No. ___

IN THE

Supreme Court of the United States

JERMAINE LENARD MOSS,

Petitioner,

v.

KENNY ATKINSON,
WARDEN,

Respondent.

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

Federal prisoners generally may challenge their convictions and sentences only by filing a direct appeal and, if unsuccessful there, one petition for collateral review in the sentencing court under 28 U.S.C. § 2255. Indeed, § 2255(h) expressly bars "second or successive" petitions unless the prisoner can point to "newly discovered evidence" or a "new" retroactive "rule of constitutional law" recognized by this Court.

But what if, after a prisoner loses both her direct appeal and § 2255 petition, the *statutory* rule under which she was convicted or sentenced changes in her favor with retroactive effect? Section 2255(h) would appear to block further collateral review, as no explicit exception for new statutory rules appears there. That would be an injustice, as the prisoner would remain incarcerated with no procedural mechanism to test whether her detention is now unlawful.

The saving clause of § 2255(e) fills that gap. It says a federal prisoner may seek an additional round of collateral review 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 [or her] detention." Interpreting this clause, nine circuits have held that § 2255 is "inadequate or ineffective" in the circumstance described above, while two circuits have held that it is not.

The question presented is whether a federal prisoner may proceed through § 2255(e)'s saving clause to seek collateral review under § 2241 when that prisoner has demonstrated a favorable, retroactive change in the statutory rule that originally established the legality of his or her conviction or sentence.

PARTIES TO THE PROCEEDING AND RELATED CASES

Petitioner is Jermaine Lenard Moss, an individual. He was the Petitioner-Appellant below.

Respondent is Kenny Atkinson, a warden. He was the Respondent-Appellee below.

There are no corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

United States Supreme Court:

Moss v. United States, No. 08-7069 (Cert Denied December 1, 2008)

United States Court of Appeals for the Fourth Circuit:

Moss v. Atkinson, No. 18-6096 (Decided April 19, 2019)

United States Court of Appeals for the Eleventh Circuit:

United States v. Moss, No. 07-14808 (Decided August 4, 2008)

United States District Court for the Middle District of Florida:

Moss v. United States, No. 8:09-cv-2463 (Decided October 15, 2010)

United States v. Moss, No. 8:06-cr-464 (Decided May 6, 2013)

Moss v. United States, No. 8:13-cv-1194 (Decided May 6, 2013)

United States District Court for the Southern District of Mississippi:

Moss v. Fisher, No. 3:14-cv-321 (Decided May 27, 2014)

United States District Court for the Eastern District of North Carolina:

Moss v. Atkinson, No. 5:17-HC-2078 (Decided January 22, 2018)

Florida Circuit Court, Second Judicial Circuit, Leon County, Florida:

State of Florida v. Moss, No. 2004 CF 001410 A (Plea Accepted June 4, 2004)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jermaine Lenard Moss 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 Fourth Circuit's opinion (Pet. App. 1a–9a) is unpublished but reported at 767 F. App'x 466. The district court's judgment (Pet. App. 10a–21a) is unreported.

JURISDICTION

The Fourth Circuit entered judgment on April 19, 2019 (Pet. App. 1a–9a) and denied rehearing on July 1, 2019. Pet. App. 22a. On September 17, 2019, Chief Justice Roberts extended the time to file a petition for a writ of certiorari until November 26, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions (28 U.S.C. §§ 2241 and 2255) are reprinted at Pet. App. 23a–27a.

INTRODUCTION

This case involves a "deep and mature circuit split" about the meaning of 28 U.S.C. § 2255(e)'s "saving clause," *Bryant v. Warden*, 738 F.3d 1253, 1279 (11th Cir. 2013)—a procedural question about the law of habeas corpus whose "complexity" has been described as "staggering," *Chazen v. Marske*, 938 F.3d 851, 856 (7th Cir. 2019). Given the recurring nature of knotty issues concerning the saving clause's reach, federal judges have called the question presented here one "of significant national importance" that is "best considered by [this] Court at the earliest possible date." *United States v. Wheeler*, 734 F. App'x 892, 893 (4th Cir. 2018) (Agee, J., statement respecting denial of rehearing en banc). Indeed, "sooner may be better than later," as the "rift" among circuits is "unlikely to close on its own" and, "so long as it lasts, the vagaries of the prison lottery will dictate how much postconviction review a prisoner gets." *Wright v. Spaulding*, 939 F.3d 695, 710 (6th Cir. 2019) (Thapar, J., concurring).

The government appears to share these views: The Solicitor General unsuccessfully petitioned for certiorari on a similar question earlier this year. *See* Petition for Certiorari, *United States v. Wheeler*, 139 S. Ct. 1318 (2019) (No. 18-420), 2018 WL 4846931, at *12 (*Wheeler* Pet.). In that case, the government said this Court's intervention was necessary to resolve a "widespread circuit conflict" that was producing "divergent outcomes for litigants in different jurisdictions on an issue of great significance." *Id.* at 12–13.

Moss agrees with the government on this point, and the petition should be granted "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." *Wheeler*, 734 F. App'x at 894 (statement of Agee, J.).

At least three reasons support granting the petition. *First*, the courts of appeals disagree deeply about the meaning of § 2255(e)'s saving clause. That much is undisputed and well-documented. As the Third Circuit explained, "[n]ine . . . circuits agree, though based on widely divergent rationales, that the saving clause permits a prisoner to challenge his detention when a change in statutory interpretation raises the potential that he was convicted of conduct that the law does not make criminal," while "[t]wo circuits see things differently, holding that an intervening change in statutory interpretation cannot render § 2255 inadequate or ineffective." *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 179–80 (3d Cir. 2017).

Second, questions about the saving clause's meaning are nationally important and recurring. Again, there is no debate about this. Courts, the government, and commentators have all recognized that the split causes arbitrary disparate treatment of federal prisoners across the country who are "similarly situated in all respects but one: they are incarcerated in federal prisons located in different circuits." *Id.* at 181. Only this Court's review can provide uniformity in this area.

