No. 23-7371

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner Laron Darrell Carter submits this reply to the Brief in Opposition ("BIO"). The government concedes that there is a deep circuit-split on the question presented regarding the jurisdictional status of the mandate rule. BIO 11. It also does not attempt to defend the minority position adopted by the Ninth Circuit treating the rule as jurisdictional, likely because such an approach contravenes numerous recent opinions of this Court. Indeed, even after the instant petition was submitted, this Court yet again rejected a misguided "jurisdictional" ruling by a lower court in a unanimous opinion, reiterating that "jurisdictional" status is a "high bar." *Harrow v. Department of Defense*, 601 U.S. 480, 484 (2024) (statutory time limit for federal employee to appeal adverse personnel action was not "jurisdictional").

Although these circumstances cry out for plenary review or perhaps even summary reversal, the government asks this Court to deny the petition based on two purported and unpersuasive "vehicle" complaints. First, the government claims that, even if the jurisdictional approach is flawed and therefore application of the mandate rule were not required, the Ninth Circuit nonetheless *could* have exercised its discretion to apply the mandate rule and declined to entertain petitioner's claim. While there are strong reasons to doubt that the Ninth Circuit would have done so, especially given the government's waiver, that really begs the

entire question behind this petition, which is whether the mandate rule is jurisdictional or instead permits discretion. How the Ninth Circuit would so exercise its discretion when weighing the government's waiver and the other circumstances is a question for it to decide on remand, not a legitimate factor weighing against review by this Court.

The government's other vehicle complaint is that petitioner's statute-of-limitations contentions are ultimately without merit. Petitioner's limitations arguments are far stronger than suggested by the government's cursory analysis; in any event, those are again questions for the Ninth Circuit on remand, not a valid vehicle complaint. The Court should grant this petition.

ARGUMENT

I. Speculation about how the Ninth Circuit may exercise its discretion under a non-jurisdictional mandate rule is an unpersuasive vehicle complaint.

The government recognizes a deep circuit split on the issue presented regarding the jurisdictional status of the mandate rule, BIO 11, but contends that the split isn't really important in this case. It reasons that even the circuits rejecting the jurisdictional rule have held that claims waived or not properly presented in a first appeal are covered by the mandate and therefore have occasionally relied on the mandate rule to bar them in a second appeal. BIO 11-13. Thus, even under a non-jurisdictional rule, the Ninth Circuit *could* invoke the

mandate rule to decline to reach the merits despite the fact that the government waived such an objection in the district court. *Id.*

This point and the corresponding cases in the government's long string cite, BIO 13 n.3, are irrelevant to the question presented, which is whether the mandate rule is jurisdictional such that it cannot waived. The government suggests that petitioner has identified no court that would have allowed consideration of the merits of his claim, BIO 8, but, when it comes to non-jurisdictional rules, courts routinely "will not enforce a procedural rule against a non-complying party if his opponent has forfeited or waived an objection." *Harrow*, 601 U.S. at 483-84; *see Pepper v. United States*, 562 U.S. 476, 506-07 (2011) (accepting waiver of any mandate objection). Actually, it is the government that has failed to cite a single case from a court that does not treat the mandate rule as jurisdictional where an opponent waived a mandate objection but the court nonetheless applied the rule, and certainly not under the circumstances of this case.

Given the circumstances, there are strong reasons to doubt that the Ninth Circuit would have barred consideration of petitioner's claim under the mandate rule had it properly understood that the rule is not jurisdictional. Here, the government's waiver was quite explicit, as petitioner emphasized in the district court that the government was waiving any procedural objections and only disputing the merits of the statute-of-limitations arguments, and the government

still declined to assert any such objections. The government presumably waived the objections because petitioner's claim that several of the charges against him were barred by the statute of limitations and his attorney was ineffective for failing to file such a motion will eventually be considered at some point, whether it is now or in a 28 U.S.C. § 2255 petition.

The government points out that limitations claims in general cannot be raised for the first time on appeal under *Musacchio v. United States*, 577 U.S. 237, 248 (2016). BIO 14-15. Petitioner, however, raised a *Strickland v. Washington*, 466 U.S. 668 (1984) claim in the district court based on his attorney's failure to make a limitations argument, *see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), and *Musacchio* did not address ineffective assistance of counsel, which is certainly a viable claim. *See Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986); *United States v. Liu*, 731 F.3d 982, 995-98 (9th Cir. 2013); *United States v. Coutentos*, 651 F.3d 809, 816-18 (8th Cir. 2011). In short, this case is governed by *Cronic*, which the government ignores, not *Musacchio*. In any event, the government waived any type of *Musacchio* objection to petitioner's ineffective-assistance claim in the district court, even if one somehow existed, and instead only addressed the merits of the limitations questions.

