No.

In the Supreme Court of the United States

ROBERT HOMRICH, PETITIONER
v.
UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) Whether petitioners who were sentenced as career offenders in accordance with the mandatory guidelines filed timely 28 U.S.C. § 2255 motions if they filed their motions within one year of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

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The judgment of the United States Court of Appeals for the Sixth Circuit affirming the District Court dismissal of Mr. Homrich's petition for relief under 28 U.S.C. § 2255 which was rendered in his case on December 8, 2017, is unreported. A copy of that order is attached in Appendix A. The Opinion and Order of the United States District Court for the Western District of Michigan, Northern Division, denying Mr. Homrich relief under 28 U.S.C. § 2255 and granting a certificate of appealability is also unreported. It is attached as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Court of Appeals entered its judgment on December 8, 2017. This petition is timely filed pursuant to Supreme Court Rule 13(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATUTORY PROVISIONS INVOLVED

Section 2255 of Title 28 states in pertinent part:

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the

sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * *

(f) 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 . . . .

28 U.S.C. § 2255(f)(3).

Section 924(e)(2)(B) of Title 18 states, in pertinent part:

§ 924. Penalties

* * *

(e)(2) As used in this subsection –

* * *

(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, . . . , that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . .

18 U.S.C. § 924(e)(2)(B).

Section 3553 of Title 18 states, in pertinent part:

§ 3553. Imposition of a sentence

* * *

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3553(b)(1).

Section 3742 of Title 18 states, in pertinent part:

§ 3742. Review of a sentence

* * *

Consideration.--Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

18 U.S.C. §3742(e).

The version of **Colorado Law § 18-4-203** in effect at the time of Mr. Homrich's conviction states:

Colo. Rev. Stat. Ann § 18-4-203 Second Degree burglary (1981)

(1) A person commits second degree burglary, if the person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property.

(2) Second degree burglary is a class 4 felony, but it is a class 3 felony if:

(a) It is a burglary of a dwelling; or

(b) It is a burglary, the objective of which is the theft of a controlled substance, as defined in section 12-22-303(7), C.R.S., lawfully kept within any building or occupied structure.

Colo. Rev. Stat. Ann. § 18-4-203 (West)

U.S. SENTENCING GUIDELINES PROVISIONS INVOLVED

United States Sentencing Guideline 4B1.1(a) states, in pertinent part:

§ 4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

	Offense Statutory Maximum	Offense Level*
(A)	Life	37
(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(G)	More than one year, but less than 5 years	12.

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

U.S.S.G. § 4B1.1(a).

United States Sentencing Guideline 4B1.2 states, in pertinent part:

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

(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.

STATEMENT

On October 14, 1993, a jury found Bobby Homrich guilty of one count of conspiracy to distribute marijuana, cocaine and heroin, in violation of 21 U.S.C. §§ 846 and 841(a)(1)(g)(1). (R. 190). The sentencing guideline range for violations of §§ 846 and 841(a)(1)(g)(1) is determined by U.S.S.G. § 4B1.1, which provides for increased penalties if the defendant was at least eighteen years old at the time of the instant offense, the instant offense is either a crime of violence or a controlled substances offense, and the defendant has at least two prior felony convictions for a crime of violence or a controlled substances offense. The commentary following § 4B1.1 provides that the term "crime of violence" is defined as it is in U.S.S.G. § 4B1.2(a), the career offender provision. In that context, a prior offense is a crime of violence if it:

> (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(a). Pursuant to this framework, the final Presentence Investigation Report ("PSR") assigned Mr. Homrich a base offense level of 37, citing two prior crimes of violence: a 1981 Colorado conviction for attempted second degree burglary, CRSA § 18-4-204, and a 1974 Michigan felonious assault conviction. His trial counsel filed an objection to the PSR arguing that attempted second degree burglary is not a crime of violence because it was not a "burglary of a dwelling" pursuant to the definition of a crime of violence contained in § 4B1.2(1)(ii).

