NO:

In the Supreme Court of the United States

ROGER SWAIN,

***Petitioner*,**

v.

UNITED STATES of AMERICA,

***Respondent*.**

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) In *Johnson v. United States (Johnson II)*, 135 S. Ct. 2551 (2015), this Court held unconstitutionally vague the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). In *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson II* announced a new substantive rule of constitutional law retroactively applicable to cases on collateral review. Roger Swain was sentenced as a career offender under the identically worded residual clause of the then-mandatory guidelines, U.S.S.C. § 4B1.2. The Sixth Circuit authorized his second or successive § 2255 motion within one year of *Johnson II*, asserting that its rule renders his sentence unconstitutional.

Did Mr. Swain file his § 2255 motion within one year of "the date on which the right asserted was initially recognized by the Supreme Court," which "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"? 28 U.S.C. § 2255(f)(3).

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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Roger Swain respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's unpublished order denying a certificate of appealability from the denial of Mr. Swain's second or successive 28 U.S.C. § 2255 motion to vacate the judgment notwithstanding *Johnson v. United States*, 135 S. Ct. 2551 (2015), is included in the Appendix at A-1. The district court's unreported order denying Mr. Swain's second or successive 28 U.S.C. § 2255 motion to vacate is included in the Appendix at A-2. The district court's order denying a certificate of appealability is

included in the Appendix at A-3. The Sixth Circuit's unpublished order granting authorization to file Mr. Swain's second or successive 28 U.S.C. § 2255 motion to vacate is included in the Appendix at A-4.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2012) and Part III of the Rules of the Supreme Court of the United States. The court of appeals issued an order denying a certificate of appealabilty on May 9, 2018. ,This petition is filed within 90 days of that order and so this petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISION INVOLVED

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

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

STATUTORY PROVISIONS INVOLVED

Section 2255 of Title 28 states in pertinent part:

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * *

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

* * *

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . . .

28 U.S.C. § 2255(f)(3) (2012).

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

§ 924. Penalties

* * *

(e)(2) As used in this subsection –

* * *

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

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

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

18 U.S.C. § 924(e)(2)(B) (2012).

Section 3553 of Title 18 states, in pertinent part:

§ 3553. Imposition of a sentence

* * *

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

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

18 U.S.C. § 3553(b)(1) (2012).

Section 3742 of Title 18 states, in pertinent part:

§ 3742. Review of a sentence

* * *

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

(1) was imposed in violation of law;

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

(3) is outside the applicable guideline range, and

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

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

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

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

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

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

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

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

18 U.S.C. §3742(e) (2012).

U.S. SENTENCING GUIDELINES PROVISIONS INVOLVED

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

§ 4B1.1. Career Offender

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

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

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

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

U.S.S.G. § 4B1.1(a) (2004).

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

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

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –

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

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

U.S.S.G. § 4B1.2 (2004).

INTRODUCTION

Roger Swain is one of many federal prisoners whose sentence was fixed by the residual clause of the mandatory career-offender guideline, U.S.S.G. § 4B1.2(a)(2) (2004). In *Johnson v. United States (Johnson II)*, 135 S. Ct. 2551 (2015), this Court held unconstitutionally vague the identically worded residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii) (2012). In *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson II* announced a new substantive rule of constitutional law retroactively applicable to cases on collateral review.

Less than one year after *Johnson II*, Mr. Swain filed an authorized second or successive 28 U.S.C. § 2255 (2012) motion to vacate, set aside, or correct his sentence, asserting that *Johnson II* recognized a new, retroactive rule that entitles him to a resentencing. The district court denied the motion as untimely pursuant to *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017) and denied a certificate of apealability. Mr. Swain appealed. The Sixth Circuit Court of Appeals relying on *Raybon,* likewise denied a certificate of appealability..

This petition presents the important question: whether petitioners who were sentenced as career offenders under the mandatory guidelines filed timely 28 U.S.C. § 2255 motions if they filed their motions within one year of *Johnson II*

This question is one that has divided the lower federal courts into two camps. Some hold that motions like Mr. Swain's are timely, and others hold the opposite.

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

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

With this petition this Court has an opportunity to explain how § 2255's statute of limitations applies. It should be granted.

