PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7482

LARRY MICHAEL SLUSSER,

Petitioner – Appellant,

v.

ACTING WARDEN VEREEN,

Respondent – Appellee.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Donald C. Coggins, Jr., District Judge. (0:19-cv-01759-DCC)

Argued: September 24, 2021 Decided: June 10, 2022

Before KING and RUSHING, Circuit Judges, and John A. GIBNEY, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Rushing wrote the majority opinion, in which Senior Judge Gibney joined. Judge King wrote a dissenting opinion.

ARGUED: Reedy Charles Swanson, HOGAN LOVELLS US LLP, Washington, D.C., for Appellant. Leesa Washington, OFFICE OF THE UNITED STATES ATTORNEY, Greenville, South Carolina, for Appellee. **ON BRIEF:** Peter M. McCoy, Jr., United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

RUSHING, Circuit Judge:

After the Supreme Court held the residual clause of the Armed Career Criminal Act (ACCA) unconstitutional in *Johnson v. United States*, 576 U.S. 591 (2015), Larry Slusser, a federal prisoner, received authorization to file a second 28 U.S.C. § 2255 motion challenging his sentence. The district court for the Eastern District of Tennessee denied Slusser's motion on the merits, and the Sixth Circuit affirmed on procedural grounds. Now, Slusser seeks to bring the same *Johnson* claim again, this time as a habeas petition under 28 U.S.C. § 2241. The district court for the District of South Carolina rejected Slusser's petition for lack of jurisdiction. Because the strictures of Section 2255 cannot be evaded so easily, we affirm.

I.

A.

In 2011, Slusser pleaded guilty to possessing a firearm as a felon in violation of 18 U.S.C. § 922(g). Ordinarily, a Section 922(g) offense carries a ten-year statutory maximum term of imprisonment. *Id.* § 924(a)(2). But under ACCA, a defendant with three prior convictions for a violent felony or serious drug offense is subject to a minimum prison sentence of fifteen years. *Id.* § 924(e)(1). At Slusser's sentencing, the district court for the Eastern District of Tennessee applied ACCA's sentencing enhancement, identifying three prior convictions for qualifying offenses: a 1994 burglary; 1999 drug trafficking; and a 1999 conviction for two offenses—aggravated burglary and aggravated assault. The court sentenced Slusser to the mandatory minimum of fifteen years' imprisonment, a sentence to which all parties agreed.

Slusser's plea agreement included a waiver of the right to appeal and the right to collaterally attack his conviction or sentence for any reason except ineffective assistance of counsel or prosecutorial misconduct. Consistent with that waiver, Slusser did not appeal. He filed his first Section 2255 motion in 2012, raising claims of prosecutorial misconduct and ineffective assistance of counsel. The district court for the Eastern District of Tennessee denied Slusser's motion, and the Court of Appeals for the Sixth Circuit declined to issue a certificate of appealability.

Following the Supreme Court's decision in *Johnson*, Slusser sought leave to file a second Section 2255 motion, contending that his prior convictions no longer qualified as ACCA predicates. The Sixth Circuit found the statutory requirements for a second or successive Section 2255 motion satisfied, *see* 28 U.S.C. § 2255(h)(2), and so authorized the district court for the Eastern District of Tennessee to consider Slusser's motion. After briefing, the district court denied the motion on the merits, concluding that Slusser's burglary, aggravated assault, and drug trafficking convictions remained proper ACCA predicates even after the Supreme Court invalidated the residual clause. *See Slusser v. United States* (*Slusser I*), Nos. 3:11-cr-78, 3:16-cv-531, 2016 WL 6892757 (E.D. Tenn. Nov. 22, 2016).

As alluded to previously, a federal prisoner has no right to appeal the denial of a Section 2255 motion unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). The Sixth Circuit granted Slusser leave to appeal a single ruling from the district court's decision on his second Section 2255 motion: that his aggravated assault conviction continues to qualify as a violent felony under ACCA. *See*

Slusser v. United States (*Slusser II*), 895 F.3d 437, 438 (6th Cir. 2018). But after briefing and argument, the Sixth Circuit declined to reach the merits and instead affirmed based on the collateral-attack waiver in Slusser's plea agreement. *Id.* at 440.

A year later, in a different case, the Sixth Circuit revisited the question whether a collateral-attack waiver is enforceable when a prisoner challenges his sentence as exceeding the statutory maximum based on a subsequent change in the law. *See Vowell v. United States*, 938 F.3d 260 (6th Cir. 2019). The court concluded that such waivers are not enforceable under those circumstances and specifically identified *Slusser II* as wrongly decided. *See id.* at 266–268.

