No. 18-

IN THE

SUPREME COURT OF THE UNITED STATES

ROY ALLEN GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF *CERTIORARI*

HEIDI R. FREESE, ESQ.
Federal Public Defender

RONALD A. KRAUSS, ESQ.
First Assistant Federal Public Defender

QUIN M. SORENSON, ESQ.
Assistant Federal Public Defender

FREDERICK W. ULRICH, ESQ.
Assistant Federal Public defender

TAMMY L. TAYLOR, ESQ.
Staff Attorney

Middle District of Pennsylvania
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101
(717) 782-2237
fritz_ulrich@fd.org

Counsel for Petitioner

March 8, 2019

QUESTION 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). And 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.

A motion to correct sentence under 28 U.S.C. § 2255 is timely when filed within one year of "the date on which the right asserted was initially recognized by this Court, if that right has been newly recognized by this Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

The question presented is:

1. Whether this Court's rulings in *Johnson* and *Welch*, retroactively invalidating the residual clause of the ACCA because it was unconstitutionally vague, apply to an identically worded provision in a different mandatory sentencing scheme, that is, the residual clause of the career-offender provision of the former mandatory Sentencing Guidelines or does this application require recognition of a "new right"?

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Roy Allen Green.

The Respondent, the appellee below, is the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

PETITION FOR A WRIT OF *CERTIORARI*

The Petitioner, Roy Allen Green, who was denied collateral relief on his motion to correct sentence under 28 U.S.C. § 2255, petitions this Court for a writ of *certiorari* to review the final order of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Court of Appeals opinion is reported at 898 F.3d 315, and is reproduced in the appendix to this petition. (Petitioner's Appendix ("Pet. App.") 1a-17a). The opinion of the district court is not officially reported, but may be found at 2017 WL 3485784, and is reproduced in the appendix, (Pet. App. 22a-28a).

JURISDICTION

The Court of Appeals for the Third Circuit issued its opinion on August 6, 2018. (Pet. App. 1a), and denied rehearing on November 8, 2018. *See* (Pet. App. 20-21). This Court granted Petitioner an extension to petition for a writ of *certiorari* to March 8, 2019. This Court has jurisdiction over this timely filed petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

INTRODUCTION

This case presents whether Mr. Green and others similarly situated can rely on the right of defendants this Court recognized in *Johnson* not to be sentenced under an unconstitutionally vague statute, and applied retroactively in *Welch*, to challenge identical language in the former, mandatory version of the U.S. Sentencing Guidelines. In denying Mr. Green the opportunity to present his claim, the Third Circuit's opinion affects innumerable individuals serving long sentences imposed under an unconstitutional framework, the mandatory Guidelines. *See Booker v. United States*, 543 U.S. 220, 226-27 (2005). Not only were these individuals sentenced under an unconstitutional scheme, but based on *Johnson*, they were also subjected to the unconstitutionally vague residual clause for career-offender enhancement.

The Third Circuit's ruling, however, effectively closes the courthouse doors to them, precluding them from seeking relief until this Court recognizes – a second time – that the vague language invalidated in *Johnson* is equally invalid as it appears in the identically worded career-offender provision. *See* (Pet. App. 17a n.5). Indeed, Justices Sotomayor and Ginsburg expressed similar concern, observing, in addition, the division on this issue among the circuits. *See Brown v. United States*, 139 S. Ct. 14-16 (2018) (Sotomayor and Ginsburg, J.J., dissenting from the denial of *certiorari*)

A writ of *certiorari* should be granted so that this Court may correct this manifest injustice and resolve the circuit split.

STATEMENT OF THE CASE

A. Background

In November 2001, at the United States Penitentiary at Allenwood, Mr. Green was involved in a television program dispute; he retrieved a shank from his cell and stabbed another inmate. *See* (C.A. 52).[1] A grand jury returned a three-count indictment, charging Mr. Green with, among other things, assault with intent to commit murder. *See* (C.A. 21). And in April 2002, Mr. Green pleaded guilty to that count.

The Probation Office prepared a presentence report, concluding that Mr. Green was subject to the career-offender provision in the Sentencing Guidelines because of a 1986 conviction for assault and robbery and a 2000 conviction for conspiring to distribute and possess with intent to distribute methamphetamine. *See* (Presentence Investigation Report at ¶¶ 19, 27-28) ("PSR"). The Probation Office did not specify which clause or clauses under the career-offender provision applied to the predicate offenses. Based on this provision, the Probation Office calculated Mr. Green's guidelines as reflecting a total offense level of 29, a criminal history category of VI, and a corresponding imprisonment range of 151 to 188 months. *See* (PSR at ¶¶ 19-20, 32, 48). At sentencing, the District Court adopted the imprisonment range in the presentence report, imposing a 151-month term of

[1] "C.A." refers to the Appendix submitted in the Court of Appeals.

incarceration consecutive to the term that Mr. Green had been serving. *See* (Pet App. 4a); (C.A. 62, 66, 70).

