No. _____

IN THE

Supreme Court of the United States

JAMES D. BRIGMAN, CORNELIUS GRAHAM, LEO D. GRAHAM, ALLARI GUZMAN, DEMETRIUS HARGROVE, MICHAEL MCELHINEY, AND MARTIN LEE PARIS,

Petitioners,

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

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KIRK REDMOND
First Assistant Federal Public Defender
PAIGE A. NICHOLS
Assistant Federal Public Defender
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioners

QUESTIONS PRESENTED

I. Whether, for purposes of 28 U.S.C. § 2255(f)(3), the new rule announced in *Johnson* applies to the identical residual clause in the mandatory guidelines, USSG § 4B1.2(a)(2)?

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

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES CITED

PAGE

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioners James Brigman, Cornelius Graham, Leo Graham, Allari Guzman, Demetrius Hargrove, Michael McElhiney, Sammy Nichols, and Martin Lee Paris, respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's unpublished order in Mr. Brigman's appeal is available at 762 Fed. Appx. 548, and is included as Appendix A. The Tenth Circuit's unpublished order denying rehearing en banc is included as Appendix C. The district court's unpublished order dismissing Mr. Brigman's motion under 28 U.S.C. § 2255 is available at 2017 WL 3267674, and is included as Appendix B.

The Tenth Circuit's unpublished order in Cornelius Graham's appeal is available at 769 Fed. Appx. 669, and is included as Appendix D. The district court's unpublished order dismissing Cornelius Graham's motion under 28 U.S.C. § 2255 is included as Appendix E.

The Tenth Circuit's unpublished order in Leo Graham's appeal is available at 769 Fed. Appx. 629, and is included as Appendix F. The district court's unpublished order dismissing Leo Graham's motion under 28 U.S.C. § 2255 is included as Appendix G.

The Tenth Circuit's unpublished order in Mr. Guzman's appeal is available at 2019 WL 2375675, and is included as Appendix H. The district court's unpublished order dismissing Mr. Guzman's motion under 28 U.S.C. § 2255 is included as Appendix I.

The Tenth Circuit's unpublished order in Mr. Hargrove's appeal is available at

2019 WL 2375666, and is included as Appendix J. The district court's unpublished order dismissing Mr. Hargrove's motion under 28 U.S.C. § 2255 is included as Appendix K.

The Tenth Circuit's unpublished order in Mr. McElhiney's appeal is available at 2019 WL 2404658, and is included as Appendix L. The district court's unpublished order dismissing Mr. McElhiney's motion under 28 U.S.C. § 2255 is available at 2018 WL 2087142, and is included as Appendix M.

The Tenth Circuit's unpublished order in Mr. Paris's appeal is available at 769 Fed. Appx. 668, and is included as Appendix N. The district court's unpublished order dismissing Mr. Paris's motion under 28 U.S.C. § 2255 is available at 2018 WL 2087187, and is included as Appendix O.

JURISDICTION

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(f) provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

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

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

USSG § 4B1.2(a)(2)[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.

STATEMENT OF THE CASE

This petition involves the now-familiar interplay between 28 U.S.C. § 2255(f)(3), USSG § 4B1.2(a)(2)'s mandatory residual clause, and *Johnson v. United States*, 135 S.Ct. 2551 (2015). So far, this Court has declined to resolve a conflict in the Circuits over whether *Johnson*'s new retroactive right applies to strike down the mandatory guidelines' residual clause as void for vagueness. *See*, *e.g.*, *Brown v. United States*, 139 S.Ct. 14 (2018) (Sotomayor, J., dissenting from the denial of cert.). We recently asked this Court to resolve this conflict in two separate petitions: *Pullen v. United States*, No. 19-5219 (involving 28 U.S.C. § 2255(h)(2)'s analogous new-retroactive-right requirement), and *Bronson v. United States* (filed July 19, 2019) (involving § 2255(f)(3) and the 1988 version of § 4B1.2). Each petition is an excellent vehicle to

[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).

resolve the conflict over *Johnson*'s application in the mandatory guidelines context. This Court should grant either or both of those petitions. If it does, this Court should hold this joint petition in abeyance pending the resolution of the petitions in *Pullen* and *Bronson*. Otherwise, this Court should grant this petition.

1. In 2004, a federal jury in Kansas convicted James Brigman of making false statements on a firearms registration form, 18 U.S.C. § 922(a)(6). Pet. App. 2a. At sentencing, Mr. Brigman's base offense level under USSG § 2K2.1 was set at 24 because the district court found that Mr. Brigman had two prior crimes of violence under USSG § 4B1.2(a). Pet. App. 2a. This resulted in a mandatory guidelines range of 100 to 120 months' imprisonment. Pet. App. 2a. The district court imposed a 120-month term of imprisonment. Pet. App. 2a. The Tenth Circuit affirmed. Pet. App. 2a.

In 2016, Mr. Brigman filed a § 2255 motion, asserting that his prior Kansas attempted aggravated battery conviction no longer qualified as a crime of violence under § 4B1.2(a)(2)'s unconstitutionally vague residual clause in light of *Johnson*. Pet. App. 2a. In response, the government asserted, *inter alia*, that the § 2255 motion was untimely under § 2255(f)(3) because, in its view, this Court's decision in *Johnson* did not apply retroactively to sentences imposed under the mandatory guidelines. Pet. App. 2a-3a. The district court agreed with the government and dismissed the § 2255 motion as untimely. Pet. App. 3a. The district court also declined to grant Mr. Brigman a certificate of appealability. Pet. App. 3a.

Mr. Brigman appealed, but the Tenth Circuit also declined to grant a certificate of appealability. Pet. App. 3a. Citing *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018) (§ 2255(f)(3) does not permit the filing of a § 2255 *Johnson* motion attacking

the mandatory guidelines' residual clause), and *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019) (§ 2255(h)(2) does not authorize a successive § 2255 *Johnson* motion to attack the mandatory guidelines' residual clause), the Tenth Circuit reaffirmed its position that *Johnson* does not apply to the mandatory guidelines' residual clause. Pet. App. 5a. The Tenth Circuit denied Mr. Brigman's petition for rehearing en banc. Pet. App. 14a-15a.

2. In 2000, Cornelius Graham pleaded guilty to a multi-count indictment charging him with gun and robbery offenses, 18 U.S.C. §§ 924(c), 1951. R1.40-57.[2] The district court found that Cornelius qualified as a career offender under § 4B1.2, which resulted in a total 488-month sentence. R1.51, 113. In 2016, Cornelius filed a § 2255 motion, asserting that he no longer qualified as a career offender under § 4B1.2(a)(2)'s unconstitutionally vague residual clause in light of *Johnson*. Pet. App. 18a. But the district court held that *Johnson* did not apply retroactively to sentences imposed under the mandatory guidelines. Pet. App. 19a. The district court granted a certificate of appealability. Pet. App. 20a. The Tenth Circuit summarily affirmed in light of its decisions in *Greer* and *Pullen*. Pet. App. 16a-17a.

