No. _____

IN THE

Supreme Court of the United States

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

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

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

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PETITION FOR WRIT OF CERTIORARI

Petitioners Raymond Aguilar and Sammy Nichols respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's unpublished order in Mr. Aguilar's appeal is available at 2019 WL 2375672, and is included as Appendix A. The district court's unpublished order dismissing Mr. Aguilar's motion under 28 U.S.C. § 2255 is available at 2017 WL 3084899, and is included as Appendix B.

The Tenth Circuit's unpublished order in Mr. Nichols' appeal is available at 765 Fed. Appx. 428, and is included as Appendix C. The district court's unpublished order dismissing Mr. Nichols' motion under 28 U.S.C. § 2255 is available at 2018 WL 3055872, and is included as Appendix D.

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(h)(2) provides:

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

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

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 interplay between 28 U.S.C. § 2255(h)(2), 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 in the § 2255(h)(2) context in *Pullen v. United States*, No. 19-5219. *Pullen* is an excellent vehicle to resolve the conflict over *Johnson*'s application in the mandatory guidelines context. This Court should grant Mr. Pullen's petition. If it does, this Court should hold this joint petition in abeyance pending the resolution of the petition in *Pullen*. Otherwise, this Court should grant this petition.

1. In 2002, Raymond Aguilar pleaded guilty to a drug offense, 21 U.S.C. § 846.

[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).

Pet. App. 3a. The district court found that Mr. Aguilar qualified as a career offender under § 4B1.2, which resulted in a 262-month term of imprisonment. Pet. App. 3a. In 2016, Mr. Aguilar 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. 4a. But the district court held that *Johnson* did not apply retroactively to sentences imposed under the mandatory guidelines. Pet. App. 7a. The district court granted a certificate of appealability. Pet. App. 8a. The Tenth Circuit summarily affirmed in light of its decision *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019) (and *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018)). Pet. App. 1a-2a.

2. In 2004, Sammy Nichols pleaded guilty to a drug offense, 21 U.S.C. § 846. Pet. App. 11a. The district court found that Mr. Nichols qualified as a career offender under § 4B1.2, which resulted in a 360-month term of imprisonment. Pet. App. 11a. In 2016, Mr. Nichols 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. 12a. But the district court held that *Johnson* did not apply retroactively to sentences imposed under the mandatory guidelines. Pet. App. 16a. The district court granted a certificate of appealability. Pet. App. 18a. The Tenth Circuit summarily affirmed in light of its decision *Pullen*, 913 F.3d 1270 (and *Greer*). Pet. App. 9a-10a.

This timely joint petition follows.

REASONS FOR GRANTING THE WRIT

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

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

b. Consistent with the text of these provisions, the Tenth Circuit authorized the successive § 2255 motions at issue here under § 2255(h)(2). Yet, despite this authorization, the district courts dismissed the § 2255 motions as unauthorized second or successive motions under § 2255(h)(2). Pet. App. 7a, 16a. There is no statutory basis for these dismissals. Section 2255(h) is directed solely at the court of appeals. As are the cross-referenced certification procedures listed in § 2244(b)(3). District courts play no role in the successive § 2255 authorization procedure.

As a statutory matter, a district court need not consider a successive § 2255 motion

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

c. The statutory context confirms that, if Congress wanted district courts to determine whether to authorize a successive § 2255 motion under § 2255(h)(2), it would have said so expressly. Section 2255(h)(2)'s new-retroactive-right analysis also exists in § 2255's statute-of-limitations provision. 28 U.S.C. § 2255(f)(3). And this provision is first directed at the district court. If the government properly invokes § 2255(f)(3), and if the district court determines that the defendant has failed to assert such a newly recognized retroactive right, the district court would dismiss the § 2255 motion as untimely. This timeliness provision applies equally to a successive § 2255 motion authorized by the court of appeals under § 2255(h)(2). Thus, there is no reason to interpret § 2255(h)(2) to permit a district court to conduct the new-retroactive-right analysis, as the district court conducts that analysis under § 2255(f)(3). Under the Tenth Circuit's reading, § 2255(f)(3) is rendered redundant in § 2255(h)(2) cases, whereas, under our reading, both clauses have work to do (a court of appeals grants authorization under § 2255(h)(2); a district court determines timeliness under § 2255(f)(3)). *See*, *e.g.*, *Republic of Sudan v. Harrison*, 139 S.Ct. 1048, 1058 (2019) ("we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law").

