No. _____

IN THE

Supreme Court of the United States

DWIGHT BULLARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant erroneously sentenced as a career offender under the advisory Guidelines can collaterally attack his enhanced sentence under 28 U.S.C. § 2255.

PARTIES TO THE PROCEEDING

The case caption contains the names of all parties.

RELATED PROCEEDINGS

Bullard v. United States, No. 17-3731 (6th Cir. Sept. 4, 2019, *rehearing and rehearing en banc denied*, Dec. 26, 2019) (reported at 937 F.3d 654) (affirming denial of 28 U.S.C. § 2255 motion).

Bullard v. United States, No. 1:17-cv-00061 (N.D. Ohio May 25, 2017) (available at 2017 WL 2291419) (denying § 2255 motion).

United States v. Bullard, No. 15-3633 (6th Cir. Aug. 25, 2016) (available at 659 F. App'x 288) (affirming conviction).

United States v. Bullard, No. 1:14-cv-00411-1 (N.D. Ohio May 21, 2015) (original conviction).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dwight Bullard respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 937 F.3d 654 (6th Cir. 2019) and is reprinted in the Appendix to the Petition ("App.") at 1a-18a. The district court's opinion is available at 2017 WL 2291419 and is reprinted at App. 19a-33a.

JURISDICTION

The Sixth Circuit entered its judgment on September 4, 2019, App. 1a, and denied a timely petition for rehearing and rehearing *en banc* on December 26, 2019, App. 34a. On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari to May 26, 2020. *See* Misc. Order, 589 U.S. ___ (Mar. 19, 2020); *see also* 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2255(a) provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by

> law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

INTRODUCTION

Everyone agrees that petitioner Dwight Bullard is not a career offender. But he was sentenced as one, based on a prior state conviction that the Government now concedes is not a qualifying predicate offense. This error tripled Bullard's advisory-Guidelines range and almost certainly extended his imprisonment. The question now is whether Bullard can collaterally attack his erroneous sentence under 28 U.S.C. § 2255. The Sixth Circuit said no, solely because Bullard's sentence was below the statutory maximum and thus could be re-imposed on remand. But that conclusion conflicts with § 2255's text and this Court's precedent, and it implicates an irreconcilable conflict among the circuits. The Court should grant certiorari to resolve the disagreement and reverse.

Section 2255 authorizes a federal prisoner to challenge his sentence when (among other things) the sentence (i) "was in excess of the maximum authorized by law," or (ii) "is otherwise subject to collateral attack" because "'a fundamental defect'" in sentencing "'inherently result[ed] in a complete miscarriage of justice.'" *Davis v. United States*, 417 U.S. 333, 346 (1974) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). This Court has long presumed—and the courts of appeals have unanimously held—that a defendant sentenced as a career offender based on a

prior conviction that is later vacated is "entitled" to relief under § 2255. *See Johnson v. United States*, 544 U.S. 295, 303 (2005). It follows that a defendant like Bullard—who never was a career offender because his prior conviction is not a qualifying predicate offense—is similarly entitled to § 2255 relief.

The Sixth Circuit, however, held as a categorical matter that a defendant may *never* assert a non-constitutional challenge to a Guidelines interpretation under § 2255 because the Guidelines are merely advisory and the sentencing court could re-impose the same sentence on remand. That ruling conflicts with uniform circuit precedent holding that a defendant can challenge his career-offender designation under the Guidelines via § 2255's miscarriage-of-justice prong where it was based on a prior conviction that has since been vacated. There is no coherent legal principle that can reconcile these two lines of case law, creating an intolerable judicial conflict across the circuits that is worthy of this Court's review.

The Sixth Circuit's ruling also touches on a long-running disagreement among federal court of appeals judges over whether, and under what circumstances, a defendant may collaterally challenge a misinterpretation of the Guidelines under § 2255. Currently, the Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits hold that a defendant cannot assert a non-constitutional advisory-Guidelines claim in a § 2255 motion. But nearly all of those cases were narrowly divided, and the general issue has caused federal courts of appeals to grant *en banc* review at least four times. To date, more than a dozen circuit court judges

have concluded that defendants can challenge a legally erroneous career-offender designation under the advisory Guidelines via § 2255.

Moreover, as those judges have explained, the rule endorsed by the Sixth Circuit here is fatally flawed in multiple respects. To start, the rule holds that a sentence can only be challenged on non-constitutional grounds under § 2255 if it exceeds the maximum authorized by statute, yet the text of § 2255 authorizes relief *not only* where a sentence exceeds the legal maximum *but also* where it is fundamentally defective for *any other reason*. Indeed, many circuits (including the Sixth) have held that mandatory-Guidelines sentences can be collaterally attacked under § 2255 even where the defendant's sentence was within statutory limits. The rule is likewise incompatible with this Court's longstanding recognition that the advisory Guidelines play a fundamental role in sentencing decisions. And the rule runs headlong into the Court's regular presumption that a defendant can challenge his career-offender designation under the Guidelines via § 2255 where it was based on a prior conviction that has since been vacated. Under the correct analysis, an ascertainable sentencing error that creates a substantial risk of a higher sentence, such as an erroneous career-offender designation, can and does constitute a miscarriage of justice.

