No. __-_____

IN THE

Supreme Court of the United States

TERRANCE SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

GEREMY C. KAMENS
Federal Public Defender

Frances H. Pratt
Assistant Federal Public Defender
Counsel of Record
Office of the Federal Public Defender
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Fran_Pratt@fd.org

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QUESTIONS PRESENTED

Petitioner was sentenced in 2003 as a career offender under then-mandatory Sentencing Guidelines, when the Guidelines' definition of "crime of violence" included a residual clause in U.S.S.G. § 4B1.2. In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held unconstitutionally vague the identically-worded residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e). In *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson* announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review. A motion filed pursuant to 28 U.S.C. § 2255 is timely when filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). Petitioner filed a § 2255 motion within one year of *Johnson*, asserting that his career offender sentence was unconstitutional in light of *Johnson*. The district court held that Petitioner's motion was untimely because this Court had not yet found the mandatory Guidelines' residual clause unconstitutionally vague, and declined to reach the merits of Petitioner's claim. Both that court and the court of appeals denied a certificate of appealability.

The questions presented are:

1. Whether a § 2255 motion filed within one year of *Johnson*, claiming that *Johnson* invalidates the residual clause of the mandatory career offender guideline, asserts a "right . . . initially recognized" in *Johnson* within the meaning of 28 U.S.C. § 2255(f)(3).

2. Whether, in light of *Johnson*, the residual clause of the mandatory career offender guideline is unconstitutionally vague.

PARTIES TO THE PROCEEDINGS

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished decision of the court of appeals appears at pages 1a to 2a of the appendix to this petition and is available at 714 F. App'x 310 (4th Cir. 2018). The unpublished decision of the district court appears at pages 2a to 8a of the appendix and is electronically available at 2017 WL 2837144 (E.D. Va. June 30, 2017).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over Petitioner's motion to vacate his sentence pursuant to 28 U.S.C. § 2255(a) and § 2244. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253(a). That court issued its opinion and judgment on March 15, 2018. Petitioner did not seek rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment provides in relevant part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

2. Section 2255 of Title 28, United States Code, provides in relevant part:

> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . .
>
> > (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. . . .
>
> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain – . . .
>
> > (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(f), (h).

3. The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides that

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

4. The U.S. Sentencing Guidelines in effect at Petitioner's sentencing in 2003 provided that

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that – . . .
>
> > (2) is burglary of a dwelling, arson, or extortion, involves the 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) (Nov. 2002).

INTRODUCTION

This Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that increasing a defendant's sentence under the Armed Career Criminal Act's (ACCA's) residual clause violates the Constitution's prohibition on vague laws, and in *Welch v. United States*, 136 S. Ct. 1257 (2016), that *Johnson* is retroactively applicable to cases on collateral review. Nearly every court, the Department of Justice, and the Sentencing Commission understood that *Johnson* directly invalidated the identical residual clause of the career offender guideline. Many prisoners diligently filed § 2255 motions within one year of *Johnson*, asserting that their career offender sentences were unconstitutional, and those motions were timely. This Court later held in *Beckles v. United States*, 137 S. Ct. 886 (2017), that the residual clause of the advisory career offender guideline is not subject to a vagueness challenge because, unlike the mandatory Guidelines, the advisory Guidelines do not fix the permissible range of sentences. Thus, § 2255 motions relying on *Johnson* in advisory Guidelines cases were timely, but wrong on the merits.

In 2003, after convictions for controlled substance offenses, Petitioner was sentenced to 360 months' imprisonment based on his designation as a career offender, a designation that depended on a prior conviction that qualified as a crime of violence under the residual clause of the career offender guideline. U.S.S.G. § 4B1.2 (Nov. 2002). The district court was mandated by statute to follow the Guidelines. *See* 18 U.S.C. § 3553(b); *United States v. Booker*, 543 U.S. 220 (2005). Within one year of *Johnson*, after receiving authorization from the court of appeals, Petitioner moved to

vacate his sentence under § 2255, arguing that his sentence was imposed in violation of the Constitution in light of *Johnson*. The district court ruled that because Petitioner's argument rested on the same residual clause at issue in *Beckles*, *Johnson*'s rule did not apply to Petitioner's case, and his motion was therefore untimely because he did not cite a rule applicable to his case. The district court denied a certificate of appealability, as did the court of appeals.

The courts of appeals have split over whether a § 2255 motion filed within one year of *Johnson* that claims *Johnson* invalidates the residual clause of the mandatory career offender guideline asserts a "right . . . initially recognized" by this Court in *Johnson* within the meaning of 28 U.S.C. § 2255(f)(3). On one side of the split, the Fourth, Sixth, and Tenth Circuits have ruled that such motions do not assert any right recognized in *Johnson* because *Johnson* did not expressly hold the mandatory Guidelines' residual clause unconstitutionally vague. On the other side, the First, Third, and Seventh Circuits have made clear that such motions assert the right recognized in *Johnson* because the invalidation of the mandatory Guidelines' residual clause is a straightforward application of *Johnson*. The decisions of the Fourth, Sixth, and Tenth Circuits conflict with this Court's relevant precedents and s 2255(f)(3)'s text. The courts are also divided on the merits, with only the Eleventh Circuit holding that the mandatory Guidelines' residual clause is not void for vagueness, a position with which other courts and judges disagree, and which conflicts with this Court's interpretation of the Sentencing Reform Act of 1984. The questions presented impact numerous federal prisoners serving lengthy mandatory career offender sentences, and

are urgently in need of resolution by this Court. The issues are cleanly presented in this case, and their resolutions should be outcome-determinative.

STATEMENT OF THE CASE

1. Petitioner was convicted in July 2003 for committing various controlled substance offenses. *See* Docs. 3, 39.[1] Following his conviction, a probation officer prepared a presentence report on him. *See* Doc. 437. Applying the drug guideline, U.S.S.G. § 2D1.1 (Nov. 2002), and the criminal history rules in U.S.S.G. § 4A1.1 and § 4A1.2, the final offense level was 36 and the final criminal history category was V. Petitioner's mandatory guideline range was therefore 292 to 365 months. *See* U.S.S.G. Ch. 5, Pt. A (sentencing table) (Nov. 2002).

