No. 11-6053

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2011

EZELL GILBERT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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Reply to Brief for the United States in Opposition

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REPLY ARGUMENT TO BRIEF IN OPPOSITION

The government does not dispute the following key facts of the instant case:

- Ezell Gilbert, Petitioner, argued at sentencing and on direct appeal that one of his prior convictions did not constitute a "crime of violence" and his career offender enhancement under the then-mandatory Sentencing Guidelines was therefore erroneous. The district court and the Eleventh Circuit rejected his challenges at sentencing and on direct appeal, respectively. Gilbert's petition for writ of certiorari was then denied.
- This Court's decision in *Begay v. United States*, 553 U.S. 137 (2008), which narrowed the definition of a "violent felony" under the Armed Career Criminal Act ("ACCA") and, by extension, the definition of a "crime of violence" under the Sentencing Guidelines, is a retroactive, circuit-law busting decision.
- In light of *Begay*, and the Eleventh Circuit's decision in *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), Gilbert is not, nor ever was, a career offender.
- Following *Begay* and *Archer*, Gilbert timely sought post-conviction relief from his erroneous career offender sentence, under 28 U.S.C. § 2241. The district court's denial of that relief was reversed by a panel of the Eleventh Circuit. In the decision below, however, a divided Eleventh Circuit en banc vacated the panel decision and affirmed the district court's denial of habeas relief. The instant petition timely followed.

The government opposes this Court's review of the decision below, and relief in Gilbert's case, because, in its view, sentences in excess of the statutory maximum may be redressable in collateral cases, but Sentencing Guideline errors are not. Brief of the United States in Opposition ("BIO") at 21-28. In advancing this position, the government downplays that, when Gilbert was sentenced, the Guidelines were mandatory and had "the force and effect of laws." *United States v.*

Booker, 543 U.S. 220, 233-34 (2005). Significantly, the Guidelines dictated the range of sentences that the sentencing judge could impose. *Id.* at 234. Thus, in Gilbert's case, he was sentenced within a dramatically higher mandatory Guideline range as a career offender, but (as is now undisputed) he is not a career offender. Gilbert has never had a reasonable opportunity to seek correction of his sentence because (i) he raised the claim at sentencing and on direct appeal, but it was rejected based on an erroneous view of the law, and (ii) *Begay*, which vindicates his previous challenges, was not decided until after his first 28 U.S.C. § 2255 motion was denied. If the decision below is left standing (as the government requests), Gilbert will forever be denied a reasonable opportunity to obtain a judicial correction of his erroneous sentence and will be forced to serve additional years in prison for conduct (being a career offender) that he did not commit. *See* Pet. App. A at 1330, 1335-36 (Martin, Barkett, Hill, JJ., dissenting).

That, however, "cannot be the law." Pet. App. B at 1163. This Court's review is therefore needed to address whether Gilbert may seek relief under the "savings clause" of 28 U.S.C. § 2255(e), which permits a federal habeas petition under 28 U.S.C. § 2241 if it "appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." This Court's review is warranted because, contrary to the government's argument, the Eleventh Circuit's interpretation of the savings clause is in conflict with the Seventh Circuit's interpretation. In addition, this Court's review is warranted because of the importance of the issue presented by this case; without this Court's intervention, federal prisoners (like Gilbert) whose sentences have proven to violate "the laws of the United States," *see* 28 U.S.C. § 2255(a), but only after their first § 2255 motions were decided, will have had no opportunity to correct their erroneously enhanced sentences. The government's opposition to Gilbert's petition is based on its view that Guidelines errors are not redressable in any collateral proceeding, in a first § 2255 or under the savings clause in a § 2241 habeas petition. BIO at 25-26. But, that view is not supportable under this Court's precedent and only underscores that this Court's authoritative voice is needed.

I. This Court's Guidance is Needed to Interpret the Meaning of the Savings Clause of 28 U.S.C. § 2255(e)

Gilbert has requested that this Court review the Eleventh Circuit's interpretation of § 2255(e)'s savings clause. Pet. at 19-30. As shown below, the government's response does not negate the validity or importance of Gilbert's request. *See* BIO at 17-30.