The one potential exception to this rule is a situation where a criminal defendant

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

d. There is another textual problem with the Tenth Circuit's position. Section 2255(h)(2), via § 2244(b)(3)(C), requires only "a prima facie showing that the application satisfies the requirements" of § 2255(h)(2). Because the court of appeals makes that prima facie determination in the first instance, there is no reason (or statutory basis) for the district court to revisit the court of appeals' prima facie determination. *See*, *e.g.*, 28 U.S.C. § 2244(b)(3)(E) (noting that this Court's grant or denial of authorization to file a successive motion is not reviewable). Nor, even assuming a court was inclined to apply § 2255(h)(2) to district courts, is there any statutory basis to interpret § 2255(h)(2) to require something more than a prima facie determination by the district court. But here, the Tenth Circuit's position permits the district court to conduct a *merits determination* under § 2255(h)(2). *Pullen*, 913 F.3d at 1275-1276. Not even the court of appeals conducts a merits determination under this provision, however. 28 U.S.C. § 2244(b)(3)(C). It is thus textually impossible to

interpret § 2255(h) to permit a merits determination by the district court, as the Tenth Circuit has done. *Pullen*, 913 F.3d at 1275-1276.

e. The Tenth Circuit also erred when it held that § 2244(b)(4) requires a district court to revisit a court of appeals' § 2255(h)(2) authorization. Pet. App. 1a-2a, 9a-10a; *Pullen*, 913 F.3d at 1283-1284. This provision is not found in § 2255(h), and it is inconceivable that Congress incorporated this provision into § 2255(h) via that provision's cross-reference to § 2244. This is so for two reasons. First, and again, the cross-reference provides that any successive § 2255 motion "must be certified as provided in § 2244," and § 2244's certification procedures are found exclusively in § 2244(b)(3). Because § 2244(b)(4) has nothing to do with Circuit certification procedures, Congress did not incorporate that provision into § 2255(h).

Second, § 2255(h) makes explicit that its certification procedures are conducted "by a panel of the appropriate **court of appeals**." But § 2244(b)(4) is directed at the **district court**, not the **court of appeals**. Whereas a court of appeals authorizes a successive motion under § 2255(h), it is a district court that dismisses a claim under § 2244(b)(4). Indeed, § 2244(b)(4) comes into play only *after* a court of appeals has certified a successive § 2255 motion. For this reason in particular, it makes no sense to say that Congress incorporated this provision into the § 2255(h) authorization itself.

The Tenth Circuit's position is also impractical. It would be inefficient (not to mention insulting and upside down) for Congress to assign a task (certification) to the court of appeals, yet then authorize the district court to reverse the court of appeals' determination. Why bother with Circuit authorization at all if, in the end,

the district court must replicate this analysis? And this is especially true when one considers that, under the Tenth Circuit's framework, a *single* district court judge has the authority to override a certification made by a *panel* of the court of appeals. Under no version of our hierarchal judicial system does this make sense. For all of these reasons, the Tenth Circuit is incorrect that a district court may properly dismiss a § 2255 motion as unauthorized under § 2255(h)(2). *Pullen*, 913 F.3d at 1283-1284. That provision plainly applies to the court of appeals, not the district court.

f. The question then becomes whether § 2244(b)(4) applies to successive § 2255 motions on its own. Other than subsection (h), nowhere else in § 2255 did Congress incorporate § 2244. And § 2244(b)'s provisions unambiguously apply only to state prisoner § 2254 petitions. *McCleskey v. Zant*, 499 U.S. 467, 486 (1991) ("Congress added subparagraph (b) to address repetitive applications by state prisoners"); *Felker v. Turpin*, 518 U.S. 651, 656 (1996) (confirming that § 2244(b), as amended in 1996, applies solely to state prisoners). As explained above, §§ 2244(b)(1) and (b)(2) expressly apply only to a "[a] claim presented in a second or successive habeas corpus application under section 2254." Section 2244(b)(3), by its plain terms, provides certification procedures for successive motions "permitted by this section." And § 2244(b)(4) includes this analogous limiting language, authorizing a district court to "dismiss any claim presented in a second or successive petition "unless the applicant shows that the claim satisfies the requirements *of this section*."

Section 2244's explicit application to "the requirements of this section" forecloses its application to § 2255 motions. Again, the first two "requirements of this section" apply, by their own terms, only to § 2254 state prisoner petitions. 28 U.S.C.

§§ 2244(b)(1), (b)(2). Moreover, the first requirement – that a claim "presented in a prior application shall be dismissed" – is found nowhere in § 2255. And while the second requirement is similar to § 2255(h), the provisions have material differences. *See*, *e.g.*, *Case v. Hatch*, 731 F.3d 1015, 1035 (10th Cir. 2013) (noting "crucial differences" between the provisions). "[B]y design, the actual-innocence gateway [in § 2244(b)2)] is narrower for successive applicants seeking to overturn state court convictions than it is for petitioners challenging federal convictions [via § 2255(h)(1)]." *Id.* at 1036.

Thus, because "the requirements" of § 2244(b) apply only to § 2254 state prisoner petitions, it is impossible to apply § 2244(b)(4) to § 2255 federal prisoner petitions. To do so would be to improperly require a district court to dismiss a § 2255 motion on grounds that apply only to § 2254 state prisoner petitions. *See*, *e.g.*, *Sosa v. Alvarez–Machain*, 542 U.S. 692, 711 n. 9 (2004) ("when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended"). But if Congress had intended to permit district courts to dismiss authorized successive § 2255 motions on the grounds mentioned in § 2244(b), it could have easily done so by including such language in § 2255 itself. *See*, *e.g.*, *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, 138 S.Ct. 1061, 1070 (2018) ("If Congress had wanted to deprive state courts of jurisdiction over 1933 Act class actions, it had an easy way to do so: just insert into § 77p an exclusive federal jurisdiction provision (like the 1934 Act's) for such suits."). Or it could have included such language in § 2244(a), the one provision within § 2244 that actually deals with § 2255 motions. But it did not. "And respect for Congress's prerogatives as

policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Murphy v. Smith*, 138 S.Ct. 784, 787-88 (2018).

