In a sharp break from Obama Era policies, the Trump DOJ has raised defenses in postconviction litigation to block federal prisoners from presenting arguments that they are actually innocent or serving illegal sentences, regardless of merit. Under Obama Era policies, in contrast, prosecutors generally waived procedural defenses in cases involving a miscarriage of justice. The below proposal is consistent with Obama Era policies, with one addition. Under the Obama DOJ, it was left to individual prosecutors to decide if they agreed with a federal prisoner's miscarriage-of-justice legal claim—if yes, they conceded; if no, they raised procedural defenses, in addition to arguing against the substance of the claim. We propose that courts be permitted to reach the substance of any nonfrivolous miscarriage-of-justice claim, so that the law can develop in an orderly manner and not according to the whims of individual prosecutors.

POSTCONVICTION LITIGATION IN NON-CAPITAL CASES[1]

Guiding Principle: A federal prisoner with a nonfrivolous claim that his or her case presents a miscarriage of justice (actually innocent or sentenced under an improperly enhanced mandatory range—statutory or guideline, minimum or maximum), which claim was not viable at the time of direct appeal, should be permitted to seek relief based on the newly viable claim.

How this impacts the Department of Justice's litigation positions:

- When a prisoner advances a nonfrivolous claim of a miscarriage of justice, the DOJ will waive procedural defense (*e.g.*, timing, procedural default).
- When the claim involving a miscarriage of justice becomes viable, if the claimant is prohibited from filing a § 2255 motion (by § 2255(h)) and thus raises it under § 2241 (via § 2255(e)'s savings clause), the DOJ will not argue against § 2241 as a potential mechanism for relief.
- The DOJ will take the position (consistent with, *e.g.*, the Seventh Circuit) that § 2255(e)'s savings clause is not jurisdictional.
- In order to avoid venue complications of § 2241 litigation, the DOJ will not raise a venue objection to a § 2241 petition filed in the district of conviction, where the court and the attorneys are expected to be most familiar with the case.

These litigation positions do not prevent the DOJ from raising available substantive defenses—*e.g.*, that the prisoner is not innocent or that he or she was sentenced under the appropriate range. Also, if a miscarriage-of-justice claim is raised in a circuit where binding precedent precludes § 2241 relief via § 2255(e)'s savings clause, the DOJ can, of course, explain as much to the court.

---

[1] The policy proposals set forth here and provided by Sentencing Resource Counsel are meant to apply to non-capital cases only. Capital post-conviction cases present unique issues and concerns not addressed by these proposals. Proposals for capital cases will be provided by the Federal Capital Habeas Project, a group created in 2006 by the Office of Defender Services devoted to litigation issues of common concern to federal prisoners under death sentence in post-conviction proceedings.

Contact: National Sentencing Resource Counsel, Federal Public & Community Defenders,
Patricia_Richman@fd.org

What it means for a claim to become "viable":

- New caselaw creates or reveals the legal basis for the claim.
- Change in circumstances creates or reveals the factual basis for the claim.

Examples of miscarriages of justice (arising in § 2241 cases):

- *McCormick v. Butler*, 977 F.3d 521 (6th Cir. 2020) (Supreme Court statutory interpretation decision, *Mathis v. United States*, 136 S. Ct. 2243 (2016), revealed that prisoner was unlawfully sentenced under Armed Career Criminal Act).

- *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020) (Supreme Court statutory interpretation decisions, *Mathis* and *Descamps v. United States*, 570 U.S. 254 (2013) revealed that prisoner was unlawfully sentenced as "career offender" under pre-*Booker* mandatory guidelines).

- *Beason v. Marske*, 926 F.3d 932 (7th Cir. 2019) (circuit decision, *United States v. Spencer*, 739 F.3d 1027 (7th Cir. 2014), revealed that everyone involved in the prisoner's case had misunderstood a matter of state sentencing law, such that he was unlawfully sentenced under the Armed Career Criminal Act).

- *United States v. Wheeler*, 649 F.3d 247 (4th Cir. 2018) (circuit decision, *United States v. Simmons*, 635 F.3d 140 (4th Cir. 2011) (en banc), revealed that prisoner's mandatory minimum sentence of 10 years under 21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 851 was unlawful).

- *Santillana v. Upton*, 846 F.3d 779 (5th Cir. 2017) (Supreme Court statutory interpretation decision, *Burrage v. United States*, 571 U.S. 204 (2014), revealed that prisoner was unlawfully sentenced to a mandatory minimum sentence for distribution of drugs resulting in death under 21 U.S.C. § 841(b)(1)(C)).

- *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016) (Supreme Court statutory interpretation decision, *Descamps v. United States*, 570 U.S. 254 (2013), and circuit statutory interpretation decision, *United States v. Royal*, 731 F.3d 333 (4th Cir. 2013), revealed that prisoner was unlawfully sentenced as "career offender" under pre-*Booker* mandatory guidelines).

- *In re Davenport*, 147 F.3d 605 (7th Cir. 1998) (Supreme Court statutory-interpretation decision, *Bailey v. United States*, 516 U.S. 137 (1995), revealed that prisoner was actually innocent of § 924(c) offense).

Please see the attached Obama Era briefs—one regarding § 2255 defenses, the other regarding § 2241 availability—as examples of the DOJ's former positions.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO. 3:11CV251
(3:02CR151)

ZAKEIA RASHON BLAKELEY,)
)
Petitioner,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)
)

GOVERNMENT'S ANSWER TO PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

COMES NOW the United States of America, by and through Anne M. Tompkins, United States Attorney for the Western District of North Carolina, and, pursuant to an Order entered on November 1, 2013, responds to Petitioner's Motion to Vacate, Set Aside, or Correct Sentence filed on May 19, 2011. In his motion, Petitioner alleges that his sentence was erroneously enhanced in light of *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), and in violation of the due process clause of the Fifth Amendment. As explained below, although Petitioner's motion is untimely and he waived his right to bring such a challenge in his plea agreement, the Government is declining to assert these defenses and is, instead, agreeing to relief in light of *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011), and *Hicks v. Oklahoma*, 447 U.S. 343 (1980). Accordingly, the Government respectfully

requests that Petitioner's motion to vacate his sentence be granted and that Petitioner be re-sentenced.

PROCEDURAL BACKGROUND

Petitioner Zakeia Rashon Blakeley was charged by a grand jury with conspiracy to possess with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841 and 846; possession with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. § 841; and possession of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c). (Doc. # 3). The Government filed an Information Pursuant to 21 U.S.C. § 851 noticing Petitioner's prior drug offense, specifically, that he was convicted in Mecklenburg County Superior Court for possession of cocaine. (Doc. No. 5). According to the PSR, Petitioner faced a sentence of only six to eight months for this offense. (Doc. No. No. 62 ("PSR") at ¶ 34). The § 851 enhancement doubled Petitioner's statutory minimum sentence from ten years of imprisonment to twenty years of imprisonment.

Petitioner entered into a plea agreement with the Government, in which he pled guilty to Counts One and Five (the conspiracy and the firearm offense). (Doc. No. 45). As part of the agreement, Petitioner acknowledged the minimum and maximum terms of imprisonment for each count; agreed that he was responsible for at least 50 grams of crack cocaine; and waived his rights to appeal or challenge in a

post-conviction proceeding his conviction or sentence, except for claims of ineffective assistance of counsel or prosecutorial misconduct. *Id.*

Following entry of the guilty plea, a United States Probation Officer prepared a Pre-Sentence Investigation Report and determined that the amount of crack cocaine attributable to Petitioner was 154.4 grams, resulting in a base offense level of 34. PSR at ¶ 20. Accounting for acceptance of responsibility, Petitioner's total offense level was 31 with a criminal history category III, yielding a guideline sentencing range of 135 to 168 months. *Id.* at ¶ 54. The statutory minimum sentences, however, were 20 years and 5 years for the conspiracy and firearm offenses, respectively. *Id.* This Court accordingly sentenced Petitioner to 240 months of imprisonment for the conspiracy offense and a consecutive term of 60 months of imprisonment for the firearm offense. Doc. No. 57. Petitioner did not appeal.

Petitioner filed an initial motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 on May 19, 2011, seeking relief from his sentence based on *Carachuri-Rosendo* and the Fifth Amendment. *See* 3:11CV251, Doc. No. 1, p. 4-5. The Government opposed Petitioner's claim for relief, contending that Petitioner's motion was untimely, waived in his plea agreement, and barred by the Fourth Circuit's recent decision in *United States v. Powell*, 691 F.3d 561 (4th Cir. 2012). Doc. No. 4. In an order dated November 9, 2012, this Court denied and dismissed Petitioner's motion, finding that it was untimely and barred by the

holding in *Powell*. Doc. No. 63. Petitioner appealed to the Fourth Circuit, and, with the consent of both parties, the Fourth Circuit remanded this matter back to this Court for consideration of Petitioner's claim for relief in light of *Miller v. United States*, -- F.3d --, 2013 WL 4441547 (4th Cir. Aug. 21, 2013), and the Government's revised position that Petitioner is entitled to relief. Doc. No. 18.

ARGUMENT

1. The Government waives the statute of limitations.

Ordinarily, a § 2255 motion must be filed within one year of "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). As the Government previously contended, Petitioner's § 2255 motion was filed more than one year after the judgment against him became final.

