No. _____

IN THE
Supreme Court of the United States

BOBBIE LONDON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the statute of limitations applicable to federal habeas proceedings, are habeas petitions challenging sentences fixed by the mandatory career offender guideline timely if filed within one year of *Johnson v. United States*, 135 S. Ct. 2551 (2015)?

2. Is the residual clause of the mandatory career offender guideline unconstitutionally vague under the rule announced in *Johnson*?

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IN THE
SUPREME COURT OF THE UNITED STATES

BOBBIE LONDON, JR.,

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

PETITION FOR WRIT OF CERTIORARI

Bobbie London respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

JUDGMENT AT ISSUE

On August 29, 2019, a panel of the Fifth Circuit Court of Appeals entered a published opinion affirming the judgment of the United States District Court for the Eastern District of Louisiana. *United States v. London*, 937 F.3d 502 (5th Cir. 2019), *as revised* (Sept. 6, 2019). A copy of the order is attached to this Petition as an appendix. App., *infra*, 1a.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on August 29, 2019. No petition for rehearing was filed. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

28 U.S.C. § 2255(f) provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

U.S.S.G. § 4B1.2(a) (1997) provided:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

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[1] A revised opinion was issued on September 6, 2019, but the revision was technical and not substantive.

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Louisiana Revised Statute 14:94 (1990) provided:

> Illegal use of weapons or dangerous instrumentalities is the intentional or criminally negligent discharging of any firearm, or the throwing, placing, or other use of any article, liquid, or substance, where it is foreseeable that it may result in death or great bodily harm to a human being.

STATEMENT OF THE CASE

This case arises from the landmark decision in *Johnson v. United States* and its chaotic aftermath, from which multiple circuit splits emerged. The issue raised in Mr. London's petition is perhaps the most important of those disagreements: how courts should interpret and apply 28 U.S.C. § 2255's statute of limitations, a critical and broadly impactful provision applicable to all federal habeas petitioners. Specifically, the circuits are divided over whether petitions challenging sentences fixed by the pre-*Booker* Mandatory Sentencing Guidelines' career offender enhancement are timely when filed within a year of *Johnson*. That question boils down to whether Mandatory Guidelines petitions have "asserted" the right recognized in *Johnson* within one year of its recognition as required by § 2255(f)(3).

The consequences of this disagreement are enormous. Its resolution "could determine the liberty of over 1,000 people." *Brown v. United States*, 139 S. Ct. 14, 16 (2018) (Sotomayor, J., dissenting). But the effects of the current state of confusion reverberate far beyond this particular class of litigants. The outcome of these unsettled questions will determine the timeliness standards applicable to all federal habeas claims going forward. And the longer the split persists, the longer federal habeas petitioners will remain subject to a confusing patchwork of conflicting procedural rules, resulting in opposite outcomes for identically situated prisoners in different districts. Moreover, the disagreement over this question has exposed a more subtle, but equally important, concern that now threatens the structural integrity of the habeas scheme and demands this Court's immediate attention: the widespread

(and incorrect) importation of the more stringent state habeas standards codified in § 2254 into the § 2255 federal habeas context. For years, circuits have improperly infected federal habeas with harsh state habeas rules and principles—a practice that is contrary to congressional intent and represents a fundamental misunderstanding of the unique constitutional doctrines relevant only to federal review of state court judgments. The Mandatory Guidelines cases represent a perpetuation of that trend and shed light on broader confusion pervading habeas review.

The current state of federal habeas law is incoherent, unpredictable, and unjust. Federal Public Defender's Offices like ours no longer understand how and when to pursue relief under § 2255 without stepping on one of the many inexplicable procedural landmines embedded in the habeas landscape. Now, post-*Johnson*, we do not understand how to comply with what we previously believed to be a straight-forward statute of limitations provision. Of course, most habeas relief is not pursued by attorneys, but by pro se incarcerated litigants whose liberty is at stake. Thus, habeas law, more than any other context, mandates well defined and consistently applied procedural rules. The law may not owe those litigants relief but it owes them clarity, predictability, and a fair opportunity to raise their constitutional claims.

As Judge Costa urged in his concurring opinion below, this Court must intervene.

United States v. Johnson

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that a sentencing provision can be void for vagueness, and, in doing so, invalided the

"residual clause" of the Armed Career Criminal Act (ACCA). ACCA transforms a ten-year maximum penalty into a fifteen-year mandatory minimum for defendants with three or more "violent felonies," defined as including any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). *Johnson* struck down this portion of the definition, holding "that imposing an increased sentence under [ACCA's] residual clause . . . violates the Constitution's guarantee of due process." *Johnson*, 135 S. Ct. at 2563. In *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court clarified that *Johnson* announced a new, substantive rule that applies retroactively to cases on collateral review—meaning, habeas petitioners whose judgments became final more than a year earlier would benefit from a new one-year statute of limitations to assert *Johnson*-based claims. *See* 28 U.S.C. § 2255(f)(3).

In the years after *Johnson*, this Court struck down similar provisions scattered throughout federal criminal law based on *Johnson*'s newly recognized right. In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Court held that *Johnson* also invalidated similar—though not identical—language in 18 U.S.C. § 16(b), explaining: "*Johnson* is a straightforward decision, with equally straightforward application here." *Id.* at 1213. More recently, this Court held that the residual clause in 18 U.S.C. § 924(c)—which is identical to § 16(b)'s—also is unconstitutionally vague under *Johnson*. *See United States v. Davis*, 139 S. Ct. 2319, 2324 (2019). Accordingly, the *Johnson*-based line of cases has followed a common jurisprudential path: this Court's announcement of a new principle (*Johnson*), followed by "straightforward

application" of that principle to different but analogous situations—i.e., invalidation of similar language with the same effect elsewhere in the law (*Dimaya* and *Davis*).