A. The Government Does Not Defend the Majority Decision's Statutory Construction or Internal Inconsistency And, Contrary to the Government's Argument, the Decision Below is in Conflict With a Decision of the Seventh Circuit.

Gilbert presented three reasons why this Court should review the Eleventh Circuit's interpretation of the savings clause. Pet. at 21-23. Notably, as to the first two reasons, the government does not defend the Eleventh Circuit's decision.

Specifically, the government does not argue that the en banc majority used the correct canon of statutory construction[1] or that the three dissenting judges used the wrong one.[2] *See* BIO at 17-28. In fact, the government does not address the canons of statutory construction at all. *See id.*

Nor does the government dispute that the majority's interpretation of the savings clause is internally inconsistent. As Gilbert argued, the majority (i) rejected Gilbert's challenge under § 2255(e)'s savings clause, reasoning that allowing it to proceed would "eviscerate" the

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[1] Pet. App. A at 1308 ("Fundamental canons of statutory construction support the conclusion that the generally worded and ambiguous savings clause, which was first enacted in 1947, cannot override the specifically worded and clear statutory bar on second or successive motions that was enacted as part of AEDPA in 1996. An ambiguous or general statutory provision enacted at an earlier time must yield to a specific and clear provision enacted at a later time.").

[2] *Id.* at 1333-34 (Martin, Barkett, Hill, JJ., dissenting) ("In construing the enactment of 28 U.S.C. § 2255(h) to deplete the importance of the previously existing § 2255(e) the majority . . . ignores another fundamental canon of statutory construction, recognized by the Supreme Court in the very case relied upon by the majority, which disfavors repeal of a statute by implication. *Morton v. Mancari*, 417 U.S. 535, 549-50 . . . (1974); *see* Maj. Op. at 1311. Indeed, the Supreme Court has expressly declined to find that certain AEDPA amendments repealed 28 U.S.C. § 2241 by implication. *Felker v. Turpin*, 518 U.S. 651, 661 . . . (1996). And yet, the majority effectively comes to that result here. By grafting the requirements of § 2255(h) onto the savings clause, the majority has stripped that clause of any independent meaning. Such a result flies in the face of Congress's deliberate choice to leave the savings clause intact when passing AEDPA.").

second/successive motions bar that otherwise precluded his challenge (Pet. App. A at 1308), but it (ii) recognized that the savings clause would allow some challenges, such as challenges to a conviction in light of an intervening statutory decision, even though those claims would also be barred by § 2255(h)'s second/successive provision (*id.* at 1319). The government does not defend the Eleventh Circuit's reasoning in rejecting Gilbert's claim, perhaps because it too recognizes that some challenges precluded by § 2255(h)'s second/successive motions bar should be permitted under the savings clause. *See* BIO at 21-22; Part I.B, *infra*. As a result, the Eleventh Circuit's reasoning in rejecting Gilbert's challenge (*i.e.*, the "eviscerat[ion]" of the second/successive bar) finds no support in the government's response.

The third reason offered by Gilbert to support his request for this Court's review is that the Eleventh Circuit's interpretation of the savings clause conflicts with the Seventh Circuit's interpretation of the clause in *In re Davenport*, 147 F.3d 605 (7th Cir. 1998). Pet. at 22-23. The government disagrees that there is a conflict because, in its view, the Seventh Circuit permitted the claim for the petitioner (Nichols) who "had been convicted of conduct that Congress had not made criminal." BIO at 22-23. The Seventh Circuit, however, did not decide *Davenport* on this basis.

In *Davenport*, the Seventh Circuit considered whether the savings clause would permit two petitioners to pursue federal habeas petitions under § 2241. 147 F.3d at 607-08. The court of appeals concluded that one of the petitioners (Davenport) could not proceed under the savings clause, because he had had the opportunity to challenge his sentence (under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)) during his direct appeal and in his first § 2255 motion. *Id.* at 609 (discussing the petitioner's "unobstructed procedural shot at getting his sentence vacated"); *see Cooper v. United States*, 199 F.3d 898, 901 (7th Cir. 1999) ("We concluded that, for [Davenport], relief under § 2255 was not inadequate: he could have presented his argument in his earlier petition."). The other petitioner (Nichols), by contrast, had not had an opportunity to raise his claim because, at the time of his direct appeal and first § 2255, Seventh Circuit law was "firmly