Nevertheless, after careful consideration, the Department of Justice has decided that in the interests of justice, in this category of cases involving *Simmons*-infirm § 851 enhancements, it will waive reliance on the statute-of-limitations defense as to sentencing errors that resulted in the improper application of a mandatory minimum term of imprisonment. *Cf. Hill v. Braxton*, 277 F.3d 701, 705 (4th Cir. 2002) (one-year statute of limitations for state prisoners "is not jurisdictional" but is instead "an affirmative defense that the state bears the burden of asserting"). The Supreme Court has explained that, while district courts (and appellate courts) have discretion *sua sponte* to raise a statute-of-limitations barrier to relief in a habeas case when the government had inadvertently failed to raise it,

Wood v. Milyard, 132 S. Ct. 1826, 1834 (2012); *Day v. McDonough*, 547 U.S. 198, 209 (2006), the Government's intentional relinquishment of the statute-of-limitations defense constitutes a waiver that courts may not override, *see Day*, 547 U.S. at 202 ("[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense."); *id.* at 210 n.11 ("Should [the government] intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice."); *Wood*, 132 S. Ct. at 1835 (holding that the State's deliberate decision not to contest the timeliness of a defendant's habeas petition "after expressing its clear and accurate understanding of the timeliness issue" constituted a deliberate waiver). Because of the United States' deliberate waiver of a statute of limitations defense, this Court should reach the merits of Petitioner's claims. The Government is similarly declining to enforce the post-conviction waiver contained in Petitioner's plea agreement.

2. Defendant is entitled to relief from the erroneously enhanced 20-year sentence.

Title 21, section 851 provides for enhanced sentences based on any prior "felony drug offense." That term is defined in section 802(44) as "an offense that is punishable by imprisonment for more than one year under [any state or federal law relating to narcotics or marijuana]." In *Simmons*, the Fourth Circuit held that an offense qualifies as a "felony drug offense" for purposes of § 841(b)(1) and is punishable by more than one year in prison only if the defendant could have received a sentence of more than one year in prison, overturning its earlier

decisions in *United States v. Jones*, 195 F.3d 205 (4th Cir. 1999), and *United States v. Harp*, 406 F.3d 242 (4th Cir. 2005), in which the Fourth Circuit had held that an offense is punishable by more than one year in prison as long as *any defendant* could receive a term of imprisonment of more than one year upon conviction for that offense. *See Simmons*, 649 F.3d at 247. Thus, for purposes of a qualifying predicate conviction under § 841(b)(1), a predicate conviction is not "punishable for a term exceeding one year," unless the defendant could have received a sentence of more than one year in prison under the North Carolina Structured Sentencing Act. In *Miller*, the Fourth Circuit held that the rule announced in *Simmons* was substantive, not procedural, and therefore retroactively applicable to cases pending on collateral review. *Miller*, --- F.3d ----, 2013 WL 4441547, *5.

In this case, this Court enhanced Petitioner's sentence based on his prior conviction for felony possession of cocaine under North Carolina General Statute § 90-95. Petitioner could not have received a sentence of more than one year in prison for this conviction under the North Carolina Structured Sentencing Act. Therefore, although *Jones* and *Harp* were still good law at the time this Court sentenced Petitioner, *Simmons* has made clear that Petitioner's prior conviction for felony possession of cocaine does not qualify as a "felony drug offense" because it was not punishable by more than one year in prison.

In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), the Supreme Court held that the due process clause is violated when a sentencing court is erroneously deprived of

any discretion to sentence a defendant below an erroneously applied statutory mandatory minimum sentence. *Id.* at 346. In this case, Petitioner's otherwise applicable Guidelines range was below the 240-month mandatory minimum, and, without the § 851 enhancement, Petitioner faced a mandatory minimum sentence of ten years. The Government recognizes that Defendant normally would not be entitled to *Simmons* relief because he received a sentence that was less than the statutory maximum sentence allowed even without the sentencing enhancement. *See United States v. Powell*, 691 F.3d 554, 563 n.2 (4th Cir. 2012) (King, J., dissenting in part and concurring in the judgment in part). But the Government is agreeing to relief in this case because *Hicks* suggests that Defendant's due process rights were violated, whereas *Simmons* involves a non-constitutional statutory error. Accordingly, the Government respectfully submits that Petitioner's sentence was a violation of the due process clause as established in *Hicks* and, therefore, Petitioner is entitled to a new sentencing hearing.

CONCLUSION

For these reasons, the Government declines to enforce the post-conviction waiver in his plea agreement, waives the statute of limitations, and recommends that this Court grant Petitioner's motion and order resentencing as to Count One.

Respectfully submitted, this the 5th day of November, 2013.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing ***Answer*** was served upon counsel for Petitioner by ECF:

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This the 5th day of November, 2013.

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No. 14-6851

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

RAYMOND ROGER SURRATT, JR.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of North Carolina

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REHEARING EN BANC

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IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 14-6851

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.
RAYMOND ROGER SURRATT, JR.,
Defendant-Appellant.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REHEARING EN BANC

The United States submits this supplemental brief to address the following question: whether a defendant who was sentenced to mandatory life imprisonment based on a recidivist enhancement that was correct, under binding circuit precedent, at the time of sentencing and his first motion under 28 U.S.C. § 2255, but now is indisputably wrong, may seek resentencing under the habeas corpus savings statute, 28 U.S.C. § 2255(e), and the habeas corpus statute, 28 U.S.C. § 2241. In the government's view, the answer is "yes."

INTRODUCTION

An error in the interpretation of a federal statute that results in an increased mandatory minimum sentence is a unique defect in the criminal process. That error alters the statutory range Congress prescribed for

punishment and removes all judicial discretion to impose anything other than the mandated term—in this case, a life sentence—so that the defendant is effectively sentenced for an aggravated offense that he did not commit. Accordingly, imposition of a mandatory minimum life sentence based on an error in interpreting the criteria Congress established for that punishment constitutes a fundamental defect that may justify relief under the habeas savings clause in 28 U.S.C. § 2255(e).

The habeas savings clause gives the judiciary latitude to grant relief for a narrow category of fundamental statutory-construction errors. Judicial errors that alter the statutory range of sentences transgress separation-of-powers principles that are essential to the federal system of criminal justice. Congress has the exclusive authority to establish the maximum and minimum terms for punishment of a federal offense. See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."). And Congress's power to establish penalties encompasses the authority to prescribe the extent of judicial discretion in sentencing. *Mistretta v. United States*, 488 U.S. 361, 364 (1989) ("[T]he scope of judicial discretion with respect to a sentence is subject to congressional control."). Because federal courts "may constitutionally impose only such punishments as Congress has seen fit to authorize," a legal error that

alters the statutory range of penalties implicates the constitutional principle of separation of powers. *Whalen v. United States*, 445 U.S. 684, 689-690 & n.4 (1980). And the erroneous deprivation of all judicial discretion to impose a lesser sentence not only contravenes Congress's intention that offenders be distinguished by the severity of their offenses and criminal records; it also threatens important liberty interests and, in the case of an erroneous mandatory life sentence, produces a punishment that Congress did not intend for all but the most exceptional offender.

When appellate courts have corrected course after a defendant's sentencing, direct appeal, and a first Section 2255 motion, Section 2255 is structurally "inadequate or ineffective to test the legality of [the defendant's] detention," 28 U.S.C. § 2255(e), for a claim that a misinterpretation of a criminal statute fundamentally altered the nature of the crime—either by showing that the defendant was convicted of non-criminal conduct or that he was ineligible for sentencing for what is conceptually an aggravated offense. And relief may therefore be available under Section 2241. These procedural and substantive prerequisites to savings-clause relief accord with Section 2255's text and history, and they ensure that finality interests are properly balanced against the need for fundamental justice in criminal law. Accordingly, when the procedural prerequisites are satisfied, the imposition of a mandatory minimum

life sentence based on an incorrect interpretation of the governing statute constitutes a fundamental error that warrants relief under the savings clause.

STATEMENT

1. In 2005, Raymond Surratt pleaded guilty to conspiracy to possess with intent to distribute at least 50 grams of cocaine base, in violation of 21 U.S.C. §§ 846 and 841(a)(1). At that time, a first-time offender was subject to a statutory sentencing range of ten years to life imprisonment. 21 U.S.C. § 841(b)(1)(A). If, however, an offender had one prior conviction for a "felony drug offense," the sentencing range increased to 20 years to life imprisonment. *Id.* And if an offender had two prior convictions for a "felony drug offense," the statute mandated a sentence of life imprisonment. *Id.*

The government filed a sentence-enhancement information under 21 U.S.C. § 851(a) identifying three prior North Carolina drug convictions, each of which qualified as a "felony drug offense" under this Court's decisions in *United States v. Harp*, 406 F.3d 242 (2005), and *United States v. Jones*, 195 F.3d 205 (1999). Although the Sentencing Guidelines would have otherwise recommended a range of 188-235 months of imprisonment, JA 366, and the district court would later describe a life sentence as "unjust" and explain that its "inability" to consider the possibility of a lesser sentence "based on all relevant evidence has troubled the Court to this day," JA 276, 313, the court held, in

light of *Harp* and *Jones*, that it had "no option" but to impose a life sentence. JA 50-51. This Court affirmed. 215 F. App'x 222 (4th Cir.), *cert. denied*, 550 U.S. 949 (2007).

Surratt filed a motion to vacate his sentence under 28 U.S.C. § 2255. The district court denied the motion and declined to issue a certificate of appealability (COA). This Court likewise denied a COA and dismissed Surratt's appeal. 445 F. App'x 640 (4th Cir. 2011).

2. In 2011, this Court, sitting en banc, expressly overruled *Harp* and *Jones*. *See United States v. Simmons*, 649 F.3d 237, 241 (4th Cir. 2011) (en banc). *Simmons*'s holding meant that only one of Surratt's three prior convictions qualified as a "felony drug offense." Accordingly, although prior circuit law held otherwise, Surratt was not properly subject to a mandatory life sentence and would, under the law in effect at the time of his sentencing, have faced a sentencing range of twenty years to life imprisonment. Based on *Simmons*, Surratt sought leave from this Court to file a successive Section 2255 motion, but leave was denied because *Simmons* is a decision of statutory construction and thus could not support a successive Section 2255 motion. *See* 28 U.S.C. § 2255(h).