The end result of the Sixth Circuit's decision is that Bullard and defendants like him will remain incarcerated for longer under improperly-enhanced sentences, with no avenue for relief. Nothing justifies that result. As several federal appellate judges have

put it, it is far past "time for [this] Court to address" the "important" and "longstanding" question whether misapplication-of-the-advisory-Guidelines claims are ever cognizable under § 2255. *Spencer v. United States* (*Spencer II*), 773 F.3d 1132, 1163 (11th Cir. 2014) (en banc) (Jordan, J., dissenting), *cert. denied*, 135 S. Ct. 2836 (2015). The Court should grant certiorari to consider this precedent-setting question of exceptional importance and resolve the confusion, inconsistency, and injustice the decision below foments.

STATEMENT OF THE CASE

A. Bullard's Sentence And Direct Appeal

In January 2015, Bullard pleaded guilty to possessing with intent to distribute heroin and being a felon in possession of a firearm and ammunition, in violation of federal law. Bullard's plea agreement specifically reserved his right to appeal any determination that he qualified as a career offender under U.S. Sentencing Guidelines ("U.S.S.G.") § 4B1.1.

The district court sentenced Bullard on May 21, 2015. Without objection from Bullard's trial counsel, the court determined that Bullard qualified as a career offender based on a 2014 Ohio drug conviction and a 2004 Arizona conviction for attempted transport for sale of a narcotic drug under Arizona Revised Statutes § 13-3408. The court thus applied a Guidelines range of 292 to 365 months' imprisonment, rather than the 92-to-115-month range applicable without the career-offender enhancement.

After designating Bullard a career offender, the district court anchored its sentencing decision in the

enhanced Guidelines range. But the court expressed concern that the range was unduly punitive in Bullard's case. Accordingly, the court varied downward, sentencing Bullard to serve what the court still viewed as an "extremely long sentence" of 140 months in prison. The court recognized that Bullard's criminal history "work[ed] against [him]." The court explained, however, that Bullard was a "low-level guy" with no apparent record of violence. Yet, even after the downward variance, Bullard's sentence was still more than two years higher than the top of the Guidelines range applicable had he not been labeled a career offender. Moreover, the same logic that led the district court to vary downward from the enhanced Guidelines range may well have caused it to sentence him within or below the correct Guidelines range.

Although Bullard preserved his right to appeal application of the career-offender enhancement, Bullard's appellate counsel did not appeal his designation as a career offender. Indeed, while appellate counsel unsuccessfully appealed the denial of a suppression motion, counsel raised no objection to Bullard's sentence whatsoever. *See United States v. Bullard*, 659 F. App'x 288, 289 (6th Cir. 2016).

B. Collateral Proceedings

On January 9, 2017, Bullard—now proceeding *pro se*—timely filed a motion to vacate his sentence under 28 U.S.C. § 2255, arguing that the district court had improperly classified him as a career offender based on the 2004 Arizona conviction and that this error subjected his sentence to collateral attack. Bullard argued that the Arizona conviction could not qualify

as a predicate offense because, among other things, the Arizona statute proscribes conduct (namely, offers and attempts to traffic in drugs) that goes beyond the Guideline's definition of what qualifies as a predicate offense. Bullard also argued that he had received ineffective assistance of trial and appellate counsel given his attorneys' failure to challenge his career-offender designation at sentencing or on appeal.

On May 25, 2017, the district court denied Bullard's § 2255 motion and declined to issue him a certificate of appealability. According to the court, Bullard's Arizona conviction qualified as a career-offender predicate offense under § 4B1.1. Based solely on its conclusion that Bullard was properly classified as a career offender, the district court held, in turn, that Bullard's trial and appellate counsel were not constitutionally ineffective for failing to challenge his career-offender designation.

On July 6, 2017, Bullard—still proceeding *pro se*—timely filed a notice of appeal and sought a certificate of appealability from the Sixth Circuit. On January 4, 2018, the court of appeals concluded that Bullard had made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and granted him a certificate of appealability on the questions whether (i) Bullard's Arizona conviction qualified as a predicate offense under § 4B1.1, and (ii) Bullard's trial and appellate counsel were ineffective because they failed to argue that the Arizona conviction could not support career-offender status. After an initial round of briefs, the court of appeals appointed counsel and ordered additional briefing.

While Bullard's appeal was pending, the Sixth Circuit resolved the first question presented by the certificate of appealability in his favor. In a unanimous *en banc* opinion, the court of appeals overruled its prior decision in *United States v. Evans*, 699 F.3d 858 (6th Cir. 2012), and held that the term "controlled substance offense" in § 4B1.1 does *not* include attempt crimes, *United States v. Havis*, 927 F.3d 382, 386-87 (6th Cir.) (en banc) (per curiam), *reconsideration denied*, 929 F.3d 317 (6th Cir. 2019). As the court of appeals explained, the Sentencing Commission may have "said it does in the commentary," *Havis*, 927 F.3d at 385, but under separation-of-powers principles long enforced by this Court, the Commission cannot add crimes to a Guideline via commentary without violating the constitutional limits on its authority. Rather, the Guideline's text controls, and it *excludes* inchoate offenses such as attempts from its scope. *Id.* at 385-86.[1]

Notwithstanding its recent *Havis* decision, the Sixth Circuit affirmed the district court's denial of Bullard's § 2255 motion. Both the court of appeals and the Government agreed that, under *Havis*, Bullard's Arizona conviction is not a predicate "controlled substance offense" and thus Bullard is not a career offender. App. 2a, 13a. The court of appeals also acknowledged that a defendant ordinarily should be resentenced under § 2255 where he demonstrates

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[1] The Government did not seek this Court's review of the Sixth Circuit's *en banc* ruling in *Havis*.

that a prior conviction used to justify a career-offender enhancement has been vacated. But the court of appeals held that Bullard was not entitled to any relief, on the theory that his challenge was non-constitutional, and non-constitutional challenges to an advisory-Guidelines interpretation are never cognizable under § 2255, even where, as here, the error stigmatizes the defendant as a career offender and results in a sentence significantly above the correct Guidelines range.

