

No. 18-6387

IN THE SUPREME COURT
OF THE UNITED STATES

SPENCER BOWENS,
Petitioner,

-v.-

UNITED STATES OF AMERICA,
Respondent.

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

ORIGINAL

Supreme Court, U.S.
FILED
JUN 29 2018
OFFICE OF THE CLERK

Spencer Bowens
F.C.I. Otisville
P.O. Box 1000
Otisville, New York 10963

Pro-se Petitioner

QUESTIONS PRESENTED

Whether the right in Johnson v. United States, 135 S. Ct. 2551 (2015), that has been newly recognized by the United States Supreme Court and made retroactively applicable to cases on collateral review, 28 U.S.C. §2255(f)(3), extend to pre-Booker mandatory career-offender guidelines.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner Spencer Bowens, and Respondent United States of America.

TABLE OF CONTENTS

Question Presented	(i)
Parties to the Proceeding	(ii)
Table of Contents / Index to Appendix	(iii)
Table of Authorities / Statutes and Guidelines	(iv)
Opinion Below	(2)
Jurisdictional Statement	(2)
Statutory Provisions Involved	(3)
Statement of the Case	(4)
Reasons for Granting the Writ	(7)
Conclusion	(9)

INDEX TO APPENDIX

Appendix A: Order of the United States Court of Appeals
For The Fourth Circuit,
In re: Spencer Bowens,
No. 16-9179
(3:98-cr-00110-REP-1) (June 23, 2016)

Appendix B: Published opinion of the United States
District Court For The Eastern District of
Virginia, Richmond Division,
United States of America v. Spencer Bowens,
2017 U.S. Dist. Lexis 167289 (October 6, 2017)

Appendix C: Published opinion of the United States
Court of Appeals For The Fourth Circuit,
United States of America v. Spencer Bowens,
717 Fed. Appx. 322; 2018 U.S. App. Lexis 8431
(April 3, 2018)

TABLE OF AUTHORITIES

Case

Beckles v. United States, 137 S. Ct. 886 (2017)	(6),(8)
Cross and Davis v. United States, F.3d _____ (7th Cir. 2018)	(8)
Johnson v. United States, 135 S. Ct. 2551 (2015)	(2),(5)
Moore v. United States, 871 F.3d 72 (1st Cir. 2017)	(8)
In re Griffen, 823 F.3d 1350 (11th Cir 2016)	(8)
In re Hoffner, 870 F.3d 301 (3rd Cir. 2017)	(8)
In re McCall, 826, F.3d 1308 (11th Cir. 2016)	(8)
In re Sapp, 827 F.3d 1334 (11th Cir. 2016)	(8)
Raybon v. United States, 867 F.3d 625 (6th Cir. 2017)	(8)
United States v. Bowens, 2017 U.S. Dist. Lexis 167289 (October 6, 2017) ...	(1),(5)
United States v. Brown, 868 F.3d 297 (4th Cir. 2017). (2),(6),(8)	
United States v. Greer, 881 F.3d 1241 (10th 2018)	(8)

Statutes and Guidelines

18 U.S.C. §3231	(2)
28 U.S.C. §1254(1)	(3)
28 U.S.C. §2255(f)(3)	(2),(3),(4),(6),(7)
28 U.S.C. §2255(h)(2)	(2),(3),(6),(7)
U.S.S.G. §4B1.2	(7)

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

SPENCER BOWENS,
Petitioner,

-v.-

UNITED STATES OF AMERICA,
Respondent.

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

The petitioner, Spencer Bowens, respectfully prays that this Court issue a writ of certiorari to review a Circuit split brought on by United States v. Brown, 868 F.3d 297 (4th Cir. 2017), the United States District Court For The Eastern District of Virginia, Richmond Disivion used to deny the petitioner's Johnson claim, in United States of America v. Spencer Bowens, 2017 U.S. Dist. Lexis 167289 (October 6, 2017), which is attached to this petition as Appendix B.

OPINION BELOW

The opinion of the United States District Court For The Eastern District of Virginia, Richmond Disvision is available on Lexis at 2017 U.S. Dist. Lexis 167289, and is attached as Appendix B to this petition.

The United States District Court For The Eastern District of Virginia, Richmond Disvision decision dismissed the petitioner's §2255 motion as barred by 28 U.S.C. §2255(h)(2) and untimely under §2255(f)(3).

JURISDICTIONAL STATEMENT

The United States District Court For The Eastern District of Virginia, Richmond Division, assumed jurisdiction over the petitioner's criminal trial pursuant to 18 U.S.C. §3231. The district court entered a judgment against the petitioner September 16, 1998.