3. In 2012, Surratt sought, *inter alia,* Section 2241 habeas relief from his mandatory life sentence. Although other avenues of relief were barred, the

government agreed that Surratt could seek Section 2241 relief because Section 2255 was "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The government explained that, in *In re Jones*, 226 F.3d 328 (4th Cir. 2000), this Court had found Section 2255 inadequate and ineffective, thus permitting recourse to Section 2241, when Section 2255's restrictions on successive motions categorically deprived a defendant of an opportunity to raise a claim that an intervening, law-changing decision of statutory construction resulted in a fundamental defect: that the defendant's conduct was not a crime. Here, the government submitted, an error that alters the statutory sentencing range for a crime raises analogous, fundamental separation-of-powers concerns because a judicial error of that character subverts Congress's constitutional prerogative to define the sentencing range for a crime and thereby alters the nature of the crime itself. See *Alleyne v. United States*, 133 S. Ct. 2151 (2013). The district court disagreed and dismissed the petition for lack of jurisdiction because, in the court's view, Surratt failed to demonstrate that Section 2255 was "inadequate or ineffective." JA 318, 327.

4. A divided panel affirmed. 797 F.3d 240. The panel concluded that Section 2255 was adequate to allow Surratt to "test" the legality of his detention because he could have challenged the sentencing court's reliance on his prior convictions on direct appeal or in his initial Section 2255 motion. *Id.*

at 251-253, 268. The panel also concluded that Surratt's substantive claim was not redressable under Section 2241 because it did not allege that he was "actually innocent" of his conviction, as was the case in *In re Jones*, *supra*, or that his mandatory life sentence exceeded the otherwise-applicable life maximum that applied even after *Simmons*, *id.* at 269.

Judge Gregory dissented, arguing that the panel's analysis conflicted with *In re Jones* and that, "[w]hen a punishment involves a complete deprivation of liberty, then even a sentence exactly at, but not exceeding, the statutory maximum can constitute an extraordinary miscarriage of justice." 797 F.3d at 270. He would have adhered to the "analytical path obligating us to grant Surratt the resentencing that he seeks, and that justice requires." *Id.* at 276.

5. Surratt filed a petition for rehearing en banc, which the government supported. This Court granted rehearing en banc, thereby vacating the panel's judgment and opinion. Order (Dec. 2, 2015); see 4th Cir. R. 35(c).

ARGUMENT

THE HABEAS SAVINGS CLAUSE IS AVAILABLE TO REMEDY THE IMPOSITION OF AN ERRONEOUS MANDATORY MINIMUM SENTENCE IN THE CIRCUMSTANCES OF THIS CASE

The habeas savings clause, 28 U.S.C. § 2255(e), provides that a federal prisoner who is authorized to seek post-conviction relief under that section may apply for habeas corpus relief to "test the legality of his detention" only

when the remedy under Section 2255 is "inadequate or ineffective." This narrow gateway to relief encompasses fundamental statutory-construction errors that were corrected by the courts only after a defendant was sentenced and completed a first motion under Section 2255. An error that alters the statutory range that Congress prescribed for punishment, and completely forecloses discretion to impose a more lenient sentence than life imprisonment, can be redressed under the savings clause, consistent with its text, judicial construction, and sound principles of collateral review. None of the reasons advanced in the now-vacated panel opinion supports denial of all relief—thus forcing prisoners like Surratt to die in prison because of a judicial error in their sentencings. Rather, granting relief is consistent with this Court's precedents and the purposes of the writ of habeas corpus.

A. The Habeas Savings Clause Provides A Narrow Avenue For Relief For Fundamental Defects In Criminal Convictions And Sentences

1. Section 2255 of Title 28, United States Code, provides the basic post-conviction remedy for federal prisoners. Enacted in 1948, *see United States v. Hayman*, 342 U.S. 205, 206 (1952), Section 2255 "provides four avenues by which a [movant] can seek relief" through a motion in the sentencing court, *United States v. Foote*, 784 F.3d 931, 936 (4th Cir.), *cert. denied*, 135 S. Ct. 2850 (2015): "the sentence was imposed in violation of the Constitution or laws of the United States"; "the court was without jurisdiction to impose such

sentence"; "the sentence was in excess of the maximum authorized by law"; or the sentence "is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Section 2255 was intended as a substitute for habeas corpus, see *Hayman*, 342 U.S. at 219, and Congress generally prevented federal prisoners from challenging their convictions or sentences in a petition for habeas corpus under Section 2241, as they did before 1948. But Congress preserved the availability of habeas corpus relief in the italicized language below, a provision known as the habeas savings clause:

> 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.*

28 U.S.C. § 2255(e) (emphasis added).

Because of the breadth of the remedy under Section 2255, for many years, federal prisoners had little reason to seek relief for substantive claims under the habeas savings clause. For example, federal prisoners could maintain successive Section 2255 motions when necessary in the interest of justice. *Sanders v. United States*, 373 U.S. 1, 15-17 (1963). And federal prisoners could rely on Section 2255 when an intervening statutory-construction decision revealed a fundamental miscarriage of justice, such as being convicted for "an

act that the law does not make criminal." *Davis v. United States*, 417 U.S. 333, 346 (1974). Nevertheless, the Supreme Court made clear that the habeas savings clause would be available for substantive relief in appropriate cases. See *Sanders*, 373 U.S. at 14.

2. In 1996, Congress restricted federal prisoners' ability to file successive motions for relief under Section 2255. See Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, Tit. I, § 105, 110 Stat. 1220. AEDPA established a gatekeeping procedure that requires certification by a court of appeals before a federal prisoner can seek successive relief under Section 2255. To maintain such a successive filing, a prisoner must show that his motion involves either (1) newly discovered evidence that establishes, by clear and convincing evidence, that the prisoner was not 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." 28 U.S.C. § 2255(h). AEDPA did not provide for successive Section 2255 motions based on intervening statutory-construction decisions. But Congress left intact the habeas savings clause in Section 2255(e) as a residual source of authority for federal post-conviction relief. As under pre-AEDPA law, Section 2255(e) authorizes a district court to entertain a federal prisoner's petition for a writ of

habeas corpus under Section 2241 when Section 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

3. The savings clause in Section 2255(e) preserves the fundamental purposes of habeas corpus by allowing review of a narrow category of claims that warrant relief even after the defendant has completed direct appeal and a prior collateral attack. When Congress passed AEDPA in 1996 and amended Section 2255 to limit successive motions to claims of factual innocence and new retroactive constitutional rules, it retained the language of Section 2255(e) without change. And Section 2255(e) specifically contemplates cases in which the Section 2255 remedy will be inadequate or ineffective to test a prisoner's claim even *after* the prisoner has completed an initial Section 2255 motion. *See* 28 U.S.C. § 2255(e) (referring to a habeas petition filed by a prisoner who "has [been] denied . . . relief" under Section 2255).

As this Court has recognized, the phrase "inadequate or ineffective" is not satisfied simply because a prisoner cannot meet Section 2255's limitations on second-or-successive motions. *In re Jones*, 226 F.3d at 333 ("It is beyond question that § 2255 is not inadequate or ineffective merely because an individual is unable to obtain relief under that provision."); *see, e.g., Gilbert v. United States*, 640 F.3d 1293, 1308 (11th Cir. 2011) (en banc) (same), *cert. denied*, 132 S. Ct. 1001 (2012). But this Court has also recognized that "there must

exist some circumstance in which resort to § 2241 would be permissible; otherwise, the savings clause itself would be meaningless." *In re Jones*, 226 F.3d at 333. This Court's conclusion that the habeas savings clause reaches "a limited number of circumstances," *ibid.*, involving a "fundamental defect," *id.* at 333 n.3, accords with the history and purpose of the savings clause.

Before Congress adopted AEDPA, the Supreme Court had made clear that a narrow set of statutory claims based on intervening changes of judicial interpretation are cognizable on collateral review under Section 2255 in order to redress "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis*, 417 U.S. at 346 (internal quotation marks omitted). In enacting AEDPA, Congress expressed no intention to foreclose all avenues of successive post-conviction relief for such statutory claims, which present "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Id.* (internal quotation marks omitted). As the Supreme Court explained in *Davis*, Congress intended the relief available in a motion under Section 2255 and the relief available in federal habeas corpus under Section 2241 to be "identical in scope." *Davis*, 417 U.S. at 343. But if a prisoner were foreclosed from filing for collateral relief based on a fundamental change in statutory interpretation and thus "through no fault of his own, has no source of redress," *Jones*, 226 F.3d at 333 n.3, Section 2255 would fall short

of its purpose. Instead, Congress retained the language of Section 2255(e), thus leaving latitude to the courts to ensure that, when such fundamental statutory claims became available only after an initial Section 2255 motion had been denied, a prisoner would not be prevented—because of Section 2255(h)'s requirements—from having one fair opportunity to present those claims.

B. An Erroneously Imposed Mandatory Minimum Sentence Is The Type Of Fundamental Defect Cognizable Under The Savings Clause

1. This Court has previously recognized that fundamental statutory error arises when "the substantive law [has] changed such that the conduct of which the prisoner was convicted is deemed not to be criminal." *Jones*, 226 F.3d at 334. In *Jones*, an erroneous interpretation of a federal criminal statute resulted in a defendant's conviction of conduct that was later determined by intervening precedent not to be a federal crime. This Court held that the error raised a fundamental defect in the proceeding that may be redressed under Section 2241. *Id.* at 333-334. A conviction for conduct that is not criminal implicates not only basic concepts of liberty under the due process clause, but also the separation-of-powers principle that "it is only Congress, and not the courts, which can make conduct criminal." *Bousley v. United States*, 523 U.S. 614, 620-621 (1998); *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) (same).

