NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

CARLTON ROBINSON, *Petitioner,*

-vs-

UNITED STATES OF AMERICA, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

Petitioner, Carlton Robinson respectfully requests this Honorable Court issue a Writ of Certiorari to review the decision issued by the United States Court of Appeals for the Sixth Circuit in *Robinson v. United States*, Case No. 16-3595, 736 F. App'x 599 (6th Cir. 2018), affirming the denial of Mr. Robinson's motion to vacate his sentence under 28 U.S.C. § 2255.

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QUESTIONS PRESENTED

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held unconstitutionally vague the residual clause of the Armed Career Criminal Act (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* announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review. Petitioner was sentenced as a career offender under the identical residual clause of the mandatory guidelines in 2002, before *United States v. Booker*, 543 U.S. 220 (2005). A 28 U.S.C. § 2255 motion is timely when filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). Petitioner filed a 28 U.S.C. § 2255 motion within one year of *Johnson*, asserting that his sentence was imposed in violation of the Constitution in light of *Johnson*. The Sixth Circuit Court of Appeals, following its previous decision in *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017), held that Petitioner's motion was untimely because this Court had not yet held that the mandatory guidelines' residual clause is void for vagueness, and declined to reach the merits of Petitioner's claim.

The questions presented are:

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

2. Whether the residual clause of the pre-*Booker* career offender guideline is unconstitutionally vague.

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JJURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its final judgment on September 7, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

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

28 U.S.C. § 2255(f):

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . .

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

18 U.S.C. § 924(e)(2)(B):

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

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

U.S.S.G. § 4B1.2(a) (2002):

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

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

INTRODUCTION

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

In 2002, Petitioner was sentenced to 262 months of imprisonment for possessing with intent to distribute 68.3 grams of crack cocaine based on his designation as a career offender, a designation that depended on a prior conviction that qualified as a crime of violence under the residual clause of the career offender guideline. U.S.S.G. § 4B1.2 (2002). The district court was mandated by statute to follow the Guidelines. *See* 18 U.S.C. § 3553(b); *United States v. Booker*, 543 U.S. 220, 233-34, 245, 259 (2005). Petitioner filed his first and only § 2255 motion within one year of *Johnson*, arguing that his sentence was imposed in violation of the Constitution in light of *Johnson*. The Sixth Circuit Court of Appeals affirmed the denial of his petition, relying entirely on the Sixth Circuit's prior holding in *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017). *Raybon* held that *Johnson* did not hold that the mandatory sentencing guidelines' residual clause

for definition of crime of violence was unconstitutionally vague, and thus the decision did not provide a point from which to measure the one-year limitations period for defendant's motion to vacate his sentence. *Raybon,* 867 F.3d at 629-31.

The courts of appeals are now divided over whether a § 2255 motion filed within one year of *Johnson,* claiming that *Johnson* invalidates the residual clause of the pre-*Booker* career offender guideline asserts a "right . . . initially recognized" by this Court in *Johnson* within the meaning of 28 U.S.C. § 2255(f)(3). The Sixth Circuit's holding joins with the Fourth and Tenth Circuits, and have ruled that such motions do not assert any right recognized in *Johnson* because *Johnson* did not expressly hold that the mandatory guidelines' residual clause is void for vagueness. Conversely, the First, Third, and Seventh Circuits, have made clear that such motions assert the right recognized in *Johnson* because the invalidation of the mandatory guidelines' residual clause is a straightforward application of *Johnson*. The decisions of the Fourth, Sixth and Tenth Circuits conflict with this Court's relevant precedents, the statutory text, and Congress's purposes in enacting the statute of limitations. 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 resolution is outcome-determinative.

STATEMENT OF THE CASE

A. Legal Background

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

2. The career offender provision of the Guidelines increases the guideline range by tying the offense level to the statutory maximum for the instant offense, and automatically placing the defendant in Criminal History Category VI. U.S.S.G. § 4B1.1 (2002). A defendant is a career offender if he was at least 18 years of age when he committed the instant offense, the instant offense is either a "crime of violence" or a "controlled substance offense," and he has at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." *Id.* § 4B1.1(a).