This Court also has limited the reach of *Johnson*'s void-for-vagueness right. In *United States v. Beckles*, 137 S. Ct. 886 (2017), which was decided on direct appeal, the Court declined to invalidate an identical residual clause in the "crime of violence" definition applicable to the current version of U.S.S.G. § 4B1.2's career offender enhancement. The Court's decision to leave the modern Sentencing Guidelines untouched by *Johnson* hinged on the fact that the Guidelines now are advisory, rather than mandatory, and therefore do not "fix" sentences in a manner like ACCA. *Beckles*, 137 S. Ct. at 892. Justice Thomas explained: "In *Johnson*, we applied the vagueness rule to a statute fixing permissible sentences. The ACCA's residual clause . . . fixed—in an impermissibly vague way—a higher range of sentences for certain defendants." *Id.* Justice Thomas also expressly identified *United States v. Booker*, 543 U.S. 220 (2005), as the legal shift critical to the Court's analysis, explaining that because post-*Booker* the Guidelines no longer are binding and "merely guide the district courts' discretion," they are "not amenable to a vagueness challenge." *Id.* at 894.

***Johnson*-based Mandatory Guidelines Claims and the § 2255(f)(3) Circuit Split**

Although *Beckles* made clear that § 2255 petitioners sentenced under the modern Advisory Guidelines could not seek *Johnson*-based relief, *Beckles* did not specifically address *Johnson*'s effect on a separate class of litigants: those sentenced before *Booker*, when the Guidelines still were mandatory. But Justice Thomas's reasoning in *Beckles*—and decades of caselaw describing the binding nature of the

pre-*Booker* Guidelines—made the answer to that question self-evident. Unlike the Advisory Guidelines examined in *Beckles*, the Mandatory Guidelines *did* fix sentences. Before *Booker*, 18 U.S.C. § 3553(b) made the Guidelines "mandatory" and "impose[d] binding requirements on all sentencing judges." *Booker*, 543 U.S. at 233. Indeed, the Mandatory Guidelines had "the force and effect of laws[.]" *Id*. at 234; *see also Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("[T]he Guidelines bind judges and courts in their uncontested responsibility to pass sentence in criminal cases."). Moreover, the text of the residual clause used to fix sentences under the Mandatory Guidelines' career offender enhancement was identical to the residual clause struck down by *Johnson*'s rule.

Nonetheless, a circuit split rapidly emerged over whether Mandatory Guidelines petitioners could bring *Johnson*-based claims in federal habeas proceedings.[2] Notably, the divide did not center around the underlying merits question, namely, whether sentences fixed by the pre-*Booker* career offender residual clause were unconstitutional under *Johnson*. Indeed, courts generally skirted that

[2] *Compare London*, 937 F.3d 502 (holding that *Johnson*-based Mandatory Guidelines claims are untimely), *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018), *cert. denied* 139 S. Ct. 2762 (2019) (same), *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 1297 (2019) (same), *United States v. Green*, 898 F.3d 315 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1590 (2019) (same), *United States v. Greer*, 881 F.3d 1241 (10th Cir.), *cert. denied*, 139 S. Ct. 374 (2018) (same), *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017), *cert. denied*, 139 S. Ct. 14 (2018) (same), *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017), *cert. denied* 138 S. Ct. 2661 (2018) (same), *and In re Griffin*, 823 F.3d 1350 (11th Cir. 2016) (holding that such claims are without merit), *with Cross v. United States*, 892 F.3d 288 (7th Cir. 2018) (holding that *Johnson*-based Mandatory Guidelines claims are timely and meritorious), *and Moore v. United States*, 871 F.3d 72 (1st Cir. 2017) (strongly suggesting the same).

substantive question altogether and instead split over a procedural question: whether Mandatory Guidelines claims are *timely* within the meaning of 28 U.S.C. § 2255(f).

That provision describes the statute of limitations applicable to federal habeas petitioners—barring consideration of claims filed too late. Most commonly, a § 2255 motion must be filed within one year of the date on which the petitioner's judgment of conviction became final. *See* § 2255(f)(1). But § 2255(f) also describes a number of triggering events that reset the clock and establish a fresh one-year statute of limitations. One such exception, described in § 2255(f)(3), permits federal prisoners to timely file a claim within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

At the Government's urging, seven Circuits—the Fifth Circuit being the most recent—have held that Mandatory Guidelines petitioners are time-barred from bringing *Johnson*-based claims to collaterally attack their sentences. *See London*, 937 F.3d 502 (Fifth Circuit); *Blackstone*, 903 F.3d 1020 (Ninth Circuit); *Russo*, 902 F.3d 880 (Eighth Circuit); *Green*, 898 F.3d 315 (Third Circuit); *Greer*, 881 F.3d 1241 (Tenth Circuit); *Brown*, 868 F.3d 297 (Fourth Circuit); *Raybon*, 867 F.3d 625 (Sixth Circuit).[3] Although the logic in these decisions is inconsistent, courts generally have held that federal habeas petitioners cannot "assert" *Johnson*'s newly recognized right because

[3] The Eleventh Circuit appears to be an anomaly. That court held—before the § 2255(f)(3) split emerged—that Mandatory Guidelines claims must be denied on the merits. *See Griffin*, 823 F.3d 1350.