Bullard filed a timely petition for rehearing and rehearing *en banc*, which the Sixth Circuit denied. App. 34a. This petition followed.

REASONS FOR GRANTING THE PETITION

A. Federal Courts Of Appeals Are Deeply Divided Over The Question Presented

The circuits uniformly agree that a defendant whose career-offender designation (under either the mandatory or advisory Guidelines) becomes *factually* erroneous—due to the later vacatur of a necessary predicate conviction—can collaterally attack his sentence under 28 U.S.C. § 2255's miscarriage-of-justice prong. *See, e.g.*, *Cuevas v. United States*, 778 F.3d 267, 274 (1st Cir. 2015) (collecting cases from Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits where vacatur of prior conviction previously used to justify career-offender designation under Guidelines was held to require § 2255 relief). Most circuits (including the Sixth Circuit here) also agree, however, that § 2255 relief is *not* available when a subsequent clarification of *law* shows that a defendant never should

have been labeled a career offender under the advisory Guidelines in the first place. *See infra* at 11-19.

These two adjacent strands of case law are irreconcilable. If an advisory-Guidelines sentence becomes fundamentally defective when a defendant no longer qualifies as a career offender due to a change in *factual* circumstances, then a defendant who *legally* never was a career offender to begin with is also serving a fundamentally defective sentence. There is no legitimate reason to treat a defendant who was properly classified as a career offender at sentencing more favorably than one who never should have been subjected to the career-offender enhancement in the first place. *See, e.g.*, *Spencer II*, 773 F.3d at 1153 (Martin, J., dissenting); *Gilbert v. United States*, 640 F.3d 1293, 1330 (11th Cir. 2011) (en banc) (Martin, J., dissenting). To the contrary, in both scenarios, the defendant's career-offender designation is erroneous, and there is a substantial risk he received a higher sentence as a result—thus necessitating § 2255 relief. *See infra* at 24-25.

Faced with this intolerable conflict of authority, court of appeals judges understandably have become "deeply divided" over whether to afford relief to defendants like Bullard. *United States v. Foote*, 784 F.3d 931, 939 (4th Cir. 2015). Several circuits hold that such relief is available if a defendant's legally erroneous sentence was imposed under the mandatory Guidelines. And while most circuits hold that § 2255 relief is unavailable to those sentenced under the advisory Guidelines, at least a dozen court of appeals judges have reached the opposite conclusion. These

entrenched judicial disagreements over application of § 2255 to erroneous Guidelines sentences warrants this Court's review.

1. *The Fifth And Eighth Circuits*

At one end of the spectrum, the Fifth and Eighth Circuits hold that challenges to a legally erroneous career-offender designation are *never* cognizable under § 2255, regardless of whether the defendant was sentenced under the advisory or mandatory Guidelines. *See Sun Bear v. United States* (*Sun Bear III*), 644 F.3d 700 (8th Cir. 2011) (en banc); *United States v. Williamson*, 183 F.3d 458 (5th Cir. 1999).

a. The defendant in *Sun Bear* was sentenced as a career offender under the then-mandatory Guidelines based on a prior conviction for attempted theft of a vehicle, and he unsuccessfully challenged his career-offender designation on direct appeal. *See United States v. Sun Bear* (*Sun Bear I*), 307 F.3d 747, 753 (8th Cir. 2002). After finalization of his conviction, the Eighth Circuit held that auto theft is not a qualifying predicate offense. *See United States v. Williams*, 537 F.3d 969, 971 (8th Cir. 2008). Based upon that intervening precedent, an Eighth Circuit panel unanimously concluded that the defendant was entitled to collaterally attack his enhanced sentence under § 2255. *See Sun Bear v. United States* (*Sun Bear II*), 611 F.3d 925, 930 (8th Cir. 2010). This was true, the panel held, even though the defendant's sentence fell within the unenhanced Guidelines range. *Id.* at 926-27.

A divided *en banc* court disagreed. The *en banc*

majority concluded that the defendant could not collaterally attack his improperly enhanced sentence under § 2255 because the sentence was within the statutory maximum. *See Sun Bear III*, 644 F.3d at 702 & n.4, 705-06. Five judges dissented, rejecting the majority's approach as "an uncompelling and unjust denial of process." *See id.* at 712 (Melloy, J., dissenting, joined by Murphy, Bye, Smith, Shepherd, JJ.). Another Eighth Circuit judge separately voiced disagreement with the *en banc* majority's decision in a later case. *See Meirovitz v. United States*, 688 F.3d 369, 372-74 (8th Cir. 2012) (Bright, J., concurring).

b. The Fifth Circuit's decision in *Williamson* is similar. There, a defendant sentenced as a career offender under the mandatory Guidelines attempted to collaterally attack his sentence after the Fifth Circuit held that one of his predicate convictions no longer supported career-offender status as a matter of law. The Fifth Circuit denied him § 2255 relief, holding that claims alleging a misapplication of the Guidelines can never give rise to a miscarriage of justice under § 2255. *Williamson*, 183 F.3d at 462.[2]

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[2] The Fifth Circuit, however, ultimately vacated the defendant's sentence for the separate reason that he received ineffective assistance of counsel, and in so doing emphasized that leaving the enhanced sentence in place would "seriously … affect the fairness, integrity and public reputation of judicial proceedings" and thereby "undermin[e] the rule of law." *Williamson*, 183 F.3d at 464.