g. Finally, there are valid reasons why Congress drafted § 2244 (and the habeas statutes in general) in a manner that makes it more stringent for state prisoners to obtain relief in federal court. Only with respect to state court judgments (not federal court judgments) do principles of "comity, finality, and federalism" caution against a federal court vacating a state court judgment. *See, e.g.*, *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009). Whereas the federal statutes impose "strict standard[s]" to review state convictions, the review of federal convictions "is more lenient." *Case v. Hatch*, 731 F.3d 1015, 1035 (10th Cir. 2013). *Id.* It is "by design" that the avenues for relief are "narrower for successive applicants seeking to overturn state court convictions than it is for petitioners challenging federal convictions." *Id.* at 1036.

2a. The lower courts have made a mess of this issue. The genesis of this mess is the Seventh Circuit's decision in *Bennett v. United States*, 119 F.3d 468 (7th Cir. 1997) (Posner, J.). The decision came down less than a year after Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104–132, § 104, 110 Stat. 1218 (legislation that amended the federal habeas provisions). *Bennett* involved a pro se federal prisoner's application to file a successive § 2255 motion to raise claims related to his sanity to testify at trial. 119 F.3d at 469. The Seventh Circuit found that the pro se prisoner had made a prima facie case that "newly discovered evidence" would have altered the outcome of his trial and, thus, authorized the successive motion under 28 U.S.C. § 2255(h)(1). *Id.* at 469-470.

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

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

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

This second "gate" is also entirely irrelevant in the § 2255 context. In order to grant habeas relief based on newly discovered evidence, of course the district court must find that the evidence would have made a difference at trial. There is no collateral relief for harmless errors. *See*, *e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) ("habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice'"); *see also Murray v. Carrier*, 477 U.S. 478, 495 (1986) ("in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ").

But in the § 2254 context, a state prisoner must do more than show prejudice. The prisoner must also demonstrate that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). Section 2244(b)(4) requires district courts to conduct this *non-merits* due diligence requirement in successive § 2254 state prisoner cases. In

contrast, because federal prisoners need not show due diligence, 28 U.S.C. § 2255(h)(1), applying § 2244(b)(4) in the § 2255 context does nothing at all. *Bennett* does not grapple with any of this. There is no legal analysis in *Bennett* whatsoever.

The Tenth Circuit's decision in *Pullen* relied on its prior decision in *United States v. Murphy*, 887 F.3d 1064 (10th Cir. 2018), which in turn relied on *Bennett* to conclude that § 2244(b)(4) is a "second procedural gate" to § 2255(h) authorization, *id.* at 1067-1068. *Pullen*, 913 F.3d at 1275-1276. It did so with no substantive analysis whatsoever. *Id.* Other courts of appeals have done the same thing. *See*, *e.g.*, *Blow v. United States*, 829 F.3d 170, 172 (2d Cir. 2016); *In re Pendleton*, 732 F.3d 280, 282-283 (3d Cir. 2013); *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001); *Johnson v. United States*, 720 F.3d 720, 721 (8th Cir. 2013); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164-1165 (9th Cir. 2000).

This Court recently struck down a line of lower court precedent because that precedent stemmed from an erroneous decision from a federal court of appeals. *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2364 (2019). Despite the fact that the lower courts had aligned around this one precedent from the D.C. Circuit, this Court granted certiorari and overruled all of it, refusing to "approve such a casual disregard of the rules of statutory interpretation." *Id.* This Court should do the same here. *Bennett*'s summary, citationless, throw-in "holding" at the end of the decision has led to an interpretation of § 2255(h) (and § 2244(b)(4)) that disregards the plain text of those statutes. This Court should overrule it.

Aside from *Bennett*, other courts of appeals have done nothing other than rely on § 2254 precedent to incorporate § 2244(b)(4) into § 2255(h). *See*, *e.g.*, *Evans-Garcia v.*

United States, 744 F.3d 235, 236 (1st Cir. 2014); *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003); *In re Moore*, 830 F.3d 1268, 1271 (11th Cir. 2016). But that ignores the differences between state and federal prisoner petitions, differences that exist within the federal habeas statutory scheme. As just one example of the shoddy workmanship at play here, consider *In re Moore*. In that case, the Eleventh Circuit relied entirely on *Jordan v. Sec'y DOC*, 485 F.3d 1351, 1353, 1357-1359 (11th Cir. 2007), with no recognition that *Jordan* involved § 2254 and not § 2255. 830 F.3d at 1271. At one point, the Eleventh Circuit erroneously stated that *Jordan* involved a "§ 2255 motion." *Id.* And where *Jordan* referenced § 2244(b)(2), *In re Moore* simply substituted § 2255(h)(2). *Id.* With this sleight of hand, the Eleventh Circuit could reference § 2244(b)(4) as requiring district courts to conduct a § 2255(h)(2) analysis. *Id.* A subsequent panel (correctly) labeled this discussion in *In re Moore* "undoubtedly" dicta that "seems quite wrong." *In re Chance*, 831 F.3d 1335, 1339 (11th Cir. 2016).

