No. _____

IN THE

Supreme Court of the United States

BOBBY G. PULLEN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1999, when the guidelines were mandatory, Bobby Pullen was sentenced as a career offender under USSG § 4B1.1 in light of a prior escape conviction. That conviction qualified as a crime of violence (only) under USSG § 4B1.2(a)(2)'s residual clause. In 2015, this Court struck down as void for vagueness an identical residual clause in 18 U.S.C. § 924(e)(2)(B)(ii). *Johnson v. United States*, 135 S.Ct. 2551 (2015). Within one year of the decision in *Johnson*, Mr. Pullen obtained authorization from the Tenth Circuit to file a successive motion to vacate under 28 U.S.C. § 2255(h)(2). Despite this authorization, the district court, citing 28 U.S.C. § 2244(b)(4), found that Mr. Pullen's motion failed to satisfy the preconditions of § 2255(h)(2) and dismissed the motion. The Tenth Circuit affirmed. In conflict with a published decision from the Seventh Circuit, the Tenth Circuit held that the new rule announced in *Johnson* does not apply to the mandatory guidelines. The questions presented are:

I. When a court of appeals grants authorization to file a successive motion under 28 U.S.C. § 2255(h)(2), does 28 U.S.C. § 2244(b)(4) permit a district court to revisit this § 2255(h)(2) authorization and to dismiss the successive motion as unauthorized?

II. Whether, for purposes of 28 U.S.C. § 2255(h)(2), the new rule announced in *Johnson* applies to the identical residual clause in the mandatory guidelines, USSG § 4B1.2(a)(2) (2004)?

III. Whether the residual clause of the mandatory guidelines, USSG § 4B1.2(a)(2) (2004), is void for vagueness?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bobby Pullen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's decision is published at 913 F.3d 1270, and is included as Appendix A. The Tenth Circuit's unpublished order denying rehearing en banc is included as Appendix C. The district court's unpublished order dismissing Mr. Pullen's motion under 28 U.S.C. § 2255 is available at 2017 WL 3674979, and is included as Appendix B.

JURISDICTION

The Tenth Circuit denied the petition for rehearing en banc on April 15, 2019. Pet. App. 37a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The Fifth Amendment's Due Process Clause provides:

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

28 U.S.C. § 2255(h)(2) provides:

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

The full text of 28 U.S.C. § 2244 is included as Appendix D.

USSG § 4B1.2(a)(2) (2004)[1] provides:

> (a) 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 use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Missouri Revised Statute § 575.210(1) (1994) provides:

> 1. A person commits the crime of escape or attempted escape from confinement if, while being held in confinement after arrest for any crime, while serving a sentence after conviction for any crime, or while at an institutional treatment center operated by the department of corrections as a condition of probation or parole, he escapes or attempts to escape from confinement.

STATEMENT OF THE CASE

In our free society, individuals should not "linger longer in prison than the law demands." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1908 (2018). But Mr. Pullen – whose prior escape conviction qualified as a crime of violence under § 4B1.2's hopelessly vague (mandatory) residual clause (and increased his sentence by some ten years) – is doing just that. Many others are as well. *Brown v. United States*, 139 S.Ct. 14, 14 (2018) (Sotomayor, J., dissenting from the denial of cert.). It is up to this Court to right the ship. Two Justices are on board with granting certiorari to resolve whether prisoners, like Mr. Pullen, can bring a void-for-vagueness challenge to the mandatory guidelines' residual clause in a § 2255 motion. *Brown*, 139 S.Ct. 14 (Justices Sotomayor and Ginsburg). We ask (beg, really) for two more votes.

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[1] The United States Sentencing Commission amended this provision in 2016. USSG Supp. to App. C, amend. 798 (2016). It currently defines a crime of violence as: "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." USSG § 4B1.2(a)(2) (2016).

There are compelling reasons to decide this issue. Most notably, the Circuits are split on it. *Brown*, 139 S.Ct. at 15-16. The issue is also extremely important because its resolution "could determine the liberty of over 1,000 people." *Id.* at 16. On the underlying merits, just as § 924(e)'s residual clause was void for vagueness (because it used a categorical approach to measure the degree of risk), so too § 4B1.2(a)(2)'s identical (in language and application) residual clause. *See id.* at 15. And this case is the perfect vehicle to resolve this issue. Mr. Pullen's prior escape conviction could count as a crime of violence only under the residual clause. With that clause excised as unconstitutional, Mr. Pullen is not a career offender. If resentenced today, Mr. Pullen would be released from prison immediately. To borrow a phrase: "[t]hat sounds like the kind of case [this Court] ought to hear." *Brown*, 139 S.Ct. at 16.

But there is also an important threshold issue of statutory interpretation at play here. Section 2255(h)(2) requires authorization *from the court of appeals* to file a successive § 2255 motion. Yet here, the Tenth Circuit affirmed *the district court's* dismissal of Mr. Pullen's § 2255 motion under § 2255(h)(2). And it did so after the Tenth Circuit itself had already authorized Mr. Pullen's § 2255 motion under § 2255(h)(2). That decision makes a mess of the statute. This Court should grant this petition to correct it.

A. Legal Background

Federal habeas corpus has roots in the common law and the Constitution. *Fay v. Noia*, 372 U.S. 391, 400 (1963); U.S. Const. Art. I, § 9, cl. 2. Today, its most prominent place is the United States Code. 28 U.S.C. §§ 2241-2255. The procedures differ (in most, but not all, respects) for state and federal prisoners. State prisoner petitions

are generally governed by 28 U.S.C. § 2254. Federal prisoner petitions are generally governed by 28 U.S.C. § 2255. Of the other thirteen provisions, 28 U.S.C. § 2241-2253, most apply in both contexts (as most of these provisions do not distinguish between state and federal prisoners). But one exception is 28 U.S.C. § 2244 (entitled "Finality of determination"), which we discuss below.

A federal prisoner (like Mr. Pullen) may move to vacate his sentence under § 2255 if that sentence violates, *inter alia*, the Constitution. 28 U.S.C. § 2255(a). Any such motion generally must be filed within one year of the date on which the judgment of conviction becomes final. 28 U.S.C. § 2255(f)(1). But one exception to this rule permits a federal prisoner to file a § 2255 motion within one year from "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).

Federal prisoners are also generally limited to one § 2255 motion. But with this rule as well, there are exceptions. Any "second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain [] a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). This new-retroactive-right language in § 2255(h)(2) is analogous to the statute-of-limitations exception in § 2255(f)(3). In other words, when this Court announces a new retroactive right, a federal prisoner may seek relief under that right whether or not the prisoner has already litigated a prior § 2255 motion, so long as the prisoner either files the § 2255 motion (if he hasn't previously filed one), or seeks authorization

to do so (if he has), within one year of this Court's decision. 28 U.S.C. § 2255(f)(3), (h)(2). Section 2255(h)(1) also authorizes a successive motion where newly discovered evidence undermines the defendant's guilt. 28 U.S.C. § 2255(h)(1).

Section 2255(h) cross-references § 2244. This provision includes four subsections. The first, subsection (a), concerns motions to vacate under § 2255. The provision provides that "[n]o circuit or district judge shall be required to entertain" a successive habeas petition from a federal prisoner "except as provided in section 2255." 28 U.S.C. § 2244(a). The other three subsections, (b), (c) and (d), concern state prisoner petitions under 28 U.S.C. § 2254. *See McCleskey v. Zant*, 499 U.S. 467, 485-86 (1991) (explaining how Congress, in 1966, amended § 2244(a) to delete all references to state prisoners and added § 2244(b) to govern habeas petitions filed by state prisoners).

For our purposes, § 2244(c) is least helpful. That provision just sets forth rules to apply to state prisoner § 2254 petitions if this Court happened to rule on the prisoner's state case. But two other provisions are more relevant, as they function similarly to § 2255(f) and § 2255(h).

Like § 2255(f), § 2244(d) sets forth an identical one-year limitations period to file a state prisoner petition under § 2254. 28 U.S.C. § 2244(d)(1). It also includes an identical new-retroactive-right exception to this limitations period. 28 U.S.C. § 2244(d)(3). And like § 2255(h), § 2244(b) governs second or successive state prisoner petitions under § 2254. This subsection has four parts. Section 2244(b)(1) precludes a state prisoner from raising a claim in a successive § 2254 petition if that claim was raised in a prior petition. 28 U.S.C. § 2244(b)(1). Like § 2255(h)(2), § 2244(b)(2) permits a state prisoner to raise a new claim in a successive petition if, *inter alia*,

"the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). This provision also includes a "newly discovered evidence" exception that differs from the newly-discovered evidence exception in § 2255(h)(1). 28 U.S.C. § 2244(b)(3)(B).

Similar to § 2255(h), § 2244(b)(3) requires a state prisoner to "move in the appropriate court of appeals for an order authorizing the district court to consider" the successive § 2254 petition. This provision sets forth five certification procedures, all of which are directed at the court of appeals (not the district court): (1) the prisoner must first apply for authorization in the **court of appeals**, 28 U.S.C. § 2244(b)(3)(A); (2) a three-judge panel of the **court of appeals** must decide the application, 28 U.S.C. § 2244(b)(3)(B); (3) the **court of appeals** may authorize the filing of a successive motion only it if determines that the prisoner has made "a prima facie showing that the application satisfies the requirements of this subsection," 28 U.S.C. § 244(b)(3)(C); (4) the **court of appeals** must grant or deny the application within thirty days, 28 U.S.C. § 2244(b)(3)(D); and (5) the grant or denial of authorization by a **court of appeals** is not appealable or subject to a petition for rehearing or a petition for writ of certiorari, 28 U.S.C. § 2244(b)(3)(E). Finally, § 2244(b)(4) provides that a "district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the application shows that that claim satisfies the requirements of this section." 28 U.S.C. § 2244(b)(4).

Back to § 2255(h). Again, that provision cross-references § 2244, but it does so in terms of certification (any "second or successive motion must be certified as provided

in section 2244 by a panel of the appropriate court of appeals"). And, as just explained, it is only at § 2244(b)(3) that Congress set forth *Circuit* certification procedures for successive habeas petitions.

These statutes are relevant here because of this Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015). *Johnson* struck down as void for vagueness the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii). This Court made *Johnson* retroactively applicable to cases on collateral review in *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016). This residual clause is identical (in language and application) to the residual clause that was once found in USSG § 4B1.2(a)(2) (before the Commission removed the clause in 2016). Indeed, the Sentencing Commission borrowed § 4B1.2's residual clause from § 924(e)(2)(B)(ii). USSG App. C, amend 268 (1989).

When Mr. Pullen was sentenced (in 1999), the guidelines were mandatory. When the guidelines were mandatory, they "impose[d] binding requirements on all sentencing judges." *United States v. Booker*, 543 U.S. 220, 233 (2005). It was the "binding" nature of the guidelines that triggered the constitutional problem in *Booker*: "[i]f the Guidelines as currently written could be read as merely advisory provisions," "their use would not implicate the Sixth Amendment." *Id.* And this "mandatory and binding" nature of the guidelines came directly from Congress. *Id.* at 233-234; 18 U.S.C. § 3553(b) (directing that courts "shall impose a sentence of the kind, and within the range" established by the Guidelines). "Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws." 543 U.S. at 234.

Booker rejected the idea that the availability of departures rendered the

guidelines anything less than mandatory and binding laws. "In 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*. In those instances*, the judge is bound to impose a sentence within the Guidelines range*." *Id.* (emphasis added). Indeed, *Booker* acknowledged that, had the district court departed from the mandatory guidelines range in Mr. Booker's case, the judge "would have been reversed." *Id.* at 234-235.

Nor is *Booker* the only time that this Court has explained that the mandatory guidelines range fixed the statutory penalty range. *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) ("The 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."); *Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases"); *Stinson v. United States*, 508 U.S. 36, 42 (1993) (noting "the principle that the Guidelines Manual is binding on federal courts").

B. Proceedings Below

1. In 1999, a federal jury in Kansas convicted Mr. Pullen of possession with intent to distribute over 100 kilograms of marijuana, 21 U.S.C. § 841(a)(1), (b)(1)(B)(vii). Pet. App. 3a, 31a. Prior to sentencing, a probation officer authored the presentence investigation report (PSR), finding that, because Mr. Pullen had two prior convictions for crimes of violence, he qualified as a career offender under USSG § 4B1.1. Pet. App. 3a. As one of the two prior qualifying convictions, the probation officer counted a prior

1994 Missouri escape conviction. Pet. App. 3a. This conviction counted as a crime of violence only under § 4B1.2(a)(2)' s then-mandatory residual clause. Pet. App. 4a, 33a. This career-offender designation resulted in a mandatory guidelines range of 262 to 327 months' imprisonment. Pet. App. 3a. The district court imposed a 262-month term of imprisonment. Pet. App. 3a. Without the career-offender designation, Mr. Pullen's mandatory guidelines range would have been 92 to 115 months' imprisonment. Pet. App. 3a.

2. The Tenth Circuit affirmed Mr. Pullen's conviction and sentence. Pet. App. 31a. In 2006, Mr. Pullen filed his first motion to vacate under § 2255, but the motion was dismissed as untimely. Pet. App. 3a, 31a.

3. In May 2016, within one year of this Court's decision in *Johnson*, Mr. Pullen sought authorization from the Tenth Circuit under § 2255(h)(2) to file a successive § 2255 motion. Pet. App. 4a. The Tenth Circuit granted authorization so that Mr. Pullen could raise a *Johnson* claim. Pet. App. 4a, 32a. The Tenth Circuit found that Mr. Pullen had made a prima facie showing that he satisfied the relevant conditions for authorization under § 2255(h)(2). Pet. App. 33a. In doing so, the Tenth Circuit indicated that Mr. Pullen had made a prima facie showing that he was unconstitutionally sentenced as a career offender under the mandatory guidelines. Pet. App. 33a.

4. With the Tenth Circuit's authorization, Mr. Pullen filed his § 2255 motion in the district court, asserting that his prior escape conviction did not count as a crime of violence in light of *Johnson*. Pet. Ap. 4a, 32a. In response, the government conceded that Mr. Pullen's prior escape conviction no longer qualified as a crime of violence.