Johnson only examined the residual clause in ACCA and did not expressly hold that the residual clause in the Mandatory Guidelines also was unconstitutionally vague.

The Seventh Circuit adamantly rejected this new interpretation of § 2255(f)(3). *See Cross*, 892 F.3d at 294. That court observed that the plain text of § 2255(f)(3) requires only that a petitioner "assert" the new right recognized—"[i]t does not say that the movant must ultimately *prove* that the right applies to his situation." *Id*. In other words, a petitioner "need only claim the benefit of a right that the Supreme Court has recently recognized" to qualify as timely under § 2255(f)(3). *Id*. Inserting into the timeliness inquiry a debate over whether *Johnson* announced a right that *applies* to Mandatory Guidelines petitioners "improperly reads a merits analysis into the limitations period." *Id*. at 293. After disposing of the Government's procedural argument, the court went on to hold on the merits that *Johnson* did in fact render invalid the identical language of the Mandatory Guidelines. *Id*. at 299.

The First Circuit agrees with this analysis. *Moore*, 871 F.3d 72 (employing the same interpretation of *Johnson* in certifying a successive motion under § 2255, and rejecting the Fourth and Sixth Circuit's contrary, narrower interpretation of *Johnson*); *see also United States v. Pullen,* 913 F.3d 1270, 1284 n.16 (10th Cir. 2019) (noting that "language in *Moore* suggests the panel of the First Circuit would have reached the same conclusion had it been conducting a [substantive] analysis"). And in the two remaining circuits—the D.C. and Second Circuits—district courts have rejected the Government's position on § 2255(f)(3) or otherwise granted relief to Mandatory Guidelines claimants on the merits. *See, e.g.*, *United States v. Carter*, No.

04-cr-0155, 2019 WL 5580091, at *13 (D.D.C. Oct. 29, 2019); *United States v. Hammond*, 351 F. Supp. 3d 106, 117 (D.D.C. 2018); *Mapp v. United States*, No. 95-cr-01162, 2018 WL 3716887, at *1 (E.D.N.Y. Aug. 3, 2018), *vacated on other grounds*, 2019 WL 1546993 (E.D.L.A. Apr. 9, 2019).

Although the circuit split appears somewhat lopsided on its face, there is widespread confusion and disagreement within and among circuits over how to apply this critical statute of limitations provision. Indeed, the circuits that have adopted the Government's view of § 2255(f)(3) are internally divided. In this case, Judge Costa authored a thorough and well-reasoned concurrence, carefully explaining why the Fifth Circuit's view is incorrect. *London*, 139 S. Ct. at 509 (Costa, J., concurring). The Fourth Circuit issued its decision over the dissent of Chief Judge Gregory. *Brown*, 868 F.3d at 304 (Gregory, C.J., dissenting). In the Sixth Circuit, Judge Moore authored a concurrence explaining why that circuit's position on the issue is wrong. *Chambers v. United States*, 763 F. App'x. 514, 519 (6th Cir. 2019) (Moore, J., concurring). As did Judge Berzon in the Ninth Circuit. *Hodges v. United States*, 778 F. App'x 413, 414 (9th Cir. 2019) (Berzon, J. concurring). And, in the Eleventh Circuit, multiple judges have registered their disagreement with their court's position on the merits of Mandatory Guidelines claims. *See, e.g., In re Sapp*, 827 F.3d 1334, 1339 (11th Cir. 2016) (Jordan, Rosenbaum, and Pryor, J., concurring); *Lester v. United States*, 921 F.3d 1306, 1318 (11th Cir. 2019) (denial of rehearing en banc) (Martin, J., dissenting, joined by Rosenbaum and Pryor, J.).

Moreover, even the circuits that have agreed on the outcome of Mandatory Guidelines petitions have used different logic to get there—inconsistency that promises to produce widespread confusion and unpredictability for courts and § 2255 litigants going forward. A number of circuits have adopted an "exact statute" approach, holding that § 2255 petitioners cannot assert a newly recognized right unless this Court expressly has applied that right to invalidate the specific provision at issue in the habeas proceeding. *See, e.g.*, *Brown*, 868 F.3d at 302; *Greer*, 881 F.3d at 1244; *Blackstone*, 903 F.3d at 1026. Some, but not all, have engaged in *Teague*[4] retroactivity analysis—not to determine whether *Johnson*'s newly recognized right is retroactive (*Welch* settled that), but to determine whether a Mandatory Guidelines *Johnson*-based claim would require a "new rule" to entitle the petitioner to relief. *See, e.g.*, *London*, 937 F.3d at 506; *Russo*, 902 F.3d at 882. Many hinged their conclusions on Justice Sotomayor's remark in a footnote to her *Beckles* concurrence that the decision "at least leaves open the question" of whether Mandatory Guidelines petitioners "may mount vagueness attacks on their sentences." *See Beckles*, 137 S. Ct. at 903 n4; *Raybon*, 867 F.3d at 630 ("Because it is an open question, it is *not* a 'right' that 'has been newly recognized by the Supreme Court' let alone one that was 'made retroactively applicable to cases on collateral review.'"). And, perhaps most worrisome, some circuits drew upon caselaw interpreting inapplicable § 2254 standards intended to set a high merits bar for *state* habeas petitioners seeking

[4] *Teague v. Lane*, 489 U.S. 288, 301 (1989).

federal intervention in state court adjudications—standards that do not apply to federal habeas petitioners. *See, e.g.*, *Greer*, 881 F.3d at 1247; *Brown*, 868 F.3d at 301.

