No. _____

IN THE

Supreme Court of the United States

ABELEE BRONSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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 Petitioner

QUESTIONS PRESENTED

In 1989, when the guidelines were mandatory, Abelee Bronson was sentenced as a career offender under USSG § 4B1.1 in light of two prior Missouri second-degree burglary convictions. At the time, § 4B1.1 defined the term "crime of violence" via 18 U.S.C. § 16. And Mr. Brunson's burglary convictions qualified as crimes of violence (only) under § 16(b)'s residual clause. In 2015, this Court struck down as void for vagueness an analogous residual clause in 18 U.S.C. § 924(e)(2)(B)(ii). *Johnson v. United States*, 135 S.Ct. 2551 (2015). And in 2018, this Court struck down as void for vagueness § 16(b)'s residual clause. *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). Within one year of the decision in *Johnson*, Mr. Bronson obtained authorization from the Tenth Circuit to file a successive motion to vacate under 28 U.S.C. § 2255(h)(2). But the district court dismissed the motion as untimely under 28 U.S.C. § 2255(f)(3). The Tenth Circuit affirmed. In conflict with a published decision from the Seventh Circuit, the Tenth Circuit held that the new rule announced in *Johnson* does not apply to the mandatory guidelines.

The questions presented are:

I. Whether, for purposes of 28 U.S.C. § 2255(f)(3), the new rule announced in *Johnson* applies to the analogous residual clause in the mandatory guidelines, USSG § 4B1.2(1) (1988)?

II. Whether the residual clause of the mandatory guidelines, USSG § 4B1.2(1) (1988), is void for vagueness?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES CITED

PAGE

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The Tenth Circuit's unpublished order is available at 765 Fed. Appx. 434, and is included as Appendix A. The district court's unpublished order dismissing Mr. Bronson's motion under 28 U.S.C. § 2255 is available at 2018 WL 2020765, and is included as Appendix B.

JURISDICTION

The Tenth Circuit issued its decision on May 6, 2019. Pet. App. 1a. 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(1) (1988)[1] provides:

The term "crime of violence" as used in this provision is defined under 18 U.S.C. § 16.

18 U.S.C. § 16 provides:

The term "crime of violence" means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Missouri Revised Statute § 569.170 (1979) provides:

1. A person commits the crime of burglary in the second degree when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.

2. Burglary in the second degree is a class C felony.

STATEMENT OF THE CASE[2]

In our free society, individuals should not "linger longer in prison than the law demands." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1908 (2018). But Mr.

[1] The United States Sentencing Commission amended this provision in 1989 to match the definition with the definition of a violent felony in 18 U.S.C. § 924(e)(2)(B)(ii). USSG App. C, amend. 268 (1989). The Commission most recently amended the 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).

[2] We recently filed a similar petition in *Pullen v. United States*, No. 19-5219. *Pullen* involves 28 U.S.C. § 2255(h)(2), not 28 U.S.C. § 2255(f)(3). But the underlying analysis – whether *Johnson* applies to the mandatory guidelines – is the same. Thus, this petition resembles the petition in *Pullen*. And if this Court grants the petition in *Pullen*, it should hold this case in abeyance pending *Pullen*'s disposition.

Bronson – whose prior burglary convictions qualified as crimes of violence under § 4B1.2(1)'s hopelessly vague (mandatory) residual clause (and increased his sentence by some fifteen years) – is doing just that (and has been for over thirty years). Many others are as well. *Brown v. United States*, 139 S.Ct. 14, 14 (2018) (Sotomayor, J., dissenting from the denial of cert.). It is up to this Court to right the ship. Two Justices are on board with granting certiorari to resolve whether prisoners like Mr. Bronson can bring a void-for-vagueness challenge to the mandatory guidelines' residual clause in a § 2255 motion. *Brown*, 139 S.Ct. 14 (Justices Sotomayor and Ginsburg). We ask (beg, really) for two more votes.