2. The savings clause is not limited to claims of actual innocence because the defendant was convicted of a non-existent offense. Certain fundamental sentencing errors are also redressable under Section 2241. Section 2255(e) focuses on Section 2255's adequacy to test the legality of a prisoner's "detention." The word "detention" includes challenges to a conviction, but it equally applies to challenges to a sentence. *See* Black's Law Dictionary 543 (10th ed. 2014) (defining "detention" to include "[t]he act or an instance of holding a person in custody"); *cf. Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (equating "[f]reedom from imprisonment" with freedom "from government custody, detention, or other forms of physical restraint"). Other provisions of Section 2255 expressly impose a conviction-only limitation, underscoring that no such implicit limitation was intended in Section 2255(e). *See Bryant v. Warden*, 738 F.3d 1253, 1281-1282 (11th Cir. 2013). For example, a court of appeals may authorize a second or successive Section 2255 motion when the prisoner relies on newly discovered evidence showing that no factfinder would have found him guilty "of the offense." 28 U.S.C. § 2255(h)(1). If Congress had intended to restrict savings clause relief to claims challenging only the offense of conviction, rather than the sentence, it could have used the word "offense" or "conviction" in Section 2255(e), just as it did in Section 2255(h)(1). But Section 2255(e) uses a different, broader word, and that

different usage, under standard principles of statutory construction, supports the conclusion that Congress did not intend that "detention" be equated with "conviction." *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

3. Statutory-construction errors that alter the range of punishment for an offense implicate the type of fundamental defect that is cognizable under the savings clause. In the federal system, "defining crimes and fixing penalties are legislative, not judicial, functions." *United States v. Evans*, 333 U.S. 483, 486 (1948). Congress alone can set maximum and minimum terms of imprisonment, *id.*, and together they define legal boundaries for the punishment for a particular crime. *See Williams v. New York*, 337 U.S. 241, 247 (1949) ("[a] sentencing judge" exercises discretion within "fixed statutory or constitutional limits"). Thus, consistent with the "constitutional principle of separation of powers," a defendant has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress," and a violation of that principle "trenches particularly harshly on individual liberty." *Whalen*, 445 U.S. at 689-690.

A statutory-construction error that results in a sentence that exceeds the statutory maximum provided by Congress unquestionably implicates that separation-of-powers principle. *See United States v. Newbold*, 791 F.3d 455, 460 (4th Cir. 2015) (recognizing, in the context of an initial Section 2255 motion, that such a sentence raises "separation-of-powers concerns" because the defendant has "received a punishment that the law cannot impose upon him") (internal quotation marks omitted). Based in part on those "serious, constitutional, separation-of-powers concerns," the Eleventh Circuit concluded in *Bryant v. Warden*, *supra*, that the imposition of a sentence above the otherwise applicable statutory maximum, where circuit law squarely foreclosed the petitioner from raising the claim at trial or during an initial Section 2255 motion, constitutes a fundamental error that is cognizable under the savings clause and Section 2241. 738 F.3d at 1271, 1274, 1283.

The imposition of an erroneous mandatory minimum sentence is equally a fundamental separation-of-powers error that "trenches particularly harshly on individual liberty," *Whalen*, 445 U.S. at 689. The separation-of-powers concerns raised by a judicial alteration of the statutory sentencing range are identical, whether the error affects the maximum or minimum term. Congress in each instance has plenary authority to set the boundaries of punishment, *Evans*, 333 U.S. at 486, and courts have no authority to alter them. Further, as

the government explained its opening brief, an increased statutory mandatory minimum term effectively imposes punishment for an aggravated offense. *See* U.S. Br. 24-31, 35-36 (citing, *inter alia*, *Alleyne v. United States*, 133 S. Ct. 2151 (2013)). And an erroneous mandatory minimum sentence deprives the sentencing court of discretion that Congress intended it to exercise, raising serious liberty-deprivation concerns. *See* U.S. Br. 31-34, 37 (citing, *inter alia*, *Hicks v. Oklahoma*, 447 U.S. 343, 346-347 (1980)).

4. The panel rejected the view that the error in this case imposed a sentence for the equivalent of an aggravated offense, reasoning that recidivism-based sentencing enhancements are not elements of a separate crime and that *Alleyne v. United States*, *supra*, cannot apply here because that decision is not retroactive to cases on collateral review and, in any event, does not apply to recidivism. 797 F.3d at 248-249. But the relevance of *Alleyne* is not for its holding that facts (other than recidivism) that increase the mandatory minimum term are subject to the Sixth Amendment jury trial guarantee. 133 S. Ct. at 2155, 2160 n.1. The government agrees that this holding is not retroactive to cases on collateral review, *see, e.g.*, *Crayton v. United States*, 799 F.3d 623 (7th Cir.), *cert. denied*, 136 S. Ct 424 (2015), and does not apply here in any event, *see* *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (recidivism-based sentence enhancements are not "elements" of an offense for Sixth Amendment

purposes). But *Simmons*'s holding is retroactive, *see* U.S. Opening Br. 11-16, and *Alleyne*'s relevance is for its recognition that the statutory minimum and maximum term together define the penalty for an offense and a fact that "alters the prescribed range of sentences to which a criminal defendant is exposed . . . produces a new penalty." 133 S. Ct. at 2160. "Elevating the low-end of a sentencing range," the Court explained, "ups the ante for a criminal defendant," and a fact that does so forms the functional equivalent of "a new, aggravated crime." *Id.* at 2161 (internal quotation marks omitted). This Court itself has recognized that a state law "conviction" based on a recidivist enhancement is an "aggravated offense." *Simmons*, 649 F.3d at 244. That recognition reinforces the separation-of-powers issues raised by an erroneous statutory construction holding that increases the mandatory minimum term. *Newbold*, 791 F.3d at 460 n.6 (finding that an "erroneously-imposed" recidivism-based "sentencing floor is problematic on its own" because, "'[i]t is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime'" (quoting *Alleyne*, 133 S. Ct. at 2160)).

The panel also found no fundamental liberty interest in this case because it distinguished *Hicks v. Oklahoma*, *supra*, as a case involving jury sentencing; because later Supreme Court cases have read it narrowly; and because *Hicks* arose on direct appeal. 797 F.3d at 265-267. That reasoning is unsound. In

Hicks, the Court found a due process violation because a defendant was erroneously sentenced to a mandatory 40-year term as a recidivist, thus depriving him of a state-law entitlement to have a jury fix his sentence to any term "not less than ten . . . years." 447 U.S. at 346. The Court rejected the state appellate court's decision to affirm simply because the erroneously imposed mandatory sentence was within the authorized range of punishment. *Id.* at 345. The involvement of a jury does not limit the meaning of *Hicks*. No constitutional right to jury sentencing exists; rather, the same due process interests are implicated by the deprivation of all judicial discretion to impose a lower sentence. *See Chitwood v. Dowd*, 889 F.2d 781, 786 (8th Cir. 1989); *Prater v. Maggio*, 686 F.2d 346, 350 n.8 (5th Cir. 1982). And the Supreme Court has not limited *Hicks* to juries simply by describing its holding in light of its facts. *See Cabana v. Bullock*, 474 U.S. 376, 387 n.4 (1986). Indeed, *Cabana* distinguished *Hicks* by noting that "[u]nlike the defendant in *Hicks*, Bullock had no state-law entitlement at the time of his trial to have the jury (*or, indeed, any one at all*)," make the findings needed to support his sentence that were later made on appeal. *Id.* (emphasis added). That language confirms that the relevant point in *Hicks* was that the defendant had a state-law entitlement to the exercise of discretion in fixing his sentence and he was deprived of that exercise of discretion by an erroneous application of a mandatory minimum term. And

the fact that *Hicks* arose on direct appeal does not imply that its assessment of the constitutional harm to the defendant is limited to that context. Accordingly, the liberty interest recognized in *Hicks*—the right to a sentence imposed by the jury in the exercise of its discretion—is equally implicated by the total deprivation of discretionary judicial sentencing. *See Newbold*, 791 F.3d at 460 n.6 (on Section 2255 review, holding that the district court's mistaken belief that the defendant was subject to a 15-year mandatory minimum sentence implicated the defendant's due process right "to be deprived of his liberty only to the extent determined by the trier of fact 'in the exercise of its statutory discretion'") (quoting *Hicks*, 447 U.S. at 346).

5. The fact that a mandatory minimum punishment may require a sentence within the range that would have been authorized absent the judicial error does not diminish the error's serious impact on liberty interests. The Supreme Court has recognized the potential of a mandatory-minimum sentence to "produce unfairly disproportionate impacts on certain kinds of offenders." *Almendarez-Torres*, 523 U.S. at 245. Because a mandatory minimum may "mandate a *minimum* sentence of imprisonment more than twice as severe as the *maximum* the trial judge would otherwise have imposed, . . . the risk of unfairness to a particular defendant is no less, and may well be greater, when a mandatory-minimum sentence, rather than a permissive maximum sentence, is

at issue." *Id.* (citation omitted). The Court confirmed that point in *Alleyne*, noting that a mandatory minimum punishment carries great significance even though a sentencing judge operating without the mandatory minimum would have statutory authority to impose the same sentence as a matter of discretion. "It is no answer," the Court stated, "to say that the defendant could have received the same sentence with or without that fact." *Alleyne*, 133 S. Ct. at 2162. "The essential point is that the aggravating fact produced a higher range," which constituted aggravated punishment. *Id.* at 2162-2163. And the Supreme Court made the same point in *Hicks*, when it found a due process violation in the deprivation of "the imposition of criminal punishment in the discretion of the trial jury," even though the resulting sentence was "within the range of punishment that could have been imposed in any event." *Hicks*, 447 U.S. at 345-346.

