NO. _____

In The Supreme Court of the United States

TYE LANFORD SARRATT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Anthony Martinez
FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Joshua B. Carpenter
Counsel of Record
Appellate Chief
One Page Avenue, Suite 210
Asheville, North Carolina 28801
(828) 232-9992
Joshua_Carpenter@fd.org

Counsel for Petitioner

Dated: July 16, 2021

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTION PRESENTED

This petition presents a question that divides the circuits but on which this Court has denied certiorari many times. *See*, *e.g.*, *Brown v. United States*, 139 S. Ct. 14 (2018) (Sotomayor, J.) (dissenting from denial of certiorari). As explained in the petition, recent developments that have broadened and entrenched the circuit conflict provide good reasons for the Court to finally grant certiorari and resolve this important and recurring issue.

A federal statute, 28 U.S.C. § 2255, provides that a criminal defendant may file a motion to vacate his sentence based on constitutional error 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." 28 U.S.C. § 2255(f)(3). The question presented is:

Does a post-conviction motion asserting the following claim—that a sentence violates due process under *Johnson v. United States*, 135 S. Ct. 2551 (2015), because it was dictated by the residual clause of the pre-*Booker* mandatory Sentencing Guidelines—qualify as a motion that "assert[s]" the "right . . . initially recognized" in *Johnson* within the meaning of 28 U.S.C. § 2255(f)(3)?

LIST OF PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

United States v. Tye Sarratt, Case No. 3:01-CR-l6-01, District Court for the Western District of North Carolina. Judgment entered April 29, 2002.

Tye Sarratt v. United States, Case No. 3:16-cv-00365, District Court for the Western District of North Carolina. Order denying and dismissing Section 2255 motion entered November 15, 2018.

Tye Sarratt v. United States, No. 19-6075, United States Court of Appeals for the Fourth Circuit. Judgment affirming district court's denying and dismissing Section 2255 motion entered February 22, 2021

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDING ii

STATEMENT OF RELATED CASES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

DECISIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. The circuits are deeply and intractably divided 7

II. The question presented is important and recurring, and this case presents a clean vehicle for review 10

III. The decision below is wrong 13

A. The circuit majority interpretation butchers the statutory text 13

B. The circuit majority interpretation misapplies this Court's new-rule jurisprudence 19

CONCLUSION 24

APPENDIX:

Unpublished Opinion of
The United States Court of Appeals
For the Fourth Circuit
Re: Affirming the District Court's Judgment
entered February 22, 2021 ..... 1a

Judgment of
The United States Court of Appeals
For the Fourth Circuit
entered February 22, 2021 ..... 4a

Order of
The United States Court of Appeals
For the Fourth Circuit
Re: Granting Certificate of Appealability
entered December 26, 2019 ..... 7a

Order of
The United States District Court for
The Western District of Virginia
Re: Denying and Dismissing with Prejudice Petitioner's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255
entered November 15, 2018 ..... 8a

Judgment in a Criminal Case of
The United States District Court for
The Western District of Virginia
entered April 30, 2002 ..... 12a

TABLE OF AUTHORITIES

Page(s)

CASES

Beckles v. United States,
137 S. Ct. 886 (2017) ..... *passim*

Brown v. United States,
139 S. Ct. 14 (2018) 2

Chaidez v. United States,
568 U.S. 342 (2013) 19, 20, 23

Chambers v. United States,
763 F. App'x 514 (6th Cir. 2019) 9

Clemons v. Mississippi,
494 U.S. 738 (1990) 22

Corley v. United States,
556 U.S. 303 (2009) 16

Cross v. United States,
892 F.3d 288 (7th Cir. 2018) ..... *passim*

Headbird v. United States,
813 F.3d 1092 (8th Cir. 2016) 20

Hodges v. United States,
778 F. App'x 413 (9th Cir. 2019) 9, 10

In re Griffin,
823 F.3d 1350 (11th Cir. 2016) 8, 9

James v. United States,
550 U.S. 192 (2007) 3, 12

Johnson v. United States,
135 S. Ct. 2551 (2015) ..... *passim*

Jones v. United States,
Sup. Ct. No. 20-7522 (June 28, 2021) 12

Lester v. United States,
921 F.3d 1306 (11th Cir. 2019) 9, 10

Moore v. United States,
871 F.3d 72 (1st Cir. 2018) 9, 17

Mora-Higuera v. United States,
914 F.3d 1152 (8th Cir. 2019) 5, 6, 10

Nunez v. United States,
954 F.3d 465 (2d Cir. 2020) 8

Raybon v. United States,
867 F.3d 625 (6th Cir. 2017) 8, 9

Russo v. United States,
902 F.3d 880 (8th Cir. 2018) 8

Sessions v. Dimaya,
138 S. Ct. 1204 (2018) 15, 18, 23

Shea v. United States,
976 F.3d 63 (1st Cir. 2020) ..... *passim*

Sotelo v. United States,
922 F.3d 848 (7th Cir. 2019) 10

Stringer v. Black,
503 U.S. 222 (1992) 22

Taylor v. United States,
495 U.S. 575 (1990) 3

Teague v. Lane,
489 U.S. 288 (1989) ..... *passim*

United States v. Arrington,
--- F.3d ---, 2021 WL 2932260 (D.C. Cir. July 13, 2021) ..... *passim*

