No. ___________

IN THE
Supreme Court of the United States

JOHN ELWOOD BUCKNER,
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

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QUESTION PRESENTED

Whether the Fourth Circuit incorrectly denied a certificate of appealability on Petitioner's claim when he argued that the residual clause of the mandatory career offender guideline was void for vagueness after *Johnson v. United States.*

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner John Buckner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. Petitioner requests that the Court grant his petition and remand his case for the Fourth Circuit Court of Appeals to issue a Certificate of Appealability ("COA"), or, in the alternative, to stay his case until it is definitively decided whether the residual clause of the mandatory sentencing guidelines is void for vagueness pursuant to *Johnson v. United States,* 135 S. Ct. 2552 (2015).

OPINIONS BELOW

The Fourth Circuit's unpublished per curiam opinion denying a certificate of appealability and dismissing Petitioner's appeal is reported at 714 Fed. App'x. 273 (4th Cir. 2018), and included in the Appendix at A-1. The United States District

Court's order denying Petitioner's motion to vacate his sentence under 28 U.S.C. § 2255 is included in the Appendix at A-3. The United States District Court's order denying Petitioner's motion for reconsideration is in the Appendix at A-4.

JURISDICTION

The court of appeals issued its decision on March 12, 2018. A-1. This petition is being filed within 90 days of the denial of rehearing, and so is timely under Rule 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

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

28 U.S.C. § 2255(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.

28 U.S.C. § 2253(c):

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

18 U.S.C. § 924(e)(2)(B):

(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; . . .

U.S.S.G. § 4B1.2(a) (2002):

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.

INTRODUCTION

Petitioner's claim rests upon a question that has been answered in different ways in different courts. He claims his career offender sentence under the mandatory guidelines was unconstitutional following *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Fourth Circuit rejected Petitioner's appeal of the District Court's denial of his request for a certificate of appealability ("COA"), even though the Fourth Circuit had previously issued a COA in the case of *United States v. Brown*[1] on the same issue asserted by Petitioner. Other Circuits have also inconsistently applied and withheld relief based on this same claim.

Recently, the United States Court of Appeals for the Seventh Circuit found claims challenging career offender sentences under the mandatory guidelines void for vagueness, timely, and meritorious. In the consolidated cases of *Cross v. United States*, No. 17-2282, and *Davis v. United States*, No. 17-2724, __ F.3d __, 2018 WL 2730774 (7th Cir. June 7, 2018) the Seventh Circuit held the right asserted by Cross and Davis "was recognized in *Johnson,"* and therefore timely. *Id.* at 7. By filing their petitions within one year of *Johnson,* Davis and Cross "complied with the limitations period of section 2255(f)(3)." *Id.* at 8. The Seventh Circuit also held Cross and Davis were entitled to relief on the merits, and that the mandatory guidelines' residual clause was "subject to attack on vagueness grounds." *Id.* at 33.

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[1] Order, *United States v. Brown*, No. 16-7056 (4th Cir.) (Doc. 14, Dec. 7, 2016).

In light of the Seventh Circuit's recent decision, reasonable jurists have indeed found that the Fourth Circuit and District Court's assumption that the Supreme Court's decision in *Beckles v. United States,* 137 S. Ct. 886 (2017) foreclosed any relief for Petitioner was and is wrong. Petitioner asks that his petition be granted and his case remanded for the Fourth Circuit to issue a COA, or, in the alternative, for his case to be stayed pending this Court's determination that the mandatory career-offender guidelines are void for vagueness after *Johnson.*

STATEMENT OF THE CASE

A. Legal Background

1. 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.

2. The career offender provision of the Guidelines increases the guideline range by tying the offense level to the statutory maximum for the instant offense, and automatically placing the defendant in Criminal History Category VI. U.S.S.G.

§ 4B1.1 (2002). 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." *Id.* § 4B1.1(a).

3. 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," *id.* § 4B1.2(a)(2), and this clause, identical to the ACCA's, 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").

