NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

Kirk Lurton Grummitt,
Jeremy Phelps,
Kurt Alan Campbell, and
Edward Lee Williams, - PETITIONERS,

vs.

United States of America, - RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A motion under 28 U.S.C. § 2255 is considered timely if 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).

The question presented is:

(1) Whether the "right" in *Johnson*, which invalidated the residual clause of the Armed Career Criminal Act, triggers this statute of limitations for a petitioner seeking to collaterally challenge a sentence under the identical residual clause in the pre-*Booker* career offender guidelines?

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The Petitioners, Kirk L. Grummit, Jeremy Phelps, Kurt A. Campbell, and Edward L. Williams, through counsel, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in consolidated case Nos. 17-3609, 17-3622, 17-3625, and 17-3628, entered on February 8, 2019.

OPINION BELOW

On February 8, 2019, a panel of the Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Northern District of Iowa. The decision is unpublished and available at 750 F. App'x 519.

JURISDICTION

The Court of Appeals entered its judgment on February 8, 2019. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND SENTENCING POLICY STATEMENTS INVOLVED

U.S. CONST. AMEND. V

> 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 offence 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.

28 U.S.C. § 2255 Federal custody; remedies on motion attacking sentence

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentences to vacate, set aside or correct the sentences.
>
> ***
>
> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of---

(1) The date on which the judgment of conviction becomes final;
(2) The date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
(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; or
(4) The date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT OF THE CASE

In this consolidated case, four petitioners challenge the denial of their 28 U.S.C. § 2255 motion as untimely. The general case background for each petitioner is as follows: [1]

A. Kirk L. Grummit

On September 4, 2003, Mr. Grummitt entered a plea of guilty to one count of conspiracy to manufacture five grams or more of actual methamphetamine and to possessing pseudoephedrine knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 846. (PSR ¶¶ 1–9). Applying the 2003 Sentencing Guidelines, the PSR determined that Mr. Grummitt's offense level based on drug quantity was 26 and his criminal history

[1] For purposes of the Statement of the Case, each petitioner's factual and procedural background is set forth independently in a separate subdivision, captioned with petitioner's name. References to Civ. Doc. in each subdivision is to the respective petitioner's § 2255 case (Grummitt Civil No. 1:16-cv-72; Phelps Civil No. 1:16-cv-80; Campbell Civil No. 5:16-cv-4037; Williams Civil No. 1:16-cv-87 No. 1:02-cr-28;) whereas references to Crim. Doc. are to each respective petitioner's underlying criminal case (Grummitt Criminal No. 1:03-cr-58; Phelps Criminal No. 1:02-cr-10; Campbell Criminal No. 5:03-cr-4020; Williams Criminal No. No. 1:02-cr-28). References to the presentence reports will be abbreviated PSR.

category was VI, yielding a sentencing range of 92–115 months. (PSR ¶¶ 29–37). Because this range was lower than the mandatory minimum, the sentencing range became 120 months. USSG § 5G1.1(b). The PSR further found that Mr. Grummitt was a career offender based on a 1997 controlled substance conviction and Iowa third-degree burglary convictions in 1997 and 1998. (PSR ¶ 38). Mr. Grummitt's base offense level was thus enhanced to 37, yielding a total adjusted offense level 34 after acceptance of responsibility, and a sentencing range of 262–327 months. (PSR ¶ 89). At the sentencing hearing, the district court imposed a sentence of 262 months – at the bottom of the mandatory pre-*Booker*[2] sentencing range. (Crim. Doc. 89).

Mr. Grummitt filed a direct appeal, arguing that his prior burglary of an unoccupied structure did not constitute burglary of a dwelling under USSG § 4B1.2(a) (2003). *United States v. Grummitt,* 390 F.3d 569, 571 (8th Cir. 2004). The Eighth Circuit rejected Mr. Grummitt's argument, but also found that even if his conviction did not qualify under the enumerated clause, it still would qualify under the residual clause of the career offender guideline. *Id.* Prior to the instant case, Mr. Grummitt had not filed a motion under 28 U.S.C. § 2255.