2. *The Fourth, Sixth, Seventh, And Eleventh Circuits*

Most other circuits reject the categorical approach taken by the Fifth and Eighth Circuits. They instead draw a distinction between challenges to mandatory- and advisory-Guidelines sentences.

Specifically, at least five circuits have recognized that legally erroneous career-offender designations can give rise to a miscarriage of justice requiring collateral relief where the defendant was sentenced under the mandatory Guidelines. *See Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020) (§ 2241); *Lester v. Flournoy*, 909 F.3d 708 (4th Cir. 2018) (§ 2241); *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016) (§ 2241); *United States v. Doe*, 810 F.3d 132 (3d Cir. 2015) (§ 2255); *Narvaez v. United States*, 674 F.3d 621 (7th Cir. 2011) (§ 2255); *see also Gilbert*, 640 F.3d 1293 (rejecting claim under § 2241 but leaving open whether one would be viable in an initial § 2255 motion).[3] In so holding, these circuits implicitly reject the Eighth Circuit's conclusion in *Sun Bear III* that any mandatory-Guidelines sentence below the statutory maximum is immune from collateral attack. *See, e.g.*, *Lester*, 909 F.3d at 714; *Narvaez*, 674 F.3d at 629.

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[3] Although not directly applicable because the case involved the viability of a § 2241 habeas petition rather than a § 2255 motion, the dissenting opinions in *Gilbert* also support allowing challenges to advisory-Guidelines sentences to proceed in § 2255 motions. *See Gilbert*, 640 F.3d at 1330-36 (Martin, J., dissenting, joined by Barkett, Hill, JJ.); *id.* at 1336-38 (Hill, J., dissenting, joined by Barkett, J.).

The Fourth, Sixth, Seventh, and Eleventh Circuits have also held, however, that a misapplication-of-the-Guidelines claim is *not* viable under § 2255 for advisory-Guidelines-sentenced defendants. *See Snider v. United States*, 908 F.3d 183 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 1573 (2019); *Foote*, 784 F.3d 931; *Spencer II*, 773 F.3d 1132; *Hawkins v. United States*, 706 F.3d 820 (7th Cir.), *opinion supplemented on denial of reh'g*, 724 F.3d 915 (7th Cir. 2013). But as discussed below, in each circuit, dissenting judges argued persuasively for the opposite result, and panels of the Fourth and Eleventh Circuits originally held such claims to be viable until the opinions were reversed by closely divided *en banc* courts.

a. In *Whiteside v. United States* (*Whiteside I*), 748 F.3d 541 (4th Cir. 2014), a divided panel of the Fourth Circuit held that the defendant could collaterally attack his erroneous career-offender designation under the advisory Guidelines in a § 2255 motion. The majority explained that, even if advisory only, the career-offender enhancement is no "run-of-the-mill guideline," *id.* at 549 n.7, because it "creates 'a category of offender subject to particularly severe punishment,'" *id.* at 551 (quoting *Buford v. United States*, 532 U.S. 59, 60 (2001)). Moreover, the majority emphasized, the "enhancement's dramatic impact" on a defendant's Guidelines range means that its erroneous application "almost certainly" increases the ultimate sentence imposed. *Id.* at 551-52.

The *en banc* court reversed on the ground that the defendant's § 2255 motion was untimely. *Whiteside v. United States* (*Whiteside II*), 775 F.3d 180, 182-87

(4th Cir. 2014) (en banc). Three judges dissented, arguing that it was a "gross injustice" to allow the defendant's erroneous career-offender designation to stand, *id.* at 187 (Gregory, J., dissenting, joined by Davis, J.), in part because it likely cost the defendant "eight years of freedom," *id.* at 190 (Wynn, J., dissenting). Shortly thereafter, another Fourth Circuit panel ruled that misapplication-of-the-advisory-Guidelines claims are never cognizable under § 2255, although it emphasized that the question had resulted in "extremely close and deeply divided" opinions across the circuits. *Foote*, 784 F.3d at 939.

b. In *Snider*, another advisory-Guidelines case, the defendant sought to collaterally attack his career-offender-enhanced sentence based on intervening Sixth Circuit precedent. 908 F.3d at 186-88. Rather than adjudicate his claim on the merits, a divided panel endorsed the Fourth Circuit's decision in *Foote* and held the defendant's misapplication-of-the-advisory Guidelines challenge uncognizable under § 2255, in part because his sentence fell within the unenhanced range. *Id.* at 191.

