ONE STRIKE, YOU'RE OUT: THE POST-*HUESO* STATE OF HABEAS CORPUS PETITIONS UNDER THE SAVINGS CLAUSE

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INTRODUCTION

The rights of federal prisoners to challenge their sentences and detentions as unlawful are defined and limited by common law and statute. At common law, federal prisoners could only challenge their detentions by applying for a writ of habeas corpus. Over time, however, Congress sought to replace this common law right to habeas corpus relief with a statutory right under 28 U.S.C. § 2255. But courts have struggled to define the scope and limit of federal prisoners' rights under § 2255. And courts have vigorously disagreed about how federal prisoners' statutory rights under § 2255 interact with the original common law right to petition for a writ of habeas corpus. Acknowledging that the landscape is complex and that there are many divisions between circuits, this contribution discusses one narrow issue that has recently caused a circuit split: whether a new rule of statutory interpretation by a circuit court can trigger § 2255(e)'s savings clause.

Part I will briefly canvas federal prisoners' rights to challenge their detentions as those rights evolved from being primarily rooted in the common law writ of habeas corpus to the current statutory scheme under § 2255. Part II outlines the Fourth and Sixth Circuit split regarding whether the savings clause of § 2255 can be triggered by a new statutory interpretation by a circuit court. Finally, Part III argues for Supreme Court intervention given the sharp circuit split regarding the scope of the savings clause. A definitive interpretation of the savings clause by the Supreme Court could bring much needed clarity to the confusion. This is especially true when the statute's text, traditional cannons of construction, and fundamental values of the criminal legal system have all failed to render a consistent interpretation.

I. FROM COMMON LAW TO STATUTE: TRACING THE RIGHTS OF FEDERAL PRISONERS TO CHALLENGE THE LAWFULNESS OF THEIR DETENTIONS

Since "the founding of our nation," the writ of habeas corpus "has played a central role in our system of justice."[1] To the Framers, "freedom from unlawful restraint" was "a fundamental precept of liberty," and "the

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[1] Scott R. Grubman, *What A Relief? The Availability of Habeas Relief Under the Savings Clause of Section 2255 of the AEDPA*, 64 S.C. L. REV. 369, 369 (2012).

writ of habeas corpus [was] a vital instrument to secure that freedom."[2] The right to a writ of habeas corpus is rooted in the traditions of English law and protected by the explicit text of the Constitution: the "Privilege of the Writ of Habeas Corpus" cannot be "suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[3] In the Judiciary Act of 1789, the First Congress both established the federal judiciary and also gave it the power to grant the writ of habeas corpus.[4] The original statutory interpretation of the Act limited the right to petition for a writ of habeas corpus in federal court to federal prisoners.[5] However, in 1867, Congress amended the statute to include state prisoners.[6] Today, the statutory right invoking the common law right to petition for a writ of habeas corpus is 28 U.S.C. § 2241.[7]

After Congress opened the federal courts to petitions by federal and state prisoners, the number of applications for habeas corpus increased substantially.[8] And since § 2241 required a habeas corpus action to be brought in the jurisdiction of confinement, the federal courts covering jurisdictions where major federal penal institutions were located "were required to handle an inordinate number of habeas corpus actions."[9] The higher volume of applications made it difficult for courts to separate meritorious claims from frivolous ones, and created procedural difficulties because the sentencing records were located in the defendant's district of sentencing, rather than the defendant's district of confinement.[10]

In response to these "practical difficulties," Congress enacted 28 U.S.C. § 2255.[11] Section 2255 provided a statutory post-conviction

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[2] Boumediene v. Bush, 553 U.S. 723, 739 (2008).
[3] U.S. CONST. art. I, § 9, cl. 2.
[4] *See* Medberry v. Crosby, 351 F.3d 1049, 1055 (11th Cir. 2003). Today, the power of the federal judiciary to grant a writ of habeas corpus is codified in 28 U.S.C.§ 2241(a): "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."
[5] *See* Ex parte Dorr, 44 U.S. 103, 105 (1845) ("Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness."); *see also* Grubman, *supra* note 1, at 372 ("At first, only prisoners in federal custody could petition a federal court for habeas relief.").
[6] *See* United States v. Hayman, 342 U.S. 205, 211 (1952) (highlighting the new language of the 1867 Act which extended to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States").
[7] 28 U.S.C. § 2241(a) ("Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.").
[8] *See Hayman*, 342 U.S. at 212 (noting the "annual volume of applications . . . nearly tripled").
[9] *Id.* at 213–14.
[10] *See id.* at 213.
[11] *Id.* at 219.