b. In contrast, the Sixth Circuit's recent decision in *Williams v. United States*, 927 F.3d 427, 435 (6th Cir. 2019), agrees with our position that "§ 2255(h)'s reference to § 2244's certification requirement is much more sensibly read as referring to the portions of § 2244 that actually concern the certification procedures, *see* 28 U.S.C. § 2244(b)(3) – the provisions, in other words, that 'provide[ ]' for how such a '"motion [is to] be certified.'" The Sixth Circuit found that it would make "no linguistic sense" to direct a court of appeals to certify that the conditions of any other subsection within § 2244(b)– other than § 2244(b)(3) – had been met. *Id.* The Sixth Circuit further held that "assessing the § 2255(h) threshold conditions themselves is wholly committed to

the issuing "'panel of the appropriate court of appeals.'" *Id.* at 438.

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

3. The resolution of this statutory issue is also extremely important. Whenever a newly recognized right is declared retroactive, *see*, *e.g.*, *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016), this statutory issue will arise. Here, for instance, the potential reach of this issue in this context could extend to over 1,000 prisoners. *Brown*, 139 S.Ct. at 14 (Sotomayor, J., dissenting from the denial of cert.). And the practical implications matter. Unlike § 2255(f)(3)'s timeliness provision, which the government can waive, *Wood v. Milyard*, 566 U.S. 463 (2012), the lower courts consider § 2255(h)(2)'s certification requirement a non-waivable jurisdictional one. *See*, *e.g.*, *United States v. Wetzel-Sanders*, 805 F.3d 1266, 1268-1269 (10th Cir. 2015). Thus, even if the government, for equitable or other reasons, agrees that a defendant should get successive habeas relief, the majority rule (and the one that applies in the

Tenth Circuit) prevents such relief. *See id.*

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

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

b. In direct conflict with the Seventh Circuit, six Circuits (including the Tenth Circuit) have held that *Johnson*'s new retroactive right does not apply to the residual clause of the mandatory guidelines. *Pullen*, 913 F.3d 1270; *United States v. Blackstone*, 903 F.3d 1020 (**9th Cir**. 2018); *Russo v. United States*, 902 F.3d 880 (**8th Cir**. 2018); *United States v. Green*, 898 F.3d 315 (**3d Cir**. 2018); *United States v. Brown*, 868 F.3d 297 (**4th Cir**. 2017); *Raybon v. United States*, 867 F.3d 625 (**6th Cir**. 2017); *In re Griffin*, 823 F.3d 1350 (**11th Cir**. 2016).

But not all of these decisions were unanimous. The Fourth Circuit issued its decision in *Brown* over the dissent of Chief Judge Gregory. 868 F.3d at 304. In the Sixth Circuit, Judge Moore authored a concurrence expressing her view that the Sixth Circuit's decision in *Raybon* "was wrong on this issue." *Chambers v. United States*, 763 Fed. Appx. 514, 519 (6th Cir. Feb. 21, 2019) (unpublished). And an entire Eleventh Circuit panel called into question the Eleventh Circuit's decision in *In re*

Griffin. *In re Sapp*, 827 F.3d 1334, 1336-1341 (11th Cir. 2016) (Jordan, Rosenbaum, Pryor, J.). Judge Martin dissented on this issue as well in *In re Anderson*, 829 F.3d 1290, 1294 (11th Cir. 2016), and *Lester v. United States*, 921 F.3d 1306, 1319 (11th Cir. 2019) (en banc) (Martin, J., dissenting, joined by Rosenbaum and Pryor, J.). Judge Rosenbaum authored a separate dissent on this issue in *Lester*. 921 F.3d at 1328. This intra-Circuit dissension supports review in this Court.

c. And although this split is currently lopsided, other Circuits may yet side with the Seventh Circuit on this issue. This issue is still an open one in the First, Second, Fifth and D.C. Circuits. In *Moore v. United States*, the First Circuit strongly implied that, if tasked with resolving the merits, it would side with the Seventh Circuit. 871 F.3d 72, 81-82 (1st Cir. 2018); *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. *See 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) 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*[2] retroactivity analysis. 902 F.3d at 882-883. But we already know that *Johnson*'s right applies retroactively to cases

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

on collateral review. *Welch*, 136 S.Ct. at 1265. The question is whether *Johnson*'s right applies to mandatory guidelines, not whether the right is retroactive under *Teague*. That analysis has nothing to do with *Teague* retroactivity.