B.

After the Sixth Circuit affirmed the denial of his second Section 2255 motion, Slusser filed a Section 2241 habeas petition in the District of South Carolina, raising the same *Johnson* challenge that had been the subject of his second Section 2255 motion.[*] The district court dismissed the petition for lack of jurisdiction, concluding that Section 2241 was not available to Slusser because he could not satisfy the requirements of Section 2255(e), which limits federal prisoners' access to Section 2241. As the court explained, because Slusser's *Johnson* argument had already been found to meet the gatekeeping provisions of Section 2255(h)(2) for second or successive motions, Section 2255 was not

[*] Although Slusser was convicted in the Eastern District of Tennessee, where he was also obligated to file his Section 2255 motions, *see* 28 U.S.C. § 2255(a), he is serving his sentence at a federal correctional facility in South Carolina. Because Section 2241 habeas petitions "must be filed in the jurisdiction where the federal petitioner is detained," Slusser's appeal is properly before this Court. *Hahn v. Moseley*, 931 F.3d 295, 300 (4th Cir. 2019); *see also* 28 U.S.C. § 2241(a).

inadequate or ineffective to test the legality of his detention and Slusser could not resort to Section 2241. The district court subsequently denied reconsideration, noting that *Vowell* did not change its analysis.

Slusser timely appealed, and we have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a).

II.

"[I]t is well established that defendants convicted in federal court are obliged to seek habeas relief from their convictions and sentences through [Section] 2255." *Rice v. Rivera*, 617 F.3d 802, 807 (4th Cir. 2010). That statute "affords every federal prisoner the opportunity to launch at least one collateral attack to any aspect of his conviction or sentence." *Marlowe v. Warden, FCI Hazelton*, 6 F.4th 562, 568 (4th Cir. 2021) (internal quotation marks and brackets omitted); *see* 28 U.S.C. § 2255(a). For most, that is the end of the road. But Congress has given federal prisoners the opportunity to pursue a second Section 2255 motion in certain "very limited circumstances." *Lester v. Flournoy*, 909 F.3d 708, 710 (4th Cir. 2018). Specifically, Congress has authorized courts of appeals to permit a second or successive motion if a federal prisoner makes a prima facie showing that either (1) "newly discovered evidence" proves he was not guilty of his offense or (2) a "previously unavailable" "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," entitles him to relief. 28 U.S.C. § 2255(h); *see id.* § 2244(b).

A federal prisoner may pursue habeas relief by way of a Section 2241 petition—like Slusser attempts to do here—only if it "appears that the [Section 2255] remedy by

motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Our Court has repeatedly acknowledged that this so-called "savings clause" must be interpreted "narrowly," as a contrary rule "'would effectively nullify' [Section] 2255's specific limitations." *Farkas v. Butner*, 972 F.3d 548, 556 (4th Cir. 2020) (quoting *In re Jones*, 226 F.3d 328, 333 (4th Cir. 2000)); *see also Lester*, 909 F.3d at 716. We have observed that the clause "juxtaposes the terms 'inadequate or ineffective' with the phrase 'to test the legality of [a prisoner's] detention,'" and "a test is not 'inadequate' just because someone fails it." *Farkas*, 972 F.3d at 555 (internal quotation marks and brackets omitted). Therefore, we have consistently reasoned that the "Section 2255 remedy 'is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provision, or because an individual is procedurally barred from filing a Section 2255 motion.'" *Marlowe*, 6 F.4th at 568–569 (brackets omitted) (quoting *In re Vial*, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997) (en banc)); *see also Farkas*, 972 F.3d at 555; *Lester*, 909 F.3d at 716; *Rice*, 617 F.3d at 807; *In re Jones*, 226 F.3d at 333.

Whether Section 2255 is inadequate or ineffective to test the legality of Slusser's detention is a jurisdictional question we review de novo. *See Marlowe*, 6 F.4th at 568. Slusser bears the burden, *id.*, and we conclude that he has failed to carry it.