On May 6, 2016, Mr. Grummitt filed a motion under 28 U.S.C. § 2255, seeking relief under *Johnson v. United States,* 135 S. Ct. 2551 (2015). (Civ. Doc. 1; App. 36–38). In his motion, Mr. Grummitt requested that the district court stay full briefing and disposition of his claim until January 2017, or until further motion of

[2] *United States v. Booker,* 543 U.S. 220 (2005).

the parties. (Civ. Doc. 1). On March 8, 2017, the district court ordered Mr. Grummitt to show cause why his motion should not be dismissed in light of *Beckles v. United States,* 137 S. Ct. 886 (2017). (Civ. Doc. 3). Following briefing by the parties, on October 2, 2017, the district court denied Mr. Grummitt's motion. (Civ. Doc. 13; App. 1-3).

On November 29, 2017, Mr. Grummitt filed a timely notice of appeal from the district court's denial of his § 2255 motion, and, on November 30, 2017, filed an application for a COA, which the Eighth Circuit granted on March 26, 2018. (Civ. Doc. 15; 8th Cir. No. 17-3609, Entry ID: 4643025).

B. Jeremy Phelps

On March 31, 2002, Mr. Phelps entered a plea of guilty to one count of conspiracy to manufacture 50 grams or more of methamphetamine mixture and to distributing 500 grams or more of methamphetamine mixture, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. (PSR ¶ 3). Applying the 2001 Sentencing Guidelines, the PSR determined that Mr. Phelps' offense level based on drug quantity was 34 and his criminal history category was III, yielding a sentencing range of 135–168 months after acceptance of responsibility. (PSR ¶¶ 26–33, 42). The PSR further found, however, that Mr. Phelps was a career offender based on two prior Iowa convictions for third-degree burglary in 1998. (PSR ¶¶ 34, 38, 39). Mr. Phelps' base offense level was thus enhanced to 37 and his criminal history was enhanced to a category VI. (PSR ¶¶ 34, 43). This made his total adjusted offense level 34 after acceptance of responsibility, yielding a sentencing range of 262–327

months. (PSR ¶ 65). At the sentencing hearing, the district court imposed a sentence within the pre-*Booker* sentencing range; it then departed for a permissible basis and reduced Mr. Phelps' sentence to 236 months. (Crim. Doc. 34).

Mr. Phelps did not file a direct appeal. Prior to the instant case, he had not filed a motion under 28 U.S.C. § 2255. On May 8, 2016, Mr. Phelps filed a motion under 28 U.S.C. § 2255, seeking relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Civ. Doc. 1). In his motion, Mr. Phelps requested that the district court stay full briefing and disposition of his claim until January 2017, or until further motion of the parties. (Civ. Doc. 1). On March 8, 2017, the district court ordered Mr. Phelps to show cause why his motion should not be dismissed in light of *Beckles v. United States*, 137 S. Ct. 886 (2017). (Civ. Doc. 2). Following briefing by the parties, on October 2, 2017, the district court denied Mr. Phelps' motion. (Civ. Doc. 10; App. 4-6).

On November 29, 2017, Mr. Phelps filed a timely notice of appeal from the district court's denial of his § 2255 motion, and, on December 1, 2017, filed an application for a COA, which the Eighth Circuit granted on March 26, 2018. (Civ. Doc. 12; 8th Cir. No. 17-3622, Entry ID: 4643047).

C. Kurt A. Campbell

On October 31, 2003, Mr. Campbell entered a plea of guilty to one count of conspiracy to manufacture 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. (PSR ¶ 4). Applying the 2003 Sentencing Guidelines, the PSR determined that Mr. Campbell's offense level based

on drug quantity was 34 and his criminal history category was VI, yielding a sentencing range of 188–235 months after acceptance of responsibility. (PSR ¶¶ 29, 31–32, 52). The PSR further found, however, that Mr. Campbell was a career offender based on a 1995 controlled substance conviction and a 1997 Iowa attempted third-degree burglary conviction. (PSR ¶¶ 30, 36, 46). Mr. Campbell's base offense level was thus enhanced to 37. (*Id.*) This made his total adjusted offense level 34 after acceptance of responsibility, yielding a sentencing range of 262–327 months. (PSR ¶ 79). The district court imposed a within-guidelines sentence of 280 months – slightly above the bottom of the mandatory pre-*Booker* sentencing range. (Crim. Doc. 26).