3. In 2000, Leo Graham pleaded guilty to armed bank robbery, 18 U.S.C. § 2113(a), (d). R1.35-49. The district court found that Leo qualified as a career offender under § 4B1.2, which resulted in a 188-month term of imprisonment. R1.138, 184. In 2016, Leo filed a § 2255 motion, asserting that he no longer qualified as a career offender under § 4B1.2(a)(2)'s unconstitutionally vague residual clause in light

[2] We cite the records on appeal in the Tenth Circuit for certain facts not mentioned in the lower court decisions below.

of *Johnson*. Pet. App. 23a. But the district court held that *Johnson* did not apply retroactively to sentences imposed under the mandatory guidelines. Pet. App. 24a. The district court granted a certificate of appealability. Pet. App. 25a. The Tenth Circuit summarily affirmed in light of its decisions in *Greer* and *Pullen*. Pet. App. 21a-22a.

4. In 1997, a federal jury in Kansas convicted Allari Guzman of drug, gun, and immigration offenses, 8 U.S.C. § 1326, 18 U.S.C. §§ 922(g), 924(c), 21 U.S.C. §§ 841, 846. R1.21-24. The district court found that Mr. Guzman qualified as a career offender under § 4B1.2, which resulted in a 420-month total sentence. R1.25, 69. In 2016, Mr. Guzman filed a § 2255 motion, asserting that he no longer qualified as a career offender under § 4B1.2(a)(2)'s unconstitutionally vague residual clause in light of *Johnson*. Pet. App. 28a. But the district court held that *Johnson* did not apply retroactively to sentences imposed under the mandatory guidelines. Pet. App. 29a. The district court granted a certificate of appealability. Pet. App. 30a. The Tenth Circuit summarily affirmed in light of its decisions in *Greer* and *Pullen*. Pet. App. 26a-27a.

5. In 1999, a federal jury in Kansas convicted Demetrius Hargrove of a kidnapping and gun offense, 18 U.S.C. §§ 924(c), 1201(a). R1.23, 64. The district court found that Mr. Hargrove qualified as a career offender under § 4B1.2, which resulted in a 420-month total sentence. R1.65, 145. In 2016, Mr. Hargrove filed a § 2255 motion, asserting that he no longer qualified as a career offender under § 4B1.2(a)(2)'s unconstitutionally vague residual clause in light of *Johnson*. Pet. App. 33a. But the district court held that *Johnson* did not apply retroactively to sentences imposed

under the mandatory guidelines. Pet. App. 33a. The district court granted a certificate of appealability. Pet. App. 34a. The Tenth Circuit summarily affirmed in light of its decisions in *Greer* and *Pullen*. Pet. App. 31a-32a.

6. In 2003, a federal jury in Kansas convicted Michael McElhiney of drug offenses, 21 U.S.C. §§ 841, 846. R2.59. The district court found that Mr. McElhiney qualified as a career offender under § 4B1.2, which resulted in a 360-month total sentence. R1.60, 234. In 2016, Mr. McElhiney filed a § 2255 motion, asserting that he no longer qualified as a career offender under § 4B1.2(a)(2)'s unconstitutionally vague residual clause in light of *Johnson*. Pet. App. 37a. But the district court held that *Johnson* did not apply retroactively to sentences imposed under the mandatory guidelines. Pet. App. 38a. The district court granted a certificate of appealability. Pet. App. 40a. The Tenth Circuit summarily affirmed in light of its decisions in *Greer* and *Pullen*. Pet. App. 35a-36a.

7. In 2004, Martin Lee Paris pleaded guilty to a bank robbery, 18 U.S.C. § 2113(a). Pet. App. 43a. The district court found that Mr. Paris qualified as a career offender under § 4B1.2, which resulted in a 180-month sentence. Pet. App. 43a. In 2016, Mr. Paris filed a § 2255 motion, asserting that he no longer qualified as a career offender under § 4B1.2(a)(2)'s unconstitutionally vague residual clause in light of *Johnson*. Pet. App. 43a. But the district court found that *Johnson* does not apply retroactively to sentences imposed under the mandatory guidelines. Pet. App. 44a. The district court granted a certificate of appealability. Pet. App. 46a. The Tenth Circuit summarily affirmed in light of its decisions in *Greer* and *Pullen*. Pet. App. 41a-42a.

This timely joint petition follows.

REASONS FOR GRANTING THE WRIT

I. 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). In doing so, the Seventh Circuit held that a § 2255 motion raising a mandatory-guidelines *Johnson* claim is timely under § 2255(f)(3).

b. In direct conflict with the Seventh Circuit, six Circuits (including the Tenth Circuit), in the § 2255(f)(3) context, have held that *Johnson*'s new retroactive right does not apply to the residual clause of the mandatory guidelines. *Greer*, 881 F.3d at 1248; *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. 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); *Pullen*, 913 F.3d at 1284 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). Indeed, a district court in Texas just granted a motion. *United States v. Meadows*, No. 1:16-cv-751-LY, D.E.75 (W.D. Tex. July 9, 2019).

What is a seven-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. *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 position 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. *Sessions v. Dimaya*, 138 S.Ct. 1204, 1210-1223 (2018). 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*[3] retroactivity analysis. 902 F.3d at 882-883. But we already know that *Johnson*'s right applies retroactively to cases on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016). The question

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

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

b. The Tenth Circuit's position also conflicts with this Court's precedent. Under § 2255(f)(3), 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 has limited *Johnson* to statutes. *Pullen*, 913 F.3d at 1283-1284. In two ways, the Tenth Circuit's position 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 has adopted the test employed by the Eighth Circuit in *Russo*. *Pullen*, 913 F.3d at 1281. 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 has ignored this portion of *Chaidez*. *See Pullen*, 913 F.3d at 1281-1283. 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." 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 position conflicts with this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). 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 has drawn the same distinction. *Pullen*, 913 F.3d at 1283. 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 position 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 position 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 *Pullen*, *Bronson*, of here,

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.

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 v. United States*, 138 S.Ct. 1897, 1908 (2018). 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." *Dimaya*, 138 S.Ct. at 1224 (Gorsuch, J., concurring). The Tenth Circuit's position ignores those vital liberty interests and effectively condemns prisoners, like petitioners here, to serve unconstitutional sentences. Review is necessary.

4. Finally, although *Pullen* and *Bronson* are excellent vehicles to resolve this issue, if those petitions are denied, this joint petition is also a suitable vehicle. The petitioners preserved the issue below, the Tenth Circuit resolved the issue on the

merits, and, if successful, the petitioners could be released from prison immediately. Review is necessary.

II. 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 I(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

This Court should grant the petitions filed in *Pullen* and/or *Bronson* and hold this joint petition in abeyance pending their resolution. Otherwise, for the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender

DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KIRK REDMOND
First Assistant Federal Public Defender
PAIGE A. NICHOLS
Assistant Federal Public Defender
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioners

FILED
United States Court of Appeals
Tenth Circuit

February 4, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES D. BRIGMAN,

Defendant - Appellant.

No. 17-3176
(D.C. Nos. 2:16-CV-02396-JWL
and 2:03-CR-20090-JWL-1)
(D. Kansas)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **LUCERO**, **HARTZ**, and **McHUGH**, Circuit Judges.