And finally, the Eleventh Circuit in *Griffin* drew a line between statutes and guidelines (whether advisory or mandatory), and held that the latter could never be void for vagueness. 823 F.3d at 1355. But it did so under bad reasoning. According to the Eleventh Circuit, guidelines cannot be vague because they "do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." *Id.* But so too recidivist sentencing statutes, like the one at issue in *Johnson*. Recidivist sentencing statutes "do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." Yet they can be void for vagueness. *Johnson*, 135 S.Ct. at 2557. And as mentioned 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(h)(2), a defendant not only must assert relief under a newly recognized right, but that right must have been made retroactively applicable to cases on collateral review. This case involves a newly recognized right (*Johnson*) that this Court has made retroactive to cases on collateral review (in *Welch*). In other words, retroactivity is not at issue. The only issue involves the scope of *Johnson*'s newly recognized right: does it only apply to statutes, or does it also apply to the mandatory guidelines? In *Pullen*, the Tenth Circuit limited *Johnson* to statutes. 913 F.3d at 1282. 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 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's decision in *Pullen* ignored this portion of *Chaidez*. 913 F.3d at 1281. 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." *Dimaya*, 138 S.Ct. at 1210-1223.

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

Which leads to the second reason to grant this petition: the Tenth Circuit's decision conflicts with this Court's decision in *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 1281-1283. 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 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* (or 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." *Sessions*, 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* is an excellent vehicle to resolve this issue, if that petition is 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.

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

The one Circuit (the Seventh) that has definitively reached the merits of this issue has held that the mandatory guidelines' residual clause is void for vagueness. *Cross*, 892 F.3d at 307. That decision is correct. The language of § 4B1.2(a)(2)' s residual clause is identical to the residual clause struck down in *Johnson* (§ 924(e)(2)(B)(ii)). Courts interpreted the two residual clauses identically (i.e., under an ordinary-case categorical approach), and even interchangeably. *See*, *e.g.*, *United States v. Pickett*, 916 F.3d 960, 965 n.2 (11th Cir. 2019); *United States v. Doyal*, 894 F.3d 974, 976 n.2 (8th Cir. 2018); *United States v. Doxey*, 833 F.3d 692, 710 (6th Cir. 2016); *United States v. Moyer*, 282 F.3d 1311, 1315 n.2 (10th Cir. 2002). And, as explained above, when mandatory, the guidelines, via § 3553(b), set the statutory penalty range. *See supra* Section II(2b). In other words, the mandatory guidelines operated as statutes, and, thus, could be void for vagueness like statutes. It flows directly from *Johnson* and *Welch*, then, that, if the residual clauses in *Johnson*, *Dimaya*, and *Davis* are void for vagueness, then so too § 4B1.2(a)(2)'s mandatory residual clause.

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

CONCLUSION

This Court should grant the petition in *Pullen* and hold this petition in abeyance pending *Pullen*'s resolution. If not, 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

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.

RAYMOND GARCIA AGUILAR,

Defendant - Appellant.

No. 17-3192
(D.C. Nos. 5:16-CV-04077-JAR &
5:02-CR-40035-JAR-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. Aguilar 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 Motion is GRANTED. Based on this court's decision in Pullen, the judgment of the district court is AFFIRMED.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Chris Wolpert
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 02-40035-01-JAR

RAYMOND GARCIA AGUILAR,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on Defendant Raymond Aguilar's Motion to Vacate Sentence Under 28 U.S.C. § 2255 (Doc. 154). On July 8, 2002, Mr. Aguilar entered a guilty plea to one count of conspiracy to distribute more than 500 grams of methamphetamine.[1] Mr. Aguilar received a sentence enhanced under the Guideline for career offenders because the offense was committed subsequent to sustaining two felony convictions for crimes of violence as defined in U.S.S.G. § 4B1.2. He was ultimately sentenced to 262 months' custody. Mr. Aguilar's original § 2255 motion was ultimately denied as time barred, and he did not appeal that decision.[2]

On June 26, 2015, the Supreme Court issued its opinion in *Johnson v. United States*,[3] in which it declared unconstitutionally vague a part of the Armed Career Criminal Act's ("ACCA") definition of "violent felony," referred to as the "residual clause."[4] The residual clause expanded the list of enumerated offenses to include any felony that "otherwise involves conduct that

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[1]Doc. 93.

[2]Doc. 147.

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

[4]*Id.* at 2557.

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

On May 20, 2016, the Tenth Circuit Court of Appeals granted Mr. Aguilar leave to file a second or successive petition for relief under 28 U.S.C. § 2255(h) to raise a claim under *Johnson*.[8] Mr. Aguilar filed a motion to vacate his sentence arguing that his prior Iowa and Kansas convictions for burglary no longer qualify as predicate crimes of violence under U.S.S.G. § 4B1.2 in the wake of the Supreme Court's decision in *Johnson*, and thus resentencing is warranted because he no longer qualifies as a career offender. At the Government's request, the Court stayed these proceedings pending the Supreme Court's decision in *Beckles v. United States*.[9] Mr. Aguilar moved the Court to lift the stay order and upon agreement of the parties, the Court issued an Order removing the stay and setting a response deadline for the Government.[10]

On March 6, 2017, the Supreme Court issued its opinion in *Beckles*, holding that "the Guidelines are not subject to a vagueness challenge under the Due Process Clause, [and] [t]he residual clause in § 4B1.2(a)(2) therefore is not void for vagueness."[11] Mr. Aguilar subsequently filed a supplemental brief arguing that because he was sentenced prior to *United States v.*

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

[6] 135 S. Ct. at 2563.

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

[8] Doc. 153.

