No. 22-5503

IN THE
Supreme Court of the United States

JOSE VARGAS-SOTO,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF OF PETITIONER

JEFFREY T. GREEN
JACQUELINE COOPER
JILLIAN SHERIDAN STONECIPHER
ALEXANDRA MUSHKA
REBECCA C. BROOKS
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8291

J. MATTHEW WRIGHT*
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 South Taylor Street
Unit 110
Amarillo, TX 79101
(806) 324-2370
Matthew_Wright@fd.org

Counsel for Petitioner

*Counsel of Record

December 14, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

INTRODUCTION

The opposition of the United States ("BIO") provides no good reason for this Court to leave the circuit split highlighted in the petition ("Pet.") unresolved. Instead, the BIO attempts to sidestep that split by taking extraordinary and contradictory positions. For example, the United States says nothing about the fact that the Fifth Circuit stands alone in overruling this Court's decision in *Reed* v. *Ross*, 468 U.S. 1 (1984), based on its interpretations of subsequent opinions of this Court that actually reaffirmed *Reed*. Pet. App. 19a–20a. In addition, the United States downplays the circuit split over *Reed*'s vitality because other circuits' novelty decisions involved the residual clauses in the Armed Career Criminal Act ("ACCA") and other laws, rather than 18 U.S.C. § 16(b). BIO at 21–22. But then in its merits discussion, the government seeks to have it both ways by invoking this Court's ACCA cases to argue that Mr. Vargas-Soto had all "the tools" needed to make his vagueness claim concerning § 16(b). BIO at 16. This suggestion turns *stare decisis* on its head. Where binding majority decisions of this Court unequivocally foreclose a constitutional claim, that claim is not "reasonably available" on direct appeal, no matter what a dissenting Justice might have written.

It simply cannot be true that the constitutional principles recognized and applied in *Johnson* v. *United States*, 576 U.S. 591 (2015) and *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018) are novel enough to reset limitations long after direct appeal (Pet. App. 14a, 28 U.S.C. § 2255(f)(3)), and even novel enough to excuse a failure to raise a vagueness claim in a *first* § 2255 motion (Pet. App. 8a–11a, § 2255(h)(2)), but not novel enough to excuse a failure to raise the same claim in

the earlier direct appeal. No other circuit has embraced this Kafkaesque view of procedural default.

And for good reason. The Fifth Circuit's flawed "novelty" test, which the government partially endorses, would require defendants to raise on direct appeal *every* constitutional argument this Court has soundly rejected if there is even a "possibility that some day" that decision "may be overruled." *Reed*, 468 U.S. at 15–16 & n.11. Under this standard, defendants in the Fifth Circuit who have meritorious vagueness claims against a residual clause will not be able to pursue those claims unless their direct appeal attorneys happened to raise a foreclosed and apparently hopeless vagueness challenge before *Johnson* even made the claim available. This will cut off collateral relief that is available in every other circuit. Review is warranted.

I. THE CIRCUITS ARE SPLIT ON THE QUESTION PRESENTED.

The BIO is noteworthy for what it does *not* dispute: "every circuit court" that has addressed the issue—other than the Fifth Circuit—has recognized that *Reed*'s three-category framework remains binding, and under that framework the vagueness principle announced in *Johnson* "is sufficiently novel to establish cause" for pre-*Johnson* defaults. Pet. App. 35a (Davis, J., dissenting); Pet. at 12–19 (discussing decisions in the First, Fourth, Sixth, Seventh, Eighth, Ninth Tenth, and Eleventh Circuits).[1] In the Fifth Circuit, in

[1] *See, e.g.*, *Jones* v. *United States*, 39 F.4th 523, 525–26 (8th Cir. 2022) (under *Reed*, the vagueness claim was not "reasonably available" before *Johnson*); *Gatewood* v. *United States*, 979 F.3d 391, 397 (6th Cir. 2020) (*Reed* "remains the controlling decision" on "whether cause exists when Supreme Court precedent itself forecloses an argument at the time of default"); *Lassend* v. *United*

contrast, the *Reed* framework has "no binding force" because it has been "unraveled." Pet. App. 25a. The Fifth Circuit's stark departure from the legal rules applied by its sister circuits leads to disparate results, as this case demonstrates. Had Mr. Vargas-Soto filed his § 2255 motion in any of these other circuits, the courts would have excused his failure to raise a vagueness claim on direct appeal. This inconsistency is intolerable. In addition, the Fifth Circuit's unilateral decision to discard *Reed* is itself a ground for this Court's intervention. Sup. Ct. Rule 10(c) (review may be warranted when a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

