NO. 13-1221

In the
Supreme Court of the United States

ALBERT WILLIAMS,

PETITIONER,

v.

SUZANNE R. HASTINGS, WARDEN, ET AL.,

RESPONDENT.

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

REPLY BRIEF FOR PETITIONER

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August 13, 2014

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REPLY BRIEF

The government does not disagree with any of the fundamental reasons why certiorari is warranted in this case. It does not dispute that there is a well-recognized circuit split over the circumstances in which a prisoner may invoke 28 U.S.C. § 2255(e) to bring a habeas petition under § 2241. *See* Opp. 20-21. It does not dispute that there are interrelated divisions in authority over whether § 2255(e) restricts a district court's subject-matter jurisdiction and whether § 2255(e) may be used to challenge a prisoner's sentence. *See* Opp. 18-19. Nor does it deny that the question presented is exceptionally important and that this Court has never before addressed the scope of § 2255(e).

The government instead offers a grab bag of artificial reasons for denying certiorari. Most notably, the government suggests that the Court should decline review because, even though the courts of appeals are deeply divided on an issue that has percolated for more than 17 years, they could always change their minds and might eventually resolve the splits themselves. *See* Opp. 19-21. But that false hope has already proved fanciful, with the Seventh Circuit issuing a decision that entrenches the conflict in lower-court authority just days after the government filed its brief. *See* Ltr. from Solicitor General to Hon. Scott Harris, Clerk of Court (Aug. 4, 2014). The government also contends that the lower courts' varying approaches are not that different in substance, even though there are nearly as many different constructions of § 2255(e) as there are circuit courts. *See* Opp. 13, 21, 24. As the petition

demonstrates, however, even minor differences in approach are often outcome determinative. *See* Pet. 17-27. And finally, the government urges the Court to prejudge the merits of petitioner's underlying habeas claims and deny certiorari based on a flawed characterization of Florida's burglary statute and the definition of curtilage. But this Court is "a court of final review and not first view," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (internal quotation marks omitted), and *no court* has ever considered the merits of petitioner's claims. *See* Opp. 24-28. Unless review is granted and this case remanded for the Eleventh Circuit to apply § 2255(e) properly, the merits of petitioner's claims will never receive the fair hearing they deserve.

The government's diversions cannot obscure that this case presents a rare opportunity and ideal vehicle for providing much-needed guidance on the meaning of § 2255(e) and resolving what the courts of appeals have described as a "deep and mature . . . split" in authority. *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1279 (11th Cir. 2013). Respected lower-court judges have recently urged this Court to address the important question presented in this case. *Brown v. Caraway*, 719 F.3d 583, 600-01 (7th Cir. 2013) (statement of Easterbrook, C.J.). That request should not be ignored; the Court should grant review.

I. The Court Should Grant Review To Resolve The Split In Authority Over When And How The Savings Clause Applies.

The government concedes that in considering the circumstances in which § 2255(e) is "inadequate or ineffective," no two circuits have answered the question the same way. Opp. 21. Nonetheless, the government asserts that "any actual disagreement" between the circuits "is quite narrow" and "does not warrant this Court's review." Opp. 18. The government is wrong. As the petition explains, the circuits are confused over the meaning of § 2255(e)'s savings clause and have fractured on several distinct but interrelated issues, applying different savings-clause tests to produce different results in cases across the country. *See* Pet. 16-27.

1. The government acknowledges that there is a significant split in authority between the Seventh Circuit and other circuits over whether the savings clause is jurisdictional. *See* Opp. 19. Yet the government argues that the Court should deny review because the Seventh Circuit "has not had occasion to reconsider its jurisdictional analysis in light of" more recent decisions, including the Eleventh Circuit's decision in this case. *Id.* It hypothesizes that the Seventh Circuit "might well reconsider its outlier holding in future cases." *Id.*

The government has already been proved wrong. The Seventh Circuit took "a fresh look" at the issue and, just days after the government filed its brief, reaffirmed its earlier holding that § 2255(e) is not jurisdictional—thereby cementing the existing circuit split. *Webster v. Caraway*, __ F.3d __, 2014 WL

3767184, at *4 (7th Cir. Aug. 1, 2014). In a careful opinion by Judge Easterbrook, the Seventh Circuit reaffirmed its judgment that, contrary to the views of the government and other circuits, § 2255(e) is not a jurisdictional provision.