Petitioner James Brigman seeks a certificate of appealability ("COA") to challenge the district court's dismissal of his 28 U.S.C. § 2255 motion challenging his sentence imposed at a time when the United States Sentencing Guidelines (Sentencing Guidelines) were mandatory. The district court dismissed Mr. Brigman's petition as untimely under 28 U.S.C. § 2255(f)(3)'s one-year limitations period. We deny Mr. Brigman's COA request and dismiss the appeal.

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

I. BACKGROUND

In June 2004, a jury convicted Mr. Brigman of making false statements on a firearms registration form in violation of 18 U.S.C. § 922(a)(6). The Presentence Investigation Report ("PSR") set Mr. Brigman's base offense level at 24 under the Sentencing Guidelines, USSG § 2K2.1(a)(2), because of his two prior convictions for crimes of violence. Based on the offense level of 24 and a criminal history category of VI, the PSR set a sentencing range between 100 and 120 months' imprisonment. Mr. Brigman did not object to the PSR. At sentencing, the district court imposed the statutory maximum 120-month term of imprisonment to be followed by a three-year term of supervised release. Mr. Brigman appealed his conviction, and we affirmed. *United States v. Brigman*, 143 F. App'x 931 (10th Cir. 2005) (unpublished).

In 2015, the Supreme Court invalidated a portion of the Armed Career Criminal Act ("ACCA") known as the residual clause as unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The residual clause of the ACCA is identical in wording to the residual clause contained in USSG § 4B1.2 when Mr. Brigman was sentenced. *Compare* 18 U.S.C. § 924(e)(2)(B)(ii) (ACCA residual clause), *with* USSG § 4B1.2(a)(2) (2004) (amended 2016) (Sentencing Guidelines residual clause). Within a year of the Supreme Court's decision in *Johnson*, Mr. Brigman filed a motion to vacate his sentence under 28 U.S.C. § 2255. He argued that his 2001 Kansas conviction for "attempted aggravated battery" could qualify as a crime of violence only under § 4B1.2's residual clause, which he asserted was unconstitutional under *Johnson*. The government argued that *Johnson* could not be

retroactively applied to the mandatory Sentencing Guidelines and so Mr. Brigman's challenge to his sentence was untimely. The district court determined the new rule in *Johnson* does not apply to the mandatory guidelines and accordingly dismissed Mr. Brigman's § 2255 motion as untimely under § 2255(f)(3). The district court also declined to grant him a COA. Mr. Brigman now seeks a COA from this court.

II. ANALYSIS

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") conditions a federal prisoner's right to appeal a denial of a § 2255 motion on the grant of a COA, which we may issue only if the applicant demonstrates a "substantial showing of the denial of a constitutional right." 28 U.S.C. §§ 2253(c)(1)(A), (c)(2). Where, as here, the district court denies the motion on procedural grounds, we issue a COA only when the prisoner shows 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." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Mr. Brigman cannot make this showing, and we therefore deny his request.

A. *Mootness*

Before we address Mr. Brigman's COA request, we consider whether we lack jurisdiction because the issue raised is moot. After Mr. Brigman filed his appeal, we abated the appeal pending a decision in *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018). While the appeal was abated, Mr. Brigman escaped from a residential

reentry center on January 13, 2018, nine days before he was set to be released.[1] He was recaptured on April 7, 2018, and has pleaded guilty to escaping from custody in violation of 18 U.S.C. § 751. Although Mr. Brigman has now fully served his original term of incarceration,[2] on January 8, 2019, the district court sentenced him to 29 months' imprisonment, followed by three years of supervised release, for this subsequent offense.

Mr. Brigman's original sentence also includes a three-year term of supervised release with both standard and special conditions. Thus, although Mr. Brigman has completed his original prison sentence, "we conclude that his sentencing appeal is not moot because Mr. [Brigman]'s unexpired term of supervised release potentially could be reduced if we were to render a favorable ruling to him." *United States v. Montgomery*, 550 F.3d 1229, 1231 n.1 (10th Cir. 2008); *see also United States v.*

[1] After Mr. Brigman's escape and before his eventual recapture, no party alerted the court to this significant event, despite the fact that Mr. Brigman's counsel provided at least two more monthly status updates while the appeal was abated. "[F]ailure to inform the court of this significant development is inexplicable and inexcusable. It is the parties, not the court, who are positioned to remain abreast of external factors that may impact their case." *Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1257 n.6 (10th Cir. 2018) (internal quotation marks omitted).

[2] Under the Bureau of Prison's Sentence Computation Manual, Mr. Brigman's original sentence resumed immediately upon federal apprehension and he has been in custody for over nine days. But the January 22, 2018, release date is based on good-time credit—without good-time credit, Mr. Brigman would complete his original sentence on March 18, 2019. We need not definitively opine on whether the Bureau of Prisons can revoke Mr. Brigman's good-time credits and require him to continue to serve his sentence until his original release date because, regardless of whether his term of incarceration has completed, the appeal is not moot based on the term of supervised release, as discussed below.

Vera-Flores, 496 F.3d 1177, 1180 (10th Cir. 2007) ("[U]nder ordinary circumstances, a defendant who has served his term of imprisonment but is still serving a term of supervised release may challenge his sentence if his unexpired term of supervised release could be reduced or eliminated by a favorable appellate ruling."). And although Mr. Brigman received a similar term of supervised release for escaping from the reentry center and the two terms of supervised release will run concurrently under 18 U.S.C. § 3624(e), Mr. Brigman could be punished with consecutive sentences for a violation of *each* term of supervised release. *See United States v. Morris*, 313 F. App'x 125, 134–36 (10th Cir. 2009) (unpublished) (rejecting argument that district court could not order consecutive sentences for violations of concurrent terms of supervised release). Accordingly, his appeal is not moot. As we now discuss, however, it is untimely.

B. *Mr. Brigman's Timeliness*

Mr. Brigman concedes that "as long as *Greer* remains good law, [his] § 2255 motion is admittedly untimely." Appellant's Br. for a COA at 16. We recently reaffirmed our holding in *Greer* that the rule in *Johnson* does not apply to challenges to the residual clause in the mandatory guidelines. *See United States v. Pullen*, _ F.3d _, 2019 WL 348642, at *10 n.17 (10th Cir. Jan. 29, 2019). Mr. Brigman thus cannot rely on *Johnson* and his § 2255 motion is untimely.

Because Mr. Brigman's § 2255 motion was clearly time-barred, no reasonable jurist could conclude the district court erred in its procedural ruling. We thus deny Mr. Brigman's request for a COA.

III. CONCLUSION

We **DENY** Mr. Brigman's request for a COA and **DISMISS** this appeal.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

United States of America,

Plaintiff,

v. **Case No. 03-20090-01-JWL**
16-cv-2396-JWL

James D. Brigman,

Defendant.

MEMORANDUM & ORDER

Following a jury trial, defendant James D. Brigman was convicted of making a false statement in connection with the attempted acquisition of a firearm and ammunition in violation of 18 U.S.C. § 922(a)(6). Mr. Brigman's base offense level was enhanced pursuant to U.S.S.G. § 2K2.1(a)(2) because the offense was committed subsequent to sustaining two felony convictions for crimes of violence as defined in § 4B1.2(a). He was ultimately sentenced to 120 months imprisonment under the then-mandatory Sentencing Guidelines.