Quite simply, we know that Section 2255 is up to the task of testing the legality of Slusser's detention because he has already pursued his argument in a Section 2255 motion and received a judgment on it. In his Section 2241 petition before us, Slusser seeks to argue that, after the Supreme Court held ACCA's residual clause unconstitutional in *Johnson*, his prior Tennessee convictions no longer qualify as ACCA predicates to support

the statutory sentencing enhancement applied by the district court. The Sixth Circuit authorized Slusser to file a second Section 2255 motion raising that exact claim because it asserts "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)(2); *see* Order, *In re Slusser*, No. 16-5671 (6th Cir. Aug. 18, 2016). In other words, the Sixth Circuit determined that Congress has provided for claims like Slusser's to be pursued by way of a second or successive Section 2255 motion. The district court for the Eastern District of Tennessee then adjudicated Slusser's second Section 2255 motion on the merits; it considered his *Johnson* challenge and found that his sentence remained legal after *Johnson*. Section 2255's remedy by motion is not only adequate to test the legality of Slusser's detention, it was in fact used to test (and approve) his detention after *Johnson*.

Our savings clause precedents agree. In *United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018), our Court created a test to evaluate whether a federal prisoner's challenge to his criminal sentence satisfies the savings clause. According to *Wheeler*, Section 2255 is "inadequate and ineffective to test the legality of a sentence" when:

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

886 F.3d at 429. The third requirement of the *Wheeler* test "honors the savings clause's mandate that prisoners may only resort to the savings clause where the other avenues for

remedy in [Section] 2255 are ineffective." *Id.* Here, Slusser cannot satisfy *Wheeler*'s third requirement because he *did* "meet the gatekeeping provisions" of Section 2255(h)(2) and pursued his claim in a second Section 2255 motion. *Id.*

In response, Slusser makes two somewhat contradictory arguments. He first and primarily contends that he is unable to satisfy Section 2255(h)(2)'s requirement that the new rule of constitutional law be "previously unavailable" because *Johnson* was, in fact, previously available to him during his most recent federal proceeding, i.e., his second Section 2255 motion. *See In re Thomas*, 988 F.3d 783, 790 (4th Cir. 2021) (explaining that, to satisfy this requirement, "the new constitutional rule [the applicant] puts forth must not have been available to him when he brought his last federal proceeding . . . challenging his conviction"). In other words, Slusser says he cannot satisfy the requirements for filing a successive Section 2255 motion because he already proceeded on this exact constitutional claim in his second Section 2255 motion.

That is correct, but it is not a reason to permit resort to Section 2241 via the savings clause. As we have previously explained, our savings clause tests, including *Wheeler*, do not "permit constitutional claims." *Farkas*, 972 F.3d at 559. The reason is obvious: Section 2255 is adequate to test constitutional claims, and Section 2255(h)(2) "speaks exactingly" to the circumstances under which a successive motion may present a constitutional claim. *Id*. To "allow[] a § 2241 application for a constitutional claim that does not fit within the narrow confines of § 2255(h)(2) would read § 2255(h)(2)'s gatekeeping provisions right out of the statute." *Id.* We thus adhere to our longstanding recognition of the "[i]mportant[]" principle that Section 2255 "'is not rendered inadequate

or ineffective merely because . . . an individual is procedurally barred from filing a § 2255 motion.'" *Rice*, 617 F.3d at 807 (ellipses in original) (quoting *In re Vial*, 115 F.3d at 1194 n.5).

Second, Slusser asserts that *Johnson* became "unavailable" to him when, after the district court for the Eastern District of Tennessee denied his second Section 2255 motion on the merits, the Sixth Circuit enforced his plea waiver and refused to consider his *Johnson* argument on appeal. As an initial matter, if this were true, it would not help Slusser with his Section 2241 petition because Section 2255 authorizes successive motions based on a "previously unavailable" new rule of constitutional law. 28 U.S.C. § 2255(h)(2). But of course, Slusser's assertion is not true. "Previously unavailable" in Section 2255(h)(2) refers to the existence of the "new rule of constitutional law," not to a particular prisoner's ability to utilize or prevail on it. *See In re Thomas*, 988 F.3d at 790; *see also In re Williams*, 364 F.3d 235, 239 (4th Cir. 2004) ("[C]onstitutional rules that were established at the time of the applicant's last [federal proceeding] were not 'previously unavailable[.]'"). And Slusser's argument overlooks the fact that the district court addressed the merits of his *Johnson* challenge. Slusser appears to insist that one round of merits review is inadequate, but that contention cannot be squared with the fact that Congress did not create an appeal as of right from a district court's ruling on a Section 2255 motion. *See* 28 U.S.C. § 2253(c). Under Slusser's approach, a constitutional claim adjudicated on the merits in district court would become "unavailable" to a prisoner any time a court denies a certificate of appealability. *See id.* That is plainly not the scheme Congress created.