In light of that decision, the government has been forced to backtrack. It now argues in a letter filing that, although the split in authority is not going away, review is unwarranted because in both this case and in the recent Seventh Circuit case, the government "opposed collateral review under the savings clause" and the "courts of appeals upheld denial of such relief." SG Letter at 1. That is irrelevant. The division in authority does not vanish merely because the government argued that relief should be denied and the courts then denied relief (albeit for different reasons). The split over whether § 2255(e) is jurisdictional has tremendous practical importance and, on its own, justifies this Court's intervention.

2. The government also concedes that the lower courts disagree over when § 2255 is inadequate or ineffective. *See* Opp. 13-14 & n.6. Nonetheless, the government contends that, save for the Tenth Circuit (which expressly disagrees with its sister circuits), the lower courts' different savings-clause tests do not differ all that much in substance. *See* Opp. 21, 24. But the government's easy generalizations fail to reflect the way the tests are applied in practice; what the government dismisses as nuances in the circuits' "varying rationales" and "formulations" are often outcome determinative. Opp. 13.

a. The government acknowledges that there is at least one clear split in authority: The Tenth Circuit has expressly rejected the position of every other circuit to have addressed the scope of § 2255(e)'s savings clause. Opp. 21; *see also* Pet. 22. The government suggests, however, that the Court should overlook this conflict on the theory that the Tenth Circuit might eventually change its mind. *See* Opp. 21. But there is no reason to think that is likely, any more than it was accurate to think that the Seventh Circuit would change its mind.

The government also notes that the Court has previously denied review in cases implicating this split of authority, but nearly all of those cases involved *in forma pauperis* petitions. *See* Opp. 10 n.3, 21 n.7. The only case that did not—*Prost v. Anderson*—was an outlier that failed to raise any of the interrelated sub-issues that have fractured the lower courts. Granting review in *Prost* may have allowed this Court to reject the Tenth Circuit's approach but unlike this case it would not have provided any opportunity for the Court to clarify the meaning of § 2255(e) more broadly.

b. Putting the Tenth Circuit's decisions to one side, the government suggests that there is no meaningful disagreement between the other circuits because, in its view, all of them apply some form of a circuit-foreclosure test, requiring that a prisoner identify circuit precedent that foreclosed his claim at the time of his direct appeal and first § 2255 motion. Opp. 13-14, 21-23. The government is mistaken. Several circuits do not require that the claim be foreclosed. *See* Pet. 20-21.

The Third Circuit, for example, has never imposed such a test. Indeed, in recent decisions, even after other circuits have expressly adopted a circuit-foreclosure requirement, the Third Circuit has never suggested that circuit foreclosure is required. *See*, *e.g.*, *United States v. Tyler*, 732 F.3d 241, 246 (3d Cir. 2013) (concluding that a prisoner could seek relief without mentioning anything about circuit precedent at the time of his trial, conviction, or first § 2255 motion). Instead, the Third Circuit requires only that a claim be based on a "previously unavailable statutory interpretation" that the prisoner "had no earlier opportunity to raise." Opp. 22 (quoting *In re Dorsainvil*, 119 F.3d 245, 248, 251 (3d Cir. 1997)).

Citing *Dorsainvil*, the government asserts that the Third Circuit's test *requires* foreclosure by existing precedent at the time of the direct appeal and first § 2255 motion. *See id.* But in *Dorsainvil*, the Third Circuit merely concluded that the prisoner "had no earlier opportunity" to raise his claim because when he filed his first § 2255 motion this Court had not yet decided *Bailey v. United States*, 516 U.S. 137 (1995), and thus he "never had an opportunity to challenge his conviction *as inconsistent with the Supreme Court's interpretation* of [the statute]." *In re Dorsainvil*, 119 F.3d 245, 251, 252 (3d Cir. 1997) (emphasis added). It did not matter whether a *Bailey*-like claim would previously have been thwarted by circuit precedent.