In June 2016, Mr. Brigman filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255 based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court held that the residual clause of the definition of "violent felony" in the Armed Career Criminal Act was unconstitutionally vague. In his motion, Mr. Brigman contends that the residual clause contained in § 4B1.2(a)'s definition of "crime of violence" is unconstitutionally vague in light of *Johnson* and, accordingly, that his underlying felony conviction for attempted aggravated battery under Kansas law no longer qualifies as a "crime of violence" for purposes of the offense level enhancement under § 4B1.2. The court stayed Mr. Brigman's motion pending

the Supreme Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017). In *Beckles*, the Supreme Court held that *Johnson* does not apply to sentences imposed under § 4B1.2 because the Guidelines are not subject to vagueness challenges. The Court, however, left open the question whether defendants (like Mr. Brigman) sentenced under mandatory, pre-*Booker* Guidelines may mount vagueness attacks on their sentences. After *Beckles*, then, the court lifted the stay in this case and permitted supplemental briefing on Mr. Brigman's motion. That briefing is now complete and the motion is ripe for resolution. As will be explained, Mr. Brigman's motion relies on a new right the Supreme Court has not yet recognized and, accordingly, the re-starting of the one-year limitation period provided by 28 U.S.C. § 2255(f)(3) does not apply—at least not yet. The Supreme Court may announce in the future a new rule of constitutional law applicable to the mandatory Guidelines and make that rule retroactive on collateral review. At that time, Mr. Brigman may be able to obtain collateral relief. But until that time, Mr. Brigman's motion does not meet the requirements of 28 U.S.C. § 2255(f)(3). Thus, the court dismisses Mr. Brigman's motion as untimely.

The government contends, among other things, that Mr. Brigman's motion must be dismissed because it is untimely filed.[1] A defendant's § 2255 motion is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which establishes a one-year limitations period for federal prisoners seeking habeas relief. Under 28 U.S.C. § 2255(f), a criminal defendant may file a habeas petition one year from the latest of four circumstances:

(1) the date on which the judgment of conviction becomes final;

[1] Because the court concludes that Mr. Brigman's motion is not timely, the court will not address the additional procedural and substantive arguments set forth by the government in opposition to Mr. Brigman's motion.

> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). Mr. Brigman relies on the *Johnson* opinion to trigger the limitations period set forth in § 2255(f)(3). As noted earlier, the Supreme Court in *Johnson* held that the residual clause of the Armed Career Criminal Act was unconstitutionally vague. It is undisputed that the Supreme Court announced a new rule in *Johnson*, which was then made retroactive in *Welch v. United States*, 136 S. Ct. 1257 (2016). The threshold timeliness question, then, is whether the new rule announced in *Johnson* applies to Mr. Brigman's claim under the mandatory Guidelines. Mr. Brigman asserts that his claim requires only a simple application of the new rule articulated in *Johnson* to the "closely analogous" context of mandatory sentencing Guidelines. The government, on the other hand, urges that Mr. Brigman's claim requires an extension of *Johnson* not yet recognized by the Supreme Court—essentially, a second "new rule" that would apply *Johnson* and the constitutional vagueness doctrine to a provision of the then-mandatory sentencing Guidelines.

Neither the Tenth Circuit nor any other Circuit Court of Appeals has decided whether a motion raising a *Johnson*-based challenge against the mandatory Guidelines' residual clause is properly raised under § 2255(f)(3). Nonetheless, it appears that every district court that has addressed this issue has held that such motions must be dismissed as untimely. *See, e.g., Davis*

v. United States, 2017 WL 3129791, at *4 (E.D. Wis. July 21, 2017) (collecting cases in mandatory Guidelines context and following those cases); *Miller v. United States*, 2017 WL 2937949, *3 (D. Utah July 10, 2017) ("Because neither the Supreme Court nor the Tenth Circuit has directly recognized a right to modify a sentence increased under the residual clause of USSG § 4B1.2 before *Booker*, the court concludes that Petitioner's § 2255 motion is untimely."); *United States v. Beraldo*, 2017 WL 2888565, at *2 (D. Or. July 5, 2017) (dismissing motion as untimely because the right not to be subjected to a sentence enhancement pursuant to a vague mandatory Guidelines is not the same right recognized in *Johnson*); *Hirano v. United States*, 2017 WL 2661629, at *7-8 (D. Hawaii June 20, 2017); *United States v. Autrey*, 2017 WL 2646287, at *4 (E.D. Va. June 19, 2017) ("[I]t is clear that *Johnson* did not establish a new 'right' applicable to defendant or the mandatory Guidelines."); *Mitchell v. United States*, 2017 WL 2275092, at *5 (W.D. Va. May 24, 2017) ("Because the Supreme Court has not decided whether the residual clause of the mandatory Sentencing Guidelines is unconstitutionally vague . . . Petitioner's motion is untimely under § 2255(f)(3)."); *Hodges v. United States*, 2017 WL 1652967, at *3 (W.D. Wash. May 2, 2017) (while "the Supreme Court may still decide that the Guidelines as they were applied prior to *Booker* are subject to a vagueness challenge based on the Court's analysis in *Johnson*," it has not done so yet); *United States v. Russo*, 2017 WL 1533380, at *3-4 (D. Neb. Apr. 27, 2017).

These district courts have uniformly concluded that the Supreme Court's holding in *Johnson* did not create a newly-recognized right that allows petitioners to challenge the constitutionality of their sentence under the mandatory Guidelines' residual clause. The court finds the reasoning of these cases persuasive. Moreover, the court has uncovered no case (and

Mr. Brigman cites none) finding that a petitioner sentenced under the mandatory Guidelines may timely file a § 2255 petition based on *Johnson*. Mr. Brigman, nonetheless, urges that an application of Johnson in the context of the mandatory sentencing Guidelines does not create a new rule. In support of that argument, he relies on the Supreme Court's cases in *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988); and *Stringer v. Black*, 503 U.S. 222 (1992). In *Godfrey*, the Supreme Court held that Georgia's "outrageously or wantonly vile, horrible and inhuman" aggravator for purposes of capital sentencing was unconstitutionally vague in violation of the Eighth Amendment. Similarly, in *Maynard*, the Court held that Oklahoma's "especially heinous, atrocious, or cruel" aggravator was unconstitutionally vague. In *Stringer*, the Supreme Court determined that *Maynard* was not a "new rule" in light of *Godfrey*:

> *Godfrey* and *Maynard* did indeed involve somewhat different language. But it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case. In applying *Godfrey* to the language before us in *Maynard*, we did not "break new ground." . . . . *Maynard* was, therefore, for purposes of *Teague*, controlled by *Godfrey*, and it did not announce a new rule.

Stringer, 503 U.S. at 229. Mr. Brigman, then, contends that the vagueness holding in *Johnson* is not limited to the ACCA and may be applied to the mandatory guideline context without "breaking new ground."