Third, this case is an ideal vehicle to resolve the conflict. To start, this case has it all. Review here would allow the Court to decide (i) whether the saving clause applies at all to changes in statutory rules, (ii) whether (if saving-clause relief is allowed) the clause applies only to erroneous convictions or also to erroneous sentences, and (iii) whether relief turns on changes in the

substantive criminal law of the circuit of conviction or confinement. Further, vehicle problems that beset other cases raising similar issues are not present here, as there are no mootness or waiver concerns, the case is not in an interlocutory posture, and the case was fully briefed and argued in the court of appeals. Finally, the decision below is incorrect. The Fourth Circuit implicitly applied a wooden "expressly overruled" standard to analyze whether another circuit's statutory rule changed in Moss's favor. That standard is out of step, not only with the saving clause's text, but also with the equitable core of the writ of habeas corpus.

The petition should be granted.

STATEMENT

A. In November 2006, a federal grand jury in the Middle District of Florida charged Moss with two drug offenses under 21 U.S.C. § 841 and one firearms offense under 18 U.S.C. § 924. J.A. 21–25.* Moss elected to proceed to a jury trial on all charges.

With trial looming, the government filed an information under 21 U.S.C. § 851 stating that, if the jury convicted Moss at trial, the government would seek enhanced penalties under 21 U.S.C. § 841(b). J.A. 36–38. Section 841(b) mandates specific penalties for specific kinds and quantities of drugs, with penalties varying "dramatically" based on the "amount of the drug possessed." *Apprendi v. New Jersey*, 530 U.S. 466, 564 (2000) (Breyer, J., dissenting). Punishments increase considerably under § 841(b)(1) for alleged recidivists with a "prior conviction for a felony drug offense."

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* "J.A." refers to the joint appendix, and "S.A." refers to the sealed appendix, filed in *Moss v. Atkinson*, 18-6096 (4th Cir.).

In its information, the government claimed that Moss was a recidivist of this kind with a "prior conviction for a felony drug offense" under § 841(b)(1). J.A. 36–38. That "prior conviction," the government contended, occurred in June 2004 when Moss "entered a plea of nolo contendere and adjudication was withheld for felony possession of cocaine" in Florida state court. J.A. 37.

Notably, adjudication of guilt is withheld in Florida state criminal proceedings only when the "trial court has found that the defendant is not likely to engage in further criminal conduct and that justice and the welfare of society do not require that the defendant suffer the penalty imposed by law." *Clarke v. United States*, 184 So.3d 1107, 1115 (Fla. 2016).

Nonetheless, then-unquestioned Eleventh Circuit precedent squarely supported the government's pursuit of enhanced penalties: *United States v. Mejias* held that a "prior plea of nolo contendere with adjudication withheld in Florida state court [was] a 'conviction' that support[ed] an enhanced sentence" under § 841(b)(1). 47 F.3d 401, 402 (11th Cir. 1995) (per curiam); *see* J.A. 37–38 & n.1. Applying *Mejias* to Moss's case would *double* his mandatory-minimum prison terms, from 10 years to 20 years on his first drug charge under § 841(b)(1)(A), and from 5 years to 10 years on his second drug charge under § 841(b)(1)(B). It would also *double* his mandatory-minimum terms of supervised release under the same statutory provisions, from 5 years to 10 years on his first drug charge, and from 4 years to 8 years on his second drug charge.

B. The jury convicted Moss on all charges in June 2007, and sentencing was scheduled for later that

year. As sentencing approached, the probation office issued its presentence-investigation report, agreeing with the government that *Mejias* applied to Moss's case. S.A. 1–24. Moss, however, objected to the "propriety of an enhancement" under § 841(b)(1) and *Mejias*, because he was "being punished for the same [Florida] crime twice for an offense that the [Florida state] Court never considered him guilty of in the first instance." J.A. 42, 45.

C. The sentencing hearing took place in October 2007. There, Moss conceded that *Mejias* supported the enhanced sentence. J.A. 83 ("[T]he Eleventh Circuit agrees with [the government]"). But he still objected, arguing that a Florida "withhold of adjudication [was] not a conviction" and "should not [have been] used to enhance" his sentence to a "mandatory 20 years when adjudication was withheld." J.A. 83.

The sentencing court, however, agreed with the government that *Mejias* applied, solidifying that Moss would spend, at the absolute minimum, 20 years of his life in federal prison.

With this 20-year baseline established, the only remaining question at sentencing was whether Moss should serve *additional* prison time beyond 20 years under the sentencing factors of 18 U.S.C. § 3553(a). Moss thus asked for the lowest possible sentence available to him: 20 years in prison. J.A. 93 ("I believe that the minimum mandatory of 20 years would be a reasonable sentence"), 94 ("I would just say that a reasonable sentence would be [the] 20-year mandatory minimum"). But in the end, Moss—then 27 years old—received 27 years in prison. J.A. 60, 104–05.

D. Moss thereafter attempted to overturn his convictions and sentence in several ways. *First*, he sought reversal on direct appeal in the Eleventh Circuit and in this Court, but he was unsuccessful. *See* 290 F. App'x 234, 253 (11th Cir.), *cert. denied*, 555 U.S. 1061 (2008). *Second*, he sought collateral review in the Middle District of Florida under § 2255, but he was unsuccessful there as well. *See* 2010 WL 4056032, at *18 (M.D. Fla. Oct. 15, 2010), *certificate of appealability denied*, No. 10-15759 (11th Cir. Apr. 8, 2011). And *third*, after Moss was transferred to a Mississippi federal prison, he sought collateral review in federal district court there under § 2255(e)'s saving clause and § 2241—but he lost there as well. *See* 2014 WL 2196392 (S.D. Miss. May 27, 2014). All three times, Moss lacked a nonfrivolous ground to challenge, and thus did not challenge, his § 841(b)(1) sentence enhancements, as *Mejias* remained firmly the law in the Eleventh Circuit.