remedy for federal prisoners to challenge the lawfulness of their detentions in the districts where they were *convicted* instead of applying for habeas corpus relief under § 2241 in the districts where they were *confined*.[12] The remedy under § 2255 is not a petition for habeas corpus, but rather a similar statutory remedy for federal prisoners aimed at alleviating some of the procedural problems facing the courts.[13] In addition to providing a new remedy and venue to federal prisoners, Congress also intended § 2255 to curb the volume of § 2241 habeas corpus petitions.[14] So in most circumstances, § 2255 replaced common law habeas corpus petitions under § 2241, unless § 2255 was deemed "inadequate or ineffective to test the legality of [the] detention."[15] The "inadequate or ineffective" clause is colloquially known as the savings clause.

Finally, Congress restricted post-conviction relief in federal courts by passing the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[16] AEDPA imposed significant limits on a federal prisoner's ability to launch successive challenges against the lawfulness of his detention by allowing a "second or successive motion" only if: (a) newly discovered evidence proved the defendant's actual innocence, or (b) the Supreme Court issued a new, retroactive rule of constitutional law that was previously unavailable to the defendant.[17] If a successive § 2255

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[12] *See* 28 U.S.C. § 2255(a) (2012) ("A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, *may move the court which imposed the sentence to vacate*, set aside or correct the sentence.") (emphasis added).
[13] *See* Medberry v. Crosby, 351 F.3d 1049, 1056–57 (11th Cir. 2003) ("Prior to the enactment of § 2255, federal prisoners petitioned for writs of habeas corpus in the district where they were detained, which frequently was different from the district where they had been tried, convicted, and sentenced.").
[14] *See id.* at 1057.
[15] § 2255(e) ("An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."); *see also Medberry*, 351 F.3d at 1057 ("If Congress had not simultaneously limited the availability of the writ of habeas corpus to federal prisoners when it authorized the new § 2255 motion, § 2255 would have failed to solve the problem posed by federal prisoners petitioning for writs of habeas corpus in districts other than those in which they had been convicted.").
[16] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 104–105, §§ 2254–2255, 110 Stat. 1214, 1218–20 (1996); *see generally* Thomas C. Martin, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201, 234–35 (1996) (discussing the legislative history of AEDPA as a whole).
[17] *See* § 2255(h) ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be

motion did not meet either of these conditions, a defendant had to resort to a petition for a writ of habeas corpus under § 2241 and prove § 2255 was "inadequate or ineffective"—the savings clause escape hatch.[18] Courts are split in several ways about what exactly renders § 2255 "inadequate or ineffective" for a defendant bringing a second or successive challenge to his detention when the defendant cannot prove either of § 2255's conditions. The first split involves whether an intervening, retroactive statutory interpretation adopted by the Supreme Court triggers the savings clause.[19] The second, more recent split involves whether an intervening, retroactive statutory interpretation adopted by a *circuit* court triggers the savings clause.[20]

II. WHEN IS THE SAVINGS CLAUSE TRIGGERED?

Assuming that the savings clause can be used to invoke new statutory interpretation decisions that render a conviction or sentence fundamentally unfair, a question still remains: which court's statutory interpretation decision counts—circuit courts or the Supreme Court alone? In determining the scope of the savings clause, two paths have emerged in the circuit courts: (A) the Fourth Circuit's more permissive standard under *Wheeler*, permitting second or successive habeas petitions to move forward when there is a new, retroactive rule of statutory interpretation adopted by a circuit court and (B) the Sixth Circuit's more restrictive standard under *Hueso*, rejecting second or successive habeas petitions when a circuit has adopted a new, retroactive rule of statutory interpretation. Despite settling on opposite ends of the spectrum, both courts rely on § 2255's text and other familiar tools of statutory interpretation to justify their positions.

A. *The Fourth Circuit and* Wheeler*: New Rules of Statutory Construction by Circuit Courts Can Trigger the Savings Clause*

In September 2006, Gerald Wheeler was indicted with conspiracy to possess with intent to distribute at least fifty grams of crack cocaine and 500 grams of powder cocaine ("Count One"); possession with intent to distribute at least five grams of crack cocaine ("Count Five"); using and

sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.").

[18] *See* § 2255(e).