3. Until August 1, 2016, the term "crime of violence" was defined to include any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another," *id.* § 4B1.2(a)(2), and this clause, identical to the ACCA's, was interpreted using the same "ordinary case" analysis as the ACCA's. *See Johnson*, 135 S. Ct. at 2560 (analyzing several

guidelines cases to demonstrate that the residual clause "has proved nearly impossible to apply consistently").

4. Nearly every court of appeals to consider the issue, the Department of Justice, and the Sentencing Commission understood that *Johnson* directly invalidated the identical residual clause of the career offender guideline.[1] Many prisoners sentenced under the guidelines' residual clause, including Petitioner, diligently filed § 2255 motions within one year of *Johnson*, asserting the right recognized in *Johnson*. Those motions were timely, and many prisoners were granted relief.[2]

5. On March 6, 2017, in *Beckles v. United States*, 137 S. Ct. 886 (2017), the Court created an exception to the rule announced in *Johnson*, ruling on the merits that because "the advisory Guidelines do not fix the permissible range of sentences," but "merely guide the exercise of a court's discretion," they "are not subject to a vagueness challenge under the Due Process Clause." *Id.* at 892.[3] The Court explained that the "advisory Guidelines do not implicate the twin concerns underlying vagueness doctrine." *Id.* at 894. The "'due process concerns that . . . require notice in a world of mandatory Guidelines no longer' apply." *Id.* (quoting *Irizarry v. United States*, 553 U.S. 708, 714 (2008)). The "advisory Guidelines also do not implicate the vagueness doctrine's concern with arbitrary enforcement," *id.* at 894, because district courts do not "enforce"

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

[2] *Beckles v. United States*, 137 S. Ct. 886 (2017) (No. 15-8544) (60 prisoners sentenced under the guidelines' residual clause obtained relief under § 2255 as of October 28, 2016).

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

the advisory guidelines, but rely on them "merely for advice in exercising [their] discretion," *id.* at 895. The pre-*Booker* Guidelines, in contrast, were "binding on district courts." *Id.* at 894 (citing *Booker,* 543 U.S. at 233). Accordingly, the Court held "only that the advisory Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine." *Id.* at 896.

Justice Sotomayor commented in a footnote that the majority's "adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment . . . during the period in which the Guidelines did fix the permissible range of sentences, may mount vagueness attacks on their sentences," but "[t]hat question is not presented by this case." *Beckles,* 137 S. Ct. at 903 n. 4 (Sotomayor, J., concurring) (internal citations and quotation marks omitted).

6. In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), this Court applied *Johnson* to a residual clause in a different statute, 18 U.S.C. § 16(b), with slightly different wording, subject to the same "ordinary case" analysis, resulting in virtually certain deportation. The Court explained that "*Johnson* is a straightforward decision, with equally straightforward application here," *id.* at 1213, and "tells us how to resolve this case," *id.* at 1223. Section 16(b)'s residual clause has the "same two features as ACCA's, combined in the same constitutionally problematic way," *id.* at 1213, viz., "an ordinary-case requirement and an ill-defined risk threshold," *id.* at 1223, and "with that reasoning, *Johnson* effectively resolved the case," *id.* at 1213.

B. Procedural Background

1. On March 2, 2002, Petitioner pled guilty to possession with intent to distribute 68.3 grams or more of crack cocaine in violation of 21 U.S.C. § 841(b)(1)(A). The plea agreement set forth that Mr. Robinson qualified as a career offender, as he had prior convictions for: 1) Robbery, Ohio

Revised Code § 2911.02(A)(3), and 2) Preparation of Drugs for Sale, Ohio Revised Code § 2925.07(A). The career offender enhancement increased Petitioner's offense level for the drug offense from 32 to 37 and his criminal history category from IV to VI, resulting in a guideline range after a three-level reduction for acceptance of responsibility of 262 to 327 months.

The district court sentenced Petitioner to 262 months for the drug offense, at the bottom of the mandatory career offender range. Absent the career offender enhancement, Petitioner's 2002 sentencing guideline range would have been 151 to 188 months. Today, his guideline range would be 57 to 71 months at total offense level 27, Criminal History Category IV.[4] Petitioner has served approximately 205 months.[5] His current release date is May 1, 2030.[6]

The district court entered judgment on May 1, 2002. Petitioner filed an appeal, which affirmed his conviction and sentence on October 17, 2003. This Court denied his petition for writ of certiorari on March 22, 2004, and the judgment became final on that date.