The court disagrees. *Maynard* presented the Court with only a minor variation of the aggravator at issue in *Godfrey*—and both cases arose in the same context of a jury instruction defining the HAC aggravator for purposes of capital sentencing. But the statute as issue in *Johnson* functions differently than the career offender provision of the Guidelines, even in the

pre-*Booker* context. *Davis*, 2017 WL 3129791, at *5. For while a career offender designation under the mandatory Guidelines removed a district court's discretion to impose a below-Guidelines sentence, an ACCA enhancement mandates a sentence 5 years above the statutory maximum for the crime. *See id*. In other words, even pre-*Booker*, the Guidelines did not increase the maximum sentence that could be imposed. In light of this substantive difference, the court is not persuaded by Mr. Brigman's reliance on *Godfrey* and *Maynard.*

Moreover, the Supreme Court in *Johnson* expressly distinguished the ACCA and rejected the suggestion that its decision called into question the residual clauses in "dozens of federal and state criminal laws" using similar terms. *See Hodges*, 2017 WL 1652967, at *2 (quoting *Johnson*, 135 S. Ct. at 2561). The Court confirmed the limits on *Johnson* in *Welch*, stating that the Court's "analysis in *Johnson* . . . cast no doubt on the many laws that 'require gauging the riskiness of conduct in which an individual defendant engaged on a particular occasion.'" *Id*. (quoting *Welch*, 136 S Ct. at 1262). And, of course, in *Beckles*, Justice Sotomayor noted that the majority opinion "leaves open" the question of whether mandatory Guidelines are subject to vagueness challenges and that she, "like the majority," took no position on that issue. *Beckles*, 137 S. Ct. at 903 n.4. Because the issue remains "open," Mr. Brigman's motion, by definition, cannot rely on a right established in *Johnson*. *See Autrey*, 2017 WL 2646287, at *4.

Effective December 1, 2009, Rule 11 of the Rules Governing Section 2255 Proceedings states that the court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner must demonstrate that "reasonable jurists would find the

district court's assessment of the constitutional claims debatable or wrong." *See Saiz v. Ortiz*, 393 F.3d 1166, 1171 n.3 (10th Cir. 2004) (quoting *Tennard v. Dretke*, 542 U.S. 274, 282 (2004)). In addition, when the court's ruling is based on procedural grounds, a petitioner must demonstrate 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Under this standard, the court declines to issue a certificate of appealability.

IT IS THEREFORE ORDERED BY THE COURT THAT Mr. Brigman's motion to vacate under 28 U.S.C. § 2255 (doc. 57) is **dismissed**.

IT IS SO ORDERED.

Dated this 1st day of August, 2017, at Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

April 26, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES D. BRIGMAN,

Defendant - Appellant.

No. 17-3176
(D.C. No. 2:16-CV-02396-JWL)
(D. Kan.)

ORDER

Before **LUCERO**, **HARTZ**, and **McHUGH**, Circuit Judges.

On February 27, 2019, we abated this matter pending the disposition of the *Petition for Rehearing En Banc* filed in *United States v. Pullen*, number 17-3194. On April 15, 2019 an order issued in *Pullen* denying rehearing, and the mandate in the appeal issued on April 23, 2019. Consequently, we now lift the abatement in this case to consider the *Petition for Panel Rehearing and Rehearing En Banc* filed on February 19, 2019.

Upon consideration, the request for panel rehearing is denied by the original panel members. In addition, the *Petition* was circulated to all members of the court who are in regular active service. *See* Fed. R. App. P. 35(a). As no member on the original panel or

the en banc court requested that a poll be called, that part of the *Petition* seeking en banc reconsideration is likewise denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

FILED
United States Court of Appeals
Tenth Circuit

May 6, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CORNELIUS GRAHAM,

Defendant - Appellant.

No. 18-3136
(D.C. Nos. 6:16-CV-01173-JTM &
6:99-CR-10023-JTM-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This matter comes on for consideration of the *Motion of the United States for Summary Affirmance* and the response filed thereto by Defendant Cornelius Graham. The United States moves for summary affirmance of the district court's dismissal of Mr. Graham's 28 U.S.C. § 2255 motion based on this court's recent published decision in *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019), *en banc rev. denied* April 15, 2019. While Mr. Graham does not dispute that *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018), and *Pullen* control the outcome of this appeal

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

and does not contest summary affirmance of the district court's judgment, he reserves the right to petition the Supreme Court of the United States for certiorari review.

Accordingly, the government's motion for summary affirmance is granted. The judgment of the district court is **AFFIRMED**.

Entered for the Court
Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. Case Nos. 99-10023-01-JTM (Criminal)
16-1173-JTM (Civil)

CORNELIUS GRAHAM,

Defendant.

MEMORANDUM AND ORDER

This case is before the court on defendant Cornelius Graham's motion to vacate sentence pursuant to 28 U.S.C. § 2255 (Dkt. 329). Defendant claims that the career offender enhancement based on U.S.S.G. § 4B1.1 of the sentencing guidelines, is unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). For the reasons set forth below, this court dismisses defendant's motion.

The United States Supreme Court held in *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), that the residual clause under U.S.S.G. § 4B1.2(a)(2)—"defining a 'crime of violence' as an offense that 'involves conduct that presents a serious potential risk of physical injury to another[]'"—was not unconstitutional. *Beckles*, 137 S. Ct. at 890. *Beckles* abrogated the Tenth Circuit's decision in *United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015), and concluded that the advisory sentencing guidelines are not subject to vagueness challenges under the due process clause. *Beckles*, 137 S. Ct. at 886, 894.

Since *Beckles*, courts, including the Tenth Circuit, have considered challenges to career offender enhancements under the mandatory sentencing guidelines. *See, e.g.*, *United States v. Mulay*, No. 17-3031, 2018 WL 985741, at *3 (10th Cir. Feb. 20, 2018); *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018). But the Tenth Circuit resolved the matter by holding a defendant "cannot rely on *Johnson* to bring a retroactive challenge to his sentence on collateral review because the right he asserts . . . was not recognized in *Johnson*." *Mulay*, 2018 WL 985741 at *3. *Johnson's* holding is limited to the residual clause of the Armed Career Criminal Act. *Id.* at *4 (quoting *Greer*, 881 F.3d at 1248).[1] Because defendant is challenging his mandatory guidelines career offender enhancement on collateral review, *Johnson* is inapplicable to afford relief.

The court agrees with defendant's argument that reasonable jurists could disagree as to whether *Johnson* applies to cases sentenced under the mandatory guidelines, and therefore, grants defendant a certificate of appealability. *See, e.g.*, *Moore v. United States*, 871 F.3d 72, 84 (1st Cir. 2017) ("We leave it to the district court to decide in the first instance if it is appropriate to consider Moore's vagueness challenge as applied or categorically and, in either event, whether the pre-*Booker* guidelines fixed Moore's sentencing range in the relevant sense that the ACCA fixed sentences."). Defendant has presented issues "adequate to deserve encouragement to proceed further." *United States v. McGuire*, 678 F. App'x 643, 644 (10th Cir. 2017) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, (2000)).

[1] The Supreme Court held in *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016), that *Johnson* was a substantive rule of constitutional law that applies retroactively to cases on collateral review.

IT IS THEREFORE ORDERED that defendant's motion to vacate sentence pursuant to 28 U.S.C. § 2255 (Dkt. 329) is dismissed.

IT IS FURTHER ORDERED that the court will issue a certificate of appealability in this case.

Dated this 4th day of May, 2018, at Wichita, Kansas.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

FILED
United States Court of Appeals
Tenth Circuit

April 30, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LEO D. GRAHAM, JR.,

Defendant - Appellant.