STATEMENT OF THE CASE

1. In June 2004, a grand jury issued a two-count indictment alleging in Count One that Mr. Swain possessed with intent to distribute 50 grams or more of cocaine base and, in Count Two he possessed with intent to distribute cocaine base in an unspecified quantity, both in violation of 21 U.S.C. § 841(a)(1) (2004). By plea agreement, Mr. Swain pleaded guilty to Count One, and the government dismissed Count Two. He also stipulated that he would be held accountable for 150–500 grams of cocaine base, and so his base offense level under the Guidelines would be 34. The government agreed that Mr. Swain's sentence would be capped at the mid-point of the mandatory Guidelines range.

2. The government and Mr. Swain concurred that the total offense level would increase to 37 because he was a career offender as defined by U.S.S.G. § 4B1.1 (2004). At the time, the Guidelines mandated an increase to the base offense level

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

U.S.S.G. § 4B1.1(a).

3. Mr. Swain had two prior felony convictions which triggered the career offender provisions of the Sentencing Guidelines: (1) a 1993 conviction for assault with intent to rob while armed in violation of Mich. Comp. Laws § 750.89; and (2) a 2001 conviction for possession with intent to deliver marijuana, in violation of Mich.

Comp. Laws § 333.7401 (2000). Seeing these two convictions, the probation department found that Mr. Swain was a "career offender." That classification increased Mr. Swain's mandatory Guidelines range from 188 to 235 months of imprisonment to 262 to 327 months. When Mr. Swain was sentenced, the district court was bound by the Guidelines as a matter of law. *See* 18 U.S.C. § 3553(b) (2004); *United States v. Booker*, 543 U.S. 220, 233–34, 259 (2005). The district court sentenced Mr. Swain to 262 months of imprisonment.

4. At the time of Mr. Swain's sentencing, the Guidelines defined a "crime of violence" as follows:

> Any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.

U.S.S.G. § 4B1.2(a) (emphasis added).

The italicized clause is known as the residual clause, *Beckles v. United States*, 137 S. Ct. 886, 891 (2017). The practical effect of the residual clause was that few defendants, including Mr. Swain, challenged career-offender designations because of the way courts interpreted the residual clause. Mr. Swain did not appeal his sentence. Following this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), Mr. Swain filed a § 2255 motion challenging his sentence. That motion was denied and Mr. Swain did not appeal.

5. In June 2015, this Court recognized that defendants have a right not to have a sentence fixed by the unconstitutionally vague residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B). *Johnson II*, 135 S. Ct. at 2556–57, 2563. The ACCA's residual clause is identical to the Guidelines' residual clause in the definition of "crime of violence." *Compare* 18 U.S.C. § 924(e)(2)(B), *with* U.S.S.C. § 4B1.2(a)(2). Invoking *Johnson II*'s new retroactive rule, Mr. Swain filed a § 2255 motion within one year of this Court's opinion.

6. On August 2015, Mr. Swain sought authorization from the Sixth Circuit to file a second or successive § 2255 motion from the Sixth Circuit Court of Appeals based upon this Court's decision in *Johnson II*. The Sixth Circuit granted authorization on February 22, 2016.

7. In September 2017, district court denied Mr. Swain's § 2255 motion as untimely and denied a certificate of appealabilty relying on *Raybon v. United States,* 867 F.3d 627 (6th Cir. 2017).

8. Mr. Swain filed a notice of appeal. On May 9, 2019, the Sixth Circuit Court construed the notice of appeal as an application for a certificate of appealability and denied same relying on *Raybon*. Mr. Swain seeks a writ of certiorari from that order.

REASONS FOR GRANTING THE WRIT

Federal prisoners seeking to vacate, correct, or amend their sentences must file motions for relief under 28 U.S.C. § 2255 within one year of the date on which "the judgment became final" or "the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(1), (3). Section 2255(f)(3) therefore has three requirements: (1) that the petitioner assert a right newly recognized by the Supreme Court; (2) that the right has been made retroactive; and (3) that the petitioner filed the motion within one year of the Supreme Court's recognition of the new right. There is no dispute that Mr. Raybon filed his petition within one year of *Johnson II*. This Court has made *Johnson II*'s rule retroactive. *See Welch*, 136 S. Ct. at 1265.