The probation officer further determined, however, that Petitioner should be treated as a career offender pursuant to U.S.S.G. § 4B1.1 and § 4B1.2. A defendant is a career offender if he was at least 18 years of age when he committed the instant offense, the instant offense is either a "crime of violence" or a "controlled substance offense," and he has at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." U.S.S.G. § 4B1.1(a).[2] Because Petitioner's instant offense was a "controlled substance offense" and he had two convictions in Arizona for

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[1] The citation "Doc." followed by a number refers to documents in the district court case from which this appeal arises, E.D. Va. No. 2:02-cr-00217-RAJ-5.

[2] Until August 1, 2016, the term "crime of violence" was defined to include any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2); *see* U.S.S.G. Supp. App. C, amend. 798. This clause, identical to the ACCA's residual clause, was interpreted using the same "ordinary case" analysis as the ACCA's. *See Johnson*, 135 S. Ct. at 2560 (analyzing several Guidelines cases to demonstrate that the residual clause "has proved nearly impossible to apply consistently").

aggravated assault," he qualified. This designation increased Petitioner's offense level to 37 and his criminal history category to VI, thus resulting in a mandatory guideline range of 360 months to life.

The court sentenced him to the bottom of that range, i.e., thirty years in prison. Following Petitioner's unsuccessful direct appeal, his conviction and sentence became final in 2007. He pursued unsuccessful post-conviction challenges soon after and again in 2014. *See* Docs. 174, 178, 231, 385, 392.

2. On June 26, 2015, this Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that increasing a defendant's sentence under the residual clause of the Armed Career Criminal Act – "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii) – violates the Constitution's prohibition on vague laws. By combining uncertainty about how to identify the "ordinary case" of the crime with uncertainty about how to determine whether a risk is sufficiently "serious," the inquiry required by the clause "both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557-58. The Court held in *Welch v. United States*, 136 S. Ct. 1257 (2016), that *Johnson* applies retroactively to cases on collateral review.

3. On June 17, 2016, after receiving authorization from the Fourth Circuit to file a second § 2255 motion, *see* 28 U.S.C. § 2244, Petitioner filed a *pro se* motion seeking vacatur of his sentence in light of *Johnson*. *See* Doc. 425 (4th Circuit order); Doc. 426 (§ 2255 motion). He contended that his mandatory career offender sentence violated due process because § 4B1.2(a) contains a residual clause in its definition of

"crime of violence" identical to the residual clause in § 924(e)'s definition of "violent felony" that the Supreme Court in *Johnson* declared unconstitutionally vague. Petitioner further contended that his assault convictions did not otherwise qualify as crimes of violence under § 4B1.2. Finally, he contended that he was entitled to relief under § 2255 because his sentence violated due process.

Upon reviewing Petitioner's *pro se* motion, the district court appointed the Federal Public Defender to represent him and set a briefing schedule. Doc. 436. Counsel filed a response to the court's order (essentially, a formal § 2255 motion). Doc. 443. The court stayed the case pending this Court's decision in *Beckles v. United States*. *See* Docs. 442, 443, 444.

4. On March 6, 2017, in *Beckles*, the Court created an exception to the rule announced in *Johnson*, ruling on the merits that because "the advisory Guidelines do not fix the permissible range of sentences," but "merely guide the exercise of a court's discretion," they "are not subject to a vagueness challenge under the Due Process Clause." 137 S. Ct. 886, 892 (2017). The Court explained that the "advisory Guidelines do not implicate the twin concerns underlying vagueness doctrine." *Id.* at 894. The "'due process concerns that . . . require notice in a world of mandatory Guidelines no longer' apply." *Id.* (quoting *Irizarry v. United States*, 553 U.S. 708, 714 (2008)). The "advisory Guidelines also do not implicate the vagueness doctrine's concern with arbitrary enforcement" because district courts do not "enforce" the advisory Guidelines, but rely on them "merely for advice in exercising [their] discretion." *Id.* at 894, 895. The mandatory Guidelines, in contrast, were "binding on

district courts." *Id.* at 894 (citing *Booker*, 543 U.S. at 233). Accordingly, the Court held "only that the advisory Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine." *Id.* at 896.

Justice Sotomayor commented in a footnote 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," but "[t]hat question is not presented by this case." *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring) (internal citations and quotation marks omitted).

Following *Beckles*, the government filed its response to Petitioner's motion. Doc. 449 . The government asserted *inter alia* that Petitioner's motion was untimely (more specifically, it was premature), because the Supreme Court has not ruled that *Johnson*, which addressed the residual clause of 18 U.S.C. § 924(e) and held that provision to be unconstitutionally vague, extends to the identical residual clause in § 4B1.2. Petitioner's counsel filed a reply rebutting the government's various contentions. *See* Doc. 455.

4. On June 30, 2017, the district court issued a memorandum opinion and order that denied the § 2255 motion as untimely. Pet. App. 3a. In its analysis, the court first laid out the requirements for filing a timely motion under 28 U.S.C. § 2255(f)(3). Pet. App. 6a. The court then briefly reviewed the Supreme Court's decisions in *Johnson* and *Beckles*, as well as in *Booker*. Pet. App. 7a-8a. The court

then summarily determined that "[b]ecause Petitioner's argument rests upon the same clause at issue in *Beckles*, where the Supreme Court found that the Guidelines were not subject to a vagueness challenge, *Johnson*'s new rule is inapplicable in the instant case." Pet. App. 8a. "Stated differently," the court continued, "Petitioner has not cited a rule recognized by the Supreme Court and made retroactively applicable to his case." *Id.* "Therefore," the court concluded, "this motion is untimely under § 2255(f)(3)" and would be denied. *Id.* Nothing in the court's summary determination, however, addressed the distinction between the advisory Guidelines at issue in *Beckles* and the mandatory Guidelines that applied to Petitioner. The court denied a certificate of appealability. *Id.* Petitioner noted a timely appeal from the court's ruling Doc. 464.

