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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

A. The decision below warrants this Court's review 2
B. The Court should preserve the possibility of review by holding the petition pending potential resentencing 7

TABLE OF AUTHORITIES

Cases:

El v. *Kallis*, appeal dismissed, No. 17-3424 (7th Cir. Feb. 12, 2018) 4
Koons v. *United States*, 138 S. Ct. 1783 (2018) 5
Lester v. *J.V. Flournoy*, 909 F.3d 708 (4th Cir. 2018) 2
McCarthan v. *Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir.), cert. denied, 138 S. Ct. 502 (2017) 4
Miller-El v. *Cockrell*, 537 U.S. 322 (2003) 6
Prost v. *Anderson*, 636 F.3d 578 (10th Cir. 2011), cert. denied, 565 U.S. 1111 (2012) 4
Reed Elsevier, Inc. v. *Muchnick*, 559 U.S. 154 (2010) 6
Sebelius v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013) 6
United States v. *Koons*, 850 F.3d 973 (8th Cir. 2012), aff'd 138 S. Ct. 1783 (2018) 5
Wood v. *Milyard*, 566 U.S. 463 (2012) 5

Statutes:

28 U.S.C. 2253(c)(1) 6
28 U.S.C. 2255(e) 1, 3, 4, 5, 6, 7
28 U.S.C. 2255(h) 6

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The court of appeals ordered habeas relief for respondent under the saving clause of 28 U.S.C. 2255(e) based on a claim that his sentence, while within the correct statutory range, was subject to an erroneously calculated statutory minimum. That decision exacerbated a deep and important circuit conflict regarding the availability of such relief to prisoners who raise statutory claims. Respondent does not dispute that such a conflict exists, but argues that this case would be a "bad vehicle" for resolving it. Br. in Opp. 11 (emphasis omitted). While the case presently still implicates the disagreement that led the government to seek this Court's review, and would be a suitable vehicle for resolving it, events subsequent to the filing of the petition—including an unanticipated delay in respondent's filing of the brief in opposition—raise the possibility that the case may become moot before the Court has an opportunity to resolve it. The district court, on remand from the Fourth

Circuit's decision, has scheduled a hearing for February 28, 2018, to address appropriate next steps, which may eliminate the potential mootness issue. The most appropriate course is therefore for the Court to hold the petition until that time, at which point the government will promptly inform the Court of the result of the hearing, and then the Court can determine whether this case remains a suitable vehicle for resolving the intractable circuit conflict on the question presented.

A. The Decision Below Warrants This Court's Review

1. Petitioner does not deny that the circuit conflict on the question presented is widespread and entrenched. See Pet. 23-25. Two circuits have determined, consistent with the government's interpretation, that the saving clause is categorically inapplicable to statutory claims. See Pet. 25. Other circuits have permitted such claims where a prisoner has argued that an intervening decision indicates that a federal criminal statute did not cover his offense conduct, see Pet. 24 n.2 (citing decisions from nine circuits), or that his sentence exceeded the applicable maximum under a statute or a mandatory Sentencing Guidelines regime, see Pet. 24 (two circuits); see also *Lester* v. *J.V. Flournoy*, 909 F.3d 708, 714 (4th Cir. 2018).

The Fourth Circuit in this case construed the saving clause to apply to a prisoner who claims that his sentence, while within the correct statutory sentencing range, resulted from the improper application of a statutory minimum. Pet. App. 19a-24a. In so holding, the court gave the clause the broadest construction of any court of appeals. That broad construction makes this case a particularly good vehicle for addressing the circuit conflict, because it allows for a precise decision that would provide the greatest degree of clarity: the Court could adopt the expansive view of the court below, the

construction of other circuits under which no statutory claims are cognizable, or an intermediate position under which some statutory challenges (*e.g.*, to a criminal conviction) are cognizable but others (*e.g.*, to a statutory minimum) are not. Respondent views the virtue of multiple options as a vice (Br. in Opp. 19-21), but offers no sound reason why the Court would be precluded from deciding the case on whichever ground it determined to be legally correct.

2. Respondent asserts that the acknowledged circuit conflict is insufficiently important to warrant this Court's review because, as the government has noted, it arises "relatively infrequently." Br. in Opp. 21 (quoting Br. in Opp. at 25, *McCarthan* v. *Collins*, 138 S. Ct. 502 (2017) (No. 17-85)). But respondent does not—and cannot—contest "the significance of the issue in the small set of cases in which it does arise," which the government has identified as the primary reason that review is warranted. Br. in Opp. at 25, *McCarthan*, *supra* (No. 17-85). Nor does respondent dispute that "[t]he disparate treatment of identical claims" by circuits with divergent interpretations of Section 2255(e) "is particularly problematic because habeas petitions are filed in a prisoner's district of confinement," which may be in a different circuit from the district in which he was sentenced. Pet. 25.

Contrary to respondent's suggestion (Br. in Opp. 22-23), nothing in the government's own litigation conduct suggests that the question presented is inconsequential. The existence of adverse precedent on the issue in several circuits, in combination with individualized case-specific considerations, mean that the government will sometimes settle or decline to appeal in particular cases, see *ibid.*, even as it appeals—and preserves its position on the scope of the saving clause—in others.