In a lengthy dissent, Judge Moore argued that a legally erroneous career-offender designation can, in certain circumstances, constitute a fundamental defect requiring § 2255 relief. Among other things, Judge Moore emphasized this Court's case law recognizing the serious, real-world impact of advisory-Guidelines miscalculations on defendants' sentences, and described the significant influence of improper career-offender designations in particular. *See id.* at

193-95, 198-99 (Moore, J., dissenting) (citing, *e.g.*, *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016); *Peugh v. United States*, 569 U.S. 530, 541 (2013); *Gall v. United States*, 552 U.S. 38, 49 (2007)). Judge Moore also explained in detail that allowing a defendant to challenge his erroneously enhanced sentence raised no finality concerns, since it would not affect his underlying conviction and would require only minimal resources to correct. *See id.* at 199-200.

The Sixth Circuit extended *Snider*'s reach in this case. Specifically, the panel clarified that, in its view, a defendant can *never* assert a misapplication-of-the-advisory-Guidelines claim under § 2255. App. 3a, 7a, 11a. That is so, the panel emphasized, even where, as here, the defendant's sentence significantly exceeded the correct Guidelines range. App. 9a-10a.

c. In *Narvaez*, the Seventh Circuit held that a § 2255 motion challenging an erroneous career-offender designation "presents a special and very narrow exception" to the ordinary rule that sentencing errors do not meet § 2255's fundamental-defect standard. 674 F.3d at 627. In such a case, the Seventh Circuit emphasized, "[a] postconviction clarification in the law has rendered the sentencing court's [career-offender designation] unlawful," making it "clear" that the defendant "never should have been subjected to the enhanced punishment reserved for such repetitive and violent offenders." *Id.* (emphasis omitted). The Seventh Circuit concluded, moreover, that such an error necessitates § 2255 relief even if the sentence imposed was below the statutory maximum. *Id.* at 629.

In *Hawkins*, the Seventh Circuit later cabined *Narvaez*'s rule to mandatory-Guidelines cases only. The majority reasoned that, while the mandatory nature of the Guidelines made it "arguable" that Narvaez's sentence "exceeded the maximum authorized by 'law,'" that was not true for a defendant sentenced under the advisory Guidelines. *Hawkins*, 706 F.3d at 822. Judge Rovner dissented, explaining that the majority's distinction between advisory- and mandatory-Guidelines cases was "illusory." *Id.* at 826 (Rovner, J., dissenting). The branding of a defendant as a career offender, in Judge Rovner's view, was the "fundamental defect" leading to a miscarriage of justice, regardless of whether the ultimate sentence could be re-imposed on remand. *See id.* at 829. Judge Rovner also dissented from denial of panel rehearing, *see Hawkins*, 724 F.3d at 919-25 (Rovner, J., dissenting), and again from denial of rehearing *en banc*, where she was joined by three other judges, *see Hawkins v. United States*, 725 F.3d 680, 680 (7th Cir. 2013) (Rovner, J., dissenting, joined by Wood, Williams, Hamilton, JJ.).

d. The Eleventh Circuit's advisory-Guidelines decision in *Spencer II* was reached (like *Sun Bear III* and *Whiteside II*) only after the panel initially held that the defendant's claim was cognizable under § 2255. *See Spencer v. United States* (*Spencer I*), 727 F.3d 1076 (11th Cir. 2013). In *Spencer I*, the panel explained that the advisory Guidelines "anchor[]" a district court's sentencing decision, making an erroneous career-offender designation "a fundamental de-

fect in the sentencing analysis." *Id.* at 1088-89 (quotation marks omitted). On rehearing, a divided *en banc* court reversed, holding that § 2255's fundamental-defect standard is satisfied in the sentencing context only if the defendant can prove he is actually innocent or a prior conviction used to enhance his sentence has been vacated. *Spencer II*, 773 F.3d at 1139. Four dissenting judges would have found the claim cognizable. *See id.* at 1145-49 (Wilson, J., dissenting, joined by Martin, Jordan, Rosenbaum, JJ.); *id.* at 1149-55 (Martin, J., dissenting, joined by Wilson, Jordan, JJ.); *id.* at 1155-64 (Jordan, J., dissenting, joined by Wilson, Martin, Rosenbaum, JJ.); *id.* at 1164-80 (Rosenbaum, J., dissenting, joined by Wilson, Martin, Jordan, JJ.). Given the nationwide conflict among circuit judges on the issue, the dissenters also urged this Court to grant review. *Id.* at 1163 (Jordan, J., dissenting).

* * *

These cases reveal persistent and well-developed disagreement over whether a defendant erroneously sentenced as a career offender under the advisory Guidelines may collaterally attack that designation through a § 2255 motion. The circuits uniformly agree that a defendant sentenced as a career offender based on a prior conviction that is later vacated is entitled to § 2255 relief. And although most circuits currently hold that a defendant may not assert a misapplication-of-the-advisory-Guidelines claim under § 2255, several allow such claims to be brought in mandatory-Guidelines cases under either § 2255 or § 2241. Moreover, panels of the Fourth and Eleventh

Circuits allowed advisory-Guidelines-misinterpretation claims before the issue was taken *en banc*, and every circuit to reject such claims has done so in closely divided cases and over well-reasoned dissents. All told, more than a dozen court of appeals judges continue to endorse the view that misapplication-of-the-advisory-Guidelines claims should be cognizable. For the reasons explained directly below, those judges are correct. The Court should grant review to resolve the ongoing debate over whether, and under what circumstances, such claims are within a federal court's power to address.