B. The motion to correct sentence under Section 2255 and the District Court's ruling

In the wake of *Johnson*, Mr. Green filed an initial motion to correct sentence under Section 2255 of Title 28 of the United States Code, 28 U.S.C. § 2255. In his filing, Mr. Green pointed out that this Court in *Johnson* held that the residual clause of the ACCA was unconstitutionally vague. *See* (Pet. App. 5a). Although Mr. Green had been sentenced as a career offender, he argued that the residual clause of that provision was identical to the one in the ACCA. *See* (C.A. 90-91). The Government successfully moved to stay the matter pending a decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), in which this Court held that a vagueness challenge cannot be maintained against the current advisory Sentencing Guidelines.

Addressing Mr. Green's motion, the District Court began by pointing out that for the motion to be timely, it had to have been filed within one year of the date on which the right asserted was first recognized by this Court. *See* (Pet. App. 23a). The Court held that Mr. Green's motion was untimely, as *Johnson* did not announce a "new rule" applicable to the former mandatory Sentencing Guidelines and, in particular, the career-offender residual clause. *See* (Pet. App. 26a). While acknowledging that some courts had concluded that the career-offender residual clause was unconstitutionally vague given *Johnson*, the Court reasoned that this result was not "'dictated by' *Johnson*." *See* (Pet. App. 27a & n.23).

C. The Third Circuit's opinion

On appeal, the Third Circuit affirmed in a precedential opinion, reasoning that *Beckles* cabined the reach of *Johnson* to the recognition of a "right" only with the ACCA. (Pet. App. 13a). In this regard, the Third Circuit emphasized that *Beckles* left the application of *Johnson* to the mandatory Guidelines as an open question. *See* (Pet. App. 13a). According to the Third Circuit, "[o]nly the Supreme Court can recognize the right that would render Mr. Green's motion timely[,]" and once that occurs, Mr. Green would have one year within which to assert that right. (Pet. App. 16a-17a & n.5).

REASONS FOR GRANTING THE PETITION

A. The Third Circuit's opinion, declining to apply the rule in *Johnson* to identically worded language in another mandatory sentencing provision, conflicts with this Court's precedent addressing the application of new rules to cases on collateral review, deepens a circuit split, and involves an issue of exceptional importance.

1. The Third Circuit's opinion conflicts with this Court's precedent

Emphasizing a footnote in Justice Sotomayor's concurring opinion in *Beckles*, the Third Circuit concluded that this Court "left open" whether *Johnson* applies to the mandatory Guidelines, and thus the right asserted by Mr. Green had not been "recognized." *See* (Pet. App. 12a-13a). In the Third Circuit's view, *Beckles* limited the right identified in *Johnson* to its holding that the residual clause of the ACCA was unconstitutionally vague. *See* (Pet. App. at 13). But just because this Court in *Beckles* did not have a mandatory Guidelines case before it, does not mean that application of *Johnson's* rule to identical language in that mandatory scheme would be "new."

This Court has never said what it means to "recognize" a "right asserted," 28 U.S.C. § 2255(f)(3), but courts of appeal have long applied this Court's jurisprudence to determine whether a "right asserted" in a Section 2255 motion "has been newly recognized." *See, e.g., Butterworth v. United States*, 775 F.3d 459, 464-65 (1st Cir. 2015). Under that jurisprudence, a right not to have one's sentence increased by the mandatory guidelines' residual clause is not another new right, but an application of *Johnson*. 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 v. United States*, 568 U.S. 342, 347-48 (2013) (quoting *Teague v. Lane*, 489 U.S. 288, 307 (1989)). "To determine what counts as a new rule," courts 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, J., 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.*

Thus, 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), which addressed vague aggravators in death penalty statutes, were not new rules, but applications of the principles that governed its prior decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980). By invalidating an aggravating factor with slightly different language in an Oklahoma statute, *Maynard* and *Clemons* did not break new ground. *Stringer*, 503 U.S. at 228-29.

And this Court's decision in *Sessions v. Dimaya* 138 S. Ct. 1204 (2018) underscores this principle. In *Dimaya* this Court held that "*Johnson* is a straightforward decision, with equally straightforward application" to a different residual clause, 18 U.S.C. § 16(b). *Dimaya*, 138 S. Ct. at 1213. This Court explained that where the two flaws *Johnson* found combined in the ACCA residual clause combine in another statute's residual clause, *Johnson* effectively resolved the case. *Id.* at 2013. It follows from this reasoning that *Dimaya* did not amount to a new rule

for *Teague* purposes (or a "newly recognized" rule to restart the Section 2255(f)(3) statute of limitations for *Johnson*). *Dimaya* shows that *Johnson* is the "new rule."