Finally, the Eleventh Circuit rejected Mandatory Guidelines claims as meritless rather than untimely, reasoning that all Guidelines—whether mandatory or advisory—can never be void for vagueness because they "do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." *Griffin*, 823 F.3d at 1355. That view would appear to conflict with *Johnson*, which itself invalided on void-for-vagueness grounds a sentencing statute that did "not establish the illegality of any conduct."

The Proceedings Below and the Fifth Circuit's "Debatable" Approach

In Mr. London's case, the Fifth Circuit became the latest court to enter the fray, siding with the majority view and cementing the circuit divide. In 1996, Mr. London pleaded guilty to an indictment charging various drug offenses and received a 327-month sentence on each count to be served concurrently. Like so many others at the time, Mr. London was subject to mandatory application of the career offender sentencing guideline. In Mr. London's case, the enhancement was based on the sentencing court's determination that his prior Louisiana conviction for illegal discharge of a firearm qualified as a crime of violence. *See* La. R.S. 14:94 (1990).

Mr. London diligently filed a § 2255 petition within one year of *Johnson*—his first—asserting that case's newly recognized right as the basis for relief. In the district court, the Government did not dispute the underlying merits of Mr. London's petition, namely, that his sentence had been unconstitutionally imposed and that

Louisiana illegal discharge of a firearm cannot qualify as a crime of violence absent the now-invalid residual clause. Instead, the Government argued that Mr. London was time-barred from bringing his claim. The district court adopted the Government's urged, merits-based approach to § 2255's statute of limitations and denied Mr. London's petition as untimely under § 2255(f)(3). *See United States v. London*, No. 96-CR-104, 2017 WL 3393989, at *5 (E.D. La. Aug. 8, 2017) ("There is no right 'newly recognized by the Supreme Court' that *entitles Petitioner to relief*. Therefore, Petitioner cannot rely on § 2255(f)(3) to file the instant motion." (emphasis added)).

A divided Fifth Circuit panel affirmed. The two-judge majority held that Mr. London's claim was untimely because "the right he claims and asserts is not the right recognized in *Johnson*." *London*, 937 F.3d at 503. The majority reasoned:

> In short, it is *debatable* whether the right recognized in *Johnson* applies to the pre-*Booker* Sentencing Guidelines—an administrative regime that governs a judge's discretion to a range within the statutory minimum and maximum sentences. Consequently, London does not assert a right dictated by *Johnson* but instead asserts a right that would extend, as opposed to apply, *Johnson* to the pre-*Booker* Guidelines.

Id. at 509 (emphasis added).

Thus, the Fifth Circuit has adopted the view that a federal habeas petitioner's claim cannot be timely within the meaning of the statute of limitations if the petition's underlying merits are "debatable"—a word that appears nowhere in the statute of limitations provision itself. In other words, if it is "debatable" whether a newly recognized, retroactive right entitles a petitioner to relief, the petitioner cannot "assert" that right within the meaning of § 2255(f)(3). Instead, the petitioner must

wait until the Supreme Court applies that right to his precise situation. Until then, according to the Fifth Circuit, any claim will be too early.

Judge Costa concurred in the judgement. *See London*, 937 F.3d at 509 (Costa, J., concurring). Although he disagreed with the majority's interpretation of § 2255(f)(3)'s text and the panel's application of habeas caselaw, he concluded that a recent, published Certificate of Appealability (COA) order foreclosed Mr. London's urged interpretation of § 2255(f)(3). *Id.* In that decision—*United States v. Williams*—the Fifth Circuit denied a COA to a pro se petitioner bringing a *Johnson*-based challenge to his § 924(c) conviction and asserting that *Johnson* required invalidation of similar residual clause language in § 924(c)(3)(B). 897 F.3d 660, 662 (5th Cir.), *cert. denied*, 139 S. Ct. 655 (2018). Although the pro se litigant did not address the timeliness question in his COA motion, the panel called for the Government to brief the issue at the COA stage. Without true adversarial treatment of the question, the panel adopted the Government's interpretation of § 2255(f)(3) in a published order, which held that habeas petitioners could not assert *Johnson*'s right to challenge § 924(c) convictions because neither *Johnson* nor any other case had expressly invalidated § 924(c)'s residual clause. *Williams*, 897 F.3d at 662 ("An assumption that the statute will eventually be invalidated at some indeterminate point cannot overcome the timeliness requirement of § 2255(f)(3). For Williams's motion to even be considered, the statute must actually have first been invalidated. . . . So in that sense, his motion *is* untimely, but because it was filed too early, not too late.").

Judge Costa determined that the published *Williams* order bound the panel in Mr. London's case, explaining: "In this circuit, the habeas clock restarts only if the Supreme Court has addressed the exact application of *Johnson* that would grant the prisoner relief." *London*, 937 F.3d at 509 (Costa, J., concurring). Judge Costa warned, however, that the Fifth Circuit is "on the wrong side of a split over the habeas limitations statute." *Id.* at 510. "[O]ur circuit and most others addressing the issue," Judge Costa observed, "require more than the statute does." *Id.* at 511. He noted that the Fifth Circuit's approach "fails to apply the plain language of the statute and undermines the prompt presentation of habeas claims the statute promotes." *Id.* at 510. And he highlighted the serious fairness concerns created by the prevailing state of chaos: "The confusion that . . . reigns in this area means a prisoner is at risk of the same claim being dismissed as too early and then too late, with no in-between period when it would be timely." *Id.* at 513.