See, *e.g.*, *El* v. *Kallis*, appeal dismissed, No. 17-3424 (7th Cir. Feb. 12, 2018). And the government's opposition to certiorari in cases where a prisoner could not obtain habeas relief under any reading of Section 2255(e), Br. in Opp. 23, simply illustrate the importance of taking the opportunity to address the question presented in this case, in which the Fourth Circuit treated the question presented as outcome-determinative.

Respondent also errs in suggesting (Br. in Opp. 24-25) that the government's continuing efforts to broaden the saving clause legislatively counsel in favor of abstaining from review of the question presented. Although the government supports amending Section 2255(e) to allow for relief in a range of circumstances in which defendants are raising statutory claims, the timing and outcome of the legislative process is inherently uncertain. The government has accordingly not invoked its legislative efforts as a reason for this Court to deny certiorari in cases in which federal prisoners have sought this Court's review, and it should not be invoked as a reason to pass up the opportunity for review here. Nor is the possibility that the government might identify another suitable vehicle for this Court to resolve the widespread and important circuit conflict, see Br. in Opp. 25-26, a reason to delay such resolution by denying certiorari in this case.

3. Respondent argues (Br. in Opp. 27-36) that the decision below was correct on the merits. But the arguments advanced by respondent—including respondent's constitutional arguments—were thoroughly considered and rejected by the two circuits that reached a contrary conclusion about the availability of habeas relief for statutory claims. See *McCarthan* v. *Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1085-1095 (11th Cir.), cert. denied, 138 S. Ct. 502 (2017); *Prost* v.

Anderson, 636 F.3d 578, 584-594 (10th Cir. 2011) (Gorsuch, J.), cert. denied, 565 U.S. 1111 (2012). Respondent's arguments are therefore immaterial to whether the circuit conflict warrants resolution.

Respondent separately contends (Br. in Opp. 14) that "the Government has waived its argument as to the savings clause" because it agreed with respondent's interpretation of the clause in the district court. As the petition explains (Pet. 26-27), however, the government's return to the position it held when AEDPA was first enacted does not pose an obstacle to this Court's review. In *Koons* v. *United States*, 138 S. Ct. 1783 (2018), for example, the government took the position in the district court and in the court of appeals that certain defendants were eligible for post-conviction sentence reductions, see 850 F.3d 973, 975 (8th Cir. 2017), but after reconsidering the issue, the government contended in this Court that they were not, see 138 S. Ct. at 1788, and this Court agreed, *id.* at 1788-1789. Unlike the decision on which respondent principally relies (Br. in Opp. 26), this is not a circumstance in which a court of appeals "resurrect[ed]" a waived issue "on its own motion" following a district-court decision that did not address it, *Wood* v. *Milyard*, 566 U.S. 463, 466-468 (2012). Instead, the government itself informed the court of appeals that it would defend the district court's construction of the saving clause. The government is now subject to binding circuit precedent rejecting its position, and nothing precludes this Court from reviewing that precedent.

In any event, the court of appeals correctly determined that Section 2255(e) imposes a jurisdictional limitation, which a court may not disregard based on the parties' litigating positions. A "plain reading" of the provision "demonstrates that Congress intended to, and

unambiguously did strip the district court of the power to act unless the savings clause applies." Pet. App. 15a (citation, ellipsis, and internal quotation marks omitted). Section 2255(e) directs that a habeas petition "shall not be entertained" unless certain conditions are met. That court-focused directive is, if anything, a clearer jurisdictional limitation than the one recognized in *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), which provided that "an appeal may not be taken to the court of appeals" without a certificate of appealability. 28 U.S.C. 2253(c)(1); see 537 U.S. at 336. The overwhelming majority of the courts of appeals to consider the issue (eight) have accordingly determined that the saving clause's requirements are jurisdictional, with only one circuit dissenting. See Pet. 28 n.3.

Context reinforces what the language itself indicates. The limitation on second-or-successive collateral attacks under Section 2255(h) is jurisdictional, see Pet. 27, and prisoners like respondent are filing habeas petitions as a substitute for such collateral attacks. Although respondent (Br. in Opp. 16) attaches great weight to the absence of the word "jurisdiction" from Section 2255(e), *Miller-El* and other cases refute the notion that "Congress must incant magic words in order to speak clearly" about a jurisdictional bar, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). And contrary to respondent's contention (Br. in Opp. 17), a limitation's "locat[ion] in a provision 'separate' from those granting federal courts subject-matter jurisdiction," is simply one "factor," among "other[s]," that may be considered in the analysis. *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 164-165 (2010). It does not create any "presumption" (Br. in Opp. 17) that the limitation is nonjurisdictional.