[19] *Compare* McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1091 (11th Cir. 2017) (rejecting), *and* Prost v. Anderson, 636 F.3d 578, 585–86 (10th Cir. 2011) (rejecting), *with* In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997) (permitting), *and* Triestman v. United States, 124 F.3d 361, 363 (2d Cir. 1997) (permitting).

[20] *Compare* Hueso v. Barnhart, 948 F.3d 324, 326 (6th Cir. 2020) (rejecting), *with* United States v. Wheeler, 886 F.3d 415, 428 (4th Cir. 2018) (permitting).

carrying a firearm during and in relation to a drug trafficking crime ("Count Six"); and being a felon in possession of a firearm ("Count Seven").[21] Wheeler pleaded guilty to all but Count Five.[22] Wheeler's United States Sentencing Guidelines range would have been seventy to eighty-seven months, and his statutory sentencing range would have been five to forty years.[23] However, the government sought to enhance Wheeler's sentence under 21 U.S.C. § 841(b)(1)(B), which mandates "any person [who] commits" a crime such as Count One "after a prior conviction for a serious drug felony or serious violent felony has become final . . . shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . ."[24] As justification for the enhancement, the government pointed to Wheeler's prior conviction for possession of cocaine in 1996 in North Carolina.[25] For the enhancement to apply, the 1996 conviction had to qualify as a "felony drug offense."[26] A "felony drug offense" under 21 U.S.C. § 802(44) is "an offense that is punishable by imprisonment for more than one year under [state law] . . . that prohibits or restricts conduct relating to narcotic drugs . . . ."[27]

At the time of the 2006 sentencing, the district court was bound by the Fourth Circuit's interpretation of "felony drug offense" under *United States v. Harp* and its panel decision in *United States v. Simmons*.[28] Both cases stated that "to determine whether a conviction is for a crime punishable by a prison term exceeding one year" under state law, a court "consider[s] the maximum *aggravated* sentence that could be imposed for that crime upon a defendant with the worst possible criminal history."[29] In other words, the Fourth Circuit rejected a more individualized approach for defining what was a "felony drug offense" in favor of a more categorical approach that swept in more recidivist defendants.[30] So the district court applied the enhancement due to Wheeler's prior "felony drug offense" and imposed a sentence of 120 months—the statutory mandatory minimum—for Count One.[31]

Still bound by *Harp* and *Simmons*, the district court rejected Wheeler's first motion in March 2011 to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.[32] Wheeler argued that, in actuality,

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[21] *Wheeler*, 886 F.3d at 419.
[22] *See id.*
[23] *See id.* at 420.
[24] 21 U.S.C. § 841(b)(1)(B) (2012); *see id.* at 419. The government sought the enhancement pursuant to 21 U.S.C. § 851. *See Wheeler*, 886 F.3d at 419.
[25] *See Wheeler*, 886 F.3d at 419.
[26] *See id.*
[27] 21 U.S.C. § 802(44); *see Wheeler*, 886 F.3d at 419.
[28] *See Wheeler*, 886 F.3d at 420.
[29] United States v. Harp, 406 F.3d 242, 246 (4th Cir. 2005); *see also* United States v. Simmons, 635 F.3d 140, 146 (4th Cir. 2011).
[30] *See Harp*, 406 F.3d at 246; *Simmons*, 635 F.3d at 146.
[31] *See Wheeler*, 886 F.3d at 419.
[32] *See id.* at 420.

he only received a sentence of six to eight months for the 1996 conviction (*i.e.* below the "one year" threshold under § 802(44)).[33] He thus claimed that his prior conviction could not qualify as a "felony drug offense" and did not justify the sentencing enhancement for Count One.[34] But under Fourth Circuit precedent, the district court was forced to look to the maximum sentence available for the 1996 conviction (fifteen months) and, thus, the 1996 conviction supported the enhancement.[35]

However, in August 2011, the Fourth Circuit, sitting en banc, overturned its interpretation of "felony drug offense" in favor of a more individualized approach.[36] Whether an offense was a "felony drug offense" would now be based on "the potential maximum sentence to which a defendant is *exposed*, not the highest possible sentence."[37]

After the new *Simmons* en banc decision, Wheeler filed a request for a second § 2255 motion and invoked § 2241 pursuant to the savings clause to challenge his sentence as unlawful.[38] Because Wheeler's successive § 2255 motion fell outside the narrow statutory parameters of AEDPA, the Fourth Circuit had to decide whether § 2255 was "inadequate or ineffective" to test the legality of Wheeler's erroneous sentence. In its decision, the court primarily relied on earlier precedent, *In re Jones*, which held that a defendant could challenge a conviction after a Supreme