Judge Costa concluded his concurrence with a plea for clarity: "[A]t a minimum, an issue that has divided so many judges within and among circuits, and that affects so many prisoners, 'calls out for an answer.'" *Id.* at 513–14 (quoting *Brown*, 139 S. Ct. at 14 (Sotomayor, J., dissenting)).

REASONS FOR GRANTING THE PETITION

I. The questions in this case are the subject of a firmly rooted circuit split and are of exceptional importance.

There now is an entrenched, multi-dimensional circuit split over how to interpret and apply § 2255(f)(3), reason enough to address the questions presented in this petition. Moreover, in the immediate term, this Court's resolution of those disputes "could determine the liberty of over 1,000 people." *Brown*, 139 S. Ct. at 16. But far beyond that, the circuits have rapidly transformed a simple statute of limitations provision into a complex procedural hurdle that federal habeas petitioners now will have to clear going forward. Because of the inconsistencies in the logic and rules adopted, this new approach promises to produce wildly differing outcomes among identically situated litigants and denies necessary predictability to attorneys and pro se litigants alike.

For these reasons, a slew of petitions for writs of certiorari—including multiple current, pending petitions—have asked this Court to resolve these exact questions. And multiple circuit judges have urged this Court to intervene. *See, e.g.*, *Chambers*, 763 F. App'x. at 526–527 (Moore, J., concurring); *London*, 937 F.3d at 513□14 (Costa, J., concurring). In fact, two justices already agree that the questions Mr. London raises merit granting certiorari. *Brown*, 139 S. Ct. at 16 (Sotomayor, J., dissenting, joined by Ginsberg, J.) ("Regardless of where one stands on the merits of how far *Johnson* extends, this case presents an important question of federal law that has divided the courts of appeals and in theory could determine the liberty of over 1,000 people. That sounds like the kind of case we ought to hear.").

The problems caused by the current confusion over § 2255(f)(3) will not dissipate with this class of litigants—they promise to create confusion and uncertainty in habeas law for years to come. This Court should intervene now to prevent further damage.

II. The majority of circuits have adopted a novel and unsupported interpretation of § 2255's statute of limitations that requires immediate correction.

Clarification also is necessary because the majority of circuits are wrong. The prevailing view of § 2255(f)(3) contradicts the plain meaning of the statute, confuses the timeliness of claims with their merits, conflicts with longstanding habeas jurisprudence defining what does and does not constitute a "new rule," undermines the legislative intent of § 2255's statute of limitations, and creates unpredictability and unnecessary procedural flaws in the habeas process. Any one of these issues alone would warrant this Court's intervention.

The question in Mr. London's case and in all Mandatory Guidelines cases was whether those petitioners "assert[ed]" a "right . . . newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review" within one year of the right's recognition—i.e., within one year of *Johnson*. By its plain terms, § 2255(f)(3) requires merely that a petitioner "assert" a newly recognized right within a year of its recognition—meaning, he must "state positively" or "invoke or enforce" that right. Black's Law Dictionary (10th ed. 2014). Thus, "in order to be timely under § 2255(f)(3), a petition need only 'invoke' the newly recognized right, *regardless of whether or not the facts of record ultimately support the movant's claim*." *United States v. Snyder*, 871 F.3d 1122, 1126 (10th Cir. 2017) (emphasis added). A court may

disagree with a litigant's interpretation and application of that right, but § 2255(f)(3) "does not say that the movant must ultimately *prove* that the right applies to his situation" to clear the statute of limitations—he simply must assert it. *Cross*, 892 F.3d at 294.

Most circuits now bypass that straightforward analysis, improperly conflating a claim's timeliness with its merit. The Fifth Circuit decision in this case typifies those flaws. The majority stated summarily: "To be sure, § 2255(f)(3) instructs us to decide only the contours of the right the Supreme Court recognized in *Johnson*." *London*, 937 F.3d at 506. But it doesn't. The text of § 2255(f)(3) merely requires that courts ensure that a petitioner has "asserted" a new, retroactive right within one year of its recognition—not define that right's "contours" and determine whether a claim falls within those bounds. The question of a new right's reach—whether the right *applies* to a particular defendant and entitles him to relief—is entirely separate from whether the claim itself was brought forward in time. As Judge Costa explained in his concurrence: "[L]itigants *assert* rights, but are unsuccessful in doing so, just about every day in this circuit. We have improperly read a success requirement into a statute that requires only the assertion of a right." *Id*. at 511.

But the Fifth Circuit's new "success requirement" goes even further. To be "timely" under § 2255(f)(3) in the Fifth Circuit, a petitioner must show not only that he will succeed on the merits, but that his success is not even "debatable." *Id.* at 509. As a result, under the panel's holding, initial federal petitioners now must meet a *higher* merits bar at the threshold timeliness stage than they even must meet at the

actual merits stage. To show that a claim is not even debatable and thus timely, the Fifth Circuit now requires that application of the right to a petitioner's particular situation must be "dictated" by the new Supreme Court case—a term the panel interpreted as meaning that there is "no room for any other view." *Id.* at 507 n.9. Under the COA order in *Williams*, that means the challenged provision must *already have been invalidated* for a petitioner's claim to be definite and therefore timely under § 2255(f)(3). *Williams*, 897 F.3d at 662 ("For Williams's motion to even be considered, the statute must actually have first been invalidated."). In other words, the Fifth Circuit now interprets the term "right recognized" to be coterminous with the relevant case's specific holding. That is the approach adopted by other circuits as well. *See, e.g.*, *Brown*, 868 F.3d at 302; *Greer*, 881 F.3d at 1244; *Blackstone*, 903 F.3d at 1026.