At best, respondent's argument (which, if accepted, would revise the law in most circuits) simply suggests that the Court should grant certiorari and add the jurisdictional issue as a second question presented. If it did so, the Court could still address the primary question presented—which would resolve a widespread circuit conflict on the scope of the saving clause—first. If the Court agrees with respondent's view of the saving clause's scope, it can simply affirm, because the court of appeals' decision permitting habeas relief would be correct, irrespective of whether Section 2255(e) is jurisdictional. If the Court rejects respondent's view of the saving clause's scope, it can then address whether Section 2255(e) is jurisdictional. If so, it can reverse and direct dismissal of respondent's habeas petition as jurisdictionally barred. If not, then it can vacate the decision below and remand for consideration in the first instance of whether the government was entitled to defend the district court's judgment, even if that judgment rested on a nonjurisdictional ground.

B. The Court Should Preserve The Possibility Of Review By Holding The Petition Pending Potential Resentencing

At present, this case continues to involve a live controversy regarding the availability of habeas relief under the saving clause for claims of statutory error. Events subsequent to the filing of the petition, however, have created some risk that the case may become moot before the Court has an opportunity to hear argument and decide it.

1. After the court of appeals denied the government's petition for rehearing en banc, Pet. App. 55a, as well as its motion to stay the mandate pending the filing and disposition of a potential petition for certiorari, *id.*

at 35a, the government filed a petition for a writ of certiorari on October 3, 2018, nearly a week before such a petition was due on a single 30-day extension. The government filed on that date based on its understanding that, even if respondent sought and was granted a 30-day extension of the time in which to respond to the petition, the Court would still have the opportunity to grant the petition and decide the case during the current Term.

On November 5, 2018—the last day available to respond to the petition—respondent waived his right to file a response. Respondent did so despite the acknowledged circuit conflict over the meaning of the saving clause and the importance of the issue in cases like this one. Just over a week later, and before the Conference for which the petition had been distributed, this Court requested a response. The response was filed, after one extension, on January 14, 2019. Given that response date, the Court no longer has the opportunity to grant review, hear argument, and resolve this case in the normal course during its current Term.

2. On June 26, 2018, after the Fourth Circuit denied the government's request to stay the mandate, the mandate issued and the case was remanded to the district court for resentencing. D. Ct. Doc. 27. Two days later, respondent moved to expedite his resentencing, D. Ct. Doc. 29, and the government agreed that such relief was warranted to carry out the court of appeals' judgment, *id.* at 4.

On November 7, 2018, two days after respondent waived his response to the petition for a writ of certiorari, the government filed its own motion to expedite resentencing in the district court, again "agree[ing] that prompt resentencing was warranted in light of the Fourth Circuit's decision." D. Ct. Doc. 30, at 2. The government

informed the district court that the government had filed a petition for a writ of certiorari, but that "any review by the Supreme Court [wa]s unlikely to occur until its October 2019 Term." *Ibid.* Noting that respondent's term of incarceration was due to expire in October 2019, the government further informed the district court that "[i]f [respondent] is not resentenced before October 2019, the Fourth Circuit's mandate will not be effectuated, and any review by the Supreme Court may well become moot." *Id.* at 3.

On December 21, 2018, the district court issued an order scheduling a hearing, to take place on February 28, 2019, on respondent's request for habeas relief. D. Ct. Doc. 31. The court directed the parties to "be prepared to address the procedural implications" of the government's resentencing motion, including its effect on the petition for a writ of certiorari. *Id.* at 1.

3. If the district court resentences respondent to a shorter term of imprisonment, requiring his release from custody ahead of his otherwise applicable release date,[*] then this case will continue to present a live controversy regarding the permissibility of such relief. Following such resentencing, a decision by this Court reversing the decision below would have the practical effect of reinstating respondent's original sentence. But if the district court reimposes the same sentence, or does not resentence respondent before he is released, then the parties' dispute over the availability of habeas

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[*] Respondent briefly asserts (Br. in Opp. 13) that he will "likely" be released "earlier than that based on the additional earned-time credit under the recently passed First Step Act." The government's understanding is that no adjustment to respondent's earned-time credits has yet occurred, but an adjustment may be made in the future.

relief will have no continuing practical effect and would, in the government's view, be moot.

The Court should therefore hold the petition pending the district court's decision on resentencing. The government will inform the Court of the case's status following the hearing on February 28, 2019, and will also inform the Court if and when respondent has been resentenced. Once that has occurred, the Court will be able to determine whether this case continues to present a suitable vehicle for resolving the circuit conflict and can act on the petition for a writ of certiorari accordingly.

4. Respondent argues (Br. in Opp. 14) that, even though the controversy would remain live if the district court reduced his sentence, "the Government's ability to reincarcerate [him] for the short period that would remain" of his sentence "is not the kind of interest that warrants this Court's review." The government's primary interests here, however, have always been in seeking this Court's resolution of a deeply entrenched circuit conflict that "is of great significance" and in obtaining review of an erroneous legal rule that threatens to "proliferate the filing of saving-clause claims (even if they are not ultimately successful) and impose significant new litigation burdens." Pet. 23.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be held pending further proceedings in the district court.

Respectfully submitted.

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Solicitor General

JANUARY 2019