5. Just a few days before the appeal was noted, the Fourth Circuit decided *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017), *reh'g denied*, ___ F.3d ____, 2018 WL 2436727 (4th Cir. 2018), *pet'n for cert. filed* May 29, 2018 (U.S. No. 17-9276). In a 2-to-1 decision, *Brown* held that a petitioner's § 2255 challenge to his mandatory Guidelines' career offender designation was untimely under § 2255(f)(3) because the court was precluded from extrapolating beyond *Johnson*'s holding to apply its reasoning to a different sentencing statute or regime. 868 F.3d at 299.

In his informal preliminary brief, Petitioner asked the Fourth Circuit to issue a certificate of appealability, and specifically addressed *Brown* and its flawed reasoning. *United States v. Smith*, 4th Cir. No. 17-7190, Doc. 13 (filed Oct. 30, 2017). In a *pro forma*, per curiam unpublished opinion issued on March 15, 2018, the Fourth Circuit denied the request and dismissed the appeal. Pet. App. 1a-2a. Although the

opinion did not reference *Brown*, it is reasonable to assume that the court denied relief on the basis of that decision given the chronology described above.

6. In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), decided on April 17, 2018, this Court applied *Johnson* to a residual clause to another definition of "crime of violence," 18 U.S.C. § 16(b). Although § 16(b) is worded slightly differently, it is subject to the same "ordinary case" analysis as the residual clauses in the ACCA and the mandatory Guidelines. The Court explained that "*Johnson* is a straightforward decision, with equally straightforward application here," *id.* at 1213, and "tells us how to resolve this case," *id.* at 1223. Section 16(b)'s residual clause has the "same two features as ACCA's, combined in the same constitutionally problematic way," *id.* at 1213, viz., "an ordinary-case requirement and an ill-defined risk threshold," *id.* at 1223, and "with that reasoning, *Johnson* effectively resolved the case," *id.* at 1213.

7. If Petitioner is no longer a career offender in light of *Johnson* and now *Dimaya*, his guideline range should be 130 to 162 months.[3] Petitioner has been detained since May 1, 2003, *see* Doc. 437, and has served over 14 years in prison to date – or longer than the high end of the reduced range. Thus, he should be eligible for immediate release if he is not a career offender, as he will have overserved any sentence within the reduced range.

[3] Whether the Chapter Two offense level is determined by application of the Guidelines in effect at a resentencing or by retroactive application of amendments to § 2D1.1, the base offense level should be 28, based on a marijuana equivalency of 724 kilograms.

REASONS FOR GRANTING THE PETITION

The courts are divided over whether a § 2255 motion claiming that *Johnson* invalidates the mandatory career offender guideline's residual clause asserts the "right . . . initially recognized" by this Court in *Johnson*. On one side of the divide, the Fourth, Sixth, and Tenth Circuits have ruled that such motions do not assert any right recognized in *Johnson* because this Court did not expressly hold in *Johnson* that the mandatory Guidelines' residual clause is unconstitutionally vague. On the other side, the First, Third, and Seventh Circuits have made clear that such motions assert the right recognized in *Johnson* because the invalidation of the mandatory Guidelines' residual clause is a straightforward application of *Johnson*. The novel approach of the Fourth, Sixth, and Tenth Circuits – that these motions were filed too early – conflicts with this Court's relevant precedents and is contrary to the statutory text. On the merits of the *Johnson* claim, the courts are also divided, with only the Eleventh Circuit holding that the mandatory Guidelines' residual clause cannot be void for vagueness. The First, Third, and Seventh Circuits disagree. The questions presented are of exceptional importance. If the mandatory Guidelines' residual clause is indeed invalid, numerous prisoners serving lengthy unlawful sentences are being denied the opportunity to have any court reach the merits of their claims, including Petitioner. The issues are cleanly presented in this case, and the answers should be outcome-determinative.

I. An Entrenched Split Has Developed Among the Circuits.

A. The Fourth, Sixth, and Tenth Circuits have ruled that § 2255 motions claiming that *Johnson* invalidates the mandatory Guidelines' residual clause do not assert any right recognized in *Johnson*.

Three circuits, the Fourth, Sixth, and Tenth, have held that § 2255 motions filed within one year of *Johnson* claiming that *Johnson* invalidates the mandatory Guidelines' residual clause are untimely because this Court did not expressly so hold in *Johnson*. In these circuits' view, the only right *Johnson* recognized was its specific holding that the ACCA's residual clause is unconstitutionally vague. *See Brown*, 868 F.3d at 303; *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017), *pet'n for cert. filed* May 7, 2018 (No. 17-8878); *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018), *pet'n for cert. filed* May 1, 2018 (No. 17-8775).

All three circuits relied on case law interpreting inapplicable statutes to reach this conclusion. In its divided panel decision, the Fourth Circuit said that it was "constrained" by AEDPA jurisprudence "from extrapolating beyond the Supreme Court's holding to apply what we view as its reasoning and principles to different facts under a different statute or sentencing regime." *Brown*, 868 F.3d at 299. For this, it relied on (1) the statement in *Williams v. Taylor*, 529 U.S. 362 (2000), that the phrase "clearly established Federal law, as determined by the Supreme Court," in 28 U.S.C. § 2254(d)(1), means "the holdings, as opposed to the dicta" of this Court, and (2) the statement in *Tyler v. Cain*, 533 U.S. 656 (2001), that the phrase "made retroactive to cases on collateral review by the Supreme Court" in 28 U.S.C. § 2244(b)(2)(A), means "held" retroactive by this Court. *Brown*, 868 F.3d at 301. The Tenth Circuit adopted

this passage, *Greer*, 881 F.3d at 1247, adding that "'interests of finality and comity' underlying federal habeas review" – of state court judgments – precluded it from applying "the reasoning of *Johnson* in a different context." *Id.* at 1248 (quoting *Teague v. Lane*, 489 U.S. 288, 308 (1989)). The Sixth Circuit relied on *Tyler*'s statement that "made" means "held" and said that the language in § 2244(b)(2)(A) is "identical" to that in § 2255(f)(3). *Raybon*, 867 F.3d at 630.