Pet. App. 33a. But the government urged the district court to deny the § 2255 motion because, in its view, this Court's decision in *Johnson* did not apply retroactively to sentences imposed under the mandatory guidelines. Pet. App. 4a. The government cited both § 2255(h)(2) and § 2255(f)(3) to preclude merits review. Pet. App. 4a, 33a.

5. The district court dismissed the § 2255 motion as unauthorized under § 2255(h)(2). Pet. App. 5a, 35a. In doing so, the district court acknowledged that the Tenth Circuit had already found that Mr. Pullen had met the gate-keeping requirements in § 2255(h)(2). Pet. App. 33a. The district court nonetheless found this authorization "was made only as a preliminary assessment, leaving this Court to determine whether Mr. Pullen has shown that his claim satisfies § 2255(h)(2)." Pet. App. 34a. Citing a Sixth Circuit decision, *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017), as well as decisions from other district courts in Kansas, the district court "adopt[ed] [the] reasoning" of these latter decisions and held that Mr. Pullen "failed to satisfy the preconditions of § 2255(h)(2)." Pet. App. 35a. This was so, according to the district court, because "the Supreme Court has not recognized the right that Mr. Pullen seeks to assert – that his sentence imposed under the mandatory Guidelines' residual clause is unconstitutionally vague." Pet. App. 35a. The district court nonetheless granted a certificate of appealability "on the issue of whether Mr. Pullen's motion falls within the scope of 28 U.S.C. § 2255(h)(2)." Pet. App. 35a.

6. On appeal, Mr. Pullen asserted that the district court erred in revisiting the Tenth Circuit's § 2255(h)(2) authorization. Pet. App. 5a. He further asserted that *Johnson*'s new retroactive right applies to the mandatory guidelines' residual clause. Pet. App. 7a. But while the appeal was pending, the Tenth Circuit held in another

case that *Johnson* only applies to individuals sentenced under the exact provision at issue in *Johnson* (§ 924(e)(2)(B)(ii)). *United States v. Greer*, 881 F.3d 1241, 1247-1249 (10th Cir. 2018) (involving the mandatory guidelines, like this case). But a few months after the decision in *Greer*, this Court applied *Johnson* to strike down as void for vagueness a provision different than the one at issue in *Johnson*. *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) (18 U.S.C. § 16(b)).

Despite *Dimaya*, the Tenth Circuit affirmed in this case. Pet. App. 2a-3a. The Tenth Circuit acknowledged that *Dimaya* called into question *Greer*'s exact-statute approach (although the Tenth Circuit found "it unnecessary to decide whether *Greer*'s statement of the rule from *Johnson* is too narrow in light of *Dimaya*"). Pet. App. 20a n.7, 29a n.17. The Tenth Circuit nonetheless affirmed because this Court "has never recognized a void for vagueness challenge to the Guidelines." Pet. App. 2a. In other words, even if *Johnson* applies to all similarly-worded statutes, it does not apply to a similarly-worded mandatory guideline. Pet. App. 22a-27a.

On the threshold statutory issue, the Tenth Circuit held that the district court properly revisited § 2255(h)(2)'s authorization requirement in light of another intervening Tenth Circuit decision – *United States v. Murphy*, 887 F.3d 1064 (10th Cir. 2018). Pet. App. 9a-11a. In light of *Murphy*, the panel below acknowledged that § 2255(h)'s cross-reference to § 2244 encompassed the certification procedures in § 2244(b)(3), but also held that § 2244(b)(4) required the district court to determine "that the petition does, in fact, satisfy [§ 2255(h)(2)'s] requirements." Pet. App. 11a. The Tenth Circuit referred to this § 2244(b)(4) analysis as "a second procedural gate." Pet. App. 11a. "[O]nce the court of appeals grants authorization, the district court

must determine whether the petition does, in fact, satisfy the requirements for filing a second or successive motion before the merits of the motion can be considered." Pet. App. 11a. In the end, then, the Tenth Circuit affirmed the district court's dismissal of the § 2255 motion as unauthorized under § 2255(h)(2). Pet. App. 29a-30a.

Mr. Pullen sought rehearing en banc in light of a conflict in the Circuits over whether *Johnson* applies to the mandatory guidelines. The Tenth Circuit denied the petition for rehearing en banc. Pet. App. 37a. This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve whether § 2244(b)(4) permits a district court to revisit a court of appeals' § 2255(h)(2) successive-motion authorization.

1a. Under the plain text of the applicable provisions, the Tenth Circuit erred when it held that a district court has the authority, via § 2244(b)(4), to dismiss a successive § 2255 motion as unauthorized, where a court of appeals has already authorized the motion under § 2255(h)(2). Start with § 2255(h)'s text. That provision plainly provides that any successive § 2255 motion must be certified by a "panel of the appropriate **court of appeals**," and that such certification must be done "as provided in section 2244." 28 U.S.C. § 2255(h) (emphasis added). In turn, as explained above, § 2244's certification procedures, found in subsection (b)(3), plainly apply to the **court of appeals**, and not the district court. 28 U.S.C. § 2244(b)(3)(A)-(E). In terms of authorizing a successive motion, then, the statutes make clear that it is the court of appeals that must authorize any successive § 2255 motion. 28 U.S.C. § 2244(b)(3); 28 U.S.C. § 2255(h).

b. Consistent with the text of these provisions, the Tenth Circuit authorized the

successive § 2255 motion at issue here under § 2255(h)(2). Pet. App. 4a, 32a. Yet, despite this authorization, the district court dismissed Mr. Pullen's § 2255 motion "as an unauthorized second or successive motion" "pursuant to § 2255(h)(2)." Pet. App. 30a, 36a. There is no statutory basis for this dismissal. Section 2255(h) is directed solely at the court of appeals. As are the cross-referenced certification procedures listed in § 2244(b)(3). District courts play no role in the successive § 2255 authorization procedure.

As a statutory matter, a district court need not consider a successive § 2255 motion under § 2255(h)(2) only if the court of appeals does *not* grant the prisoner authorization to file the § 2255 motion. 28 U.S.C. § 2244(a). Once the court of appeals authorizes the filing of a second § 2255 motion, however, § 2255(h)(2)'s requirements are met, and § 2255(h)(2) no longer prevents the district court from considering the § 2255 motion. The lower courts' contrary holdings are wrong.

c. The statutory context confirms that, if Congress wanted district courts to determine whether to authorize a successive § 2255 motion under § 2255(h)(2), it would have said so expressly. Remember, § 2255(h)(2)'s new-retroactive-right analysis also exists in § 2255's statute-of-limitations provision. 28 U.S.C. § 2255(f)(3). And this provision is first directed at the district court. If the government properly invokes § 2255(f)(3), and if the district court determines that the defendant has failed to assert such a newly recognized retroactive right, the district court would dismiss the § 2255 motion as untimely. This timeliness provision applies equally to a successive § 2255 motion authorized by the court of appeals under § 2255(h)(2). Thus, there is no reason to interpret § 2255(h)(2) to permit a district court to conduct the

new-retroactive-right analysis, as the district court conducts that analysis under § 2255(f)(3). Under the Tenth Circuit's reading, § 2255(f)(3) is rendered redundant in § 2255(h)(2) cases, whereas, under our reading, both clauses have work to do (a court of appeals grants authorization under § 2255(h)(2); a district court determines timeliness under § 2255(f)(3)). *See*, *e.g.*, *Republic of Sudan v. Harrison*, 139 S.Ct. 1048, 1058 (2019) ("we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law").

The one potential exception to this rule is a situation where a criminal defendant files a successive § 2255 motion within one year of the date his conviction becomes final (which would not trigger § 2255(f)(3)). But the actual chance that this could happen is exceedingly rare (we haven't found a successive motion filed within this one-year time period). And even if this factual scenario is possible, there is no reason to think that Congress would not have expected a district court to consider that timely motion if authorized by a court of appeals. Again, nothing within the statutory scheme or structure permits district courts to reconsider the court of appeals' authorization of a federal prisoner's successive § 2255 motion. Instead, there is a provision that makes clear that a court of appeals' § 2255(h)(2) authorization is unreviewable. 28 U.S.C. § 2244(b)(3)(E).

d. There is another textual problem with the Tenth Circuit's decision. Section 2255(h)(2), via § 2244(b)(3)(C), requires only "a prima facie showing that the application satisfies the requirements" of § 2255(h)(2). Because the court of appeals makes that prima facie determination in the first instance, there is no reason (or statutory basis) for the district court to revisit the court of appeals' prima facie

determination. *See*, *e.g.*, 28 U.S.C. § 2244(b)(3)(E) (noting that this Court's grant or denial of authorization to file a successive motion is not reviewable). Nor, even assuming a court was inclined to apply § 2255(h)(2) to district courts, is there any statutory basis to interpret § 2255(h)(2) to require something more than a prima facie determination by the district court. But here, the Tenth Circuit's decision permits the district court to conduct a *merits determination* under § 2255(h)(2). Not even the court of appeals conducts a merits determination under this provision, however. 28 U.S.C. § 2244(b)(3)(C). It is thus textually impossible to interpret § 2255(h) to permit a merits determination by the district court, as the Tenth Circuit (incorrectly) did here. Pet. App. 10a-11a.

e. The Tenth Circuit also erred when it held that § 2244(b)(4) requires a district court to revisit a court of appeals' § 2255(h)(2) authorization. Pet. App. 11a-12a. This provision is not found in § 2255(h), and it is inconceivable that Congress incorporated this provision into § 2255(h) via that provision's cross-reference to § 2244. This is so for two reasons. First, and again, the cross-reference provides that any successive § 2255 motion "must be certified as provided in § 2244," and § 2244's certification procedures are found exclusively in § 2244(b)(3). Because § 2244(b)(4) has nothing to do with Circuit certification procedures, Congress did not incorporate that provision into § 2255(h).

Second, § 2255(h) makes explicit that its certification procedures are conducted "by a panel of the appropriate **court of appeals**." But § 2244(b)(4) is directed at the **district court**, not the **court of appeals**. Whereas a court of appeals authorizes a successive motion under § 2255(h), it is a district court that dismisses a claim under

§ 2244(b)(4). Indeed, § 2244(b)(4) comes into play only *after* a court of appeals has certified a successive § 2255 motion. For this reason in particular, it makes no sense to say that Congress incorporated this provision into the § 2255(h) authorization itself.

The Tenth Circuit's decision is also impractical. It would be inefficient (not to mention insulting and upside down) for Congress to assign a task (certification) to the court of appeals, yet then authorize the district court to reverse the court of appeals' determination. Why bother with Circuit authorization at all if, in the end, the district court must replicate this analysis? And this is especially true when one considers that, under the Tenth Circuit's framework, a *single* district court judge has the authority to override a certification made by a *panel* of the court of appeals. Under no version of our hierarchal judicial system does this make sense. For all of these reasons, the Tenth Circuit erred when it held that the district court properly dismissed Mr. Pullen's § 2255 motion as unauthorized under § 2255(h)(2). Pet. App. 30a. That provision plainly applies to the court of appeals, not the district court.

f. The question then becomes whether § 2244(b)(4) applies to successive § 2255 motions on its own. Other than subsection (h), nowhere else in § 2255 did Congress incorporate § 2244. And § 2244(b)'s provisions unambiguously apply only to state prisoner § 2254 petitions. *McCleskey*, 499 U.S. at 486 ("Congress added subparagraph (b) to address repetitive applications by state prisoners"); *Felker v. Turpin*, 518 U.S. 651, 656 (1996) (confirming that § 2244(b), as amended in 1996, applies solely to state prisoners). As explained above, §§ 2244(b)(1) and (b)(2) expressly apply only to a "[a] claim presented in a second or successive habeas corpus application under section

2254." Section 2244(b)(3), by its plain terms, provides certification procedures for successive motions "permitted by this section." And § 2244(b)(4) includes this analogous limiting language, authorizing a district court to "dismiss any claim presented in a second or successive petition "unless the applicant shows that the claim satisfies the requirements *of this section*."

Section 2244's explicit application to "the requirements of this section" forecloses its application to § 2255 motions. Again, the first two "requirements of this section" apply, by their own terms, only to § 2254 state prisoner petitions. 28 U.S.C. §§ 2244(b)(1), (b)(2). Moreover, the first requirement – that a claim "presented in a prior application shall be dismissed" – is found nowhere in § 2255. And while the second requirement is similar to § 2255(h), the provisions have material differences. *See*, *e.g.*, *Case v. Hatch*, 731 F.3d 1015, 1035 (10th Cir. 2013) (noting "crucial differences" between the provisions). "[B]y design, the actual-innocence gateway [in § 2244(b)2)] is narrower for successive applicants seeking to overturn state court convictions than it is for petitioners challenging federal convictions [via § 2255(h)(1)]." *Id.* at 1036.

Thus, because "the requirements" of § 2244(b) apply only to § 2254 state prisoner petitions, it is impossible to apply § 2244(b)(4) to § 2255 federal prisoner petitions. To do so would be to improperly require a district court to dismiss a § 2255 motion on grounds that apply only to § 2254 state prisoner petitions. *See*, *e.g.*, *Sosa v. Alvarez–Machain*, 542 U.S. 692, 711 n. 9 (2004) ("when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended"). But if Congress had intended to permit district

courts to dismiss authorized successive § 2255 motions on the grounds mentioned in § 2244(b), it could have easily done so by including such language in § 2255 itself. *See*, *e.g.*, *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, 138 S.Ct. 1061, 1070 (2018) ("If Congress had wanted to deprive state courts of jurisdiction over 1933 Act class actions, it had an easy way to do so: just insert into § 77p an exclusive federal jurisdiction provision (like the 1934 Act's) for such suits."). Or it could have included such language in § 2244(a), the one provision within § 2244 that actually deals with § 2255 motions. But it did not. "And respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Murphy v. Smith*, 138 S.Ct. 784, 787-88 (2018).

g. Finally, there are valid reasons why Congress drafted § 2244 (and the habeas statutes in general) in a manner that makes it more stringent for state prisoners to obtain relief in federal court. Only with respect to state court judgments (not federal court judgments) do principles of "comity, finality, and federalism" caution against a federal court vacating a state court judgment. *See*, *e.g.*, *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009). Whereas the federal statutes impose "strict standard[s]" to review state convictions, the review of federal convictions "is more lenient." *Case*, 731 F.3d at 1035. *Id.* It is "by design" that the avenues for relief are "narrower for successive applicants seeking to overturn state court convictions than it is for petitioners challenging federal convictions." *Id.* at 1036.