United States v. Bacote,
189 F. App'x 191 (4th Cir. 2006) 3, 12

United States v. Blackstone,
903 F.3d 1020 (9th Cir. 2018) 8, 9

United States v. Booker,
543 U.S. 220 (2005) ..... *passim*

United States v. Brown,
868 F.3d 297 (4th Cir. 2017) ..... *passim*

United States v. Davis,
139 S. Ct. 2319 (2019) 15, 18

United States v. Green,
898 F.3d 315 (3d Cir. 2018) 8, 9

United States v. Hammond,
351 F. Supp. 3d 106 (D.D.C. 2018) 21

United States v. Jones,
832 F. App'x 929 (6th Cir. Oct. 19, 2020) 10, 12

United States v. London,
937 F.3d 502 (5th Cir. 2019) 8, 9, 17, 23

United States v. Pullen,
913 F.3d 1270 (10th Cir. 2019) 8

United States v. Rumph,
824 F. App'x 165 (4th Cir. 2020), reh'g denied,
2020 U.S. App. LEXIS 38943 (4th Cir. Dec. 11, 2020) 10

United States v. Wolfe,
767 F. App'x 390 (3d Cir. 2019) 10

Welch v. United States,
136 S. Ct. 1257 (2016) 4

Wood v. Milyard,
566 U.S. 463 (2012) 18

Wright v. West,
505 U.S. 277 (1992) 21

CONSTITUTIONAL PROVISION

U.S. CONST. amend. I 14

STATUTES

18 U.S.C. § 924(c) 2, 15

18 U.S.C. § 924(e) 3

18 U.S.C. § 2119 2

28 U.S.C. § 1254(1) 1

28 U.S.C § 2255 ..... 5, 6, 17, 19

28 U.S.C. § 2255(f) 1, 18

28 U.S.C. § 2255(f)(3) ..... *passim*

GUIDELINES

U.S.S.G. § 4B1.2 3

U.S.S.G. § 4B1.2(a)(1) 3

U.S.S.G. § 4B1.2(a)(2) 3

U.S.S.G. § 5A 4

OTHER AUTHORITIES

137 Cong. Rec. S8558-02, 1991 WL 111516 (June 25, 1991) 19

ASSERT, Black's Law Dictionary (11th ed. 2019) 14

HOLDING, Black's Law Dictionary (11th ed. 2019) 16

RIGHT, Black's Law Dictionary (11th ed. 2019) 17

Section 404 of the First Step Act 12

PETITION FOR WRIT OF CERTIORARI

Petitioner Tye Sarratt respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

DECISIONS BELOW

The Fourth Circuit's unpublished opinion is reprinted at Pet. App. 1a-31a. The Fourth Circuit's published precedent on this issue, on which the unpublished opinion relies, is reported at 868 F.3d 297. The district court's written judgment is reprinted at Pet. App. 8a-11a.

JURISDICTION

The court of appeals entered its judgment on February 22, 2021. Pet. App. 1a. This petition is timely filed based on this Court's March 2020 order extending the deadline for filing a petition for certiorari from 90 days to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

A federal statute, 28 U.S.C. § 2255(f), provides in relevant part: "A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of . . . (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

STATEMENT OF THE CASE

This petition presents an issue on which this Court has denied certiorari in many cases. *See*, *e.g.*, *Brown v. United States*, 139 S. Ct. 14 (2018). If past is prologue, this petition is hopeless and will be perfunctorily denied.

But there are good reasons for a different outcome this time around. The undisputed circuit split at the heart of this petition, which the Solicitor General has previously dismissed as "shallow," has deepened and become entrenched. Prisoners in the First, Seventh, and D.C. Circuits are now receiving relief from unduly draconian sentences imposed under the residual clause of the career-offender guideline, which was mandatory (rather than advisory) at the time of their sentencings. By contrast, prisoners with identical sentences in every other circuit remain procedurally barred from having their claims considered on the merits.

This Court should end these geographic disparities and decide, once and for all, the important and recurring statutory-interpretation issue presented by this petition. This case presents an ideal vehicle for the Court to do so.

1. In July 2001, the petitioner, Tye Sarratt, pled guilty in federal court to one count of carjacking in violation of 18 U.S.C. § 2119 and one count of possessing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). At sentencing, Sarratt was subject to an enhanced guidelines range because his two prior North Carolina convictions for "attempted breaking or entering" qualified as "crimes of violence" under the career-offender provision. That provision defined a "crime of violence" as follows:

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

U.S.S.G. § 4B1.2 (2000).[1] This definition was based on, and incorporated much of its language from, the "violent felony" definition in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). *See* U.S.S.G. Supp. App. C, Amend. 268, at 132-33.