2. Petitioner filed his first and only § 2255 motion on January 25, 2016, within one year of *Johnson*, arguing that he was not a career offender in light of *Johnson* because his prior conviction under Ohio's robbery statute qualified as a "crime of violence" only under the residual clause. The district court dismissed the motion finding "the rule announced in *Johnson* is a non-watershed procedural rule as applied to the residual clause of the Guidelines and therefore does not apply

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4 Under the Fair Sentencing Act, his 68.3 grams of crack cocaine would subject him to a mandatory minimum statutory term of 60 months, which could be enhanced to 120 months. 21 U.S.C. §§ 841(a)(1), (b)(1)(B), 851 (2018). Under either scenario, the statutory range would replace the sentencing guideline range.

5 Petitioner has been in custody since October 25, 2001.

6 Federal Bureau of Prisons, Inmate Locator, https://www.bop.gov/inmateloc/.

retroactively to cases on collateral review." Dkt. 40, Order dated May 23, 2016, p. 3. The district court further held that the Ohio robbery statute qualified under the force clause. *Id.* at pp. 4-5 (citing *United States v. Mansur*, 375 F. App'x 458 (6th Cir. 2010)).

3. Petitioner appealed. The court of appeals granted a certificate of appealability on whether: 1) in light of *Beckles*, the decision in *Johnson* applies to the former residual clause of the sentencing guidelines where a defendant was sentenced under the mandatory sentencing guidelines; and 2) Petitioner's Ohio robbery conviction qualifies as a crime of violence under the elements clause of § 4B1.2(a).[7] While the appeal was pending, this Court decided *Beckles*. Additionally, while pending, the Sixth Circuit issued *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017), which found that a portion Ohio robbery statute – the same sub-section for which Petitioner was convicted – does not contain an element of force and is not a crime of violence under the career offender guideline.

On September 7, 2018, the Sixth Circuit affirmed, holding the motion untimely under § 2255(f)(3). The panel gave no real analysis into the legal issue but merely held it was bound by its previous holding in *Raybon v. United States*, 867 F.3d 623 (6th Cir. 2017). Ex. A, p. 2. The panel recognized that *Raybon* conflicts with the First and Seventh Circuits, but indicated it was nonetheless bound by *Raybon*. Ex. A, p. 2.

[7] Order, *Robinson v. United States*, No. 16-3595 (6th Cir.) (Doc. 11-2, November 16, 2017).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

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

I. There Is an Entrenched Split Among and Within the Circuits.

A. Three circuits have ruled that § 2255 motions claiming that *Johnson* invalidates the mandatory guidelines' residual clause do not assert any right recognized in *Johnson*.

The Fourth, Sixth and Tenth Circuits have held that § 2255 motions filed within one year of *Johnson* claiming that *Johnson* invalidates the mandatory guidelines' residual clause are untimely because this Court did not expressly so hold in *Johnson*. They say that the only right *Johnson* recognized was its specific holding that the ACCA's residual clause is unconstitutionally vague. *See United Stated v. Brown*, 868 F.3d 297, 303 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017); *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018).

All three circuits relied on caselaw interpreting inapplicable statutes to reach this conclusion. In its divided panel decision, the Fourth Circuit said that it was "constrained" by AEDPA jurisprudence "from extrapolating beyond the Supreme Court's holding to apply what we view as its reasoning and principles to different facts under a different statute or sentencing regime." *Brown*, 868 F.3d at 299. For this, it relied on: (1) the statement in *Williams v. Taylor*, 529 U.S. 362 (2000), that the phrase "clearly established Federal law, as determined by the Supreme Court," in 28 U.S.C. § 2254(d)(1), means "the holdings, as opposed to the dicta" of this Court, and (2) the statement in *Tyler v. Cain*, 533 U.S. 656 (2001), that the phrase "made retroactive to cases on collateral review by the Supreme Court" in 28 U.S.C. § 2244(b)(2)(A), means "held" retroactive by this Court. *Brown*, 868 F.3d at 301. The Tenth Circuit adopted this passage, *Greer*, 881 F.3d at 1247, adding that "'interests of finality and comity' underlying federal habeas review" – of state court judgments – precluded it from applying "the reasoning of *Johnson* in a different context." *Id.* at 1248 (quoting *Teague v. Lane*, 489 U.S. 288, 308 (1989)). The Sixth Circuit relied on *Tyler*'s statement that "made" means "held" and said that the language in § 2244(b)(2)(A) is "identical" to that in § 2255(f)(3). *Raybon*, 867 F.3d at 630.

