No. _____

IN THE
Supreme Court of the United States

GARY MICHAEL ALLEN,

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

PARKS NOLAN SMALL
Federal Public Defender
for the District of South Carolina

EMILY DECK HARRILL
Counsel of Record
Assistant Federal Public Defender
1901 Assembly Street
Suite 200
Columbia, South Carolina 29201
803.765.5079
Emily_Harrill@fd.org

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether a motion for relief under 28 U.S.C. § 2255 filed within one year of Johnson v. United States, 576 U.S. __, 135 S. Ct. 2551 (2015), and asserting 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 petitions for 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The unpublished decision of the court of appeals appears at pages 1a – 2a of the appendix to this petition and is electronically available at United States v. Allen, 717 F. App'x 313 (4th Cir. 2018). The unpublished decision of the district court appears at page 3a of the appendix. The district court's unpublished decision denying Petitioner's motion for reconsideration appears at page 4a of the appendix. The court of appeals' order granting authorization to file a second § 2255 motion appears at pages 5a – 6a of the appendix.

JURISDICTION

The district court in the District of South Carolina had jurisdiction over Petitioner's motion to vacate 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 § 2253(a). That court entered its opinion and judgment on April 2, 3018. Petitioner did not seek rehearing.

This petition is filed within ninety (90) days of the court of appeals' opinion, and is therefore timely.[1] Jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1).

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[1] On June 20, 2018, undersigned counsel sought an extension of time in which to file this Petition. See Allen v. United States, No. 17A1400 (U.S. June 20, 2018). As of the filing date of this Petition, an extension has not been granted.

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), (h):

> (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 available 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.

18 U.S.C. § 924(e):

> (2)(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) (Nov. 1995):

> 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.

INTRODUCTION

In 2015, this Court held in Johnson (Samuel) v. United States, 576 U.S. __, 135 S. Ct. 2551 (2015) (hereinafter "Johnson"), that increasing a defendant's sentence under the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), violates the Constitution's prohibition on vague laws. In Welch v. United States, 578 U.S. __, 136 S. Ct. 1257 (2016), this Court held Johnson retroactively available to cases on collateral review. Many prisoners like Petitioner filed motions for relief under 28 U.S.C. § 2255 within one year of Johnson, asserting that their career offender sentences were unconstitutional. This Court held in Beckles v. United States, 580 U.S. __, 137 S. Ct. 886 (2017), that the residual clause of the advisory career offender guideline is not subject to a vagueness challenge. Unlike the ACCA and the mandatory Guidelines, this Court held the advisory Guidelines do not fix the permissible range of sentences. Thus, the § 2255 motions relying on Johnson in advisory Guidelines cases were timely, but wrong on the merits.

In 1997, Petitioner was convicted of conspiracy to possess with intent to distribute and distribution of cocaine. On September 22, 1998, he was sentenced as a career offender based on his prior convictions that qualified as "crimes of violence" under the residual clause of the career offender guideline. U.S.S.G. § 4B1.2(a) (Nov. 1995). The career offender enhancement increased Petitioner's guideline range from 262 to 327 months' imprisonment, to 360 months to life. The district court imposed a sentence of 360 months' imprisonment. 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. 22,

233-34, 245, 259 (2005).

Within one year of Johnson, after receiving authorization from the court of appeals to file a second § 2255 motion, Petitioner moved to vacate his sentence under § 2255, asserting that his sentence was unconstitutional in light of Johnson. The district court ruled this Court had "squarely rejected" Petitioner's claim in Beckles, dismissed his § 2255 motion, and denied a certificate of appealability. The court of appeals also denied a certificate of appealability and dismissed Petitioner's appeal.