Sarratt's prior convictions for attempted breaking or entering did not satisfy § 4B1.2(a)(1)'s element-of-force requirement or qualify as the enumerated offense of "burglary of a dwelling" under § 4B1.2(a)(2). *See James v. United States*, 550 U.S. 192, 197 (2007) (holding that *attempted* burglary does not involve an element of force and does not satisfy the definition of generic burglary adopted in *Taylor v. United States*, 495 U.S. 575 (1990)); *see also United States v. Bacote*, 189 F. App'x 191, 194 (4th Cir. 2006) (concluding that a § 14-54 conviction "was not burglary of a dwelling" as required by § 4B1.2 because it encompasses non-dwelling burglaries). Instead, those prior convictions qualified as crimes of violence solely because of § 4B1.2(a)(2)'s "residual clause," which covered an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *See James*, 550 U.S. at 197; *see also Bacote*, 189 F. App'x at 194-95 (holding that district

[1] The Sentencing Commission amended the crime-of-violence definition in 2016 by, among other things, removing Section 4B1.2(a)(2)'s "residual clause." *See* U.S.S.G. Supp. App. C, Amend. 798.

court should have determined whether a § 14-54 conviction satisfied the residual clause).

The career-offender enhancement more than doubled Sarratt's sentencing exposure, creating a mandatory guidelines range of 188 to 235 months on Count One. *See* Court of Appeals Joint Appendix ("CAJA"), at 86 (citing Presentence Report at ¶ 54). Absent the career-offender enhancement, his range would have been 70 to 87 months.[2] Because Sarratt was sentenced before this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the district court was required to impose a sentence within the career-offender sentencing range. *Id.* at 234 (explaining that "no departure will be legally permissible" in "most cases," meaning that "the judge is bound to impose a sentence within the Guidelines range"). The district court in fact imposed a low-end sentence of 188 months on the carjacking count—equal to the lowest sentence that was legally permissible at the time. CAJA 16. Sarratt also received a mandatory, consecutive sentence of 120 months on the related firearm count. CAJA 16.

2. In 2015, this Court struck down the ACCA's residual clause as "unconstitutionally vague." *See Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). It subsequently held that *Johnson* is a substantive decision and thus "has retroactive effect under *Teague* in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

---

[2] This calculation is based on an adjusted offense level of 25 and a criminal history category of III, as calculated by the presentence report before application of the career-offender enhancement. *See* CAJA 80, 83; *see also* U.S.S.G. § 5A (sentencing table).

The Court later held that that *Johnson*'s vagueness holding does not apply in the context of a challenge to the calculation of the *advisory* guidelines range. *See Beckles v. United States*, 137 S. Ct. 886 (2017). It explained that, in the criminal context, the "void for vagueness" doctrine undergirding the *Johnson* rule applies only to "laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses." *Id.* at 892 (emphases in original). Because the guidelines in their now-advisory form "do not fix the permissible range of sentences," the Court held that the advisory guidelines "are not subject to a vagueness challenge." *Id.*

The Court's analysis in *Beckles* expressly distinguished the now-advisory guidelines that "merely guide the district courts' discretion" from the previously mandatory guidelines that "were initially binding" and that "constrain[ed]" the district courts. *Id.* at 894. And the Court explained that the reason the advisory guidelines "are not amenable to a vagueness challenge" is "[b]ecause they merely guide the district courts' discretion." *Id.*

3. In June 2016, Sarratt filed a post-conviction motion under 28 U.S.C § 2255 to assert a claim that his career-offender sentence was unconstitutional under *Johnson*. His case was held in abeyance pending the *Beckles* decision, at which point he filed a supplemental memorandum explaining that, in contrast to the *advisory* guidelines scheme at issue in *Beckles*, he was sentenced under the *mandatory* guidelines scheme in effect before *Booker*. That distinction, he contended, was dispositive because "the pre-*Booker* guidelines 'fix[ed] the

permissible sentences for criminal offenses' in the same way the ACCA's residual clause 'fixed—in an impermissibly vague way—a higher range of sentences for certain defendants.'" *See* CAJA at 38 (quoting *Beckles*, 137 S. Ct. at 892).

Less than six months after *Beckles* was decided and while Sarratt's motion remained pending in the district court, the Fourth Circuit issued its decision in *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017)—a case where the defendant, like Sarratt, raised a *Johnson*-based challenge to his mandatory career-offender sentence. The Court did not reach the merits question of whether the pre-*Booker* residual clause is unconstitutionally vague. Instead, the panel majority held, over Chief Judge Gregory's dissent, that the defendant's Section 2255 motion was "untimely under 28 U.S.C. § 2255(f)(3)," which provides for a one-year limitations period that runs from "the date on which the right asserted was initially recognized by the Supreme Court." *Brown*, 868 F.3d at 299. In support of that holding, the panel majority reasoned that the scope of the *Johnson* rule is limited to the ACCA context: "*Johnson* only recognized that ACCA's residual clause was unconstitutionally vague." *Id.* at 303. Based on that narrow understanding of the *Johnson* rule, the panel majority held that the Supreme Court had not yet "recognized" the right the defendant sought to apply. *Id.*; *see id.* at 302 (stating that "the *Beckles* Court carefully crafted its holding to avoid deciding whether the logic of *Johnson* applied outside the context of ACCA").