(Addendum to the PSR, Page 5). Counsel indicated that the appropriate base offense level was 36/V rather than 37/VI if the objection was sustained. This guideline calculation agreed with the probation officer's calculations if the career offender enhancement did not apply. At sentencing, the trial Court overruled the objection and held that "under either analysis" the court "finds a series of potential threats of physical injury" holding that attempted second degree burglary under the Colorado statute is a crime of violence under the residual clause. (*See*: Sentencing Transcript; Page 106; Line 18 - 25). The resulting sentencing guideline range was, therefore, a total offense level of 37 and a resulting Criminal History Category of VI, which put the defendant at a guideline range of 360 months to life. Without the crime of violence-enhanced base offense level, the guideline range would have been 292 to 365 months. The Court imposed a sentence at the low end of the guideline range of 360 months in custody, followed by ten years of supervised release. (App. B, *infra* at 9a). Mr. Homrich filed a notice of appeal in the United States Court of Appeals for the Sixth Circuit. (App. B, *infra* at 9a). Mr. Homrich appealed his sentence and argued that his attempted second degree burglary conviction should not be considered a categorical crime of violence. On June 30, 1995, the Sixth Circuit Court of Appeals affirmed Mr. Homrich's sentence and held that his conviction for attempted second degree burglary is a crime of violence under the residual clause because it "otherwise involves conduct that presents a serious potential risk of physical injury to another." (unpublished opinion) The appeals court cited *United States v. Fish,* 928 F.2d 185 (6th Cir. 1991) as the basis for its decision.

On June 25, 2015, the United States Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA") is unconstitutionally vague and enhanced sentences based on that clause violate due process of law. *Johnson v. United States (Johnson II)*, 135 S. Ct. 2551 (2015). The ACCA's residual clause is identical to the final clause in the "crime of violence" definition used to determine the base offense level under § 2K2.1. Thus, for the reasons discussed more fully below, the residual clause used to enhance sentences under § 2K2.1 is also unconstitutionally vague and sentences imposed which are based on it, like Mr. Homrich's, violate due process.

Mr. Homrich filed a Motion Under 28 U.S.C. § 2244 for Order Authorizing District Court to Consider Second or Successive Application for Relief Under 28 U.S.C. § 2255 on September 16, 2015. (Case 15-1999; Doc. 4). The government filed a response (Case 15-1999; Doc. 5) and Mr. Homrich filed a pro se reply on October 27, 2015. (Case 15-1999; Doc. 6). Mr. Homrich also filed a Motion for Reduction of Sentence under the Guideline Amendment 782. (R. 603; PageID.354). Mr. Homrich was denied a reduction as he was sentenced as a career offender. (R. 611; PageID.363). Upon denial of the motion for reduction, on July 23, 2015, Mr. Homrich filed a motion (letter) to the court asking if he was eligible for relief under *Johnson*. (R. 618; PageID.409). The Honorable Judge Paul L. Maloney appointed counsel to assist with this request. Unknown to counsel, Mr. Homrich also had filed his § 2244 motion in the Sixth Circuit Court of Appeals. On March 28, 2016, the Sixth Circuit granted Mr. Homrich's motion to file a second or successive motion to

vacate. (Case 15-1999; Doc. 7). Mr. Homrich filed a supplemental brief (R. 626; PageID.442-472) in accordance with the trial Court's April 11, 2016, Order (R. 625; PageID.441) directing both parties to file supplemental briefs. Mr. Homrich asserted that his sentence was unconstitutional because it was enhanced under the residual clause, which violates due process of law.

On July 19, 2016, the government filed a Motion to Stay Litigation Pending Supreme Court's Decision in *Beckles v. United States* (R. 633; PageID.542) which was granted by the Court on July 28, 2016 (R. 639; PageID.561-566), following a hearing conducted on July 25, 2016. On March 8, 2017, the Court lifted the stay and ordered the parties to file new briefs in light of *Beckles v. United States*, 137 S. Ct. 886 (2017). Following briefing, the Court denied Mr. Homrich's motion for relief under 28 U.S.C. § 2255 but granted a certificate of appealability. (R. 645; PageID.602-609).