Brown and *Raybon* also misinterpreted the majority opinion in *Beckles*, and Justice Sotomayor's footnote 4 in *Beckles*, to mean that this Court had not recognized a right invalidating any residual clause but the ACCA's. *See Brown*, 868 F.3d at 302-03; *id.* at 299 n.1, 300; *Raybon*, 867 F.3d at 629-30.

From these mistaken premises, the Fourth Circuit concluded that *Johnson* "only recognized that ACCA's residual clause was unconstitutionally vague," and that a challenge to the mandatory Guidelines' residual clause was untimely because it did not fall within the "narrow" confines of that "binding holding." *Brown*, 868 F.3d at 303; *see also Greer*, 881 F.3d at 1248 ("Greer has not raised a true *Johnson* claim because he was not sentenced under any clause of the ACCA."); *Raybon*, 867 F.3d at 630 ("Because it is an open question, it is *not* a 'right' that 'has been newly recognized by the Supreme Court' . . . .").

B. A divided Eleventh Circuit has ruled that the mandatory Guidelines' residual clause is not unconstitutionally vague.

The Eleventh Circuit has also blocked consideration of *Johnson* claims by prisoners sentenced under the mandatory Guidelines' residual clause, but in a different way. Shortly after *Welch* and ten months before *Beckles*, a panel of the Eleventh

Circuit issued a published decision denying an application for authorization to file a successive § 2255 by a *pro se* prisoner, holding that "the Guidelines – whether mandatory or advisory – cannot be unconstitutionally vague." *In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016). Griffin was barred from seeking rehearing or certiorari review, 28 U.S.C. § 2244(b)(3)(E), and *Griffin* became binding circuit precedent barring relief on the merits for any first or successive § 2255.

A different Eleventh Circuit panel sharply disagreed, stating that "we believe *Griffin* is deeply flawed and wrongly decided" and that "*Johnson* applies with equal force to the residual clause of the mandatory career offender guideline." *In re Sapp*, 827 F.3d 1334, 1339 (11th Cir. 2016) (Jordan, Rosenbaum, and J. Pryor, JJ., concurring). A fourth judge agreed with the *Sapp* panel. *See United States v. Matchett*, 837 F.3d 1118, 1134 n.3 (11th Cir. 2016) (Martin, J., dissenting from denial of rehearing en banc).

C. The First, Third, and Seventh Circuits disagree with the Fourth, Sixth, Tenth, and Eleventh Circuits on both timeliness and the merits.

Three circuits disagree with the reasoning and conclusions of *Brown*, *Raybon*, *Greer*, and *Griffin*.

1. In *United States v. Moore*, 871 F.3d 72 (1st Cir. 2017), the First Circuit held that a § 2255 motion arguing that J*ohnson* invalidates the mandatory career offender guideline's residual clause was timely because it was filed within one year of *Johnson*, *id.* at 77 n.3, and authorized a successive motion. The court concluded that the right Moore "seeks to assert is exactly the right recognized by *Johnson*." *Id.* at 83.

The court was "not . . . persuaded" by the government's argument that the rule upon which Moore relied had not been "recognized" by this Court. *Id.* at 81. The court did not "need to make new constitutional law in order to hold that the pre-*Booker* SRA fixed sentences" because this Court had already resolved that question of statutory interpretation in *Booker*. *Id.* (citing *Booker*, 543 U.S. at 233-34, 245; 18 U.S.C. § 3553(b)). The First Circuit expressly rejected the reasoning of *Brown* and *Raybon*. *Id.* at 82-83. It explained that in § 2255, Congress used words such as "rule" and "right" rather than "holding" because it "recognizes that [this] Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law." *Id.* at 82. The pre-*Booker* guidelines' residual clause "is not clearly different in any way that would call for anything beyond a straightforward application of *Johnson*." *Id.* And "*Beckles* did not limit *Johnson II* to its facts. Rather, one can fairly and easily read *Beckles* as simply rejecting the application of *Johnson II* to the advisory guidelines because, as a matter of statutory interpretation, those guidelines do not fix sentences." *Id.* at 83.

Moore also disagreed with *Griffin*. Because this Court had "consistently held that the Guidelines [had] the force and effect of laws," and "the lower end of a guidelines range sentence often exceeds what would have otherwise been the statutory minimum," the court was "quite skeptical" of *Griffin*'s conclusion that the mandatory Guidelines "'did not alter the statutory boundaries for sentences set by Congress for the crime.'" *Moore*, 871 F.3d at 81 (quoting *Griffin*, 823 F.3d at 1355). "Nor does the fact

that the Eleventh Circuit so concluded mean that a contrary conclusion would be a new rule," since the "all reasonable jurists standard is objective." *Id.* at 81 (internal citations and punctuation omitted).

2. The Third Circuit, in *In re Hoffner*, 870 F.3d 301 (3d Cir. 2017), also authorized a successive § 2255 motion because it "relies on" *Johnson*. The court explained that "the way to determine" whether applying *Johnson* to the mandatory Guidelines would create a "second new rule" is to "undertake a *Teague* analysis" to determine whether doing so "'breaks new ground,'" or instead "'[is] merely an application of the principle that governed' a prior decision to a different set of facts." *Id.* at 311-12 & n.15 (quoting *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013)).[4] The Third Circuit declined to follow *Griffin*, in substance or procedure. *Id.* at 310 & n.13.

3. Most recently, on June 7, 2018, the Seventh Circuit decided *United States v. Cross*, ___ F.3d ____, 2018 WL 2730774 (7th Cir. 2018). On the question of timeliness, the Seventh Circuit rejected the approach taken by the Fourth, Sixth, and Tenth Circuits, explaining that it "suffers from a fundamental flaw" because

> [i]t improperly reads a merits analysis into the limitations period. Section 2255(f)(3) runs from "the date on which the right *asserted* was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3) (emphasis added). It does not say that the movant must ultimately *prove* that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized. An

[4] *Hoffner* did not expressly address the statute of limitations, but left it to the district court to determine in the first instance "whether [the] petition has merit." *Id.* at 312.