4. Nearly every court of appeals to consider the issue, the Department of Justice, and the Sentencing Commission understood that *Johnson* directly invalidated the identical residual clause of the career offender guideline.[2] Many prisoners sentenced under the guidelines' residual clause, including Petitioner, diligently filed § 2255 motions within one year of *Johnson*, asserting the right recognized in *Johnson*. Those motions were timely, and many prisoners were granted relief.[3]

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[2] *See Beckles*, 137 S. Ct. at 902 n.3 (collecting cases) (Sotomayor, J., concurring); U.S.S.G., Supp. App. C, Amend. 798 (Aug. 1, 2016) (Reason for Amendment) (striking the residual clause in light of *Johnson*).

[3] Reply Brief of Petitioner at App.1-14 (Re-Sentencings After Johnson), *Beckles v. United States*, 137 S. Ct. 886 (2017) (No. 15-8544) (60 prisoners sentenced under the guidelines' residual clause obtained relief under § 2255 as of October 28, 2016).

5. On March 6, 2017, in *Beckles v. United States*, 137 S. Ct. 886 (2017), 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." *Id.* at 892.[4] 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," *id.* at 894, because district courts do not "enforce" the advisory guidelines, but rely on them "merely for advice in exercising [their] discretion," *id.* at 895. The pre-*Booker* 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." *Beckles* 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,

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[4] Beckles' motion, filed within one year of the date on which his conviction became final, *Beckles*, 137 S. Ct. at 891, was timely under § 2255(f)(1).

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).

6. In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), this Court applied *Johnson* to the residual clause in a different statute, 18 U.S.C. § 16(b), with slightly different wording, subject to the same "ordinary case" analysis. 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.

B. Procedural Background

1. On October 17, 2001 Petitioner pled guilty to conspiring to distribute controlled substances. A-31. The probation officer applied the career offender enhancement without indicating in the presentence report which convictions were used as predicates. A-5. Four of the convictions in Petitioner's criminal history might have been relied upon, at the time the report was written, as crimes of violence. They were:

1986 2nd degree rape, Maryland

1988 assault with intent to murder, robbery with a deadly weapon, Maryland (concurrent)

1990 battery, Maryland

A-5. Recent case law suggests Petitioner's convictions for 2nd degree rape, assault with intent to murder, and battery were not crimes of violence after *Johnson*. The District Court sentenced Petitioner to 250 months. He has been in custody since March 31, 2000. A-30. Petitioner has served approximately 221 months. His current release date is January 12, 2019.[5] The District Court entered judgment on April 9, 2002. A-13.

2. After being sentenced in 2002, Petitioner filed a *pro se* § 2255 motion that was dismissed by the Court as untimely. *See Buckner v. United States*, No. 2:05-cv-705-PMD, slip op. (D.S.C. Nov. 10, 2005), *appeal dismissed sub nom. United States v. Buckner*, 167 F. App'x 979 (4th Cir. 2006) (per curiam). He filed another *pro se* motion to reduce his sentence on December 23, 2014 based on a USSC Amendment that was ultimately denied by the District Court.

3. On April 8, 2016, with the assistance of counsel, Petitioner filed a third motion to vacate under 28 U.S.C. § 2255 and claimed relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). A-5. He argued that three of the four convictions that could have been used as predicates for his career offender status—2nd degree rape, assault with intent to murder, and battery—were not predicate crimes of violence after *Johnson*. A-5.[6] Thus, he was not a career offender.

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[5] Federal Bureau of Prisons, Inmate Locator, https://www.bop.gov/inmateloc/.

[6] Because his two 1988 convictions (assault with intent to murder and robbery with a deadly weapon) stemmed from the same set of facts or circumstances, they would count as a single predicate. A-5,6.

The Government filed a motion to dismiss on the grounds that Petitioner's motion was untimely, that § 2255 could not be used to challenge a Guidelines enhancement, and that *Johnson* was not retroactive. A-12. The Government did not address the merits of Petitioner's claim that he did not have 2 prior convictions that were crimes of violence. *Id.*

Following Petitioner's response in opposition, the District Court ordered that his motion be transferred to the Fourth Circuit to determine whether or not Petitioner had permission to file a second or successive 28 U.S.C. § 2255 motion. A-27, 31.