[33] *See id.*
[34] *See id.*
[35] *See id.*
[36] *See* United States v. Simmons, 649 F.3d 237, 249–50 (4th Cir. 2011) (en banc); *see also* United States v. Kerr, 737 F.3d 33, 37 (4th Cir. 2013) ("Specifically, we determined that in deciding whether a sentencing enhancement was appropriate under the Controlled Substances Act, a district court could no longer look to a hypothetical defendant with the worst possible criminal history. Instead, we held that a sentencing court may only consider the maximum possible sentence that the *particular* defendant could have received."); Carachuri-Rosendo v. Holder, 560 U.S. 563, 577 n.12 (2010) ("In other words, when the recidivist finding giving rise to a 10-year sentence is not apparent from the sentence itself, or appears neither as part of the judgment of conviction nor the formal charging document, the Government will not have established that the defendant had a prior conviction for which the maximum term of imprisonment was 10 years or more (assuming the recidivist finding is a necessary precursor to such a sentence).") (citation omitted).
[37] *Wheeler*, 886 F.3d at 420 (emphasis added).
[38] *See id.* at 422. The en banc decision in *Simmons* was made retroactive on collateral review by Miller v. United States, 735 F.3d 141 (4th Cir. 2013). However, Wheeler's 28 U.S.C. § 2241 petition was stayed pending rehearing en banc of *United States v. Surratt*, 797 F.3d 240, 269 (4th Cir. 2015), *reh'g en banc granted*, Dec. 2, 2015, which held that notwithstanding an intervening statutory interpretation decision that rendered a mandatory minimum life sentence illegal, a defendant could not pass through the savings clause to have a § 2241 petition heard on the merits. *See Wheeler*, 886 F.3d at 421–22. The Fourth Circuit did not resolve the issue because President Obama commuted Surratt's sentence; thus, the Fourth Circuit in *Wheeler* was addressing "the savings clause requirements de novo, unbound by . . . *Surratt*." *Id.* at 422.

Court statutory interpretation decision rendered the conduct underlying the conviction no longer illegal.[39]

Given the purpose of habeas relief, circuit precedent, and the text of § 2255, the Fourth Circuit held that savings clause relief *was not dependent on a Supreme Court decision.*[40] First, the court noted that the purpose of habeas relief under § 2241 was to provide prisoners with a "meaningful opportunity" to challenge their detentions.[41] And the purpose of § 2255 was to provide prisoners with "the *same rights*" as § 2241 "in another and more convenient forum."[42]
Second, looking to precedent, the court conceded that the recently vacated *United States v. Surratt* decision restricted savings clause relief only to changes in Supreme Court law.[43] The *Surratt* panel justified this holding by looking to § 2255's conditions for second or successive motions. The *Surrat* panel reasoned that "only a Supreme Court decision" could trigger § 2255(e)'s savings clause because one of the conditions for a second or successive motion under § 2255(h) requires a new, retroactive rule of constitutional law to come from the Supreme Court.[44] However, the *Wheeler* court found the text of § 2255 to "cut[] the other way."[45] Congress could have made savings clause relief in § 2255(e) dependent only on Supreme Court changes to constitutional law as it did in § 2255(h), but it did not.[46] Accordingly, the *Wheeler* court reasoned that Congress's failure to write similar language in § 2255(e) and § 2255(h) means that the former is not constrained in the same way as the latter.

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[39] *See* 226 F.3d 328, 333–34 (4th Cir. 2000) (holding that "§ 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gate keeping provisions of § 2255 because the new rule is not one of constitutional law.").
[40] *See Wheeler*, 886 F.3d at 428; *see also Jones*, 226 F.3d at 333–34.
[41] *Wheeler*, 886 F.3d at 426 (emphasizing it is "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law") (quoting Boumediene v. Bush, 553 U.S. 723, 779 (2008)).
[42] *Id.* (quoting Davis v. United States, 417 U.S. 333, 344 (1974)).
[43] *See id.* at 428; *see also* United States v. Surratt, 797 F.3d 240, 259 (4th Cir. 2015), *dismissed as moot*, 855 F.3d 218 (4th Cir. 2017) (reasoning § 2255(h)'s conditions for second or successive § 2255 motions should limit the scope of the savings clause).
[44] *Wheeler*, 886 F.3d at 428; *see also* § 2255(h) ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.").
[45] *Wheeler*, 886 F.3d at 428.
[46] *See id.* at 429.