In light of these developments, Sarratt filed a supplemental memorandum in the district court. He conceded that his *Johnson* claim was untimely based on the

holding in *Brown*, but he sought a certificate of appealability to pursue further review of *Brown*'s timeliness holding. The district court agreed that Sarratt's motion was untimely under *Brown*, and it therefore "denied and dismissed" his motion. Pet. App. 8a-11a. The court also declined to issue a certificate of appealability. Pet. App. 10a-11a.

On appeal, the Fourth Circuit granted a certificate of appealability on "whether [Sarratt] timely challenged his mandatory career offender sentencing enhancement as invalid under *Johnson v. United States*, 135 S. Ct. 2551 (2015)." Pet. App. 7a. After receiving briefing, the court issued an unpublished opinion affirming the district court's order based on the *Brown* precedent. It reasoned that "*Brown*'s framework" remains "binding" and that Sarratt's "motion, therefore, does not qualify as timely under § 2255(f)(3)." Pet. App. 3a.

REASONS FOR GRANTING THE WRIT

I. The circuits are deeply and intractably divided.

The availability of sentencing relief for a criminal defendant like Sarratt depends entirely on the happenstance of geography. Those in the First, Seventh, and D.C. Circuits are receiving relief. Those with identical convictions and sentences in other circuits are foreclosed from even having their claims reviewed on the merits.

The details of the circuit split are well documented. *See*, *e.g.*, *United States v. Arrington*, --- F.3d ---, 2021 WL 2932260, *6 (D.C. Cir. July 13, 2021) (collecting cases). Eight circuits—including the Fourth Circuit in the decision below—hold

that § 2255(f)(3)'s limitations period does not apply to post-conviction motions, like Sarratt's, that challenge a sentence imposed under the mandatory career-offender guideline's residual clause. *See Nunez v. United States*, 954 F.3d 465, 471 (2d Cir. 2020); *United States v. Green*, 898 F.3d 315 (3d Cir. 2018); *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017); *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017); *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018); *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018); *United States v. Pullen*, 913 F.3d 1270, 1283-84 (10th Cir. 2019). One circuit, the Eleventh, holds that sentences under the mandatory guidelines are immune from vagueness challenges without directly addressing the statute-of-limitations issue. *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

On the other hand, the First, Seventh, and D.C. Circuits hold that § 2255(f)(3) permits such petitions to proceed as timely filed. *Shea v. United States*, 976 F.3d 63 (1st Cir. 2020); *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018); *Arrington*,--- F.3d ---, 2021 WL 2932260. The First and Seventh Circuits also hold, on the merits, that the Johnson decision invalidates the mandatory career-offender guideline's residual clause, while the D.C. Circuit's recent *Arrington* decision remanded for the district court to consider that merits issue in the first instance. *Shea*, 976 F.3d at 81-82; *Cross*, 892 F.3d at 299-307; *Arrington*, 2021 WL 2932260, *7.

The top line numbers of the split—nine on one side and three on the other—understate the split's depth. Several judges in the nine-circuit majority have

registered their disagreement and urged further review of the issue. *See*, *e.g.*, *Chambers v. United States*, 763 F. App'x 514, 519 (6th Cir. 2019) (Moore, J., concurring), rh'g denied, No. 18-3298 (6th Cir. June 26, 2019) (expressing view that *Raybon* "was wrong on this issue"); *Brown*, 868 F.3d at 304-05, 310 (Gregory, C.J., dissenting) ("Because Brown asserts th[e] same right [recognized in Johnson], I would find his petition timely under § 2255(f)(3), even though his challenge is to the residual clause under the mandatory Sentencing Guidelines, rather than the ACCA."); *London*, 937 F.3d at 510 (5th Cir.) (Costa, J., concurring in judgment) ("We are on the wrong side of a split. . . . Our approach fails to apply the plain language of the statue and undermines the prompt presentation of habeas claims the statute promotes."); *Hodges v. United States*, 778 F. App'x 413, 414-15 (9th Cir. 2019) (Berzon, J., concurring) ("[I]n my view, *Blackstone* was wrongly decided."); *Lester v. United States*, 921 F.3d 1306, 1319 (11th Cir. 2019) (en banc) (Martin, J., joined by Rosenbaum and J. Pryor, JJ., statement respecting the denial of rehearing en banc) ("[T]he opinion in *In re Griffin* is mistaken.").

Since this Court's initial denials of certiorari, the circuit split on this issue has deepened and become entrenched. For a while, the Seventh Circuit's decision in *Cross* stood alone as the sole decision bucking the majority. But the First Circuit joined *Cross* in a Septmeber 2020 decision while observing that the mere fact that the majority of circuits "have snowballed down one path doesn't mean we should follow them." *Shea*, 976 F.3d at 69. Even more recently, the D.C. Circuit in July 2021 joined *Cross* and *Shea*, noting that the courts in the circuit majority "have,

with some exceptions, largely elided the key interpretive questions we address today." *Arrington*, --- F.3d ---, 2021 WL 2932260, *6.