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

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

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

The Eleventh Circuit has also blocked consideration of *Johnson* claims by prisoners sentenced under the mandatory guidelines' residual clause, but in a different way. Shortly after *Welch* and ten months before *Beckles*, a panel of the Eleventh Circuit issued a published decision denying an application for authorization to file a successive § 2255 by a *pro se* prisoner, holding that "the Guidelines – whether mandatory or advisory – cannot be unconstitutionally vague." *In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016). Griffin was barred from seeking rehearing or certiorari review, 28 U.S.C. § 2244(b)(3)(E), and *Griffin* became binding circuit precedent barring relief on the merits for any first or successive § 2255.

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

States v. Matchett, 837 F.3d 1118, 1134 n. 3 (11th Cir. 2016) (Martin, J., dissenting from denial of rehearing en banc).

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

Other circuits, circuit judges, and district court judges disagree with the reasoning and conclusions of *Brown*, *Raybon*, *Greer*, and *Griffin*. In *United States v. Moore*, 871 F.3d 72 (1st Cir. 2017), the First Circuit held that a § 2255 motion arguing that *Johnson* invalidates the pre-*Booker* career offender guideline's residual clause was timely because it was filed within one year of *Johnson*, *id.* at 77 n. 3, and authorized a successive motion. The court concluded that the right *Moore* "seeks to assert is exactly the right recognized by *Johnson*." *Id.* at 83. The court was "not . . . persuaded" by the government's argument that the rule upon which *Moore* relied had not been "recognized" by this Court. *Id.* at 81. The court did not "need to make new constitutional law in order to hold that the pre-*Booker* fixed sentences" because this Court had already resolved that question of statutory interpretation in *Booker*. *Id.* (citing *Booker*, 543 U.S. at 233-34, 245; 18 U.S.C. § 3553(b)). The First Circuit expressly rejected the reasoning of *Brown* and *Raybon*. *Id.* at 82-83. It explained that in § 2255, Congress used words such as "rule" and "right" rather than "holding" because it "recognizes that [this] Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law." *Id.* at 82. The pre-*Booker* guidelines' residual clause "is not clearly different in any way that would call for anything beyond a straightforward application of *Johnson*." *Id.* And "*Beckles* did not limit *Johnson* II to its facts. Rather, one can fairly and easily read *Beckles* as simply rejecting the application of *Johnson* II to the advisory

guidelines because, as a matter of statutory interpretation, those guidelines do not fix sentences." *Id.* at 83.

Moore also disagreed with *Griffin*. Because this Court had "consistently held that the Guidelines [had] the force and effect of laws," and "the lower end of a guidelines range sentence often exceeds what would have otherwise been the statutory minimum," the court was "quite skeptical" of *Griffin*'s conclusion that the mandatory guidelines "'did not alter the statutory boundaries for sentences set by Congress for the crime.'" *Moore*, 871 F.3d at 81 (quoting *Griffin*, 823 F.3d at 1355). "Nor does the fact that the Eleventh Circuit so concluded mean that a contrary conclusion would be a new rule," since the "all reasonable jurists standard is objective." *Id.* at 81 (internal citations and punctuation omitted).

The Third Circuit, in *In re Hoffner*, 870 F.3d 301 (3d Cir. 2017), authorized a successive § 2255 motion because it "relies on" *Johnson*. The court explained that "the way to determine" whether applying *Johnson* to the mandatory guidelines would create a "second new rule" is to "undertake a *Teague* analysis" to determine whether doing so "'breaks new ground,'" or instead "'[is] merely an application of the principle that governed' a prior decision to a different set of facts.'" *Id.* at 311-12 & n. 15 (quoting *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013)).[8] The Third Circuit declined to follow *Griffin*, in substance or procedure. *Id.* at 310 & n. 13.