The courts of appeals are split over whether a § 2255 motion filed within one year of Johnson asserting that Johnson invalidates the residual clause of the mandatory career offender guideline claims a "right . . . initially recognized" by this Court in Johnson within the meaning of 28 U.S.C. § 2255(f)(3). The Fourth, Sixth, and Tenth Circuits have ruled that such motions are not timely because Johnson did not expressly hold the mandatory Guidelines' residual clause unconstitutionally vague. The First, Third, and Seventh Circuits have ruled that such motions assert the right recognized in Johnson because the invalidation of the mandatory Guidelines' career offender 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 the text of § 2255(f)(3). 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

On August 25, 1997, Petitioner was convicted by a jury of conspiracy to possess with intent to distribute and distribution of cocaine base in violation of 21 U.S.C. § 841(a)(1) and § 846. ECF Nos. 1, 308.[2] In preparation for sentencing, a probation officer prepared a Presentence Report (PSR). Applying the drug guideline, U.S.S.G. § 2D1.1 (Nov. 1995), and the criminal history rules in U.S.S.G. § 4A1.1 (Nov. 1995) and § 4A1.2 (Nov. 1995), the probation officer determined the offense level was 34, and calculated Petitioner's criminal history category to be VI. This produced a mandatory guideline range of 262 to 327 months' imprisonment. See U.S.S.G. Ch. 5, Pt. A (sentencing table) (Nov. 1995).

The probation officer then designated Petitioner a "career offender" pursuant to U.S.S.G. § 4B1.1 (Nov. 1995) and § 4B1.2 (Nov. 1995). A defendant is a "career offender" if he was at least eighteen 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) (Nov. 1995).[3]

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[2] The citation "ECF No." followed by a number refers to documents in the district court case from which this appeal arises, United States v. Allen, D.S.C. Cr. No. 9:96-cr-986-09 (PMD).

[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

The probation officer did not identify which convictions were used to find Petitioner to be a career offender, but did not base the career offender designation on Petitioner having a "controlled substance offense conviction." Petitioner's only possible "crimes of violence" were a conviction for Pennsylvania "Robbery" and two convictions for Delaware "Robbery-Second Degree." Because of his designation as a career offender, Petitioner's offense level was increased from 34 to 37, and his criminal history category was VI, resulting in a guideline range of 360 months to life imprisonment. On September 22, 1998, Petitioner was sentenced to 360 months' imprisonment.

Absent the career offender designation, Petitioner's guideline range would have been 262 to 327 months' imprisonment. Petitioner's current release date is December 26, 2022.[4]

The district court entered judgment on October 7, 1998. Petitioner filed a direct appeal, challenging the sufficiency of the evidence and the district court's attribution of over fifty (50) grams of cocaine base to him at sentencing. The Fourth Circuit Court of Appeals affirmed Petitioner's conviction and sentence in 1999. United States v. Allen, 202 F.3d 260 (4th Cir. 1999) (Table). His conviction and sentence became final in 2000. Petitioner filed one unsuccessful § 2255 motion, claiming that the indictment

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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 (Samuel) v. United States, 576 U.S. __, 135 S. Ct. 2551, 2560 (2015) (analyzing several Guidelines cases to demonstrate the residual clause "has proved nearly impossible to apply consistently").

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

was defective, he was improperly sentenced in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), and trial counsel was ineffective. See Allen v. United States, D.S.C. Civil Action No. 9:00-cv-4016-SB (D.S.C. Dec. 27, 2000).

On June 26, 2015, this Court held that increasing a defendant's sentence under the residual clause of the ACCA violates the Constitution's prohibition on vague laws. Johnson, 135 S. Ct. 2551. Two features of the ACCA's residual clause rendered it unconstitutionally vague. First, the clause provided "grave uncertainty" about "deciding what kind of conduct the 'ordinary case' of a crime involved." Id. at 2257. The clause therefore "denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges because it "tie[d] judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." Id. Second, the ACCA residual clause left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." Id. at 2258. This Court concluded that "imposing an increased sentence under the residual clause . . . violates the Constitution's guarantee of due process." Id. at 2563.

In Welch v. United States, 578 U.S. __, 136 S. Ct. 1257 (2016), this Court held Johnson applies retroactively to cases on collateral review.