> alternative reading would require that we take the disfavored step of reading "asserted" out of the statute.

2018 WL 2730774, at *3. The court held that the right asserted "was recognized in *Johnson*." *Id.* "Under *Johnson*, a person has a right not to have his sentence *dictated* by the unconstitutionally vague language of the mandatory residual clause." *Id.* Because the appellants "assert precisely that right," they therefore "complied with the limitations period of section 2255(f)(3) by filing their motions within one year of *Johnson*." *Id.*

On the merits question, the Seventh Circuit concluded that the "same two faults" that render the ACCA's residual clause – the combined indeterminacy of how much risk the crime of conviction posed and the degree of risk required – "inhere in the residual clause of the guidelines." 2018 WL 2730774, at *8. It "hardly could be otherwise" because the clauses are identically worded and the categorical approach applies to both. *Id.* The court further explained that the majority and concurring opinions in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), "reconfirm[ed]" its view that the Guidelines' residual clause "shares the weaknesses that *Johnson* identified in the ACCA." *Id.* at *9.

Additionally, the Seventh Circuit held that the mandatory Guidelines' residual clause implicated the twin concerns of the vagueness doctrine because it fixed the permissible range of sentences. 2018 WL 2730774, at **11-13. The court explained that *Beckles* "reaffirmed that the void-for-vagueness doctrine applies to 'laws that fix the permissible sentences for criminal offenses.'" *Id.* at *12 (quoting *Beckles*, 137 S. Ct. at 892). "As *Booker* described, the mandatory guidelines did just that. They fixed

sentencing ranges from a constitutional perspective." *Id.* Because the Guidelines were "'not advisory'" but "'mandatory and binding on all judges,'" *id.* (quoting *Booker*, 543 U.S. at 233-34 (2005)), "[t]he mandatory guidelines did . . . implicate the concerns of the vagueness doctrine." *Id.* "[T]he residual clause of the mandatory guidelines did not merely guide judges' discretion; rather, it mandated a specific sentencing range and permitted deviation only on narrow, statutorily fixed bases." *Id.* at 13. The court added that "even statutory minimum sentences are not exempt from departures," *id.* (citing 18 U.S.C. § 3553(e) and § 3553(f)), yet "as we know from *Johnson*'s treatment of the ACCA, statutory minima must comply with the prohibition of vague laws," and the same is true of the pre-*Booker* mandatory guidelines. *Id.* The Seventh Circuit held that because the residual clause of the mandatory Guidelines implicated the "twin concerns" of the vagueness doctrine, it is "thus subject to attack on vagueness grounds." *Id.* (quoting *Beckles*, 137 S. Ct. at 894-95).

The Seventh Circuit's decision deepens the circuit conflicts concerning whether *Johnson* recognized a right not to have one's sentence increased by the mandatory Guidelines' residual clause and whether that clause is unconstitutionally vague. It therefore confirms the reasons for granting the petition for a writ of certiorari in this case.

II. The Fourth Circuit's Position Conflicts With Both This Court's Relevant Precedents and the Text of § 2255(f)(3).

This Court has never said what it means to "recognize" a "right asserted," 28 U.S.C. § 2255(f)(3), but the lower courts have long applied this Court's "new rule" jurisprudence to the question. Under that jurisprudence, a right not to have one's sentence increased by the mandatory Guidelines' residual clause is not another new right but simply an application of *Johnson*. The Fourth Circuit, along with the Sixth and Tenth Circuits, has taken an unprecedented approach, requiring that this Court first confirm that a motion is correct on the merits before the statute of limitations can be met. In doing so, they have relied on case law interpreting inapplicable statutes, in a way that does violence to the statutory text. For movants like Petitioner, this means their claims can never be timely and can never be adjudicated on the merits. More broadly, it means arbitrariness, inconsistency, and delay – the opposite of what Congress intended.

A. The Fourth Circuit relied on inapplicable decisions from this Court.

As an initial matter, the *Brown* majority acknowledged that the mandatory Guidelines' residual clause "looks like" and "operates like" the ACCA's, but said that it was "constrained by the [AEDPA] jurisprudence from extrapolating beyond the Supreme Court's holding to apply what we view as its reasoning and principles to different facts under a different statute or sentencing regime." *Brown*, 868 F.3d at 299.

For this, the majority relied on snippets of case law interpreting inapplicable statutes that actually disprove its point. First, it cited this Court's statement in

Williams v. Taylor, 529 U.S. 362, 412 (2000), that the phrase "clearly established Federal law, as determined by the Supreme Court," in 28 U.S.C. § 2254(d)(1), means "the holdings, as opposed to the dicta" of this Court. *Brown*, 868 F.3d at 301. Section 2254(d)(1) bars state prisoners from relitigating federal claims that were already adjudicated on the merits in state-court proceedings unless the state-court decision was "contrary to" or an "unreasonable application" of "clearly established Federal law, as determined by the Supreme Court." Section 2254(d)(1) bars a state prisoner's claim even though his application was filed within one year of the date on which the "right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2244(d)(1)(C). Thus, the § 2254(d)(1) standard is different from and more demanding than the term "initially recognized by the Supreme Court." Indeed, the standard is "intentionally difficult to meet," according maximum deference to state courts in "the interests of comity and federalism." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). In contrast, a federal court deciding a § 2255 motion is not deferring to a coequal jurisdiction, and it is the federal prisoner's first opportunity to litigate a claim under a new, retroactive rule of federal law. No interest in "comity" or "federalism" exists. Accordingly, nothing in § 2255(f)(3) or elsewhere requires that a right asserted by a federal prisoner must be "clearly established by a Supreme Court holding."