Mr. Homrich timely appealed. (Notice of Appeal, R. 64; PageID.611).

REASONS FOR GRANTING THE PETITION

Federal prisoners seeking to vacate, correct, or amend their sentences must file motions for relief under 28 U.S.C. § 2255 within one year of the date on which "the judgment became final" or "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)(1), (3). Section 2255(f)(3) therefore has three requirements: (1) that the petitioner assert a right newly recognized by the Supreme Court; (2) that the right has been made retroactive; and (3) that the petitioner filed the motion within one year of the Supreme Court's recognition of the new right. There is no dispute that Mr. Homrich filed his petition within one year of *Johnson II*. This Court has made *Johnson II*'s rule retroactive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). ("*Johnson* affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied. *Johnson* is thus a substantive decision and so has retroactive effect under *Teague* in cases on collateral review.").

The courts of appeals cannot agree, however, about whether *Johnson II* announced a new, retroactive rule that applies to sentences imposed under the mandatory career-offender guideline. This disagreement is entrenched. Without this Court's intervention, some federal prisoners are being denied the opportunity to seek relief under *Johnson II*. In other districts, even second-time movants are being resentenced. This Court should intervene quickly to resolve this question to prevent federal prisoners from serving unconstitutional sentences.

I. The Circuit Courts of Appeals disagree about whether prisoners sentenced under with the mandatory career-offender guideline filed timely § 2255 motions after *Johnson*.

Mr. Homrich recognizes that Mr. Raybon is also asking this court to grant a Writ of Certiorari on similar issues. It is clear that the 6th Circuit panel that upheld the district court dismissal of Mr. Homrich's § 2255 petition, did so applying the *Raybon* precedent to his case. This leads us into the circuit split on the issue of timeliness of the filing of § 2255 motions. Three circuits have held untimely motions filed by federal prisoners who were sentenced under the mandatory career-offender guideline who filed within one year of *Johnson II*: the **Fourth Circuit**, the **Sixth Circuit**, and **the Tenth Circuit**. *See United States v. Greer*, 881 F.3d 1241,1247–49; *Raybon v. United States*, 867 F.3d 625, 630; *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017) at 303. Although the courts agree on the ultimate result, their reasoning slightly differs.

The **Fourth** and **Sixth Circuits** relied on Justice Sotomayor's concurring opinion in *Beckles v. United States*, 137 S. Ct. 886 (2017) as proof that application of *Johnson*'s rule to the mandatory guidelines would constitute a new rule. *Raybon*, 867 F.3d at 629–30 (citing *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment); *Brown*, 868 F.3d at 302. This Court had no occasion to determine whether *Johnson*'s rule applies to mandatory guidelines; the question was only about the applicability of *Johnson II*'s rule to advisory guidelines. *See Beckles*, 137 S. Ct. 890–91.

The **Fourth** and **Tenth Circuits** relied on AEDPA jurisprudence that applies

to state habeas petitioners. They reasoned that federal prisoners filing § 2255 motions could benefit from only this Court's holdings, relying on 28 U.S.C. § 2254(d)(1) and *Williams v. Taylor*, 529 U.S. 362, 412 (2000). *Brown*, 868 F.3d at 301; *Greer*, 881 F.3d at 1247. The **Sixth Circuit** conflated the rules that apply to first-time movants with the restrictions 28 U.S.C. § 2255(h)(2) places on federal prisoners' ability to file second or successive motions. *See Raybon*, 867 F.3d at 630 & n.5 (citing *Tyler v. Cain*, 533 U.S. 656 (2001)).