Nor has the Ninth Circuit required foreclosure. The government notes that the Ninth Circuit allows § 2255(e)'s savings clause to be used only when a

prisoner "has not had an unobstructed procedural shot at presenting that claim." Opp. 22 (quoting *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006)). But an "unobstructed procedural shot" does not turn on circuit foreclosure; it turns on the timing of the claim and whether the claim is based on a decision interpreting a statute issued after the prisoner's first § 2255 motion was denied. *See Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006).

Even among those circuits that have adopted a circuit-foreclosure requirement, there is substantial disagreement over what that means—*i.e.*, whether the prisoner's precise claim must have been rejected by an earlier circuit court decision or whether his claim must merely have been inconsistent with then-existing circuit precedent. In this case, the Eleventh Circuit applied a circuit-foreclosure test that required petitioner to identify directly on-point precedent holding that his exact offense—second-degree burglary of a dwelling under Florida law—was a violent felony before it would find a *Begay* challenge to his predicate offense foreclosed. In other words, even though earlier analogous circuit precedent would have foreclosed petitioner's claim, that was not sufficient to save his claim under § 2255(e). *See* Pet. 14, 19.

That is not what the Seventh Circuit (or the Fifth Circuit) requires. *See* Pet. 18-19. To the contrary, the Seventh Circuit finds circuit foreclosure whenever a prisoner's claim falls within the scope of an earlier, broader ruling, even if the court had not

addressed and rejected the precise claim the prisoner has raised. *See id.*

In *Brown v. Caraway*, for example, the prisoner claimed that he was improperly sentenced as a career offender because his conviction for third-degree arson was not a "crime of violence." 719 F.3d at 585. No precedent specifically held that his arson conviction qualified as a crime of violence. Nonetheless, the Seventh Circuit concluded that the prisoner's claim was foreclosed because the circuit in which he was convicted had previously determined that first-degree reckless endangering qualified as a crime of violence. Had the prisoner made the argument he was currently advancing, he would have lost under that reckless-endangering precedent. *See id.* at 595; *see also Light v. Caraway*, __ F.3d __, 2014 WL 3811001, at *4 (7th Cir. Aug. 4, 2014) (interpreting earlier case "to encompass categories of logically related offenses, rather than only the specific offense in question").

c. In addition to the disagreement over whether § 2255(e) incorporates a circuit-foreclosure test, the lower courts are also divided on whether § 2255(e)'s savings clause applies to sentencing claims. *See* Pet. 22-24. The government has no meaningful response to this point. Instead, sounding its familiar refrain, the government suggests that certiorari is not needed "at the present time" because the relevant Fifth and Sixth Circuit decisions are nonprecedential and, therefore, those courts might potentially reconsider their approach in future cases. *See id.*

But once again the government offers no reason to think that those courts will reconsider their positions. The courts have addressed this issue in

numerous cases, and in each case the issue was dispositive. *See Newton v. Maye*, 517 F. App'x 266 (5th Cir. 2013) (per curiam); *Brown v. Hogsten*, 503 F. App'x 342 (6th Cir. 2012) (per curiam); *Wiwo v. Medina*, 491 F. App'x 482 (5th Cir. 2012) (per curiam); *Jones v. Castillo*, 489 F. App'x 864 (6th Cir. 2012) (per curiam); *Maddox v. Maye*, 455 F. App'x 435 (5th Cir. 2011) (per curiam); *Dority v. Roy*, 402 F. App'x 2 (5th Cir. 2010) (per curiam); *Devore v. Menifee*, 283 F. App'x 219 (5th Cir. 2008) (per curiam). Indeed, the decisions are unpublished because the courts were applying what they believed were well-established rules of law to facts similar to those in earlier published opinions. *See* 5th Cir. R. 47.5.1; 6th Cir. I.O.P. 32.1(b).

There is no reason that prisoners with identical sentencing claims, who differ only with respect to the district in which they happen to be incarcerated, should be treated differently. The right to relief should not turn on the happenstance of where the Department of Corrections decides to house an inmate.