On June 14, 2016, the petitioner filed a motion for authorization to file a successive §2255 motion with the United States District Court For The Eastern District of Virginia, Richmond Division, based on this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). On June 23, 2016, the Court of Appeals For The Fourth Circuit granted the petitioner authorization to file the petitioner's successive motion in the district Court.

On October 6, 2017, relying on a recent decision from the United States Court of Appeals For The Fourth Circuit in *United States v. Brown*, 868 F.3d 297, 303 (4th Cir. 2017), which held that "Johnson only recognized that ACCA's residual clause" of the

Sentencing Guidelines, the district court concluded that the petitioner's claim was procedurally barred by 28 U.S.C. §2255(h)(2) and untimely under 28 U.S.C. §2255(f)(3).

The petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1), through the timely filing of the instant petition for writ of certiorari.

STATUTORY PROVISIONS INVOLVED

The district court found the petitioner's successive §2255 motion did not qualify under 28 U.S.C. §2255(h)(2) nor 28 U.S.C. §2255(f)(3).

Section 2255(h) states, in relevant part:

- (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. §2255(h)(2).

Likewise, the timeliness considerations under 28 U.S.C. §2255(f)(3) provides:

- (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).

STATEMENT OF THE CASE

On September 16, 1998, a jury sitting in the Eastern District of Virginia convicted the petitioner of conspiracy to possess and distribute crack cocaine, powder cocaine, and heroin, in violation of 21 U.S.C. §846 (count one); two counts of harboring a fugitive from arrest, in violation of 18 U.S.C. §1071 (count three and four); and obstruction of justice, in violation of 18 U.S.C. §1503 (count six).

Prior to sentencing, the Probation Department prepared a Presentence Investigation Report (PSR). The PSR found the petitioner to be a career offender based on two prior robbery convictions from 1983. Based on the career offender enhancement, the petitioner criminal history category increased from category IV to category VI. The petitioner's guideline range was determined to be life imprisonment.

On January 8, 1999, the petitioner appeared for sentencing. The Honorable Judge Robert E. Payne, following the mandatory United States Sentencing Guidelines, sentenced the petitioner to a term of life imprisonment on count one, 60 months on counts three and four, and 120 months on count six, all to be served concurrently.

The petitioner filed a notice of appeal to the Court Of Appeals For The Fourth Circuit on January 13, 1999.

On appeal, the Court Of Appeals For The Fourth Circuit affirmed the petitioner's life sentence, but vacated the petitioner's two convictions for harboring a fugitive. See United States v. Bowens, 224 F.3d 302 (4th Cir. 2000). The petitioner filed a petition for certiorari which was subsequently denied by the Supreme Court. Bowens v. United States, 121 S. Ct. 1408 (2001).

On March 22, 2002, the petitioner filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255. On December 17, 2002, the district court denied the petitioner's §2255 relief. Since then, the petitioner filed several unauthorized second or successive §2255 motions not relevant to the instant proceedings.

On June 14, 2016, the petitioner filed a motion for authorization to file a successive §2255 motion with the Court Of Appeals For The Fourth Circuit based on the United States Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015). See In re Bowens, No. 16-9179. On June 23, 2016, the Court Of Appeals For The Fourth Circuit granted the petitioner authorization to file the petitioner's successive §2255 motion in the district court.

The petitioner's successive §2255 motion argued that the prior convictions used to enhance the petitioner's sentence pursuant to section 4B1.1 and 4B1.2 of the United States Sentencing Guidelines no longer qualified in light of Johnson. The petitioner had previously been convicted of New York first-degree robbery and second-degree robbery, which were used to enhance the petitioner's sentence under the then mandatory career offender Guidelines.

On August 11, 2016, the United States filed a motion to hold the petitioner's §2255 motion in abeyance pending a decision in Beckles v. United States, 137 S. Ct. 886 (2017). The district court granted the government's motion and stayed the petitioner's §2255 motion.

The Supreme Court decided Beckles on March 6, 2017, and held that the advisory guidelines were not subject to a void-for-vagueness challenge. Beckles v. United States, 137 S. Ct. 886, 894 (2017). Following the Court's decision in Beckles, the government filed its response to dismiss the petitioner's claims. The petitioner submitted his reply on June 11, 2017.

Thereafter, the district court issued its Memorandum Opinion and Order dismissing the petitioner's §2255 motion on October 10, 2017. The district court concluded that the petitioner's claim was procedurally barred by 28 U.S.C. §2255(h)(2) and untimely under 28 U.S.C. §2255(f)(3). In so finding, the district court relied on a recent decision from the Court Of Appeals For The Fourth Circuit in United States v. Brown, which held that "Johnson only recognized that ACCA's residual clause was unconstitutionally vague" and "it did not touch upon the residual clause" of the sentencing guidelines. United States v. Brown, 868 F.3d 297, 303 (4th Cir. 2017). Accordingly, the district court held that the petitioner's §2255 motion was procedurally barred by 28 U.S.C. §2255(h)(2) and untimely under 28 U.S.C. §2255(f)(3).