The government's principal response is that the other circuits' novelty decisions involved the residual clauses in the ACCA and other statutes, not 18 U.S.C § 16(b). BIO at 20–22 (arguing that none of the other circuits "addressed whether . . . *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), was sufficiently novel to excuse the procedural default" of a Section 16(b) claim). That elides an important point: "the reasoning in" *Dimaya*, BIO at 20, presupposes and depends on the reasoning in *Johnson*. See *Dimaya*, 138 S. Ct. at 1204, 1213 ("*Johnson* effectively resolved" *Dimaya*.); *id.* at 1213 (Section "16's residual clause has the same two features as ACCA's, combined in the same constitutionally problematic way"). The government's suggestion

---

States, 898 F.3d 115, 122–23 (1st Cir. 2018) (the court of appeals is "bound" by *Reed*); *Cross* v. *United States*, 892 F.3d 288, 295–96 (7th Cir. 2018) (recent Supreme Court decisions relying on *Reed* "put our concerns to rest" and it remains valid); *United States* v. *Snyder*, 871 F.3d 1122, 1126–27 (10th Cir. 2017) (a *Johnson* claim is novel under *Reed*'s first category.).

that the novelty analysis might nonetheless differ for § 16(b) claims is unexplained.[2]

Given the *Johnson-Dimaya* linkage, it is unsurprising that the reasoning of the decision below is not limited to *Dimaya* claims. Indeed, the Fifth Circuit held "that there are no separate claims for *Johnson*, *Dimaya*, and [*United States* v. *Davis*, 139 S. Ct. 2319 (2019)]; rather, there's just one claim based on the same void-for-vagueness ground." Pet. App. 7a (citing *United States* v. *Castro*, 30 F.4th 240, 247 (5th Cir. 2022)). The holding and reasoning below therefore extend to void-for-vagueness challenges to other residual clauses and directly conflict with the holdings of the other circuits.

Other aspects of the Fifth Circuit's analysis confirm that it views vagueness challenges to various residual clauses as "just one claim." Pet. App. 7a. In its analysis of limitations, the Fifth Circuit held that Mr. Vargas-Soto asserted the right "initially recognized . . . in *Johnson*, on June 26, 2015." Pet. App. 14a. The Fifth Circuit also cited Justice Scalia's dissents in *James* v. *United States*, 550 U.S. 192, 214–31 (2007), and *Sykes* v. *United States*, 564 U.S. 1, 28–35 (2011)—which addressed the ACCA's residual clause—to argue that Mr. Vargas-Soto had the tools to raise his Section 16(b) vagueness claim when he litigated his direct appeal in 2011–2012. Pet. App. 21a. Given the Fifth Circuit's recognition that all residual-clause vagueness claims are *Johnson* claims, and its reliance on ACCA-based precedent in resolving the Section 16(b) "cause" issue,

---

[2] In Mr. Vargas-Soto's direct appeal, the Fifth Circuit applied § 16(b) based on the "reasoning" of an ACCA residual-clause decision. *See United States* v. *Sanchez-Ledezma*, 630 F.3d 447, 448–51 (5th Cir. 2011) (evading arrest was a § 16(b) crime of violence under the binding "logic" of an ACCA decision.); Pet. App. 60a (affirming Mr. Vargas-Soto's sentence under *Sanchez-Ledezma*).

it plainly would reach the same result for a vagueness claim against the ACCA's residual clause or any other residual clause.[3]

The government's only other argument is that this Court "has recently and repeatedly declined to review [the] purported conflict." BIO at 20 (citing the denials of *certiorari* in *Gatewood* v. *United States*, 141 S. Ct. 2798 (2021) (mem.) (No. 20-1233), *Granda* v. *United States*, 142 S. Ct. 1233 (2022) (mem.) (No. 21-6171), and *Blackwell* v. *United States*, 142 S. Ct. 139 (2021) (mem.) (No. 20-8016)). This argument falls short because all three of those denials came before the decision below. That decision has fundamentally changed the landscape, given the Fifth Circuit's divergence from its sister circuits and from this Court's precedent. That development warrants this Court's attention.