The Seventh Circuit, in *United States v. Cross*, 892 F.3d 288, 291 (7th Cir. 2018), granted the § 2255 motion for two petitioners sentenced prior to *Booker*, finding that *Beckles* "applies only to advisory guidelines, not to mandatory sentencing rules." *Cross* further held that "'under *Johnson*, the guidelines residual clause is unconstitutionally vague insofar as it determined

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

mandatory sentencing ranges for pre-*Booker* defendants." *Cross*, 892 F.3d at 291. Endorsing the legal analysis of *Raybon* and *Brown*, the district court held the petitioners' § 2255 motion was untimely under § 2255(f). *Id.* at 293. The Seventh Circuit reversed, finding, "[u]nder *Johnson*, a person has a right not to have his sentence dictated by the unconstitutionally vague language of the mandatory residual clause. Davis and Cross assert precisely that right. They complied with the limitations period of section 2255(f)(3) by filing their motions within one year of *Johnson*." *Id.* Finding *Beckles* was limited to post-*Booker* sentences, and not applicable to pre-*Booker* sentences, the Seventh Circuit found the residual clause of the mandatory guidelines void for vagueness. *Id.* at 305-06.

The Second Circuit, in an unpublished opinion, recognized that *Beckles* held only that the advisory guidelines were not amenable to a vagueness challenge but did not foreclose such a challenge to the mandatory guidelines' residual clause. The court authorized the successive motion and instructed the district court to consider staying the case pending "relevant" decisions including *Dimaya*. *See Vargas v. United States*, No. 16-2112, 2017 WL 3699225, at *1 (2d Cir. May 8, 2017). Before and after *Moore*, district courts within the First Circuit have found these motions timely and granted relief on the merits. *See United States v. Roy*, 282 F. Supp. 3d 421, 425-28 (D. Mass. 2017) (relying on *Moore* to hold that for purposes of timeliness, "the rule *Roy* relies on here is the rule announced in *Johnson* II," that rule "is retroactive to cases on collateral review," and the residual clause of the mandatory career offender guideline is void for vagueness); *United States v. Hardy*, No. 00-cr-10179 (D. Mass. Jan. 26, 2018) (oral ruling, Dkt. 69); *Reid v. United States*, 252 F. Supp. 3d 63 (D. Mass. 2017) (holding before *Moore* that the pre-*Booker* guidelines' residual clause violates the Due Process Clause under *Johnson*, and rejecting government's argument that

Beckles applies to sentences imposed under the mandatory guidelines). After *Moore*, the government has not appealed or has abandoned its appeals of such rulings.

Other district courts have expressly disagreed with *Brown*, *Raybon*, and *Greer*. A district court in the Sixth Circuit granted a certificate of appealability, reasoning that "the right vindicated in *Johnson* was the right to be free from unconstitutionally vague statutes that fail to clearly define 'crime of violence' or 'violent felony,' not simply the right not to be sentenced under the residual clause of the ACCA," and that *Raybon*'s "excessively narrow construction" of § 2255(f)(3) "invites Potemkin disputes about whether the Supreme Court has explicitly applied its precedents to a specific factual circumstance rather than asking whether the right the Supreme Court has newly recognized applies to that circumstance." *United States v. Chambers*, No. 01-cr-172, 2018 WL 1388745, at *2 (N.D. Ohio Mar. 20, 2018). A magistrate judge in the Western District of Texas recently recommended that relief be granted, rejecting the reasoning of *Brown*, *Raybon*, and *Greer*, embracing that of *Moore* and the dissent in *Brown*, and recognizing that *Dimaya* "adds significant weight to this position." *Zuniga-Munoz v. United States*, No. 16-cv-0732, slip op. at 8-10 (W.D. Tex. Apr. 26, 2018); *see also United States v. Meza*, No. 11-cr-00133, 2018 WL 2048899 (D. Mont. May 2, 2018) (rejecting government's argument based on *Greer* that *Johnson* announced only "a defendant's right not to have his sentence increased under the residual clause of the ACCA," as *Dimaya* confirms that the "right" established by *Johnson* is the "right not to be penalized under a clause that is applied by categorical analysis and has both an ordinary-case requirement and an ill-defined risk threshold").[9]