E. That all changed in May 2016, when the Eleventh Circuit decided *United States v. Clarke*, 822 F.3d 1213 (11th Cir. 2016) (per curiam). *Clarke* erased the stated justifications for, and therefore cast substantial doubt upon, *Mejias*'s holding that a Florida withheld adjudication, such as Moss's, was a prior "conviction" under § 841(b)(1).

To understand why, start with *Mejias* itself. *Mejias* looked to just one source of "federal law" to define the word "conviction" in § 841(b)(1): the Eleventh Circuit's two-paragraph decision in *United States v. Jones*, 910 F.2d 760 (11th Cir. 1990) (per curiam). *See Mejias*, 47 F.3d at 404. But *Jones*, just like *Mejias*, also looked to just one source of authority for its holding that a Florida withheld adjudication was a "conviction" under the

federal sentencing guidelines: earlier Eleventh Circuit precedent holding that a Florida withheld adjudication was a "conviction" under the federal felon-in-possession statute. *Jones*, 910 F.2d at 760–61 (relying on, for example, *United States v. Grinkiewicz*, 873 F.2d 253, 255 (11th Cir. 1989) (per curiam), and stating, without further analysis, that the "reasoning applied in these cases is applicable in this case").

Clarke, however, overturned the law that supported *Jones* and therefore, by extension, *Mejias*. *Clarke* held that a Florida withheld adjudication *did not* constitute a "conviction" under the federal felon-in-possession statute, 18 U.S.C. § 922, expressly overruling the contrary Eleventh Circuit precedent upon which *Jones* was based. *Compare Clarke*, 822 F.3d at 1214–15 ("*Grinkiewicz* was wrong"), *with Jones*, 910 F.2d at 760–61 (relying on *Grinkiewicz* and other felon-in-possession cases). Thus, because of *Clarke*, *Mejias* now rests entirely on the reasoning of a prior Eleventh Circuit decision (*Jones*) that, in turn, rests entirely on the reasoning of a line of Eleventh Circuit precedent that *Clarke* expressly overruled: federal felon-in-possession precedent. At the absolute minimum, then, substantial doubt exists about whether *Mejias* remains good law in the Eleventh Circuit after *Clarke*.

Moss thus filed a pro se § 2241 petition—this time in the Eastern District of North Carolina, after yet another prison transfer—seeking the opportunity to argue that *Clarke* worked a change in the statutory rule that originally established the legality of his sentence: *Mejias*. J.A. 183, 201–03. For the applicable test, he relied on the Fourth Circuit's decision in *In re Jones*, 226 F.3d 328 (4th Cir. 2000), in which the court held that § 2255 was "inadequate and ineffective to test the

legality of a conviction" under § 2255(e)'s saving clause when (among other things) the statutory rule that originally made the prisoner's conviction lawful "changed" with retroactive effect after direct appeal and an initial § 2255 petition. *Id.* at 333–34.

Without addressing *Clarke*'s effect on *Mejias* in any way, however, the district court denied Moss's § 2241 petition, concluding that *Mejias* remained the law in the Eleventh Circuit. Pet. App. 15a n.1, 19a–20a.

F. Moss appealed to the Fourth Circuit, seeking the opportunity for further collateral review of his sentence in light of *Clarke*. While his appeal was pending, the Fourth Circuit decided *United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1318 (2019). *Wheeler* extended *In re Jones*'s saving-clause test—applicable only to erroneous convictions—to sentencing errors and requires a similar showing that the statutory rule that originally "established the legality of the sentence" at issue "changed" after direct appeal and initial § 2255 proceedings. *Id.* at 429. The court of appeals therefore appointed the undersigned counsel to brief and argue the appeal for Moss under *Wheeler*'s new test. Under that new test, Moss argued, *Clarke* effectively changed the law of *Mejias*, requiring vacatur and a remand to grant the writ and order the respondent, Warden Kenny Atkinson, to present Moss in the Middle District of Florida for resentencing. *See, e.g.*, *Salazar v. Sherrod*, No. 09-619, 2012 WL 3779075, at *1, *7 (S.D. Ill. Aug. 31, 2012) (ordering resentencing in the sentencing court under the saving clause); *McCoy v. Rios*, No. 10-1239, 2012 WL 3267707, at *2 (C.D. Ill. Aug. 9, 2012) (same).

The Fourth Circuit, however, affirmed the decision to deny Moss the opportunity to seek further review of his sentence under §§ 2255(e) and 2241. Pet. App. 1a–9a. In so ruling, the panel implicitly read the word "changed" from *Wheeler*'s test narrowly to mean "expressly overruled" and found that *Clarke* had not expressly overruled *Mejias*, thus precluding relief under *Wheeler*'s test. Pet. App. 4a–8a. To confirm its supposition that *Mejias* remained good law after *Clarke*, the panel relied on unpublished Eleventh Circuit decisions that did not directly address *Clarke*'s effect on *Mejias*. Pet. App. 7a–8a (citing, for example, *United States v. Solis-Alonzo*, 723 F. App'x 863, 865 (11th Cir. 2018), and *United States v. Marius*, 678 F. App'x 960, 964 (11th Cir. 2017)).

Moss sought rehearing, arguing that the panel's effective "expressly overruled" standard conflicted with decisions of other courts of appeals, ignored the equitable nature of habeas proceedings, and would arrogate to the Fourth Circuit the power to decide the state of another circuit's law without procedural safeguards in place for prisoners in Moss's situation. The court of appeals, however, denied rehearing. Pet. App. 22a.

* * * * *

All of this means one thing: Absent this Court's review, Moss will remain in federal prison for an additional *ten years* without ever receiving a definitive determination by the Eleventh Circuit in his case about whether his sentence remains lawful after *Clarke*.

REASONS TO GRANT THE PETITION

The petition should be granted for at least three reasons. *First*, this case involves a longstanding and acknowledged circuit split about the meaning of

§ 2255(e)'s saving clause. *Second*, questions about the saving clause's meaning are nationally important and recurring. And *third*, this case presents an ideal vehicle to settle the division of authority.