C. The Erroneous Imposition Of A Mandatory Minimum Life Term Results In An Unduly Harsh Sentence In All But The Rarest Cases

The separation-of-powers and liberty-interest concerns described above establish the fundamental character of the defect in this case. Those concerns are reinforced by the reality that the mandatory life term in this case is far in excess of what Surratt would have, or perhaps could have, received absent the error.

1. Before this Court's decision in *Simmons*, this Circuit's governing decisions incorrectly classified a defendant with Surratt's criminal history as one of the most serious possible federal drug offenders—one whose offense and prior crimes mandated that he spend the rest of his life in prison. Surratt was thus required to serve the most severe sentence available for a non-homicide defendant. *Simmons* restored Congress's intention that a defendant like Surratt be subject to a range of sentencing options, from which the district court is required to select a sentence that is "sufficient, but not greater than necessary" to accomplish the statutory purposes of sentencing. *See* 18 U.S.C. § 3553(a); 21 U.S.C. § 841(b)(1)(A) (providing for range of 20 years to life imprisonment for defendant with one prior felony drug conviction). The error in pre-*Simmons* law almost certainly resulted in a far harsher sentence for Surratt than would otherwise have been imposed, one that Congress did not intend for all but the rarest offender.

When Congress enacts a broad sentencing range, it necessarily contemplates punishment alternatives for the full spectrum of offenders. Sentencing judges are expected to reserve the harshest punishment for the most culpable offenders and the most lenient punishment for the least culpable—and to graduate punishment for offenders who fall in between those

extremes. Imposing the most severe sentence on every defendant conflicts with Congress's provision of a statutory range of punishments.

For that reason, even before the enactment of the Sentencing Reform Act, this Court and others would reverse a sentence at the statutory maximum when the sentencing judge had failed to exercise discretion in light of the circumstances of the individual offender, but had instead imposed the most severe sentence available based solely on the offense of conviction. *See United States v. Bowser*, 497 F.2d 1017, 1019 (4th Cir.) (vacating sentence where court imposed the maximum sentence for bank robbery of 25 years of imprisonment when circumstances suggested an absence of an "actual exercise of discretion"), *cert. denied*, 419 U.S. 857 (1974); *see also, e.g.*, *United States v. Barker*, 771 F.2d 1362, 1367 (9th Cir. 1985); *United States v. Wardlaw*, 576 F.2d 932, 938-939 (1st Cir. 1978); *United States v. Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974) (per curiam); *United States v. Hartford*, 489 F.2d 652, 655-656 (5th Cir. 1974); *Woosley v. United States*, 478 F.2d 139, 143-145 (8th Cir. 1973); *United States v. Daniels*, 446 F.2d 967, 971 (6th Cir. 1971); *United States v. McCoy*, 429 F.2d 739, 743 (D.C. Cir. 1970) (per curiam). Those courts recognized that, when Congress establishes a punishment range, it intends sentencing courts to take into account individualized circumstances rather than routinely imposing the maximum sentence. *See Barker*, 771 F.2d at 1367 (Congress's "express legislative

authorization" of five-year maximum term for marijuana offenses "clearly evidenced an implied legislative will to impose a lesser sentence where appropriate") (internal quotation marks omitted); *Hartford*, 489 F.2d at 655-656 (judge's "rigid" policy of sentencing drug offenders to maximum five-year term "runs counter to the considered judgment of Congress in prescribing a non-mandatory maximum sentence" and "failed to abide by the implied congressional mandate to frame the punishment to address the particular circumstances of the individual defendant"). Likewise, a statutory-construction error that causes courts to mechanically impose the maximum sentence available, without any exercise of sentencing discretion, conflicts with Congress's intent in establishing a sentencing range.

The error in requiring a mandatory minimum term of life imprisonment unquestionably deprives a defendant of the exercise of judicial discretion to which he is entitled. But it also results in a strong likelihood that the defendant is deprived of a substantively better outcome—the imposition of a sentence less than life imprisonment. When a district court has a range of options for sentencing a defendant convicted of a drug-trafficking offense, even a recidivist, it is exceedingly unlikely that the court will select a term of life imprisonment, the harshest sentence available for a non-homicide defendant. Indeed, such a sentence may be substantively unreasonable when, as is true in

this case, the district court would have to vary significantly above the advisory Sentencing Guidelines range to impose that sentence. *See, e.g.*, *United States v. Howard*, 773 F.3d 519, 529-536 (4th Cir. 2014) (holding that sentence of life plus a term of years, which represented an upward departure from the Guidelines range, was substantively unreasonable); see JA 366 (Surratt's advisory range at the time of sentencing would have been 188 to 235 months absent the *Simmons* error). "[A] major departure should be supported by a more significant justification than a minor one." *Gall v. United States*, 552 U.S. 38, 50 (2007). A departure or variance to life imprisonment would have represented a major increase in the severity of Surratt's sentence, one that might even have been reversed on appeal as substantively unreasonable.

2. Sentencing statistics bear out the rarity of life sentences for drug-trafficking defendants. In fiscal year 2013, for example, district courts sentenced more than 22,000 defendants for drug-trafficking crimes. *See* U.S. Sentencing Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, Table 27.[1] But courts imposed life sentences in only 64 of those cases, and in only 29 cases where that sentence was not statutorily mandated. *See* U.S. Sentencing

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[1] Available at: http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013

Comm'n, *Life Sentences in the Federal System* 4, 9 (Feb. 2015).[2] Sentencing courts thus exercised their discretion to impose a life sentence in approximately one tenth of one percent of drug-trafficking cases.

Such a sentence would be particularly rare if it required an upward departure or variance from the advisory Guidelines. For example, in fiscal year 2014, above-range sentences were imposed in about 2.2% of federal sentencings nationally and 2.4% of cases in the Fourth Circuit. For drug defendants, the rate of above-range sentences was even smaller: .9% for drug defendants nationally, and 1.3% in the Fourth Circuit. *See* U.S. Sentencing Comm'n, *Statistic Information Packet – Fourth Circuit (Fiscal Year 2014)*, Tables 8 and 10.[3] And in the year when Surratt was sentenced, only a handful of drug defendants in the Fourth Circuit were sentenced above the Guidelines range. *See* U.S. Sentencing Comm'n, *2005 Sourcebook of Federal Sentencing Statistics*, Table 9 (sentencings under *United States v. Booker*, 543 U.S. 220 (2005)).[4] Thus,

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[2] Available at: http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf.

[3] Available at: http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2014/4c14.pdf.

[4] Available at: http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2005/4c05.pdf.

the likelihood that a drug defendant whose range was 188-235 months of imprisonment would have received an upward variance to life imprisonment was exceedingly low in any drug case, let alone in a typical case like this one.

Accordingly, the erroneous application of a mandatory minimum sentence converts the imposition of life imprisonment from the rarest of outcomes to one that is required in every case, regardless of the particular circumstances of the offense and the individual characteristics of the offender. And that is exactly what happened in Surratt's case: the sentencing judge made clear that absent the erroneous mandatory minimum, he would have imposed a lesser term of imprisonment. See JA 313 (court noted that its "inability to fashion Surratt's sentence based on all relevant evidence" had "troubled the Court to this day"). The mandatory minimum resulted only because, before *Simmons*, Surratt's prior crimes were judged in light of the harshest punishment available for a *hypothetical* offender under state law, rather than in light of Surratt's actual conduct.

3. The Supreme Court's recent decision in *Montgomery v. Louisiana*, 2016 WL 280758 (Jan. 25, 2016), supports the conclusion that the incorrect classification of a criminal defendant as among the category of offenders subject to the most severe available sentence is a fundamental error that warrants correction on habeas corpus review. In *Montgomery*, the Court held

that its constitutional holding in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which prohibited mandatory sentences of life imprisonment without parole for juveniles convicted of homicide offenses, applied retroactively in a state collateral review proceeding. 2016 WL 280758, at *11-*16. "Before *Miller*," the Court stated, "every juvenile convicted of a homicide offense could be sentenced to life without parole," whereas "[a]fter *Miller*, it will be the rare juvenile offender who can receive that same sentence." *Id.* at * 13.

The effect of the ruling in *Simmons* is that, rather than *every* defendant with Surratt's prior crimes being imprisoned for the rest of his life, only a very few defendants will be subject to sentencing at the upper limit of the statutory sentencing range. As was the case in *Montgomery*, the possibility that life imprisonment could be an appropriate sentence for a particularly culpable defendant with Surratt's record does not mean that all other defendants serving mandatory life terms based on a legal error must be denied relief. *See Montgomery*, 2016 WL 280758, at *13 (fact that life without parole could be proportionate sentence for "rare" juvenile offender "does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right"). Rather, the reality that the vast majority of offenders like Surratt would not have received the most severe non-capital sentence available absent the *Simmons* error—and that such a sentence

might even have been substantively unreasonable—supports a determination that the habeas savings clause should be available. As in *Montgomery*, "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Id.* at *11 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (opinion of Harlan, J.)).

D. Neither The Text Of Section 2255 Nor *Simmons*'s Status As A Circuit-Level Decision Justifies Denial Of Savings Clause Relief

The foregoing establishes that the erroneous imposition of a mandatory minimum life sentence qualifies as a fundamental defect redressable under Section 2255(e)'s savings clause, when the procedural requirements for relief are satisfied (*see* U.S. Opening Br. 18-19). Neither the text of Section 2255(e), nor Surratt's reliance on an intervening court of appeals decision—rather than a Supreme Court decision—that abrogated prior precedent, defeats the availability of habeas saving clause.