This interpretation strays far from § 2255(f)(3)'s text. There is no suggestion in the statute that the newly recognized right must have been applied to a situation identical to the petitioner's for the petitioner to timely assert it—or that "right recognized" means "holding." *Moore*, 871 F.3d at 82. In fact, the opposite is true. Congress used words like "rule" and "right" rather than "holding" in § 2255 because it "recognizes that the Supreme Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings[.]" *Id.* Indeed, "the Supreme Court often will never address a particular application of one of its decisions; that job is left largely to the lower courts." *London*, 937 F.3d at 510 (Costa, J., concurring). If "new rules" were limited to the precise facts examined by

the Supreme Court in the case announcing the those rules, scores of litigants would be denied relief to which they plainly are entitled merely because their precise situation did not happen to be the vehicle for establishing the principles announced. For Mandatory Guidelines petitioners in particular, the majority's rule means that this class of litigants *never* will be able to pursue relief, because they now are barred from habeas review and direct appeal of this long-abandoned sentencing scheme is impossible.

Many of the circuits that sided with the Government on the Mandatory Guidelines question derived these new rules not from the text of the statute but from caselaw addressing an issue distinct from a claim's timeliness: whether the new Supreme Court case on which a petitioner relies announced a new right qualifying as "retroactive" within the meaning of § 2255(f)(3). *See, e.g.*, *Russo*, 902 F.3d at 882; *Greer*, 881 F.3d at 1245. Like other circuits, the Fifth Circuit has incorporated into § 2255(f)(3) *Teague* retroactivity analysis, which arose from the state petitioner context. In *United States v. Morgan*, the Fifth Circuit held that *Teague*'s framework should be used to determine whether a new Supreme Court case has announced a "new rule" that may be asserted retroactively by federal petitioners on collateral review. 845 F.3d 664 (5th Cir. 2017).

As Judge Costa explained below, cases like *Morgan* applied *Teague* to determine "whether the recent Supreme Court case the prisoner relied on announced a new right or merely applied previously recognized rights." *London*, 937 F.3d at 512 n.3 (Costa, J., concurring). But, importantly here, this Court already answered that

difficult question in *Welch*, rendering *Teague* analysis unnecessary. The Fifth Circuit in Mr. London's case ignored *Welch* and inappropriately expanded applicability of *Teague*'s retroactivity principles to the question of whether Mr. London had "asserted" the right recognized in *Johnson*. In other words, the panel majority used *Teague* "not to ask whether the Supreme Court case on which the prisoner relies recognized a new right, but to ask whether the application the prisoner seeks would qualify as a 'new rule.'" *Id.* But there is no evidence of such a requirement in § 2255(f)(3). Again, "whether [Mr.] London is ultimately able to show that *Johnson* affords him relief is a different question than whether he is asserting a new right within the meaning of the limitations statute." *Id.*

Notably, even if the *Teague* framework *did* apply in the manner the panel used it, Mandatory Guidelines petitions still would qualify as timely, because the resolution of Mr. London's claim did not in fact require a "new rule" under *Teague*, as the Fifth Circuit and others have concluded. *Teague* jurisprudence does not hold that each application of an existing rule to a new situation announces a new rule. Indeed, that would mean *every* Supreme Court holding resets the statute of limitations clock. To the contrary, under the *Teague* framework, a case announces a "new rule" when it "breaks new ground," but "a case does not 'announce a new rule, when it is merely an application of the principle that governed' a prior decision to a different set of facts." *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013) (quoting *Teague*, 489 U.S. at 301, 307) (alterations omitted). And directly contrary to the Fifth Circuit's COA order in *Williams*, this Court has made clear that the statute challenged by a petitioner

need not be the one previously invalided when the Court initially recognized the new rule asserted in the habeas petition. That view is foreclosed by *Stringer v. Black*, 503 U.S. 222 (1992).

Finally, reading § 2255(f)(3) to require a precisely on-point Supreme Court opinion to create each new right encourages movants to sit on their claims until the Court decides a case exactly like theirs—undermining the purpose of a statute of limitations "to encourage plaintiffs to pursue diligent prosecution of known claims." *Cal. Pub. Emps. Ret. Sys. v. ANZ Sec.*, 137 S. Ct. 2042, 2049 (2017). That is particularly true of the statute of limitations at issue here. "Congress intended the [§ 2255] statute of limitations 'to eliminate delays in the federal habeas review process,' not to create them. Requiring people who 'assert' that *Johnson* gives them a right to relief to file within a year of *Johnson*'s issuance serves Congress's purpose much better." *United States v. Meza*, No. 11-cr-133, 2018 WL 2048899, at *5 (D. Mont. May 2, 2018) (quoting *Holland v. Florida*, 560 U.S. 631, 648 (2010)).