II. THE FIFTH CIRCUIT'S DECISION IS WRONG.

The government's attempt to defend the decision below is unavailing. It halfheartedly argues that the *Johnson-Dimaya* vagueness claim *was* reasonably

---

[3] As the petition explains, the Eleventh Circuit distinguishes between *Johnson* challenges and *Davis* challenges, but has not yet addressed a *Dimaya* claim. Pet. 17–18. The government asserts that the Sixth Circuit has similarly "recognized" that ACCA decisions "do not resolve cause-and-prejudice issues for other statutes," but the court merely declined to reach that issue. *See* BIO at 21; *Gatewood*, 979 F.3d at 397 n.3 ("we need not decide whether *James'* rejection of a vagueness challenge to the ACCA foreclosed the argument that § 3559(c)(2)(F)(ii) is unconstitutionally vague for procedural-default purposes"). In any event, the Fourth, Seventh, and Eighth Circuits have all recognized that vagueness challenges to other residual clauses are novel enough to excuse pre-*Johnson* defaults. *See Jones*, 39 F.4th at 524; *United States* v. *Jackson*, 32 F.4th 278, 283 n.3 (4th Cir. 2022); *Cross*, 892 F.3d at 295–96.

available back in 2012. BIO at 14–16. That is incorrect: "no one—the government, the judge, or the [defendant]—could reasonably have anticipated *Johnson*." *United States* v. *Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016). *Johnson* was one of the rare substantive constitutional rules that can be asserted for the first time in a first or second 28 U.S.C. § 2255 motion. *E.g., Raines* v. *United States*, 898 F.3d 680, 687 (6th Cir. 2018); *Lassend* v. *United States*, 898 F.3d 115, 122–23 (1st Cir. 2018); *United States* v. *Snyder*, 871 F.3d 1122, 1126–27 (10th Cir. 2017).

The government's argument that the vagueness claim was reasonably available in 2012 also contradicts the Fifth Circuit's undisputed recognition that the *Johnson-Dimaya* rule was "previously unavailable" to Mr. Vargas-Soto for purposes of 28 U.S.C. § 2255(h)(2). Pet. App. 11a. Section 2255(h) codifies abuse-of-the-writ, which applied the same cause-and-prejudice standard as procedural default to answer the same question: whether the movant "has a legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey* v. *Zant*, 499 U.S. 467, 490 (1991). Congress decided that the standard is satisfied for claims containing new, retroactive, and previously unavailable constitutional rules like *Johnson, Dimaya,* and *Davis*. As the Fourth Circuit recognized, procedural default cannot bar a claim based on "a new rule of constitutional law made retroactive on collateral review." *United States* v. *Jackson*, 32 F.4th 278, 283 & n.3 (4th Cir. 2022). Yet the government persists in defending an overly crabbed construction of "novelty."

In addition, the government asserts that Justice Scalia's dissenting opinions in *James*, 550 U.S. at 229–30, and *Sykes*, 564 U.S. at 33–35, gave Mr. Vargas-Soto the "legal theory" necessary to raise a *Johnson-Dimaya* claim. BIO at 15–16. Yet the government also

argues—apparently with a straight face—that this Court's majority decisions *rejecting* that "legal theory" somehow failed to foreclose the as-yet unavailable claim. BIO at 18–19.

Indeed, the government's argument that *James* and *Sykes* foreclosed vagueness challenges to the ACCA's residual clause, but not § 16(b), BIO at 18–19, is inconsistent with its own prior advocacy. *Id.* at 4–5; Br. in Opp'n, *Nevarez-Puentas* v. *United States*, No. 08-5894, 2008 WL 4758647 at *4 (Oct. 22, 2008) (successfully arguing that "*James'*s interpretation of ACCA's residual clause forecloses petitioner's constitutional arguments about 18 U.S.C. 16(b)."). So, too, would the government's current argument about *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004) surprise its earlier self. BIO at 18. In 2016, it convinced the Fifth Circuit to apply *Leocal*'s analysis in § 16(b) cases, even after *Johnson*. U.S. Suppl. En Banc Br. at 37–44, *United States* v. *Gonzalez-Longoria*, No. 15-40041, 2016 WL 1728880 (5th Cir. Apr. 27, 2016); see *United States* v. *Gonzalez-Longoria*, 831 F.3d 670, 678–79 (5th Cir. 2016) (en banc). On that basis, the Fifth Circuit denied Mr. Vargas-Soto's 2016 motion for authorization, Pet. App. 56a, keeping him out of court for another two years, *Id.* at 54a, and subjecting him to an erroneous denial of relief in the district court based on a short-lived and mistaken change in the Fifth Circuit's interpretation of 18 U.S.C. § 16(a). *Id.* at 50a–52a (discussing *United States* v. *Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc), *abrogated by Borden* v. *United States*, 141 S. Ct. 1817 (2021)). If the government truly believes that *Leocal* only addressed "statutory interpretation" and did not foreclose a constitutional vagueness attack on § 16(b), it should have said so back in 2016. Mr. Vargas-Soto would already be home.

At bottom, though, this is not a dispute about whether *Leocal*, *James*, and *Sykes* would have foreclosed a clairvoyant attorney's assertion of a *Johnson-Dimaya* vagueness attack on § 16(b) in 2011–2012. Obviously, the answer is "yes." Almost no one at the time believed that this Court might one day overrule and abrogate its decisions in *Leocal*, *James*, and *Sykes*.[4] Everywhere else, such defaults are excused.