1. The text of Section 2255(e) readily encompasses more than a mere procedural opportunity to raise a claim. The habeas savings clause applies when Section 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention," 28 U.S.C. § 2255(e), and those words embrace "[t]he essential function of habeas corpus," which "is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental

legality of his conviction and sentence." *Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999) (internal quotation marks omitted).

a. "*Test.*" Section 2255(e) does not preclude habeas relief where the defendant had a theoretical opportunity to "test" the legality of his conviction or sentence by raising his claim at an earlier stage, even though that claim was foreclosed by circuit law throughout his sentencing, direct appeal, and initial motion under Section 2255. A defendant whose claim is foreclosed by controlling circuit law cannot readily "test" his claim. *MLC Automotive, LLC v. Town of Southern Pines*, 532 F.3d 269, 278 (4th Cir. 2008) ("[A]s a panel, we cannot overrule a prior panel and are bound to apply principles decided by prior decisions of the court to the questions we address.") (internal quotation marks omitted). The district and circuit courts are bound by the precedent, and only rare and discretionary action by the en banc court or the Supreme Court can alter the law. And when a law-changing decision comes after the usual avenues of relief are exhausted, a prisoner had no reasonable opportunity to rely on it at an earlier time.

Here, for example, before the en banc decision in *Simmons*, an objection to the use of Surratt's North Carolina convictions to support a mandatory life sentence was squarely foreclosed by circuit precedent. Unlike an unresolved issue that could be freely addressed on the merits, the district court, circuit

court, and collateral review courts would have summarily rejected any objection. *See*, *e.g.*, *United States v. Brandon*, 376 Fed. Appx. 343, 345 (4th Cir. 2010) (acknowledging that Court could not revist *Harp* as appellant requested because "a panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court"); *United States v. Williams*, 353 Fed. Appx. 839, 841 (4th Cir. 2009) (same); *United States v. Lemons*, 280 Fed. Appx. 258, 258 (4th Cir. 2008) (same). The opportunity to make a legal claim that can be entertained only by overruling precedent, insulated by the doctrine of *stare decisis*, does not provide the adequate and effective opportunity for review that the savings clause contemplates. *Cf. Boumediene v. Bush*, 553 U.S. 723, 791-792 (2008) (Deputy Secretary of Defense's "wholly . . . discretionary" and unreviewable decision to convene a new Combatant Status Review Tribunal to allow detainee to introduce new evidence did not render habeas substitute adequate or effective).

b. *"Inadequate or ineffective."* One court of appeals has suggested that the terms "inadequate or ineffective" in Section 2255(e) refer only to circumstances in which practical, rather than legal, difficulties frustrate the statutory remedy, such that relief under the savings clause is unavailable "so long as a petitioner could've raised his argument in an initial § 2255 motion." *Prost v. Anderson*, 636 F.3d 578, 588 (10th Cir. 2011) (reasoning that the Section 2255 remedy would

only be "inadequate or ineffective" where no practical ability to use the Section 2255 remedy exists, such as where the prisoner's sentencing court has been abolished or dissolved), *cert. denied*, 132 S. Ct. 1001 (2012). The terms "inadequate or ineffective," however, do not warrant such a narrow construction.

Prost's analysis is refuted by Section 2255(e)'s text, when read as a whole. The first clause of the subsection bars a court from entertaining a habeas petition on behalf of a prisoner who is authorized to bring a Section 2255 motion "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*." 28 U.S.C. § 2255(e) (emphasis supplied). Section 2255(e) itself thus contemplates cases where, even after a prisoner has sought and been denied relief from an existing sentencing court, the statutory remedy proves to be inadequate or ineffective to test the legality of his detention.

Supreme Court precedent confirms that the terms "inadequate or ineffective" are properly understood to include legal barriers to relief. In *Sanders*, the Court held that a first Section 2255 motion does not have res judicata effect on a second or successive motion under that section. 373 U.S. at 12-14. In reaching that conclusion, the Court noted that incorporating res judicata into Section 2255 "would probably prove to be completely

ineffectual," since "[a] prisoner barred by res judicata would seem as a consequence to have an 'inadequate or ineffective' remedy under § 2255 and thus be entitled to proceed in federal habeas corpus." *Id.* at 14; *see also Triestman v. United States*, 124 F.3d 361, 375-376 (2d Cir. 1997) (noting that in *Swain v. Pressley*, 430 U.S. 372 (1977), the Supreme Court addressed the merits of argument that D.C. Code provision was "inadequate and ineffective" because it "provided for review by Article I judges," which showed that "[t]he Court obviously assumed that 'inadequate and ineffective' *did* refer to legal inadequacies, and not merely to practical ones"). The advent of AEDPA has superseded the holding of *Sanders* on the availability of successive Section 2255 motions, but it did not disturb *Sanders*'s interpretation of Section 2255(e) to cover legal barriers to relief.

The drafting history of Section 2255(e) also cuts against *Prost*'s interpretation. Congress specifically chose the words "inadequate or ineffective" over other terminology that would have covered only practical difficulties. *See Wofford v. Scott*, 177 F.3d at 1239-1241; *Triestman*, 124 F.3d at 376. An earlier version of Section 2255(e) considered by Congress would have provided that:

> No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or

> will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons.

See H.R. 4233, 79th Cong., 1st Sess. § 2 (1945) and S. 1451, 79th Cong., 1st Sess. § 2 (1945). But the version of Section 2255 ultimately adopted by Congress replaced the language of practicability with the more expansive concepts of inadequacy and ineffectiveness, supporting the conclusion that Congress intended to preserve the availability of habeas for fundamental error. *See Boumediene v. Bush*, 553 U.S. at 779 (finding it "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") (citation omitted).

c. "*Legality*." Section 2255(e)'s reference to testing "the legality of" the prisoner's detention also poses no barrier to applying the savings clause to claims such as Surratt's.

i. In context, the term "legality" refers to the four types of legal errors that are cognizable under Section 2255(a), including claims "that the sentence was imposed in violation of the . . . laws of the United States." 28 U.S.C. § 2255(a). That is consistent with the savings clause's purpose to ensure that cognizable claims of that character are not erroneously barred by Section 2255. The linkage between subsections (a) and (e) also explains why the "fundamental

defect" test, which governs whether a non-constitutional claim is cognizable under Section 2255(a), *see Davis*, 417 U.S. at 346, is relevant to the applicability of the savings clause. When a prisoner's claim is that Section 2255 is "inadequate or ineffective" to test the prisoner's non-constitutional claim, the Supreme Court's highly restrictive test (*see* pp. 49-51, *infra*) for finding that a sentence was "imposed in violation of the . . . laws of the United States" controls the analysis of whether the prisoner is seeking to test the "legality" of his detention.

A sentence of imprisonment that is imposed "in violation of the . . . laws of the United States" can implicate the legality of a prisoner's detention even when the sentence does not exceed the maximum term authorized, which is a separate basis for relief under Section 2255(a). *See* 28 U.S.C. § 2255(a) (listing a sentence "in excess of the maximum authorized by law" as a separate category of error). Common use of the term "legality" confirms that interpretation. Courts routinely refer to Section 2255 motions as motions that "challeng[e] the legality of" prisoners' sentences, *United States v. Hadden*, 475 F.3d 652, 660 (4th Cir. 2007), even though Section 2255(a) is not limited to claims that a sentence exceeds a statutory maximum, violated the Constitution, or was entered by a court without jurisdiction. *See Davis*, 417 U.S. at 346 ("[T]he fact that a contention is grounded not in the Constitution, but in the 'laws of the United

States' would not preclude its assertion in a § 2255 proceeding."). Accordingly, whether a sentence exceeds the statutory maximum or reflects an erroneous mandatory minimum, it is cognizable on an initial motion under Section 2255, and, in appropriate cases involving changes in intervening law, is cognizable under the savings clause.

ii. Cases noting that a sentence was not "illegal" when, among other things, it was within the prescribed term, *see*, *e.g.*, *United States v. Addonizio*, 442 U.S. 178, 186 (1979); *Hill v. United States*, 368 U.S. 424, 430 (1962), do not imply that *all* such sentences are legal. Nor are cases defining "illegal sentences" in a more restrictive sense in other contexts relevant here. *See*, *e.g.*, *United States v. Thornsbury*, 670 F.3d 532, 539 (4th Cir. 2012); *United States v. Pavlico*, 961 F.2d 440, 443 (4th Cir. 1992). For instance, before its amendment in 1984, Federal Rule of Criminal Procedure 35(a) set forth different time limits for bringing motions to correct an "illegal sentence" and motions to correct "a sentence imposed in an illegal manner." *See Pavlico*, 961 F.2d at 443. The language of the Rule thus distinguished between two categories of illegalities. In contrast, Section 2255 calls for no such distinction. Section 2255(a) sets forth categories of challenges to a prisoner's sentence, all of which can plainly be characterized as challenges to the legality of the prisoner's sentence. Section 2255(e) thus preserves access to habeas corpus for cases in which the prisoner is authorized

to bring a motion under Section 2255 but where that remedy is nonetheless inadequate or ineffective to test the legality of the prisoner's detention. Had Congress intended the term "legality" in Section 2255(e) to mean that the writ of habeas corpus was preserved only when the Section 2255 remedy proved inadequate or ineffective with respect to a limited subset of the legal errors cognizable under Section 2255(a), it would have said so explicitly.

d. "*Detention.*" Congress's use of the term "detention" in Section 2255(e) naturally applies to a prisoner's detention under judgment of a court. See 28 U.S.C. §§ 2245, 2249. The term "detention" refers to the physical confinement of the prisoner. *See* Black's Law Dictionary, Detention (10th ed. 2014) ("The act or an instance of holding a person in custody; confinement or compulsory delay"); *see also* Oxford English Dictionary, Imprison (2d ed. 1989) ("To put into prison, to confine in a prison or other place of confinement; *to detain in custody*, to keep in close confinement; to incarcerate.") (emphasis added). Although the term is not limited to physical incarceration following conviction and sentence (and could thus reach periods of pretrial detention), the term certainly includes such periods of incarceration.