against him." *Davenport*, 147 F.3d at 610. This Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995), which narrowed the meaning of "use" under 18 U.S.C. § 924(c) and called his conviction into question, was issued after Nichols' first § 2255 motion was decided. *Id.* at 607. As the Seventh Circuit found, Nichols "could not use a first motion under [§ 2255] to obtain relief on a basis not yet established by law." *Id.* at 610. The Seventh Circuit thus interpreted the savings clause (and its use of "inadequate") to permit claims, such as Nichols', when the federal prisoner "*had no reasonable opportunity* to obtain earlier judicial correction of a fundamental defect in his conviction or sentence *because the law changed after his first 2255 motion*." *Id.* at 611 (emphasis added).

Therefore, the critical factor for the Seventh Circuit's interpretation of the savings clause is whether the law changed after the first § 2255 motion was decided, such that the petitioner would not have had an "adequate" opportunity to raise his claim, and not (as the government suggests) whether the petitioner challenges his conviction or sentence.[3] Indeed, the Seventh Circuit's savings clause standard contemplates challenges to a conviction or sentence: "A federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his *conviction or sentence* because the law changed after his first 2255 motion." *Id.* at 611 (emphasis added).[4]

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[3] The government itself would permit ACCA challenges to be brought under the savings clause if the petitioner raises a "claim that his sentence exceeds the applicable statutory maximum in light of a retroactively applicable decision of this Court that postdates his sentencing, direct appeal, and initial Section 2255 motion." BIO at 21-22. Thus, under the government's own interpretation of the savings clause, Davenport could have challenged his ACCA sentence under § 2255(e)'s savings clause in a § 2241 petition, if his challenge had been based on a change in the law after his first § 2255 motion had been decided. To the government, then, the fact that Davenport challenged his sentence, and not his conviction, is not dispositive.

[4] Moreover, the Seventh Circuit has clearly rejected the government's argument that collateral relief is limited to challenges to a conviction. *See Narvaez v. United States*, slip op. at 13 (7th Cir. 2011) (attached to the government's December 7, 2011 letter).

Accordingly, contrary to the government's contention, the decision below conflicts with *Davenport*'s interpretation of the savings clause. The Eleventh Circuit held that Gilbert's challenge did not fall within the purview of the savings clause, even though he had not had a reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his sentence because the law changed after his first § 2255 motion. Pet. App. A at 1305, 1307-08; *see id.* at 1335-36 (Martin, Barkett, Hill, JJ., dissenting) ("Because Mr. Gilbert has never had a 'reasonable opportunity' to obtain a judicial correction of such a fundamental defect, it may well be that he would prevail in the Seventh Circuit."). The conflict between the Seventh and Eleventh Circuit's interpretation of the savings clause thus supports Gilbert's request for review. The government has not negated the need for this review.

B. The Government's Interpretation of the Savings Clause – to Allow Some Sentencing Claims, But Not Errors Under the then-Mandatory Sentencing Guidelines – Further Warrants this Court's Review

Before this Court, as it did below, the government has conceded that certain sentencing errors fall within the savings clause and may be brought in a § 2241 petition – *i.e.*, claims that a "sentence exceeds the applicable statutory maximum in light of a retroactively applicable decision of this Court that postdates his sentencing, direct appeal, and initial Section 2255 motion." BIO at 21-22; Pet. App. A at 1319 n.20. The Eleventh Circuit did not decide whether such claims may be brought under the savings clause in a § 2241 petition, but suggested that erroneous ACCA sentences (which result in a sentence in excess of the correct statutory maximum)[5] may have been what a previous Eleventh Circuit panel had in mind when it stated, in dicta, that "the savings clause 'may conceivably' apply to some sentencing claims in some circumstances where there was a fundamental defect in sentencing that the prisoner had no opportunity to have corrected before the end of his

[5] Under the ACCA, the mandatory minimum sentence is 15 years in prison. 18 U.S.C. § 924(e)(1). Without the ACCA enhancement, the maximum sentence is 10 years in prison. 18 U.S.C. § 924(a)(2).