[9] 137 S. Ct. 886 (2017); *see* Doc. 157.

[10] Docs. 158, 160.

[11] 137 S. Ct. at 892.

Booker,[12] he may still raise a vagueness challenge to a mandatory Guideline scheme.[13] Although the Government concedes that Mr. Aguilar's prior burglary conviction under Iowa state law no longer qualifies as a predicate crime of violence, it argues that his motion must nevertheless be dismissed and all relief denied because it does not meet the restrictions in 28 U.S.C. § 2255(h)(2), which is satisfied only when a defendant relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." After careful consideration of the parties' submissions, the Court finds that no evidentiary hearing is needed and the motion should be dismissed.

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

Mr. Aguilar's assumption in his § 2255 motion as originally filed that the holding of *Johnson* extends to the "virtually identical" residual clause in U.S.S.G. § 4B1.2(a)(2) was supported by the Tenth Circuit's decision in *United States v. Madrid*.[16] In light of *Madrid's* abrogation by *Beckles*, Mr. Aguilar now relies on qualifying language in *Beckles* that the

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

[13]Doc. 166.

[14]Doc. 153.

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

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

advisory Guidelines are not subject to a vagueness challenge under the Due Process Clause,[17] as well as Justice Sotomayor's concurring opinion recognizing that the "distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker* . . . may mount vagueness attacks on their sentences."[18]

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

Accordingly, this Court must determine whether Mr. Aguilar's re-styled pre-*Booker* claim is based on a new rule of constitutional law retroactively applicable to cases on collateral

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[17] 137 S. Ct. at 895.

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

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

[20] *Beckles,* 137 S. Ct. at 892.

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

Rule 11 of the Rules Governing Section 2255 Proceedings requires the court to "issue or deny a certificate of appealability when it enters a final order adverse" to the petitioner. A court may grant a certificate of appealability ("COA") only "if the applicant has made a substantial showing of the denial of a constitutional right."[25] "When the district court denies a habeas petition on procedural grounds without reaching the [petitioner's] underlying constitutional

[21]28 U.S.C. § 2255(h)(2).

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

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

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

[25]28 U.S.C. § 2253(c)(2).

claim, a COA should issue when the [petitioner] shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[26] Here, the Court concludes that reasonable jurists could debate whether the Court was correct in its ruling. The Court thus grants a COA on the issue of whether Mr. Aguilar's motion falls within the scope of 28 U.S.C. § 2255(h)(2).

IT IS THEREFORE ORDERED BY THE COURT THAT defendant Raymond Garcia Aguilar's Motion to Vacate Under § 2255 (Doc. 154) is DISMISSED as an unauthorized second or successive motion. Mr. Aguilar is granted a COA.

IT IS SO ORDERED.

Dated: August 23, 2017

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

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

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.

SAMMY NICHOLS,

Defendant - Appellant.

No. 18-3179
(D.C. Nos. 2:16-CV-02381-KHV &
2:03-CR-20149-KHV-DJW-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. Nichols 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,	)	**CRIMINAL ACTION**
	)	**No. 03-20149-01-KHV**
v.	)	
	)	**CIVIL ACTION**
SAMMY NICHOLS,	)	**No. 16-2381-KHV**
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

On September 12, 2005, the Court sentenced defendant to prison for 360 months, which it later reduced to 324 months. This matter is before the Court on defendant's Motion To Vacate Sentence [Under 28 U.S.C. § 2255] (Doc. #436) filed June 3, 2016. For reasons stated below, the Court dismisses defendant's motion to vacate as a second or successive motion under 28 U.S.C. § 2255 and grants a certificate of appealability.

Factual Background

On July 21, 2004, a grand jury returned an indictment which charged Sammy Nichols and others with conspiracy to distribute and possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a), (b)(1)(A)(ii) and 846. See Superseding Indictment (Doc. #147). On November 2, 2004, defendant pled guilty to that charge. Plea Agreement (Doc. #187). The Court determined that defendant was a career offender under Section 4B1.1(a) of the United States Sentencing Guidelines. Defendant's total offense level was 41, with a criminal history category VI, resulting in a sentencing range of 360 months to life in prison. On September 12, 2005, the Court sentenced defendant to 360 months. Defendant did not appeal.

On February 25, 2011, defendant filed a motion to vacate his sentence under 28 U.S.C. § 2255. See Motion To Vacate, Set Aside, Or Correct Sentence Of Defendant In Federal Custody Pursuant To 28 U.S.C. § 2255(f)(3) (Doc. #366). On June 21, 2011, the Court overruled defendant's motion and denied a certificate of appealability. See Memorandum And Order (Doc. #369).

On May 31, 2016, the Tenth Circuit Court of Appeals granted defendant leave to file a second or successive Section 2255 motion to raise a claim based on Johnson v. United States, 135 S. Ct. 2551 (2015). See Order (Doc. #435). On June 3, 2016, defendant filed a motion to vacate his sentence under 28 U.S.C. § 2255. Motion To Vacate Sentence (Doc. #436). Defendant asserts that under Johnson, he no longer qualifies as a career offender under Section 4B1.1 of the Guidelines and is entitled to a reduced sentence. Id. at 15-28.