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

I. This Court should clarify whether federal prisoners who were sentenced under the mandatory career-offender guideline filed timely § 2255 motions within one year of *Johnson II*.

This Court should grant Mr. Swain's petition because the question presented is one that affects many federal prisoners and about which the federal courts disagree.

A. There is an entrenched circuit split on this question.

Three circuits have said the § 2255 motions filed by federal prisoners who were sentenced under the mandatory career-offender guideline who filed within one year of *Johnson II* are untimely: the Fourth Circuit, the Sixth Circuit, and the Tenth Circuit. *See Greer*, 881 F.3d at 1247–49; *Raybon*, 867 F.3d at 630; *Brown*, 868 F.3d at 303. Although these courts agree on the result, their reasoning differs somewhat.

The Fourth and Sixth Circuits relied on Justice Sotomayor's observation that the majority opinion "at least leaves open" whether defendants sentenced under the mandatory guidelines as proof that application of *Johnson II* to the mandatory guidelines would constitute a new rule. *Raybon*, 867 F.3d at 629–30 (citing *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment); *Brown*, 868 F.3d at 302 (same). But this Court had no occasion to determine whether *Johnson*'s rule applies to mandatory guidelines; the question was only whether *Johnson II* applied to advisory guidelines. *See Beckles*, 137 S. Ct. 890–91.

All three courts used jurisprudence that is not applicable to first-time § 2255 movants to hold that these motions are untimely. The Fourth and Tenth Circuits

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

The Sixth Circuit suggested the career-offender guideline might not be unconstitutional, a position it inferred from what it described as this Court's statement that *Johnson II*'s holding did not cast "constitutional doubt" on "textually similar" laws that "required an evaluation of the particular facts of the case." *Raybon*, 867 F.3d at 630 (citing *Johnson II*, 135 S. Ct. at 2561; *Welch*, 136 S. Ct. at 1262).

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

12. Likewise, the Seventh Circuit concluded that § 2255 motions challenging sentences under the mandatory residual clause of § 4B1.2 were timely when filed within one year of *Johnson*. *Cross v. United States*, 892 F.3d 288 (6th Cir. 2018).

Relying on *Moore*, district courts in the First Circuit have held as timely first-time § 2255 motions like Mr. Swain's, which were filed within one year of *Johnson II* and challenged the constitutionality of a sentence imposed pursuant to the then-mandatory career-offender guideline. *United States v. Roy*, 282 F. Supp. 3d 421, 427 (D. Mass. 2017); *United States v. Hardy*, No. 00-cr-10179 (D. Mass. Jan. 26, 2018) (oral ruling, Dkt #69). The government has not appealed those decisions. A magistrate judge in the Western District of Texas similarly held a first-time motion to vacate a mandatory guidelines sentence as timely in light of *Johnson II*. *See Zuniga-Munoz*, No. 1:02-cr-00134 (W.D. Tex. Apr. 26, 2018).

Numerous district courts outside the Fourth and Sixth Circuits have also disagreed with *Raybon*'s analysis. *See, e.g.*, *Long v. United States*, No. CV 16-4464 CBM, at 1–7 (C.D. Cal. Sept. 15, 2017) (holding *Johnson* invalidates the mandatory Guidelines' residual clause and petition was timely); *United States v. Parks*, No. 03-CR-00490-WYD, 2017 WL 3732078, at *1–7 (D. Colo. Aug. 1, 2017) (same); *Sarracino v. United States*, No. 95-CR-210-MCA, 2017 WL 3098262, at *2–5 & n.3 (D.N.M. June 26, 2017) (same). One district court within the Sixth Circuit has criticized the holding of *Raybon*, granting a certificate of appealability and noting that the Sixth Circuit's restrictive reading of § 2255(f)(3) "invites Potemkin disputes about whether [this

Court] has explicitly applied its precedents to a specific factual circumstance rather than asking whether the *right* the Supreme Court has newly recognized applies to that circumstance." *United States v. Chambers*, No. 1:01-CR-172, 2018 WL 1388745, at *2 (N.D. Ohio Mar. 20, 2018). Members of the Sixth Circuit have noted "the irony that a defendant in a similar position to that of the defendant in *Johnson* seems unable even to seek the same relief." *Gipson v. United States*, 710 F. App'x 697, 698 (6th Cir. 2018) (Kethledge, J.).