B. The Decision Below Is Incorrect And Conflicts With This Court's Precedent

Contrary to the Sixth Circuit's holding, a defendant sentenced as a career offender under the advisory Guidelines should be entitled to collaterally attack his sentence under § 2255 when he can show that his sentence suffered from a "fundamental defect" that worked a miscarriage of justice. *Davis*, 417 U.S. at 346. Bullard undoubtedly made that showing here because he demonstrated that (1) the sentencing court applied a legally erroneous sentencing enhancement and (2) the error created a "significant risk" of a higher sentence. *Peugh*, 569 U.S. at 550.

1. This Court has long held that even non-constitutional errors are cognizable under § 2255 if they "inherently result[] in a complete miscarriage of justice." *Davis*, 417 U.S. at 346 (quotation marks omitted). That can occur where a change in the law renders the defendant's conduct no longer punishable. *Id.* at 341-46. Likewise, the Court has always assumed that "a

defendant given a sentence enhanced for a prior conviction is entitled to a reduction" under § 2255 "if the earlier conviction is vacated." *Johnson*, 544 U.S. at 303; *see also id.* at 304 (noting that the Court had previously "acknowledged" that a defendant may utilize § 2255 "after successful review of the prior state conviction" used to enhance his sentence).

Against this backdrop, an erroneous career-offender designation is no ordinary Guidelines error, but a defect resulting in a miscarriage of justice. It has a dramatic effect on a defendant's Guidelines range, thereby creating an intolerable risk of an excessive sentence. Here, for example, everyone agrees that the sentencing court improperly designated Bullard a career offender, tripling his recommended Guidelines range and almost certainly resulting in extra prison time for him.

2. The Sixth Circuit did not dispute these principles, but instead believed a miscarriage of justice could never arise from an advisory-Guidelines miscalculation simply because the district court could have "lawfully impose[d] the same sentence," error or not. That analysis is inconsistent with § 2255's text and several strands of this Court's jurisprudence.

a. To start, the Sixth Circuit's reasoning conflates two separate grounds for § 2255 relief. The plain text of the statute allows a defendant to challenge his sentence if it was "in excess of the maximum authorized by law … *or* is *otherwise* subject to collateral attack." 28 U.S.C. § 2255(a) (emphases added). By phrasing these grounds for relief in the disjunctive, Congress anticipated circumstances in which a defendant could

collaterally attack a sentence that was fundamentally defective yet could be lawfully re-imposed on resentencing. *See Davis*, 417 U.S. at 344 (legislative history of § 2255 "fully supports [the] view" that "the words 'otherwise open to collateral attack' are intended to be 'a catch-all phrase'"); *United States v. Addonizio*, 442 U.S. 178, 186 (1979) (recognizing claim that sentence imposed was outside "the statutory limits" and claim that proceeding was "infected with an[] error of fact or law of [a] 'fundamental' character" are separate grounds for relief).

This Court already has recognized as much. For instance, in *United States v. Behrens*, 375 U.S. 162 (1963), the Court permitted a defendant to collaterally attack his sentence under § 2255 based on a procedural error—even though the challenged sentence fell within statutory limits, and sentencing courts at the time had essentially unfettered discretion to choose a sentence. *Id.* at 165-66; *see Snider*, 908 F.3d at 196 (Moore, J., dissenting). For the same reason, at least five circuits recognize that a mandatory-Guidelines error can be "fundamental"—and thus justify a collateral attack under § 2255—even if the sentence imposed does not exceed the statutory maximum. *Supra* at 13; *see, e.g.*, *Lester*, 909 F.3d at 714 ("We ... reject the government's contention that any sentence falling below the statutory maximum is per se lawful and thus immune from savings clause challenge."); *Narvaez*, 674 F.3d at 629 ("The fact that Mr. Narvaez's sentence falls below the applicable statutory-maximum sentence is not alone determinative of whether a miscarriage of justice has occurred.").

b. The Sixth Circuit's rule also cannot be squared with this Court's case law recognizing "the real and pervasive effect" that the advisory Guidelines have on sentencing decisions. *Molina-Martinez*, 136 S. Ct. at 1346 (summarizing empirical evidence of Guidelines' controlling effect). As the Court repeatedly has explained, the advisory Guidelines form "the essential framework" for sentencing proceedings and "'anchor'" a district court's discretion. *Id.* at 1345 (quoting *Peugh*, 569 U.S. at 549). By law, district courts "*must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Peugh*, 569 U.S. at 541 (quotation marks omitted). Moreover, the advisory Guidelines "are not only the starting point for most federal sentencing proceedings but also the lodestar." *Molina-Martinez*, 136 S. Ct. at 1346. Indeed, the advisory-Guidelines range not only "is intended to," but also "usually does, exert controlling influence on the sentence that the court will impose." *Peugh*, 569 U.S. at 545 (plurality op.).[4]

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[4] This Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), is not to the contrary. There, the Court held that the advisory Guidelines are not susceptible to void-for-vagueness challenges under the Due Process Clause. *Id.* at 896. The Court emphasized, however, that advisory-Guidelines sentences are not immune from scrutiny. For instance, the Court reaffirmed its holding in *Peugh* that a retrospective increase in the advisory-Guidelines range applicable to a defendant violates the Ex Post Facto Clause. *Id.* at 895. The two types of challenges, the Court explained, ask fundamentally different questions: Whereas a vagueness challenge analyzes whether the law "provides notice and avoids arbitrary enforcement," an *ex post facto* claim asks "whether a change in law creates a significant risk of