I. The Circuits Disagree About The Meaning Of § 2255(e)'s Saving Clause

There can be no debate: The courts of appeals disagree profoundly about what the saving clause means. Judges have recognized the entrenched split of authority. *E.g.*, *Wright*, 939 F.3d at 710 (Thapar, J., concurring) ("The circuits are already split" on this issue); *Wheeler*, 734 F. App'x at 893 (statement of Agee, J.) (describing the "existing circuit split"); *Bruce*, 868 F.3d at 179–80 (same); *Prost v. Anderson*, 636 F.3d 578, 594 (10th Cir. 2011) (Gorsuch, J.) ("Long before we arrived on the scene the circuits were already divided").

Commentators, too, have recognized the circuit split. *E.g.*, B. Means, Federal Habeas Manual § 1:29 (2019) (describing the split in detail); J. Case, *Kaleidoscopic Chaos*, 45 U. Mem. L. Rev. 1, 4, 53–54 (2014) (explaining the "deep and fractured circuit split"); Comment, Prost v. Anderson *and the Enigmatic Savings Clause*, 89 Denv. U. L. Rev. 435, 456 (2012) ("It is now up to the Supreme Court to settle the circuit split").

And even the government has repeatedly acknowledged the split before this Court. *E.g.*, Brief in Opposition to Certiorari at 13–14, *Walker v. English*, No. 19-52 (U.S. Sep. 27, 2019) (*Walker* Opp'n) (describing the "division of authority among the courts of appeals"); Brief in Opposition to Certiorari at 18–20, *Jones v. Underwood*, No. 18-9495 (U.S. Sep. 27, 2019) (*Jones* Opp'n) (same); *Wheeler* Pet. 12 (discussing the "widespread circuit conflict").

To put to rights this entrenched divide and to end the disparate treatment that it creates for federal prisoners across the nation, Moss respectfully submits that the Court "should step in" now. *Wright*, 939 F.3d at 710 (Thapar, J., concurring).

A. Nine Circuits Permit Saving-Clause Relief, But Under Widely Varying Standards

Nine circuits currently allow prisoners to seek another round of collateral review under § 2255(e)'s saving clause and § 2241 based on new retroactive rules of statutory interpretation. But even courts in the majority have adopted "widely divergent rationales," *Bruce*, 868 F.3d at 179, and "different formulations" of the applicable test, *Wheeler* Pet. 24. Judges and commentators alike have recognized this. *E.g.*, *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002) ("Varying standards have been adopted by the circuits"); *Samak v. Warden,* 766 F.3d 1271, 1293 (11th Cir. 2014) (Pryor, J., concurring) (The "circuits have adopted varying interpretations of the savings clause"); *Wheeler*, 734 F. App'x at 894 n.2 (Thacker, J., statement on petition for rehearing en banc) ("[D]ecisions [in the majority] provide varying tests and analyses"); *Kaleidoscopic Chaos*, *supra*, at 15 (The "circuit courts have devised increasingly distinct and divergent tests," and the "patchwork" is "staggering"); J. Case, *Text Me: A Text-Based Interpretation of 28 U.S.C. § 2255(e)*, 103 Ky. L. J. 169, 170 (2015) ("The plethora of circuit court tests is well-documented").

1. Start with the First Circuit. That court holds broadly that "habeas corpus relief under § 2241 [and the saving clause of § 2255(e)] remains available for federal prisoners in limited circumstances." *United States v. Barrett*, 178 F.3d 34, 49–54 (1st Cir. 1999).

"[A]dequacy and effectiveness must be judged ex ante" in the First Circuit, and "post-conviction relief can be termed 'inadequate' or 'ineffective' [under the saving clause] only when, in a particular case, the configuration of section 2255 is such 'as to deny a convicted defendant *any* opportunity for judicial rectification.'" *Trenkler v. United States*, 536 F.3d 85, 99 (1st Cir. 2008) (quoting *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998)).

2. The Second Circuit's test is completely different. That court holds that saving-clause relief is available only in that "set of cases in which the petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious *constitutional* questions." *Triestman v. United States*, 124 F.3d 361, 377 (2d Cir. 1997) (emphasis added); *see, e.g.*, *Adams v. United States*, 372 F.3d 132, 134–36 (2d Cir. 2004); *Cephas v. Nash*, 328 F.3d 98, 103–08 (2d Cir. 2003); *Poindexter v. Nash*, 333 F.3d 372, 378–82 (2d Cir. 2003).

3. The Third Circuit, in contrast, holds more broadly that a "prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law *may* negate" and which "applie[s] retroactively" can proceed through the saving clause for additional collateral review under § 2241. *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997) (emphasis added); *see, e.g.*, *Cordaro v. United States*, 933 F.3d 232, 239 (3d Cir. 2019); *Gardner v. Warden Lewisburg USP*, 845 F.3d 99, 103 (3d Cir. 2017); *Bruce*, 868 F.3d at 180; *United States v. Tyler*, 732 F.3d 241, 246 (3d Cir. 2013). "Invoking the district court's jurisdiction" under § 2255(e) in the Third Circuit, however, "requires only that the record

supports 'at least a sufficiently *colorable* claim' that these conditions are met." *Cordaro*, 933 F.3d at 240 (emphasis added) (quoting *Dorsainvil*, 119 F.3d at 252). And the court has also held that saving-clause relief is available simply where the petitioner "would have *no other means* of having his or her claim heard." *United States v. Brooks*, 230 F.3d 643, 648 (3d Cir. 2000).

4. In the Fourth Circuit, in comparison, § 2255 is considered "inadequate and ineffective to test the legality of a *conviction*" under a three-part test, which requires a showing that:

> (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.

In re Jones, 226 F.3d at 333–34 (emphasis added); *see, e.g.*, *Hahn v. Moseley*, 931 F.3d 295, 300 (4th Cir. 2019); *Rice v. Rivera*, 617 F.3d 802, 807 (4th Cir. 2010).