Thus, savings clause relief extended to fundamental sentencing errors resulting from a new, retroactive statutory interpretation by a circuit court.

To determine whether § 2255 was actually "inadequate and ineffective" to test the legality of Wheeler's sentence, the Fourth Circuit then proceeded with a four-factor analysis: (1) settled law of the circuit had changed; (2) the change in law was made retroactive; (3) Wheeler could not satisfy the conditions for second or successive § 2255 motions; and (4) the changed law made Wheeler's sentence grave enough to constitute a fundamental defect.[47] In sum, the *Wheeler* court held that the text and purpose of § 2255 permit a defendant to challenge his sentence when, among other requirements, the sentence represents a "fundamental defect" after a circuit court adopts a new, intervening statutory interpretation.[48]

B. *The Sixth Circuit and* Hueso*: New Rules of Statutory Construction by Circuit Courts Cannot Trigger the Savings Clause*

The Sixth Circuit also adopted a textualist approach—a more in-depth textualist approach as compared to *Wheeler*—yet expressly rejected the Fourth Circuit's interpretation of the savings clause. In *Hueso v. Barnhart*, the Sixth Circuit adopted a stricter and narrower interpretation of the savings clause and, thus, created a circuit split.

Similar to Gerald Wheeler, Roman Hueso was convicted in 2009 of conspiring to distribute and possession with intent to distribute illegal drugs.[49] The government sought to enhance Hueso's mandatory minimum from ten years to twenty years based on a prior "felony drug offense" as defined by 21 U.S.C. § 802(44).[50] The basis for the enhancement was Hueso's two prior convictions of possessing illegal drugs that carried a maximum penalty of five years, thus exceeding § 802(44)'s one-year threshold.[51] Hueso only faced a maximum of six months under the state sentencing guidelines for the previous convictions.[52] But Ninth Circuit precedent (the circuit in which Hueso was sentenced) held that a state conviction was a "felony drug offense" so long as the maximum statutory sentence exceeded one year, regardless of what the maximum sentence

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[47] *See id.* ("[W]e conclude that § 2255 is inadequate and ineffective to test the legality of a sentence when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.").

[48] *Id.*

[49] *See* Hueso v. Barnhart, 948 F.3d 324, 329 (6th Cir. 2020).

[50] *Id.* at 330.

[51] *See id.*

[52] *See id.*

available under the sentencing guidelines was.[53] Therefore, the court applied the enhancement and sentenced Hueso to a mandatory minimum of twenty years.[54] After being sentenced, Hueso filed a § 2255 motion, but it failed.[55]

After his first § 2255 motion failed, the Ninth Circuit overruled its previous interpretation of "felony drug offense" and adopted a more individualized approach.[56] Based on the new retroactive statutory interpretation of "felony drug offense," Hueso filed a habeas petition under § 2241 to challenge his erroneous sentence.[57] Hueso had already filed a § 2255 motion, and his second petition did not meet the conditions in § 2255(h) for a second or successive motion.[58] So Hueso could only justify his § 2241 petition by arguing § 2255 was "inadequate or ineffective" the first time.[59] In other words, he had to resort to the savings clause to justify review of his sentence.[60]

The Sixth Circuit rejected Hueso's arguments and held that a new, retroactive statutory interpretation by a circuit court could not trigger § 2255(e)'s savings clause.[61] In doing so, the court appealed to the text and structure of § 2255, specifically emphasizing the need to read all of its various subparts harmoniously rather than discordantly.[62] First, the court looked to the plain meaning of § 2255(e).[63] Specifically, it noted that the savings clause applies when the § 2255 "remedy" is "inadequate or ineffective."[64] To the court, the text confirmed that § 2255 was more of a procedural rather than substantive guarantee.[65] In other words, the savings clause "asks only whether § 2255's motion is sufficient to assert a claim on the merits; it does not guarantee success on the merits."[66]

Using the "harmonious-reading rule," the court also reasoned that the structure of the statute supported excluding new rules of statutory