Second, the *Brown* majority cited this Court's statement in *Tyler v. Cain*, 533 U.S. 656 (2001), that the phrase "made retroactive to cases on collateral review by the Supreme Court" in 28 U.S.C. § 2244(b)(2)(A), means "held" retroactive by this Court. 868 F.3d at 301. Both § 2244(b)(2)(A) and the analogous provision for federal prisoners

at § 2255(h)(2) require for authorization of a second or successive motion, a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." But *Tyler* did not address whether this Court had announced a "new rule" or "newly recognized" a "right." Rather, it addressed whether the Court had "made" an undisputedly new rule "retroactive," and decided that "made" means "held" in that context. 553 U.S. at 663-64. Moreover, an express holding is not required. This Court can implicitly "make" a rule retroactive through "multiple holdings that logically dictate the retroactivity of the new rule." *See id.* at 668-69 (O'Connor, J., concurring); *see also id.* at 666 (agreeing with this principle); *id.* at 672-73 (Breyer, J., dissenting) (same).

B. The Fourth Circuit's position conflicts with this Court's applicable decisions.

Federal courts have long applied this Court's "new rule" jurisprudence to determine whether a "right asserted" in a § 2255 motion "has been newly recognized." Under that jurisprudence, 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 v. Lane*, 489 U.S. 288, 307 (1989)). "To determine what counts as a new rule," a court must "ask whether the rule a habeas 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 rule is not new. *Id.*

For example, in *Stringer v. Black*, 503 U.S. 222 (1992), this Court held that *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Clemons v. Mississippi*, 494 U.S. 1074 (1990), were not new rules but instead applications of the principles that governed its prior decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980). In invalidating an aggravating factor with slightly different language in an Oklahoma statute, *Maynard* did not break new ground with *Godfrey*. 503 U.S. at 228-29. *Clemons*'s invalidation of Mississippi's identical aggravating factor, which followed *a fortiori* from *Godfrey*, was not a "new rule" simply because it was previously "undecided." *Id.* at 229; *see also Penry v. Lynaugh*, 492 U.S. 302, 314, 318-19 (1989) (concluding that the rule Penry sought requiring instructions permitting the jury to "give effect" to evidence of mental disability was not a "new rule" but simply an application of principles established by prior cases to a "closely analogous" case), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Yates v. Aiken*, 484 U.S. 211, 217 (1988) (holding that *Francis v. Franklin*, 471 U.S. 307 (1985), was not a new rule but "merely an application of the principle that governed our decision in" *Sandstrom v. Montana*, 442 U.S. 510 (1979), in which the question was "almost identical").[5]

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[5] For recent cases illustrating the application of this jurisprudence by the courts of appeals, see, e.g., *Butterworth v. United States*, 775 F.3d 459, 464-65 (1st Cir. 2015) (relying on *Teague* and *Chaidez* to conclude that *Alleyne v. United States*, 133 S. Ct. 2151 (2013), is a "'newly recognized' right"); *United States v. Smith*, 723 F.3d 510, 515 (4th Cir. 2013) (relying on *Teague* to conclude that "right" recognized in *Fowler v. United States*, 131 S. Ct. 2045 (2011), "has been 'newly recognized' by Supreme Court" under § 2255(f)(3)); *Figuereo-Sanchez v. United States*, 678 F.3d 1203, 1207-08 (11th

Applying the correct jurisprudence, a right not to have one's sentence increased by a residual clause that suffers from the same flaws that invalidated the ACCA's residual clause is not another new right that "breaks new ground" with *Johnson*, but is "merely an application of the principle that governed" *Johnson* to a closely analogous set of facts. *Chaidez*, 568 U.S. at 347-48; *Teague*, 489 U.S. at 307. The mandatory Guidelines' residual clause "is not clearly different in any way that would call for anything beyond a straightforward application of *Johnson*." *Moore*, 871 F.3d at 81. The right asserted is "logically inherent" in *Johnson*, and "is exactly the right recognized by *Johnson*." *Id.* at 82-83. Because "the mandatory Guidelines' residual clause presents the same problems of notice and arbitrary enforcement as the ACCA's residual clause at issue in *Johnson*," Petitioner "is asserting the right newly recognized in *Johnson*." *Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting).

Because the right Petitioner asserted is a straightforward application of *Johnson*, the proper time for filing was within one year of *Johnson*. To illustrate, in *Descamps v. United States*, this Court first expressly held that "courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." 570 U.S. 254, 258 (2013). In doing so, it reasoned from existing precedent. *Id.* at 260-64 (discussing *Taylor v. United*

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."); *United States v. Hong*, 671 F.3d 1147, 1148, 1150 (10th Cir. 2011) (applying *Teague* "to decide whether *Padilla* announced a new rule" for purposes of § 2255(f)(3)); and *Coleman v. United States*, 329 F.3d 77, 81-82 (2d Cir. 2003) (relying in part on *Teague* to conclude that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was "new rule" with respect to § 2255(f)(3)).

States, 45 U.S. 575 (1990), and its progeny). Applying *Teague* and its progeny, courts of appeals held that § 2255 motions relying on *Descamps* were untimely because *Descamps* was merely an application of existing precedent. *See United States v. Morgan*, 845 F.3d 664, 668-69 (5th Cir. 2017) (holding motion untimely because *Descamps* "relied on existing precedent," and "a rule that applies a general principle to a new set of facts typically does not constitute a new rule"); *United States v. Headbird*, 813 F.3d 1092, 1095-97 (8th Cir. 2016) (same); *Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016); *Ezell v. United States*, 778 F.3d 762, 764, 766 (9th Cir. 2015).

Finally, this Court's recent decision in *Dimaya* further confirms that the proper time for filing was within one year of *Johnson*. *Dimaya* refutes *Brown*'s assertion that "*Johnson* only recognized that ACCA's residual clause was unconstitutionally vague." *Dimaya* explained that "*Johnson* is a straightforward decision, with equally straightforward application here," 138 S. Ct. at 1213, and "tells us how to resolve this [§ 16(b)] case," *id.* at 1223. *Dimaya* demonstrates that *Johnson* recognized a right not to suffer serious consequences under a residual clause that, like the ones in the ACCA, § 16(b), and the career offender guideline, "ha[s] both an ordinary-case requirement and an ill-defined risk threshold." *Id.* at 1223. If *Johnson* "effectively resolved the case" before the Court in *Dimaya*, *id.* at 1213, involving a "similar" clause resulting in "virtual[ly] certain[]" deportation, then *Johnson*'s application to a clause identical in its text and mode of analysis to the ACCA's, mandating years longer in prison, resolves Petitioner's case as well.