§ 2255 proceeding." Pet. App. A at 1319 n.20 (discussing *Wofford v. Scott*, 177 F.3d 1236, 1244-45 (11th Cir. 1999)). The Eleventh Circuit concluded, however, that "the savings clause does not apply to sentencing errors that do not push the term of imprisonment beyond the statutory maximum." *Id.*

The government argues that the Eleventh Circuit's decision is correct. BIO at 23-24. As shown below, however, the government's defense of the Eleventh Circuit's interpretation of the savings clause – to exclude claims challenging erroneous sentences under the then-mandatory Sentencing Guidelines – cannot be sustained.

1. The Government's Position Downplays that the Sentencing Guidelines Were Mandatory and Had the "Force and Effect of Laws" When Gilbert Was Sentenced

The government's position is that sentences exceeding the statutory maximum may be corrected under the savings clause in § 2241 petitions, but erroneous Sentencing Guidelines sentences may not. BIO at 21-22, 25-26. The government reasons that a sentence exceeding the statutory maximum implicates the separation-of-powers principle that only the legislative branch, and not the judicial branch, may authorize punishment. *Id.* at 24-25. The government attempts to contrast Guidelines errors by stating that:

> An erroneous Guidelines sentence does not implicate these concerns, however, because the ultimate sentence imposed remains firmly within the limits authorized by Congress. A defendant's range under the Sentencing Guidelines provides direction and advice for the sentencing court, but neither expands nor contracts the statutory sentencing range to which the defendant's crime exposes him.

Id. at 25. Based on this premise, the government argues that a Guidelines error "is not a fundamental defect warranting collateral relief" or "resort to the habeas savings clause." *Id.* at 25-26. But, this argument is undermined by the government's faulty premise concerning the Guidelines.

Gilbert was sentenced in 1997, when the Guidelines were "mandatory and binding on all judges." *United States v. Booker*, 543 U.S. 220, 233 (2005). As this Court explained, "[b]ecause they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws." *Id.* at 234 (citing *Mistretta v. United States*, 488 U.S. 361, 391 (1989); *Stinson v. United*

States, 508 U.S. 36, 42 (1993)). The Guidelines also dictated the range of sentences that the judge could impose. Indeed, by statute, Congress mandated that the sentencing judges impose a sentence within the Guidelines range (unless grounds for a departure were met). 18 U.S.C. § 3553(b)(1); *see Booker*, 543 U.S. at 234. As this Court discussed:

> The Guidelines permit departures from the prescribed sentencing range in cases in which the judge "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b)(1) (2000 ed., Supp. IV). *At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum.* Were this the case, there would be no *Apprendi* problem. *Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range.*

Booker, 543 U.S. at 234 (emphasis added). Thus, contrary to the government's argument, the Sentencing Guidelines provided more than "direction and advice for the sentencing court" and contracted the range of sentences that the sentencing court could impose. *See* BIO at 25.

The government also ignores that Congress established the requirements for the career offender enhancement by statute. Specifically, in 28 U.S.C. § 994(h), Congress directed the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for career offenders, and then defined career offenders as those defendants who have "previously been convicted of *two or more* felonies" that are "crime[s] of violence" or certain drug offenses. 28 U.S.C. § 994(h) (emphasis added); *see also United States v. LaBonte*, 520 U.S. 751 (1997) (interpreting "maximum term authorized" in § 994(h)). Although the definition of a "crime of violence" appears in the Sentencing Guidelines, *see* U.S.S.G. § 4B1.2(a), rather than in the statute, the definition "closely tracks" the ACCA's statutory definition of a "violent felony." *James v. United States*, 550 U.S. 192, 206 (2007).[6] Gilbert is not a career

[6] Indeed, because of the similarity of the ACCA's "violent felony" and Guidelines' "crime of violence" definitions, the government has acknowledged that *Begay*, an ACCA decision, applies to

offender, because (as the government agrees) he was not previously convicted of "*two or more*" qualifying offenses. Gilbert has thus been punished as a career offender for conduct (the commission of only one qualifying offense) that Congress did not authorize under § 994(h) or the mandatory Guidelines. The government's view that Gilbert and federal prisoners like him are not entitled to any relief should therefore be rejected.