The record is also adequately developed because petitioner's attorney submitted a declaration admitting deficient performance, and the government never

contended that a hearing or other evidence were required, *see Liu*, 731 F.3d at 995-98; *Coutentos*, 651 F.3d at 816, and again it even waived any arguments under the *Strickland* standard other than the merits of the limitations questions. The district court reached the merits of the limitations issues, as it was invited to do by the government, and it issued a written order explaining its analysis. Meanwhile, petitioner's counsel based his entire appellate strategy and briefing on the government's waivers and the district court's corresponding ruling based on those waivers. In short, a pure legal issue was teed up for the Ninth Circuit, it was awfully unfair to petitioner to pull the plug on his claim at such a late juncture, and the government has still yet to identify any practical reason why the issue should not be resolved now and instead should inefficiently await an additional § 2255 proceeding.

Bottom line, however, is that speculation about what the Ninth Circuit might have done if it had properly understood that the mandate rule is not jurisdictional amounts to nothing more than a tangential vehicle gripe. Instead, such a discretionary exercise is simply a question for the Ninth Circuit on remand. What is truly important at this stage is that the government concedes a deep circuit-split on the jurisdictional status of the mandate rule, and it has not even bothered to defend the Ninth Circuit's minority position on that important jurisdictional question.

II. Speculation about the resolution of the merits of the limitations questions is also an unpersuasive vehicle complaint.

Obviously, the Ninth Circuit did not rule on the merits of the limitations questions given its flawed jurisdictional ruling, and it goes without saying that this Court is "a court of review, not of first view." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2399 (2024). Thus, the government's summary arguments about the merits, *see* BIO 15-17, are also not grounds for denying review of a conceded circuit-split on a threshold jurisdictional issue; they are again simply questions for the Ninth Circuit on remand. While no more really needs to be said about this imaginary procedural obstacle, petitioner will briefly respond to the government's merits arguments. Given the government's cursory treatment of the merits, petitioner will only summarize his contentions, which are more fully articulated in his briefs below.

The government first contends that Counts 1-10 were timely under 18 U.S.C. § 3299.[1] The conduct alleged in Counts 1-10, however, occurred before § 3299 was enacted in 2006. A threshold issue, regardless of the Ex Post Facto Clause, is whether Congress intended for a criminal statute to apply to offenses committed before its enactment. *See Johnson v. United States*, 529 U.S. 694, 701-

[1] Section 3299 provides: "Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense under section 1201 involving a minor victim, and for any felony under chapter 109A, 110 (except for section 2257 and 2257A), or 117, or section 1591." 18 U.S.C. § 3299.

02 (2000); *see also Carr v. United States*, 560 U.S. 438, 458 (2010).

In making this determination, the strong presumption is that Congress does *not* intend for criminal provisions to apply to offenses committed before their enactment, and that presumption can only be rebutted by a "clear statement" of contrary congressional intent. *Johnson*, 529 U.S. at 701. In the criminal context, even a new statute that *favors* a defendant generally does not apply to pre-enactment conduct. *See Dorsey v. United States*, 567 U.S. 260, 272 (2012). This principle applies with even extra force to criminal statute of limitations provisions, *see Toussie v. United States*, 397 U.S. 112, 115 (1970), and, in accordance with *Toussie* and this principle, lower courts have held that limitations provisions like § 3299 do not apply to pre-enactment conduct. *See United States v. Richardson*, 512 F.2d 105, 106 (3d Cir. 1975); *United States v. Gentile*, 235 F. Supp. 3d 649, 655 (D.N.J. 2017).

Congress did not express a *clear* intent that § 3299 applies to offenses committed before its 2006 enactment. When Congress has intended for a new criminal statute of limitations to apply to pre-enactment offenses, it has specifically said so in a note to the statute. For example, when Congress lengthened the statute of limitations for financial institution offenses, it twice included specific notes following the statute explaining that the amendments were intended to apply to offenses committed before their enactment. *See* 18 U.S.C. § 3293. Congress

included a similar note when lengthening the limitations period for terrorism offenses. *See* 18 U.S.C. § 3286; *see also* 18 U.S.C. § 3297. Congress included no such note with respect to § 3299, demonstrating that it was not meant to apply to offenses committed before its enactment. *See Johnson*, 529 U.S. at 702 n.5 (comparing Congress's express statement of an effective date in related legislation in finding that criminal provision did not apply to offenses committed before its enactment); *United States v. Miller*, 911 F.3d 638, 644 (1st Cir. 2018) (recognizing retroactivity notes to limitations provisions).