Any possibility of the split resolving itself has now passed. The Seventh Circuit denied the government's en banc rehearing petition in *Cross* and later expressly declined the government's suggestion to reconsider *Cross* in a subsequent case. *See Sotelo v. United States*, 922 F.3d 848, 851 (7th Cir. 2019). Likewise, the circuits in the majority have repeatedly declined to reconsider their holdings. *See*, *e.g.*, *United States v. Jones*, 832 F. App'x 929 (6th Cir. Oct. 19, 2020); *United States v. Rumph*, 824 F. App'x 165, 168-69 (4th Cir. 2020), reh'g denied, 2020 U.S. App. LEXIS 38943 (4th Cir. Dec. 11, 2020); Order, *Hodges v. United States*, 778 F. App'x 413 (9th Cir. Oct. 17, 2019) (No. 17-35408); *Lester*, 921 F.3d at 1307; *United States v. Wolfe*, 767 F. App'x 390, 391 (3d Cir. 2019); *Mora-Higuera v. United States*, 914 F.3d 1152, 1154 (8th Cir. 2019).

In short, the circuit conflict is deep and entrenched. Only this Court can resolve it.

II. The question presented is important and recurring, and this case presents a clean vehicle for review.

It is beyond dispute that the issue presented in this case is a recurring one, as evidenced by the numerous petitions raising the issue in this Court over the past several terms. The issue is undoubtedly important as well, given that it impacts the liberty interests of countless federal prisoners. "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." *Brown*, 139 S. Ct. at 14 (Sotomayor, J., dissenting from the denial of certiorari).

If this Court does not intervene to answer the question presented, the result will be continued geographic disparities in the criminal justice system. Such disparate outcomes, based on nothing more than the federal circuit in which an offender was convicted, tarnish the integrity and public reputation of our criminal justice system. A decision by this Court to forever duck such an important criminal justice issue would tarnish this Court's reputation as well.

This case presents a very clean vehicle for the Court to finally address this issue, as the courts below relied solely on the timeliness issue without any alternative holdings or any consideration of the claim's merits. *See* Pet. App. at 3a, 10a. Given that posture, the Court can focus solely on the timeliness issue, which presents nothing more than a question of statutory interpretation. If the claim is deemed timely, as it should be, the Court can then remand for further proceedings to consider the merits. *See Arrington*, --- F.3d ---, 2021 WL 2932260, *7 (finding the defendant's motion timely under § 2255(f)(3) and remanding for the district court to determine, in the first instance, "whether [the defendant's] petition was otherwise procedurally barred or whether it could succeed on the merits"). This posture will allow the court to avoid potentially complicating issues presented in other petitions, such as whether the predicates in question qualified under a different provision of the career-offender definition.

The vast majority of this Court's denials of certiorari came before the First Circuit's decision in *Shea* served to deepen and firmly entrench the circuit conflict. The most recent denial came in *Jones v. United States*, Sup. Ct. No. 20-7522 (June 28, 2021). Although that petition was filed after the *Shea* decision, the *Jones* case was an improper vehicle for this Court's review because the government conceded that the petitioner there should receive relief from his career-offender sentence through another mechanism, namely Section 404 of the First Step Act. *See* Brief of Respondent (May 26, 2021), at 13-14. That concession mooted the petitioner's post-conviction motion as a practical matter (if not as a doctrinal matter). Here, by contrast, Petitioner's offense is not a crack-cocaine offense covered by the First Step Act, and the government has not agreed to relief from the career-offender error through any other mechanism.

Moreover, the denial in *Jones* occurred before the D.C. Circuit issued its *Arrington* decision in July 2021. Now that every circuit with criminal jurisdiction has weighed in, this Court should grant certiorari to resolve the circuit split.

Finally, although a grant of certiorari to resolve the timeliness issue would be warranted either way given the posture of this case, it is worth highlighting that the timeliness issue will almost certainly determine whether Sarratt is ultimately able to receive relief. As noted above, precedent makes clear that Sarratt's prior convictions do not qualify under any of the career-offender provision's remaining provisions. *See James*, 550 U.S. at 197; *Bacote*, 189 F. App'x at 194. Likewise, the affirmative defenses preserved in the government's initial district-court pleadings

are all but foreclosed by precedent. *See* Sarratt's Fourth Circuit Brief (Doc. No. 21), at 32-38 (addressing these arguments); *see also Cross*, 892 F.3d at 294-300 (rejecting similar arguments). In short, if Sarratt's motion is deemed timely, as it would be in the First, Seventh, and D.C. Circuits, he would almost certainly receive relief on the merits. But, again, the posture of this case makes it unnecessary for the Court to wade into any of the merits-related questions.

III. The decision below is wrong.

The interpretation of § 2255(f)(3)'s limitation period adopted by the majority of circuits, including the Fourth Circuit's *Brown* decision on which the panel below relied, is legally flawed in two primary respects. First, the majority reading conflicts with basic principles of textualism and statutory interpretation. It rewrites the statutory language by requiring a defendant to *prove* an entitlement to relief based on a Supreme Court *holding*, whereas Congress required only that a defendant *assert* an entitlement to relief based on a *right* recognized by the Supreme Court. Second, the majority interpretation conflicts with this Court's well-established framework for distinguishing claims that seek application of a previously recognized right from those that would require the creation of a new right.