2. The Government's Position is Based on its View that Guidelines Errors are Not Redressable in Collateral Cases (In First § 2255 Motions or § 2241 Habeas Petitions), But that View Is Not Supportable

The government's contention that this Court should not review Gilbert's case is based on its view that Guidelines errors may not be corrected in collateral cases, in either first § 2255 motions or under the savings clause in § 2241 habeas petitions. BIO at 25-26. However, the government's view is not supported by decisions of this Court or the text of § 2255, is inconsistent with a recent decision of the Seventh Circuit, and ultimately provides no defense for the decision below.

a. The Government's Position is Not Supported by this Court's Precedent or the Text of § 2255(a)

The government contends that this Court's decision in *Addonizio v. United States*, 442 U.S. 178 (1979), is "instructive" with respect to its position that Guidelines are not redressable in collateral cases. *Id.* at 26. The government's position, however, is not supported by *Addonizio* and is contrary to another decision of this Court.

In *Addonizio*, this Court considered whether a claim – that the Parole Commission's post-sentencing change in policy had "prolonged [petitioners'] actual imprisonment beyond that intended by the sentencing judge" – met the standards for collateral attack under § 2255. 442 U.S. at 179. This Court concluded that it did not, because (i) "there is no claim of a constitutional violation; (ii) "the sentence imposed was within the statutory limits"; *and* (iii) there was no error of law "of the

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the Guidelines. Gov. En Banc Br. at 59 ("And, as Gilbert correctly notes . . . , *Begay* is retroactive to cases on collateral review because the decision announced a substantive interpretation of the ACCA (and, by extension, the career-offender guideline) . . . .").

'fundamental' character that renders the entire proceeding irregular or invalid," because the judgment ("then or now") was "lawful." *Id.* at 186-87. This Court therefore tracked the statute in finding that the claim did not fall within § 2255. *See id.* at 179 n.1.[7] The government takes this Court's "reliance on the fact that the actual sentence was 'within the statutory limits'" to support its "conclusion that an error in applying the Sentencing Guidelines is not a fundamental error redressable under Section 2255 or in a habeas corpus savings clause petition." BIO at 26. That reasoning, however, is non sequitur. What the Court said in *Addonizio* is that the sentence imposed was "within the statutory limits . . . *and* . . . not infected with any error of . . . law." 442 U.S. at 186-87.[8] The Court, however, did not say that *only* sentences that were in excess of the statutory maximum would be redressable under § 2255.

The government's argument would require a reading of *Addonizio* that is contrary to the text of § 2255 itself. That statute provides five distinct grounds for relief, including a claim that a sentence was imposed "in excess of the maximum authorized by law" and a claim that it was imposed "in violation of the . . . laws of the United States." 28 U.S.C. § 2255(a). Because § 2255 provides both of these grounds for relief, the statutory text itself demonstrates that relief is not limited to claims that a sentence was imposed in excess of the statutory maximum. *See also Begay*, 553 U.S. at 143 (applying cannon of statutory construction that every clause and word should be given effect).

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[7] Section 2255 provides five distinct grounds for relief, including a claim that a sentence was imposed (i) "in violation of the Constitution," (ii) "in excess of the maximum authorized by law," and (iii) "in violation of the . . . laws of the United States." 28 U.S.C. § 2255(a).

[8] This Court contrasted the judgment in *Addonizio* with that in *Davis v. United States*, 417 U.S. 333 (1974), where a change in law established that the "conviction and sentence were no longer lawful." *Addonizio*, 442 U.S. at 186-87. *Davis*, in turn, relied on the "violation of the . . . laws of the United States" prong to find that the claim raised therein was cognizable under § 2255. *Davis*, 417 U.S. at 342-47.