The language used in § 3299 also supports the conclusion that it does not apply to offenses committed before its enactment. "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992). Section 3299 uses the verb "involving," which is in the present tense. A statute's use of the present tense is a "striking indicator" of its "prospective orientation." *Carr*, 560 U.S. at 449. This rule has special force in the *criminal* context; as *Carr* explained, "neither the government nor the dissent identifies any instance in which this Court has construed a present-tense verb in a *criminal* law to reach preenactment conduct." *Id.* at 448 (emphasis added).

The brief in opposition cites *United States v. Piette*, 45 F.3d 1142, 1159-62 (10th Cir. 2022) in support of its § 3299 argument. BIO 16. As an initial matter, the Tenth Circuit *rejected* the cursory textual analysis offered in the brief in

opposition and undertaken by the district court in this case. *Compare Piette*, 45 F.4th at 1160-61; *with* BIO 16; App. 35. The Tenth Circuit, however, ultimately erred by applying the retroactivity test in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) for *civil* statutes. This is perhaps understandable because the defendant in *Piette* urged application of the *Landgraf* test. *See Piette*, 45 F.4th at 1159.

After *Landgraf*, this Court explained that the only question in the criminal context is whether Congress clearly expressed an intent for the statute to apply to pre-enactment conduct; if Congress failed to do so, then the statute does not apply, and no further analysis is needed. *See Johnson*, 529 U.S. at 701-02. *Johnson* explicitly rejected the "retroactive effect" inquiry that is involved in civil cases. *Id.* at 702 ("the case does not turn on whether Johnson is worse off under [the new statute] than he previously was under" the old statute). For all of these reasons, and the additional reasons offered in the briefing below, which demonstrated retroactive effect even under the *Landgraf* test for civil statutes, § 3299 does not apply to the pre-enactment conduct alleged in Counts 1-10.

The government also contends that Counts 1-10 were timely under 18 U.S.C. § 3283. BIO 16-17.[2] This Court has repeatedly explained that an essential-

[2] The version of § 3283 in effect at the time of the offenses alleged in Counts 1-10 provided: "No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during the life of the child." 18 U.S.C. § 3283 (2003).

ingredient test limited to the elements of the charged offense governs the application of limitations provisions like § 3283. *See Bridges v. United States*, 346 U.S. 209, 221-23 (1953); *United States v. Scharton*, 285 U.S. 518 (1932); *United States v. Noveck*, 271 U.S. 201 (1926). Indeed, the language used in § 3283, "offense involving," is identical to the language used in the limitations provisions at issue in *Bridges*, *Scharton*, and *Noveck*. The elements-based inquiry of the essential-ingredient test is now more familiarly known as the categorical approach. *See United States v. Taylor*, 596 U.S. 845, 850 (2022); *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 389 (2017).

In his briefing below, petitioner demonstrated that the statutes charged here, 18 U.S.C. §§ 1591 and 2423(a), clearly do not satisfy an essential-ingredient or categorical approach for numerous reasons. The government conceded as much and waived any argument to the contrary in the Ninth Circuit. Likewise, the cursory analysis in the brief in opposition does not make any attempt to show that the charged statutes satisfy an essential-ingredient test, continuing to waive any contrary position. BIO 17.[3] For this reason and based on the arguments more fully presented in the briefing below, § 3283 also does not save Counts 1-10.

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[3] The only case cited by the government, *Weingarten v. United States*, 865 F.3d 48, 59-60 (2d Cir. 2017), declined to decide whether a categorical approach applied, and thus it did not address this Court's opinions in *Bridges*, *Scharton*, and *Noveck*, which clearly require such an approach.

In any event, these merits issues are for the Ninth Circuit on remand, not valid vehicle complaints regarding the threshold jurisdictional issue presented in the instant petition. What is actually important at this stage is that the government concedes a deep circuit-split on the jurisdictional question presented, and it does not defend the Ninth Circuit's minority view. This Court should therefore grant plenary review or summarily reverse.

CONCLUSION

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

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Respectfully submitted,

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