The Sixth Circuit's later confession of error does not change the savings clause analysis. That court affirmed the district court's denial of Slusser's second Section 2255 motion because his plea agreement waived the right to collaterally attack his conviction and sentence. *Slusser II*, 895 F.3d at 440. The court's subsequent determination in *Vowell* that the waiver should not have been interpreted to bar appellate review on the merits assessed the scope of the waiver, not the scope of Section 2255. Put simply, the Sixth Circuit's error did not change anything about Section 2255 and so did not make Section 2255 inadequate or ineffective to test the legality of Slusser's detention. As our Court has repeatedly emphasized, "[i]t is beyond question that [Section] 2255 is not inadequate or ineffective merely because an individual [has been] unable to obtain relief under the provision." *In re Jones*, 226 F.3d at 333; *see In re Vial*, 115 F.3d at 1194 n.5. The very fact that Slusser was able to pursue his *Johnson* claim in a second Section 2255 motion demonstrates that Section 2255 is adequate and effective to test his detention; the correctness of the Sixth Circuit's ruling does not affect the adequacy of the remedial vehicle. To hold otherwise would convert Section 2241 into an appeal from all Section 2255 denials.

III.

Neither the text of Section 2255(e) nor this Court's precedent permits resort to Section 2241 for a disappointed federal prisoner who seeks to relitigate his previous Section 2255 motion. Slusser had the opportunity to test his *Johnson* claim, and his inability to obtain relief on that claim—whether correct or not—does not make the Section 2255 remedy any less adequate or effective. The judgment of the district court is

AFFIRMED.

KING, Circuit Judge, dissenting:

Unlike my good colleagues in the panel majority, I am confident that Larry Slusser has satisfied *Wheeler*'s third prong. That is, Slusser has shown that he is unable to meet the gatekeeping provisions of 28 U.S.C. § 2255(h)(2) for a second or successive motion. *See United States v. Wheeler*, 886 F.3d 415, 429 (4th Cir. 2018). For that reason, I would vacate the judgment on appeal and remand for an assessment of whether Slusser satisfies the final prong of *Wheeler*'s framework. A ruling in favor of Slusser on that prong would allow the district court to exercise jurisdiction over — and proceed to resolve — his 28 U.S.C. § 2241 petition on its merits. Because the majority has affirmed the judgment of dismissal, I dissent.

I.

A federal prisoner is entitled to seek habeas corpus relief pursuant to § 2241 when it appears that 28 U.S.C. § 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention." *See* 28 U.S.C. § 2255(e). As the panel majority recognizes, our controlling precedent of *Wheeler* spells out a four-prong framework for evaluating whether, in a case where a prisoner seeks to collaterally attack his sentence, § 2255 is "inadequate or ineffective," thus rendering § 2241 available for the prisoner's pursuit of habeas corpus relief. *See Wheeler*, 886 F.3d at 429. The third prong of the *Wheeler* framework requires a prisoner to show that he "is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions." *Id.* The majority rules, however, that Slusser "cannot satisfy *Wheeler*'s third prong because he *did* meet the

gatekeeping provisions of Section 2255(h)(2) and pursued his claim in a second Section 2255 motion," that is, in his related 2016 litigation in the Eastern District of Tennessee. *See ante* at 8 (internal quotation marks omitted). I part company with that ruling.[1]

II.

My disagreement with the panel majority is predicated upon its erroneously restrictive interpretation of *Wheeler*'s third prong. First, the majority incorrectly rules that a petitioner who has satisfied the gatekeeping provisions of § 2255(h)(2) at some point in the past can never satisfy *Wheeler*'s third prong. And second, the majority has misapplied certain aspects of our prior decisions to support its ruling that Slusser cannot satisfy *Wheeler*'s third prong.

A.

As an initial matter, my friends are incorrect in focusing on whether, for purposes of *Wheeler*'s third prong, Slusser satisfied the gatekeeping provisions of § 2255(h)(2) at some point in the past. *Wheeler*'s third prong, after all, is phrased in the *present tense*.