But the Fourth Circuit is also one of three circuits (along with the Sixth and Seventh Circuits) that has extended saving-clause relief to sentencing errors, holding that § 2555 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.

Wheeler, 886 F.3d at 429 (emphasis added); *see Lester v. Flournoy*, 909 F.3d 708, 712 (4th Cir. 2018).

5. The Fifth Circuit, in contrast, applies a narrower test. There, the saving-clause test for erroneous convictions has three elements: "(1) the petition raises a claim 'that is based on a retroactively applicable *Supreme Court* decision'; (2) the claim was previously 'foreclosed by circuit law at the time when [it] should have been raised in petitioner's trial, appeal or first § 2255 motion'; and (3) that retroactively applicable decision establishes that 'the petitioner may have been convicted of a nonexistent offense.'" *Garland v. Roy*, 615 F.3d 391, 394 (5th Cir. 2010) (emphasis added) (quoting *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001)). The Fifth Circuit thus does not allow relief for changes in *circuit* precedent, and it has also declined to apply the clause to sentencing errors. *See In re Bradford*, 660 F.3d 226, 230 (5th Cir. 2011).

6. In the Sixth Circuit, on the other hand, saving-clause relief is available more broadly for both erroneous convictions and sentences, and the test requires the following:

> [A] federal prisoner who has already filed a § 2255 motion and cannot file another one cannot access § 2241 *just* because a new Supreme

> Court case hints his conviction or sentence may be defective. Rather, the prisoner must *also* show that binding adverse precedent (or some greater obstacle) left him with "no reasonable opportunity" to make his argument any earlier, "either when he was convicted and appealed or later when he filed a motion for postconviction relief under section 2255."

Wright, 939 F.3d at 703 (quoting *Davenport*, 147 F.3d at 610); *see Hill v. Masters*, 836 F.3d 591, 599 (6th Cir. 2016).

Notably, however, the Sixth Circuit has "glossed over" parts of its own test in several published decisions, generating confusion about what is and is not required. *Wright*, 939 F.3d at 703 n.5 (citing, as examples, *Harrington v. Ormond*, 900 F.3d 246, 249 (6th Cir. 2018), *Paulino v. United States*, 352 F.3d 1056, 1061 (6th Cir. 2003), and *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003)).

7. The Seventh Circuit likewise applies a broader test applicable to both erroneous convictions and sentences. Under that test, a prisoner must establish that "(1) the claim relies on a statutory interpretation case, not a constitutional case, and thus could not have been invoked by a successive § 2255 motion; (2) the petitioner could not have invoked the decision in his first § 2255 motion and the decision applies retroactively; and (3) the error is grave enough to be deemed a miscarriage of justice." *Chazen*, 938 F.3d at 856 (quoting *Beason v. Marske*, 926 F.3d 932, 935 (7th Cir. 2019)).

But the court has "not been consistent in [its] articulation," and has "employed various formulations," of the test's second requirement, *id.* at 861, prompting

one member of the court to say recently: "We need to pick one," *id.* at 866 (Barrett, J., concurring).

"In some instances, [the Seventh Circuit has] said that satisfying this [second] condition requires a petitioner to show that he is relying on a 'new rule' that applies 'retroactively to cases on collateral review and could not have been invoked in his earlier proceeding.'" *Id.* at 861 (majority opinion) (quoting *Camacho v. English*, 872 F.3d 811, 813 (7th Cir. 2017)). In other cases, the court has "held that a petitioner seeking relief under § 2241 need only show that the case on which he relies had not yet been decided at the time of his § 2255 petition." *Id.* (citing *Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012)). And "[i]n still other cases, [the court has] employed a 'slightly higher standard,' requiring a petitioner to show not only that he relies on a newly decided case of statutory interpretation, but also that, at the time of his initial § 2255 petition, his claim was 'foreclosed by binding precedent' in the circuit of his conviction." *Id.* at 861–62 (quoting *Brown v. Caraway*, 719 F.3d 583, 595 (7th Cir. 2013)).

Thus, as Judge Barrett put it, the Seventh Circuit "has stated the 'saving clause' test in so many different ways that it is hard to identify exactly what it requires." *Id.* at 863 (Barrett, J., concurring).

8. In the Ninth Circuit, a "petition meets the escape hatch criteria" of the saving clause for an erroneous conviction only in the narrow circumstance where a prisoner "makes a claim of actual innocence" and "has not had an unobstructed procedural shot at presenting that claim." *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011) (quoting *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006)).

9. Finally, the D.C. Circuit holds, in line with a 1998 Seventh Circuit decision, that § 2255 "can fairly be termed inadequate when it is so configured as to deny a convicted defendant *any* opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense." *Smith*, 285 F.3d at 8 (quoting *Davenport*, 147 F.3d at 611).

B. Two Circuits Categorically Disallow Saving-Clause Relief

On the other side of the split, two circuits categorically disallow saving-clause relief for new retroactive statutory rules based on a restrictive reading of the statutory language "appears . . . inadequate or ineffective to test the legality of [a prisoner's] detention."

1. The Tenth Circuit was the first court to so hold. *Prost v. Anderson* concluded in 2011 that a prisoner "can proceed to § 2241 [under the saving clause] only if his initial § 2255 motion was *itself* inadequate or ineffective to the task of providing the petitioner with a *chance* to *test* his sentence or conviction." 636 F.3d at 587. In other words, *Prost* held, the saving clause reaches only those truly exceptional circumstances when a prisoner, in fact, cannot file an initial § 2255 petition—for example, when the sentencing court has been "abolished" or "literally dissolve[d]" after sentencing and before the chance for collateral review. *Id.* at 588. *Prost* said the clause does not apply to new retroactive statutory rules because—even if binding precedent squarely established the legality of a conviction or sentence when the initial § 2255 petition was filed, and even though discretionary appellate review is ex-

ceedingly rare and not focused on mere error correction—the prisoner still could have asked the court of appeals sitting en banc or this Court to "undo that precedent." *Id.* at 590.