On June 21, 2016, Petitioner applied to the court of appeals for permission to file a second § 2255 motion. See 28 U.S.C. § 2244; In re Allen, 4th Cir. No. 16-9435 (4th Cir. June 21, 2016). On June 27, 2016, the court of appeals granted Petitioner's application, and Petitioner proceeded in the district court under § 2255. Petitioner asserted his sentence violated due process under the Fifth Amendment because the

mandatory career offender sentence was based on an application of the residual clause contained in its definition of "crime of violence" that was identical to the ACCA's definition of "violent felony" declared unconstitutionally vague in Johnson. Petitioner further contended that his robbery convictions in Pennsylvania and Delaware did not otherwise qualify as crimes of violence under § 4B1.2, and he was, therefore, entitled to relief under § 2255.

The district court directed the government to file a response to Petitioner's motion. ECF No. 672. The government sought a stay pending this Court's decision in Beckles. ECF No. 675. On September 7, 2016, the district court stayed Petitioner's motion, noting that the government sought a stay based upon the impact that Beckles would have on the determination of whether Petitioner's robbery convictions would remain "crimes of violence." ECF No. 676. The district court found the government had "impliedly conced[ed] that the three robberies could fit only under § 4B1.2(a)'s potentially invalid residual clause[,]" as "if the other portions of § 4B1.2(a) could cover any of the robbery convictions, there would be no need to seek a stay; the Government could instead seek dismissal on the merits." Id. at 3 n.1. In response to the district court's order, the government filed a motion to dismiss, preserving arguments and defenses and asserting that Petitioner's § 2255 motion was premature under § 2255(f)(3). See ECF No. 678. The government, even after being provided the express opportunity to do so by the district court, did not present legal argument why Petitioner's robbery convictions should be considered "crimes of violence" under any clause of U.S.S.G. § 4B1.2(a).

On March 6, 2017, this Court decided Beckles. This Court found 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. at 892. 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., as 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, this 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." Id. at 903 n.4 (Sotomayor, J., concurring) (internal citations and quotation marks omitted). However, she noted "[t]hat question is not presented by this case." Id.

On the same day that Beckles was decided, the district court lifted the stay in

Petitioner's case and denied his § 2255 motion. Without briefing by either party, the district court summarily determined Petitioner's claim had been "squarely rejected" by this Court in Beckles. Pet. App. 3a. The district court did not address any distinction between the advisory sentencing scheme at issue in Beckles and the mandatory Guidelines that had been applied at Petitioner's sentencing in 1998. The district court also denied a certificate of appealability. Petitioner moved for reconsideration; this motion was summarily denied. Pet. App. 4a. Petitioner noted a timely appeal from the district court's ruling. ECF No. 686.

On August 21, 2017, the Fourth Circuit Court of Appeals decided United States v. Brown, 868 F.3d 297 (4th Cir. 2017), reh'g denied, 891 F.3d 115 (4th Cir. 2018), pet'n for cert. filed (U.S. May 29, 2018) (No. 17-9276). In a 2-to-1 decision, Brown held a petitioner's § 2255 challenge to his mandatory Guidelines' career offender designation is 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 mandatory sentencing regime. 868 F.3d at 299. On February 26, 2018, the court of appeals denied rehearing and rehearing en banc. 891 F.3d 115.

On April 2, 2018, the Fourth Circuit Court of Appeals issued a per curiam unpublished opinion denying Petitioner's request for a certificate of appealability and dismissing his appeal. Pet. App. 5a – 6a. The opinion gave no specific reason and did not reference Brown. However, it is reasonable to assume the court denied relief based upon Brown as the Fourth Circuit had previously strongly indicated that Johnson applies to the mandatory Guidelines' career offender residual clause. In re Hubbard,

825 F.3d 225, 235 (4th Cir. 2016), and had recently denied the petition for rehearing in Brown.

On April 17, 2018, this Court decided Sessions v. Dimaya, 584 U.S. __, 138 S. Ct. 1204 (2018). In Dimaya, this Court applied Johnson to a residual clause in a different statute with slightly different wording (18 U.S.C. § 16(b)). 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; that is, "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.