For these very reasons, the Court has repeatedly refused to give controlling weight to the Guidelines' advisory nature. In *Peugh*, the Court held that a retrospective increase in the advisory-Guidelines range "creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation." *Id.* at 544 (majority op.). Likewise, the Court has concluded that even a minor error in an advisory-Guidelines calculation is sufficient evidence, standing alone, to show "a reasonable probability of a different outcome" at sentencing. *Molina-Martinez*, 136 S. Ct. at 1346. That is, application of the wrong Guidelines range is presumptively prejudicial and demonstrates "an effect on the defendant's substantial rights" absent evidence to the contrary. *Id.* at 1347. The Sixth Circuit's categorical rule, by contrast, echoes an argument that this Court has explicitly *rejected*: "that the Guidelines are too much like guideposts and not enough like fences" to create any concerns about "fundamental justice." *Peugh*, 569 U.S. at 547, 550.

Contrary to the Sixth Circuit's reasoning, an erroneous application of the career-offender enhancement satisfies the miscarriage-of-justice standard, even though it does not alter the statutory range within

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a higher sentence." *Id.* (quotation marks omitted). The question here—whether an advisory-Guidelines error gives rise to a miscarriage of justice—clearly falls on *Peugh*'s side of that line. After all, the only reason to permit an advisory-Guidelines defendant to collaterally attack his sentence after an underlying predicate is vacated, *see Cuevas*, 778 F.3d at 274, is because the enhancement creates an intolerable risk that the sentence imposed is higher than it should be.

which the district court may affix the sentence. *See id.* at 546-49. Just because a district court *could* re-impose the same sentence on remand does not suggest that it *would* actually do so. *See Narvaez*, 674 F.3d at 629 ("[T]o assume that the same sentence would have been imposed in the absence of the career offender provision is 'frail conjecture' that evinces in itself 'an arbitrary disregard of the petitioner's right to liberty.'" (quoting *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980))). This case perfectly illustrates the point. The district court anchored its sentencing decision in the Guidelines range. It commented that Bullard's criminal history was light compared to other drug offenders. And it emphasized that it viewed the resulting 140-month sentence as "extremely long." Against this backdrop, it strains credulity to assume that, had Bullard's Guidelines range been properly calculated, the district court would have varied *upward* by two years to re-impose the same sentence.

c. The Sixth Circuit's rule, treating all misapplication-of-the-advisory-Guidelines challenges as non-cognizable under § 2255, is likewise incompatible with how federal courts treat post-sentencing factual developments that negate a defendant's career-offender status. In *Johnson v. United States*, 544 U.S. 295 (2005), for instance, the Court acknowledged its historical understanding that a defendant sentenced as a career offender under the mandatory Guidelines can challenge his sentence under § 2255 if one of the convictions used to enhance his sentence is successfully vacated. *See id.* at 304. Indeed, the Court emphasized, a defendant who diligently obtains vacatur

of a predicate conviction is ordinarily "entitled" to a reduced sentence. *Id.* at 303.

As explained, the circuits have universally applied *Johnson*'s reasoning to advisory-Guidelines sentences. *See Cuevas*, 778 F.3d at 274. Thus, a defendant sentenced as a career offender under the advisory Guidelines who later successfully challenges one of his underlying convictions as factually flawed is entitled to resentencing, even where the initial sentence was within the statutory limits. But, under the Sixth Circuit's rule, a defendant who, as a matter of law, was never a career offender to begin with may not challenge his erroneous designation via § 2255. That state of affairs is untenable. *See supra* at 9-10.

d. Nor can the Sixth Circuit's rule be justified by finality concerns, as some circuits have suggested. Our system values finality not for its own sake, but only "insofar as it promotes certain principles: (1) to build confidence in the integrity of the judicial system; (2) to minimize administrative costs and delay; (3) to avoid [spoliation] of evidence; and (4) to honor comity." *Gilbert*, 640 F.3d at 1334 (Martin, J., dissenting) (citing *Addonizio*, 442 U.S. at 184 n.11). Yet none of those principles is furthered by denying relief to defendants like Bullard, who challenge only their concededly erroneous federal sentences. *See, e.g.*, *Snider*, 908 F.3d at 199-200 (Moore, J., dissenting); *Spencer II*, 773 F.3d at 1154-55 (Martin, J., dissenting); *Sun Bear III*, 644 F.3d at 707-12 (Melloy, J., dissenting). For one thing, vacating Bullard's sentence will be "relative[ly] eas[y]," and will not affect the finality of Bullard's federal criminal conviction in any

way. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018); *see United States v. DiFrancesco*, 449 U.S. 117, 133 (1980). Further, many procedural bars, such as the statute of limitations and § 2255's prohibition on second or successive petitions, also will strictly limit who can challenge an advisory-Guidelines sentence via § 2255. And, in any event, this Court has "consistently reaffirmed" that finality ultimately "must yield to the imperative of correcting a fundamentally unjust incarceration." *Schlup v. Delo*, 513 U.S. 298, 320-21 (1995) (quotation marks omitted). In other words, allowing Bullard to collaterally attack his concededly incorrect sentence will promote, not denigrate, judicial integrity.