No. 18-3137
(D.C. Nos. 6:16-CV-01174-JTM and 6:99-CR-10023-JTM-2)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This matter is before the court on the *Motion of the United States for Summary Affirmance* and appellant Leo D. Graham, Jr.'s response. The United States moves for summary affirmance of the district court's judgment based on this court's recent published decision in *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019), *en banc rev. denied* April 15, 2019. Mr. Graham does not dispute that *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018) and *Pullen* control the outcome of this appeal and does not

* After examining the appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. 32.1.

contest summary affirmance of the district court's judgment, but reserves the right to petition the United States Supreme Court for certiorari review.

In light of the foregoing and of this court's decision in *Pullen*, the court grants the government's motion and summarily affirms the judgment of the district court.

Entered for the Court
Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. Case Nos. 99-10023-02-JTM (Criminal)
16-1174-JTM (Civil)

LEO D. GRAHAM, JR.,

Defendant.

MEMORANDUM AND ORDER

This case is before the court on defendant Leo Graham's motion to vacate sentence pursuant to 28 U.S.C. § 2255 (Dkt. 330). Defendant claims that the career offender enhancement based on U.S.S.G. § 4B1.1 of the sentencing guidelines, is unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). For the reasons set forth below, this court dismisses defendant's motion.

The United States Supreme Court held in *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), that the residual clause under U.S.S.G. § 4B1.2(a)(2)—"defining a 'crime of violence' as an offense that 'involves conduct that presents a serious potential risk of physical injury to another[]'"—was not unconstitutional. *Beckles*, 137 S. Ct. at 890. *Beckles* abrogated the Tenth Circuit's decision in *United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015), and concluded that the advisory sentencing guidelines are not subject to vagueness challenges under the due process clause. *Beckles*, 137 S. Ct. at 886, 894.

Since *Beckles*, courts, including the Tenth Circuit, have considered challenges to career offender enhancements under the mandatory sentencing guidelines. *See, e.g.*, *United States v. Mulay*, No. 17-3031, 2018 WL 985741, at *3 (10th Cir. Feb. 20, 2018); *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018). But the Tenth Circuit resolved the matter by holding a defendant "cannot rely on *Johnson* to bring a retroactive challenge to his sentence on collateral review because the right he asserts . . . was not recognized in *Johnson*." *Mulay*, 2018 WL 985741 at *3. *Johnson's* holding is limited to the residual clause of the Armed Career Criminal Act. *Id.* at *4 (quoting *Greer*, 881 F.3d at 1248).[1] Because defendant is challenging his mandatory guidelines career offender enhancement on collateral review, *Johnson* is inapplicable to afford relief.

The court agrees with defendant's argument that reasonable jurists could disagree as to whether *Johnson* applies to cases sentenced under the mandatory guidelines, and therefore, grants defendant a certificate of appealability. *See, e.g.*, *Moore v. United States*, 871 F.3d 72, 84 (1st Cir. 2017) ("We leave it to the district court to decide in the first instance if it is appropriate to consider Moore's vagueness challenge as applied or categorically and, in either event, whether the pre-*Booker* guidelines fixed Moore's sentencing range in the relevant sense that the ACCA fixed sentences."). Defendant has presented issues "adequate to deserve encouragement to proceed further." *United States v. McGuire*, 678 F. App'x 643, 644 (10th Cir. 2017) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, (2000)).

[1] The Supreme Court held in *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016), that *Johnson* was a substantive rule of constitutional law that applies retroactively to cases on collateral review.

IT IS THEREFORE ORDERED that defendant's motion to vacate sentence pursuant to 28 U.S.C. § 2255 (Dkt. 330) is dismissed.

IT IS FURTHER ORDERED that the court will issue a certificate of appealability in this case.

Dated this 4th day of May, 2018, at Wichita, Kansas.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

FILED
United States Court of Appeals
Tenth Circuit

May 3, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALLARI GUZMAN,

Defendant - Appellant.

No. 18-3135
(D.C. Nos. 6:16-CV-01169-JTM &
6:97-CR-10022-JTM-4)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This matter is before us on the Response of the United States to Court Order of April 18, 2018, within which was a motion seeking summary affirmance of the district court's judgment. The United States moves for summary affirmance based on this court's recent published decision in *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019), *en banc rev. denied* April 15, 2019, and the court's earlier decision in *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018). While the appellant does not

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

dispute that *Greer* and *Pullen* control the outcome of this appeal and does not contest summary affirmance of the district court's judgment, he reserves the right to appeal this matter to the United States Supreme Court for further review.

In light of the foregoing, the tolling of proceedings in this appeal is lifted, and the appellee's motion for summary affirmance is granted. The judgment of the district court is affirmed.

Entered for the Court
Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. Case Nos. 97-10022-04-JTM (Criminal)
16-1169-JTM (Civil)

ALLARI GUZMAN,

Defendant.

MEMORANDUM AND ORDER

This case is before the court on defendant Allari Guzman's motion to vacate sentence pursuant to 28 U.S.C. § 2255 (Dkt. 157). Defendant claims that the career offender enhancement based on U.S.S.G. § 4B1.1 of the sentencing guidelines, is unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). For the reasons set forth below, this court dismisses defendant's motion.

The United States Supreme Court held in *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), that the residual clause under U.S.S.G. § 4B1.2(a)(2)—"defining a 'crime of violence' as an offense that 'involves conduct that presents a serious potential risk of physical injury to another[]'"—was not unconstitutional. *Beckles*, 137 S. Ct. at 890. *Beckles* abrogated the Tenth Circuit's decision in *United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015), and concluded that the advisory sentencing guidelines are not subject to vagueness challenges under the due process clause. *Beckles*, 137 S. Ct. at 886, 894.

Since *Beckles*, courts, including the Tenth Circuit, have considered challenges to career offender enhancements under the mandatory sentencing guidelines. *See, e.g.*, *United States v. Mulay*, No. 17-3031, 2018 WL 985741, at *3 (10th Cir. Feb. 20, 2018); *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018). But the Tenth Circuit resolved the matter by holding a defendant "cannot rely on *Johnson* to bring a retroactive challenge to his sentence on collateral review because the right he asserts . . . was not recognized in *Johnson*." *Mulay*, 2018 WL 985741 at *3. *Johnson's* holding is limited to the residual clause of the Armed Career Criminal Act. *Id.* at *4 (quoting *Greer*, 881 F.3d at 1248).[1] Because defendant is challenging his mandatory guidelines career offender enhancement on collateral review, *Johnson* is inapplicable to afford relief.

The court agrees with defendant's argument that reasonable jurists could disagree as to whether *Johnson* applies to cases sentenced under the mandatory guidelines, and therefore, grants defendant a certificate of appealability. *See, e.g.*, *Moore v. United States*, 871 F.3d 72, 84 (1st Cir. 2017) ("We leave it to the district court to decide in the first instance if it is appropriate to consider Moore's vagueness challenge as applied or categorically and, in either event, whether the pre-*Booker* guidelines fixed Moore's sentencing range in the relevant sense that the ACCA fixed sentences."). Defendant has presented issues "adequate to deserve encouragement to proceed further." *United States v. McGuire*, 678 F. App'x 643, 644 (10th Cir. 2017) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, (2000)).