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[53] *See id.*
[54] *See id.*
[55] *Id.*
[56] *See* United States v. Valencia-Mendoza, 912 F.3d 1215, 1224 (9th Cir. 2019) (reasoning that courts "must consider *both* a crime's statutory elements *and* sentencing factors when determining whether an offense is 'punishable' by a certain term of imprisonment").
[57] *See Hueso*, 948 F.3d at 331.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 340.
[62] *See id.* at 334–35.
[63] *Id.* at 333; *see also* 28 U.S.C. § 2255(e) (2012) ("An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.").
[64] *Hueso*, 948 F.3d at 333.
[65] *See id.*
[66] *Id.* (citation omitted).

interpretation by circuit courts.[67] First, permitting new circuit law to trigger § 2255(e) would effectively nullify the limit on successive motions under § 2255(h)(2).[68] Section 2255(h)(2) only permits second or successive petitions if a new constitutional rule comes from the Supreme Court.[69] If new statutory rules by circuit courts could render § 2255 "inadequate or ineffective," then prisoners would have an easier time bringing statutory claims than constitutional claims.[70] To resolve this "odd dichotomy," Hueso's interpretation would also have to permit new constitutional rules by circuit courts to trigger § 2255(e)—what the court viewed as an even broader expansion beyond the plain text.[71]

Additionally, the court reasoned that Hueso's interpretation nullified § 2255(f), which limits the time period for when a prisoner can file a § 2255 motion.[72] Specifically, § 2255(f)(3) starts the one-year clock for filing a § 2255 motion when the Supreme Court recognizes the right asserted.[73] If new circuit law triggered § 2255(e), then prisoners would always have a "backdoor" to avoid the statute's timing limitation.[74]

Finally, the Sixth Circuit relied on statutory history to reject Hueso's interpretation. First, the court argued that the current restrictions under § 2255(h) were meant to codify the common law "cause" requirement originally used to police multiple § 2255 motions.[75] Prior to 1996, it appeared that "cause" could only be shown by new precedent from the Supreme Court.[76] Therefore, if circuit court decisions alone did not suffice under the original "cause" requirements, then Congress's choice to codify limits to § 2255 motions in accordance with historical practice would be "paradoxically" relaxed.[77]

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[67] *Id.* at 334–35.
[68] *Id.*
[69] *Id.*; *see also* § 2255(h)(2) ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain . . . (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.").
[70] *Hueso*, 948 F.3d at 334.
[71] *See id.* at 334–35.
[72] *See id.* at 335; *see also* § 2255(f) ("A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of . . . (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . . .").
[73] *See Hueso*, 948 F.3d at 335.
[74] *See id.*
[75] *See id.* at 335–36 (explaining how the "cause" exception "allowed prisoners to file another collateral challenge only if a new claim had not been 'reasonably available' in prior challenges") (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)).
[76] *Id.* at 336 (explaining new Supreme Court decisions included "explicitly overrul[ing] one of its precedents"; "overturn[ing] a longstanding and widespread practice" that had been adopted by "a near-unanimous body of lower court authority"; or "disapprov[ing] of a practice the Court arguably had sanctioned in prior cases").
[77] *Id.*

Turning to practical considerations, the court opined on the "choice of law" difficulty that would arise under Hueso's interpretation: a court of confinement hearing the § 2241 petition would have to choose between applying its own circuit precedent or the circuit precedent of the sentencing court that hears the § 2255 petition.[78] In fact, the court emphasized that § 2255(h)'s limitations were promulgated to prevent one circuit from having to "grade" the opinions of another.[79] Finally, the court stressed that a narrow interpretation of the savings clause prevents prisoners from forum shopping for a circuit with the most advantageous law for their case.[80]

III. THE CASE FOR SUPREME COURT INTERVENTION

A clear circuit split now exists on the scope and application of the savings clause when a circuit court adopts a new rule of statutory construction. This split prevents the uniform administration of federal law on an issue of great significance for the finality of sentences and the role of habeas corpus in protecting individual liberty. It also arises against a backdrop of broader disagreement about the scope of the savings clause. While the Supreme Court denied certiorari in *Wheeler*,[81] it is high time the Supreme Court speaks.

First, there is now a clear split. Under Supreme Court Rule 10, certiorari is granted for "compelling reasons" such as a court of appeals entering a decision in conflict with the decision of another court of appeals.[82] The legal test adopted by the Fourth Circuit in *Wheeler* is the diametric opposite of that adopted by the Sixth Circuit in *Hueso*. The

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[78] *See id.* at 336–37.

[79] *Id.* ("The rule that only a later Supreme Court decision may trigger § 2255(e)'s authorization for new habeas filings at least lessens the potential friction between the sentencing court (which hears the § 2255 motion) and the court of confinement (which hears the § 2241 petition). Any new decision from the Supreme Court binds both courts. So when considering a § 2241 petition relying on that new decision, the court of confinement need not 'grade' the opinions of the sentencing circuit.").