There are compelling reasons to decide this issue. Most notably, the Circuits are split on it. *Brown*, 139 S.Ct. at 15-16. The issue is also extremely important because its resolution "could determine the liberty of over 1,000 people." *Id.* at 16. On the underlying merits, *Sessions v. Dimaya* holds that § 16(b)'s residual clause is void for vagueness under *Johnson v. United States*, 135 S.Ct. 2551 (2015). 138 S.Ct. 1204, 1215-1223 (2018). Section 4B1.2(1) (1988) adopts § 16(b)'s definition of crime of violence. And each of these residual clauses – in § 924(e), § 16(b), and § 4B1.2(1) – are identical in application (use of a categorical approach to measure the degree of risk). If the former provisions are void for vagueness, then so too the latter provision.

This case is also the perfect vehicle to resolve this issue. Mr. Bronson's prior burglary convictions could count as crimes of violence only under § 4B1.2(1)'s residual clause. With that clause excised as unconstitutional, Mr. Bronson is not a career offender. If resentenced today, Mr. Bronson would be released from prison immediately. To borrow a phrase: "[t]hat sounds like the kind of case [this Court]

ought to hear." *Brown*, 139 S.Ct. at 16.

A. Legal Background

Federal habeas corpus has roots in the common law and the Constitution. *Fay v. Noia*, 372 U.S. 391, 400 (1963); U.S. Const. Art. I, § 9, cl. 2. Today, its most prominent place is the United States Code. 28 U.S.C. §§ 2241-2255. The procedures differ (in most, but not all, respects) for state and federal prisoners. State prisoner petitions are generally governed by 28 U.S.C. § 2254. Federal prisoner petitions are generally governed by 28 U.S.C. § 2255.

A federal prisoner (like Mr. Bronson) may move to vacate his sentence under § 2255 if that sentence violates, *inter alia*, the Constitution. 28 U.S.C. § 2255(a). Any such motion generally must be filed within one year of the date on which the judgment of conviction becomes final. 28 U.S.C. § 2255(f)(1). But one exception to this rule permits a federal prisoner to file a § 2255 motion within one year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

This provision is relevant here because of this Court's decisions in *Johnson* and *Dimaya*. *Johnson* struck down as void for vagueness the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii). This Court made *Johnson* retroactively applicable to cases on collateral review in *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016). Following *Johnson*, in *Dimaya*, this Court struck down § 16(b)'s residual clause as void for vagueness. 138 S.Ct. at 1214-1215. This latter residual clause was expressly incorporated into the residual clause that was once found in USSG § 4B1.2(1) (before

the Commission amended the clause in 1989, then removed it in 2016).

The guidelines themselves have been around for over three decades. In 1984, Congress established the United States Sentencing Commission to, *inter alia*, "establish sentencing policies and practices for the Federal criminal justice system." 28 U.S.C. § 991(b)(1). Congress directed the Commission to promulgate and distribute sentencing guidelines "for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). Congress further instructed that the Commission "shall assure that the guidelines specify a sentence of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and has been convicted of two or more felonies, each of which is a crime of violence" (or controlled substance offense).[3] 28 U.S.C. § 994(h)(1).

When Mr. Bronson was sentenced (in 1989), the guidelines were mandatory. When the guidelines were mandatory, they "impose[d] binding requirements on all sentencing judges." *United States v. Booker*, 543 U.S. 220, 233 (2005). It was the "binding" nature of the guidelines that triggered the constitutional problem in *Booker*: "[i]f the Guidelines as currently written could be read as merely advisory provisions," "their use would not implicate the Sixth Amendment." *Id.* And this "mandatory and binding" nature of the guidelines came directly from Congress. *Id.* at 233-234; 18 U.S.C. § 3553(b) (directing that courts "shall impose a sentence of the kind, and within the range" established by the Guidelines). "Because they are binding

[3] This case has nothing to do with controlled substance offenses, so we say no more about them.

on judges, we have consistently held that the Guidelines have the force and effect of laws." 543 U.S. at 234.

Booker rejected the idea that the availability of departures rendered the guidelines anything less than mandatory and binding laws. "In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and *no departure will be legally permissible*. In those instances*, the judge is bound to impose a sentence within the Guidelines range*." *Id.* (emphasis added). Indeed, *Booker* acknowledged that, had the district court departed from the mandatory guidelines range in Mr. Booker's case, the judge "would have been reversed." *Id.* at 234-235.