2a. The lower courts have made a mess of this issue. The genesis of this mess is the Seventh Circuit's decision in *Bennett v. United States*, 119 F.3d 468 (7th Cir. 1997) (Posner, J.). The decision came down less than a year after Congress passed the

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104–132, § 104, 110 Stat. 1218 (legislation that amended the federal habeas provisions). *Bennett* involved a pro se federal prisoner's application to file a successive § 2255 motion to raise claims related to his sanity to testify at trial. 119 F.3d at 469. The Seventh Circuit found that the pro se prisoner had made a prima facie case that "newly discovered evidence" would have altered the outcome of his trial and, thus, authorized the successive motion under 28 U.S.C. § 2255(h)(1). *Id.* at 469-470.

But in doing so, the Seventh Circuit concluded with this:

> The grant is, however, it is important to note, tentative in the following sense: the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits of the motion, if the court finds that the movant has not satisfied the requirements for the filing of such a motion. 28 U.S.C. § 2244(b)(4). The movant must get through two gates before the merits of the motion can be considered.

Id. at 470. Thus, with no analysis whatsoever, in a case involving a pro se prisoner, the Seventh Circuit applied § 2244(b)(4) – a provision aimed solely at § 2254 state prisoner petitions – to § 2255 federal prisoner petitions. As explained above, the statutory language does not permit this interpretation of § 2244(b)(4).

This second "gate" is also entirely irrelevant in the § 2255 context. In order to grant habeas relief based on newly discovered evidence, of course the district court must find that the evidence would have made a difference at trial. There is no collateral relief for harmless errors. *See*, *e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) ("habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice'"); *see also Murray v. Carrier*, 477 U.S.

478, 495 (1986) ("in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ").

But in the § 2254 context, a state prisoner must do more than show prejudice. The prisoner must also demonstrate that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). Section 2244(b)(4) requires district courts to conduct this *non-merits* due diligence requirement in successive § 2254 state prisoner cases. In contrast, because federal prisoners need not show due diligence, 28 U.S.C. § 2255(h)(1), applying § 2244(b)(4) in the § 2255 context does nothing at all. *Bennett* does not grapple with any of this. There is no legal analysis in *Bennett* whatsoever.

The Tenth Circuit's decision below relied on its prior decision in *Murphy*, Pet. App. 10a, which in turn relied on *Bennett* to conclude that § 2244(b)(4) is a "second procedural gate" to § 2255(h) authorization, *Murphy* 887, F.3d at 1067-1068. It did so with no substantive analysis whatsoever. *Id.* Other courts of appeals have done the same thing. *See*, *e.g.*, *Blow v. United States*, 829 F.3d 170, 172 (2d Cir. 2016); *In re Pendleton*, 732 F.3d 280, 282-283 (3d Cir. 2013); *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001); *Johnson v. United States*, 720 F.3d 720, 721 (8th Cir. 2013); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164-1165 (9th Cir. 2000).

This Court recently struck down a line of lower court precedent because that precedent stemmed from an erroneous decision from a federal court of appeals. *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2364 (2019). Despite the fact that the lower courts had aligned around this one precedent from the D.C. Circuit, this

Court granted certiorari and overruled all of it, refusing to "approve such a casual disregard of the rules of statutory interpretation." *Id.* This Court should do the same here. *Bennett*'s summary, citationless, throw-in "holding" at the end of the decision has led to an interpretation of § 2255(h) (and § 2244(b)(4)) that disregards the plain text of those statutes. This Court should overrule it.

Aside from *Bennett*, other courts of appeals have done nothing other than rely on § 2254 precedent to incorporate § 2244(b)(4) into § 2255(h). *See*, *e.g.*, *Evans-Garcia v. United States*, 744 F.3d 235, 236 (1st Cir. 2014); *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003); *In re Moore*, 830 F.3d 1268, 1271 (11th Cir. 2016). But that ignores the differences between state and federal prisoner petitions, differences that exist within the federal habeas statutory scheme. As just one example of the shoddy workmanship at play here, consider *In re Moore*. In that case, the Eleventh Circuit relied entirely on *Jordan v. Sec'y DOC*, 485 F.3d 1351, 1353, 1357-1359 (11th Cir. 2007), with no recognition that *Jordan* involved § 2254 and not § 2255. 830 F.3d at 1271. At one point, the Eleventh Circuit erroneously stated that *Jordan* involved a "§ 2255 motion." *Id.* And where *Jordan* referenced § 2244(b)(2), *In re Moore* simply substituted § 2255(h)(2). *Id.* With this sleight of hand, the Eleventh Circuit could reference § 2244(b)(4) as requiring district courts to conduct a § 2255(h)(2) analysis. *Id.* A subsequent panel (correctly) labeled this discussion in *In re Moore* "undoubtedly" dicta that "seems quite wrong." *In re Chance*, 831 F.3d 1335, 1339 (11th Cir. 2016).

b. In contrast, the Sixth Circuit's recent decision in *Williams v. United States*, 927 F.3d 427, 435 (6th Cir. 2019), agrees with our position that "§ 2255(h)'s reference to

§ 2244's certification requirement is much more sensibly read as referring to the portions of § 2244 that actually concern the certification procedures, *see* 28 U.S.C. § 2244(b)(3) – the provisions, in other words, that 'provide[ ]' for how such a "'motion [is to] be certified.'" The Sixth Circuit found that it would make "no linguistic sense" to direct a court of appeals to certify that the conditions of any other subsection within § 2244(b) – other than § 2244(b)(3) – had been met. *Id.* The Sixth Circuit further held that "assessing the § 2255(h) threshold conditions themselves is wholly committed to the issuing "'panel of the appropriate court of appeals.'" *Id.* at 438.

In dicta, the Sixth Circuit in *Williams* further indicated that the "requirements of this section" language in § 2244(b)(4) "could conceivably" refer to the requirements in § 2255 via § 2244(a). *Id.* at *8. As explained above, however, it makes little sense to think that Congress would put within subsection (b) a provision related to subsection (a). The latter provision applies exclusively to federal prisoner petitions; the former to state prisoner petitions. If Congress meant § 2244(b)(4)'s provisions to apply to federal petitions under § 2244(a), it would not have put § 2244(b)(4) solely within subsection (b). There is no reason to credit this dicta in *Williams* (or think that a subsequent panel in the Sixth Circuit would follow it). The dissension between the Sixth Circuit and the other courts of appeals, and the utter unpersuasiveness of the decisions from the other courts of appeals, is reason enough to grant certiorari here.

3. The resolution of this statutory issue is also extremely important. Whenever a newly recognized right is declared retroactive, *see*, *e.g.*, *Welch*, 136 S.Ct. at 1265, this statutory issue will arise. Here, for instance, the potential reach of this issue in this context could extend to over 1,000 prisoners. *Brown*, 139 S.Ct. at 14 (Sotomayor, J.,

dissenting from the denial of cert.). And the practical implications matter. Unlike § 2255(f)(3)'s timeliness provision, which the government can waive, *Wood v. Milyard*, 566 U.S. 463 (2012), the lower courts consider § 2255(h)(2)'s certification requirement a non-waivable jurisdictional one. *See*, *e.g.*, *United States v. Wetzel-Sanders*, 805 F.3d 1266, 1268-1269 (10th Cir. 2015). Thus, even if the government, for equitable or other reasons, agrees that a defendant should get successive habeas relief, the majority rule (and the one that applies in the Tenth Circuit) prevents such relief. *See id.*

4. Finally, this case is an excellent vehicle to address this issue. The district court granted a certificate of appealability on it, the parties briefed it below, and the Tenth Circuit issued a published decision resolving it. There are no procedural hurdles that prevent this Court from resolving this extremely important issue.

II. This Court should resolve whether the new retroactive rule announced in *Johnson* applies to the identical residual clause in the mandatory guidelines.

1a. Review is necessary because there is an entrenched circuit split over this issue. The Seventh Circuit has held, in a published decision, that the new retroactive rule announced in *Johnson* applies to the residual clause in the mandatory guidelines. *United States v. Cross*, 892 F.3d 288, 299-306 (7th Cir. 2018). Although it did so under § 2255(f)(3), the Seventh Circuit has since acknowledged that *Cross* applies equally in the § 2255(h)(2) context. *D'Antoni v. United States*, 916 F.3d 658, 662 n.2 (7th Cir. 2019).

b. In direct conflict with the Seventh Circuit, six Circuits (including the Tenth Circuit here) have held that *Johnson*'s new retroactive right does not apply to the residual clause of the mandatory guidelines. Pet. App. 26a-28a; *United States v.*

Blackstone, 903 F.3d 1020 (**9th Cir**. 2018); *Russo v. United States*, 902 F.3d 880 (**8th Cir**. 2018); *United States v. Green*, 898 F.3d 315 (**3d Cir**. 2018); *United States v. Brown*, 868 F.3d 297 (**4th Cir**. 2017); *Raybon v. United States*, 867 F.3d 625 (**6th Cir**. 2017); *In re Griffin*, 823 F.3d 1350 (**11th Cir**. 2016).

But not all of these decisions were unanimous. The Fourth Circuit issued its decision in *Brown* over the dissent of Chief Judge Gregory. 868 F.3d at 304. In the Sixth Circuit, Judge Moore authored a concurrence expressing her view that the Sixth Circuit's decision in *Raybon* "was wrong on this issue." *Chambers v. United States*, 763 Fed. Appx. 514, 519 (6th Cir. Feb. 21, 2019) (unpublished). And an entire Eleventh Circuit panel called into question the Eleventh Circuit's decision in *In re Griffin*. *In re Sapp*, 827 F.3d 1334, 1336-1341 (11th Cir. 2016) (Jordan, Rosenbaum, Pryor, J.). Judge Martin dissented on this issue as well in *In re Anderson*, 829 F.3d 1290, 1294 (11th Cir. 2016), and *Lester v. United States*, 921 F.3d 1306, 1319 (11th Cir. 2019) (en banc) (Martin, J., dissenting, joined by Rosenbaum and Pryor, J.). Judge Rosenbaum authored a separate dissent on this issue in *Lester*. 921 F.3d at 1328. This intra-Circuit dissension supports review in this Court.

c. And although this split is currently lopsided, other Circuits may yet side with the Seventh Circuit on this issue. This issue is still an open one in the First, Second, Fifth and D.C. Circuits. In *Moore v. United States*, the First Circuit strongly implied that, if tasked with resolving the merits, it would side with the Seventh Circuit. 871 F.3d 72, 81-82 (1st Cir. 2018); Pet. App. 28a n.16 (conceding that "language in *Moore* suggests the panel of the First Circuit would have reached the same conclusion had it been conducting a [substantive] analysis"). And district courts in all four Circuits

have granted *Johnson* relief to individuals sentenced under the residual clause of the mandatory guidelines. *United States v. Hammond*, 351 F.Supp.3d 106 (Dist. D.C. 2018); *United States v. Moore*, 2018 WL 5982017 (D. Mass. Nov. 14, 2018); *Mapp v. United States*, 2018 WL 3716887 (E.D. N.Y. Aug. 3, 2018); *Zuniga-Munoz v. United States*, No. 1:02-cr-134, dkt. 79 & 81 (W.D. Tex. June 11, 2018). What is a six-to-one split could easily become a seven-to-five split. And regardless, the current split is still sufficiently important for this Court to resolve. *See*, *e.g.*, *Beckles v. United States*, 137 S.Ct. 886, 892 n.2 (2017) (resolving similar issue whether residual clause of advisory guidelines was constitutional where only one Circuit had held that it was).

Moreover, without this Court's resolution, the split will continue to exist. The Seventh Circuit recently declined the government's suggestion to reconsider *Cross*. *Sotelo v. United States*, 922 F.3d 848, 851 (7th Cir. 2019). And it is implausible to think that all of the other seven Circuits would switch sides. Indeed, by denying rehearing en banc in this case, the Tenth Circuit has made clear that it does not intend to overrule its own precedent to side with the Seventh Circuit's decision in *Cross*. Pet. App. 37a; *see also Mora-Higuera v. United States*, 914 F.3d 1152, 1154 (8th Cir. 2019) (reaffirming earlier decision in *Russo*); *United States v. Wolfe*, 767 Fed. Appx. 390, 391 (3d Cir. Apr. 29, 2019) (refusing to reconsider earlier decision in *Green*); *Lester*, 921 F.3d 1306 (refusing to consider this issue en banc over two dissents).

This is also an issue this Court has been asked to resolve:

> the Supreme Court should resolve this split. It is problematic that these individuals are potentially sentenced in violation of the Constitution or laws of the United States without clarification as to whether *Johnson* applies to a

> sentencing provision that is worded identically to, and is equally binding as, the ACCA's unconstitutionally vague residual clause.

Chambers, 763 Fed. Appx. at 526-527 (Moore, J., concurring). In light of the conflict in the Circuits, this Court should do just that.

2a. Review is also necessary because the majority rule (including the Tenth Circuit's decision below) is wrong. To begin, both the Fourth and Sixth Circuit held, pre-*Dimaya*, that *Johnson* does not apply beyond cases involving the exact statute at issue in *Johnson*. *Brown*, 868 F.3d at 302; *Raybon*, 867 F.3d at 630-631. But *Dimaya* applied *Johnson* to strike down a different provision as unconstitutionally vague. 138 S.Ct. at 1210-1223; Attach. 18-19. And this Court again applied *Johnson* to strike down a different provision as unconstitutionally vague in *United States v. Davis*, 139 S.Ct. 2319 (2019). The Fourth and Sixth Circuit's reasoning does not survive *Dimaya* and *Davis*. Not even the government agrees with this exact-statute approach. *Moore*, 871 F.3d at 82.