[1] The majority opinion fails to discuss whether Slusser has satisfied the first two of *Wheeler*'s four prongs. But he clearly has. That is, Slusser has demonstrated that (1) at the time of his sentencing, settled law established the legality of his sentence; and (2) subsequent to his direct appeal and first § 2255 motion, the settled law changed and was deemed by the Supreme Court to apply retroactively on collateral review. *See Wheeler*, 886 F.3d at 429. The majority also does not reach *Wheeler*'s fourth and final prong, which requires a showing that, "due to th[e] retroactive change [in the applicable law], the sentence now presents an error sufficiently grave to be deemed a fundamental defect." *Id.*

That prong thus requires a showing that a prisoner "is [now] unable" — not "was" or "has been" unable — to satisfy the gatekeeping provisions of § 2255(h)(2). *See Wheeler*, 886 F.3d at 429. Put simply, Slusser's ability to satisfy the gatekeeping provisions at some point *in the past* does not necessarily translate into his ability to satisfy those provisions *at the present time*. The text of § 2255(e) supports that proposition. Specifically, § 2255(e) provides:

> 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.

Section 2255(e) explicitly contemplates that, in certain cases, the § 2255 remedy may be "inadequate or ineffective," even after the sentencing court has reviewed the motion and "denied . . . relief." Applying that provision, the fact that Slusser satisfied the gatekeeping provisions of § 2255(h)(2) in his related 2016 proceeding in the Eastern District of Tennessee does not create a categorical bar to his pursuit of habeas corpus relief under § 2241 in these proceedings.

B.

As explained above, *Wheeler*'s third prong requires a showing that "the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions." *See Wheeler*, 886 F.3d at 429. And it is plain that Slusser is unable to meet those provisions, which is clearly why he now seeks to proceed under § 2241.

The gatekeeping provisions of § 2255(h)(2) require: "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." And the new rule of constitutional law that is relevant here was enunciated in the Court's *Johnson v. United States* decision in 2015. *See* 576 U.S. 591, 606 (2015). The *Johnson* rule was then deemed by the Court to apply retroactively on collateral review. *See Welch v. United States*, 578 U.S. 120, 135 (2016). Finally, the *Johnson* rule is not "previously unavailable" to Slusser — it was in fact available and relied upon when Slusser pursued his second § 2255 motion in the Eastern District of Tennessee in 2016. Because the *Johnson* rule was previously available to Slusser, he does not and cannot satisfy § 2255(h)(2)'s mandate that the new rule must be "previously unavailable." And because Slusser is unable to meet the gatekeeping provisions of § 2255(h)(2), he satisfies the text of *Wheeler*'s third prong.

1.

The panel majority nevertheless rules that Slusser cannot satisfy *Wheeler*'s third prong, even though their opinion agrees explicitly that the *Johnson* rule was previously available to Slusser — and that the *Johnson* rule is thus not now "previously unavailable," as mandated by the gatekeeping provisions of § 2255(h)(2). Despite that, the majority asserts that Slusser's inability to now satisfy the gatekeeping provisions — which is precisely what is required by *Wheeler*'s third prong — "is not a reason to permit resort to Section 2241 via the savings clause" contained in § 2255(e). *See ante* at 8.

To support its position that Slusser cannot satisfy *Wheeler*'s third prong, the majority emphasizes "our longstanding recognition of the important principle that

Section 2255 is not rendered inadequate or ineffective merely because an individual is procedurally barred from filing a § 2255 motion." *See ante* at 8-9 (alterations and internal quotation marks omitted). That statement is obviously correct. Being "merely" procedurally barred from pursuing a § 2255 motion is, of course, insufficient to render § 2255 inadequate or ineffective. Instead, our *Wheeler* precedent requires that a prisoner seeking to challenge his sentence by way of a § 2241 petition must demonstrate that he satisfies each of the four prongs of the *Wheeler* framework. *See Wheeler*, 886 F.3d at 429; *see also Lester v. Flournoy*, 909 F.3d 708, 711-12 (4th Cir. 2018). In essence, the majority's assertion that Slusser cannot satisfy *Wheeler*'s third prong because of the general rule that being "merely" procedurally barred from filing a § 2255 motion is insufficient, is the same as deciding that Slusser cannot satisfy *Wheeler*'s third prong because satisfaction of all four prongs is mandated. That logic is inconsistent and unsustainable.[2]

2.