In *Raybon*, the **Sixth Circuit** also reasoned that *Johnson II*'s rule does not apply to mandatory guidelines provisions because this Court said in *Johnson II* that the holding did not cast "constitutional doubt" on "textually similar" laws to mean that the career-offender guideline provision may still be constitutional. *Raybon*, 867 F.3d at 630 (citing *Johnson II*, 135 S. Ct. at 2561; *Welch*, 136 S. Ct. at 1262).

On the other side are the **First** and **Third Circuits**. The **First Circuit** expressly held that the defendant's motion challenging his mandatory career-offender sentence was timely under § 2255(f)(3) because it was filed within one year of *Johnson*. *Moore v. United States*, 871 F.3d 72, 77 n.3 (1st Cir. 2017). In doing so, the court expressly rejected the reasoning of the **Sixth** and **Fourth Circuits**. *Id.* at 82–83. It also concluded that it would not need to "make new constitutional law in order to hold that the pre-*Booker* SRA fixed sentences." *Id.* at 81. The **Third Circuit** reached a similar conclusion, noting that the courts must undertake a *Teague* analysis to determine whether applying *Johnson* to the mandatory guidelines would create a "second new rule." *In re Hoffner*, 870 F.3d 301, 311–12 (3d Cir. Sept.

7, 2017).

Relying on *Moore*, one district court held timely a first-time § 2255 motion, which was filed within one year of *Johnson II* and challenged the constitutionality of a sentence imposed pursuant to the then-mandatory career-offender guideline. *United States v. Roy*, 282 F.Supp.3d 421, 427 (D. Mass. 2017). The government has not appealed the district court's opinion and order. A magistrate judge in the Western District of Texas similarly held timely a first-time motion to vacate a mandatory guidelines sentence in light of *Johnson II*. *See Zuniga-Munoz*, No. 1:02-cr-00134 (W.D. Tex. Apr. 26, 2018).

Numerous district courts outside of the Fourth and Sixth Circuits have also disagreed with *Raybon*'s analysis, contributing the disparate treatment of federal prisoners throughout the country. *See, e.g.*, *Long v. United States*, No. CV 16-4464 CBM, at 1–7 (C.D. Cal. Sept. 15, 2017) (holding *Johnson* invalidates the mandatory Guidelines' residual clause and petition was timely); *United States v. Parks*, No. 03-CR-00490-WYD, 2017 WL 3732078, at *1–7 (D. Colo. Aug. 1, 2017) (same); *Sarracino v. United States*, No. 95-CR-210-MCA, 2017 WL 3098262, at *2–5 & n.3 (D.N.M. June 26, 2017) (same). And even one district court within the Sixth Circuit has criticized the holding of *Raybon*, arguing the Sixth Circuit's restrictive reading of § 2255(f)(3) "invites Potemkin disputes about whether [this Court] has explicitly applied its precedents to a specific factual circumstance rather than asking whether the *right* the Supreme Court has newly recognized applies to that circumstance." *United States v. Chambers*, No. 1:01-CR-172, 2018 WL 1388745, at *2 (N.D. Ohio

Mar. 20, 2018).

In short, the existing split between the lower federal courts is entrenched. This petition presents an ideal vehicle to intervene to clarify whether federal prisoners like Mr. Homrich filed timely § 2255 motions.

II. The circuit courts holding untimely these § 2255 motions misapply this Court's jurisprudence.

A. The court should have followed *Teague* to determine whether the rule invoked is "new."

Without examining if there are any relevant differences between the residual clauses of the ACCA and the mandatory Guidelines, the Sixth Circuit rejected Mr. Homrich's motion, following the reasoning in *Raybon*, that he filed it too soon because Johnson did not announce a new, retroactive rule of constitutional law that invalidated the residual clause of § 4B1.2 of the mandatory guidelines. *Homrich,* 17-1612 citing *Raybon*, 867 F.3d at 629–30. In doing so, the Sixth Circuit did not use the correct analytical framework—this Court's "new rule" jurisprudence of *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. But Mr. Homrich, like Mr. Raybon, does not assert a right that would "break[] new ground"; he asserts a right that is "merely an application" of *Johnson* to the mandatory Guidelines. *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013).