Nevertheless, one judge has expressed the view that Section 2255(e)'s use of the term "detention" is limited to detention by the executive branch or pretrial custody, rather than detention under judgments of a court. *See Samak v.*

Warden, FCC Coleman-Medium, 766 F.3d 1271, 1280 (11th Cir. 2014) (Pryor, J., concurring). Under that interpretation, challenges to a custodian's calculation of good time credits or to parole-revocation decisions would be the quintessential claims "saved" by Section 2255(e)'s savings clause. *See id.* But that reading of "detention," in addition to placing an artificial limitation on the meaning of that term, is inconsistent with other language in Section 2255(e).

The first clause of Section 2255(e) sets forth the circumstances under which a court may not entertain a Section 2241 petition: when "*a prisoner who is authorized to apply for relief by motion pursuant to*" Section 2255 "has failed to apply for relief, by motion, to the court which sentenced him, or . . . such court has denied him relief." 28 U.S.C. § 2255(e) (emphasis added). A prisoner is authorized to apply for relief pursuant to Section 2255 only if that motion raises one of the four challenges to the legality of the prisoner's sentence that are set forth in Section 2255(a). Unless a prisoner brings one of the four types of claims authorized by Section 2255(a), Section 2255(e)'s prohibition on the consideration of a Section 2241 petition does not apply, and resort to Section 2255(e)'s savings clause is unnecessary. It follows that, rather than forming the core of the savings clause, challenges to the executive detention in the execution of a prisoner's sentence are routinely found to be *outside* the scope of Section 2255(a). *See, e.g.*, *Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348,

1351 n.1 (11th Cir. 2008) (prisoner's challenge to the "execution of his sentence" is "outside the scope of § 2255(a)"). The only claims that *are* saved by Section 2255(e) are claims that would be barred absent a showing that the remedy by motion is "inadequate or ineffective": conviction and sentencing challenges authorized by Section 2255(a).

2. Reading Section 2255(e) to bar habeas review when a prisoner had a mere theoretical opportunity to raise a claim, even though foreclosed by circuit precedent—or to permit habeas review only to challenge executive detention—would conflict with this Court's decision in *In re Jones*, *supra*, and the holdings of all but one other circuit allowing saving clause relief for conviction for a non-existent offense. And those holdings cannot be distinguished on the premise that they turn on a principle of constitutional avoidance limited to that singular type of claim.

a. Reading "test" and "inadequate or ineffective" to make habeas relief unavailable if the defendant had a theoretical opportunity to raise his claim earlier—which will virtually always be the case—would eliminate savings clause relief, even for claims based on new decisions that make clear that a defendant was convicted of conduct that is not a crime or was sentenced above the maximum term authorized. This Court in *Jones* took a diametrically opposite approach. The Court held that Section 2255 was "inadequate" because the

claim at issue (that the defendant's mere possession of a firearm was not "use" under 18 U.S.C. § 924(c) in light of *Bailey* v. *United States*, 516 U.S. 137 (1995)) was squarely foreclosed by prior circuit law. *See* 226 F.3d at 330, 333-334. The Court did not embrace the view that, because any defendant *could* have raised the claim that ultimately prevailed in *Bailey*, Section 2255 was necessarily "adequate." Rather, it treated the question of whether a claim was foreclosed by prior circuit precedent—so that an attempt to raise that claim would have been "futile"—as an integral element of the inquiry into Section 2255's adequacy. *See* 226 F.3d at 333 (agreeing with the "rationale and holdings" of courts that have held that savings clause relief is available when "the prisoner's first § 2255 motion was filed prior to the decision in *Bailey*, at a time when it would have been futile to challenge the then-prevailing interpretation of the 'use' prong of § 924(c)(1)"); *accord Williams v. Warden*, 713 F.3d 1332, 1347 (11th Cir. 2013); *Reyes-Requena v. United States*, 243 F.3d 893, 903-904 (5th Cir. 2001); *In re Davenport*, 147 F.3d 605, 609-612 (7th Cir. 1998); *In re Dorsainvil*, 119 F.3d 245, 251-252 (3d Cir. 1997); *but see Prost v. Anderson*, *supra*.

In re Jones is also incompatible with the view that "detention" speaks only to executive acts, not to judicial judgments. *Jones* permitted a savings clause attack on a conviction—a judicial, not an executive act. Reading "detention" in Section 2255(e) to refer only to executive acts would preclude habeas relief

even for new decisions that decriminalize conduct or reveal the illegality of sentences that exceed the maximum term authorized. Even if a defendant's conviction were for conduct that a new legal decision had held not to be criminal, an undisturbed judgment of conviction would authorize lawful executive custody. For the defendant to have a valid claim to release, a court would have to apply the change in law to vitiate the effect of the judgment. Accordingly, reading "detention" to preclude savings clause relief from criminal judgments imposed by courts would eviscerate the savings clause. *Jones*, 226 F.3d at 333.

b. The holdings of *In re Jones* and other circuits that the savings clause allows relief for a defendant convicted of conduct later determined not to be criminal cannot be explained as an application of the constitutional avoidance principle. Even assuming that continued incarceration of such a defendant without a fair opportunity for access to judicial relief would raise a serious constitutional question, *see Dorsainvil*, 119 F.3d at 248 (expressing view that a "thorny constitutional issue" would arise if no "avenue of judicial review [were] available" for a defendant who raises a claim of factual or legal innocence based on a "previously unavailable statutory interpretation"), that principle does not permit a court to ascribe different meanings to a single statutory phrase depending on whether a particular application of the statute "approaches

constitutional limits." *Clark v. Martinez*, 543 U.S. 371, 384, 386 (2005) (viewing as "dangerous" the idea that "the same statutory text [could have] different meanings in different cases"). "The canon of constitutional avoidance . . . functions as *a means of choosing between*" permissible alternative "construction[s]" of a text. *Id.* at 385. Section 2255(e) therefore cannot have one "construction" when applied to a claim that a defendant was convicted of non-criminal conduct—*e.g.*, that previously foreclosed fundamental defects are cognizable—and another "construction" when applied to a challenge to an erroneous mandatory minimum sentence—*e.g.*, that previously foreclosed fundamental defects are not. The text of Section 2255(e) does not draw that distinction, and the avoidance canon is not a device for rendering "every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id.* at 382.

In any event, this case is properly resolved without resort to the avoidance canon. As an initial matter, it is by no means clear that there is a serious constitutional question to avoid. The Supreme Court has never held that the Suspension Clause, U.S. Const. Art. 1, § 9, has application to collateral legal attacks on a final judgment in a criminal case, as opposed to being limited to the sort of challenges that existed at the Founding. *See Felker v. Turpin*, 518 U.S. 651, 663-664 (1996) ("[W]e assume, for purposes of decision here, that the

Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789" and going on to reject Suspension Clause challenge to AEDPA's "modified res judicata rule" for "successive petitions"). Nor has the Court held that any other constitutional provision mandates judicial access to a successive habeas proceeding to vindicate a fundamental claim based on intervening changes of law. *Cf. Montgomery v. Louisiana*, 2016 WL 280758, at *10 ("States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge" in situations "*[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement*") (emphasis added); *id.* at *11 (State must apply the "controlling [constitutional] right" under "its collateral review procedures," "*assuming the claim is properly presented in the case*") (emphasis added). But whatever the analysis of those issues, Congress independently vested federal courts with ample authority to redress fundamental statutory errors in a criminal case through the habeas savings clause. Congress first provided this authority to the judiciary in 1948, and, although Congress amended Section 2255 in 1996, it left the habeas savings clause intact. *See* pp. 10-13, *supra*. Section 2255(e) thus continues to provide the courts with clear authority to redress claims of the sort that Surratt presses.

3. Nothing in the savings-clause analysis adopted in *In re Jones* requires that the intervening decision that reveals a fundamental statutory defect emanate from the Supreme Court, rather than a circuit-level precedent. Although Congress provided for successive Section 2255 motions based on new constitutional decisions only when the rule was made retroactive by the Supreme Court, *see* 28 U.S.C. § 2255(h), the habeas savings clause is not restricted by that limitation in its coverage of fundamental statutory error. Courts of appeals have accordingly granted savings clause relief based on circuit-level statutory-construction decisions. *See Alaimalo v. United States*, 645 F.3d 1042, 1046-1048 (9th Cir. 2011) (relying on *United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003) (en banc)).

Nor, as a matter of principle, must a new statutory construction decision be announced by the Supreme Court in order to establish a fundamental defect in a conviction or sentence. For example, in *Davis*, the Supreme Court held that a fundamental defect revealed by a court of appeals' decision that had interpreted, but had not been controlled by, a prior Supreme Court decision could form the basis for post-conviction relief under Section 2255. 417 U.S. at 346 (discussing the defendant's reliance on *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), which had interpreted *Gutknecht v. United States*, 396 U.S. 295 (1970)); *cf. id.* at 347-350 (Powell, J., concurring in part and dissenting in part)

(disputing that *Fox* had correctly applied *Gutknecht*). The Supreme Court had no hesitation in holding that, if Davis's reliance on the court of appeals' interpretation were "well taken, then Davis' conviction and punishment are for an act that the law does not make criminal," and collateral relief would be warranted. 417 U.S. at 346.