The Third Circuit in *Green* also adopted an exact-statute approach, but it did so post-*Dimaya*. 898 F.3d at 321-322. The decision in *Green* is just as unpersuasive as *Brown* and *Raybon*, however, because that decision ignores *Dimaya* entirely. *Id.*

The Third, Fourth, and Sixth Circuit's exact-statute approach conflicts with this Court's void-for-vagueness habeas precedent. In *Godfrey v. Georgia*, this Court held unconstitutional a vague **Georgia** capital-sentencing statute. 446 U.S. 420, 433 (1980). In a subsequent habeas case, *Maynard v. Cartwright* held unconstitutional a vague **Oklahoma** capital-sentencing statute. 486 U.S. 356, 363-364 (1988). The decision in *Maynard* was "controlled by *Godfrey*," even though *Godfrey* and *Maynard*

involved different sentencing statutes. *Stringer v. Black*, 503 U.S. 222, 228-229 (1992). And *Godfrey* also controlled in *Stringer* even though that case involved a vague **Mississippi** capital-sentencing scheme of a different character than the one in *Godfrey*. *Id.* at 229. This line of precedent makes clear that an exact-statute approach is wrong.

The Ninth Circuit in *Blackstone* relied primarily on *Beckles*. *Beckles* held that *Johnson* did not provide relief for individuals sentenced under the advisory guidelines' residual clause because the advisory guidelines "do not fix the permissible range of sentences." 137 S.C.t at 892. But *Beckles* distinguished advisory guidelines from mandatory guidelines. *Id.* at 894. *Beckles* cabined its decision: "[w]e hold 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. *Beckles* did not hold that *Johnson*'s rule does not apply to the mandatory guidelines.

Blackstone also relied on footnote 4 of Justice Sotomayor's concurrence in *Beckles*. 903 F.3d at 1026. In that footnote, Justice Sotomayor, like the majority opinion, cabined the decision in *Beckles* to the advisory guidelines:

> The Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in [*Booker*]—that is, during the period in which the Guidelines did "fix the permissible range of sentences"—may mount vagueness attacks on their sentences.

137 S.Ct. at 903 n.4 (cleaned up). Rather than take *Beckles* (and Justice Sotomayor's concurrence) at its word – that *Johnson* does not extend to the advisory guidelines – the Ninth Circuit fixated on Justice Sotomayor's use of the phrase "leaves open the question" to conclude that *Johnson* could not apply to the

mandatory guidelines because that question is an open one. 903 F.3d at 1027. But it is the decision in *Beckles*, not *Johnson*, that purports to leave that question open. *Brown*, 139 S.Ct. at 15 (Sotomayor, J., dissenting). Although the advisory guidelines are not subject to void-for-vagueness challenges, that does not mean that the mandatory guidelines are not. *Beckles*, 137 S.Ct. at 894-896. *Beckles* did not answer this question because it was not presented. But the Ninth Circuit mistakenly interpreted *Beckles* as having answered the question.

The Eighth Circuit in *Russo* engaged in a *Teague*[2] retroactivity analysis. 902 F.3d at 882-883. But we already know that *Johnson*'s right applies retroactively to cases on collateral review. *Welch*, 136 S.Ct. at 1265. The question is whether *Johnson*'s right applies to mandatory guidelines, not whether the right is retroactive under *Teague*. That analysis has nothing to do with *Teague* retroactivity.

And finally, the Eleventh Circuit in *Griffin* drew a line between statutes and guidelines (whether advisory or mandatory), and held that the latter could never be void for vagueness. 823 F.3d at 1355. But it did so under bad reasoning. According to the Eleventh Circuit, guidelines cannot be vague because they "do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." *Id.* But so too recidivist sentencing statutes, like the one at issue in *Johnson*. Recidivist sentencing statutes "do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." Yet they can be void for vagueness. *Johnson*, 135 S.Ct. at 2557. And as mentioned

[2] *Teague v. Lane*, 489 U.S. 288 (1989).

above, this Court declared sentencing provisions void for vagueness in *Godfrey*, *Maynard*, and *Stringer*. Review is necessary.

b. The Tenth Circuit's decision also conflicts with this Court's precedent. Under § 2255(h)(2), a defendant not only must assert relief under a newly recognized right, but that right must have been made retroactively applicable to cases on collateral review. This case involves a newly recognized right (*Johnson*) that this Court has made retroactive to cases on collateral review (in *Welch*). In other words, retroactivity is not at issue. The only issue involves the scope of *Johnson*'s newly recognized right: does it only apply to statutes, or does it also apply to the mandatory guidelines? The Tenth Circuit limited *Johnson* to statutes. Pet. App. 26a. In two ways, the Tenth Circuit's decision is inconsistent with this Court's precedent.

The first involves the test employed to determine the scope of a newly recognized right. The Tenth Circuit adopted the test employed by the Eighth Circuit in *Russo*. Pet. App. 22a. That test asks whether the application of the newly recognized right is "dictated by precedent" and "apparent to all reasonable jurists" as opposed to "susceptible to debate among reasonable minds." *Id.* The Eighth Circuit derived this test from three decisions: *Teague*, 489 U.S. at 301, *Butler v. MecKellar*, 494 U.S. 407, 415 (1990), and *Chaidez v. United States*, 568 U.S. 342, 347 (2013).

But these decisions dealt with retroactivity, not the scope of a newly recognized right. In *Teague*, for instance, this Court conducted a retroactivity analysis and determined that the petitioners' proposed new rule would not apply retroactively to cases on collateral review. 489 U.S. at 301. Thus, this Court declined to consider "whether the fair cross section requirement should be extended to the petit jury." *Id.*

at 309-310, 316. Because *Teague* did not address the scope of the right asserted by the defendant, it is impossible to read *Teague* as providing guidance on that issue.

Butler also involved retroactivity. There, a subsequent decision made clear that the defendant's interrogation was unconstitutional. 494 U.S. at 411-412. There was no question about the scope of this new right, only a question whether this right applied retroactively to cases on collateral review. *Id.* at 412-413. The issue here is not whether *Johnson* is retroactive (it is). The issue is whether *Johnson*'s right encompasses the mandatory guidelines. Nothing in *Butler* helps to answer that question.

Chaidez also involved retroactivity. 568 U.S. at 344. It too is inapposite. And even if a retroactivity analysis mattered when defining the scope of a newly recognized right, *Chaidez* explains "that a case does not announce a new rule when it is merely an application of the principle that governed a prior decision to a different set of facts." *Id.* at 347-348 (cleaned up).

> Where the beginning point of our analysis is a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent. Otherwise said, when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes.

Id. at 348 (cleaned up). The Tenth Circuit ignored this portion of *Chaidez*. To the extent that it has relevance, it confirms that *Johnson*'s newly recognized right applies to the mandatory guidelines. After all, we know from *Dimaya* that *Johnson* announced "a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts." *Id.*; 138 S.Ct. at 1210-1223.

Rather than employ these retroactivity decisions to define the scope of *Johnson*'s right, the Tenth Circuit should have employed *Beckles*. In *Beckles*, this Court defined the scope of *Johnson*'s right: it applies to provisions that "fix the permissible range of sentences." 137 S.Ct. at 892. Thus, the straightforward question here is whether the mandatory guidelines fixed the permissible range of sentences. This Court should grant this petition to answer this question.

Which leads to the second reason to grant this petition: the Tenth Circuit's decision conflicts with this Court's decision in *Booker*. Because *Booker* establishes that the mandatory guidelines fixed the permissible range of sentences, *Johnson* applies in this case.

Booker held that the application of the mandatory guidelines violated a defendant's Sixth Amendment right to have a jury find facts "essential to his punishment." 543 U.S. at 232. Because, under a mandatory guidelines scheme, judges were authorized to find facts "necessary to support a sentence exceeding the maximum authorized by" a defendant's guilty plea or a jury's verdict, the mandatory guidelines violated the Sixth Amendment. *Id.* at 244 (emphasis added).

Booker made clear that the mandatory guidelines "impose[d] binding requirements on all sentencing judges." *Id.* at 233. It was the "binding" nature of the guidelines that triggered a constitutional problem: "[i]f the Guidelines as currently written could be read as merely advisory provisions," "their use would not implicate the Sixth Amendment." *Id.* And this "mandatory and binding" nature of the guidelines came directly from Congress. *Id.* at 233-234; 18 U.S.C. § 3553(b) (directing that courts "shall impose a sentence of the kind, and within the range" established

by the Guidelines). "Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws." 543 U.S. at 234.

Booker rejected the idea that the availability of departures rendered the guidelines anything less than mandatory and binding laws. "In 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. In those instances, the judge is bound to impose a sentence within the Guidelines range." *Id.* (emphasis added). Indeed, *Booker* acknowledged that, had the district court departed from the mandatory guidelines range in Mr. Booker's case, the judge "would have been reversed." *Id.* at 234-235.

In *Booker*, the government argued that the guidelines did not violate the Sixth Amendment because they "were promulgated by a Commission rather than the Legislature." *Id.* at 237. The Tenth Circuit below drew the same distinction. Pet. App. 23a-24a. But *Booker* rejected the distinction. "In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance." 543 U.S. at 237. It did not matter "whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission." *Id.* at 239. Rather, "the Commission is an independent agency that exercises policymaking authority delegated to it by Congress." *Id.* at 243.

Nor, as mentioned above, is *Booker* the only time that this Court has explained that the mandatory guidelines range fixes the statutory penalty range. *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) ("The 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."); *Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases"); *Stinson v. United States*, 508 U.S. 36, 42 (1993) (noting "the principle that the Guidelines Manual is binding on federal courts"). In *R.L.C.*, this Court held that the applicable "maximum" term of imprisonment authorized for a juvenile tried and convicted as an adult was the upper limit of the guidelines range that would apply to a similarly situated adult offender. 503 U.S. at 306-307. The decision in *R.L.C.* only makes sense if the mandatory guidelines range was the statutory penalty range.

The Tenth Circuit's decision ignores the "commonplace" rule "that the specific governs the general." *NLRB v. SW Gen.*, 137 S.Ct. 929, 941 (2017). Thus, when the guidelines were mandatory, the mandatory guidelines range controlled over the statutory penalty range for the underlying conviction because the guidelines range "provide[d] more specific guidance." *See Booker*, 543 U.S. at 234-244. This is much like § 924(e)'s application in cases where its provisions apply to trump the general penalty provisions in 18 U.S.C. § 924(a)(2).

Beckles cabins *Johnson*'s right to provisions that "fix the permissible range of sentences." 137 S.Ct at 892. The mandatory guidelines did just that. *Booker*, 543 U.S. at 232-243; *Cross*, 892 F.3d at 306 ("as the Supreme Court understood in *Booker*, the residual clause of the mandatory guidelines did not merely guide judges' discretion; rather, it mandated a specific sentencing range and permitted deviation only on narrow, statutorily fixed bases"); *Moore*, 871 F.3d at 81 (noting *Booker* "essentially

resolved" this issue when it ruled that "the Guidelines [were] binding on district judges"). Because the Tenth Circuit's decision is both inconsistent with this Court's precedent, and incorrect on its own terms, review is necessary.

3. The importance of this issue cannot be understated. "Regardless of where one stands on the merits of how far *Johnson* extends, this case presents an important question of federal law that has divided the courts of appeals and in theory could determine the liberty of over 1,000 people." *Brown*, 139 S.Ct. at 14 (2018) (Sotomayor, J., dissenting from the denial of cert.). And because the guidelines are no longer mandatory, it is impossible to resolve this issue on direct appeal.

The reality is this: unless this Court grants certiorari in a case like Mr. Pullen's, federal prisoners sentenced under the mandatory residual clause will either be eligible for relief or not depending on nothing else but geography. Those defendants sentenced within the Seventh Circuit and (almost certainly) the First Circuit (and at least some, if not all, in the Second, Fifth, and D.C. Circuits) will be resentenced to much shorter terms of imprisonment, whereas federal prisoners sentenced within the other Circuits will be left to serve the remainder of their unconstitutional sentences behind bars. In Mr. Pullen's case, this difference in geography means another five years in prison as opposed to immediate release.

This liberty interest is not insubstantial. Even in the *advisory* guidelines context, and even with respect to a plain vanilla guidelines error, this Court has acknowledged "the risk of unnecessary deprivation of liberty," a risk that "undermines the fairness, integrity, or public reputation of judicial proceedings." *Rosales-Mireles*, 138 S.Ct. at 1908. Here, the error is much more than that. The residual clause is

unconstitutionally vague; it is "no law at all." *Davis*, 139 S.Ct. at 2323. This Court's decision in *Johnson* acknowledged that the void for vagueness doctrine "serves as a faithful expression of ancient due process and separation of powers principles the Framers recognized as vital to ordered liberty under the Constitution." *Sessions v. Dimaya*, 138 S.Ct. 1204, 1224 (2018) (Gorsuch, J., concurring). The Tenth Circuit's decision ignores those vital liberty interests and effectively condemns prisoners, like Mr. Pullen, to serve unconstitutional sentences. Review is necessary.

4. Finally, this case is an excellent vehicle to resolve this issue. Mr. Pullen preserved the issue below, the Seventh Circuit resolved the issue on the merits, and, if successful, Mr. Pullen will undoubtedly be released from prison immediately. Liberty is actually on the line. And it is liberty that Mr. Pullen could obtain if his conviction came about from a different part of the country. This case is compelling. Review is necessary.