If Petitioner is no longer a career offender in light of Johnson, his guideline range should be 120 to 150 months' imprisonment.[5] Petitioner has been detained for this conviction since December 3, 1996, see ECF No. 88, and has served over twenty years in prison to date. Thus, Petitioner should be eligible for immediate release if he is not a career offender, as he has overserved any sentence within the reduced range by over ten years.

[5] 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 26 based upon finding Petitioner responsible for 150 grams of cocaine base at sentencing.

REASONS FOR GRANTING THE PETITION

The circuit 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. The Fourth, Sixth, and Tenth Circuits have ruled that such motions do not assert any right yet recognized because this Court did not expressly hold in Johnson that the mandatory Guidelines' career offender residual clause is unconstitutionally vague. The First, Third, and Seventh Circuits have made clear that § 2255 motions relying on Johnson do assert the right recognized in Johnson because the invalidation of the mandatory career offender guideline's residual clause is a straightforward application of Johnson. The approach taken by the Fourth, Sixth, and Tenth Circuits—that these § 2255 motions were filed too early—conflicts with this Court's relevant precedents and is contrary to the statutory text of § 2255(f)(3).

On the merits of the Johnson claim, the courts are also divided, with the Eleventh Circuit holding the mandatory Guidelines' career offender 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' career offender 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 § 2255 Motions Claiming Johnson Invalidates the Mandatory Guidelines' Career Offender Residual Clause Do Not Assert Any Right Recognized in Johnson.

Three circuits, the Fourth, Sixth, and Tenth, have found that § 2255 motions filed within one year of Johnson claiming Johnson invalidates the mandatory Guidelines' career offender residual clause are untimely. These circuits base this conclusion on the fact that 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.), cert. denied, __ S. Ct. __, 2018 WL 2184984 (U.S. June 18, 2018); United States v. Greer, 881 F.3d 1241, 1247 (10th Cir. 2018), pet'n for cert. filed (U.S. May 1, 2018) (No. 17-8775).

These three circuits rely on case law interpreting inapplicable statutes to reach this conclusion. In its divided panel decision, the Fourth Circuit stated it was "constrained" by jurisprudence interpreting the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.) ("AEDPA"), "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. In Brown, the Fourth Circuit 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 of Brown, see 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." Greer, 881 F.3d at 1248 (quoting Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality decision)). 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.

From these mistaken premises, the Fourth Circuit concluded Johnson "only recognized that ACCA's residual clause was unconstitutionally vague," and that a challenge to the mandatory Guidelines' career offender 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' . . . .").

Brown and Raybon also misinterpreted the majority opinion in Beckles, and Justice Sotomayor's footnote 4 in Beckles, to mean 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.

B. A Divided Eleventh Circuit Has Ruled the Mandatory Guidelines' Career Offender Residual Clause Is Not Unconstitutionally Vague.

The Eleventh Circuit has blocked consideration of Johnson claims by prisoners sentenced under the mandatory Guidelines' career offender residual clause, but in a different way. Shortly after Welch and before Beckles, a panel of the Eleventh Circuit issued a published decision denying an application for authorization to file a successive § 2255, 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 precluding 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 Eleventh Circuit judge has 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. In Moore v. United States, 871 F.3d 72 (1st Cir. 2017), the First Circuit authorized a successive § 2255 motion, holding that a § 2255 motion arguing that Johnson invalidates the mandatory career offender guideline's residual clause was timely because it was filed within one year of Johnson. The court concluded 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 [Sentencing Reform Act] 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 also 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' career offender residual clause "is not clearly different in any way that would call for anything beyond a straightforward application of Johnson." Id. Additionally, "Beckles did not limit Johnson [ ] to its facts. Rather, one can fairly and easily read Beckles as simply rejecting the application of Johnson [ ] 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 also authorized a successive § 2255 motion because it "relies on" Johnson. In re Hoffner, 870 F.3d 301, 312 (3d Cir. 2017). 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)).[6] The Third Circuit declined to follow Griffin, in substance or procedure. Id. at 310 & n.13.