II. The Question Presented Is Exceptionally Important And This Case Presents An Ideal Vehicle For Resolving It.

The government cannot dispute the "exceptional importance" of the question presented. Gov't Resp. to Pet. for Reh'g En Banc at 15, *Prost v. Anderson*, No. 08-1455 (10th Cir. Apr. 25, 2011) (agreeing the issue is exceptionally important). The lower courts have spent 17 years grappling with the scope of the savings clause, producing divergent results on an

issue that ultimately determines whether federal prisoners are able to secure relief when a retroactive decision of this Court implicates their liberty interests. *See* Pet. 31-33. The government instead contends that this case presents a "poor vehicle" for addressing the question presented. Opp. 24.

But the "vehicle" issue concocted by the government is not really a vehicle issue at all. The government does not suggest that there is any impediment to the Court's review. Nor does it suggest that the Court could not reach and resolve all three dimensions of the disagreement between the circuits implicated by the question presented. The government argues only that petitioner's underlying sentencing claim lacks merit and that he therefore would not be entitled to habeas relief even if the savings clause applied. *See* Opp. 24-28.

The government's attempt to skip over the question presented and go straight to the merits is improper. No court has ever addressed the merits of petitioner's underlying *Begay* claim—despite his "multiple post-conviction motions" challenging the validity of his sentence enhancement. Opp. 4. And the merits should first be decided by the lower courts, not this Court. This Court "do[es] not decide in the first instance issues not decided below." *Zivotofsky*, 132 S. Ct. at 1430 (quoting *NCAA v. Smith*, 525 U.S. 459, 470 (1999)).

Moreover, the merits question is nowhere near as simple as the government tries to make it seem. Petitioner's claim turns on what Florida law meant 25 years ago and whether, under Florida's definition of "curtilage," its burglary statute as interpreted at

the time encompassed an offense that looked more like trespass than burglary. *See* Pet. 33-35. The government largely sidesteps those important questions by focusing on *James v. United States*, 550 U.S. 192 (2007), which held that attempted burglary of a dwelling under Florida law qualifies as a violent felony. Under the logic of *James*, the government contends, petitioner's burglary convictions also qualify as violent felonies. *See* Opp. 25. But *James* involved burglaries committed after the Florida Supreme Court's 1995 decision in *State v. Hamilton*, 660 So. 2d 1038 (Fla. 1995), which significantly narrowed the definition of "curtilage" under Florida law. Because *Hamilton* does not apply to petitioner's burglary conviction, neither does *James*. (The Eleventh Circuit's decision in *United States v. Matthews*, 466 F.3d 1271 (11th Cir. 2006), on which the government also relies, does not address this question either. Both parties there assumed that Florida's definition of "curtilage" was narrowly drawn at the time of the defendant's offenses. *See* Br. of United States, *United States v. Matthews*, No. 05-13447, 2006 WL 2923564, at 10 (Jan. 12, 2006); Reply Br., *United States v. Matthews*, No. 05-13447, 2006 WL 2923565 (Feb. 6, 2006).)

Nor is it clear, contrary to the government's suggestion, *see* Opp. 26-27, that *Sykes v. United States*, 131 S. Ct. 2267 (2011), narrowed *Begay* to such an extent that it precludes petitioner's *Begay*-based claim. Even if *Sykes* narrowed *Begay*, that does not mean that when petitioner committed his crime, violations of the applicable burglary statute "present[ed] a serious potential risk of physical injury to another." *Sykes*, 131 S. Ct. 2273. To the contrary,

at the time, the burglary statute encompassed offenses such as stealing a bicycle from the driveway of a home, *see J.E.S. v. State*, 453 So. 2d 168 (Fla. 1st D.C.A. 1984), and "stealing apples from a neighbor's backyard," *United States v. Pluta*, 144 F.3d 968, 975-76 (6th Cir. 1998)—offenses that do not ordinarily pose a serious risk of injury to another.

In any event, the dispositive point is that this Court should not avoid resolving the entrenched splits in lower-court authority by prejudging the merits. The question presented is a procedural one, and the merits have little to do with it. Instead, it is time for this Court to clean up this "messy field," *Prost v. Anderson*, 636 F.3d 578, 594 (10th Cir. 2011), and to determine the extent to which prisoners may bring claims for habeas relief to obtain the benefit of this Court's retroactive statutory decisions. This petition presents the Court with an ideal opportunity to address every dimension of § 2255(e)'s interrelated savings-clause issues and to bring clarity to an area of the law that has confused the lower courts for years.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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