4. On July 26, 2016 the Fourth Circuit authorized Petitioner's successive application for post-conviction relief. A-34. On August 19, 2016 the District Court denied the Government's motion to dismiss and ordered additional briefing on the merits of whether 2 of Petitioner's prior convictions were crimes of violence. A-36. The Government did not brief the merits of Petitioner's claim. Instead, it requested that the case be stayed pending the Supreme Court's decision in *Beckles*. *Id.*

5. On October 13, 2016 the District Court granted the Government's motion and stayed Petitioner's case pending the Supreme Court's decision in *Beckles.* A-43. It also ordered that "[i]f the Government determines its position is that Mr. Buckner's career-offender designation would survive even a defense-friendly decision in *Beckles*, it shall file a brief so stating before the *Beckles* decision is issued." *Id.* To date, the Government has filed no such brief.

6. On March 6, 2017 this Court issued its opinion in *Beckles*. The same day, the District Court lifted its previous stay and denied Petitioner's § 2255 motion on the ground that *Beckles* "squarely rejected" the argument that the residual clause of U.S.S.G § 4B1.2(a)(2) is void for vagueness. A-3. The District Court also declined to issue a certificate of appealability. *Id.* On March 17, 2017 Petitioner filed a motion for reconsideration, and on March 24, 2017 Petitioner filed a notice of appeal of final judgment on the order on the motion to vacate. A-46. On April 11, 2017 the District Court denied Petitioner's motion for reconsideration. A-4.

7. On August 16, 2017 the Fourth Circuit placed Petitioner's case in abeyance pending a decision in *United States v. Thilo Brown,* No. 16-7056. A-48. On August 21, 2017 a divided panel of the Fourth Circuit affirmed *Brown*, holding the motion untimely under § 2255(f)(3). On February 26, 2018, the Fourth Circuit denied rehearing and rehearing en banc, over Chief Judge Gregory's written dissent. *United States v. Brown,* No. 16-7056 (4th Cir. Feb. 26, 2018).

8. Following *Brown*, on March 12, 2018 the Fourth Circuit denied Petitioner a certificate of appealability and dismissed Petitioner's appeal. A-1.

REASONS FOR GRANTING THE WRIT

The standard for a grant of a COA is found in 28 U.S.C. § 2253(c)(2). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." When reviewing a denial on the merits, a petitioner must demonstrate that reasonable jurists would find that the district court's assessment

of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 472, 482-84 (2000).

The District Court's denial of Petitioner's § 2255 motion was based on an incorrect reading of *Beckles* and its impact on career offender cases. The District Court never considered the merits of whether or not Petitioner's underlying convictions were appropriately considered as crimes of violence. Instead, the District Court decided the relief Petitioner sought was unavailable to him because *Beckles* "squarely rejected" the argument that the residual clause of U.S.S.G § 4B1.2(a)(2) is void for vagueness. A-3. However, the holding of *Beckles* is only "that the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that §4B1.2(a)'s residual clause is not void for vagueness." *Beckles* at 897. The District Court and Fourth Circuit's assessment that *Beckles* foreclosed any relief for Petitioner is debatable, as demonstrated by the split among and within the circuits on the issue of whether defendants could get relief from their career offender guidelines assigned under the residual clause of the mandatory guidelines.

Furthermore, when the Fourth Circuit denied Petitioner's request for a COA it created inconsistencies with other cases in the Fourth Circuit where a COA was granted on the same issue—most obviously, in the case of *United States v. Thilo Brown*.[7] Inconsistencies on who gets a COA also exists amongst other circuits.

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[7] Order, *United States v. Brown*, No. 16-7056 (4th Cir.) (Doc. 14, Dec. 7, 2016).

Whether or not relief from the residual clause in the mandatory career offender guidelines is available is a question available for this Court to consider in *Brown* or other petitions. In the interim, Petitioner seeks either the remand of his case to the Fourth Circuit for the issuance of a certificate of appealability, or the stay of his case pending a definitive answer to the question of whether or not the mandatory career offender guidelines are void for vagueness following *Johnson.* This result would be in line with other Fourth Circuit cases being held pending action by this Court, and other courts throughout the United States.