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

B. Courts should use the analysis described in *Teague* to determine whether the rule invoked is "new."

A first-time § 2255 movant "has one year from the date on which the right he asserts was initially recognized by this Court." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (discussing 28 U.S.C. § 2255(f)(3)). This text makes clear that the dispositive question is whether Mr. Swain has "asserted" that his sentence violates *Johnson II*, not whether *Johnson II* ultimately applies to his sentence (although it does). Mr. Swain's § 2255 motion unquestionably *claimed*, or "asserted," that his sentence violates a right newly recognized by this Court, and whether that right in fact applies to the facts of his case is a separate, merits issue.

Without examining whether there are any relevant differences between the residual clauses of the ACCA and the mandatory Guidelines, the Sixth Circuit

rejected Mr. Swain's motion, relying on *Raybon's* reasoning that he filed it too soon because this Court had not yet expressly recognized that *Johnson II* applies to the mandatory Guidelines' residual clause. *Raybon*, 867 F.3d at 629–31. In doing so, the Sixth Circuit did not use the correct analytical framework—this Court's "new rule" jurisprudence under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. Mr. Swain does not assert a right that would "break[] new ground"; he asserts a right that is "merely an application" of *Johnson* to the mandatory Guidelines. *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013).

To determine whether "the right asserted has been newly recognized by the Supreme Court" under § 2255(f)(3), federal courts apply the "new rule" jurisprudence under *Teague* and its progeny. *See, e.g.*, *United States v. Morgan*, 845 F.3d 664, 667–68 (5th Cir. 2017) (applying *Teague* to hold that *Descamps v. United States*, 570 U.S. 254 (2013), did not recognize a new right under § 2255(f)(3)); *Headbird v. United States*, 813 F.3d 1092, 1095 (8th Cir. 2016) (explaining that § 2255(f)(3) was "enacted against the backdrop" of existing "new rule" precedent); *United States v. Smith*, 723 F.3d 510, 515 (4th Cir. 2013) (citing *Teague* when deciding whether a § 2255 motion invokes a "new rule" and is therefore timely); *Figuereo-Sanchez v. United States*, 678 F.3d 1203, 1207–08 (11th Cir. 2012) ("In deciding retroactivity issues under § 2255(f)(3), we have applied the rubric developed in *Teague*" to "first answer whether the Supreme Court decision in question announced a new rule"); *cf. In re Conzelmann*,

872 F.3d 375, 376 (6th Cir. 2017) ("To decide whether a rule is 'new' for purposes of § 2255(h)(2), we look to *Teague*." (citation omitted)).

The Sixth Circuit ignored this well-established persuasive authority, and did not address whether Mr. Raybon's § 2255 motion "asserted . . . [a] right [that] has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

As *Teague* instructs, a case announces a "new rule" when it "breaks new ground," but "a case does *not* 'announce a new rule, when it is merely an application of the principle that governed' a prior decision." *Chaidez*, 568 U.S. at 347–48 (quoting *Teague*, 489 U.S. at 307) (emphasis in original). "To determine what counts as a new rule," the question is whether the rule the petitioner "seeks can be meaningfully distinguished from that established by [existing] precedent." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, concurring in the judgment). If a "factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful," and the rule is not new. *Id.*

Mr. Swain invokes the right recognized in *Johnson II* and contends that the rule applies to his circumstances, which differ from Mr. Johnson's in only one respect: a provision of the Guidelines fixed his sentence. There is no difference between the text of the ACCA's definition of a "violent felony" and the sentencing Guidelines' definition of a "crime of violence." *See, e.g.*, *United States v. Pawlak*, 822 F.3d 902,

905 (6th Cir. 2016) (citing *United States v. Ford*, 560 F.3d 420, 421 (6th Cir. 2009)). And "[t]he answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing Guidelines is that the mandate to apply the Guidelines is itself statutory." *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) (citing 18 U.S.C. § 3553(b)).

