
(704) 344-6222 (office)
(704) 344-6629 (facsimile)
Karen.S.Marston@usdoj.gov

APPENDIX J

AO 245B (WDNC Rev. 4/04) Judgment in a Criminal Case

United States District Court
For The Western District of North Carolina

UNITED STATES OF AMERICA

V.

GERALD ADRIAN WHEELER

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: DNCW306CR000363-003

USM Number: 20977-058
Reggie E. McKnight
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 1s, 6s & 7s.
_ Pleaded nolo contendere to count(s) which was accepted by the court.
_ Was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
21:846	Conspiracy to possess with intent to distribute cocaine, cocaine base and marijuana (21:841(a), 851)	9/28/06	1S
18:924(c)	Possession of a firearm during and in relation to a drug trafficking crime	3/15/06	6s
18:922(g)	Possession of a firearm by a convicted felon	3/15/06	7s

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

_ The defendant has been found not guilty on count(s) .
X Count(s) 1, 5, 5s,6 & 7 (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 2/28/08

Robert J. Conrad, Jr.
Chief United States District Judge

Date: March 13, 2008

AO 245B (WDNC Rev. 4/04) Judgment in a Criminal Case

Defendant: GERALD ADRIAN WHEELER
Case Number: DNCW306CR000363-003

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Count 1s: ONE HUNDRED TWENTY (120) MONTHS. Count 7s: SEVENTY (70) MONTHS to run concurrently with Count 1s. Count 6s: SIXTY (60) MONTHS to run consecutively to Counts 1s & 7s, for a total of ONE HUNDRED EIGHTY (180) MONTHS.

X The Court makes the following recommendations to the Bureau of Prisons:
Participation in any available substance abuse treatment program. If eligible receive benefits of 18:3621(e)(2).
Participation in educational and/or vocational programs
Participation in Inmate Financial Responsibility Program.
Designation as close as possible to Charlotte, NC consistent with the needs of BOP.

_ The defendant is remanded to the custody of the United States Marshal.

_ The defendant shall surrender to the United States Marshal for this district:

_ At ___ On __.
_ As notified by the United States Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

_ Before 2 pm on .
_ As notified by the United States Marshal.
_ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ To _____

At _____, with a certified copy of this Judgment.

United States Marshal

By
Deputy Marshal

Defendant: GERALD ADRIAN WHEELER
Case Number: DNCW306CR000363-003

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Count 1s: FIVE (5) YEARS. Counts 6s & 7s: THREE (3) YEARS each count to run concurrently and concurrently with count 1s.

_ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the court.
4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.
7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.
9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
10. The defendant shall support his or her dependents and meet other family responsibilities.
11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.
14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively.
15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.
18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.
19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.
20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.
23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.
24. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

ADDITIONAL CONDITIONS:

Defendant: GERALD ADRIAN WHEELER
Case Number: DNCW306CR000363-003

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$300.00	$0.00	$0.00

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

_ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

_ The defendant shall pay court appointed counsel fees.

X The defendant shall pay $500.00 towards court appointed fees.

Defendant: GERALD ADRIAN WHEELER
Case Number: DNCW306CR000363-003

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ___ Lump sum payment of $ _____ Due immediately, balance due

___ Not later than _____ , or
___ In accordance ___ (C), ___ (D) below; or

B X Payment to begin immediately (may be combined with ___ (C), X (D) below); or

C ___ Payment in equal _____ (E.g. weekly, monthly, quarterly) installments of $ _____ To commence ___ ___ (E.g. 30 or 60 days) after the date of this judgment; or

D X Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $ 50.00 To commence 60 (E.g. 30 or 60 days) after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

___ The defendant shall pay the cost of prosecution.
___ The defendant shall pay the following court costs:
___ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.