Judge Seymour dissented from the majority's holding that saving-clause relief was categorically disallowed for new statutory rules, stating that the majority's decision "creat[ed] an unnecessary circuit split." *Id.* at 599. The "fundamental purpose of habeas corpus and collateral review," she explained, is to "afford a prisoner a 'reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.'" *Id.* at 605 (quoting *Davenport*, 147 F.3d at 609). And the "notion that an actually innocent prisoner can adequately and effectively 'test' the legality of his conviction when he has no legal basis in his circuit for doing so" when filing his first § 2255 petition "cannot be squared with this central purpose of habeas review or the plain language of the savings clause." *Id.*

2. Sitting en banc and reversing its precedent allowing saving-clause relief, the Eleventh Circuit adopted the Tenth Circuit's view in *McCarthan v. Director of Goodwill Industries–Suncoast, Inc.*, 851 F.3d 1076, 1080 (11th Cir. 2017). There, the court held that a "change in caselaw does not make a motion to vacate a prisoner's sentence 'inadequate or ineffective to test the legality of his detention.'" 851 F.3d 1076, 1080 (11th Cir. 2017). Like the Tenth Circuit, the court reasoned that, "[d]espite circuit precedent" that squarely foreclosed the petitioner's argument when he initially sought § 2255 review, the petitioner still "could have tested the legality of his detention" at that time "by requesting that we reconsider our precedent en banc

or by petitioning the Supreme Court for a writ of certiorari." *Id.* at 1087.

Three separate dissents and one partial dissent followed, reaching wide-ranging conclusions about the meaning of the saving clause. *See id.* at 1111 (Wilson, J., dissenting); *id.* at 1112 (Martin, J., dissenting); *id.* at 1121 (Rosenbaum, J., dissenting); *id.* at 1101 (Jordan, J., dissenting in part).

* * * * *

As these fractures demonstrate, "this body of law is plagued by numerous complex issues," about which the courts of appeals have disagreed for years. *Chazen*, 938 F.3d at 866 (Barrett, J., concurring). "Only this Court's intervention can provide the necessary clarity." *Wheeler* Pet. 13.

II. Questions About The Saving Clause's Meaning Are Nationally Important And Recurring

Judges, the government, and commentators have also agreed about something else: Questions about the saving clause's reach are nationally important and recurring, thus warranting this Court's review.

A. To begin with, federal judges have frequently called for guidance in this area and resolution of the split because of the disparate treatment that it creates for federal prisoners across the country who are "similarly situated in all respects but one: they are incarcerated in federal prisons located in different circuits." *Bruce*, 868 F.3d at 181.

Judge Thapar of the Sixth Circuit, for instance, recently wrote in a special concurrence that "th[is] Court should step in" to decide the question presented and

that "sooner may be better than later," because the "circuits are already split" and the "rift is unlikely to close on its own." *Wright*, 939 F.3d at 710. He explained that, "so long as [the split] lasts, the vagaries of the prison lottery will dictate how much postconviction review a prisoner gets" and that a "federal inmate in Tennessee can bring claims" under the saving clause "that would be thrown out were he assigned to neighboring Alabama." *Id.* At bottom, he said, "[l]ike cases are not treated alike" under the status quo. *Id.*

The Third Circuit expressed similar concerns in *Bruce* in 2017. There, the court described how two brothers—Gary and Robert Bruce—convicted of the very same federal offenses could not both seek "another round of collateral review" under the saving clause for the simple (and arbitrary) reason that one brother was imprisoned in a circuit that permitted relief (the Third Circuit) while the other was imprisoned in a circuit that did not (the Eleventh Circuit). *See* 868 F.3d at 180–81 (discussing *Bruce v. Warden*, 658 F. App'x 935, 939 (11th Cir. 2016)). The court stressed that the "disparate treatment of [the Bruce brothers] should not be overlooked" and lamented that these "difficulties" will remain "until Congress or [this] Court speaks on the matter." *Id.*; *see also In re Wright*, --- F.3d ----, 2019 WL 5800218, at *2–5 (11th Cir. Nov. 7, 2019) (Rosenbaum, J., concurring) (explaining that a prisoner barred from seeking saving-clause relief in the Eleventh Circuit could seek relief in the Fourth Circuit, as he was confined in South Carolina).

Other judges, too, have called for this Court's intervention and direction on the saving clause. Judge Agee of the Fourth Circuit, for example, wrote in 2018 that questions about the saving clause are of "significant

national importance and are best considered by th[is] Court at the earliest possible date." *Wheeler*, 734 F. App'x at 893 (statement respecting denial of rehearing en banc). He said this Court should "resolve the conflict separating the [circuits] nationwide" so that "federal courts, Congress, the Bar, and the public will have the benefit of clear guidance and consistent results in this important area of law." *Id.* at 894. Judge Easterbrook of the Seventh Circuit likewise said "[r]esolution of the conflict belongs to Congress or the Supreme Court." *Brown*, 719 F.3d at 600 (statement concerning circulation under Circuit Rule 40(e)).

B. The government, as well, has asserted before this Court and others that questions about the saving clause's meaning are "recurring" and of "exceptional importance," Resp. to Pet. for Reh'g at 15, *Prost*, No. 08-1455 (10th Cir. Apr. 25, 2011), because the split "has produced, and will continue to produce, divergent outcomes for litigants in different jurisdictions," *Wheeler* Pet. 13; *see id.* (calling this "an issue of great significance"). The government explained the issue well in its *Wheeler* petition: The "disparate treatment of identical claims is particularly problematic because [§ 2241] habeas petitions are filed in a prisoner's district of confinement," "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." *Id.* at 25–26. Accordingly, the government stressed, "[o]nly this Court's intervention can ensure nationwide uniformity as to the saving clause's scope." *Id.* at 26. Moss agrees.

C. Finally, commentators have recognized and described in detail the nationwide implications of the circuits' "staggering" "patchwork of rules" interpreting the saving clause. *Kaleidoscopic Chaos*, *supra*, at 15.