Most recently, on June 7, 2018, the Seventh Circuit decided United States v. Cross, __ F.3d __ , 2018 WL 2730774 (7th Cir. June 7, 2018). On the question of

[6] Hoffner did not expressly address the statute of limitations, and left it to the district court to determine in the first instance "whether [the] petition has merit." In re Hoffner, 870 F.3d 301, 312 (3d Cir. 2017).

timeliness, the Seventh Circuit rejected the approach taken by the Fourth, Sixth, and Tenth Circuits, explaining this analysis "suffers from a fundamental flaw" as

> [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 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 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, the Seventh Circuit concluded that the "same two faults" identified in Johnson that render the ACCA's residual clause unconstitutionally vague "inhere in the residual clause of the guidelines." Id. 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 Dimaya "reconfirm[ed]" its view that the mandatory Guidelines' career offender residual clause "shares the weaknesses that Johnson identified in the ACCA." Id. at *9.

The Seventh Circuit also held the mandatory Guidelines' career offender

residual clause implicated the twin concerns of the vagueness doctrine because it fixed the permissible range of sentences. Id. 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), "[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 career offender residual clause of the mandatory Guidelines implicated the "twin concerns" of the void-for-vagueness doctrine, it is "thus subject to attack on vagueness grounds." Id. (quoting Beckles, 137 S. Ct. at 894-95).

II. The Fourth Circuit's Position Conflicts With Both This Court's Relevant Precedents and the Text of 28 U.S.C. § 2255(f)(3).

This Court has not specified 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 an unconstitutionally vague mandatory Guidelines' career offender residual clause is not a new right but just an application of Johnson. The Fourth Circuit, along with the Sixth and Tenth Circuits, requires this Court to first confirm that a motion is correct on the merits before the statute of limitations can be met. In doing so, these courts have relied on case law interpreting statutes inapplicable to a § 2255 movant. For movants like Petitioner, this faulty reasoning means claims asserting the unconstitutionality of the mandatory career offender residual clause can never be timely and can never be adjudicated on the merits. More broadly, it means arbitrariness, inconsistency, and delay in habeas law - the exact opposite of what Congress intended.

A. The Fourth Circuit Relied on Inapplicable Decisions from this Court.

The Brown majority acknowledged the mandatory Guidelines' career offender residual clause "looks like" and "operates like" the ACCA's, but 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, the majority relied on snippets of case law from this Court that actually disprove its point. First, it cited this Court's statement in Williams, 529 U.S. at 412, 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 previously 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." 28 U.S.C. § 2254(d)(1). This section of § 2254 bars a state prisoner's claim even though his habeas 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). This is because retroactively applying federal decisions articulating "new rules" of law to overturn state convictions, when the state proceedings "conformed to then-existing constitutional standards," would be highly "intrusive" and tread upon principles of comity. Teague, 489 U.S. at 310. Indeed, the standard set forth in § 2254(d)(1) is "intentionally difficult to meet," according maximum deference to state courts in "the interests of comity and federalism." Woods v. Donald, 575 U.S. __, 135 S. Ct. 1372, 1376 (2015). Thus, the § 2254(d)(1) standard is different from and more demanding than the term "initially recognized by the Supreme Court" contained in § 2255(f)(3) and § 2244(d)(1)(C).

A federal court deciding a § 2255 motion is not deferring to a court of coequal jurisdiction, and a § 2255 motion is the federal prisoner's first opportunity to litigate a claim under a new, retroactively available rule of constitutional law. No interest in "comity" or "federalism" exists. Unlike § 2254, nothing in the statutory text of § 2255 requires that a right asserted by a federal prisoner be "clearly established by a Supreme Court holding."