Analysis

Defendant argues that he is entitled to relief under Johnson, which the Supreme Court decided less than one year before he filed his Section 2255 motion. In Johnson, the Supreme Court held that the residual clause portion of the "violent felony" definition under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutional under the void-for-vagueness doctrine. 135 S. Ct. at 2557-60, 2563. The Supreme Court later held that its ruling in Johnson was retroactive to cases on collateral review. See Welch v. United States, 136 S. Ct. 1257, 1265 (2016). Defendant argues that based on the reasoning in Johnson, his conviction for involuntary manslaughter no longer is a "crime of violence" under the residual clause in Section 4B1.2(a)(2) of the Guidelines.

The government asserts that defendant's motion is barred as a second or successive motion. See Government's Response To Defendant's Motion To Vacate And Supplemental Brief

(Doc. #455) filed June 23, 2017 at 15-17.[1] Under Section 2255(h), the Court can consider a second or successive motion only if a panel of the court of appeals certifies that the motion contains –

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

On May 31, 2016, the Tenth Circuit Court of Appeals granted defendant leave to file a second or successive Section 2255 motion to raise a claim based on Johnson. See Order (Doc. #435). The Tenth Circuit's authorization, however, merely reflects its preliminary determination that defendant made a prima facie showing that he could meet the requirements of Section 2244(b). LaFevers v. Gibson, 238 F.3d 1263, 1264 (10th Cir. 2001) (evaluating analogous prohibition of successive § 2254 petitions); see Case v. Hatch, 731 F.3d 1015, 1030 (10th Cir. 2013) (after petitioner makes prima facie showing to appellate panel, district court must determine whether petition in fact satisfies requirements of § 2244(b)); 28 U.S.C. § 2244(b)(3)(C) (court of appeals may authorize filing of second or successive application if it determines that application makes prima facie showing that satisfies requirements); 28 U.S.C. § 2255(h) (second or successive § 2255 motion

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[1] The government also asserts that defendant's motion is barred as untimely. See Government's Response To Defendant's Motion To Vacate And Supplemental Brief (Doc. #455) at 7-15. Under Section 2255(f)(3), the Court can consider a claim which is filed after the one-year deadline, but within one year of the date on which the Supreme Court initially recognized the right asserted, "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). The one-year statute of limitations is not jurisdictional. See United States v. Springer, 875 F.3d 968, 980 (10th Cir. 2017) (citations omitted). Because defendant has not satisfied the jurisdictional requirement for second or successive motions under Section 2255(h), the Court need not address the government's timeliness argument.

must be certified as provided in § 2244). This Court has an independent duty to examine defendant's second Section 2255 petition and determine whether the petition does, in fact, satisfy the gatekeeping requirements of Section 2244(b). LaFevers, 238 F.3d at 1265; see 28 U.S.C. § 2244(b)(4) (district court shall dismiss any claim presented in second or successive application that court of appeals has authorized unless applicant shows that claim satisfies requirements of section); United States v. Washington, 890 F.3d 891, 895 (10th Cir. 2018) (after court of appeals authorizes successive petition based on prima facie showing, defendant must pass through "second gate" in district court).

Initially, the Court addresses how the Supreme Court decision in Beckles v. United States, 137 S. Ct. 886 (2017), impacts defendant's claim. On March 6, 2017, the United States Supreme Court held that despite its holding in Johnson as to the ACCA residual clause, the Guidelines are not subject to a vagueness challenge under the Due Process Clause. Beckles, 137 S. Ct. at 892 (residual clause in § 4B1.2(a)(2) not void for vagueness); see id. at 894 (because Guidelines merely guide district court discretion, they are not amenable to vagueness challenge). The Supreme Court decision in Johnson, therefore, is not a "new rule of constitutional law" within the meaning of Section 2255(h)(2) which would support a due process challenge to the Guidelines. Defendant asserts that Beckles, which applied to the advisory Guidelines, does not foreclose his claim because this Court sentenced him under "mandatory" Guidelines. Supplemental Brief Re: Beckles (Doc. #454) filed June 1, 2017 at 1-2, 10. The Court sentenced defendant some eight months after the Supreme Court decided United States v. Booker, 543 U.S. 220 (2005), which rendered the

Guidelines "effectively advisory." 543 U.S. at 245.[2] The Statement of Reasons in this case confirms that at the time of sentencing, this Court understood that the Guidelines were advisory. See Statement Of Reasons submitted September 13, 2005 at 1-3 (several references to "advisory" Guidelines). To the extent defendant argues that the Court effectively treated the career offender portion of the Guidelines as mandatory in violation of Booker, he should have raised any such argument at sentencing or on direct appeal. In light of Beckles, defendant's motion is barred as a second or successive motion.