Moreover, Congress enacted the statute of limitations in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") to "curb lengthy delays in filing," while "preserving the availability of review when a prisoner diligently . . . applies for federal habeas review in a timely manner," including when this Court "recognizes a new right that is retroactively applicable." H.R. Rep. No. 104-23, at 9 (Feb. 8, 1995). Congress used the word "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." *Moore v. United States,* 871 F.3d 72, 82 (1st Cir. 2017). Reading Section 2255(f)(3) to require prisoners to wait for this Court to decide a case exactly like theirs encourages delay and discourages diligent pursuit of known claims, contrary to Congress's purposes. *Cf. Johnson v. United States*, 544 U.S. 295, 309 (2005) ("explicit" requirement of "due diligence" in Section 2255(f)(4) "reflects AEDPA's core purposes").

2. The Courts of Appeal disagree on whether *Johnson* applies to the mandatory Guidelines.

Although the Third Circuit emphasized its decision was in line with those of other circuits, this is not true. In making this statement, the Third Circuit cited the Tenth Circuit's ruling in *United States* v. *Greer*, 881 F.3d 1241 (10th Cir. 2018), which held that this Court has not recognized a right to bring a vagueness challenge to the mandatory Guidelines. *See* (Pet. App. at 14). But the Tenth Circuit recently granted

rehearing in *United States v. Ward*, No. 17-3182, a case in which that court had summarily affirmed based on *Greer*. In the order granting rehearing, the court that explained that "[b]oth Supreme Court and circuit court decisions have issued since the opening brief was filed that may affect the court's consideration of the issues before it." *United States v. Ward*, No. 17-3182, dkt. 010110033070 (10th Cir. Aug. 6, 2018). Those decisions include *Dimaya* and the Seventh Circuit's opinion in *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018), in which the court held that the Section 2255 motion was timely and that *Johnson's* holding applied to the mandatory Guidelines. *See id*. at 294, 307. And the First Circuit has taken a position at odds with the Third Circuit. *See Moore,* 871 F.3d at 80-84.[2]

On the other side of this divide are *United States v. Blackstone*, 903 F.3d 1020, 1028 (9th Cir. 2018); *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017); *Russo v. United States*, 902 F.3d 880, 883-84 (8th Cir. 2018); and *United States v. Brown,* 868 F.3d 297, 301-03 (4th Cir. 2017). In the Eleventh Circuit, notably, the issue has created an intra-circuit split of sorts. At first, a panel of the Eleventh Circuit issued a published decision denying an application for authorization to file a successive Section 2255 motion 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*, 28 U.S.C. § 2244(b)(3)(E), and that decision became binding circuit precedent barring

[2] Recently, in *United States v. Hammond*, No. 02-294, 2018 WL 6434767 (D.D.C. Dec. 7, 2018), the Chief Judge of the District Court for the District of Columbia sided with the Seventh Circuit's reasoning in *Cross*, setting up the potential for yet a deeper split of authority.

relief on the merits for any first or successive Section 2255 motion. But then a different Eleventh Circuit panel sharply disagreed — "we believe *Griffin* is deeply flawed and wrongly decided" and that "*Johnson* applies with equal force to the residual clause of the mandatory career offender guideline." *In re Sapp*, 827 F.3d 1334, 1339 (11th Cir. 2016) (Jordan, Rosenbaum, and Pryor, J.J., 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*).

As Justices Sotomayor and Ginsburg recognized, the issue presented involves an exceptionally important question of federal law that has divided the circuits and affects the liberty of over 1,000 individuals. *See Brown*, 139 S. Ct. at 16.

3. **The Third Circuit is mistaken in assuming that Mr. Green would be able to file for collateral relief after this Court addresses the issue**.

The Third Circuit noted that once this Court recognizes the right to challenge the mandatory Guidelines, then Mr. Green would have one year to file a subsequent petition based on that decision. *See* (Pet. App. 17a n.5). But that's not necessarily true. It is more likely that this Court, assuming that it accepts review in such a case, will simply apply *Johnson* to the identical language in the career-offender residual clause in the former-mandatory Guidelines. This application would be the same as occurred in *Dimaya*.

And if this Court "applies" *Johnson* to the mandatory Guidelines, then Mr. Green and those similarly situated will not have a new one-year period to file another

petition. Rather, they will be out of court and without a mechanism under Section 2255(f) and (h) to bring their *Johnson*-based claims. *See Dodd v. United States*, 545 U.S. 353, 359 (2005).

CONCLUSION

For all these reasons, this Honorable Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

HEIDI R. FREESE, ESQ.
Federal Public Defender
Middle District of Pennsylvania

RONALD A. KRAUSS, ESQ.
First Assistant Federal Public Defender

QUIN M. SORENSON, ESQ.
Assistant Federal Public Defender

/s/ Frederick W. Ulrich
FREDERICK W. ULRICH, ESQ.
Assistant Federal Public Defender

TAMMY L. TAYLOR, ESQ.
Staff Attorney

Middle District of Pennsylvania
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101
(717) 782-2237
fritz_ulrich@fd.org

Counsel for Petitioner

March 8, 2019