The Brown majority also relied on this Court's statement in Tyler 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 authorization of a second or successive motion be based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Tyler only 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 Tyler, 533 U.S. 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." A rule is a "new rule" when it "breaks new ground"; "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). "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. 738 (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 a statutory aggravating factor with slightly different language than that which it reviewed in Godfrey, Maynard did not announce a new rule. Stringer, 503 U.S. at 228-29. Indeed, "it would be a mistake to conclude that the vagueness ruling of Godfrey was limited to the precise language before us in that case." Id. The invalidation of Mississippi's identical aggravating factor in Clemons, 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 the rule Penry sought requiring instructions permitting the jury to "give effect" to evidence of mental disability was not a "new rule" but rather 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 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").[7]

[7] 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)

A right not to have one's sentence increased by a mandatorily applicable residual clause that suffers from the same unconstitutional vagueness that doomed the ACCA's residual clause is not a 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' career offender 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).

The right Petitioner asserts is a straightforward application of Johnson; therefore, the proper time for seeking authorization from the circuit court and filing

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(relying on Teague v. Lane, 489 U.S. 288 (1989) (plurality decision), and Chaidez v. United States, 568 U.S. 342 (2013), to conclude that Alleyne v. United States, 570 U.S. 99 (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, 563 U.S. 668 (2011), "has been 'newly recognized' by Supreme Court" under § 2255(f)(3)); 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."); United States v. Hong, 671 F.3d 1147, 1148, 1150 (10th Cir. 2011) (applying Teague "to decide whether Padilla [v. Kentucky, 559 U.S. 356 (2010),] 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)).

a § 2255 motion was within one year of Johnson. For example, 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 States, 495 U.S. 575 (1990), and its progeny). Thereafter, applying Teague and its progeny, courts of appeals subsequently held that § 2255 motions relying on Descamps were untimely because Descamps was an application of existing precedent. See, e.g., 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).

This Court's recent decision in Dimaya further confirms the proper time for filing a § 2255 asserting Petitioner's claim was within one year of Johnson. Dimaya refutes Brown's assertion that "Johnson only recognized that ACCA's residual clause was unconstitutionally vague." This Court explained that "Johnson is a straightforward decision, with equally straightforward application here," Dimaya, 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 adverse consequences under a residual clause that, like the ones in the ACCA, § 16(b), and the

pre-Booker 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, id. at 1210, Johnson's application to a clause identical in its text and mode of analysis to the ACCA's, mandating additional years in prison, resolves Petitioner's case as well.

C. The Fourth Circuit's Position Conflicts with the Statutory Text of 28 U.S.C. § 2255(f)(3).

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 timeliness of a § 2255 motion is a threshold inquiry, distinct from a district court's subsequent determination of the merits. The Fourth Circuit's reading of § 2255(f)(3) not only reverses the order of operations, but also requires that this Court first confirm that a claim is correct on the merits before the statute of limitations can be met. This sets an artificially high bar for the threshold statute-of-limitations inquiry, much higher than that for courts to grant relief on the merits. This faulty analysis renders 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 effectively reads out of existence the term "asserted."[8] As this Court has

[8] To "assert" means to "state positively," or to "invoke or enforce a legal right." Black's Law Dictionary 139 (10th ed. 2014).

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). There is no assumption in common usage or in the law that one's assertions are necessarily correct.

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.[9] By the same logic, motions asserting a right within one year of a later case applying Johnson (such as Dimaya) are unlikely to be timely because this Court "initially recognized" the "right asserted" in Johnson. Applying the correct reading of § 2255(f)(3), courts held that § 2255 motions filed within a year of Descamps were untimely because this Court had "initially recognized" the "right asserted" in previous cases. See supra page 26.

If the statutory language in § 2255(f)(3) requiring a "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 for individuals in Petitioner's circumstance. That is, none of these prisoners sentenced before 2005 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, miring cases like

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

Petitioner's in "an infinite loop." Zuniga-Munoz v. United States, No. 1:02-cr-124, ECF No. 79, at 8 (W.D. Tex. Apr. 26, 2018) (Report and Recommendation rejecting this position and recommending district court grant defendant's § 2255 motion), adopted without objection, ECF No. 81 (June 11, 2018); 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). For individuals like Petitioner, there would never be a "future case" to "wait for." Brown, 868 F.3d at 303.