As Judge Costa observed, "[r]equiring an application of the right to the prisoner's circumstances *delays* the presentation of habeas claims." *London*, 937 F.3d at 513. "It means that a prisoner seeking to apply a newly recognized right to his similar-but-not-identical claim cannot file within a year of the Supreme Court decision; he must await a future decision applying it to his exact situation." *Id*. These flaws are unnecessary—they are not compelled by the statute's text, the caselaw interpreting it, or Congressional intent. In fact, they are wholly avoided through

simple application of § 2255(f)(3)'s statute of limitations in the same manner it now has been applied for decades and in the manner its text requires.

This Court should intervene to correct these serious errors.

III. This case presents an opportunity to correct improper importation of state habeas standards into the federal habeas context.

The more subtle problem with the logic employed by many of the circuits in this line of cases is that it improperly imported strict standards applicable only to state habeas petitioners into § 2255. In addition to establishing standards applicable to federal prisoners seeking habeas relief, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) codified court-imposed limits on federal collateral oversight of constitutional claims that already had been adjudicated by state courts. Those strict limits are set out in 28 U.S.C. § 2254, the habeas scheme applicable state prisoners seeking relief from state convictions in federal court.

AEDPA explicitly directs federal courts to defer to state court determinations on the merits of those claims unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). Importantly, that provision—§ 2255(d)—imposes a high *merits* bar on state petitioners seeking collateral relief in federal courts after a previous state court denial. It does not bear on a claim's timeliness and has no relation to § 2255(f)(3), the statute of limitations applicable to federal habeas petitioners. This Court has held that the § 2254(d)(1) standard is "intentionally difficult to meet," giving maximum

deference to state courts in the "interests of federalism and comity." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (internal quotation marks omitted).

The harsh § 2254 standards generally do *not* apply to federal petitioners—nor do the principles motivating them. Indeed, the statutory scheme constructs a firewall between state and federal petitioners—instituting different standards for those two classes of litigants. That separation makes sense. Unlike the state habeas context, there is no state jurisdiction to which to defer in federal collateral review and, thus, the interests of "comity" and "federalism" are irrelevant. Finality concerns also are lessened because the petitioner has not already litigated the same claim through a parallel legal system that, presumably, was constitutionally compliant and gave fair hearing to the petitioner's claims. In particular, for *initial* federal petitioners like Mr. London—who have filed no previous § 2255 petitions—this is their first and only opportunity to seek collateral relief and they are doing so under a new, retroactive rule of constitutional law that they could not have benefited from at the time of their convictions.

Nonetheless, cross-pollination of state and federal standards has infected the current split over § 2255(f)(3)'s interpretation. Many of the circuits siding with the Government drew upon caselaw interpreting § 2254(d)'s merits provision to parse the meaning of § 2255(f)(3)'s statute of limitations, leading those courts to conclude, without textual support, that application of *Johnson* to the Mandatory Guidelines must be "definite" before a federal petitioner can even "assert" such a claim within the meaning of § 2255(f)(3). For example, the Fourth Circuit cited *Williams v. Taylor*,

529 U.S. 362 (2000)—a § 2254(d)(1) case—for guidance on what it means to "recognize" a new right under § 2255(f)(3). *Brown*, 868 F.3d at 301. Other circuits quickly adopted Brown's reasoning or cited § 2254(d)(1) caselaw themselves. *See, e.g.*, *Greer*, 881 F.3d at 1248; *Green*, 898 F.3d at 318; *Blackstone*, 903 F.3d at 1026. Still other circuits did not draw upon § 2254(d)(1) explicitly, but echoed its "clearly established" standard. The Fifth Circuit in this case, for example, held that the invalidity of the challenged provision must be beyond debate—there can be "no room for any other view." *London*, 937 F.3d at 507 n.9. Sometimes these errors were especially glaring: the Tenth Circuit concluded that the "interests of comity and finality underlying federal habeas review" precluded the court from applying "the reasoning of *Johnson* in a different context[,]" namely, to the Mandatory Guidelines. *Greer*, 881 F.3d at 1248 (internal quotation marks omitted). But comity has no relevance to the statute of limitations applicable only to federal petitioners.

Consequently, not only have courts improperly imposed a merits requirement on initial federal petitioners at the perfunctory *statute of limitations* stage, but that merits showing is the functional equivalent of the intentionally high bar applicable only to state petitioners. There is no justification—in AEDPA or the Constitution—for requiring initial federal petitioners to meet such a demanding merits standard simply to prove that their claims are timely. Indeed, by importing § 2254 merits analysis into § 2255's statute of limitations, initial federal petitioners in some circuits now must make a higher merits showing at the timeliness stage than they even must make at the actual merits stage.

This line of cases was not the first time courts have drawn upon state habeas principles and standards to unduly limit access to relief in the federal habeas context. Indeed, throughout the development of this circuit split, Mandatory Guidelines petitioners have been saddled with caselaw that likely never should have applied to them to begin with. Most significantly, binding circuit precedent in Mr. London's case held that *Teague*—a pre-AEDPA case governing federal courts' review of state habeas claims—applied equally to federal petitioners when it comes to retroactivity analysis. *See Morgan*, 845 F.3d at 667–68. Other circuits also have held that *Teague* applies to federal petitioners. *See, e.g.*, *United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003) ("We have already held that *Teague* applies equally to sections 2254 and 2255 habeas cases."); *Headbird v. United States*, 813 F.3d 1092, 1095–97 (8th Cir. 2016).