One commentator, for example, played out the scenarios of 12 hypothetical federal prisoners—all convicted of the same offense, but each serving a prison sentence and seeking relief in a different circuit—and demonstrated how the results "var[ied] wildly depending on such things as where they were sentenced, where they [were] presently confined, and how and when the court system's understanding of the underlying criminal statute changed." *Id.* at 4, 36–52. The result, this commentator wrote, was "kaleidoscopic chaos across the country that impairs the ability of prisoners, counsel, and the federal courts" to "understand when and how a federal prisoner can pass through the Savings Clause and challenge his conviction and sentence." *Id.* at 53.

A student commentator, similarly, relied on the real-life example of the Bruce brothers (*see supra*, at pg. 21) to describe the "inequity" that the "split poses for inmates based simply on a prison's location," and explained that, "[s]ince neither prisoners nor courts control where inmates are sent, inmates [in certain circuits] face the possibility of being denied an opportunity that is given to otherwise similarly situated prisoners" in other circuits. Note, *Back to the Future*, 87 Fordham L. Rev. 1577, 1581 (2019).

* * * * *

As these sources demonstrate, all agree: The question presented in this case is nationally important and recurring, and it warrants this Court's review.

III. This Case Provides An Ideal Vehicle To Resolve The Split

Review is warranted for at least one more reason: This case provides an ideal vehicle to resolve the split.

A. This Case Cleanly Presents Many Of The Saving Clause's Key Issues

To start, this case has it all.

1. If review were granted here, the Court could decide, first, the threshold question whether the saving clause applies *at all* to new retroactive statutory rules.

It does, and this Court should so hold in this case, as nine circuits (including the Fourth Circuit) already have. The Seventh Circuit explained why skillfully in *Davenport*. There, the court wrote that the "essential function" of habeas is to "give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." 147 F.3d at 609. So when (like in Moss's case) binding precedent interpreting a statute was "firmly against" a prisoner when he filed his first § 2255 petition, *id.* at 610, it "appears" in that circumstance "that the remedy by [§ 2255] motion [was] inadequate or ineffective to test the legality of his detention," § 2255(e).

That is because the doctrine of stare decisis would compel the district court to follow precedent and deny relief, the court of appeals would be "unwilling (in all likelihood) to listen" to a head-on challenge to precedent, "and the Supreme Court does not view itself as

being in the business of correcting errors" and thus grants review in rare circumstances. *Id.* at 611. And even if that precedent were later called into question (as *Mejias* was later called into question by *Clarke* here), *Davenport* explained that § 2255 would still appear inadequate or ineffective, because § 2255(h) allows second or successive § 2255 petitions only for new *constitutional* rules, not new statutory rules. *Id.* at 610. In that circumstance, therefore, the prisoner should be permitted to proceed through the saving clause to seek further collateral review under § 2241, as any other result would forever bar relief.

2. Further, because Moss's case involves an erroneous sentence enhancement, the Court could also decide whether the saving clause applies to erroneous sentences in addition to erroneous convictions, as the Fourth, Sixth, and Seventh Circuits have held, or whether it applies only to convictions, as the Fifth Circuit has held. *Compare Wheeler*, 866 F.3d at 429, *Hill*, 836 F.3d at 599, *and Brown*, 719 F.3d at 587, *with Bradford*, 660 F.3d at 230.

Here too, the majority view is correct, and the Court need not await further percolation in the lower courts to decide as much. Indeed, as the Fourth Circuit explained in *Wheeler*, "[i]ncluding sentencing errors within the ambit" of the saving clause follows plainly from "the statutory language" of § 2255(e) contemplating "one's 'detention,'" as "[d]etention necessarily implies imprisonment." 886 F.3d at 427–28; *see Brown*, 719 F.3d at 588 ("The text of the clause focuses on the legality of the prisoner's detention"; "it does not limit its scope to testing the legality of the underlying criminal conviction"). And if the statutory text is not enough, this Court, too, has "long recognized a right to

traditional habeas corpus relief based on an illegally extended sentence." *Wheeler*, 886 F.3d at 428 (collecting decisions); *see Nelson v. Campbell*, 541 U.S. 637, 643 (2004) (The "'core' of habeas corpus" has included challenges to "the duration of [a] sentence").

3. Finally, review of this case would allow the Court to decide whether saving-clause relief turns on changes in the substantive criminal law of the circuit of conviction or circuit of confinement, as Moss was sentenced in the Eleventh Circuit under *Mejias* but transferred to a federal prison in the Fourth Circuit, filing his § 2241 petition in the Eastern District of North Carolina.

Again, further percolation is unnecessary on this issue, because the answer is clear: The test should assess the substantive criminal law of the circuit of conviction, not confinement, as the law of the circuit of conviction is what originally established the legality of the conviction or sentence. Judge Barrett of the Seventh Circuit recently confirmed this view in a concurring opinion. She wrote that "[a]pplying the law of the circuit of confinement risks recreating some of the problems that § 2255 was designed to fix," because case outcomes would turn "on the fortuitous placement of a prisoner by the Bureau of Prisons, not the more rational factor of the place of conviction." *Chazen*, 938 F.3d at 865 (quoting *Hernandez v. Gilkey*, 242 F. Supp. 2d 549, 554 (S.D. Ill. 2001)). Moss agrees.

B. Vehicle Problems Present In Other Cases Are Not Present Here

This case is also an ideal vehicle because the problems that weighed down other cases before this Court are not present here. *First*, unlike in *Wheeler*, there is

no concern here about mootness, as Moss will not be released from prison (absent this Court's intervention) until December 2026. *Compare* Fed. Bureau of Prisons, Inmate Locator, https://www.bop.gov/inmateloc/ (last visited Nov. 26, 2019), *with* Reply for Petitioner at 1, *Wheeler*, 139 S. Ct. 1318, 2019 WL 411356, at *1 (*Wheeler* Reply) ("[T]he case may become moot before the Court has an opportunity to resolve it").