Mr. Campbell did not file a direct appeal. Prior to the instant case, he had not filed a motion under 28 U.S.C. § 2255. On May 6, 2016, Mr. Campbell filed a motion under 28 U.S.C. § 2255, seeking relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Civ. Doc. 1). In his motion, Mr. Campbell requested the district court to stay full briefing and disposition of his claim until January 2017, or until further motion of the parties. (Civ. Doc. 1). On March 7, 2017, the district court ordered Mr. Campbell to show cause why his motion should not be dismissed in light of *Beckles v. United States*, 137 S. Ct. 886 (2017). (Civ. Doc. 2). Following briefing by the parties, on October 4, 2017, the district court denied Mr. Campbell's motion. (Civ. Doc. 12; App. 7-10).

On November 29, 2017, Mr. Campbell filed a timely notice of appeal from the district court's denial of his § 2255 motion, and, on December 1, 2017, filed an

application for a COA, which the Eighth Circuit granted on March 26, 2018. (Civ. Doc. 15; 8th Cir. No. 17-3625, Entry ID: 4643051).

D. Edward L. Williams

On July 10, 2002, Mr. Williams was convicted following a jury trial of one count of distribution of cocaine base after a prior felony drug offense, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), 846, 851, and 18 U.S.C. § 2(a). (Crim. Doc. 84). Applying the 2002 Sentencing Guidelines, the PSR determined that Mr. Williams' offense level based on drug quantity was 26 and his criminal history category was V, yielding a sentencing range of 110–137 months. (PSR ¶¶ 22, 28, 64, 115). The PSR further found, however, that Mr. Williams was a career offender based on: (1) a 1988 Iowa conviction for one count of second-degree burglary and one count of assault while participating in a felony (PSR ¶ 46); and (2) a 1996 Iowa conviction for delivery of a controlled substance (PSR ¶ 53). (PSR ¶ 29). Mr. Williams' base offense level was thus enhanced to 34 and his criminal history was enhanced to a category VI, yielding a sentencing range of 262–327 months. (PSR ¶¶ 30, 32, 64, 115). The district court imposed a sentence of 262 months – at the bottom of the pre-*Booker* mandatory sentencing guideline range. (Crim. Doc. 84).

Mr. Williams filed a direct appeal, raising various procedural, evidentiary, and downward departure issues not relevant to his § 2255 motion. *United States v. Williams,* 340 F.3d 563 (8th Cir. 2003). The Eighth Circuit affirmed his conviction and sentence. *Id*. at 572. Prior to the instant case, Mr. Williams had not filed a motion under 28 U.S.C. § 2255.

On May 8, 2016, Mr. Williams filed a motion under 28 U.S.C. § 2255, seeking relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Civ. Doc. 1). In his motion, Mr. Williams requested that the district court stay full briefing and disposition of his claim until January 2017, or until further motion of the parties. (Civ. Doc. 1). On March 7, 2017, the district court ordered Mr. Williams to show cause why his motion should not be dismissed in light of *Beckles v. United States*, 137 S. Ct. 886 (2017). (Civ. Doc. 2). On October 4, 2017, the district court filed an order denying Mr. Williams' motion. (Civ. Doc. 11; App. 11-14).

On November 29, 2017, Mr. Williams filed a timely notice of appeal from the district court's denial of his § 2255 motion (Civ. Doc. 15). The Eighth Circuit treated the notice of appeal as an application for COA, which it granted on May 24, 2018. (8th Cir. Entry ID: 4665611).

E. Eighth Circuit Consolidated Appeals

The Eighth Circuit consolidated the cases for purposes of appeal and affirmed the district court's decision that the § 2255 petitions were untimely. *Grummitt v. United States*, 750 F. App'x 519 (8th Cir. 2019). The Eighth Circuit relied on its prior decision in *Russo v. United States,* 902 F.3d 880 (8th Cir. 2018), *petition for cert denied* 139 S. Ct. 1297 (March 4, 2019). *Id*. at 520. In *Russo*, the circuit determined that challenges to sentences under the then-mandatory career offender guidelines was not a right initially recognized in *Johnson*, and therefore these § 2255 petitions were untimely. *Id*. at 521.

REASONS FOR GRANTING THE WRIT

Federal circuit courts are divided over whether *Johnson* recognized the right on which the petitioners base their § 2255 motions. The Eighth Circuit is joined by the Third, Fourth, Sixth, Ninth, and (for now) Tenth Circuits in holding that the "right" recognized in *Johnson* is nothing more than the right not be sentenced under the Armed Career Criminal Act's ("ACCA's") residual clause. According to these circuits, the statute of limitations period will not start unless and until the Supreme Court announces that *Johnson* similarly invalidates the residual clause in the mandatory career offender guideline.