Of course, *Wheeler*'s third prong should not be understood to be satisfied any time a prisoner can show that he previously pursued the same challenge in a second or successive § 2255 motion and was denied relief. As we have recognized, however, a

[2] I also disagree with the majority's conclusion that, because Slusser's claim is constitutional — and not statutory, for example — he cannot resort to § 2241 to challenge his sentence. Nothing in § 2255(e) limits the availability of § 2241 habeas corpus relief to non-constitutional challenges only. And we explained in *Wheeler* that the purpose of traditional habeas corpus relief was to "remedy statutory, as well as constitutional, claims presenting . . . 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is present.'" *See* 886 F.3d at 428 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

prisoner who cannot meet the gatekeeping provisions of § 2255(h)(2) "through no fault of his own," may be able to use § 2255(e) to open the door to § 2241. *See Wheeler*, 886 F.3d at 427 (quoting *In re Jones*, 226 F.3d 328, 333 n.3 (4th Cir. 2000)); *see also Braswell v. Smith*, 952 F.3d 441, 449 (4th Cir. 2020). After all, "the Supreme Court has long recognized a right to traditional habeas corpus relief based on an illegally extended sentence." *See Wheeler*, 886 F.3d at 428 (citing *Nelson v. Campbell*, 541 U.S. 637, 643, (2004)). And in *Rice v. Rivera* in 2010, we ruled that a § 2241 motion is unavailable to a prisoner who "had an unobstructed procedural shot" at pursuing a § 2255 motion to take advantage of a substantive change in the law. *See* 617 F.3d 802, 807 (4th Cir. 2010).

In this case, however, Slusser has never had an "unobstructed procedural shot" at pursuing his second § 2255 motion. That is because, after granting him a certificate of appealability to resolve his *Johnson* claim, the Sixth Circuit dismissed Slusser's appeal by enforcing a collateral-attack waiver contained in his plea agreement. *See Slusser v. United States*, 895 F.3d 437, 430 (6th Cir. 2018). As a result, the court of appeals neither reached nor resolved the merits of Slusser's *Johnson* claim. And the court's ruling that enforced the waiver and dismissed Slusser's appeal, as the Sixth Circuit commendably acknowledged, was actually predicated on an erroneous interpretation of its own precedent. *See Vowell v. United States*, 938 F.3d 260, 266-68 (6th Cir. 2019) (ruling that collateral-attack waiver is unenforceable when federal prisoner challenges sentence as exceeding statutory maximum based on subsequent change in relevant law). The Sixth Circuit's admittedly erroneous enforcement of the collateral-attack waiver has thus "obstructed" Slusser's ability to pursue his second § 2255 motion. And that obstruction — imposed

through no fault of Slusser's — may well have rendered the § 2255 remedy inadequate or ineffective.

3.

Finally, unlike my friends of the panel majority, I do not view the fact that the Tennessee district court has addressed the merits of Slusser's *Johnson* claim as in any way undermining his contention that § 2255 is inadequate or ineffective. As the Supreme Court has explained, it is "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." *See Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (internal quotation marks omitted). In these circumstances, that meaningful opportunity may well have been denied because of the admittedly erroneous dismissal of Slusser's appeal in the Sixth Circuit.

In asserting otherwise, the majority maintains that "Congress did not create an appeal as of right from a district court's ruling on a Section 2255 motion." *See ante* at 9. But neither did Congress entirely preclude appellate review. *See* 28 U.S.C. § 2253(c). As the majority recognizes, "the Sixth Circuit determined that Congress has provided for claims like Slusser's to be pursued by way of a second or successive Section 2255 motion." *See ante* at 7. And because the Sixth Circuit has explicitly recognized the potential merit of Slusser's *Johnson* claim and actually awarded him a certificate of appealability, the adequate § 2255 remedy should require that he be accorded an unobstructed shot at an appeal. I would therefore remand this proceeding to the district court for consideration of whether Slusser satisfies *Wheeler*'s final prong, that is, whether his sentence "now presents

an error sufficiently grave to be deemed a fundamental defect." *See Wheeler*, 886 F.3d at 429.

III.

It is true — as the majority recognizes — that "the strictures of Section 2255 cannot be [easily] evaded." *See ante* at 2. But the situation presented here today does not at all resemble an evasion. Rather, it is simply a reasonable effort by Slusser to reclaim his opportunity to seek habeas corpus relief, which he was erroneously deprived of. The unique circumstances of Slusser's case should allow him to pursue his *Johnson* claim in the district court by way of a § 2241 petition, if he can satisfy *Wheeler*'s final prong. The majority's erroneous disposition of this appeal, however, has forced Slusser to bear the severe consequences resulting from the Sixth Circuit's acknowledged error. I respectfully dissent.