I. There Is an Entrenched Split Among and Within the Circuits On Whether *Johnson* invalidates the mandatory guidelines' residual clause.

While the District Court treated *Beckles* as a square rejection of Petitioner's request for relief pursuant to *Johnson,* other courts to consider the question have created an entrenched split.

A. The Seventh Circuit has ruled that § 2255 motions claiming Johnson invalidates mandatory guidelines' residual clause asserts the right recognized in Johnson and that the clause is unconstitutionally vague.

On June 7, 2018, the United States Court of Appeals for the Seventh Circuit issued an opinion in the consolidated cases of *Cross v. United States*, No. 17-2282, and *Davis v. United States*, No. 17-2724, __ F.3d __, 2018 WL 2730774 (7th Cir. June 7, 2018). The decision deepens the conflict among the courts of appeals on both questions. On the question of timeliness, the Seventh Circuit decision directly conflicts with the decision below in this case, and with the Sixth and Tenth Circuits' decisions in *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017) and *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018), and agrees with the First Circuit's

decision in *Moore v. United States*, 871 F.3d 72 (1st Cir. 2017). On the merits question, the Seventh Circuit disagreed with the Eleventh Circuit's decision in *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

As in Petitioner's case, district courts had to increase the sentences of Cross and Davis in accordance with the pre-*Booker* mandatory career-offender guideline, U.S.S.G. § 4B1.1. They both had prior convictions which were "crimes of violence" under the residual clause. *Id.* § 4B1.2(a)(2). Like Petitioner, Cross and Davis filed a first § 2255 motion within one year of *Johnson*, claiming their sentences are unconstitutional because *Johnson* recognized "[t]he right not to be sentenced under a rule of law using [the] vague language" of the residual clause." *Cross*, slip op. at 7.

The Seventh Circuit held that these motions complied with § 2255(f)(3) and were thus timely because Cross and Davis asserted the right recognized in *Johnson*, *i.e.*, the "right not to have [a] sentence *dictated* by the unconstitutionally vague language of the mandatory residual clause." *Id.* at 8. In holding the motions timely, the court identified the disagreement among the circuit courts, *id.* at 7 (comparing *United States v. Brown*, 868 F.3d 297, 301-04 (4th Cir. 2017); *Raybon*, 867 F.3d at 629-31, *with Moore*, 871 F.3d at 80-84), and sided with the First Circuit, *id.* The Seventh Circuit rejected the government's argument that § 2255(f)(3)'s requirements could not be met "unless and until the Supreme Court explicitly extends the logic of *Johnson* to the pre-*Booker* mandatory guidelines." *Cross*, slip op. at 7. According to the Seventh Circuit, the approach taken by the government, and the Fourth, Sixth, and Tenth Circuits, "suffers from a fundamental flaw":

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

Id. at 7.

The court acknowledged that the right Cross and Davis asserted "was recognized in *Johnson*": the "right not to have his sentence *dictated* by the unconstitutionally vague language of the mandatory residual clause." *Id.* at 7–8. By filing their petitions within one year of *Johnson*, Davis and Cross "complied with the limitations period of section 2255(f)(3)." *Id.* at 8.

The Seventh Circuit also held that both Cross and Davis were entitled to relief on the merits. The court concluded that the "same two faults" that render the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)—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." *Cross*, slip op. at 19. It "hardly could be otherwise" because the clauses are identically worded and the categorical approach applies to both. *Id.* at 19-21. The court further explained that the majority and concurring opinions in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) "reconfirm[ed]" the court's view that the guidelines' residual clause "shares the weaknesses that *Johnson* identified in the ACCA." *Id.* at 22; *id.* at 22–25.

Finally, 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. *Cross*, slip op. at 28-33. The court explained that *Beckles v. United States*, 137 S. Ct. 886 (2017) merely "reaffirmed that the void-for-vagueness doctrine applies to 'laws that *fix the permissible sentences* for criminal offenses.'" *Id.* at 30 (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.* at 30–31. In contrast to advisory guidelines, the Seventh Circuit explained that *mandatory* guidelines implicated "the concerns of the vagueness doctrine." *Id.* at 30. Consequently, "the 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 32. 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 court held that the mandatory guidelines "are thus subject to attack on vagueness grounds." *Id.* at 32-33.