Similarly here, to establish a fundamental defect, Surratt relies on this Court's en banc decision in *Simmons*, a decision that itself interpreted and applied the Supreme Court's ruling in *Carachuri-Rosendo v. Holder,* 560 U.S. 563 (2010); indeed, *Simmons* reached the en banc Court after the Supreme Court had issued a "GVR" order vacating an earlier panel decision and remanding for further consideration in light of *Carachuri-Rosendo*. *Simmons*, 649 F.3d at 239; *see id.* at 243-246. As in *Davis*, a court of appeals' decision interpreting a Supreme Court precedent can support a finding of a fundamental defect. That is particularly appropriate where no circuit conflict exists, the government accepts this Court's holding, and Supreme Court review is therefore highly unlikely. Surratt should not be denied collateral relief for which he is otherwise eligible because the Supreme Court has not confirmed the illegality in imposing his mandatory minimum sentence, when the reason that the Court is unlikely to do so is that all lower courts (and the government) agree with Surratt's claim of error.

E. The Supreme Court's Order in *Persaud* Provides Additional Support For The Availability Of Savings Clause Relief

In *Persaud v. United States*, No. 13-6435, a defendant similarly situated to Surratt sought habeas relief under 28 U.S.C. § 2241 from a mandatory minimum sentence of life imprisonment that was erroneous under *Simmons*. U.S. Br. at 3-8, *Persaud v. United States*, 2013 WL 8115776. The district court denied Persaud's habeas petition on the ground that savings clause relief was not available because Persaud challenged his sentence (rather than his conviction), and this Court summarily affirmed. *United States v. Persaud*, 517 Fed. Appx. 137 (4th Cir. 2013) (per curiam). When Persaud filed a certiorari petition, the United States took the position that "the erroneous imposition of a mandatory minimum sentence is a fundamental defect that warrants correction under the savings clause when the defendant otherwise had no opportunity to raise it." U.S. Br. at 20-22. The Supreme Court, in turn, entered a GVR order granting the petition, vacating the judgment, and remanding "for further consideration in light of the position asserted . . . in [the] brief for the United States." 134 S. Ct. 1023 (2014).

The Court's GVR order did not, of course, constitute a final ruling on the merits of the issue presented here. *See Lawrence v. Chater*, 516 U.S. 163, 171 (1996) (per curiam). Nor does the order necessarily mean "that the Supreme Court believes that [this Court's prior decision] was wrongly decided."

See Communities for Equity v. Michigan High School Athletic Ass'n, 459 F.3d 676, 681 (6th Cir. 2006) (interpreting a GVR order requiring reconsideration in light of an intervening Supreme Court decision). The Court may have remanded for reconsideration in *Persaud* in part because this Court had not previously considered the position set forth in the government's brief. *See* U.S. Br. in *Persaud* at 10-11, 22 (arguing that a GVR was appropriate because this Court had not sought the government's views and the government had taken a different position in the district court).

Nevertheless, the GVR order in *Persaud* provides some additional support for holding that Surratt may seek relief under the savings clause. As Surratt points out, the Supreme Court does not "mechanically" issue GVR orders in response to the government's confession that a court of appeals' judgment was in error. Supp. Br. 42 (quoting *Lawrence*, 516 U.S. at 171). The Court has instead explained that it will issue such an order when "it appears reasonably probable that a confession of error reveals a genuine and potentially determinative error by the court below." *Lawrence*, 516 U.S. at 172. In other words, in remanding for reconsideration in light of the government's position, the Court in *Persaud* took "a step that," without "endors[ing]" the government's "views, indicates receptivity to them." *United States v. Corner*, 598 F.3d 411, 414 (7th Cir. 2010) (en banc) (discussing the significance of the Supreme Court's

order vacating a decision and remanding for further consideration in light of the Solicitor General's position).

F. Finality Concerns Do Not Justify Denial Of Relief For The Narrow Class Of Errors At Issue Here

1. Compelling finality concerns justify restricting access to collateral review. *See United States v. Frady*, 456 U.S. 152, 164 (1982). No legal system can afford to perpetually subject all convictions and sentences to habeas review for new claims of legal error, *Teague v. Lane,* 489 U.S. 288, 309-310 (1989) (plurality opinion), and that principle has particular force in the context of successive habeas petitions, *see Felker v. Turpin,* 518 U.S. at 662-664. But the law also provides relief from that principle in exceptional cases. 28 U.S.C. § 2255(e). And where an undisputed error in imposing a statutory mandatory minimum sentence is clear in light of a retroactive, previously unavailable, substantive decision, as is the case with *Simmons,* finality concerns should yield. This case, which involves an erroneous mandatory life sentence, provides a paradigmatic example of circumstances that warrant savings-clause relief. This severe a sentence, which is far above what the Sentencing Commission deemed warranted and which "forswears altogether the rehabilitative ideal," *Graham v. Florida*, 560 U.S. 48, 74 (2010), should be imposed only in extreme cases—and is difficult to justify absent significantly aggravating factors not present here. Thus, notwithstanding the profound finality concerns in recognizing access to

the savings clause, defendants like Surratt who were erroneously sentenced to mandatory-minimum terms in light of the retroactive decision in *Simmons* may seek relief in the form of resentencing.

2. Recognizing relief in this case will not open the floodgates to savings clause petitions based on non-constitutional sentencing claims. To the contrary, as the Supreme Court made clear in *Davis*, not "every asserted error of law can be raised" even "on a [first] § 2255 motion." 417 U.S. at 346. The Supreme Court has repeatedly rejected assertions of non-constitutional claims on federal post-conviction review. *See Addonizio*, 442 U.S. at 185-190 (judicial misunderstanding about the expected course of parole proceedings did not justify collateral attack under § 2255); *United States v. Timmreck*, 441 U.S. 780, 784-785 (1979) (technical violation of Federal Rule of Criminal Procedure 11 did not justify relief under § 2255); *Hill*, 368 U.S. at 426 (claim that sentence was imposed in violation of Federal Rule of Criminal Procedure 32(a) did not raise "an error that [could] be raised by collateral attack" under § 2255); *see also Reed v. Farley*, 512 U.S. 339, 352 (1994) ("Referring to . . . the *Hill* and *Timmreck* decisions, we conclude that a state court's failure to observe the 120-day rule of IAD Article IV (c) is not cognizable under [28 U.S.C.] § 2254 when the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement.").

The fundamental-defect standard thus seriously limits nonconstitutional sentencing claims cognizable under Section 2241. A statutory error that effectively results in the defendant's being sentenced for an aggravated offense, *i.e.*, an error that increases the statutory minimum or maximum sentence, constitutes such a fundamental defect. When the increase in mandated minimum punishment is unwarranted by law—and, particularly as in this case, results in a mandatory life sentence without possibility of release—the effect of a mandatory minimum is severe enough to warrant resort to the savings clause to raise the previously unavailable claim of statutory error.

The case is otherwise with respect to claimed misapplications of the Sentencing Guidelines. *See Foote*, 784 F.3d at 939-944 (misapplication of the advisory career-offender guideline not cognizable in a first motion under Section 2255). Unlike the complete removal of sentencing discretion that occurs with statutes that mandate a particular minimum sentence, "a misapplication of the guidelines typically" is not cognizable on collateral review because it does not "involve 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *United States v. Mikalajunas*, 186 F.3d 490, 495-496 (4th Cir. 1999) (holding that an error in applying Sentencing Guidelines § 3A1.3 was not cognizable under Section 2255); *see also Gilbert*, 640 F.3d at 1295 (holding that, because of finality concerns, errors in applying the

career-offender provision of the Sentencing Guidelines are not cognizable under the habeas savings clause).

An erroneous guidelines sentence does not implicate the concerns raised by errors that alter the statutory range. A defendant's range under the guidelines provides direction and advice for the sentencing court. *See Foote*, 784 F.3d at 941-942. But it neither alters the statutory sentencing range to which the defendant's crime exposes him, nor implicates the legislative prerogative to define crimes and establish punishments. *See Mistretta*, 488 U.S. at 396 (explaining that guidelines do not usurp "the legislative responsibility for establishing minimum and maximum penalties for every crime," but instead operate "within the broad limits established by Congress"). As the Supreme Court has explained, "the top sentence in a guidelines range is generally not really the 'maximum term . . . prescribed by law' for the 'offense' because guidelines systems typically allow a sentencing judge to impose a sentence that exceeds the top of the guidelines range under appropriate circumstances." *United States v. Rodriquez*, 553 U.S. 377, 390 (2008). An error in applying the guidelines, therefore, does not implicate the separation-of-powers concerns raised when a court's misinterpretation of a statute causes it to increase the minimum or maximum term.

Significant procedural barriers, moreover, limit the types of sentencing errors that may be redressed under the savings clause. Relief is triggered when binding circuit precedent foreclosed the possibility of relief on direct appeal and in the defendant's first Section 2255 motion, and new legal authority establishes that the defendant was sentenced above the maximum term or to a statutory mandatory minimum that improperly eliminated the district court's discretion to impose a lesser sentence. Those conditions reserve the savings clause for a prisoner who, "through no fault of his own, has no source of redress." *Jones*, 226 F.3d at 333 n.3. Courts will have little difficulty determining when that circuit-foreclosure test is met, as is demonstrated by the judiciary's experience in granting savings clause relief for a defendant foreclosed by prior judicial decisions from bringing a statutory claim that would decriminalize his conduct—a rule followed by multiple circuits, including this Circuit.

3. The case of an erroneous denial of judicial discretion to impose anything other than a life sentence presents an exceptionally compelling case for relief. Where, as here, the error is attributable to a judicial decision not corrected until the usual avenues for relief are unavailable, the habeas savings clause comes into play. The error is too fundamental to fair criminal process to be ignored.

CONCLUSION

The judgment of the district court denying Surratt's petition for relief under Section 2241 should be vacated, and this Court should direct the district court to grant the petition and resentence Surratt without the application of the erroneous mandatory minimum.

Respectfully submitted,

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I HEREBY CERTIFY that I caused a true and correct copy of the foregoing response to be served this 2nd day of February 2016, by the Court's ECF system, on Joshua B. Carpenter, defendant's counsel, and Steven B. Harris and Jeffrey T. Green, *amicus curiae*.

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