[9] *See also, e.g.*, *Brow v. United States*, No. 90-cr-00048, slip op. at 14-17 (D.V.I. Apr. 20, 2018) (finding that a "straightforward application of *Johnson* is appropriate," and recommending sentence be vacated); *Long v. United States*, No. 16-cv-4464, 2017 WL 6886299, at *2 (C.D. Cal. Sept. 15, 2017) (holding motion timely and granting relief on the merits); *United States v. Parks*,

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 Petitioner filed timely first-time § 2255 motions.

II. The Decision Below, and *Raybon*, Conflict with this Court's Relevant Precedents, the Statutory Text, and Congress's Purposes in Enacting the Statute of Limitations.

In denying Petitioner relief, the Sixth Circuit relied entirely and exclusive on its prior holding in *Raybon*. The Sixth Circuit's holding in the instant case as well as *Raybon* were improperly decided. 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 Petitioner has "asserted" that his sentence violates *Johnson*, not whether *Johnson* ultimately applies to his sentence (although it does). Petitioner's § 2255 motion unquestionably claimed, or "asserted," that his sentence violates a right newly recognized by this Court, and whether that right 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 Petitioner's motion, reasoning that he filed it too soon because this Court had not yet expressly recognized that *Johnson* applies to the mandatory Guidelines' residual clause. Ex. A, p. 2; *see also Raybon*, 867 F.3d at 629-31. In doing so, the Sixth Circuit did not use the correct analytical framework – this Court's

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No. 03-cr-00490, 2017 WL 3732078, at **2-7, 11-12 (D. Colo. Aug. 1, 2017) (holding before *Greer* that mandatory guidelines' residual clause implicates the twin concerns of the vagueness doctrine, and motion was timely); *United States v. Walker*, No. 93-cr-00333, 2017 WL 3034445, at *5 (N.D. Ohio July 18, 2017) (before *Raybon*, holding that "[b]ecause the pre-*Booker* mandatory Sentencing Guidelines are sufficiently statute-like to be subject to vagueness analysis, *Johnson* applies directly").

"new rule" jurisprudence under *Teague*, 489 U.S. 288, and its progeny. Petitioner 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*, 568 U.S. at 347-48.

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 Petitioner'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). "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.*

Petitioner invokes the right recognized in *Johnson* 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." *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* is a straightforward decision, with equally straightforward application" to the residual clause of the mandatory career-offender guideline. *Dimaya*, 138 S. Ct. at 1213. *Johnson* announced a new rule: the "ordinary case" interpretation of the residual clause paired with a "hazy risk threshold" of the ACCA does not provide a clear standard by which sentences may be fixed. *Dimaya*, 138 S. Ct. at 1218; *Johnson*, 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.

Petitioner "seeks to benefit from [the] holding in [*Johnson*]," *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, 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 Petitioner 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.*

In denying Petitioner relief, the Sixth Circuit confused the requirements of a first-time § 2255 motion with those for a second or successive motion. In *Raybon*, the Sixth Circuit conflated 28 U.S.C. § 2255(h)(2)'s requirements for second or successive petitioners with § 2255(f)(3)'s requirements for first-time petitioners. *Raybon*, 867 F.3d at 630 & n. 5 (citing *Tyler*, 533 U.S. 656). Second or successor movants may rely on only new rules of constitutional law "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h)(2).

In contrast, first petitioners file timely motions when they "assert" a right newly recognized by the Supreme Court and "made retroactively applicable to cases on collateral review." *Id.* § 2255(f)(3). Any court can make a right retroactive for purposes of § 2255(f)(3). *See Dodd*, 545 U.S. at 357-58, 359 (under § 2255(f)(3), "a court must have made the right retroactively applicable to cases on collateral review"; under § 2255(h)(2), the rule must be "made retroactive . . . by the Supreme Court"). These textual differences make the panel's reliance on *Tyler* – a § 2255(h)(2) case – inappropriate.