The real dispute is whether *Reed* has been implicitly overruled. The Fifth Circuit says "yes," even though the very cases that it relies on, *Bousley* v. *United States*, 523 U.S. 614, 622 (1998), and *Smith* v. *Murray*, 477 U.S. 527, 536–37 (1986), actually reaffirm and apply *Reed*. Pet. App. 25a. Other circuits say "no," recognizing that *Reed* is fully consistent with those decisions. See *Gatewood* v. *United States*, 979 F.3d 391, 395 (6th Cir. 2020); *Lassend*, 898 F.3d at 122–23. Far from "unravel[ing] *Reed*[]", Pet. App. 25a, *Smith* addressed and resolved any tension between novelty (which gives rise to cause) and "perceived futility" in a lower court (which does not). Before and until this Court recognizes a new retroactive constitutional right, any claim based on that right is not "'available' at all." *Smith*, 477 U.S. at 537. After this Court announces a new constitutional right, a defendant must press a claim in the lower courts and give those courts an "opportunity" to reconsider adverse decisions. *Id.* at 534–35 (quoting *Engle* v. *Isaac*, 456 U.S. 107, 130 n. 36 (1982)).

---

[4] To cite two prominent examples, the petitioners in *Welch* v. *United States*, 578 U.S. 120 (2016), and *Taylor* v. *United States*, 142 S. Ct. 2015 (2022), likewise failed to raise vagueness challenges in their direct appeals. *See United States* v. *Welch*, 683 F.3d 1304 (11th Cir. 2012); *see also* Br. of Appellant, *United States* v. *Taylor*, No. 09-4468 (4th Cir. Mar. 16, 2010).

III. THE COURT SHOULD SETTLE THE CONFLICT THIS TERM.

The government does not dispute that the question presented is a recurring issue, nor does it identify any true vehicle problem. Procedural default—and particularly the Fifth Circuit's refusal to recognize the novelty of the right first recognized in *Johnson*—is the only disputed issue in this case. The government does not and cannot defend the substantive legality of the fifteen-year sentence; "the sentencing judge relied on the now-unconstitutional residual clause" Pet. App. 5a, in § 16(b) when imposing the sentence; and the government "does not dispute that a sentence exceeding the statutory maximum by five years qualifies as actual prejudice." *Id.* at 33a n.3 (Davis, J., dissenting). There is even agreement that the motion satisfies the stringent standards for a successive motion under § 2255(h)(2). *Id.* at 8a–11a

That makes this petition an ideal vehicle, unlike the others mentioned in the BIO where there were alternative bases for denying collateral relief.[5] Not so here. Everything turns on the Fifth Circuit's unilateral abridgment of the *Reed* framework.

The maximum lawful sentence for this offense is ten years in prison, plus one year for a prior revocation of

---

[5] *See* Br. in Opp'n at 23–29, *Granda* v. *United States*, No. 21-6171 (Feb. 2, 2022) (noting that the § 924(o) conviction "was premised on several alternative predicate offenses," including two concededly valid drug-trafficking offenses); Br. in Opp'n at 22–25, *Gatewood* v. *United States*, No. 20-1233 (May 21, 2021) (explaining that defendant's prior offenses were serious violent felonies even without the residual clause); Br. in Opp'n at 10–13, *Blackwell* v. *United States*, No. 20-8016 (July 14, 2021) (defendant waived his right to collaterally attack his conviction and sentence in exchange for dismissal of valid charges of armed bank robbery and § 924(c)).

supervised release. As of December 14, 2022, Mr. Vargas-Soto has served 12 years and 22 days in prison, and he has earned 648 days of good-conduct time. This Court previously expressed confidence "that, for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.'" *Murray* v. *Carrier*, 477 U.S. 478, 495–96 (1986) (quoting *Engle*, 456 U.S. at 135). That confidence is only warranted in a world where a defendants can correct an unlawful sentence as soon as his constitutional claim becomes reasonably available.

CONCLUSION

For the foregoing reasons and those stated in the petition, the Court should grant certiorari this Term.

Respectfully submitted,

JEFFREY T. GREEN
JACQUELINE COOPER
JILLIAN SHERIDAN STONECIPHER
ALEXANDRA MUSHKA
REBECCA C. BROOKS
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8291

J. MATTHEW WRIGHT*
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 South Taylor Street
Unit 110
Amarillo, TX 79101
(806) 324-2370
Matthew_Wright@fd.org

Counsel for Petitioner

*Counsel of Record

December 14, 2022