A. The circuit majority interpretation butchers the statutory text.

Let's start with the text. The statute provides that a motion is timely if filed within one year of "the date on which the right *asserted* was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3) (emphasis added). According to Black's Law Dictionary, the word "assert" means to "[t]o state positively" or "[t]o invoke or

enforce a legal right." ASSERT, Black's Law Dictionary (11th ed. 2019). Thus, a motion is timely under Section 2255(f)(3) if it "invokes" a right newly recognized by the Supreme Court. Or, as the Seventh Circuit put it, a movant establishes timeliness simply by "claim[ing] the benefit of a right that the Supreme Court has recently recognized." *Cross*, 892 F.3d at 294.

The D.C. Circuit leaned heavily on the meaning of "assert" in determining the timeliness issue. After reviewing four different dictionary definitions, the court concluded that Congress's choice of the word "asserted" means that, "for a motion to be timely under section 2255(f)(3), it need only 'state' or 'invoke' the newly recognized right, not conclusively prove that the right applies to the movant's circumstances." *Arrington*, --- F.3d ---, 2021 WL 2932260, *5. The court buttressed its reliance on dictionaries with an ordinary-usage example: "Suppose an individual challenges a speech restriction, but it turns out her speech was unprotected incitement. Applying section 2255's vocabulary, we could quite naturally say that she had asserted the right to free speech recognized by the First Amendment, even though she was ultimately wrong about the right's application to her case." *Id.* This example, the court explained, "demonstrate[s] a generally applicable linguistic point: 'asserting' a right is an entirely different matter than proving that you can successfully claim its benefit." *Id.*

In *Brown*, the Fourth Circuit's panel majority focused not on the word "asserts" but instead on the word "recognized." 868 F.3d at 299. It reasoned that the rule "recognized" in *Johnson* was limited to the ACCA context. 868 F.3d at 301-03.

Therefore, because Brown was not challenging an ACCA sentence, he was not *asserting* the right "recognized" in *Johnson*. *Id.* at 303. To the extent that line of reasoning—casting *Johnson* as an ACCA-only decision—ever had any persuasive value, it has been undermined entirely by the subsequent decision in *Dimaya*, which confirmed that *Johnson* has application outside the ACCA context. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). As *Dimaya* explains, *Johnson* recognizes a non-ACCA-specific right, a right not to face mandatory punishment due to application of a residual clause that shares the dual features of "an ordinary-case requirement and an ill-defined risk threshold." *Id.* at 1223; *see also United States v. Davis*, 139 S. Ct. 2319 (2019) (holding that *Johnson* invalidates the residual clause of 18 U.S.C. § 924(c)).

Here, Sarratt has *asserted* precisely this right. He asserts that his sentence is unconstitutional because he faced mandatory punishment under the career-offender guideline due to a residual clause that suffers from the same two features that combined to invalidate the residual clauses in the ACCA, Section 16(b), and Section 924(c). A claim based on such an assertion should be timely if filed within a year of *Johnson*, and that remains true without regard to whether the claim ultimately prevails on the merits. As the Seventh Circuit explained in *Cross*, the government's alternative reading—now adopted by a majority of circuits—"suffers from a fundamental flaw" in that it "improperly reads a merits analysis into the limitations period." *Cross*, 892 F.3d at 293; *see also Arrington*, ,--- F.3d ---, 2021 WL 2932260, *5

(explaining that the "central defect in the government's approach" is that it "collapses the timeliness and merits inquiries into one").

The government's interpretation violates a core principle of statutory interpretation by rendering the word "asserted" completely superfluous. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (cleaned up). The Seventh Circuit explained this point succinctly:

> Section 2255(f)(3) runs from 'the date on which the right *asserted* was initially recognized by the Supreme Court. It does not say that the movant must ultimately *prove* that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized. An alternative reading would require that we take the disfavored step of reading "asserted" out of the statute."

Cross, 892 F.3d at 294 (emphases in original; internal citations omitted); *see also Arrington*, ,--- F.3d ---, 2021 WL 2932260, *5 (rejecting the government's "approach" because it "reads the word 'asserted' out of section 2255(f)(3)").

Another component of the statutory text further supports this interpretation. Congress chose to make timeliness turn on whether the movant's claim is based on a "right" recently recognized by the Supreme Court, not on whether the claim is based on the "holding" of a recent Supreme Court case. *See* 28 U.S.C. § 2255(f)(3). This word choice is important because a "right" is broader than the "holding" of a particular case. *Compare* HOLDING, Black's Law Dictionary (11th ed. 2019) ("A court's determination of a matter of law pivotal to its decision."), *with*

RIGHT, Black's Law Dictionary (11th ed. 2019) ("Something that is due to a person by just claim, legal guarantee, or moral principle.").