B. Three circuits have denied § 2255 motions that claim Johnson invalidates the mandatory guidelines' residual clause.

The Fourth, Sixth, and Tenth Circuits 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*. These Circuits have held that the only right *Johnson* recognized was the 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); *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018).

All three circuits relied on caselaw 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,* 489 U.S. at 308). 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 Petitioner's claim 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.").

C. 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 became binding circuit precedent barring relief on the merits for any first or successive § 2255.

A different Eleventh Circuit panel sharply disagreed—"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).

D. Two other circuits, as well as circuit and district court judges, have made clear that § 2255 motions claiming that *Johnson* invalidates the mandatory guidelines' residual clause assert a right recognized in *Johnson*.

Other circuits, circuit judges, and district court judges disagree with the reasoning and conclusions of *Brown*, *Raybon*, *Greer*, and *Griffin*. In his dissent in *Brown*, Chief Judge Gregory examined whether there is any relevant distinction between the mandatory guidelines' and the ACCA's residual clauses, found none, and concluded that Petitioner had asserted the right recognized in *Johnson* and that he is entitled to relief on the merits. *Brown*, 686 F.3d at 304-11 (Gregory, C.J., dissenting).

In *United States v. Moore*, 871 F.3d 72 (1st Cir. 2017), the First Circuit held that a § 2255 motion claiming that *Johnson* invalidates the pre-*Booker* career offender guideline's residual clause was timely because it was filed within one year of *Johnson*, *id.* at 77 n.3. The First Circuit 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).

The Third Circuit, in *In re Hoffner*, 870 F.3d 301 (3d Cir. 2017), 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)).[8] The Third Circuit declined to follow *Griffin*, in substance or procedure. *Id.* at 310 & n.13.

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" decisions including *Dimaya*. *See Vargas v. United States*, No. 16-2112, 2017 WL 3699225, at *1 (2d Cir. May 8, 1017).

Before and after *Moore,* district courts within the First Circuit have found these motions timely and granted relief on the merits. *See United States v. Roy*, 282 F. Supp. 3d 421, 425-28 (D. Mass. 2017) (relying on *Moore* to hold that for purposes of timeliness, "the rule Roy relies on here is the rule announced in

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

Johnson II," that rule "is retroactive to cases on collateral review," and the residual clause of the mandatory career offender guideline is void for vagueness); *United States v. Hardy*, No. 00-cr-10179 (D. Mass. Jan. 26, 2018) (oral ruling, Dkt. #69); *Reid v. United States*, 252 F. Supp. 3d 63 (D. Mass. 2017) (holding before *Moore* that the pre-*Booker* guidelines' residual clause violates the Due Process Clause under *Johnson*, and rejecting government's argument that *Beckles* applies to sentences imposed under the mandatory guidelines). After *Moore*, the government has not appealed, or has abandoned its appeals of such rulings.

Other district courts have expressly disagreed with *Brown*, *Raybon* and *Greer.* A district court in the Sixth Circuit granted a certificate of appealability, reasoning that "the *right* vindicated in *Johnson* was the right to be free from unconstitutionally vague statutes that fail to clearly define 'crime of violence' or 'violent felony,' not simply the right not to be sentenced under the residual clause of the ACCA," and that *Raybon*'s "excessively narrow construction" of § 2255(f)(3) "invites Potemkin disputes about whether the Supreme 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. 01-cr-172, 2018 WL 1388745, at *2 (N.D. Ohio Mar. 20, 2018). A magistrate judge in the Western District of Texas recently recommended that relief be granted, rejecting the reasoning of *Brown*, *Raybon* and *Greer*, embracing that of *Moore* and Chief Judge Gregory's dissent in *Brown*, and recognizing that *Dimaya* "adds significant weight to this position." *Zuniga-Munoz*

v. United States, No. 16-cv-0732, slip op. at 8-10 (W.D. Tex. Apr. 26, 2018); *see also United States v. Meza*, No. 11-cr-00133, 2018 WL 2048899 (D. Mont. May 2, 2018) (rejecting government's argument based on *Greer* that *Johnson* announced only "a defendant's right not to have his sentence increased under the residual clause of the ACCA," as *Dimaya* confirms that the "right" established by *Johnson* is the "right not to be penalized under a clause that is applied by categorical analysis and has both an ordinary-case requirement and an ill-defined risk threshold").[9]