The First and Seventh Circuit, on the other hand, define the "right" recognized in *Johnson* more broadly. These circuits see in *Johnson* the right to be free from a sentenced "fixed" by a residual clause that shares the exact characteristics that rendered the ACCA's residual clause unconstitutionally vague. Under this reasoning, *Johnson* triggers the statute of limitations for those seeking relief from their mandatory career offender sentences.

This Court should resolve this conflict. 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 v. United States,* 139 S. Ct. 14, 16 (Oct. 15, 2018) (Sotomayor, J., dissenting from the denial of certiorari).

Further, the Eighth Circuit's interpretation is at odds with the Supreme Court's "new rule" jurisprudence and contrary to the language and purpose of §

2255(f)(3). More fundamentally, it is in conflict with this Court's own applications of *Johnson*. The Court should therefore grant certiorari.

I. Federal courts are divided over whether the "right" recognized in *Johnson* is limited to the residual clause of the ACCA.

There is an entrenched split in the circuits over whether a petitioner sentenced under the mandatory career offender guidelines may rely on *Johnson* to reopen their limitations period for filing a § 2255 motion. Two circuits, the Seventh and the First, have said "yes." In *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018), the Seventh Circuit defined the right in *Johnson* as "a right not to have [a] sentence dictated by the unconstitutionally vague language of a mandatory residual clause," and therefore that mandatory guideline petitions met the requirements of § 2255(f)(3). [3] According to the Seventh Circuit, debating at the statute of limitations stage whether the petitioners were correct on the merits would "improperly read[] a merits analysis into the limitations period." *Id*. at 293. The First Circuit in *United States v. Moore*, 871 F.3d 72 (1st Cir. 2017), similarly held that *Johnson's* holding started the clock for mandatory guideline cases, stating that the Supreme Court "guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings."

On the other side of the divide, five circuit courts of appeals, including the Eighth Circuit, have said that individuals subject to the mandatory guidelines may

[3] Recently, in *United States v. Hammond*, No. 02-294, 2018 WL 6434767 (D. D. C. Dec. 7, 2018), the Chief Judge in the District Court for the District of Columbia adopted the Seventh Circuit's reasoning in *Cross*.

not rely on the right recognized in *Johnson*. *United States v. Blackstone,* 903 F.3d 1020, 1026 (9th Cir. 2018); *United States v. Green*, 898 F.3d 315, 321 (3d. Cir. 2018); *United States v. Brown,* 868 F.3d 297, 299 (4th Cir. 2017); *Raybon v. United States,* 867 F.3d 625, 627 (6th Cir. 2017). These courts adopt a narrow interpretation of the right in *Johnson* that does not extend beyond the residual clause of the ACCA. They also place significant weight on Justice Sotomayor's statement in *Beckles* that the Supreme Court had left "open the question" whether the mandatory guidelines are susceptible to vagueness challenges. *Beckles,* 137 S. Ct. at 903 n. 4 (Sotomayor, J, concurring). Since that question has not been settled, these courts argue that the Supreme Court cannot have "recognized" the right asserted by those challenging their mandatory career offender sentences. *See, e.g., Green*, 898 F.3d at 321.

The Tenth Circuit had previously ruled that the Supreme Court has not recognized a right to bring a vagueness challenge to the mandatory guidelines in *United States v. Greer,* 881 F.3d 1241 (10th Cir. 2018), but the circuit appears to be reevaluating that decision. 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 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). These decisions include *Cross* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

Finally, in the Eleventh Circuit, 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 § 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 relief on the merits for any first or successive § 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 the denial of rehearing en banc).

II. The Eighth Circuit's decision conflicts with this Court's precedents.

The Eighth Circuit, and others, believe a petitioner's window to file a vagueness claim will only reopen when the Supreme Court holds that *Johnson* applies to the mandatory career offender guidelines. This conclusion cannot be squared with this Court's precedent defining "new rules," much less with its post-*Johnson* vagueness decisions.