Even if the Court were to assume that it effectively sentenced defendant under the mandatory Guidelines which pre-dated Booker or a mandatory portion of the Guidelines related to career offenders, his motion nevertheless is barred as a second or successive motion. Indeed, defendant concedes that recent Tenth Circuit authority requires this Court to "deny" his motion.[3] Status Report (Doc. #468) filed April 20, 2018 (citing United States v. Greer, 881 F.3d 1241 (10th Cir. 2018), petition for cert. filed (U.S. May 4, 2018), and United States v. Mulay, No. 17-3031, 2018 WL 985741 (10th Cir. Feb. 20, 2018)). In Greer, the Tenth Circuit held that a challenge to the residual clause of Section 4B1.2(a)(2) of the mandatory Guidelines does not assert a right recognized in Johnson. Greer, 881 F.3d at 1247. The Tenth Circuit reasoned as follows:

> [I]t is apparent that Mr. Greer has not raised a true Johnson claim because he was not

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[2] Before Booker, the Guidelines were binding on district courts. Beckles, 137 S. Ct. at 894; Booker, 543 U.S. at 233. The pre-Booker Guidelines permitted departures in limited cases in which the judge found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Booker, 543 U.S. at 234 (citing 18 U.S.C. § 3553(b)(1) (2000 ed., Supp. IV)). Because departures were not available in every case, the Supreme Court found that the pre-Booker Guidelines were mandatory. Booker, 543 U.S. at 234.

[3] Defendant asks the Court to "deny" his motion. For reasons stated elsewhere in this order, the Court dismisses his motion for lack of jurisdiction.

> sentenced under any clause of the ACCA. Instead, . . ., Mr. Greer is attempting to apply the *reasoning* of Johnson in a different context not considered by the [Supreme] Court. . . . To entertain such an argument would undermine Congress's intent in passing AEDPA and the "interests of comity and finality" underlying federal habeas review. See Teague v. Lane, 489 U.S. 288, 308, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989).

Greer, 881 F.3d at 1248 (emphasis in original); see also Mulay, 2018 WL 985741, at *4 (applying Greer to reject collateral challenge to § 4B1.2(a)(2) of mandatory Guidelines on vagueness grounds). Because the Tenth Circuit has not extended the right recognized in Johnson to a challenge under the then mandatory Guidelines, defendant's motion is barred as a second or successive motion.

For reasons stated above and substantially the reasons stated in the Government's Response To Defendant's Motion To Vacate And Supplemental Brief (Doc. #455), the Court finds that defendant's motion to vacate fails to meet the authorization standards for a second or successive motion under Section 2255(h). The Court therefore dismisses defendant's motion for lack of jurisdiction.[4]

Certificate Of Appealability

Under Rule 11 of the Rules Governing Section 2255 Proceedings, 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).[5] To satisfy this standard, the movant must demonstrate

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[4] Even if defendant could show that Johnson applies retroactively to his sentence, he has not shown how he is entitled to relief under Johnson. As the government notes, absent the career offender enhancement under the Guidelines, defendant's guideline range remains the same: 360 months to life.

[5] The denial of a Section 2255 motion is not appealable unless a circuit justice or a circuit or district judge issues a certificate of appealability. See Fed. R. App. P. 22(b)(1); 28 U.S.C. § 2253(c)(1).

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." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Defendant asks the Court to grant a certificate of appealability. Status Report (Doc. #468) at 1. The government takes no position on this issue. Id. at 4. Defendant bases his request on the purported circuit split on the issue whether the right recognized in Johnson applies to the residual clause of Section 4B1.2(a)(2) of the mandatory Guidelines. Contrary to the Tenth Circuit decision in Greer, the Seventh Circuit recently held that the right recognized in Johnson applies to vagueness challenges under Section 4B1.2(a)(2) of the mandatory Guidelines. See Cross v. United States, Nos. 17-2282 and 17-2724, --- F.3d ----, 2018 WL 2730774, at *3 (7th Cir. June 7, 2018). Despite the circuit split whether Johnson applies to challenges under the mandatory Guidelines, defendant cites no authority that the reasoning of Cross extends to sentences imposed after Booker, which rendered the Guidelines advisory. Even so, reasonable jurists could debate whether the rationale of Johnson and Cross extends to certain sentences after Booker in courts where the career offender guideline retained its pre-Booker mandatory features. See Defendant's Reply To Government's Response To Defendant's Motion To Vacate And Supplemental Brief Re: Beckles V. United States (Doc. #460) filed July 28, 2017 at 1-3 (arguing that Tenth Circuit continued to recognize mandatory features of career offender guideline for some time after Booker). Accordingly, the Court grants defendant a certificate of appealability. See Miller-El, 537 U.S. at 336 (certificate should issue if reasonable jurists could debate whether petition should have been resolved in different manner or issues presented were adequate to deserve encouragement to proceed further).

IT IS THEREFORE ORDERED that defendant's Motion To Vacate Sentence [Under 28 U.S.C. § 2255] (Doc. #436) filed June 3, 2016 is **DISMISSED for lack of jurisdiction.**

IT IS FURTHER ORDERED that a certificate of appealability as to the ruling on defendant's Section 2255 motion is **GRANTED**.

Dated this 20th day of June, 2018 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge

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

28 U.S.C.A. § 2244

§ 2244. Finality of determination

Effective: April 24, 1996
Currentness

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

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

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

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

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

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

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

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

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

Appendix E

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

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

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

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

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

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

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

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

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

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

CREDIT(S)

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

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

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