The D.C. Circuit relied on this textual point as well. It explained that § 2255(f)(3) "turns on what 'right' the Supreme Court recognized in a prior case. It does not turn on the case's precise holding or, as AEDPA does elsewhere, the content of 'clearly established Federal law.'" *Arrington*, ,--- F.3d ---, 2021 WL 2932260, *4. The court also reviewed several dictionaries, concluding that "all relevant definitions invariably define a 'right' at a relatively high level of generality." *Id.* Several other courts and judges have relied on this same textual feature in determining that a motion like Sarratt's is timely under § 2255(f)(3). *See Moore v. United States*, 871 F.3d 72 (1st Cir. 2018) (noting that "Congress in § 2255 used words such as 'rule' and 'right' rather than 'holding'" and explaining that "Congress presumably used these broader terms 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"); *London*, 937 F.3d at 511 (Costa, J., concurring in the judgment) (arguing that the Fifth Circuit's interpretation errs by "requir[ing] a *holding* when the statute requires only Supreme Court recognition of the *right*") (emphases added); *Brown*, 868 F.3d at 304 (Gregory, C.J., dissenting) (criticizing the majority for limiting the "right" recognized in *Johnson* to the case's "narrow holding" and concluding that the statutory language "is more sensibly read to include the reasoning and principles that explain" the holding).

Armed with this understanding of the statutory text, the question presented by this case is easily resolved. Like the defendant in *Arrington*, Sarratt asserts that his mandatory sentence based on the residual clause violates the "right" recognized in *Johnson*—that is, the "right not to have one's sentence dictated by a rule of law using the residual clause's vague language." *Arrington*, --- F.3d ---, 2021 WL 2932260, *4. That understanding of the *Johnson* "right" accords not only with *Johnson* itself but also with this Court's articulation of the right in *Beckles*, *Dimaya*, and *Davis*. As the D.C. Circuit concluded, a motion that invokes this right is timely under § 2255(f)(3): "whether or not Arrington's case indeed falls within that refined articulation of the right, he has plainly 'asserted' that right as the basis for his petition." *Id.*

This reading also accords with Section 2255(f)(3)'s purpose as a limitations period. As this Court has explained, a statute of limitations is a "threshold bar." *Wood v. Milyard*, 566 U.S. 463, 466 (2012). Any statute-of-limitations analysis necessarily comes before a merits analysis, and parties can freely waive limitations defenses. *See id.* Thus, it makes sense that Congress would frame § 2255(f)'s limitations period in terms of the right "asserted" by the prisoner, as that pre-merits requirement matches the threshold nature of a statute of limitations. The contrary interpretation conflates timeliness with the merits, something that Congress surely did not intend. *See Cross*, 892 F.3d at 293.

In sum, Congress chose in the text of § 2255(f)(3) to make timeliness turn on whether the defendant *asserts* that he is entitled to relief based on a *right* that the

Supreme Court has recently recognized. The government's reading, by contrast, would make timeliness turn on whether the defendant *proves* that he is entitled to relief based on the *holding* of a recent Supreme Court case. This Court should reject that rewriting of the statutory language.

B. The circuit majority interpretation misapplies this Court's new-rule jurisprudence.

Sarratt's interpretation of the statutory language finds additional support in this Court's retroactivity case law. Before 1996, Congress did not provide any limitations period for the filing of a Section 2255 motion. *See* 28 U.S.C. § 2255 (1995) ("A motion for such relief may be made at any time."). When Congress adopted a one-year limitations period in 1996, it crafted the language of Section 2255(f)(3) against the backdrop of well-established Supreme Court precedent governing whether a decision qualifies as "new" for purposes of post-conviction review. *See*, *e.g.*, *Teague v. Lane*, 489 U.S. 288 (1989); *see also* 137 Cong. Rec. S8558-02, 1991 WL 111516, at *45, *48, *53 (June 25, 1991) (floor statement of Sen. Hatch) (stating that the same limitations language in precursor legislation was "designed" to "preserve and codify the important Supreme Court rulings in this area," and citing *Teague* as an example).

The *Teague* framework confirms that Sarratt's claim is timely. Under *Teague*, a case announces a "new rule" when it "breaks new ground," but it "does *not* announce a new rule, when it is merely an application of the principle that governed a prior decision." *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013) (quoting *Teague*; internal quotation marks omitted). The circuit courts routinely refer to this

framework in determining whether a defendant's claim satisfies § 2255(f)(3)'s requirements. *See*, *e.g.*, *Headbird v. United States*, 813 F.3d 1092 (8th Cir. 2016) (recognizing legislative backdrop and collecting cases from numerous circuits applying the *Teague* framework in analyzing Section 2255(f)(3)'s applicability).

The First Circuit relied heavily on the *Teague* framework in concluding that a claim like Sarratt's is timely. *Shea*, 976 F.3d at 68. The *Shea* court focused its inquiry on the portion of § 2255(f)(3) requiring that the right asserted be "initially" or "newly" recognized by the Supreme Court, and it thus asked whether granting relief on the claim "would require the habeas court to forge a new rule of law not recognized in *Johnson*." *Id.* at 70. To answer that question, the court laid out the *Teague-Chaidez* analytical framework for determining what constitutes a "new rule":

> [A] case announces a new rule if it breaks new ground or imposes a new obligation on the government – that is, if the result [is] not dictated by precedent[.] And a holding is not so dictated unless it would [be] apparent to all reasonable jurists. But that account has a flipside: 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. So when a court simply applie[s] the same constitutional principle to a closely analogous case, it does not create a new rule.

Shea, 976 F.3d at 70-71 (alternations in original; internal quotations and citations omitted). Under this framework, "the Supreme Court does not announce a new rule every time it applies the same constitutional principle to a new regulatory scheme." *Id.* at 73-74. Instead, "'[i]f a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any

deviation from precedent is not reasonable.'" *Id.* at 74 (quoting *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring)). In other words, this latter scenario involves merely the application of the previously recognized rule, not the creation of a new rule.