III. This Court should resolve whether the mandatory guidelines' residual clause is void for vagueness.

The one Circuit (the Seventh) that has definitively reached the merits of this issue has held that the mandatory guidelines' residual clause is void for vagueness. *Cross*, 892 F.3d at 307. That decision is correct. The language of § 4B1.2(a)(2)' s residual clause is identical to the residual clause struck down in *Johnson* (§ 924(e)(2)(B)(ii)). Courts interpreted the two residual clauses identically (i.e., under an ordinary-case categorical approach), and even interchangeably. *See*, *e.g.*, *United States v. Pickett*, 916 F.3d 960, 965 n.2 (11th Cir. 2019); *United States v. Doyal*, 894 F.3d 974, 976 n.2 (8th Cir. 2018); *United States v. Doxey*, 833 F.3d 692, 710 (6th Cir.

2016); *United States v. Moyer*, 282 F.3d 1311, 1315 n.2 (10th Cir. 2002). And, as explained above, when mandatory, the guidelines, via § 3553(b), set the statutory penalty range. *See supra* Section II(2b). In other words, the mandatory guidelines operated as statutes, and, thus, could be void for vagueness like statutes. It flows directly from *Johnson* and *Welch*, then, that, if the residual clauses in *Johnson*, *Dimaya*, and *Davis* are void for vagueness, then so too § 4B1.2(a)(2)'s mandatory residual clause.

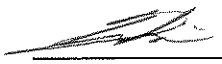
In the end, if this Court holds that § 2255(h)(2) authorizes a *Johnson* claim to challenge a sentence imposed under the residual clause of the mandatory guidelines, as it should, this Court should further declare that residual clause void for vagueness.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender



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Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BOBBY G. PULLEN,

Defendant - Appellant.

No. 17-3194

Appeal from the United States District Court
for the District of Kansas
(D.C. Nos. 5:16-CV-04067-JAR and 5:98-CR-40080-JAR-1)

Daniel T. Hansmeier, Appellate Chief, Kansas Federal Public Defender (Melody Brannon, Federal Public Defender, and Kirk Redmond, First Assistant Federal Public Defender), Kansas City, Kansas, for Defendant - Appellant.

Jared S. Maag, Assistant United States Attorney (Thomas E. Beall, former United States Attorney; Stephen R. McAllister, United States Attorney; and James A. Brown, Assistant United States Attorney, with him on the briefs), Topeka, Kansas, for Plaintiff - Appellee.

Before **McHUGH**, **MORITZ**, and **EID**, Circuit Judges.

McHUGH, Circuit Judge.

The district court sentenced Bobby G. Pullen as a career offender pursuant to United States Sentencing Guidelines Manual ("USSG") § 4B1.1 at a time when the

Sentencing Guidelines were mandatory. In 2015, the Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), holding the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) is unconstitutionally vague. As the residual clause of § 924(e)(2)(B)(ii) is identical in wording to the residual clause of USSG § 4B1.2 (a definitional provision for USSG § 4B1.1), Mr. Pullen, relying on *Johnson*, moved for authorization to file a second or successive 28 U.S.C. § 2255 motion. This court determined Mr. Pullen made a prima facie showing that *Johnson* created a retroactive, new rule of constitutional law applicable to the mandatory Guidelines. The district court, however, concluded *Johnson* did not actually create a new rule applicable to the mandatory Guidelines and dismissed Mr. Pullen's § 2255 motion pursuant to 28 U.S.C. § 2255(h)(2), a provision governing authorization to file a second or successive § 2255 motion. The district court did, however, grant Mr. Pullen a certificate of appealability ("COA").

On appeal, Mr. Pullen argues the district court procedurally erred when it relied on § 2255(h)(2) as the basis for dismissing his § 2255 motion and substantively erred when it determined *Johnson* did not create a new rule applicable to the mandatory Guidelines. As to Mr. Pullen's procedural challenge, our recent decision in *United States v. Murphy*, 887 F.3d 1064 (10th Cir.), *cert. denied*, 2018 WL 3462559 (Oct. 29, 2018), forecloses his argument. With respect to Mr. Pullen's substantive challenge, the Supreme Court has never recognized a void for vagueness challenge to the Guidelines and so *Johnson* neither creates a new rule applicable to the Guidelines nor dictates that any provision of the

Guidelines is subject to a void for vagueness challenge. Accordingly, we affirm the district court's judgment.

I. BACKGROUND

In 1999, a jury convicted Mr. Pullen of one count of possession with intent to distribute 100 kilograms or more of marihuana, or aiding and abetting the same, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B), 18 U.S.C. § 2. At sentencing, the district court established a total offense level of thirty-four and a criminal history category of VI. The offense level and criminal history category resulted from application of the career offender provision of USSG § 4B1.1 (1998). Application of the career offender provision rested in part on a prior Missouri conviction for escape. Under the offense level and criminal history category compelled by the career offender provision, the presentence investigation report set Mr. Pullen's Guidelines range at 262 to 327 months' imprisonment. The district court sentenced Mr. Pullen to 262 months' imprisonment. Absent designation as a career offender, Mr. Pullen's Guidelines range would have been 92 to 115 months' imprisonment.

In 2006, Mr. Pullen filed his first motion under 28 U.S.C. § 2255, which the district court dismissed as untimely. *United States v. Pullen*, No. 98–40080–JAR, 2006 WL 1133232, at *1 (D. Kan. Apr. 21, 2006). In 2015, the Supreme Court decided *Johnson*, relying on the void for vagueness doctrine to invalidate the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii). *See* 135 S. Ct. at 2563. This residual clause is part of the Armed Career Criminal Act ("ACCA"), which enhances the statutory mandatory minimum for certain defendants who have three or more previous

convictions "for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). Section 924(e)(2)(B)(ii) defines "violent felony" to include an offense that "is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." (emphasis added). The clause emphasized above is the residual clause invalidated in *Johnson*. Importantly, the residual clause of § 924(e)(2)(B)(ii) is identical to the residual clause in USSG § 4B1.2, which defined "crime of violence" for purposes of the career offender guideline as an offense that "is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." USSG 4B1.2(a)(2) (emphasis added).

Within one year of the decision in *Johnson*, Mr. Pullen, relying on 28 U.S.C. § 2255(h)(2) and arguing *Johnson* created a new rule of constitutional law applicable to the mandatory Guidelines, filed a motion in this court for authorization to file a second or successive § 2255 motion. We granted the motion for authorization and Mr. Pullen filed his § 2255 motion in district court. The Government filed a response in which it conceded Mr. Pullen's Missouri escape conviction qualified as a "crime of violence" only under the residual clause of USSG § 4B1.2(a)(2) but argued, in part, that (1) *Johnson* did not create a new rule applicable to the mandatory Guidelines; (2) a rule allowing void for vagueness challenges to the Guidelines would be a new rule that the Supreme Court had not yet recognized; and (3) Mr. Pullen's motion was, therefore, untimely for purposes of 28 U.S.C. § 2255(f).

The district court focused its analysis on § 2255(h)(2)'s requirement that Mr. Pullen's motion be based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." *See* ROA at 184 (quoting § 2255(h)(2)). The district court concluded Mr. Pullen's motion was untimely and did not satisfy § 2255(h)(2) because relief was premised on the void for vagueness doctrine applying to the Guidelines but neither *Johnson* nor any other Supreme Court case has recognized a void for vagueness challenge to the Guidelines. Thus, the district court, relying on § 2255(h)(2), dismissed Mr. Pullen's motion.

The district court, however, granted Mr. Pullen a COA. In pertinent part, the COA reads: "Here, the Court concludes that reasonable jurists could debate whether the Court was correct in its ruling. The Court thus grants a COA on the issue of whether Mr. Pullen's motion falls within the scope of 28 U.S.C. § 2255(h)(2)." ROA at 187. In his opening brief, Mr. Pullen focuses on the § 2255(h)(2) nature of the dismissal, arguing this provision is directed at the circuit court's authority to grant a prisoner authorization to file a second or successive § 2255 motion and, once a circuit court grants authorization, the district court may not dismiss the motion pursuant to § 2255(h)(2).[1] In its response brief, the Government argues a grant of authorization by a circuit court only preliminarily certifies that the movant satisfied the preconditions for a second or successive § 2255

[1] Mr. Pullen moved for leave to file a pro se opening brief. Because Mr. Pullen is represented by counsel, we deny his motion. *See United States v. McDermott*, 64 F.3d 1448, 1450 n.1 (10th Cir. 1995) (declining to consider issues raised in pro se brief based on "policy of addressing on direct appeal only those issues raised by counsel").

motion and that the district court has a secondary gatekeeping role to assure the motion does, in fact, satisfy § 2255(h)(2). The Government further argues the district court correctly concluded *Johnson* did not create a retroactive, new rule applicable to the mandatory Guidelines.

After briefing concluded, several key developments occurred in the law surrounding *Johnson*. First, the Supreme Court issued its decision in *Sessions v. Dimaya*, holding application of *Johnson* resulted in the conclusion that 18 U.S.C. § 16(b)—which is similarly, but not identically, worded to the residual clause of § 924(e)(2)(B)(ii)—was unconstitutionally vague. 138 S. Ct. 1204 (2018). Second, the Supreme Court denied certiorari petitions in several cases where circuit courts rejected § 2255 *Johnson*-based challenges to the residual clause in USSG § 4B1.2. *See, e.g.*, *Raybon v. United States*, 138 S. Ct. 2661 (2018); *Lester v. United States*, 138 S. Ct. 2030 (2018). Third, several other circuit courts addressed whether *Johnson* created a retroactive, new rule applicable to the residual clause of USSG § 4B1.2. *See United States v. Blackstone*, 903 F.3d 1020, 1025–28 (9th Cir. 2018) (holding Supreme Court has yet to announce rule that mandatory Guidelines are susceptible to void for vagueness challenge); *Russo v. United States*, 902 F.3d 880, 882–84 (8th Cir. 2018) (denying § 2255 relief and holding prisoner was not asserting a right based on *Johnson* because reasonable minds could debate whether *Johnson* announced a new rule of constitutional law applicable to the mandatory Guidelines); *United States v. Green*, 898 F.3d 315, 319–23 (3d Cir. 2018) (holding § 2255 motion untimely because *Beckles v. United States*, 137 S. Ct. 886 (2017), favors conclusion *Johnson* did not create new rule applicable to mandatory Guidelines and that

issue remains open); *Cross v. United States*, 892 F.3d 288, 299–306 (7th Cir. 2018) (holding *Johnson* created new rule applicable to all vague, mandatory residual clauses that enhance punishment such that § 2255 relief from sentence imposed under mandatory Guidelines scheme was proper).

In the midst of these developments, we ordered the parties to submit simultaneous supplemental briefs. In his supplemental brief, Mr. Pullen argues *Dimaya* teaches us that *Johnson* created a new rule that applies beyond 18 U.S.C. § 924(e)(2)(B)(ii).[2] And Mr. Pullen articulates the new rule from *Johnson* as a

> due process right not to have a statutory penalty range fixed by a provision that defines a prior conviction as one involving "conduct that presents a serious potential risk of physical injury to another," and that uses an ordinary-case categorical approach to measure whether the conviction is sufficiently risky to count under the provision.

Pullen Supp. Br. at 5–6 (not identifying source of quotation). The Government argues neither *Dimaya* nor *Johnson* addressed the constitutionality of a Guidelines provision or whether the void for vagueness doctrine applies to the Guidelines. Rather, the Government argues, *Beckles* provides the best guidance on whether *Johnson* created a new rule relative to the mandatory Guidelines. The majority opinion in *Beckles* rejected a *Johnson*-based challenge to the advisory Guidelines and Justice Sotomayor, in a concurrence, indicated that *Johnson*'s applicability to the mandatory Guidelines "remains an open question." Gov. Supp. Br. at 5. The Government

[2] Out of concern that his counsel might not have filed a supplemental brief, Mr. Pullen moved to file a pro se supplemental brief. As Mr. Pullen is represented by counsel and his counsel did file a supplemental brief, we deny Mr. Pullen's motion. *See McDermott*, 64 F.3d at 1150 n.1.

theorizes that if the question remains open, *Johnson* does not create a new rule applicable to the mandatory Guidelines because, if a question is "expressly left open, then the right, by definition, has not been recognized." *Id.* at 5–6 (quoting *United States v. Brown*, 868 F.3d 297, 299 n.1 (4th Cir. 2017), *cert. denied*, 139 S. Ct. 14 (2018)).

Finally, subsequent to oral argument, the Supreme Court, over a two justice dissent, denied certiorari petitions in a second set of cases where circuit courts denied § 2255 motions raising *Johnson*-based challenges to the residual clause of USSG § 4B1.2, as applied when the Guidelines were mandatory. *Brown v. United States*, 139 S. Ct. 14 (2018); *see Gipson v. United States*, 2018 WL 1993703 (Oct. 15, 2018); *Lewis v. United States*, 2018 WL 3094227 (Oct. 15, 2018); *Greer v. United States*, 2018 WL 2087987 (Oct. 15, 2018); *Wilson v. United States*, 2018 WL 2064772 (Oct. 15, 2018); *Molette v. United States*, 2018 WL 1640168 (Oct. 15, 2018); *Homrich v. United States*, 2018 WL 2364812 (Oct. 15, 2018); *Chubb v. United States*, 2018 WL 3024068 (Oct. 15, 2018); *Smith v. United States*, 2018 WL 3024136 (Oct. 15, 2018); *Buckner v. United States*, 2018 WL 3024166 (Oct. 15, 2018);[3] *see also Robinson v. United States*, 2019 WL 113550 (Jan. 7, 2019); *Garrett v. United States*, 2018 WL

[3] Footnote 1 of the dissent from the denial of certiorari in *Brown v. United States* indicates that the dissent also applies to the other nine orders denying certiorari that issued on October 15, 2018. 139 S. Ct. 14, 14 n.1 (2018) (Sotomayor, J., dissenting from denial of certiorari). Where Justice Ginsburg joined the dissent in *Brown* in full and without reservation, we interpret footnote 1 as indicating that Justice Ginsburg dissented from the other nine denials of certiorari issued on October 15, 2018, even though the orders in those denials do not specifically identify Justice Ginsburg as dissenting.

3660076 (Dec. 3, 2018); *Bowens v. United States*, 2018 WL 5113456 (Nov. 19, 2018); *Callins v. United States*, 2018 WL 4932460 (Nov. 13, 2018).