[1] The Supreme Court held in *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016), that *Johnson* was a substantive rule of constitutional law that applies retroactively to cases on collateral review.

IT IS THEREFORE ORDERED that defendant's motion to vacate sentence pursuant to 28 U.S.C. § 2255 (Dkt. 157) is dismissed.

IT IS FURTHER ORDERED that the court will issue a certificate of appealability in this case.

Dated this 4th day of May, 2018, at Wichita, Kansas.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

FILED
United States Court of Appeals
Tenth Circuit

May 3, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEMETRIUS R. HARGROVE,

Defendant - Appellant.

No. 18-3194
(D.C. Nos. 2:16-CV-02567-CM &
2:98-CR-20033-CM-2)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This matter is before us on the Motion of the United States for Summary Affirmance. The United States moves for summary affirmance based on this court's recent published decision in *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019), *en banc rev. denied* April 15, 2019, and the court's earlier decision in *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018). While the appellant does not dispute that *Greer* and *Pullen* control the outcome of this appeal and does not contest summary

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

affirmance of the district court's judgment, he reserves the right to petition the United States Supreme Court for further review.

In light of the foregoing, the abatement of proceedings in this appeal is lifted, and the appellee's motion for summary affirmance is granted. The judgment of the district court is affirmed.

Entered for the Court
Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Case No. 98-20033-02**
DEMETRIUS R. HARGROVE,	)	**16-2567**
Defendant.	)	
	)	

MEMORANDUM AND ORDER

On April 17, 2017, this court denied defendant Demetrius R. Hargrove's motion to vacate sentence pursuant to 28 U.S.C. § 2255 based on *Johnson v. United* States, 135 S. Ct. 2551 (2015). (Doc. 224). Defendant filed a Motion to Reconsider Pursuant to Rule 59(e). (Doc. 225.) The court stayed briefing on that motion pending the Tenth Circuit's resolution of *United States v. Greer*, Case No. 16-1282 and *United States v. Mulay*, Case No. 17-3031. The Tenth Circuit has now decided both of these cases, and found that *Johnson* does not apply to mandatory guidelines cases on collateral review.

Defendant recognizes that the court is bound by these cases and cannot grant the relief that defendant seeks. Defendant acknowledges that the court must deny his motion. He does ask, however, that the court grant a certificate of appealability on the underlying denial of habeas relief.

Rule 11 of the rules governing § 2255 provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11, 28 U.S.C. § 2255. A defendant must make a "substantial showing of the denial of a constitutional right" in order for the district court to issue a certificate of appealability. § 2253(c)(2). A defendant may meet this burden by "showing that reasonable jurists could debate whether (or, for that matter agree that) the

petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). A defendant must show "something more than the absence of frivolity or the existence of mere good faith on his or her part." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Barefoot*, 463 U.S. at 893). The court must "indicate which specific issue or issues satisfy the showing required . . . ." § 2253(c)(3). If the district court denies a certificate, the parties may seek a certificate from the Tenth Circuit.

Defendant suggests that he should be granted a certificate of appealability because the circuits are split on whether the Supreme Court's decision in *Johnson* should apply to identical language in § 4B1.2. The court agrees. As defendant notes, whether his petition will ultimately prevail in this circuit is irrelevant to whether a certificate should be granted. The petition is not frivolous as there is a circuit split on the issue of whether the *Johnson* decision should entitle individuals sentenced under § 4B1.2, while the guidelines were mandatory, to retroactive collateral review of their sentences. The court grants defendant's request for a certificate of appealability.

IT IS THEREFORE ORDERED that defendant's Motion to Reconsider Pursuant to Rule 59(e) (Doc. 225) is denied, but the court grants defendant's request for a certificate of appealability on the denial of the underlying habeas petition.

Dated this 12th day of July, 2018, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

April 23, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL PATRICK MCELHINEY,

Defendant - Appellant.

No. 18-3140
(D.C. Nos. 5:16-CV-04120-DDC &
5:98-CR-40083-DDC-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This matter is before us on the "Motion of the United States for Summary Affirmance" ("Motion"). The United States moves for summary affirmance of the district court's judgment based on this court's recent published decision in United States v. Pullen, 913 F.3d 1270 (10th Cir. 2019), *en banc rev. denied* April 15, 2019. Defendant-Appellant does not dispute that United States v. Greer, 881 F.3d 1241 (10th Cir. 2018) and Pullen control the outcome of this appeal; Mr. McElhiney does not contest summary

* After examining the appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

affirmance of the district court's judgment, but he reserves the right to appeal this matter to the United States Supreme Court for further review.

In light of the foregoing, the abatement of this matter is LIFTED, and the Motion is GRANTED. In light of this court's decision in Pullen, the judgment of the district court is AFFIRMED.

Entered for the Court
Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **MICHAEL PATRICK MCELHINEY (01),** **Defendant.**	**Case No. 98-40083-01-DDC**

MEMORANDUM AND ORDER

This matter is before the court on defendant Michael Patrick McElhiney's Motion to Vacate his sentence under 28 U.S.C. § 2255. Doc. 638. Defendant currently is serving a 360 months' prison sentence after a jury found him guilty of the following offenses: (1) conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. § 846; and (2) aiding and abetting heroin distribution in violation of 21 U.S.C. § 841(a)(1). *See* Doc. 552 at 1–2. On June 28, 2016, the Tenth Circuit granted Mr. McElhiney leave to file a second or successive motion to vacate his sentence, based on his argument that he no longer qualifies as a career offender under United States Sentencing Guideline § 4B1.2. *In re Michael McElhiney*, No. 16-3179 (10th Cir. June 28, 2017). Invoking the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause contained in the Armed Career Criminal Act is unconstitutionally vague, Mr. McElhiney's successive § 2255 motion argues that his sentence was improperly enhanced as a career offender under the identically-worded residual clause of § 4B.1.2(a).

In response to the parties' joint request, the court stayed the case pending the Tenth Circuit's decisions in *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018), and *United States*

v. Mulay, __ F. App'x __, 2018 WL 985741 (10th Cir. Feb. 20, 2018). It did so because these cases presented the question whether the Supreme Court's decision in *Johnson* extends to individuals—like Mr. McElhiney—who were sentenced under identical language in the Guidelines and during a time when the Guidelines were mandatory.

The Tenth Circuit recently decided both cases, holding that *Johnson* does not apply to mandatory Guidelines cases on collateral review. *See Greer*, 881 F.3d at 1248 (affirming denial of petitioner's § 2255 motion because "the 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" but "[t]he Court did not consider in *Johnson*, and has still not decided, whether the mandatory Guidelines can be challenged for vagueness in the first instance, let alone whether such a challenge would prevail," and so, "it is not for this court acting on collateral review to do so"); *see also Mulay*, 2018 WL 985741, at *4 (denying petitioner's § 2255 motion because "*Johnson* did not recognize the right Mr. Mulay asserts," *i.e.*, "that the residual clause in § 4B1.2(a)(2) of the mandatory Guidelines was void for vagueness, and that the right not to be sentenced under the mandatory residual clause is retroactively applicable to his 2002 sentence on collateral review").