D. The Fourth Circuit Misinterpreted Beckles.

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. Beckles demonstrates no such thing. A rule need not apply to every situation or not at all. Beckles decided only that § 2255 movants relying on Johnson in advisory Guidelines cases could not obtain relief. If anything, Beckles confirmed that Johnson "recognized" the right Petitioner asserts, and the Court thereafter created an exception to the rule for the advisory Guidelines. This is not because the advisory Guidelines' career offender 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 misinterpreted Justice Sotomayor's footnote 4 to say that Beckles "expressly left open" and "expressly declined to address" whether Johnson

applies to the mandatory Guidelines' career offender residual clause, and concluded from this that "the right, by definition, has not been recognized." 868 F.3d at 299 n.1, 300. However, Beckles did not and could not "expressly leave open" or "expressly decline to address" whether Johnson applies to the pre-Booker Guidelines' career offender 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's point was 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.[10]

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

A. The Residual Clause of the Mandatory Guidelines' Career Offender Provision is Unconstitutionally Vague After Johnson.

This Court should reject the Fourth Circuit's reading of § 2255(f)(3) and reach the merits of Petitioner's claim. The residual clause of the mandatory Guidelines' career offender provision is unconstitutionally vague for the same reasons as the

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[10] 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' career offender residual clause. The court authorized the successive motion and instructed the district court to consider staying the case pending "relevant" decisions, including Sessions v. Dimaya, 584 U.S. __, 138 S. Ct. 1204 (2018). See Vargas v. United States, No. 16-2112, 2017 WL 3699225, at *1 (2d Cir. May 8, 2017).

residual clause of the ACCA. 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.

Title 18 United States Code § 3553(b) made the Guidelines "mandatory and impose[d] binding requirements on all sentencing judges." Booker, 543 U.S. at 259; 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 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.

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, the mandatory Guidelines' career offender residual clause violates due process because it failed to clearly specify the range of penalties available, and "due process . . . require[d] notice in a world of mandatory Guidelines." Id. at 894 (quoting Irizarry, 553 U.S. at 713-14).

The mandatory Guidelines' career offender residual clause also invited arbitrary enforcement. Just like the ACCA's residual clause, it left judges "free . . . to prescribe the sentences or sentencing ranges available," "without any legally fixed standards." Id. at 894-95 (internal citations omitted).

B. The District Court's Judgment is in Error and the Fourth Circuit's Denial of a Certificate of Appealability Was Also in Error Because Petitioner's Prior Felony Convictions for Delaware Robbery Are Not Qualifying "Crimes of Violence."[11]

Petitioner is entitled to a certificate of appealability upon making "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). Such a showing has been made when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Petitioner is entitled to a certificate of appealability because he has shown not only that "reasonable jurists could debate" his entitlement to relief, but that any reasonable jurist would agree with it. For the reasons stated above, Johnson is a substantive rule that must be applied retroactively to Petitioner.

Additionally, any reasonable jurist would agree that Johnson entitles Petitioner to resentencing. Petitioner argued before the district court in his § 2255 motion and again in his informal brief to the court of appeals that his predicate convictions for Delaware robbery (which were essential to his designation as a career offender) could qualify only by virtue of the mandatory Guidelines' career offender residual clause.

Petitioner was convicted of robbery in the second degree in Delaware on two

[11] As of the filing date of this Petition, the Third Circuit has at least two cases pending addressing the Pennsylvania robbery statute and whether a conviction thereof qualifies as a violent felony under the ACCA. See United States v. Harris, 3rd Cir. No. 17-1861 (set for rehearing en banc on October 10, 2018); and United States v. Mayo, 3rd Cir. No. 16-4282 (argued Oct. 12, 2017).

separate occasions in 1992. At the time of Petitioner's convictions, the statute provided:

> A person is guilty of robbery in the second degree when, in the course of committing theft, the person uses or threatens the immediate use of force upon another person with intent to:
>
> > (1) Prevent or overcome resistance to the taking of the property or to the retention thereof immediately after the taking; or
> >
> > (2) Compel the owner of the property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.

Del. Code Ann. tit. 11, § 831(a) (1991).