II. STANDARD OF REVIEW

"Where, as here, the district court does not hold an evidentiary hearing, but rather denies the motion as a matter of law . . . our review is strictly de novo." *United States v. Barrett*, 797 F.3d 1207, 1213 (10th Cir. 2015) (quotation marks omitted). Further, "[w]e are not bound by the district court's reasoning and may affirm on any ground adequately supported by the record." *United States v. Greer*, 881 F.3d 1241, 1244 (10th Cir. 2018), (internal quotation marks omitted) *cert. denied* 2018 WL 2087987; *see Grossman v. Bruce*, 447 F.3d 801, 805 n.2 (10th Cir. 2006) ("[W]e are free to affirm [the denial of 28 U.S.C. § 2241 relief] on any ground for which there is a sufficient record to permit conclusions of law.").

III. DISCUSSION

A. *Threshold Requirement for Second or Successive § 2255 Motion*

Although prisoners who have not filed a prior § 2255 motion may file such a motion directly in the district court, a prisoner who filed a prior § 2255 motion must obtain authorization from a circuit court judge prior to filing the motion in district court. *See* 28 U.S.C. § 2244(a); *see also id.* § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). Section 2255(h) of Title 28 sets out the requirements for authorization and states, in pertinent part:

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

To obtain authorization to file a second or successive § 2255 motion, a movant relying on a new rule of constitutional law must make a prima facie showing to the circuit court that he satisfies the § 2255(h)(2) requirements. 28 U.S.C. § 2244(b)(3)(C).

B. *Secondary Requirement for Second or Successive § 2255 Motion*

Having concluded that Mr. Pullen made a prima facie showing to the circuit court that he satisfies the § 2255(h)(2) requirements, we next consider whether the district court possessed the authority to deny Mr. Pullen relief and dismiss his § 2255 motion pursuant to § 2255(h)(2) after the circuit court certified his prima facie compliance. Our recent decision in *Murphy* controls our analysis.

As discussed, "[u]nder § 2255(h)(2), a second or successive [§ 2255] motion must be certified—as provided in 28 U.S.C. § 2244—by a court of appeals to contain a previously unavailable new rule of constitutional law that the Supreme Court has made retroactively applicable to cases on collateral review." *Murphy*, 887 F.3d at 1067. In turn, § 2244(b)(3) instructs that "to receive certification, a motion *need only make a prima facie showing* that it satisfies § 2255's criteria." *Id.* (emphasis added). Because § 2244(b)(3) requires only a prima facie showing for certification by the court of appeals, certification amounts to only a "preliminary" determination that the

second or successive § 2255 motion contains a claim based on a new rule of constitutional law made retroactive on collateral review by the Supreme Court. *Id.* The "preliminary" nature of this determination means the movant must pass through a second procedural gate once in district court: "[P]ursuant to § 2244(b)(4), once the court of appeals grants authorization, the district court must determine whether the petition does, in fact, satisfy the requirements for filing a second or successive motion before the merits of the motion can be considered." *Id.* (internal quotation marks omitted). In summation, the two procedural gates a prisoner must pass through before obtaining review of the merits of a second or successive § 2255 motion are:

> (1) a prima facie showing to the court of appeals that the motion satisfies the requirements of § 2255(h), defined as "a sufficient showing of possible merit to warrant a fuller exploration by the district court" and
> (2) a determination by the district court that the petition does, in fact, satisfy those requirements.

Id. at 1068 (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)).

In accord with this two-gate approach, the district court was required to analyze whether Mr. Pullen's § 2255 motion actually relied on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court" as required by § 2255(h)(2) and § 2244(b)(4). Concluding that Mr. Pullen's § 2255 motion did not actually rely on a new rule of constitutional law applicable to the mandatory Guidelines, the district court relied on § 2255(h)(2) to dismiss the motion.

With these requirements in mind, we discuss the history of the Sentencing Guidelines and of *Johnson* and its progeny before turning to the issue of whether the district court correctly determined that Mr. Pullen cannot actually satisfy the requirements of § 2255(h)(2). *See* 28 U.S.C. § 2244(b)(4). That is, whether his motion relies on a new rule of constitutional law already decided and deemed retroactively applicable by the Supreme Court.

C. *Legal Background*

1. History of the Guidelines

In 1984, Congress authorized the United States Sentencing Commission to promulgate the Sentencing Guidelines. *Mistretta v. United States*, 488 U.S. 361, 362 (1989). Prior to the adoption of the Guidelines, the often expansive statutory minimum and maximum penalties for an offense served as the only constraint on a federal judge's discretion at sentencing. *Id.* at 364 (describing the pre-Guidelines sentencing scheme as one where "Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected"). One of the primary purposes behind the creation of the Guidelines was to "promote uniformity and proportionality in sentencing" across the country. *United States v. Jackson*, 921 F.2d 985, 988 (10th Cir. Dec. 17, 1990) (en banc). And in passing the Sentencing Reform Act of 1984, Congress intentionally "settl[ed] on a mandatory-guideline system," rather than an advisory system. *Mistretta*, 488 U.S. at 367.

Codifying the generally mandatory nature of the Guidelines, Congress enacted 18 U.S.C. § 3553(b)(1), which states, in pertinent part:

> Except as provided in paragraph (2), the court *shall impose a sentence of the kind, and within the range*, [produced by the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.

(emphasis added). In 2005, the Supreme Court struck down the above-quoted statutory provision, concluding the Sixth Amendment precluded a sentencing judge from finding facts that effectively increased a defendant's punishment where those facts had not been found by a jury or admitted by the defendant as part of a guilty plea. *United States v. Booker*, 543 U.S. 220, 244 (2005).[4] In reaching this conclusion, the Court held the Guidelines acted like a statute because a sentencing judge's ability to depart from the Guidelines range was so strictly limited that the Guidelines range drove a defendant's sentence in the vast majority of cases. *Id.* at 234. To solve the constitutional problem with a mandatory-Guidelines scheme, the Supreme Court severed the portion of the Sentencing Reform Act of 1984 that made the Guidelines

[4] Despite *Booker*'s statement about judicial factfinding at sentencing violating the Sixth Amendment, an exception to this general prohibition exists where the district court makes factual findings regarding a defendant's prior criminal history. *See Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000).

mandatory, transforming the Guidelines into their present-day, advisory form. *Id.* at 265; *see also id.* at 245–60.

2. *Johnson* and its Progeny

In 2015, the Supreme Court addressed the constitutionality of 18 U.S.C. § 924(e)(2)(B). Section 924(e)(2)(B) defined "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*

(emphasis added). In *Johnson*, the Court concluded the emphasized language, known as the residual clause, was void for vagueness because "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2557; *see id.* at 2556 (identifying "fail[ure] to give ordinary people fair notice of the conduct it punishes" and being "so standardless that it invites arbitrary enforcement" as two bases for finding statute unconstitutionally vague). *Johnson*, however, limited its holding to the residual clause of § 924(e)(2)(B)(ii). *See id.* at 2563 ("Today's decision does not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA's] definition of a violent felony."); *see also Greer*, 881 F.3d at 1248 ("[T]he only right recognized by the Supreme Court in *Johnson* was a defendant's right not to have his sentence increased under the residual clause of the ACCA.").

In the aftermath of *Johnson*, courts were flooded with challenges, both on direct appeal and under § 2255, to convictions or sentences supported by § 924(e)(2)(B)(ii) or other provisions resembling § 924(e)(2)(B)(ii). A trio of Supreme Court cases shape the state of the law post-*Johnson*. First, in *Welch v. United States*, the Court held *Johnson* announced a new rule of constitutional law that applied retroactively to cases on collateral review. 136 S. Ct. 1257, 1264–65 (2016). Although *Welch* never explicitly states the rule from *Johnson*, the majority opinion suggests the rule was limited to the ACCA. *See id.* at 1265 ("By striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering the range of conduct or the class of persons that the [Act] punishes . . . . The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence. *Johnson* establishes . . . that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." (internal quotation marks omitted)). *But see id.* at 1272 (Thomas, J., dissenting) ("*Johnson*'s new constitutional rule is that a law is unconstitutionally vague if it 'requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk,' of some result." (quoting *Johnson*, 135 S. Ct. at 2557)).

Second, in *Beckles*, the Court addressed whether the residual clause of USSG § 4B1.2 of the advisory Guidelines was susceptible to a void for vagueness challenge

similar to the challenge that prevailed in *Johnson*.[5] *See* 137 S. Ct. at 890. Because the residual clause of USSG § 4B1.2(a)(2) was identical to the language held void for vagueness in *Johnson*, several circuit courts, including this court, concluded the rule from *Johnson* necessitated the invalidation of the residual clause in § 4B1.2(a)(2) within the context of the advisory Guidelines. *See United States v. Pawlak*, 822 F.3d 902 (6th Cir. 2016); *United States v. Hurlburt*, 835 F.3d 715 (7th Cir. 2016) (en banc); *United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015). *But see United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015) (rejecting void for vagueness challenge to advisory Guidelines).

In *Beckles*, the Supreme Court rejected the position that the advisory Guidelines were susceptible to the rule from *Johnson* or a void for vagueness

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[5] Recall that USSG § 4B1.2 defined "crime of violence" as:

> [A]ny offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

USSG § 4B1.2(a) (1998–2015) (emphasis added). The emphasized language is the residual clause that was at issue in *Beckles v. United States*, 137 S. Ct. 886 (2017), and is at issue in this case. In 2016, the Sentencing Commission passed an amendment to the Guidelines adding several enumerated offenses to subsection (2) and removing the residual clause of the subsection. USSG Supp. to App. C., Amend 798 at 131 (Nov. 1, 2016) ("Amendment 798"). Amendment 798, however, has no bearing on Mr. Pullen's case as the Amendment does not apply retroactively. *See* USSG § 1B1.10(d) (listing amendments that apply retroactively).

challenge. 137 S. Ct. at 894–95. In so holding, the Court observed it had "invalidated two kinds of criminal *laws* as 'void for vagueness': laws that *define* criminal offenses and *laws* that *fix the permissible sentences* for criminal offenses." *Id.* at 892 (first and third emphases added). The *Beckles* Court further observed that "'*statutes* fixing sentences' must specify the range of available sentences with 'sufficient clarity,'" *id.* (emphasis added) (first quoting *Johnson*, 135 S. Ct. at 2557, then quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979)), and that "[b]y specifying 'the *range* of penalties that prosecutors and judges may seek and impose,' Congress ha[s] 'fulfilled its duty'" to craft a law that comports with due process, *id.* at 893 (quoting *Batchelder*, 442 U.S. at 126). The Court then distinguished the advisory Guidelines, which "do not fix the permissible range of sentences," from the "statute" at issue in *Johnson*, which did "fix[] permissible sentences." *Id.* at 892. From this, the Court concluded "[t]he advisory Guidelines . . . do not implicate the twin concerns underlying [the] vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* at 894. As to the first of these concerns, "[a]ll of the notice required is provided by the applicable statutory range, which establishes the permissible bounds of the court's sentencing discretion." *Id*. Along those lines, the Court stated, "[t]he Guidelines . . . do not regulate the public by prohibiting any conduct or by 'establishing minimum and maximum penalties for any crime.'" *Id.* at 895 (quoting *Mistretta*, 488 U.S. at 396).

The majority opinion in *Beckles*, however, indicated that the second concern of the void for vagueness doctrine—preventing arbitrary enforcement—was ameliorated

by the advisory nature of the Guidelines post-*Booker* and the sentencing judge's discretion to impose a sentence anywhere within the statutory range. *Id.* The distinction between the discretion afforded sentencing judges under the advisory Guidelines, compared to the mandatory Guidelines, caught the attention of Justice Sotomayor, whose concurrence stated:

> The Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker*, 543 U.S. 220 (2005)—that is, during the period in which the Guidelines *did* "fix the permissible range of sentences"—may mount vagueness attacks on their sentences. That question is not presented by this case and I, like the majority, take no position on its appropriate resolution.

Id. at 903 n.4 (Sotomayor, J. concurring in the judgment) (citations omitted).

Third, in *Dimaya*, the Supreme Court relied on the void for vagueness doctrine to strike down 18 U.S.C. § 16(b)'s definition of crime of violence, a provision the Court described as "similarly worded" to the residual clause struck down in *Johnson*. *Dimaya*, 138 S. Ct. at 1210. In so holding, the opinion of the Court made three statements potentially important to determining the scope of the new rule from *Johnson*. First, *Dimaya* indicated its ruling was a product of "adhering" to the analysis set forth in *Johnson*. *Id*. Second, *Dimaya* called *Johnson* "a straightforward decision, with equally straightforward application here" such that the "reasoning" of *Johnson* "effectively resolved the [issue] before" the Court in *Dimaya*.[6] *Id.* at 1213.

[6] Notably, *Dimaya* could have, but did not, state that any "rule" from *Johnson* "dictated" a result in *Dimaya*. *Cf. Russo v. United States*, 902 F.3d 880, 883 (8th Cir.

Finally, *Dimaya* compared § 16(b) and § 924(e)(2)(B)(ii), stating that both statutes "'require[] a court to picture the kind of conduct that the crime involves in "the ordinary case" and to judge whether that abstraction presents' some not-well-specified-yet-sufficiently-large degree of risk." *Id.* at 1216 (quoting *Johnson*, 135 S. Ct. at 2556–57). Under this analytical framework, *Dimaya* concluded "§ 16(b) produces, just as the ACCA's residual clause did, 'more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Id.* at 1216 (quoting *Johnson*, 135 S. Ct. at 2558).

D. *Analysis*

Based on *Johnson* and its progeny, Mr. Pullen describes the new and retroactive rule from *Johnson* as a right not to be sentenced under an ordinary-case categorical approach requiring a judge to picture conduct of the crime and predict whether that conduct presents a sufficiently large degree of risk. Before considering the rule Mr. Pullen advances, we pause to address the iterations of the rule by this court and others. We then turn to the formulation of the rule endorsed by Mr. Pullen, ultimately deciding it does not permit relief on a second or successive § 2255 claim challenging the mandatory Guidelines because the Supreme Court has not yet

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2018) (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989), for proposition that "[a] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final" and concluding that any rule relative to the mandatory Guidelines would be a new rule because the rule "is not dictated by *Johnson*").

announced a rule with respect to the mandatory Guidelines. Thus, we agree with the district court that Mr. Pullen's motion does not actually satisfy § 2255(h)(2).