C. The Fourth Circuit's position also conflicts with the statutory text.

A motion is timely under § 2255(f)(3) if filed within one year of the date on which the "right asserted was initially recognized" by this Court. The statute of limitations is a threshold inquiry, separate from the district court's subsequent determination of the merits. The reading of § 2255(f)(3) by the Fourth Circuit in *Brown* not only reverses the order of operations, but requires that this Court first confirm that the claim is correct on the merits before the statute of limitations can be met, setting a higher bar for the threshold statute-of-limitations inquiry than for courts to grant relief on the merits. This would render the statute of limitations redundant: a motion is timely only if this Court has already decided that it is correct on the merits, but if this Court has not already decided that it is correct on the merits, it is untimely.

Brown reads out of existence the term "asserted." To "assert" means to "state positively," or to "invoke or enforce a legal right." Black's Law Dictionary 139 (10th ed. 2014). There is no assumption in common usage or in law that one's assertions are necessarily correct. To the contrary. As this Court has put it, a § 2255 motion is timely if filed within one year of the date of the decision from which it "[seeks] to benefit." *Dodd v. United States*, 545 U.S. 353, 360 (2005).

Under the correct interpretation of § 2255(f)(3), motions filed within one year of *Johnson* by prisoners sentenced under the advisory Guidelines were timely, but were wrong on the merits.[6] Likewise, motions asserting a right within one year of a later

[6] If such a motion were filed after *Beckles*, it would be dismissed under Rule 4(b) of the § 2255 Rules.

case applying *Johnson* (such as *Dimaya*) are unlikely to be timely because this Court "initially recognized" the right asserted in *Johnson*. Under this correct reading, courts held that motions filed within a year of *Descamps* were untimely because this Court had "initially recognized" the right asserted in previous cases. *See supra* pages 23-24.

For prisoners like Petitioner, the Fourth Circuit's reading of § 2255(f)(3) is a logical and practical impossibility. If the "right initially recognized by the Supreme Court" requires a precise holding by this Court, it would be impossible for this Court to ever recognize the right or any court to adjudicate the merits. None of these prisoners has an active direct appeal, and more than one year has passed since their convictions became final. 28 U.S.C. § 2255(f)(1). Section 2255 motions would always be premature if this Court had not precisely decided the issue, and this Court could never precisely decide the issue because it would always be too early, in "an infinite loop." *Zuniga-Munoz v. United States*, No. 1:02-cr-124, Doc. 79, at 8 (W.D. Tex. Apr. 26, 2018) (rejecting this position and recommending that district court grant defendant's motion, which court did, *see* Doc. 81); *see also United States v. Chambers*, No. 01-cr-172, 2018 WL 1388745, at *2 (N.D. Ohio Mar. 20, 2018) (expressing skepticism of *Raybon* for this reason and granting certificate of appealability). There could be no "future case" to "wait for." *Brown*, 868 F.3d at 303.

D. The Fourth Circuit misinterpreted *Beckles*.

Finally, the *Brown* majority reasoned that *Beckles* "confirms" that *Johnson* did not "invalidat[e] all residual clauses," and therefore "demonstrates that quacking like ACCA is not enough to bring a challenge within the purview of the right recognized by

Johnson." 868 F.3d at 302-03. But a rule need not apply to every situation or not at all, and *Beckles* decided only that motions relying on *Johnson* in *advisory* Guidelines cases were wrong on the merits. If anything, *Beckles* confirmed that *Johnson* "recognized" the right Petitioner asserts. *Beckles* created an exception to the rule announced in *Johnson* for the advisory Guidelines, not because the Guidelines' residual clause is any less vague than the ACCA's, but because the advisory Guidelines, unlike the ACCA or the mandatory Guidelines, do not "fix the permissible range of sentences." 137 S. Ct. at 894-95.

The *Brown* majority also misstated Justice Sotomayor's footnote 4 to say that *Beckles* "expressly left open" and "expressly declined to address" whether *Johnson* applies to the mandatory Guidelines' residual clause, and concluded from this that "the right, by definition, has not been recognized." 868 F.3d at 299 n.1, 300. *Beckles* did not and could not "expressly leave open" or "expressly decline to address" whether *Johnson* applies to the mandatory Guidelines' residual clause because a mandatory Guidelines case was not before the Court. *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring) ("That question is not presented by this case."). Accurately read, Justice Sotomayor noted that the Court's reasoning in reliance on the "distinction between mandatory and advisory rules" left open the merits question in a mandatory Guidelines case not then before the Court.[7]

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[7] In contrast to the Fourth Circuit, the Second Circuit, in an unpublished opinion, recognized that *Beckles* held only that the advisory Guidelines were not amenable to a vagueness challenge but did not foreclose such a challenge to the mandatory Guidelines' residual clause. The court authorized the successive motion and instructed the district court to consider staying the case pending "relevant"

III. This Court Should Reach the Merits and Hold That *Johnson* Invalidates the Mandatory Guidelines' Residual Clause.

This Court should reject the Fourth Circuit's reading of § 2255(f)(3), and reach the merits. The residual clause of the mandatory career offender provision is unconstitutionally vague for the same reasons that the residual clause of the ACCA is unconstitutionally vague. The text and mode of analysis are identical, and like the ACCA, the law under which Petitioner was sentenced "fix[ed] the permissible range of sentences." *Beckles*, 137 S. Ct. at 892.

That law, 18 U.S.C. § 3553(b), made the Guidelines "mandatory and impose[d] binding requirements on all sentencing judges." *United States v. Booker*, 543 U.S. 220, 259 (2005); *id.* at 245 (§ 3553(b) was the "provision of the federal sentencing statute that ma[de] the Guidelines mandatory"). By virtue of § 3553(b), the Guidelines "had the force and effect of laws." *Id.* at 234; *see also Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("[T]he Guidelines bind judges and courts in . . . pass[ing] sentence in criminal cases."); *Stinson v. United States*, 508 U.S. 36, 42 (1993) ("[T]he Guidelines Manual is binding on federal courts."); *Dillon v. United States*, 560 U.S. 817, 820 (2010) ("As enacted, the SRA made the Sentencing Guidelines binding.").