C. The Question Presented Is Exceptionally Important, And This Case Is An Ideal Vehicle To Resolve It

1. As the numerous appellate decisions discussed above confirm, the question presented is frequently recurring. The question is also self-evidently important, because it directly implicates the ability of criminal defendants to obtain relief from sentences that are unnecessarily punitive and never should have been imposed in the first place. Habeas review is designed to be a safety-valve in exactly that circumstance. *See, e.g.*, *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969) (habeas is "the fundamental instrument for safeguarding individual freedom against … lawless [government] action").

The severe injustice of an erroneous career-offender designation is plain. Unlike ordinary Guidelines errors, the career-offender designation brands a

defendant as "'a malefactor deserving of far greater punishment than that usually meted out for an otherwise similarly situated individual who had committed the same offense.'" *Hawkins*, 706 F.3d at 826 (Rovner, J., dissenting) (quoting *Narvaez*, 674 F.3d at 629). The label signals to the sentencing court that the defendant should "'be treated differently'" because he belongs "'in a special category reserved for the violent and incorrigible.'" *Id.* (quoting *Narvaez*, 674 F.3d at 629). And it often renders the defendant ineligible for other sentencing reductions that would otherwise be available. *See Hill*, 836 F.3d at 593.

The stigma accompanying a career-offender designation exists by design. Congress directed the Sentencing Commission to adopt the career-offender enhancement to ensure that recidivist defendants with multiple prior violent or drug-related felonies received a sentence "at or near the maximum term authorized" by law. *See* 28 U.S.C. § 994(h). The Commission has acknowledged that its wording of the enhancement is intended to capture only "the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate." U.S.S.G. § 4B1.1 cmt. (background).

Befitting its congressional purpose, a career-offender enhancement is one of the most punitive available under the Guidelines. In 92.7% of career-offender cases, the application of a career-offender enhancement results in an increase in the defendant's

Guidelines range.[5] Indeed, the enhancement often multiplies the defendant's Guidelines range by a factor of two or more. *See, e.g.*, *Lester*, 909 F.3d at 709 (Guidelines range more than doubled); *Spencer II*, 773 F.3d at 1148 (Wilson, J., dissenting) (Guidelines range roughly doubled); *Hawkins*, 706 F.3d at 821 (Guidelines range increased by factor of ten); *Gilbert*, 640 F.3d at 1299-1300 (Guidelines range doubled); *Williamson*, 183 F.3d at 464 (Guidelines range increased from 140-to-175 months to 360-months-to-life). And the majority of defendants sentenced as career offenders are given a within-Guidelines sentence. *Quick Facts*, *supra* note 5, at 2. Taken together, this means that most defendants sentenced as career offenders under the advisory Guidelines serve sentences that are years longer than those served by similarly-situated defendants who lack the enhancement.

This case illustrates the unjust impact of erroneously labeling a defendant a career offender. Bullard's improper career-offender designation increased his Guidelines range from 92 to 115 months' imprisonment to 292 to 365 months' imprisonment—an increase of between sixteen and twenty years. In effect, the enhancement tripled Bullard's Guidelines range, and it almost certainly resulted in extra prison time for him. *See Peugh*, 569 U.S. at 544 (noting that empirical evidence shows "that when a Guidelines

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[5] U.S. Sentencing Commission, *Quick Facts: Career Offenders* 1 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY18.pdf.

range moves up or down, offenders' sentences move with it"). Absent this Court's review, however, Bullard and other defendants erroneously sentenced as career offenders will remain in prison under impermissibly extended sentences with no opportunity for judicial recourse.

2. Bullard's case is an ideal vehicle to address the question presented. The Sixth Circuit was explicit that it denied Bullard relief solely because, in its view, non-constitutional advisory-Guidelines challenges are never cognizable under § 2255. App. 11a. Prior panels of other circuits and at least a dozen court of appeals judges, by contrast, have expressly disagreed with that approach.

In addition, Bullard's ultimate sentence was significantly above the correct Guidelines range, and the record strongly suggests that he would receive a lesser sentence on remand. Indeed, all of the district court's comments at sentencing indicate that it likely would have imposed an even lower sentence had it begun its analysis with the correct Guidelines range. In this case, there is thus no need to address whether similar claims would be viable under circumstances where the defendant cannot show prejudice, such as when the defendant's sentence is within the correct Guidelines range, as occurred in *Sun Bear* and *Snider*, or where the sentencing court has stated on the record that it would have imposed the same sentence no matter what Guidelines range applied.

Moreover, unlike many other cases where defendants have pursued similar claims, this case involves an initial § 2255 motion that is unquestionably timely

because it was filed well within one year of Bullard's conviction becoming final. *See* 28 U.S.C. § 2255(f)(1); *see also* App. 21a. The case thus presents the narrow question of whether such claims are ever cognizable in a § 2255 motion, without raising additional complexities about the viability or timeliness of such claims raised in a second or successive § 2255 motion or a § 2241 habeas petition filed years after a defendant's sentence has become final. *See Gilbert*, 640 F.3d at 1306. Further, Bullard's plea agreement specifically preserved his right to challenge any career-offender designation, so there is no argument that his claim is foreclosed.

In short, Bullard's challenge to his sentence *is* cognizable under § 2255. The Sixth Circuit's holding to the contrary conflicts with the opinions of nearly a dozen circuit judges, runs roughshod over this Court's binding precedents, and offends fundamental principles of justice. The Court should grant certiorari on this exceedingly important issue before the Sixth Circuit's rule categorically barring relief for every defendant like Bullard is allowed to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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