This Court has not explained what it means to "recognize" a "right asserted" for purposes of § 2255(f)(3). Nonetheless, lower courts agree that the question can be settled by looking to the Court's "new rule" jurisprudence. *See, e.g., United States v. Headbird*, 813 F.3d 1092, 1095 (8th Cir. 2016); *Butterworth v. United States,* 775 F.3d 459, 464-65 (1st Cir. 2015); *United States v. Smith,* 723 F.3d 510, 515 (4th Cir. 2013); *Figuereo-Sanchez v. United States,* 678 F.3d 1203, 1207 (11th Cir. 2012). However, circuits that have interpreted Justice Sotomayor's statement that this issue was "left open" to mean that, when eventually decided, it will announce a "new rule," misapply this Court's "new rule" case law.

For example, in *Stringer v. Black,* 503 U.S. 222 (1992), a petitioner hoped to take advantage of three Supreme Court decisions invalidating aggravating factors similar to one used to justify his death sentence. The first decision on which he relied, *Godfrey v. Georgia*, 446 U.S. 423 (1980), invalidated an aggravating factor in the Georgia death penalty statute as unconstitutionally vague. *Godfrey* was followed by *Maynard v. Cartwright,* 486 U.S. 356 (1988), and *Clemons v. Mississippi,* 494 U.S. 738 (1990), in which the Supreme Court invalidated similar aggravating factors in Mississippi and Oklahoma statutes. *Stringer,* 503 U.S. at 227-28.

Because Stringer's case had become final before *Maynard* and *Clemons*, his success on collateral review depended on whether those decisions created "new rules." This Court concluded they did not. Although the aggravating factors in *Maynard* and *Clemons* were not identical to the one challenged in *Godfrey*, the

application of *Godfrey* to slightly different language did not break any new ground. *Id.* Nor did it matter that *Clemons* settled an "open question" regarding *Godfrey's* application to "weighing states," whose use of aggravating factors differs from how they are used in capital systems like Georgia's. *Id.* at 229. "[T]he extent that the differences are significant," the Court stated, "they suggest that application of the *Godfrey* principle to the Mississippi sentences process follows, *a fortiori,* from its application to the Georgia system." *Id*. at 229. In other words, *Maynard* and *Clemons* were *applications* of *Godfrey's* general principles to a new set of facts. They did not announce new rules.

Here, what the petitioners are seeking is not a new rule, but the application of the general principles of *Johnson* to a new set of facts. This Court has already applied *Johnson's* general principles outside of the ACCA context, specifically in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

The Court in *Dimaya* applied *Johnson* to the residual clause in 18 U.S.C. § 16 (b), thereby dispelling any notion that *Johnson* established a narrow rule of decision limited to the ACCA. It described *Johnson* as a "straightforward decision" turning on "two features" common to both statutes. The residual clause in the career offender guideline contains the same two faults that doomed the provisions in *Johnson* and *Dimaya*. Therefore, this Court has done "all the relevant constitutional legwork" needed to trigger a pathway under § 2255(f)(3) to argue this claim. *United States v. Hammond*, No. 02-294, 2018 WL 6434767 at *11 (D. D. C. Dec. 7, 2018).

III. The Eighth Circuit's decision conflicts with the text and purpose of the statute of limitations.

Before 1996, there was no statute of limitations for § 2255 motions. *See* Act of June 25, 1948, § 2255, 62 Stat. at 967 (providing that motion could "be made at any time"). Congress enacted the statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (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." H.R. Rep. No. 104-23, at 9 (Feb. 8, 1995). The "statutory purpose" is to "encourage[e] prompt filings in federal court," *Carey v. Saffold,* 536 U.S. 214, 266 (2002), and to "eliminate delays in the federal habeas review process," *Holland v. Florida,* 560 U.S. 631, 648 (2010).

To that end, Congress provided that a motion is timely under § 2255(f)(3) only if filed within one year of the date on which the "right *asserted* was *initially* recognized by the Supreme Court." The word "initially" calls for prompt action, not delay. "Initially" means "at the beginning, at the outset, at first." Oxford English Dictionary (2d ed. 1989).[4] And one's assertions do not necessarily turn out to be correct. In common usage, to "assert" means to "insist upon . . . a (disputed) claim to (anything)," or to "declare or affirm the existence of." Oxford English Dictionary (2d ed. 1989).[5] In law, to "assert" means "to state positively" or to "invoke or enforce

[4] Available at OED Online, http://www.oed.com/view/Entry/96060 (accessed April 18, 2019).
[5] Available at OED Online, http://www.oed.com/view/Entry/11821 (accessed April 18, 2019).

a legal right." *Black's Law Dictionary* 139 (10th ed. 2014). Each party in every case "asserts" contrary arguments, and one or the other is inevitably rejected.