Meanwhile, appeals by § 2255 movants are pending in two circuits: *United States v. Blackstone*, No. 17-55023 (9th Cir.) (argued April 11, 2018); *United States v. Green*, No. 17-2906 (3d Cir.) (argument calendared for June 11, 2018).

II. The Fourth Circuit Court of Appeals Has Created Inconsistencies Within the Circuit and With Other Circuits As to Whom is Granted a COA When They Claim Relief from the Residual Clause of the Mandatory Career Offender Guideline Pursuant to *Johnson*.

Prisoners with the same meritorious claims are receiving disparate treatment by different courts across the country. Cases in the Fourth Circuit are being held

[9] *See also, e.g.*, *Brow v. United States*, No. 90-cr-00048, slip op. at 14-17 (D.V.I. Apr. 20, 2018) (finding that a "straightforward application of *Johnson* is appropriate," and recommending sentence be vacated); *Long v. United States*, No. 16-cv-4464, 2017 WL 6886299, at *2 (C.D. Cal. Sept. 15, 2017) (holding motion timely and granting relief on the merits); *United States v. Parks*, No. 03-cr-00490, 2017 WL 3732078, at **2-7, 11-12 (D. Colo. Aug. 1, 2017) (holding before *Greer* that mandatory guidelines' residual clause implicates the twin concerns of the vagueness doctrine, and motion was timely); *United States v. Walker*, No. 93-cr-00333, 2017 WL 3034445, at *5 (N.D. Ohio July 18, 2017) (holding before *Raybon* that "[b]ecause the pre-*Booker* mandatory Sentencing Guidelines are sufficiently statute-like to be subject to vagueness analysis, *Johnson* applies directly").

pending action by this Court.[10] Most glaringly, in the *Brown* case, Thilo Brown was granted a COA on the same issue asserted by Petitioner in this case.[11]

In the Sixth Circuit, some district courts are denying motions and certificates of appealability, while others are granting certificates of appealability.[12] In the Eleventh Circuit, all possibility of relief has thus far been foreclosed. In the Third, Seventh and Ninth Circuits, most cases have been stayed pending resolution of appeals.[13] Meanwhile, in the First Circuit and in scattered cases elsewhere, movants are being resentenced.

III. The District Court's Assessment of Petitioner's Constitutional Claims is Wrong.

Petitioner should have been issued a COA. He made, as required by 28 U.S.C. § 2253(c)(2), "a substantial showing of the denial of a constitutional right." Petitioner has claimed that he was unconstitutionally sentenced as a career offender, and that pursuant to *Johnson,* he should not be subject to a sentence fixed by vague language that violated his Fifth amendment due process right.

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

[11] Order, *United States v. Brown*, No. 16-7056 (4th Cir.) (Doc. 14, Dec. 7, 2016).

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

[13] *See Cross v. United States*, No. 17-2282 (7th Cir.) (argued Jan. 10, 2018); *United States v. Blackstone*, No. 17-55023 (9th Cir.) (argued April 11, 2018); *United States v. Green*, No. 17-2906 (3d Cir.) (argument calendared for June 11, 2018).

The District Court denied relief on the merits, while other cases within the Fourth Circuit and other districts received the remedy sought by Petitioner. These other cases provide proof that "reasonable jurists would"—and indeed did—" find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 474, 484 (2000). Petitioner should have the ability to proceed with his claim.

CONCLUSION

The petition should be granted, and Petitioner's case remanded to the Fourth Circuit for a certificate of appealability or stayed pending a dispositive case.

Respectfully submitted,

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