On December 1, 2017, the petitioner timely submitted notice of appeal.

On December 27, 2017, the petitioner filed a application for certificate of appealability in the United States Court Of Appeals For The Fourth Circuit. On April 3, 2018, the certificate of appealability was denied.

REASONS FOR GRANTING THE WRIT

1. The Fourth Circuit's interpretation of the application of Johnson to the pre-Booker mandatory career offender guidelines are at odds with other Circuits, and clarification as to whether Johnson extend to pre-Booker career offender guidelines would bring uniformity as to Johnsons' application to pre-Booker mandatory career offender guidelines to all the Circuits.

In rejecting the petitioner's claim that the district court erred when it denied the petitioner's motion that argued that Johnson invalidated the identically worded "residual clause" in United States Sentencing Guidelines §4B1.2, robbery is not an enumerated offense in §4B1.2, and further, because robbery fails to satisfy the "force clause" of that guideline, the petitioner no longer has two predicate "crimes of violence" to find the petitioner a career offender, the Fourth Circuit held that because Johnson fails to extend to the petitioner's sentence pursuant to the Sentencing Guidelines, the petitioner fails to satisfy the requirements of §2255(h)(2) and §2255(f)(3). This ruling is inconsistent from other Circuits that have held that under Johnson, a person has a right not to have his sentence dictated by the unconstitutionally vague language of the mandatory residual clause in the United States Sentencing Guidelines, and a claimant assertion of that claim comply with the limitation period of section

§2255(f)(3) by filing their motion within one year of Johnson, and puts the Fourth Circuit at odds with these other Circuits.

The decision in *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017), which holding that Johnson did not recognize a new right related to pre-Booker Sentencing Guidelines, rendering §2255 filing untimely under 28 U.S.C. §2255(f)(3), has sprung widespread disagreement among other Circuits. Also see *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017); *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018); *In re Griffen*, 823 F.3d 1350 (11th Cir. 2016) (Four Eleventh Circuit judges have since detailed at length why "Griffin is deeply flawed and wrongly decided," yet the decision remains controlling in that Circuit) *In re Sapp*, 827 F.3d 1334, 1337 (11th Cir. 2016); *In re McCall*, 826, F.3d 1308, 1310 (11th Cir. 2016).

In contrast, the Court of Appeals for Circuits other than the Fourth, Sixth, tenth and Eleventh, have held that under Johnson, a person has a right not to have his sentence dictated by the unconstitutionally vague language of the mandatory residual clause in the United States Sentencing Guidelines, and a claimant assertion of that claim comply with the limitation period of section §2255(f)(3) by filing their motion within one year of Johnson. See *Cross v. United States*, and *Davis v. United States*, F.3d (7th Cir. 2018); *Moore v. United States*, 871 F.3d 72 (1st Cir. 2017); *In re Hoffner*, 870 F.3d 301 (3rd Cir. 2017). The rationale underlying these decisions find support in this Court's ruling in *Beckles v. United States*, 137 S. Ct. 886 (2017), which held that

The advisory Sentencing Guidelines are not subject to a void for vagueness challenge. However, in cases where a defendant was sentenced mandatory under the Sentencing Guidelines, like the petitioner, this Court did not decide in Beckles whether the career offender Guideline's residual clause would be unconstitutionally vague in the context of a mandatory Guidelines regime.

As the many petitions denied in district courts that raised the claim that Johnson rule has been extended to pre-Booker mandatory career-offender Guidelines, this Court's clarity on whether federal inmates are entitled to mount constitutional vagueness challenges to their career offender enhancements under the residual clause of the mandatory Sentencing Guidelines affects many federal inmates.

This Court should grant this writ to bring the Fourth Circuit in line with the other Circuits on this critical constitutional right, ensuring that defendants in the Fourth Circuit are not unfairly and incorrectly subject to an incorrect interpretation of Johnson that defendants in other Circuits are not subjected to. Fixing the disparity between the Fourth Circuit and the other Circuits is not only important to the fair administration of justice as between the Circuits, it would unify the application of a constitutional right of widespread importance on which the lower courts are divided.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays

this Court exercise its discretion to grant a writ of certiorari to the Fourth Circuit.

Dated: June 29, 2018
F.C.I. Otisville, New York

Respectfully Submitted,

Spencer Bowens, Pro-se
F.C.I. Otisville
P.O. Box 1000
Otisville, New York 10963