Mr. McElhiney's most recent status report (Doc. 671) concedes that the Tenth Circuit's decisions in *Greer* and *Mulay* require the court to deny his § 2255 motion. Mr. McElhiney notes that he disagrees with the Tenth Circuit's decisions but agrees that they bind the court. However, Mr. McElhiney asks the court to grant him a certificate of appealability.

Because Mr. McElhiney's § 2255 motion asserts that he is entitled to relief using the same argument that the Tenth Circuit rejected in *Greer* and *Mulay*, the court denies his Motion to

Vacate his sentence under 28 U.S.C. § 2255. But the court grants Mr. McElhiney a certificate of appealability because reasonable jurists could debate whether the court's ruling is correct.

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." 28 U.S.C. § 2253(c)(2). "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, the court concludes that reasonable jurists could debate whether the court is correct in its ruling. Indeed, the Circuits have split on the question whether *Johnson* applies to individuals sentenced under the mandatory Guidelines. *Compare Moore v. United States*, 871 F.3d 72, 82–83 (1st Cir. 2017) (granting petitioner's request to file successive § 2255 motion asserting that *Johnson* applies to mandatory Guideline sentences) *with United States v. Brown*, 868 F.3d 297, 303 (4th Cir. 2017) (holding that petitioner's challenge to the mandatory Guidelines was untimely and did not assert a right recognized by *Johnson*); *Raybon v. United States*, 867 F.3d 625, 630–31 (6th Cir. 2017) (affirming denial of § 2255 motion because the constitutionality of the mandatory Guidelines 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 § 2255(f)(3)); *In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016) (concluding that petitioner could not assert a successive § 2255 petition

because the right he was asserting was not recognized in *Johnson*). And, although with *Greer* and *Mulay* "this issue has been settled in this circuit and not overturned by the Supreme Court, the existence of a split among the circuits persuades [the court] that 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.'" *United States v. Gomez-Sotelo*, 18 F. App'x 690, 692 (10th Cir. 2001) (quoting *Slack*, 529 U.S. at 484). The court thus grants Mr. McElhiney a COA.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant Michael Patrick McElhiney's Motion to Vacate Under § 2255 (Doc. 638) is DISMISSED. The court grants Mr. McElhiney a COA.

IT IS SO ORDERED.

Dated this 4th day of May, 2018, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

May 6, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARTIN LEE PARIS,

Defendant - Appellant.

No. 18-3139
(D.C. No. 5:16-CV-04073-DDC &
5:03-CR-40031-DDC-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This matter comes on for consideration of the *Motion of the United States for Summary Affirmance* and the response filed thereto by Defendant Martin Lee Paris. The United States moves for summary affirmance of the district court's dismissal of Mr. Paris's 28 U.S.C. § 2255 motion based on this court's recent published decision in *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019), *en banc rev. denied* April 15, 2019. While Mr. Paris does not dispute that *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018), and *Pullen* control the outcome of this appeal and does not

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

contest summary affirmance of the district court's judgment, he reserves the right to petition the Supreme Court of the United States for certiorari review.

Accordingly, the government's motion for summary affirmance is granted. The judgment of the district court is **AFFIRMED**.

Entered for the Court
Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARTIN LEE PARIS (01),

Defendant.

Case No. 03-40031-01-DDC

MEMORANDUM AND ORDER

This matter is before the court on defendant Martin Lee Paris's Motion to Vacate his sentence under 28 U.S.C. § 2255. Doc. 86. After Mr. Paris pleaded guilty to bank robbery in violation of 18 U.S.C. § 2113(a), the court sentenced him to a 180-month prison sentence and three years of supervised release. Doc. 71. Mr. Paris's § 2255 motion invokes the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), holding that the residual clause contained in the Armed Career Criminal Act is unconstitutionally vague, to argue that his sentence was improperly enhanced as a career offender under the identically-worded residual clause of United States Sentencing Guideline § 4B1.2.

In response to the parties' joint request, the court stayed the case pending the Tenth Circuit's decisions in *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018), and *United States v. Mulay*, __ F. App'x __, 2018 WL 985741 (10th Cir. Feb. 20, 2018). It did so because these cases presented the question whether the Supreme Court's decision in *Johnson* extends to individuals—like Mr. Paris—who were sentenced under identical language in the Guidelines and during a time when the Guidelines were mandatory.

The Tenth Circuit recently decided both cases, holding that *Johnson* does not apply to mandatory Guidelines cases on collateral review. *See Greer*, 881 F.3d at 1248 (affirming denial of petitioner's § 2255 motion because "the 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" but "[t]he Court did not consider in *Johnson*, and has still not decided, whether the mandatory Guidelines can be challenged for vagueness in the first instance, let alone whether such a challenge would prevail," and so, "it is not for this court acting on collateral review to do so"); *see also Mulay*, 2018 WL 985741, at *4 (denying petitioner's § 2255 motion because "*Johnson* did not recognize the right Mr. Mulay asserts," *i.e.*, "that the residual clause in § 4B1.2(a)(2) of the mandatory Guidelines was void for vagueness, and that the right not to be sentenced under the mandatory residual clause is retroactively applicable to his 2002 sentence on collateral review").

Mr. Paris's most recent status report (Doc. 115) concedes that the Tenth Circuit's decisions in *Greer* and *Mulay* require the court to deny his § 2255 motion. Mr. Paris notes that he disagrees with the Tenth Circuit's decisions but agrees that they bind the court. However, Mr. Paris asks the court to grant him a certificate of appealability.

Because Mr. Paris's § 2255 motion asserts that he is entitled to relief using the same argument that the Tenth Circuit rejected in *Greer* and *Mulay*, the court denies his Motion to Vacate his sentence under 28 U.S.C. § 2255. But the court grants Mr. Paris a certificate of appealability because reasonable jurists could debate whether the court's ruling is correct.

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." 28 U.S.C. § 2253(c)(2). "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, the court concludes that reasonable jurists could debate whether the court is correct in its ruling. Indeed, the Circuits have split on the question whether *Johnson* applies to individuals sentenced under the mandatory Guidelines. *Compare Moore v. United States*, 871 F.3d 72, 82–83 (1st Cir. 2017) (granting petitioner's request to file successive § 2255 motion asserting that *Johnson* applies to mandatory Guideline sentences) *with United States v. Brown*, 868 F.3d 297, 303 (4th Cir. 2017) (holding that petitioner's challenge to the mandatory Guidelines was untimely and did not assert a right recognized by *Johnson*); *Raybon v. United States*, 867 F.3d 625, 630–31 (6th Cir. 2017) (affirming denial of § 2255 motion because the constitutionality of the mandatory Guidelines 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 2255(f)(3)); *In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016) (concluding that petitioner could not assert a successive § 2255 petition because the right he was asserting was not recognized in *Johnson*). And, although with *Greer* and *Mulay* "this issue has been settled in this circuit and not overturned by the Supreme Court, the existence of a split among the circuits persuades [the court] that 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a

different manner.'" *United States v. Gomez-Sotelo*, 18 F. App'x 690, 692 (10th Cir. 2001) (quoting *Slack*, 529 U.S. at 484). The court thus grants Mr. Paris a COA.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant Martin Lee Paris's Motion to Vacate Under § 2255 (Doc. 86) is DISMISSED. The court grants Mr. Paris a COA.

IT IS SO ORDERED.

Dated this 4th day of May, 2018, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge