No.

IN THE SUPREME COURT OF THE UNITED STATES

LARON DARRELL CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether the rule requiring a district court to follow the mandate of a court of appeals is "jurisdictional" such that it cannot be waived by a party.

STATEMENT OF RELATED CASES

- *United States v. Laron Darrell Carter*, No. 14CR00297-VAP, U.S. District Court for the Central District of California. Amended judgment entered October 19, 2021.

- *United States v. Laron Darrell Carter*, No. 16-50271, U.S. Court of Appeals for the Ninth Circuit. Judgment entered November 2, 2018.

- *Laron Darrell Carter v. United States*, No. 18-7721, Supreme Court of the United States. Petition for a writ of *certiorari* denied June 24, 2019.

- *United States v. Laron Darrell Carter*, No. 21-50234, U.S. Court of Appeals for the Ninth Circuit. Judgment entered November 20, 2023, rehearing and rehearing *en banc* denied January 30, 2024.

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INTRODUCTION

After partially reversing in a first appeal, the Ninth Circuit bounced this second appeal raising important statute-of-limitations questions, holding that the district court violated the "rule of mandate" by entertaining the limitations-based arguments on remand, *with the government's consent*, because the mandate rule is "jurisdictional" and thus cannot be waived. The Ninth Circuit relied on its opinion in *United States v. Thrasher*, 483 F.3d 977 (9th Cir. 2007), which stated that the "circuits appear to be split four to four on the issue." *Id.* at 982. While this count of the split may not have been precise, there is, without question, a "deep circuit split on whether the mandate rule is jurisdictional" resulting in considerable confusion. Adam Crews, *The Mandate Rule*, 73 S.C. L. Rev. 263, 293 (2021).

The Court should grant review to settle this fundamental question on "a staple of federal practice." *Id.* at 265. This Court has repeatedly suggested that the similar "law of the case" doctrine is *not* "jurisdictional," *see Pepper v. United States*, 562 U.S. 476, 506-07 (2011); *Castro v. United States*, 540 U.S. 375, 384 (2003), and several of this Court's recent opinions have sought to rein in lower-court reliance on "drive-by jurisdictional" labels. *Wilkins v. United States*, 598 U.S. 152, 160-61 (2023); *see, e.g.*, *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023). Consistent with this precedent, the Court should put an end to another misguided "jurisdictional" rule.

OPINIONS BELOW

The decision below can be found at *United States v. Carter*, No. 21-50234, 2023 WL 8014357 (9th Cir. Nov. 20, 2023). In a prior appeal, the Ninth Circuit affirmed in part and reversed in part in both published and unpublished decisions that can be found at *United States v. Carter*, 907 F.3d 1199 (9th Cir. 2018) and *United States v. Carter*, 754 Fed. Appx. 534 (9th Cir. Nov. 2, 2018).

JURISDICTION

The court of appeals filed its memorandum opinion on November 20, 2023 and denied a petition for rehearing and rehearing *en banc* on January 30, 2024. App. 1-2.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Title 28, United States Code, Section 2106 provides:

§ 2106. Determination

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

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[1] "App." refers to the Appendix. "CR" refers to the Clerk's Record or the docket entry in the district court's docket. "ER" refers to the Excerpts of Record in the Ninth Circuit. "FER" refers to the Further Excerpts of Record in the Ninth Circuit. "AOB" refers to the Appellant's Opening Brief in the Ninth Circuit.

STATEMENT OF THE CASE

In 2016, a federal grand jury in the Central District of California returned a superseding indictment charging petitioner with 14 counts of violating 18 U.S.C. §§ 1591 and 2423(a). ER 18-32. Counts 1-10 alleged violations occurring in the 2003 to 2005 time period. ER 18-28. Before trial, petitioner moved to dismiss the counts based on the delay in filing the charges, although defense counsel did not specifically invoke the statute of limitations. CR 206. The district court denied the motion, CR 219, and a jury ultimately convicted petitioner on all counts. CR 247, 249. The district court imposed a total sentence of 40 years in custody and lifetime supervised release. CR 268, 270.

In petitioner's first direct appeal, he contended that Counts 1-10 were barred by the statute of limitations; he argued that his pretrial motion to dismiss based on delay preserved the issue, and, in response to the answering brief's assertion that the claim was waived, he argued in his reply that the court of appeals could alternatively reverse due to ineffective assistance of counsel. App. 7-8. In an unpublished memorandum, the Ninth Circuit declined to resolve the *merits* of the limitations arguments and the ineffective-assistance claim:

> We do not reach the merits of Carter's argument that the prosecution of Counts 1-10 was barred by the statute of limitations because Carter failed to raise the statute of limitations in the district court. . . . We also decline Carter's request – made for the first time in his reply brief – that we consider his statute of limitations argument as a claim of ineffective assistance of

> counsel. "Arguments not raised by a party in its opening brief are deemed waived,' and in any event we so no reason to depart from our 'general rule' that 'we do not review challenges to the effectiveness of defense counsel on direct appeal."

App. 7-8 (citations omitted). In a published opinion, however, the Ninth Circuit vacated Counts 13-14 and remanded for resentencing. *See Carter*, 907 F.3d at 1211; App. 11-32.

Although the Ninth Circuit decisions mentioned a remand for resentencing, in accordance with established practice, the parties and the district court proceeded under the rule that issues left unresolved were still open for consideration. For example, although the Ninth Circuit did not explicitly state that the government could retry Counts 13-14, the government took the position that it could, and nobody disagreed. CR 303. The government ultimately elected to dismiss Counts 13-14, but it did so because its witness was unavailable and not because anyone thought that the Ninth Circuit's "mandate" precluded a retrial. CR 327.

Likewise, because the Ninth Circuit declined to resolve the merits of the limitations questions and related ineffective assistance of counsel, the parties and the district court all agreed that they could be considered on remand. Petitioner filed a motion to dismiss Counts 1-10 based on ineffective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668 (1984) (requiring deficient performance and prejudice), and his trial attorney submitted a declaration stating

that he missed the limitations issue and would have filed such a motion had he not overlooked the effective dates of the limitations provisions. CR 337; FER 6-7, 15.

The government did not dispute that the issue could be decided by the district court, nor did it raise any "jurisdictional" objections; instead, it only addressed the merits of the limitations argument, essentially conceding there was ineffective assistance if the limitations claim was meritorious. CR 340; FER 16-26. Accordingly, petitioner's reply brief in the district court pointed out: "The government does not dispute that Mr. Carter's statute of limitations claim is properly before the Court, thereby waiving any contrary contention. Given the government's concession, the only issue before the Court is the merits of the statute of limitations question." CR 347; FER 28 (citations omitted). Likewise, the reply also asserted that "the government has failed to make any argument other than on the merits of the statute of limitations question, and therefore it has waived any other arguments regarding ineffective assistance or the timing of this motion." FER 28-29. The government did not file any other pleadings disagreeing with these assertions.

Given this posture, the district court only addressed the merits of the limitations arguments in denying petitioner's motion to dismiss. App. 33-39. The district court held that Counts 1-10 were timely under 18 U.S.C. § 3299, which eliminates a statute of limitations for offenses under 18 U.S.C. §§ 1591 and

2423(a). App. 35-37. Although § 3299 was enacted in 2006 after the offense conduct charged in Counts 1-10, the district court reasoned that the language in § 3299 indicated that it applied to pre-enactment conduct. *Id.* The district court alternatively held that the offenses were timely under the lengthened limitations period in 18 U.S.C. § 3283. App. 37-39. The district court subsequently imposed the same 40-year sentence that it had originally imposed, and this second direct appeal followed. CR 378; ER 3, 10.

Petitioner's opening brief in the Ninth Circuit challenged the district court's conclusions on the limitations issues and explained the procedural posture of how the limitations issues arose on appeal, including in the context of ineffective assistance of counsel, and the government's waiver of any arguments other than the merits of the limitations claim:

> In the first appeal, this Court declined to entertain Mr. Carter's claim that he received ineffective assistance of counsel when his attorney failed to move to dismiss Counts 1-10 as untimely under the statute of limitations. . . . On remand . . . Mr. Carter moved to dismiss Counts 1-10. He again argued that the charges were barred by the statute of limitations, and his prior attorney submitted a declaration admitting deficient performance in failing to raise the claim. The government only responded by arguing the merits of the statute of limitations issue, thereby conceding that it was properly before the court and waiving any other arguments. The district court, accepting the government's concession, addressed the merits of the claim. The district court held that Counts 1-10 did not violate the limitations period.

AOB 3-4 (citations omitted). Later in the opening brief, petitioner again pointed

out: "As mentioned, the government has waived any argument that the issue was not properly before the court, and the district court accepted the government's concession and solely addressed the substantive merits of the claim." AOB 12 n.3.

After obtaining a lengthy extension to submit its answering brief, the government instead filed a motion to dismiss the appeal, contending for the first time that the district court did not have "jurisdiction" under the rule of mandate. Petitioner filed an opposition, and a Ninth Circuit motions panel denied the dismissal request without prejudice. The government then filed an answering brief re-raising its "jurisdictional" arguments, which petitioner again opposed in his reply brief.

Unlike the motions panel, a Ninth Circuit merits panel sustained the government's "jurisdictional" arguments. Relying on *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007), the panel held that the "rule of mandate" precluded the district court from considering the statute of limitations arguments, even as part of an ineffective assistance of counsel claim. App. 3-4. Although the government clearly waived any reliance on the "rule of mandate" in the district court, the panel cited *Thrasher* and *United States v. Luong*, 627 F.3d 1306, 1309-10 (9th Cir. 2010) to hold that the mandate rule is "jurisdictional" and therefore cannot be waived. App. 3-4.

ARGUMENT

I. This Court should grant review because the circuits are split on whether the mandate rule is "jurisdictional."

In the district court, the government waived any reliance on the "rule of mandate" or "law of the case" doctrines. Relying on *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007), however, the Ninth Circuit held that the mandate rule is "jurisdictional" and therefore cannot be waived. App. 3-4 (also citing *United States v. Luong*, 627 F.3d 1306, 1309-10 (9th Cir. 2010), which based the no-waiver rule on the "jurisdictional" holding in *Thrasher*).

In adopting a rule that the mandate doctrine is "jurisdictional," *Thrasher* stated that "[t]he circuits appear to be split four to four on the issue." *Thrasher*, 483 F.3d at 982. *Thrasher*, however, only cited Third, Sixth, and Ninth Circuit opinions in support of a "jurisdictional" rule, which would mean, by its count, the split was actually 4-3 against a "jurisdictional" rule. *Id.* (citing *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982) and *Tapco Prods. Co. v. Van Mark Prods. Corp.*, 466 F.2d 109, 110 (6th Cir. 1972)). Furthermore, Sixth Circuit precedent is not entirely clear, as at least one of its cases suggests that the mandate rule is not a hard "jurisdictional" barrier. *See United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994).

On the other hand, as *Thrasher* recognized, the First, Fifth, Tenth and

Federal Circuits have explicitly stated that the mandate rule is *not* "jurisdictional" and permits district courts to reconsider claims on remand under certain circumstances. *See, e.g.*, *United States v. Teel*, 691 F.3d 578, 583 (5th Cir. 2012) ("[b]oth the law-of-the-case doctrine and the mandate rule are discretionary practices, not jurisdictional rules"); *United States v. Lang*, 405 F.3d 1060, 1064 (10th Cir. 2005) ("the mandate rule is not a jurisdictional limitation"); *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1349 (Fed. Cir. 2001); *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993).

Meanwhile, although not explicitly rejecting the "jurisdictional" label, the Second, Fourth, Seventh, and Eleventh Circuits implicitly recognize that the mandate rule is not "jurisdictional" and can "bend in sufficiently compelling circumstances" such as "subsequent factual discoveries or changes in the law." *Carmody v. Board of Trustees of University of Illinois*, 893 F.3d 397, 407-08 (7th Cir. 2018); *accord United States v. Valente*, 915 F.3d 916, 924 (2d Cir. 2019); *United States v. Amedeo*, 487 F.3d 823, 829-30 (11th Cir. 2007); *United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993).

The main difference in reasoning appears to be that some circuits treat the mandate rule as a species of or similar to the law of the case doctrine, which is not "jurisdictional," *see Carmody*, 893 F.3d at 407-08; *Teel*, 691 F.3d at 583, while other circuits consider the mandate rule to be different and therefore deserving of

"jurisdictional" status. *See Thrasher*, 483 F.3d at 982 ("While both doctrines serve an interest in consistency, finality and efficiency, the mandate rule also serves an interest in preserving the hierarchical structure of the court system"). In sum, whatever the precise numerical calculation, there is a "deep circuit split on whether the mandate rule is jurisdictional[,]" Crews, *The Mandate Rule*, 73 S.C. L. Rev. at 293, and this Court should grant review to resolve the longstanding conflict.

II. The minority view treating the mandate rule as "jurisdictional" and therefore non-waivable is inconsistent with this Court's precedent, and this case is an excellent vehicle to overrule the flawed minority approach.

This Court should also grant review because the minority position adopted by the Ninth Circuit is wrong. The conflict and confusion in the lower courts is likely because, "[f]or such an important facet of federal practice, the mandate rule is under-explored and under-theorized." Crews, *The Mandate Rule*, 73 S.C. L. Rev. at 267. The Ninth Circuit's analysis is no exception, as it has essentially reasoned: "We have described our mandate as limiting the district court's 'authority' on remand, which is jurisdictional language." *Thrasher*, 483 F.3d at 982 (quoting *United States v. Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994)). The earlier Ninth Circuit opinion in *Pimentel* based its "authority" language on former Fed. R. Crim. P. 35(a)(2), which granted a district court limited authority to resentence a defendant. Rule 35(a)(2) does not even exist anymore and certainly did not provide a basis for a wide-ranging "jurisdictional" rule for all purposes.

Thrasher's reasoning that the Ninth Circuit once loosely used the term "authority" in the context of the mandate doctrine, thereby making it a "jurisdictional" rule, is the type of analysis that this Court has since repeatedly rejected. "[C]ourts, including this Court, have more than occasionally misused the term 'jurisdictional' to refer to nonjurisdictional prescriptions.' The mere fact that this Court previously described something 'without elaboration' as jurisdictional therefore does not end the inquiry." *Wilkins v. United States*, 598 U.S. 152, 159-60 (2023) (citations omitted). Indeed, the "jurisdictional" rule appears to be mostly based on lower courts' loose and outdated use of the term without elaboration, a widespread jurisprudential problem that this Court has attempted to correct in recent years.

This Court has explained that the "jurisdictional" label has "many, too many, meanings." *Id.* at 156. Accordingly, it "has undertaken 'to ward off profligate use of the term[,]" *Fort Bend County, Texas v. Davis*, 139 S. Ct. 1843, 1848 (2019), by *repeatedly* rejecting arguments that similar rules designed to enhance the orderly process of litigation are "jurisdictional" and therefore cannot be waived. *See, e.g.*, *Santos-Zacaria v. Garland*, 598 U.S. 411, 416-18 (2023); *Wilkins*, 598 U.S. at 157-58; *Boechler v. Commissioner of Internal Revenue*, 596 U.S. 199, 203-06 (2022); *Fort Bend County, Texas*, 139 S. Ct. at 1848-51; *Gonzalez v. Thaler*, 565 U.S. 134, 141-45 (2012); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434-41

(2011); *see also McIntosh v. United States*, 144 S. Ct. 980 (2024).

This Court has emphasized that a rule is "jurisdictional" only if Congress has *clearly* indicated such an intent given the "harsh consequences" that flow from such a rule, which include that a late "jurisdictional" objection may unfairly derail months, if not years, of work by the parties and the court. *Santos-Zacaria*, 598 U.S. at 416-18. The statute governing mandates contains no such clear language, and, if anything, indicates that there is no blanket jurisdictional rule because it is focused on mandates being "just under the circumstances." 28 U.S.C. § 2106.

Rather than examining statutory authority, which does not clearly support a "jurisdictional" rule, some courts have treated the mandate rule as "a doctrine inherited from judicial practice alone" or a creature of the inherent authority of federal courts. Crews, *The Mandate Rule*, 73 S.C. L. Rev. at 270. This treatment is mistaken, as the rule is rooted in statutory law. *Id.* at 270-71 (the explanation of the mandate rule in *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895) cited *Sibbald v. United States*, 37 U.S. 488, 492-93 (1838), which derived the rule from the First Judiciary Act).

But even if the mandate rule were based on inherent judicial power, there is no *clear* historical precedent or practice to support a "jurisdictional" rule. Just like a clear statement from Congress is required to create a "jurisdictional" rule, there must be clear historical precedent for a judicially created "jurisdictional" rule, and

there is no such clear historical support. *See Wilkins*, 598 U.S. at 161. Indeed, the historical precedent in some of the lower courts advancing a "jurisdictional" rule can best be described as "drive-by jurisdictional ruling[s.]" *Id.* at 160. Even the Ninth Circuit had to acknowledge that "[c]ourts have not been consistent in describing the mandate doctrine[,]" *Thrasher*, 483 F.3d at 982, undermining any contention that the "jurisdictional" nature of the mandate rule was *clearly* established in historical precedent.

Furthermore, there are also judicially created "doctrines like waiver and estoppel [to] ensure efficiency and fairness by precluding parties from raising arguments they had previously disavowed." *Wilkins*, 598 U.S. at 158. "Given the risk of disruption and waste that accompanies the jurisdictional label, courts will not lightly apply it," and lower courts advocating a "jurisdictional" rule have not even advanced the lightest of reasons for why a judicially created mandate rule should trump judicially created rules of waiver and estoppel. *Id.*

If the mandate rule is a creature of judicial power, then it should be treated similarly to the judicially created law of the case doctrine, which clearly is not jurisdictional. *See Pepper v. United States*, 562 U.S. 476, 506-07 (2011); *Castro v. United States*, 540 U.S. 375, 384 (2003). No court has suggested that the law of the case doctrine cannot be waived by a party, and even the Ninth Circuit has acknowledged that its "jurisdictional" rule may be inconsistent with this Court's

statements regarding the law of the case doctrine as expressed in cases like *Castro*. *See Thrasher*, 484 F.3d at 982.

While the Ninth Circuit admitted that the minority "jurisdictional" rule may have been inconsistent with this Court's precedent in 2007 at the time of *Thrasher*, there can be little question that the minority view is now in flat-out conflict with this Court's precedent given the work done in recent years to "to ward off profligate use" of purported "jurisdictional" rules. *Fort Bend County, Texas*, 139 S. Ct. at 1848; *see Henderson*, 562 U.S. at 435 ("Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term."). This Court should again grant review to bring the same discipline to such an important area of the law.

This case is also an excellent vehicle to review the question presented because it starkly demonstrates the problems with treating the mandate rule as "jurisdictional" such that it cannot be waived by a party. In the first appeal, the Ninth Circuit did not decide the merits of petitioner's limitations claim or whether he received ineffective assistance of counsel. On remand in the district court, petitioner submitted new evidence to support his *Strickland* claim -- a declaration from his attorney admitting that he missed the statute of limitations argument and should have raised it. *See United States v. Liu*, 731 F.3d 982, 995-98 (9th Cir. 2013) (finding ineffective assistance on direct appeal for failing to file a

meritorious limitations motion); *United States v. Coutentos*, 651 F.3d 809, 816-18 (8th Cir. 2011) (same).

Faced with this new evidence, the government chose solely to respond to the merits of the limitations claim; it chose *not* to raise the rule of mandate or law of the case doctrine, or any waiver or timeliness issues, or even to dispute deficient performance or other aspects of the *Strickland* inquiry. Furthermore, petitioner's pleadings in the district court explicitly highlighted that the government was waiving all such arguments, and the government still chose not to file anything in response disputing this state of affairs.

Given the government's waivers, the district court addressed the merits of the limitations claim, and there were very good reasons to do so. The limitations issues were complicated and had created difficulties for courts, *see, e.g.*, *United States v. Miller*, 911 F.3d 638, 644-45 (1st Cir. 2018), and it was far more productive and fair to address the issues while petitioner was represented by counsel, as opposed to a later 28 U.S.C. § 2255 motion when he may be proceeding pro se. The limitations issues were significant, and certainly there was nothing wrong with the government and the district court concluding that, in fairness, they should be aired immediately. Both the district court and the government also evidently thought that it was more efficient to address the issues now, rather than requiring a separate § 2255 proceeding filed at some unknown

time in the future. Indeed, this Court and lower courts have recognized the utility of such an approach. *See United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984); *United States v. Quinn*, 475 F.3d 1289, 1290-91 (D.C. Cir. 2007); *United States v. Camacho*, 302 F.3d 35, 36-37 (2d Cir. 2002).

But the admirably fair and efficient approach taken in the district court was then abandoned when the government switched course on appeal and successfully convinced the Ninth Circuit to invoke the mandate rule. Relying on the government's waivers and litigation position in the district court, petitioner solely raised the limitations issues in his opening brief, although there were other potential claims that he could have raised. Despite petitioner's complaints that he had been sandbagged, *see Fort Bend County, Texas*, 139 S. Ct. at 1849 ("Tardy jurisdictional objections . . . disturbingly disarm litigants."), the Ninth Circuit ignored his requests to raise additional claims if it were actually going to sustain the government's new "jurisdictional" argument raised for the first time on appeal.

These circumstances starkly present the "harsh," unfair, and senseless consequences that this Court has warned against in the context of restricting "jurisdictional" rules. *Santos-Zacaria*, 598 U.S. at 416-18. Indeed, application of a "jurisdictional" no-waiver rule actually works to "undo the benefits of" the mandate rule. *Id.* at 418. The mandate rule is designed to promote efficiency and to protect an appellate court's decision from second-guessing, but here the Ninth

Circuit never addressed the merits of the limitations and *Strickland* issues, and its handling of this second appeal inefficiently requires these same arguments to be raised yet again for a fourth time in a separate § 2255 proceeding.

As a result, the Ninth Circuit's rule requires the "litigants [here to] slog through" a § 2255 proceeding even though the government originally did not "demand[] it" and the district court implicitly found that "it would be pointless, wasteful, or too slow." *Santos-Zacaria*, 598 U.S. at 418. The district court will presumably render the same ruling in a future § 2255 proceeding, and therefore a third appeal raising the same issue will be taken, just with additional years of delay and the inefficiencies of having a new set of appellate judges review this case yet again. Clearly, the government's "objection raised late in [this] litigation . . . derail[ed] 'many months of work on the part of the attorneys and the court." *Id.* "Thus, jurisdictional treatment . . . disserve[d] the very interest in efficiency that [the rule of mandate] ordinarily advances." *Id.*

Finally, even if the mandate rule is somehow "jurisdictional," this Court should at least clarify that plain-error review would apply to a mandate claim that was waived and at least forfeited in the district court and raised for the first time on appeal. *See United States v. Carnell*, 35 F.4th 1092, 1095 (7th Cir. 2022) (plain-error review of mandate claim). While the Ninth Circuit claimed that its prior decision "resolved" the limitations issue as "waived" in the first appeal, App. 3,

that did not *plainly* prohibit the district court from considering the merits in the context of an ineffective-assistance claim on remand. *See Anderson v. United States*, 194 Fed. Appx. 745, 747 (11th Cir. 2006). It was certainly not *plainly* erroneous for the district court to *deny* the claim on the merits so that it could be considered on direct appeal. *See Cronic*, 466 U.S. at 667 n.42; *Quinn*, 475 F.3d at 1290-91; *Camacho*, 302 F.3d at 36-37. Nor can the government demonstrate the third and fourth prongs of the plain-error test, *see United States v. Olano*, 507 U.S. 725, 734-36 (1993), as the fairness, public reputation, and integrity of these proceedings is actually undermined by rewarding the government's "eleventh-hour" sandbagging. *Wilkins*, 598 U.S. at 157-68; *see Santos-Zacaria*, 598 U.S. at 418.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

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Respectfully submitted,

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