"*Johnson [II]* is a straightforward decision, with equally straightforward application" to the residual clause of the mandatory career-offender guideline. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018). *Johnson II* announced a new rule: the "ordinary case" interpretation paired with a "hazy risk threshold" of the residual clause does not provide a clear standard by which sentences may be fixed. *Dimaya*, 138 S. Ct. at 1218; *Johnson II*, 135 S. Ct. at 2556–57. As the residual clauses of the ACCA and the career-offender guideline are identical, they are vague for the same reasons.

Mr. Swain "seeks to benefit from [the] holding in [*Johnson II*]," *Dodd*, 545 U.S. at 360, which applies to another law that fixed sentences using an identically-worded and identically-interpreted residual clause—the mandatory career-offender guideline. *See* 18 U.S.C. § 3553(b); U.S.S.G. § 4B1.2(a)(2). The mandatory guidelines range fixed sentences within a prescribed range, just as the ACCA fixed sentences within a prescribed range. "Because they [were] binding on judges, [this Court] consistently held that the Guidelines have the force and effect of laws." *Booker*, 543 U.S. at 234; *see also id.* at 238.

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

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

Relying on 28 U.S.C. § 2254(d)(1) and *Williams*, 529 U.S. at 412, the Fourth and Tenth Circuits reasoned that federal prisoners filing § 2255 motions could benefit only from this Court's holdings. *Brown*, 868 F.3d at 301; *Greer*, 881 F.3d at 1247. But § 2254(d)(1) is a relitigation bar that applies to state prisoners asserting federal claims already adjudicated on the merits by the state courts. The standard described

in § 2254(d)(1) is designed to give maximum deference to state courts. *See Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015).

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

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

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

was timely. As this Court has acknowledged, "'the mere existence of a dissent,' like the existence of conflicting authority in state or lower federal courts, does not establish that a rule is new." *Chaidez*, 568 U.S. at 354 n.11 (quoting *Beard v. Banks,* 542 U.S. 406, 416 n.5 (2004)).

In any event, Justice Sotomayor's observation had nothing to do with the statute of limitations, which was not an issue in *Beckles*. This Court could not have held that the vagueness doctrine applies to the mandatory Guidelines without rendering an advisory opinion in violation of Article III because Mr. Beckles was sentenced under advisory guidelines. *See Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment) ("That question is not presented by this case.").

In addition, the Sixth and Tenth Circuits misunderstood this Court's statement that its holding did not cast "constitutional doubt" on "textually similar" laws. *Raybon*, 867 F.3d at 630 (citing *Johnson II*, 135 S. Ct. at 2561; *Welch*, 136 S. Ct. at 1262); *Greer*, 881 F.3d at 1247 n.5, 1248. That caveat in *Johnson II*—that laws requiring an assessment of conduct "*on a particular occasion*" survive—plainly has no application to U.S.S.G. § 4B1.2(a)(2). The circuits have unanimously held that § 4B1.2(a)(2) requires courts to evaluate whether the offense, in the ordinary case, presents a serious potential risk of injury to another, just as the ACCA does. *E.g.*, *United States v. Wray*, 776 F.3d 1182, 1185 (10th Cir. 2015); *United States v. Denson*, 728 F.3d 603, 610 (6th Cir. 2013). The caveat in *Johnson II* does not apply to a provision that, just like the ACCA, "ties the judicial assessment of risk to a judicially

imagined 'ordinary case' of a crime, not to real-world facts." *Johnson II*, 135 S. Ct. at 2257. This Court was referring to laws that require "gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*," like 18 U.S.C. § 16(b), and not the Guidelines. *Johnson II*, 135 S. Ct. at 2561 (emphasis in original); *see also Welch*, 136 S. Ct. at 1262 (same).

For these reasons, this Court has recognized a right that invalidates the sentencing guidelines' residual clause. It follows that Mr. Swain's post-conviction motion is timely under 28 U.S.C. § 2255(f)(3). It likewise follows that the Guidelines' residual clause, when applied in a mandatory way, is unconstitutionally vague.