Section 3553(b) required that "the court 'shall impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited circumstances." *Booker*, 543 U.S. at 234. Departure was not permitted unless the Commission had "not adequately" taken a circumstance into account, to be

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decisions, including *Dimaya*. *See Vargas v. United States*, No. 16-2112, 2017 WL 3699225, at *1 (2d Cir. May 8, 2017).

determined by considering "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission," 18 U.S.C. § 3553(b) (emphasis added), all of which were "binding." *Stinson*, 508 U.S. at 42-43. Thus, "[i]n most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible." *Booker*, 543 U.S. at 234.

Accordingly, this Court repeatedly recognized that the mandatory Guidelines fixed the permissible range of sentences. *Booker*, 543 U.S. at 226 (observing that "binding rules set forth in the Guidelines limited the severity of the sentence that the judge could lawfully impose"); *id.* at 227 (factual findings "mandated that the judge select a sentence" within range); *id.* at 236 (judge, not jury, "determined upper limits of sentencing"). Courts were not "bound only by the statutory maximum," *id.* at 234, and there was no difference between the guideline maximum and "the prescribed statutory maximum," *id.* at 238.

Because the law under which Petitioner was sentenced "fixe[d] permissible sentences," it was required to "provide[] notice and avoid[] arbitrary enforcement by clearly specifying the range of penalties available." *Beckles*, 137 S. Ct. at 895. By combining an ordinary-case requirement and an ill-defined risk threshold, *Johnson*, 135 S. Ct. at 2557-58, the mandatory Guidelines' residual clause failed to clearly specify the range of penalties available. *Beckles*, 137 S. Ct. at 894. As the Court reiterated in *Beckles*, "due process . . . require[d] notice in a world of mandatory Guidelines." *Id.* at 894 (quoting *Irizarry v. United States*, 553 U.S. 708, 713-14 (2008)). The mandatory Guidelines' residual clause also invited arbitrary enforcement. It left

judges "free . . . to prescribe the sentences or sentencing ranges available," "without any legally fixed standards." *Id.* at 894-95 (internal citations omitted).

IV. The Questions Presented Are Exceptionally Important and Urgently in Need of Resolution by This Court.

If *Johnson* indeed invalidates the mandatory career offender guideline's residual clause, numerous federal prisoners are serving unlawful sentences. Nearly 1,200 prisoners sentenced as career offenders before *Booker* have pending § 2255 motions or appeals challenging their sentences in light of *Johnson*. *See* Brief of Fourth Circuit Federal Defenders as Amicus Curiae Supporting Appellant, at 1 & Add. 1a-5a, *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017) (No. 16-7056, Doc. 62).[8] Cases in the First Circuit are proceeding, but most others remain in limbo, awaiting definitive action by this Court. These prisoners have all served over thirteen years of potentially unlawful sentences, and many would be eligible for immediate release. As an indication, the career offender enhancement increased the average guideline minimum from 70 to 188 months for nearly half of defendants sentenced as career offenders in fiscal year 2017, and from 84 to 188 months for nearly a third of the remaining career offenders.[9]

Meanwhile, prisoners with meritorious claims are receiving disparate treatment by different courts across the country. In the Eleventh Circuit, all possibility of relief

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[8] This does not include many prisoners whose applications to file a successive motion were denied, primarily by the Eleventh Circuit, as they have no case pending.

[9] *See* U.S. Sentencing Comm'n, *Quick Facts: Career Offenders* (May 2018), *available at* https://www.ussc.gov/research/quick-facts (last accessed June 13, 2018).

has thus far been foreclosed. In the Sixth Circuit, some district courts are denying motions and certificates of appealability, while others are granting certificates of appealability.[10] Many cases in the Fourth Circuit are being held pending action by this Court.[11] In the Third, Seventh and Ninth Circuits, most cases have been stayed pending resolution of appeals.[12] Finally, in the First Circuit and in scattered cases elsewhere, movants are being resentenced.

V. This Case Provides an Excellent Vehicle for Deciding the Questions Presented.

This petition cleanly presents the issues, and their resolution should be outcome-determinative. Petitioner was sentenced as a career offender in 2003, when the Guidelines were binding on the sentencing judge as a matter of law. The career offender guideline mandated a range, the low end of which was 68 months higher than the otherwise permissible range. In light of recent decisions from this Court and the circuit courts, the enhancement depended on prior convictions that could have qualified as a "crime of violence" only under the residual clause. Petitioner's appeal of the district court's denial of his § 2255 motion thus largely rose and fell on whether *Johnson* invalidated the residual clause.

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[10] *See* Petition for Writ of Certiorari 31-32, *Raybon v. United States*, No. 17-8878 (U.S. May 7, 2018) (collecting cases).

[11] *See, e.g.*, Order, *United States v. Rumph*, No. 17-7080 (4th Cir. Apr. 6, 2018) (Doc. 21); Order, *Brown v. United States*, No. 01-cr-00377 (D. Md. Apr. 23, 2018) (Doc. 119).

[12] *See United States v. Green*, No. 17-2906 (3d Cir.) (argument recalendared for June 13, 2018); *United States v. Cross*, ___ F.3d ____, 2018 WL 2730774 (7th Cir. 2018) (decided June 7, 2018); *United States v. Blackstone*, No. 17-55023 (9th Cir.) (argued April 11, 2018).

If Petitioner were resentenced today without the career offender enhancement, his guideline range would be significantly reduced. Finally, there is no possibility that the case would become moot, as Petitioner's current release date is July 30, 2029.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted. In the alternative, the case should be held until the Court rules on similar cases presenting the issues raised here and considered at that time.

Respectfully submitted,

GEREMY C. KAMENS
Federal Public Defender
for the Eastern District of Virginia

Frances H. Pratt
Assistant Federal Public Defender
Counsel of Record
Office of the Federal Public Defender
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Fran_Pratt@fd.org

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