The government's argument that only sentences imposed in excess of the statutory maximum may be redressable in collateral cases is also contrary to *Johnson v. United States*, 544 U.S. 295 (2005). In *Johnson*, a case involving a § 2255 challenge to a career offender sentence, *id.* at 301, this Court stated "that a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated." *Id.* at 303 (citing *Custis v. United States*, 511 U.S. 485 (1994); *Daniels v. United States*, 532 U.S. 374 (2001)). Although the claim in *Johnson* was based on a vacated prior conviction and Gilbert's claim is based on a retroactive substantive change in the law, *Johnson* makes clear that a career offender Guidelines sentence is redressable in habeas. The government's argument, therefore, finds no support in *Addonizio* and cannot be squared with *Johnson*.

b. The Government's Position is Inconsistent With a Decision of the Seventh Circuit

The government's view is also inconsistent with the Seventh Circuit's decision in *Narvaez*. In that case, the Seventh Circuit recognized that an erroneous career offender sentence imposed under the then-mandatory Guidelines illegally increases a petitioner's sentence "beyond that authorized by the sentencing scheme" and the petitioner's challenge to such a sentence "goes to the fundamental legality of his sentence and asserts an error that constitutes a miscarriage of justice, entitling him to relief." *Narvaez*, slip op. at 13. The same fundamental defect resulting in a miscarriage of justice has occurred in Gilbert's case; Gilbert's mandatory Guidelines range was significantly increased, costing him many extra years in prison, due to the erroneous career offender enhancement. Although *Narvaez* involved a first § 2255 motion and therefore did not address the savings clause, *see id*. at 13 n.14, that decision (which remains intact in its amended opinion) rejects

the government's view that an erroneous career offender sentence under the mandatory Guidelines is not redressable under § 2255. *See* BIO at 25.[9]

The government offers that a fundamental defect has not occurred here because, even if Gilbert were re-sentenced today with a correct (and lower) Guidelines range, the sentencing court could "in theory" reject the now-advisory Guidelines range and sentence Gilbert to the statutory maximum. BIO at 26-27. The Seventh Circuit has rejected this very argument, concluding that "[s]peculation that the district court today might impose the same sentence is not enough to overcome the fact that, at the time of his initial sentencing, Mr. Narvaez was sentenced based upon the equivalent of a nonexistent offense." *Narvaez*, slip op. at 13. In Gilbert's case, there is no need to speculate; the district court unequivocally stated that it would not have sentenced Gilbert as harshly but for the mandatory career offender Guideline. *See* Pet. at 5 (quoting sentencing court's statement that the "sentence is too high" and that it would have downward departed if it could have done so); *see also* Pet. App. C-2 at *5 (district court's more recent statement, in order denying 18 U.S.C. § 3582(c) motion, that Gilbert "is no longer deemed a career offender and has served the time that would be required of him were he sentenced today").[10]

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[9] Additionally, the Eighth Circuit's decision in *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011) (en banc), does not support the government's position. *See* BIO at 25-26. The government suggests that *Sun Bear* held that a fundamental error had not occurred because the sentence imposed was below the statutory maximum. *Id.* In *Sun Bear*, however, no miscarriage of justice had occurred where the sentence was *both* below the statutory maximum *and* within the Guideline range based on an upward departure separate and apart from the career offender enhancement. 644 F.3d at 701-02, 705. Gilbert's sentence, by contrast, was determined based on the career offender enhancement and did not involve any upward departures under the Guidelines. Gilbert's case is therefore more like *Narvaez* than *Sun Bear*. *See Narvaez*, slip op. at 13-14 n.14 (explaining that "[u]nlike the defendant in *Sun Bear*, Mr. Narvaez's sentence was not within the sentencing range had the career offender status not been applied").

[10] In fact, Gilbert was released from prison on bond, following the Panel's decision ordering that he be re-sentenced. *See* Pet. App. A at 1324 n.22 ("After the panel issued its decision, it ordered Gilbert released from prison immediately."). After the en banc Court rejected Gilbert's arguments for habeas relief, Gilbert returned to prison and has resumed serving his erroneously enhanced sentence.

c. The Government's Position Provides No Defense of the Decision Below

The Eleventh Circuit itself did not base its decision on the government's view that Guidelines challenges may not be brought in a first § 2255; it declined to decide this issue. Pet. App. A at 1306. And, it has previously ordered that a § 2255 petitioner be resentenced to correct an erroneous career offender Guideline sentence. *See Young v. United States*, 936 F.2d 533, 534-38 (11th Cir. 1991). The government's view that Guidelines errors may not be brought in a first § 2255 therefore provides no defense of the Eleventh Circuit's decision below.