Although the Sixth Circuit recognized that "'multiple holdings [can] logically dictate the retroactivity of the new rule,'" *Raybon*, 867 F.3d at 630 n. 5 (quoting *In re Watkins*, 810 F.3d 375, 381 (6th Cir. 2015) (quoting *Tyler*, 533 U.S. at 668 (O'Connor, J., concurring)), it held that *Johnson*'s holding was retroactively applicable to only sentences fixed by the ACCA. *Raybon*, 867 F.3d at 630-31. This holding does not survive *Dimaya*, which applied *Johnson* to a different statute, 18 U.S.C. § 16(b) (2012), which used slightly different wording to define "crime of violence." *Dimaya* explained that "*Johnson* is a straightforward decision, with equally straightforward application" to other provisions that, like U.S.S.G. § 4B1.2(a), require courts to assess whether the "ordinary case" of a crime meets an imprecisely defined threshold of risk. 138 S. Ct. at 1213-16. If there was any doubt before, *Dimaya* makes clear that *Johnson*'s holding extends to all mandatory laws that share the same constitutionally problematic features of the ACCA. This Court need not separately take up and explicitly strike down each and every statute that shares those features to recognize that none of them can stand.

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 Petitioner's § 2255 motion is 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 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 Circuit, like the Tenth Circuit, 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*, 135 S. Ct. at 2561; *Welch*, 136 S. Ct. at 1262); *Greer*, 881 F.3d at 1247 n. 5, 1248. That caveat in *Johnson* – 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. *See 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* 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*, 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*, 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 Petitioner'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.

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

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

That law, 18 U.S.C. § 3553(b), made the Guidelines "mandatory and impose[d] binding requirements on all sentencing judges." *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.

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

Because the law under which Petitioner was sentenced "fixe[d] permissible sentences," it was required to "provide[] notice and avoid[] arbitrary enforcement by clearly specifying the range of penalties available." *Beckles*, 137 S. Ct. at 895. By combining an ordinary-case requirement and an ill-defined risk threshold, *Johnson*, 135 S. Ct. at 2557-58, the mandatory guidelines' residual clause failed to clearly specify the range of penalties available. *Beckles*, 137 S. Ct. at 894. As the Court reiterated in *Beckles*, "due process . . . require[d] notice in a world of mandatory Guidelines." *Id.* at 894 (quoting *Irizarry*, 553 U.S. at 713-14). The mandatory guidelines' residual clause also invited arbitrary enforcement. It left judges "free . . . to prescribe the sentences or sentencing ranges available," "without any legally fixed standards." *Id.* at 894-95 (internal citations omitted).

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

If *Johnson* indeed invalidates the mandatory career offender guideline's residual clause, numerous federal prisoners are serving unlawful sentences. Approximately 1,200 prisoners sentenced as career offenders before *Booker* have pending § 2255 motions or appeals challenging their sentences in light of Johnson.[10] *See* Amicus Brief of Sixth Circuit Federal Defenders, Appendix.

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

A5, *United States v. Raybon*, Case No. 17-8878; *see also Brown v. United States*, Case No. 17-9276 (October 15, 2018) (order denying petition for writ of certiorari, Sotomayor, J., dissenting). 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. *In re Liddell*, 722 F.3d 737, 738 (6th Cir. 2013); *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999). While Petitioner 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 Petitioner. *See e.g.*, *Swain v. United States*, No. 1:03-cr-20031-DML (E.D. Mich. Sept. 26, 2017); *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 for relief. *See Roy*, 282 F. Supp. 3d at 428, 432.

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

This petition cleanly presents the issues, and their resolution is outcome-determinative. Petitioner was sentenced as a career offender in 2002, when the guidelines were binding on the sentencing judge as a matter of law, for which Petitioner received a sentence of 262 months. The enhancement depended on a prior conviction that qualified as a "crime of violence" only under the residual clause, *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017), and thus Petitioner would not qualify as a career offender today. Thus, if Petitioner were resentenced today without the career offender enhancement, his sentence would be significantly reduced. Finally, there is no possibility that the case would become moot, as Petitioner's current release date is May 1, 2030.

CONCLUSION

The petition should be granted.

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