But there is good reason to question whether *Teague*'s retroactivity framework should apply to federal petitions at all—much less whether it should be used to determine the timeliness of federal claims as the Fifth Circuit did in Mr. London's case. *Teague* stands for the general proposition that—with limited exceptions—state court petitioners cannot bring claims in federal habeas proceedings based on "new rules" of constitutional law that were not yet established at the time their convictions became final, nor can they ask federal courts for new or novel applications of existing precedent a state court would not have been expected to apply in the first instance. In other words, *Teague* recognizes that "state courts should not necessarily be subject to Monday-morning quarterbacking every time they are eventually proven wrong on

an issue." *Valentine v. United States*, 488 F.3d 325, 342 (6th Cir. 2007) (Martin, J., concurring in part and dissenting in part).

As one commentator has explained: "[F]ederalism and finality concerns are at their apex in the context in which the *Teague* decision was rendered: when a federal court is reviewing a state court conviction that has already been through a full round of state collateral review on the merits of the claim raised before the federal court." Kendall Turner, *A New Approach to the Teague Doctrine*, 66 Stan. L. Rev. 1159, 1161 (2014). Accordingly, while *Teague* left some state defendants "without redress for constitutional wrongs, the Court has determined that society's interest in repose and federal court deference to state courts outweighs its interest in re-adjudicating convictions to ensure they conform to contemporary constitutional law." *Id.*

By contrast, those same "federalism and finality" concerns "do not justify *Teague*'s application in [the federal habeas] context." *Id.* at 1173. Thus, courts and commenters alike have questioned whether importation of the *Teague* retroactivity framework into the federal habeas context was a mistake. *See, e.g.*, *id.* at 1165 ("[T]he assumption that *Teague* applies when federal courts review federal convictions is misguided[.]"); *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1190 (9th Cir. 2011) (explaining that "there is now some doubt as to whether *Teague* applies to federal-prisoner petitioners"); *Duncan v. United States*, 552 F.3d 442, 444 n.2 (6th Cir. 2009) ("It is not entirely clear that *Teague*'s framework is appropriate for federal habeas petitions under 18 U.S.C. § 2255 because many of the comity and federalism concerns animating Teague are lacking. . . . But it has been this Court's practice to apply

Teague to § 2255 petitions, and we adhere to it today."); *Valentine*, 488 F.3d at 342 (Martin, J., concurring in part and dissenting in part) ("Because concerns with comity are reduced—if not nonexistent—in the context of section 2255, however, it would seem to me that a bit more scrutiny is warranted in determining what the legal landscape actually was, and whether a given rule was 'dictated by precedent existing at the time the defendant's conviction became final.'" (quoting *Teague*, 489 U.S. at 301)).

The Mandatory Guidelines cases present an opportunity to finally address these questions, which have been lurking in AEDPA caselaw for years. The questionable premise that various standards and principles applicable to federal review of state habeas claims can appropriately be imported into § 2255 deserves this Court's scrutiny.

IV. Mr. London's case is an ideal vehicle for resolving these critical questions.

Mr. London's case is an optimal vehicle for addressing this complex circuit split and settling the widespread confusion that Mandatory Guidelines claims like his have exposed. In Mr. London's case, resolution of the questions presented will be outcome-determinative because the merits of his constitutional claim are clear. The only barriers standing between Mr. London and relief are the procedural questions presented in this petition.

Indeed, when Mr. London filed his petition in the district court, the Government argued it was procedurally barred but did not dispute its merits. Specifically, the Government did not dispute that Mr. London's predicate Louisiana

conviction for illegal use of a weapon does not qualify as a valid career offender predicate absent the residual clause—i.e., that it can continue to qualify under the still-valid force clause of U.S.S.G. § 4B1.2(a)'s crime of violence definition. In fact, the Government previously has conceded that this exact predicate does not so qualify. *See* Gov't Resp. in Opp. at 2–3, Dkt. #81, *United States v. Washington*, No. 08-cr-103 (M.D. La. Oct. 6, 2017) ("The defendant claims that his prior convictions for the Louisiana crime of illegal discharge of a firearm, in violation of LSA R.S. 14:94, are no longer applicable under the ACCA in light of *Johnson*. The United States agrees.").

Strangely, the Government in Mr. London's case eventually attempted to backtrack on this concession and argued for the first time on appeal that Louisiana illegal discharge of a weapon *is* still a crime of violence under the force clause. But the Government was right the first time: this predicate plainly does not qualify alternatively as a crime of violence under the force clause, because it does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). First, the statute expressly proscribes negligent conduct, which is fatal to its qualification under the force clause. *See* La. R.S. 14:94 (1990) (prohibiting "the intentional or *criminally negligent* discharging of any firearm, or the throwing, placing, or other use of any article, liquid, or substance" (emphasis added)); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("[T]he "use . . . of physical force against the person or property of another' . . . most naturally suggests a higher degree of intent than negligent or merely accidental conduct."). Moreover, Louisiana illegal discharge of a weapon also does not require as an element the use of force

against the person of another, as it can be committed by simply firing a gun into empty space where a person theoretically could have been (but wasn't). *See, e.g.*, *State v. Dumaine*, 534 So. 2d 32, 33 (La. Ct. App. 1988) (firing a gun across an empty highway into a vacant lot without looking for oncoming traffic); *State v. Matthews*, 70 So. 3d 116, 117 (La. Ct. App. 2011) (firing a gun in an urban area).

Thus, if permitted to clear the § 2255(f)(3) procedural hurdle, Mr. London would be entitled to relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted November 25, 2019,

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