Thus, to encourage diligent action and punish delay, "[w]hat Congress has said in [§ 2255(f)(3)] is clear: An applicant 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) (emphases added). If the Court "decides a case recognizing a new right, a federal prisoner *seeking to assert that right* will have one year from [the] Court's decision within which to file his § 2255 motion." *Id.* at 358-59 (emphasis added). The movant must file no later than a year from the date the Supreme Court *first* recognized the new right that he *claims* applies to his case

The Eighth Circuit's position urges the opposite: The movant must *wait until after* the Supreme Court *definitively holds* that the right applies to his case. The Eighth Circuit's interpretation thus reads the words "initially" and "asserted" out of the statute, and also "improperly reads a merits analysis into the limitations period." *Cross*, 892 F.3d at 293-94. The statutory text "does not say" that the movant must "*prove* that the right applies to his situation" before he may seek a determination on the merits; "he need only claim the benefit of a right that the Supreme Court has recently recognized." *Id.* at 294. Whether *Johnson* actually invalidates the mandatory guidelines' residual clause is decided at the merits stage, *see* 28 U.S.C. § 2255(b), not the statute of limitations stage. *Cf. George v. United States,* 672 F.3d 942, 946 (10th Cir. 2012) (Gorsuch, J.) ("Were the rule otherwise, of course, the statute of limitations and merits inquiries would collapse and involve no

analytically distinct work.") (affirming district court's interpretation of statute of limitations under the Quiet Title Act).

IV. The Eighth Circuit's decision raises concerns under the Suspension Clause.

Finally, the Eighth Circuit's decision presents constitutional concerns. The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *See* U.S. Const., Art. I, § 9, cl. 2. It is "uncontroversial" that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation of relevant law.'" *Boumediene v. Bush,* 553 U.S. 723, 779 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

"[T]here may be circumstances where the limitation period at least raises serious constitutional questions." *Miller v. Marr,* 141 F.3d 976, 978 (10th Cir. 1998). This is one of them. If the Eighth Circuit's reading is correct, prisoners seeking to demonstrate that the mandatory guidelines' residual clause is unconstitutionally vague can never have their claims decided. No one sentenced before *Booker* has a direct appeal pending or a judgment less than a year old (so as to be timely under § 2255(f)(1)). Their motions are deemed premature because the Supreme Court has not yet applied *Johnson* to the mandatory guidelines, but the Supreme Court can never apply *Johnson* to a mandatory guidelines case because their motions are always premature.

Soon after the AEDPA, then-Judge Sotomayor held that AEDPA's new one-year statute of limitations did "not, at least in general," constitute "an unconstitutional suspension of the writ." *Rodriguez v, Artuz*, 990 F.Supp. 275, 279 (S.D.N.Y. 1998), *aff'd on opinion below*, 161 F.3d 763, 764 (2d Cir. 1998) (per curiam). However, "cases in which a petitioner could *never* have raised his or her claim create [] grave constitutional issues." *Id.* at 282. The courts had only just begun to construe AEDPA's several provisions restarting the one year, and "there may well be cases in which these provisions do not leave a reasonable opportunity to file" and thus squarely present "whether the Suspension Clause forbade application in that case." *Id.* at 283-84.

Surely, that includes this case, where petitioners "act[ed] expeditiously," *Id.* at 282, but nonetheless can never raise their *Johnson* claims. *See also Muniz v. United States,* 236 F.3d 122, 123-24, 127-29 (2d Cir. 2001) (per curiam) (finding a "serious constitutional question would arise if Muniz were denied the opportunity to file her first petition within the one-year grace period to which she was entitled," and thus treating instant motion as a "first" motion, where district court dismissed previous motion as untimely); *cf. Lonchar v. Thomas,* 517 U.S. 314, 322-24 (1996) (reversing court of appeals' pre-AEDPA dismissal of delayed habeas petition for reasons not encompassed within the framework of Rule 9, noting that "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty").

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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