The government's response, however, supports Gilbert's request for this Court's review. If this Court were to grant Gilbert's petition to decide whether his (and other federal prisoners') erroneously enhanced Guidelines sentences may be remedied under the savings clause in a § 2241 petition, this Court would also have the opportunity to resolve any issue concerning whether such claims, as a preliminary matter, are redressable under § 2255 at all. Gilbert's case presents a good vehicle to address these issues, because his claim is preserved and not procedurally defaulted.

C. The Government's Response as to the Actual Innocence of Sentence Exception Recognized in *Sawyer v. Whitley*, 505 U.S. 333 (1992), Demonstrates the Need for this Court's Review

The government acknowledges that the courts of appeals are divided as to the scope of *Sawyer*'s actual innocence of sentence exception. BIO at 28-29. Specifically, the government recognizes that the circuits are split concerning (1) "whether *Sawyer*'s exception is limited to capital sentences," and (2) "whether the exception applies only to claims involving constitutional error." *Id.* at 29.[11] The government nonetheless asserts that this Court's review is not warranted because,

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[11] In his petition, Gilbert argued that the Eleventh Circuit's conclusion that Gilbert's claim is not constitutional in nature conflicts with a decision of the Seventh Circuit. Pet. at 26-27 (citing *Narvaez v. United States*, 641 F.3d 877 (7th Cir. 2011)). After Gilbert's petition and the government's BIO were filed, the Seventh Circuit amended its decision in *Narvaez* to no longer reach the question of whether an erroneous career offender determination constituted a violation of due process. *See Narvaez*, slip op. at 9 n.10. As a result, the decision below is not in conflict with the Seventh Circuit' decision in *Narvaez* concerning the nature of a career offender claim (whether

even if these disputes were resolved in Gilbert's favor, the Eleventh Circuit correctly concluded that Gilbert would not be entitled to relief. *Id.* at 28, 30.

This assertion begs the question of what is the proper scope of the *Sawyer* exception. The government, like the Eleventh Circuit, posits that Gilbert does not fall within the *Sawyer* exception because he is still "statutorily eligible" for the sentence he received. *Id.* at 29-30. *Sawyer*'s actual innocence test, however, "focus[es] on those elements that render a defendant eligible for the [enhanced] penalty." 505 U.S. at 347. Gilbert is not eligible for the enhanced penalty, because the elements of the career offender enhancement are not met – *i.e.*, he did not commit two predicate offenses. *See* 28 U.S.C. § 994(h); U.S.S.G. § 4B1.2. The government's response, which depends on the proper scope of *Sawyer*, demonstrates that this Court's guidance is needed.[12]

II. A Federal Prisoner Should be Permitted to Re-open and Amend his First § 2255 Motion, Pursuant to Federal Rule of Civil Procedure 60(b), to Include a Challenge to His Sentence that is Related to the Challenge Presented in the his First § 2255 Motion

Gilbert, *pro se*, attacked his career offender enhancement in his first § 2255 motion via an ineffective assistance of counsel challenge. *See* Pet. at 5. At that time, Gilbert could not have obtained any relief from his career offender sentence, because circuit law (pre-*Begay*) precluded both the merits of such claim and the consideration of a claim already denied on direct appeal. *See id.* at 16. Although the government contends that Gilbert cannot seek to re-open and amend his first § 2255 in light of *Gonzalez v. Crosby*, 545 U.S. 524 (2005), *see* BIO at 30-31, only this Court can decide whether a federal prisoner (like Gilbert) may re-open and amend his first § 2255 motion to

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constitutional or not). A circuit conflict remains, however, concerning whether the *Sawyer* exception is even limited to constitutional claims. *See* Pet. at 27-28 (citing *United States v. Mikalajunas*, 186 F.3d 490, 495 n.4 (4th Cir. 1999)). The government recognizes this conflict. BIO at 29.

[12] The government also notes that there is a "substantial question" as to whether the *Sawyer* exception survived AEDPA. *Id.* at 29. Only this Court can answer that substantial question. And, Gilbert's case presents the Court with the opportunity to do so.

include a related claim without running afoul of *Gonzalez*. This Court's guidance as to Gilbert's alternative request for relief is therefore needed.

CONCLUSION

For the reasons set forth above and in his petition for writ of certiorari, Petitioner Ezell Gilbert respectfully requests that his petition be granted.

Respectfully submitted,

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_____
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