To determine whether "the right asserted has been newly recognized by the Supreme Court" under § 2255(f)(3), nearly all federal courts apply the "new rule" jurisprudence under *Teague* and its progeny. *See, e.g.*, *United States v. Morgan*, 845 F.3d 664, 667–68 (5th Cir. 2017) (applying *Teague* to hold that *Descamps v. United*

States, 570 U.S. 254 (2013), did not recognize a new right under § 2255(f)(3)); *Headbird v. United States*, 813 F.3d 1092, 1095 (8th Cir. 2016) (explaining that § 2255(f)(3) was "enacted against the backdrop" of existing "new rule" precedent); *Conrad v. United States*, 815 F.3d 324 (7th Cir. 2016) (treating § 2255(f)(3)'s reference to a new "right" as synonymous with *Teague*'s new "rule"); *United States v. Powell*, 691 F.3d 554, 557 (4th Cir. 2012) (discussing *Teague* when deciding whether a § 2255 motion invokes a "new rule" and is therefore timely); *Figuereo-Sanchez v. United States*, 678 F.3d 1203, 1207–08 (11th Cir. 2012) ("In deciding retroactivity issues under § 2255(f)(3), we have applied the rubric developed in *Teague*" to "first answer whether the Supreme Court decision in question announced a new rule"); *cf. In re Conzelmann*, 872 F.3d 375, 376 (6th Cir. 2017) ("To decide whether a rule is 'new' for purposes of § 2255(h)(2), we look to *Teague*." (citation omitted). This Court should grant this writ of certiorari if the courts are universally mistaken about whether *Teague*'s new rule jurisprudence governs § 2255's statute of limitations.

As *Teague* instructs, a case announces a "new rule" when it "breaks new ground," but "a case 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*, 489 U.S. at 307)). "To determine what counts as a new rule," the question is whether the rule the petitioner "seeks can be meaningfully distinguished from that established by [existing] precedent." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, concurring in the judgment). If a "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," then the rule is not new. *Id.* "[T]he mere existence of conflicting authority does not necessarily mean a rule is new." *Id.* (citing *Stringer v. Black*, 503 U.S. 222, 237 (1992)).

Mr. Homrich invokes the right recognized in *Johnson II* and contends that rule applies to his circumstances which differ from Mr. Johnson's in only one respect: a provision of the Guidelines fixed his sentence. There is no difference between the text of the ACCA's definition of a "violent felony" and the sentencing Guidelines' definition of a "crime of violence." *See, .e.g.*, *United States v. Pawlak*, 822 F.3d 902, 905 (6th Cir. 2016) (citing *United States v. Ford*, 560 F.3d 420, 421 (6th Cir. 2009)). And "[t]he answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing Guidelines is that the mandate to apply the Guidelines is itself statutory." *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) (citing 18 U.S.C. § 3553(b)).

"*Johnson* is a straightforward decision, with equally straightforward application" to the residual clause of the mandatory career-offender guideline. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018). *Johnson* announced a new rule: the "ordinary case" interpretation of the residual clause paired with a "hazy risk threshold" does not provide a clear standard by which sentences may be fixed. *Dimaya*, 138 S. Ct. at 1218; *Johnson*, 135 S. Ct. at 2556–57. Mr. Homrich "seeks to benefit from [the] holding in [*Johnson*]," *Dodd v. United States*, 545 U.S. 353, 360 (2005), which applies to another law that fixed sentences using an identically-worded

and identically-interpreted residual clause—the mandatory career-offender guideline. *See* 18 U.S.C. § 3553(b); U.S.S.G. § 4B1.2(a)(2).