E. The question presented is exceptionally important.

Resolution of this question will affect approximately 1,200 people. *See,* Appendix to Amicus Br. by 6th Cir. Fed. Defenders filed in Support of Petition for Rehearing En Banc, *Raybon v. United States,* Appendix Sixth Circuit Case No. 16-2522. Because this Court invalidated the mandatory Guidelines in 2005, these men and women have already served at least twelve years in prison. The career-offender enhancement has a well-known and dramatic impact on sentencing outcomes: for 48.6% of career offenders in 2016, the enhancement increased the average guidelines minimum from 70 months to 168 months, a 240% increase; for another 33.2%, it increased the minimum from 84 months to 188 months, a 223% increase. *See* U.S. Sent'g Comm'n, *Quick Facts – Career Offenders* (June 2017), available at https://www.ussc.gov; *see also* U.S.S.G § 5A (sentencing table). There is, therefore, a

real possibility that these men and women have already spent more time in prison than the Constitution permits.

Moreover, the effect of the timeliness holdings of the Sixth, Fourth, and Tenth Circuit, is that federal prisoners sentenced under mandatory guidelines must wait for this Court to declare the mandatory career-offender guideline unconstitutional and retroactive to file § 2255 motions. But that day may never come to pass. Not one of these prisoners has an active case on direct appeal. Thus, there are only two mechanisms for these men and women to obtain relief: filing a § 2255 motion or an original petition for a writ of habeas corpus in this Court. *See* Judiciary Act of 1789 § 14; *Felker v. Turpin*, 518 U.S. 651, 660 (1996).

Further complicating matters are decisions by the Sixth Circuit holding that 28 U.S.C. § 2244(b)(1) requires dismissal of claims presented in a second or successive § 2255 that were previously presented in a prior § 2255 motion. *E.g.*, *In re Liddell*, 722 F.3d 737, 738 (6th Cir. 2013); *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999). While Mr. Raybon does not agree that § 2244(b)(1) applies to § 2255 motions, as other circuit courts have recognized, see e.g., *United States v. Winestock*, 340 F.3d 200, 204-05 (4th Cir. 2003) (doubting that § 2244(b)(1) applies to second or successive applications under § 2255); *Moore*, 871 F.3d at 78 (noting that § 2244(b)(1) "only appear[s] to apply to § 2254 motions by [its] terms"), the Sixth Circuit's decisions could operate to preclude new filings raising *Johnson* based claims—or at least create further uncertainty and complexity while the issue is litigated. For those serving

unconstitutionally severe sentences, some decades longer than the correct guideline range, dismissal of their claims because they brought them *too soon* would strike an especially cruel blow. These federal prisoners diligently pursued their claims, as statutes of limitations encourage them to do. *Cf. CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) ("Statutes of limitations require plaintiffs to pursue 'diligent prosecution of known claims.'" (quoting Black's Law Dictionary 1546 (9th ed. 2009))).

Finally, the disparate treatment of § 2255 motions involving mandatory career-offender guidelines also works great injustice. District courts within the Sixth Circuit are denying § 2255 motions and certificates of appealability filed by federal prisoners like Mr Swain. *United States v. Sinclair*, No. 13-CR-20829, 2017 WL 3977888, at *4–5 (E.D. Mich. Sept. 11, 2017) (dismissing the petition and denying a certificate of appealability); *Price v. United States*, No. 16-CV-12623, 2017 WL 3581324, at *1–2 (E.D. Mich. Aug. 18, 2017) (same); *Eady v. United States*, No. 1:16-CV-588, 2017 WL 3530081, at *4–5 (W.D. Mich. Aug. 17, 2017) (same). Disagreeing with the Sixth Circuit, other district courts are granting certificates of appealability. *See Chambers*, 2018 WL 1388745, at *3; *Crowder v. United States*, No. CR 01-80098, 2018 WL 1141805, at *3 (E.D. Mich. Mar. 2, 2018). Meanwhile, in other districts, federal prisoners presenting identical grounds are obtaining relief. *See Roy*, 282 F. Supp. 3d 421 at 428, 432.

CONCLUSION

The petition should be granted.

Respectfully submitted,

By: _____
FEDERAL DEFENDER OFFICE

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Detroit, Michigan
August 7, 2018

No:

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER SWAIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

DECLARATION VERIFYING TIMELY FILING

Petitioner Gregory Carter, through undersigned counsel, and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter was sent through the United States Postal Service by first-class mail, postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing, addressed to the Clerk of the Supreme Court of the United States, on August 7, 2018, which is timely pursuant to the rules of this Court.

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