1. Decisions Defining the Rule Announced in *Johnson*

Several circuit court decisions, including our own decision in *Greer*, have stated the new rule created by *Johnson* as "a defendant's right not to have his sentence increased under the residual clause of the ACCA."[7] *Greer*, 881 F.3d at 1248; *see also Green*, 898 F.3d at 321 ("[I]n light of *Beckles*, *Johnson*'s holding as to the residual clause in the ACCA created a right only as to the ACCA, and not a broader right that applied to all similarly worded residual clauses, such as that found in the advisory Sentencing Guidelines."); *Brown*, 868 F.3d at 303 ("*Johnson* only recognized that ACCA's residual clause was unconstitutionally vague."). If this phrasing of the new rule from *Johnson* is correct, Mr. Pullen is not entitled to proceed on his § 2255 motion because his Guidelines range was increased as a result of application of USSG § 4B1.1 and the residual clause of USSG § 4B1.2(a)(2) of the mandatory Guidelines and not the residual clause of the ACCA.

The Seventh Circuit, the only circuit to grant relief to a § 2255 movant relying on *Johnson* to challenge USSG §§ 4B1.1, 1.2 of the mandatory Guidelines, has expressed the new rule from *Johnson* as "a right not to have his sentence *dictated* by

[7] The narrowness of that statement of the rule from *Johnson* has been called into question by *Dimaya*'s application of the rule to a statutory context outside of the ACCA—albeit on direct review. But we need not define the precise boundaries of the rule today because Mr. Pullen's attempt to apply *Johnson* to the mandatory Guidelines fails even under his more expansive statement of that rule.

the unconstitutionally vague language of the mandatory residual clause." *Cross*, 892 F.3d at 294; *see Blackstone*, 903 F.3d at 1027 (identifying quoted language from *Cross* as Seventh Circuit's statement of new right from *Johnson*). But the Ninth Circuit has concluded that the Seventh Circuit's proposed rule is phrased at such a high level of generality that it runs afoul of Supreme Court teachings regarding the parameters for phrasing a new rule for purposes of a collateral proceeding. *See Blackstone*, 903 F.3d at 1026 ("The Supreme Court has repeatedly admonished our court not to advance on its own in determining what rights have been recognized by the Supreme Court under AEDPA.") (citations omitted). We need not consider whether the Seventh Circuit's articulation of the rule is so broad as to restate existing law, rather than announcing a new rule, because Mr. Pullen has espoused a more narrow interpretation of the rule from *Johnson.* We consider Mr. Pullen's phrasing of the new rule now.

2. Mr. Pullen's Statement of the Rule

Mr. Pullen argues the proper statement of the new rule from *Johnson* is the right not to be sentenced under an ordinary-case categorical approach that requires the judge to imagine both the conduct necessary to commit the crime and the degree of risk posed by such conduct. Support for Mr. Pullen's interpretation of *Johnson* can be drawn from the dissent in *Welch* and from *Dimaya*. On the former, as pointed out above, the dissent in *Welch* identified the new rule from *Johnson* in a manner similar to the rule stated by Mr. Pullen. *See Welch*, 136 S. Ct. at 1272 (Thomas, J., dissenting) ("*Johnson*'s new constitutional rule is that a law is unconstitutionally

vague if it 'requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk,' of some result." (quoting *Johnson*, 135 S. Ct. at 2557)). With respect to the latter, *Dimaya* read *Johnson* as concluding that a residual clause is unconstitutionally vague if it "'requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents' some not-well-specified-yet-sufficiently-large degree of risk." 138 S. Ct. at 1216 (quoting *Johnson*, 135 S. Ct. at 2556–57). Assuming for the sake of argument that Mr. Pullen is correct regarding the proper phrasing of the new rule from *Johnson*, three considerations defeat his ability to rely on the rule to proceed with a second or successive § 2255 motion challenging the mandatory Guidelines.

First, central to whether Mr. Pullen can rely on any new rule from *Johnson* is whether application of the rule to the mandatory Guidelines is "*dictated* by precedent" and "apparent to all reasonable jurists" as opposed to "susceptible to debate among reasonable minds." *Russo*, 902 F.3d at 883 (quotation marks omitted).[8] Neither *Johnson*, *Welch*, nor *Dimaya* addressed a challenge to a provision of the Guidelines, mandatory or advisory. Instead, the only case to address a *Johnson*-based challenge to the Guidelines is *Beckles*, which concluded the advisory Guidelines were

[8] The Eighth Circuit reached this conclusion based on a trio of Supreme Court cases discussing principles governing new rules: *Teague v. Lane*, 489 U.S. 288, 301 (1989), *Chaidez v. United States*, 568 U.S. 342, 347 (2013), and *Butler v. MecKellar*, 494 U.S. 407, 415 (1990). *See Russo v. United States*, 902 F.3d 880, 883 (8th Cir. 2018).

not susceptible to a void for vagueness challenge. 137 S. Ct. at 897. And while the advisory nature of the Guidelines at issue in *Beckles* was undoubtedly important to the Court's holding, the concurrence in *Beckles* indicated that *Johnson*'s applicability to the mandatory Guidelines remained an open question. *See id.* at 903 n.4 (Sotomayor, J. concurring in the judgment) ("The Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker* . . . may mount vagueness attacks on their sentences.").[9] If a question remains "open," it is not dictated by precedent. *See Brown*, 868 F.3d at 301 ("[I]f the existence of a right remains an open question as a matter of Supreme Court precedent, then the Supreme Court has not 'recognized' that right."); *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' let alone one that was 'made retroactively applicable to cases on collateral review.'" (quoting 28 U.S.C. § 2255(f)(3))); *see also Blackstone*, 903 F.3d at 1026–27 (relying on open nature of question when affirming denial of § 2255 relief).

Second, central to why the question remains open is that *Johnson* involved a federal statute, while the Guidelines, even in their mandatory form, were agency-

[9] Even after *Dimaya*, Justice Sotomayor still believes the question remains open. *See Brown v. United States*, 139 S. Ct. 14, 15 (2018) (Sotomayor, J., dissenting from denial of certiorari) ("But for petitioners like Brown, who were sentenced long before *Johnson*, this Court has thus far left the validity of their sentences an open question. The Court's decision today all but ensures that the question will never be answered." (citation omitted)).

created rules formed by the U.S. Sentencing Commission to supplement existing, congressionally-enacted statutory maximum and minimum sentencing ranges. While the Guidelines established a mandatory range, this mandatory range always fell within the statutory minimum and maximum affixed by Congress. *See* USSG § 5G1.1. Thus, regardless of any vagueness in the mandatory Guidelines, the Supreme Court might conclude the statutory scheme enacted by Congress placed the defendant on fair notice of the possible penalties he faced for committing an offense. *Cf. Beckles*, 137 S. Ct. at 893 ("By specifying 'the *range* of penalties that prosecutors and judges may seek and impose,' Congress ha[s] 'fulfilled its duty.'" (quoting *Batchelder*, 442 U.S. at 126)); *id.* at 894 ("All of the notice required is provided by the applicable statutory range, which establishes the permissible bounds of the court's sentencing discretion.").[10]

Third, where the Guidelines replaced an open-ended sentencing scheme under which judges could impose any sentence within the statutory range, even a somewhat vague residual clause in the Guidelines provided more guidance to sentencing judges than existed prior to the mandatory Guidelines.[11] *See In re Griffin*, 823 F.3d 1350,

[10] By concluding that the Supreme Court *might* not strike the residual clause in the mandatory Guidelines as void for vagueness, we do not mean to suggest the Court *will* reach such a result.

[11] Mr. Pullen does not identify any case holding that an open-ended sentencing scheme under which a judge could impose any sentence between a properly announced statutory minimum and statutory maximum failed under the Due Process Clause and the void for vagueness doctrine.

1354–55 (11th Cir. 2016) (per curiam) ("Because there is no constitutional right to sentencing only under guidelines, the limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague. . . . Even vague guidelines cabin discretion more than no guidelines at all.").[12] And, because the Supreme Court has already indicated in *Beckles* that a defendant received fair notice of the broad, but specified, range of penalties he faced under the statutory scheme, 137 S. Ct. at 894–95, and it could reasonably conclude that the sentencing judge's discretion was more cabined with the residual clause in USSG § 4B1.2(a)(2) than in the absence of any Guidelines, the Court might conclude that the two concerns underlying the void for vagueness doctrine are not present in the context of the mandatory Guidelines.

[12] To be sure, the Supreme Court could conclude the language of USSG § 4B1.2, within the context of the mandatory Guidelines, did not satisfy due process and void for vagueness considerations. Justice Sotomayor suggested the possibility of such a result within her concurrence in *Beckles*:

> [A] district court's reliance on a vague Guideline [such as U.S.S.G. § 4B1.2] creates serious risk of "arbitrary enforcement." . . . It introduces an unacceptable degree of arbitrariness into sentencing proceedings to begin by applying a rule that is so vague that efforts to interpret it boil down to guesswork and intuition."

137 S. Ct. at 901 (Sotomayor, J., concurring) (citations omitted). The point is that the Supreme Court has not yet answered the question. This is fatal to Mr. Pullen's successive § 2255 motion, especially within in the context of a § 2255(h)(2) analysis where Mr. Pullen must identify a new rule retroactively applicable to his claim for relief.

In accord with the second and third reasons discussed above, *Beckles* observed that the Court has "invalidated two kinds of criminal *laws* as 'void for vagueness': laws that *define* criminal offenses and *laws* that *fix the permissible sentences* for criminal offenses." *Id.* at 892 (first and third emphases added). As to the second type of laws, "'*statutes* fixing sentences' must specify the range of available sentences with 'sufficient clarity.'" *Id.* (emphasis added) (first quoting *Johnson*, 135 S. Ct. at 2557, then quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). But, the mandatory Guidelines were not laws or statutes; rather, they merely operated like statutes. Thus, while the Supreme Court might one day conclude, by relying on the actual innocence gateway,[13] that the mandatory Guidelines sufficiently took the form of a law or a statute so as to expose the mandatory Guidelines to a void for vagueness challenge, such a conclusion or rule is (1) debatable and (2) essential to Mr. Pullen's ability to prevail. Accordingly, Mr. Pullen's § 2255 motion is dependent on a rule not yet established by the Supreme Court and, consequently, not made retroactively applicable by the Court.[14] This conclusion provides a sufficient basis to preclude Mr.

[13] This circuit does not recognize actual innocence in the sentencing context, except in capital sentences. *See United States v. Denny*, 694 F.3d 1185, 1191 (10th Cir. 2012) ("[A] defendant cannot be actually innocent of a noncapital sentence[.]" (internal quotation marks omitted)). But other circuits do permit such arguments, *see Cristin v. Brennan*, 281 F.3d 404, 421–22 (3d Cir. 2002) (collecting cases), and the Supreme Court has left open the question of whether a prisoner can rely on the actual innocence gateway to challenge a noncapital sentence, *see Dretke v. Haley*, 541 U.S. 386, 393–94 (2004).

[14] The Court could conclude that the mandatory Guidelines, although not statutes, are subject to a void for vagueness challenge and that they do not satisfy due

Pullen from proceeding on his § 2255 motion. *See Blackstone*, 903 F.3d at 1028; *Russo*, 902 F.3d at 883.

3. Summation

Mr. Pullen is not entitled to proceed on his § 2255 motion under his iteration of the new rule from *Johnson*. Accordingly, the district court correctly concluded Mr. Pullen failed to actually satisfy the precondition established by § 2255(h)(2) for filing a second or successive § 2255 motion. This conclusion is consistent with the rulings of six of our seven sibling circuits, which deny § 2255 relief because *Johnson* either (1) did not recognize a new right applicable to the mandatory Sentencing Guidelines for purposes of the requirement in 28 U.S.C. § 2255(f)(3) or (2) did not create a new rule applicable to the mandatory Sentencing Guidelines for purposes of meeting the requirements in 28 U.S.C. § 2255(h)(2). *See Blackstone*, 903 F.3d at 1028 (denying § 2255 relief under § 2255(f)(3) as *Johnson* did not recognize right as to mandatory Guidelines); *Russo*, 902 F.3d at 883–84 (same); *Green*, 898 F.3d at 321–33 (same); *Brown*, 868 F.3d at 301–02 (same); *Raybon*, 867 F.3d at 629–31 (same); *In re*

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process concerns because they permitted judges to prescribe sentencing ranges arbitrarily. *See Beckles*, 137 S. Ct. at 894-95 (explaining that a vague law which permits judges to prescribe sentencing ranges invites arbitrary enforcement). But, to date, the Supreme Court has not announced a new rule retroactively applicable to the mandatory Guidelines. Nor, as apparent from the denials of certiorari, has the Supreme Court seen fit to take up the issue of *Johnson*'s impact on the mandatory Guidelines. And unless and until it does, Mr. Pullen cannot establish that his successive § 2255 motion actually relies on a new rule for purposes of authorization under § 2255(h)(2).

Griffin, 823 F.3d at 1354–56 (denying authorization under § 2255(h)(2) because *Johnson* did not announce new rule applicable to the mandatory Guidelines).[15] *But see Cross*, 892 F.3d at 294.[16] It is also consistent with the Supreme Court's recent denials of certiorari on a series of petitions seeking reversal of the aforementioned circuit decisions. And while denials of certiorari often do not shed light on the merits

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[15] Although the Fourth, Sixth and Eleventh Circuits reached their decisions before *Dimaya*, the Sixth and Eleventh Circuits continue to rely respectively upon *Raybon* and *Griffin* after *Dimaya*. *See Robinson v. United States*, 736 F. App'x 599, 599–600 (6th Cir. 2018) (holding *Raybon* had not been overruled by a Supreme Court decision and remained law of the circuit); *Foxx v. United States*, 736 F. App'x 253, 254 (11th Cir. 2018) ("[W]e cannot deviate from *In re Griffin* given the current state of the law, and this forecloses Foxx's appeal."); *Lewis v. United States*, 733 F. App'x 501, 503 (11th Cir. 2018) (concluding *In re Griffin* "remains binding"). It does not appear the Fourth Circuit has revisited the issue since *Dimaya*.