The mandatory guidelines range fixed sentences to a prescribed range, just as the ACCA fixed sentences between mandatory minimum and maximum sentences. *See Alleyne v. United States*, 133 S. Ct. 2151, 2162–63 (2013). "Because they [were] binding on judges, [this Court] consistently held that the Guidelines have the force and effect of laws." *United States v. Booker*, 543 U.S. 220, 234 (2005); *see also id.* at 238.

The mandatory nature of the pre-*Booker* guidelines is a distinction that matters. Unlike advisory guidelines, which are not susceptible to vagueness challenges, mandatory guidelines "fix the permissible range of sentences." *Beckles v. United States*, 137 S. Ct. 886, 892 (2017). When Mr. Homrich was sentenced, district courts could "rely exclusively on the guidelines range," and "contrain[ed] [their] discretion." *Id.* at 894 (internal quotation marks omitted). A vague mandatory guideline does not give ordinary people guidance about to avoid an enhanced sentence, which the district court is bound to impose. *Cf. id.* (explaining that "perfectly clear [advisory] Guidelines could not provide notice" because district courts "retain discretion to impose the enhanced sentence"). Vague mandatory guidelines invite arbitrary enforcement in the same way that vague statutes do; they "permit[] [judges] to prescribe the sentencing range available" "without any legally fixed standards." *Id.* (internal quotation marks omitted). For those reasons, mandatory guidelines "implicate the twin concerns underlying the vagueness doctrine—

providing notice and preventing arbitrary enforcement." *Id.*

B. The Sixth Circuit confused the requirements of a first-time § 2255 motion with those for a second or successive motion.

In *Raybon*, the Sixth Circuit confused 28 U.S.C. § 2255(h)(2)'s requirements for second or successive petitioners with § 2255(f)(3)'s requirements for first-time petitioners. *See Raybon*, 867 F.3d at 630 & n.5 (citing *Tyler v. Cain*, 533 U.S. 656 (2001)). There are important distinctions between the filing requirements for first-time filers and SOS movants. SOS movants like Mr. Homrich may rely on only new rules of constitutional law "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h)(2). In contrast, first petitioners file timely petitions when they "assert" a right newly recognized by the Supreme Court and "made retroactively applicable to cases on collateral review." *Id.* § 2255(f)(3). In addition, any court can make a right retroactive for purposes of § 2255(f)(3). *See Dodd*, 545 U.S. at 357–58, 359 (under § 2255(f)(3), "a court must have made the right retroactively applicable to cases on collateral review"; under § 2255(h)(2), the rule must be "made retroactive . . . by the Supreme Court"). These textual differences make the panel's reliance on *Tyler*—a § 2255(h)(2) case—inappropriate. Therefore, the application of the *Raybon* analysis to Mr. Homrich is also inappropriate.

C. The Fourth and Tenth Circuits used rules applicable to state habeas petitioners to conclude the motions by federal prisoners are untimely.

Relying on 28 U.S.C. § 2254(d)(1) and *Williams v. Taylor*, 529 U.S. 362, 412 (2000), the Fourth and Tenth Circuits reasoned that federal prisoners filing § 2255 motions could benefit from only this Court's holdings. *Brown*, 868 F.3d at 301; *Greer*,

881 F.3d at 1247. But § 2254(d)(1) is a relitigation bar that applies to state prisoners asserting federal claims that state courts adjudicated on the merits. The standard described in § 2254(d)(1) is designed to give maximum deference to state courts. *See Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015).