Second, unlike in *Wheeler*, there are no waiver concerns or issues related to interlocutory posture in this case. Indeed, the parties preserved all issues below, and proceedings in the district court concluded in January 2018. *Contra Wheeler* Reply 1–2 (explaining that proceedings were still occurring in the district court while the petition for certiorari was pending); *id.* at 5 (responding to waiver arguments based on the government's changing arguments below).

Third, unlike other more-recent cases raising similar questions (*e.g.*, *Jones*, No. 18-9495, and *Walker*, No. 19-52), this case was fully briefed and argued in the Fourth Circuit by both parties, presenting this Court with a full record for review. *Contra Walker* Opp'n 18 ("[N]one of the issues here were briefed below"); *Jones* Opp'n 25 (same).

C. The Decision Below Is Incorrect

Finally, this case is an ideal vehicle because the Fourth Circuit's decision is incorrect. Moss demonstrated that substantial doubt exists about whether the law that originally established the legality of his sentence (the Eleventh Circuit's decision in *Mejias*) remains good law after *Clarke*. Yet the court below held that this was not enough, effectively applying a wooden "expressly overruled" standard to analyze

Mejias's continuing vitality. *E.g.*, Pet. App. 4a–8a (stating that the "*Clarke* panel could not overrule *Mejias*"). That restrictive standard goes against, not only the saving clause's text, but also the equitable core of the writ of habeas corpus. The Court should grant the petition and reverse to make clear that federal prisoners in Moss's situation are entitled to meaningful review under the saving clause.

1. Habeas is, "at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). It is thus "adaptable," and its "precise application and scope" must change "depending upon the circumstances." *Boumediene v. Bush*, 553 U.S. 723, 779 (2008). As this Court explained nearly 60 years ago, the "Great Writ" is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). Congress has therefore reposed in the federal courts "broad remedial powers to secure" that equitable purpose and to ensure that Moss and other prisoners are provided a "meaningful opportunity to demonstrate" that they are "being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 776, 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)). The "essential function" of habeas is, after all, to "give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *Davenport*, 147 F.3d at 609.

The saving clause's language reflects this broad and flexible equitable purpose. It uses the words "inadequate," a "term of art" that "appears in the jurisprudence of equity," and "ineffective," another "term of art" meaning "constitutionally deficient" under the Suspension Clause. *McCarthan*, 851 F.3d at 1131–32 (Rosenbaum, J., dissenting). And the clause's text does not require a prisoner to show that § 2255 *is* "inadequate or ineffective." Instead, it requires a prisoner to show only that it "*appears*" that § 2255 is "inadequate or ineffective," a lower bar implying that the existence of a degree of uncertainty does not preclude review. § 2255(e) (emphasis added). After all, and by analogy, no one would debate that there is a meaningful difference between saying "she *is* happy" and saying "she *appears* to be happy," and this same ordinary-meaning understanding must be applied to the saving clause's text. *Appear*, Merriam-Webster's Online Dictionary, https://tinyurl.com/uqqppb7 (last visited Nov. 26, 2019) (defining "appear" as "hav[ing] an outward aspect: [to] seem" // She appears (to be) happy enough"); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (undefined statutory terms get their "ordinary meaning").

Accordingly, a prisoner should be able to satisfy the saving clause by demonstrating that substantial doubt exists about whether the statutory rule that originally established the legality of her conviction or sentence remains good law. Several circuits already apply a similar test and do not require a showing that the statutory rule at hand was expressly overruled. *E.g.*, *Dorsainvil*, 119 F.3d at 252 (requiring only a "sufficiently colorable claim," not proof that precedent was expressly overruled); *Wright*, 939 F.3d at 703 (relief is

available where subsequent precedent "hints [that a] conviction or sentence may be defective," not when it expressly says so); *Chazen*, 938 F.3d at 861 (a prisoner "need only show that the case on which he relies had not yet been decided at the time of his § 2255 petition," not that the case expressly overruled precedent).

2. Moss satisfies the test described above, and he is therefore entitled to saving-clause relief. He demonstrated, as explained above in detail (at pp. 7–8), that there is, at the absolute minimum, substantial doubt about whether the Eleventh Circuit's decision in *Mejias* remains good law in the wake of its subsequent decision in *Clarke*. Indeed, *Mejias* now rests entirely upon another Eleventh Circuit decision (*Jones*) that, in turn, rests entirely upon a line of precedent (felon-in-possession precedent such a *Grinkiewicz*) that *Clarke* expressly overruled. But because *Mejias* stood squarely in Moss's way when he filed his initial § 2255 petition, and because *Clarke* was not decided until years later and involved a statutory rule, it "appears" in this case "that the remedy by [§ 2255] motion" for Moss is "inadequate or ineffective to test the legality of his detention." § 2255(e).

All that Moss asks for is therefore a meaningful opportunity to test the legality of his detention after *Clarke* within the only circuit that can say definitively whether Eleventh Circuit law has indeed changed: the Eleventh Circuit itself. *See, e.g.*, *Salazar*, 2012 WL 3779075, at *1, *7 (ordering resentencing in the sentencing court under the saving clause); *McCoy*, 2012 WL 3267707, at *2 (same). Only through that remedy would Moss be provided "a reasonable opportunity to obtain a *reliable* judicial determination of the funda-

mental legality of his conviction and sentence," *Davenport*, 147 F.3d at 609 (emphasis added), as the Fourth Circuit is powerless to say conclusively what the state of Eleventh Circuit law is after *Clarke*, *see, e.g.*, *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) (Ginsburg, J.) ("Binding precedent" is set "for the district courts within a circuit" only "by the court of appeals for that circuit"). "Surely, the Great Writ cannot be so moribund, so shackled by the procedural requirements of rigid gatekeeping, that it does not afford review of [this] claim." *Gilbert v. United States*, 640 F.3d 1293, 1337 (11th Cir. 2011) (Hill, J., dissenting).

* * * * *

This case therefore provides an ideal vehicle to decide the scope of the saving clause.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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