Delaware second degree robbery is not a qualifying predicate conviction under the "force clause" of the mandatory Guidelines' career offender provision. In Johnson (Curtis) v. United States, 559 U.S. 133, 140 (2010) ("Curtis Johnson"), this Court held that Florida battery conviction did not qualify under the elements clause because it did not require as an element the use or threat of "violent force," defined as "'extreme physical force'" that is "capable of causing physical pain or injury to another person." Id. at 140-41 (quoting Black's Law Dictionary 1188 (9th ed. 2009)) (emphasis in original). The same is true of Petitioner's convictions for Delaware robbery second degree. The Delaware Supreme Court has affirmed second degree robbery convictions based upon a minimal use of actual force against an individual.[12] These cases include a robbery second degree conviction for "bumping" a victim, Mitchell v. State, 663 A.2d

[12] Johnson v. Fankell, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.").

488 at *1 (Del. Sup. Ct. 1995) (Table) ("The 'bumping' was of sufficient force to warrant a robbery conviction . . . ."); pushing an individual "on the shoulder and then shoving [a] shopping car between himself and the [individual][,]" Stigars v. State, 577 A.2d 755 at *2 (Del. Sup. Ct. 1990) (Table); and moving an individual's legs and then taking his wallet, Turner v. State, 45 A.3d 149 (Del. Sup. Ct. 2012) (Table). See also Stigars, 577 A.2d 755 at *3 ("Force is 'strength or power of any degree that is exercised without justification or contrary to law or thing.") (emphasis in original) (citation omitted). Additionally, the Delaware Supreme Court has upheld a robbery first degree conviction when the defendant "grabbed" a victim's wallet but made no contact with the victim whatsoever. Male v. State, 812 A.2d 224 at *1 (Del. Sup. Ct. 2002) (Table).

Accordingly, because Curtis Johnson held that an offense must have violent force as an element and Petitioner's Delaware convictions plainly did not, Curtis Johnson directly controls. The career offender enhancement cannot stand under the "force clause," and Petitioner's designation as a "career offender" was thus contingent on the now-void residual clause.

Because reasonable jurists could at least debate that Petitioner is entitled to be resentenced under Johnson, the Fourth Circuit's denial of a certificate of appealability should be reversed. See Bigelow v. Virginia, 421 U.S. 809, 827 (1975) (where the outcome of the issue before the Court "is readily apparent," reversal is the appropriate remedy).

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

Because Johnson operates to invalidate 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).[13] Cases in the First Circuit are proceeding, but most others remain in limbo, awaiting definitive action by this Court. These prisoners have all served 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 one third of the remaining career offenders.[14]

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

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

[14] See U.S. Sentencing Comm'n, Quick Facts: Career Offenders (May 2018), available at https://www.ussc.gov/research/quick-facts/career-offenders (last accessed June 25, 2018).

appealability.[15] Many cases in the Fourth Circuit are being held pending action by this Court.[16] In the Third, Seventh and Ninth Circuits, most cases have been stayed pending resolution of appeals.[17] Finally, in the First Circuit and in scattered courts 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 1998, 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 98 months higher than the otherwise permissible guideline range. In light of recent decisions from this Court and the circuit courts, Petitioner's sentence 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 depended on whether Johnson invalidated the mandatory Guidelines' career offender residual clause.

If Petitioner were resentenced today without the career offender enhancement,

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

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

[17] See United States v. Green, No. 17-2906 (3d Cir.) (argued June 13, 2018); United States v. Blackstone, No. 17-55023 (9th Cir.) (argued Apr. 11, 2018).

his guideline range would be significantly lower. Finally, there is no possibility that the case will become moot, as Petitioner's current release date is December 26, 2022.

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,

PARKS NOLAN SMALL
Federal Public Defender
for the District of South Carolina

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EMILY DECK HARRILL
Counsel of Record
Assistant Federal Public Defender
1901 Assembly Street
Suite 200
Columbia, South Carolina 29201
803.765.5079
Emily_Harrill@fd.org

Counsel for Petitioner

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