The First Circuit determined that the defendant's *Johnson*-based challenge to a pre-*Booker* residual-clause sentence fell into that category, making it timely filed within a year of *Johnson*. The court explained that "the government's proffered distinctions between the ACCA and the mandatory Guidelines do 'not change the force with which [*Johnson*'s] underlying principle applies' when, as in most cases, the defendant was ineligible for a departure from the Guideline range." 976 F.3d at 74-75 (quoting *Wright*, 505 U.S. at 304 (O'Connor, J., concurring)). Therefore, the First Circuit determined:

> *Johnson* dictates the rule Shea asserts: namely, that § 4B1.2(a)(2)'s residual clause was unconstitutionally vague and could not be applied to enhance the permissible range of sentences a judge could impose, as Shea claims it did in his case. As a result, we hold that Shea "asserts" the same right "newly recognized" in *Johnson*, making his petition (filed within a year of that decision) timely.

Id. at *5; *see also United States v. Hammond*, 351 F. Supp. 3d 106, 127-28 (D.D.C. 2018) (applying *Teague* framework to conclude that the defendant's claim was timely because "*Johnson* articulated a new rule that Hammond merely asks to be applied to a materially indistinguishable circumstance, simply swapping the ACCA's residual clause for its mandatory-Guidelines' parallel").

In contrast to this *Teague*-based reasoning, the Fourth Circuit's controlling decision below did not consider the *Teague* framework at all. Its failure to do so led

it to misread the significance of Justice Sotomayor's statement that *Beckles* "leaves open" the question whether pre-*Booker* sentences are subject to a *Johnson*-based vagueness challenge. *See Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring). Under the Fourth Circuit panel majority's view, that statement means that only a future Supreme Court decision can create the "new" rule needed to trigger the § 2255(f)(3) limitations period. 868 F.3d at 303 ("we must wait for the Supreme Court to recognize the right urged by Petitioner"). But that analysis fails to recognize that resolving an "open" question does not involve the creation of a "new" rule if doing so requires "merely an application of the principle that governed a prior decision to a different set of facts." *Shea*, 976 F.3d at 71.

This Court's retroactivity jurisprudence illustrates both that principle and the flaw in the Fourth Circuit's reasoning. Consider the decision in *Stringer v. Black*, 503 U.S. 222 (1992), where this Court analyzed whether *Clemons v. Mississippi*, 494 U.S. 738 (1990), announced a "new" rule under *Teague*. The state of Mississippi argued that *Clemons* was necessarily "new" because it resolved an issue that the Supreme Court had "left open" by "express language" in a prior case. *Stringer*, 503 U.S. at 230. The Supreme Court rejected that argument. It reasoned that, although a prior case left the issue "open," its resolution of that issue in *Clemons* was not "new" because it required only the application of "a well-settled principle" established by prior cases. 503 U.S. at 237.

That same rationale controls here. Although Justice Sotomayor described the mandatory-guidelines question as "open" in *Beckles*, resolving that question would

not create a "new rule" because it requires "merely an application of the principle that governed a prior decision to a different set of facts." *Chaidez*, 568 U.S. at 347-48 (internal quotation marks omitted). This Court's post-*Beckles* decision in *Dimaya* makes this clear by holding that a "straightforward application" of *Johnson*'s rule requires the invalidation of Section 16(b)'s residual clause. As the Seventh Circuit recognized, "the textual differences between the ACCA and guidelines pale in comparison to the differences between ACCA and section 16." *Cross*, 892 F.3d at 302. Thus, striking down the mandatory guidelines' residual clause—like striking down Section 16(b)—would require only an "application" of the *Johnson* rule for purposes of the *Teague* doctrine. *See Shea*, 976 F.3d at 69; *Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting) (reasoning that, because "the mandatory Guidelines' residual clause presents the same problems of notice and arbitrary enforcement as the ACCA's residual clause at issue in *Johnson*," the defendant challenging such a sentence "is asserting the right newly recognized in *Johnson*"); *London*, 937 F.3d at 511 (Costa, J., concurring in judgment) (holding that a challenge to a pre-*Booker* residual-clause sentence "asserted the right to be free from vague laws 'fixing sentences' that *Johnson* recognized"). For this reason, a claim challenging a pre-*Booker* residual-clause sentence is timely if filed within one year of *Johnson*.

* * *

In sum, the controlling decision below—and the circuit majority that has fallen in line with the same position—is flawed because it misreads the relevant statutory text and conflicts with this Court's "new rule" precedent. The circuit

minority, by contrast, has correctly concluded that a claim like Sarratt's is timely filed under § 2255(f)(3) and must be considered on the merits. This Court should grant review and resolve this entrenched conflict.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

Anthony Martinez
Federal Public Defender for the Western
District of North Carolina

/s/ Joshua B. Carpenter
Joshua B. Carpenter
Appellate Chief
OFFICE OF THE FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF NORTH CAROLINA
One Page Avenue, Suite 210
Asheville, NC 28801
(828) 232-9992