[80] *Id.* at 337 ("That is, a rule allowing circuit decisions to trigger § 2255(e) would give prisoners the right to shop around the country in the hope of receiving a more favorable ruling.") (citation omitted).

[81] The government sought certiorari, but despite the high grant rate of petitions filed by the Solicitor General, the Court denied review. *United States v. Wheeler*, 139 S. Ct. 1318 (2019). As is customary, the Court gave no reasons for this order.

[82] SUP. CT. R. 10(a) ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ."); *see also* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE ch. 4 (11th ed.) ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

Wheeler court explicitly declared: "We see no need to read the savings clause as dependent only on a change in Supreme Court law."[83] Meanwhile, the *Hueso* court explicitly criticized the Fourth Circuit: "Although the Fourth Circuit has blessed [a request that prisoners be able to seek habeas relief under § 2241 based on new circuit court decisions], we must respectfully decline."[84] In the wake of these two opinions, habeas petitions by prisoners across the nation will produce disparate outcomes. Prisoners confined in the Fourth Circuit will have a greater ambit of habeas rights than prisoners confined in the Sixth Circuit, even if the two groups are sentenced in the same circuit.

More consequential, the decision in *Hueso* further entrenches the broad circuit split on the scope of the savings clause in general. While prisoners confined in the Sixth Circuit have narrower access to savings clause relief than those in the Fourth Circuit, they at least have broader relief than prisoners in the Tenth and Eleventh Circuits.[85] In *Prost v. Anderson*, the Tenth Circuit adhered to a strictly textualist approach to reject a prisoner's invocation of the savings clause based on a new statutory interpretation by the Supreme Court.[86] And in *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, the Eleventh Circuit followed suit. It parsed the words of the statute and ultimately agreed to the same narrow reading of the savings clause.[87] In his petition for certiorari, the defendant in *McCarthan* emphasized that the scope of the savings clause was a "mature and widely recognized conflict on an exceptionally important and recurring question involving the review of federal criminal judgments."[88] Despite the 9-2 circuit split,[89] the Supreme Court declined to take up the issue.[90] Thus, the *Hueso*-*Wheeler* circuit split is related to an even further entrenched split on whether new statutory interpretation can *ever* trigger the savings clause. As the majority in *Hueso* recognized, the practical effect of such splits causes prisoners'

[83] United States v. Wheeler, 886 F.3d 415, 428 (4th Cir. 2018).
[84] *Hueso*, 948 F.3d at 326 (citation omitted).
[85] *See* Prost v. Anderson, 636 F.3d 578, 590 (10th Cir. 2011); McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1091 (11th Cir. 2017).
[86] 636 F.3d at 589–90 ("The § 2255 remedial vehicle was fully available and amply sufficient to test the argument, whether or not Mr. Prost thought to raise it. And that is all the savings clause requires. . . . And whenever legal error occurs it may very well mean that *circuit law* is inadequate or deficient. But that does not mean the § 2255 remedial vehicle is inadequate or ineffective to the task of *testing* the argument.").
[87] 851 F.3d at 1086 ("To determine whether a prisoner satisfies the saving clause, we ask only whether the motion to vacate is an adequate procedure to test the prisoner's claim.").
[88] Petition for Writ of Certiorari at 3, *McCarthan v. Collins*, No. 17-85 (*petition for cert. filed* July 12, 2017).
[89] *Id.* at 4, 14 (citing nine circuits that permit "persons in federal custody to invoke Section 2255(e)'s saving clause to seek relief under Section 2241 where an intervening and retroactively applicable statutory-interpretation decision of this Court rendered their continuing custody illegal").
[90] *McCarthan*, 851 F.3d 1076, *cert. denied*, 138 S. Ct. 502 (2017). The Court also declined to review *Prost v. Anderson* several years earlier. *See* 636 F.3d 578 (10th Cir. 2011), *cert. denied*, 565 U.S. 1111 (2012).

access to habeas relief to be subject to the happenstance of their locations of confinement.[91]