Separately, we observe that while *In re Griffin* involved the denial of authorization for failing to make a prima facie showing under § 2255(h)(2) and 28 U.S.C. § 2244(b)(3), 823 F.3d 1350, 1351, 1354–56 (11th Cir. 2016) (per curiam), Mr. Pullen already passed through the prima facie gate when we granted authorization. Thus, rather than relying on § 2244(b)(3) when dismissing Mr. Pullen's § 2255 motion, the district court correctly relied on § 2244(b)(4) to conclude Mr. Pullen did not satisfy the requirements set forth by § 2255(h)(2).

[16] Mr. Pullen argues the First Circuit, in *Moore v. United States*, 871 F.3d 72 (1st Cir. 2017), reached the same result as the Seventh Circuit. *Moore*, however, involved a preliminary, or prima facie, determination under 28 U.S.C. § 2244(b)(3) that a § 2255 movant could rely on *Johnson* to challenge the mandatory Guidelines and not the conclusion that the second or successive § 2255 motion was actually premised on a new rule of constitutional law made retroactive by the Supreme Court for purposes of the 28 U.S.C. § 2244(b)(4) analysis. *See Moore*, 871 F.3d at 80 ("Having explained the focused yet tentative nature of the examination called for in evaluating a request to file a second or successive § 2255 motion, we turn next to Moore's motion."). Thus, even if other language in *Moore* suggests the panel of the First Circuit would have reached the same conclusion had it been conducting a § 2244(b)(4) analysis, *see id.* at 85, *Moore* does not establish any binding precedent as to the § 2244(b)(4) question.

of an issue, *see United States v. Carver*, 260 U.S. 482, 490 (1923), these denials of certiorari (1) were over a two justice dissent, which expressly states the question is open and not likely to ever be resolved; and (2) the individual defendants are now precluded from filing new and timely § 2255 motions based on *Johnson* should the Supreme Court later adopt the position advanced in their certiorari petitions.[17]

IV. CONCLUSION

We conclude *Johnson* did not create a new rule of constitutional law applicable to the mandatory Guidelines because (1) *Beckles* suggests the void for vagueness doctrine's applicability to the mandatory Guidelines remains an open question; (2) the Guidelines, even in their mandatory form, were not statutes; and (3) even a vague provision of the Guidelines provided more guidance to defendants and sentencing judges than did the congressionally-enacted statutory minimum and maximum sentences that provided defendants sufficient due process. Although the Supreme Court might reject all of these considerations and invalidate the residual clause of the mandatory Guidelines, it has not yet done so. Because *Johnson* did not create a new rule of constitutional law applicable to

[17] In concluding that, regardless of how the new rule from *Johnson* is phrased, *Johnson* does not create a new rule of constitutional law relative to the mandatory Guidelines, we find it unnecessary to decide whether *Greer*'s statement of the rule from *Johnson* is too narrow in light of *Dimaya*. Rather, it is clear *Greer*'s holding, that *Johnson* does not create a new rule of constitutional law applicable to the mandatory Guidelines, remains good law.

the mandatory Guidelines, the district court properly denied relief and dismissed Mr. Pullen's § 2255 motion pursuant to § 2255(h)(2). Accordingly, we **AFFIRM**.[18]

[18] We **DENY** Mr. Pullen's motion to file a pro se opening brief and his motion to file a pro se supplemental brief.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 98-40080-01-JAR

BOBBY G. PULLEN,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on Defendant Bobby Pullen's Motion to Vacate Sentence Under 28 U.S.C. § 2255 (Doc. 156). Mr. Pullen was convicted by a jury of possession with the intent to distribute approximately 320 pounds of marijuana, in violation of 21 U.S.C. § 841 on April 15, 1999. Mr. Pullen received a sentence enhanced under the Guideline for career offenders because the offense was committed subsequent to sustaining two felony convictions for crimes of violence as defined in U.S.S.G. § 4B1.2. He was ultimately sentenced to 262 months' custody. His conviction and sentence were affirmed on direct appeal to the Tenth Circuit.[1] Mr. Pullen's original § 2255 motion was ultimately denied as time barred, and he did not appeal that decision.[2]

On June 26, 2015, the Supreme Court issued its opinion in *Johnson v. United States*,[3] in which it declared unconstitutionally vague a part of the Armed Career Criminal Act's ("ACCA")

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[1] *United States v. Pullen*, 232 F.3d 903 (Table), 2000 WL 1480362 (10th Cir. 2000).

[2] Doc. 147.

[3] 135 S. Ct. 2551 (2015).

definition of "violent felony," referred to as the "residual clause."[4] The residual clause expanded the list of enumerated offenses to include any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[5] The Court expressly stated that its ruling invalidating the residual clause "does not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."[6] In 2016, the Supreme Court determined that *Johnson* announced a new rule of constitutional law "that has retroactive effect in cases on collateral review."[7]

On May 9, 2016, the Tenth Circuit Court of Appeals granted Mr. Pullen leave to file a second or successive petition for relief under 28 U.S.C. § 2255(h) to raise a claim under *Johnson*.[8] Mr. Pullen filed a motion to vacate his sentence arguing that his prior Missouri conviction for escape from custody no longer qualifies as a predicate crime of violence under U.S.S.G. § 4B1.2 in the wake of the Supreme Court's decision in *Johnson*, and resentencing is warranted because he no longer qualifies as a career offender. At the Government's request, the Court stayed these proceedings pending the Supreme Court's decision in *Beckles v. United States*.[9] Mr. Pullen moved the Court to lift the stay order and upon agreement of the parties, the Court issued an Order removing the stay and setting a response deadline for the Government.[10]

On March 6, 2017, the Supreme Court issued its opinion in *Beckles*, holding that "the Guidelines are not subject to a vagueness challenge under the Due Process Clause, [and] [t]he

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[4] *Id.* at 2557.

[5] *See* 18 U.S.C. § 924(e)(2)(B)(ii).

[6] 135 S. Ct. at 2563.

[7] *Welch v. United States,* 136 S. Ct. 1257, 1268 (2016).

[8] Doc. 155.

[9] 137 S. Ct. 886 (2017); *see* Doc. 160.

[10] Docs. 166, 169.

residual clause in § 4B1.2(a)(2) therefore is not void for vagueness."[11] Mr. Pullen subsequently filed a supplemental brief arguing that because he was sentenced prior to *United States v. Booker*,[12] he may still raise a vagueness challenge to a mandatory Guideline scheme.[13] Although the Government concedes that Mr. Pullen's prior conviction under Missouri state law for escape from custody no longer qualifies as a predicate crime of violence, it argues that his motion must nevertheless be dismissed and all relief denied because it does not meet the restrictions in 28 U.S.C. § 2255(h)(2), which is satisfied only when a defendant relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." After careful consideration of the parties' submissions, the Court finds that no evidentiary hearing is needed and the motion should be dismissed.

Mr. Pullen applied to the Tenth Circuit for authorization to bring a second or successive § 2255 motion based on *Johnson*. In granting authorization, the Tenth Circuit found that Mr. Pullen had made a prima facie showing that his claim met the gatekeeping requirements of § 2255(h)(2) and § 2244(b)(3) because "*Johnson* announced a new rule of constitutional law that was made retroactive to cases on collateral review in *Welch*."[14] The Tenth Circuit relied on its holding in *In re Encinias* "that second or successive § 2255 motions that rely on *Johnson* to challenge the career-offender guideline qualify for authorization under § 2255(h)(2)."[15]

Mr. Pullen's assumption in his § 2255 motion as originally filed that the holding of *Johnson* extends to the "virtually identical" residual clause in U.S.S.G. § 4B1.2(a)(2) was

[11] 137 S. Ct. at 892.

[12] 543 U.S. 220 (2005).

[13] Doc. 174.

[14] Doc. 155.

[15] *Id.* (citing *Encinias,* 821 F.3d 1224 (10th Cir. 2016)).

supported by the Tenth Circuit's decision in *United States v. Madrid*.[16] In light of *Madrid's* abrogation by *Beckles*, Mr. Pullen now relies on qualifying language in *Beckles* that the advisory Guidelines are not subject to a vagueness challenge under the Due Process Clause,[17] as well as Justice Sotomayor's concurring opinion recognizing that the "distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker* . . . may mount vagueness attacks on their sentences."[18]

As the Government points out, however, this Court can reach the merits of Mr. Pullen's claim only if he satisfies the conditions of § 2255(h)(2) that apply to second or successive motions; otherwise, the Court lacks jurisdiction to grant relief, and Mr. Pullen's motion must be dismissed.[19] The Tenth Circuit's grant of authorization was made only as a preliminary assessment, leaving this Court to determine whether Mr. Pullen has shown that his claim satisfies § 2255(h)(2). As noted, the Tenth Circuit relied on *Encinias* in granting Mr. Pullen authorization to file the instant § 2255 motion. However, the premise of *Encinias* has been rendered obsolete by the abrogation of *Madrid* and the conclusion in *Beckles* that "the Guidelines are not subject to a vagueness challenge under the Due Process Clause, [and] [t]he residual clause in § 4B1.2(a)(2) therefore is not void for vagueness."[20] Consequently, the Court agrees that the basis for authorization by the Tenth Circuit in the first instance cannot be relied upon by Mr. Pullen in the

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[16] 805 F.3d 1204, 1211 (10th Cir. 2015), *abrogated by Beckles v. United States,* 137 S. Ct. 886 (2017).

[17] 137 S. Ct. at 895.

[18] *Id.* at 903 n.4 (Sotomayor, J., concurring).

[19] *Case v. Hatch,* 731 F.3d 1015, 1029 (10th Cir. 2013); *see* 28 U.S.C. § 2244(b)(4) ("A district court must dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.").

[20] *Beckles,* 135 S. Ct. at 892.

second instance wherein he now challenges his career offender status under the pre-*Booker* mandatory Guidelines.

Accordingly, this Court must determine whether Mr. Pullen's re-styled pre-*Booker* claim is based on a new rule of constitutional law retroactively applicable to cases on collateral review.[21] It is now open to debate whether the Due Process Clause applies to the mandatory Guidelines. Although the Tenth Circuit has not ruled on this issue, the Sixth Circuit recently dismissed a similar § 2255 claim as untimely because the Supreme Court's holding in *Johnson* did not create a newly-recognized right allowing petitioners to assert vagueness challenges under the Due Process Clause based on the mandatory Guideline's residual clause.[22] In this District, Judge Lungstrum and Judge Crabtree reached similar conclusions in the context of finding § 2255 motions to be untimely because the time limit of § 2255(f)(3) is only available when a claim is based on a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."[23] The Court finds the reasoning of these cases persuasive, and adopts that reasoning here. Because the Supreme Court has not recognized the right that Mr. Pullen seeks to assert—that his sentence imposed under the mandatory Guidelines' residual clause is unconstitutionally vague—the Court concludes that he has failed to satisfy the preconditions of § 2255(h)(2) and his motion must be dismissed.[24]

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[21] 28 U.S.C. § 2255(h)(2).

[22] *Raybon v. United States,* ---F.3d---, 2017 WL 3470389, at *3 (6th Cir. Aug. 14, 2017) (collecting cases).

[23] *See United States v. Ward,* 01-CR-40050-01-DDC, 2017 WL 3334644, at *2 (D. Kan. Aug. 4, 2017) (collecting cases); *United States v. Brigman,* No. 03-20090-JWL, 2017 WL 3267674, at *2–3 (D. Kan. Aug. 1, 2017) (same).

[24] *See United States v. Taylor,* No. CR-95-158-D, 2017 WL 3431849, at *3–4 (W.D. Okla. Aug. 9, 2017) (holding Supreme Court has not issued a ruling that *Johnson* applies retroactively to the Federal Sentencing Guidelines, and dismissing motion because it could not satisfy the requirements of § 2255(h)(2)); *Mitchell v. United States,* No. 3:00-CR-00014, 2017 WL 2275092, at *2 (W.D.Va. May 24, 2017) (same).

Rule 11 of the Rules Governing Section 2255 Proceedings requires the court to "issue or deny a certificate of appealability when it enters a final order adverse" to the petitioner. A court may grant a certificate of appealability ("COA") only "if the applicant has made a substantial showing of the denial of a constitutional right."[25] "When the district court denies a habeas petition on procedural grounds without reaching the [petitioner's] underlying constitutional claim, a COA should issue when the [petitioner] shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[26] Here, the Court concludes that reasonable jurists could debate whether the Court was correct in its ruling. The Court thus grants a COA on the issue of whether Mr. Pullen's motion falls within the scope of 28 U.S.C. § 2255(h)(2).

IT IS THEREFORE ORDERED BY THE COURT THAT defendant Bobby G. Pullen's Motion to Vacate Under § 2255 (Doc. 156) is DISMISSED as an unauthorized second or successive motion. Mr. Pullen is granted a COA.

IT IS SO ORDERED.

Dated: August 23, 2017

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

[25] 28 U.S.C. § 2253(c)(2).

[26] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

FILED
United States Court of Appeals
Tenth Circuit

April 15, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BOBBY G. PULLEN,

Defendant - Appellant.

No. 17-3194

ORDER

Before **McHUGH**, **MORITZ**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2244

§ 2244. Finality of determination

Effective: April 24, 1996
Currentness

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

Appendix D

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 965; Pub.L. 89-711, § 1, Nov. 2, 1966, 80 Stat. 1104; Pub.L. 104-132, Title I, §§ 101, 106, Apr. 24, 1996, 110 Stat. 1217, 1220.)

28 U.S.C.A. § 2244, 28 USCA § 2244
Current through P.L. 116-29.

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