Comity and federalism are not concerns limiting the remedies available to federal prisoners in federal court. When a federal prisoner files her first § 2255 motion, she has not presented her claims to a co-equal court and has never had any other opportunity to litigate them. Thus, as this Court has explained, "AEDPA did not codify *Teague*, and . . . the AEDPA and *Teague* inquiries are distinct." *Greene v. Fisher*, 565 U.S. 34, 39 (2011) (internal quotation marks omitted). "The retroactivity rules that govern federal habeas review on the merits—which include *Teague*—are quite separate from the relitigation bar imposed by AEDPA; neither abrogates or qualifies the other." *Id.*

D. The Sixth Circuit misinterpreted this Court's statements in *Johnson II* and *Beckles*.

In *Raybon*, the Sixth Circuit relied on *Beckles v. United States*, 137 S. Ct. 886 (2017), which held that the residual clause of the *advisory* career-offender guideline was not subject to vagueness challenges, and a footnote in Justice Sotomayor's concurrence. Justice Sotomayor wrote that the majority's "adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment . . . during the period in which the Guidelines *did* fix the permissible range of sentences, may mount vagueness attacks on their sentences." *Beckles*, 137 S. Ct. at 903 n.4 (internal

citations and quotation marks omitted). This comment is irrelevant to the question whether Mr. Homrich's petition is timely. Justice Sotomayor's observation had nothing to do with the statute of limitations, which was not an issue in the case. This Court could not have held that the vagueness doctrine applies to the mandatory Guidelines without rendering an advisory opinion in violation of Article III because Mr. Beckles' sentence was not fixed by mandatory guidelines. *See Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment) ("That question is not presented by this case.").

In addition, the Sixth Circuit misunderstood this Court's statement that its holding did not cast "constitutional doubt" on "textually similar" laws. *Raybon*, 867 F.3d at 630 (citing *Johnson*, 135 S. Ct. at 2561; *Welch*, 136 S. Ct. at 1262). But this Court said nothing about how to apply *Johnson*'s holding to *identically* worded statutes. This Court was alluding to laws that require "gauging the riskiness of conduct in which an individual defendant engages on a particular occasion," and not the Guidelines. *Johnson II*, 135 S. Ct. at 2561; *see also Welch*, 136 S. Ct. at 1262 (same). By restricting the reach of *Johnson II*'s rule, the Sixth Circuit ignored this Court's instruction that "the mere existence of conflicting authority does not necessarily mean a rule is new." *Wright v. West*, 505 U.S. at 304 (O'Connor, J., concurring in the judgment) (citing *Stringer v. Black,* 503 U.S. 222, 237 (1992)).

III. The issue raised in this case is of exceptional importance and has broad implications in achieving fairness in sentencing through the uniform application of the Mandatory Career Offender Guidelines.

This question is one that has divided the lower federal courts into two camps.

Some hold that motions like Mr. Hormich's are timely, and others hold the opposite. Compare *United States v. Greer*, 881 F.3d 1241, 1247–49 (10th Cir. 2018) (holding untimely § 2255 motions asserting entitlement to relief because the residual clause of the career-offender guideline is unconstitutionally vague); *Raybon*, 867 F.3d at 630 (same); *United States v. Brown*, 868 F.3d 297, 303 (4th Cir. 2017) (same), *with Moore v. United States*, 871 F.3d 72, 81–83 (1st Cir. 2017) (authorizing filing a second and successive motion and rejecting the reasoning of *Raybon*); *In re Hoffner*, 870 F.3d 301, 311–12 (3d Cir. Sept. 7, 2017) (authorizing a second or successive motion because, under *Teague*, application of *Johnson II* to the Guidelines would not require recognizing a new rule).

This question impacts many federal prisoners who were sentenced as career offenders when the Sentencing Guidelines were mandatory. The very same residual clause that *Johnson II* deemed unconstitutionally vague fixed their sentences. Asserting that a simple application of *Johnson II* would make them eligible for resentencing, federal prisoners, like Robert Homrich, filed § 2255 motions within one year of *Johnson II*. Whether their petitions were timely and can be adjudicated on the merits is a question that impacts this substantial class of people and also divides the federal courts.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 33

I hereby certify that this petition for writ of certiorari complies with the type-volume limitation set forth in Rule 33(2). This petition contains 22 pages, complied with 12-point Century Schoolbook proportionally spaced type.

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