Second, the circuit split implicates fundamental issues of justice and fairness. The Sixth Circuit's narrow interpretation of § 2255(e) threatens to reduce a prisoner's habeas rights and prolong detention even when the law of the circuit decrees that the individual is unlawfully detained. Instead of granting prisoners an avenue to challenge wrongful convictions or improper sentences, *Hueso* preferred to place higher value on the finality of adjudications over accuracy.[92] Finality is a necessary value in the criminal justice system, or else perpetual attacks will undermine the "ultimate certitude" of a criminal conviction.[93] However, in protecting finality, *Hueso* and similar cases like *Prost* and *McCarthan* may actually sanction frivolous attacks on existing law. As Judge Moore wrote in dissent in *Hueso*:

> The majority today withholds relief from Hueso—whose legal arguments have now been undisputedly accepted by the Ninth Circuit . . . because, nearly a decade ago, he did not argue to the Ninth Circuit that its standing interpretation of the law was incorrect. This suggestion is surprising given the majority's recognition of society's interest in stopping perpetual attacks on final criminal judgements. The rule created today not only incentivizes but *requires* prisoners to raise arguments to courts that are squarely foreclosed by binding precedent, to the detriment of judicial efficiency.[94]

Wheeler, on the other hand, was willing to sacrifice finality to pursue substantively fair outcomes. In doing so, the court recognized its unique role as an institution "entrusted with ensuring [a prisoner] has a meaningful opportunity to demonstrate that he is entitled to relief from his allegedly erroneous sentence."[95] Put differently, by permitting a circuit's new statutory interpretation to trigger the savings clause, the court is protecting the "essential function" of habeas corpus: "to give a prisoner a reasonable opportunity to obtain a reliable judicial

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[91] *See* Hueso v. Barnhart, 948 F.3d 324, 340 (6th Cir. 2020).

[92] *See id.* at 326; *see also Prost*, 636 F.3d at 582–83 ("The principle of finality, the idea that at *some* point a criminal conviction reaches an end, a conclusion, a termination, 'is essential to the operation of our criminal justice system.'") (quoting Teague v. Lane, 489 U.S. 288, 309 (1989)).

[93] *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452–53 (1963); *see also Prost*, 636 F.3d at 583 ("In every case there comes a time for the litigation to stop, for a line to be drawn, and the parties encouraged to move forward rather than look back.").

[94] *Hueso*, 948 F.3d at 353–54 (Moore, J., dissenting) (internal quotation marks omitted).

[95] United States v. Wheeler, 886 F.3d 415, 426 (4th Cir. 2018).

determination of the fundamental legality of his conviction and sentence."[96]

In sum, circuit precedent regarding the savings clause is intractably divided. The *Hueso*-*Wheeler* split about whether new statutory interpretation by a circuit court can trigger the savings clause is a microcosm of the deeper conflict of whether new statutory interpretation decisions by *any* court (even the Supreme Court) can trigger the savings clause. On both questions, circuits are divided about what the text says, how to interpret it, and how best to balance the values of accuracy, finality, and justice. In view of the fundamental injustice of detaining a prisoner who is imprisoned because of his circuit's error and who had no viable path for bringing an earlier challenge, the Supreme Court should vindicate the Fourth Circuit's view. In doing so, the Court would be protecting the purpose and flexibility of the habeas statutes to ensure substantial justice. Alternatively, if the Court finds the text and structure of AEDPA to support the Sixth Circuit's approach, a definitive ruling by the Court may motivate Congress to act. It is unlikely that the legislature intentionally condemned federal prisoners to serve sentences for conduct that no longer justifies the sentence. Either way, this fundamental issue in criminal justice warrants a uniform answer.

CONCLUSION

Whatever the proper interpretation of § 2255 may be, the circuits' inability to reach a consensus on the contours of the savings clause highlights the broader need for Supreme Court intervention. The circuits have invoked various tools of statutory interpretation, yet neither the statute's text, nor traditional canons of construction, nor the values underlying the criminal justice process have rendered a consistent answer. After the recent split between the Fourth Circuit's *Wheeler* decision and the Sixth Circuit's *Hueso* decision, a prisoner's right to challenge his sentence will vary purely based on geography. Even more, *Hueso*'s strict textualist approach could foreshadow the Sixth Circuit curtailing the scope of § 2255(e) to look more like the Tenth and Eleventh Circuits. In the latter circuits, the savings clause is unavailable for *any* new rule of statutory interpretation—regardless of whether it is from a circuit court or the Supreme Court. In short, the circuit divide is deep and the stakes are high enough that Supreme Court intervention is warranted.

[96] In re Davenport, 147 F.3d 605, 609 (7th Cir. 1998).