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

B. Proceedings Below

1. In 1989, a federal jury in Kansas convicted Mr. Bronson of armed bank robbery, 18 U.S.C. §§ 2113(a), (d). Pet. App. 3a. At sentencing, the district court found that, because Mr. Bronson had two prior convictions for crimes of violence, he qualified as

a career offender under USSG § 4B1.1. Pet. App. 3a. The crime-of-violence determination hinged on Mr. Bronson's two prior Missouri second-degree burglary convictions. *United States v. Brunson*, 907 F.2d 117, 120-121 (10th Cir. 1990).[4] These convictions counted as crimes of violence only under § 4B1.2(1)'s then-mandatory residual clause. *Id.* This career-offender designation resulted in a mandatory guidelines range of 262 to 300 months' imprisonment. Pet. App. 3a. The district court imposed a 262-month term of imprisonment. Pet. App. 3a. Without the career-offender designation, Mr. Bronson's mandatory guidelines range would have been 84 to 105 months' imprisonment. Pet. App. 3a.

The district court imposed a 262-month term of imprisonment, to run consecutively to another 262-month bank-robbery sentence imposed in the Western District of Missouri. Pet. App. 3a. So, because of his career-offender designation, for robbing two banks, Mr. Bronson was sent to prison for forty-three years. His current release date is not until 2028.

2. In 1990, the Tenth Circuit affirmed Mr. Bronson's conviction and sentence, specifically finding that the prior burglary convictions qualified as crimes of violence under § 4B1.2(1)'s residual clause. *Brunson*, 907 F.2d at 121.

3. In 2016, Mr. Bronson filed a § 2255 motion in the district court, asserting that his prior second-degree burglary convictions did not count as crimes of violence in light of *Johnson*. Pet. App. 3a. In response, the government conceded that Mr.

[4] The underlying documents and decisions sometimes refer to Mr. Bronson as Mr. Brunson. We use Bronson in this petition because that is the name used to refer to him in these § 2255 proceedings.

Bronson's prior burglary convictions no longer qualified as crimes of violence. R2.63.[5] But the government urged the district court to deny the § 2255 motion because, in its view, this Court's decision in *Johnson* did not apply retroactively to sentences imposed under the mandatory guidelines. R2.64.

4. The district court dismissed the § 2255 motion as untimely under § 2255(f)(3). Pet. App. 5a. The district court relied on the Tenth Circuit's earlier decision in *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018) (decided before this Court's decision in *Dimaya*), which held that *Johnson* does not permit a prisoner to challenge a sentence imposed under the mandatory guidelines' residual clause. Pet. App. 5a-6a. The district court nonetheless granted a certificate of appealability on whether *Dimaya* "sufficiently undermines" the Tenth Circuit's decision in *Greer* "to warrant a retreat" from that holding and to find that Mr. Bronson's § 2255 motion was timely under § 2255(f)(3). Pet. App. 6a.

5. In October 2018, we moved to hold Mr. Bronson's appeal in abeyance in light of another case pending in the Tenth Circuit – *United States v. Ward*, No. 17-3182. *Ward* raised the same issue – whether a *Johnson* motion premised on the mandatory guidelines' residual clause was timely under § 2255(f)(3). An earlier panel of the Tenth Circuit had affirmed in *Ward* in light of *Greer*, *United States v. Ward*, 718 Fed. Appx. 757 (10th Cir. Apr. 11, 2018), but the panel later granted panel rehearing in light of this Court's decision in *Dimaya*, *United States v. Ward*, No. 17-3182 (10th Cir. Aug. 6, 2018). We also represent Mr. Ward, and we filed our rehearing brief in *Ward*

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

in September 2018. In order to avoid duplicate briefing on the identical issue, the Tenth Circuit suspended briefing in other *Johnson* § 2255(f)(3) appeals, including Mr. Bronson's appeal.

The Tenth Circuit still has not issued a decision in *Ward*. But in January 2019, the Tenth Circuit published a decision in *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019). *Pullen* involved the mandatory guidelines' residual clause, *Johnson*, and 28 U.S.C. § 2255(h)(2)'s successive-motion authorization. *Id.* at 1271. Section 2255(h)(2) mirrors the timeliness provision at issue here, § 2255(f)(3). These provisions permit an untimely or successive motion only if the motion relies on a new retroactive rule of constitutional law. *Pullen* reaffirmed the Tenth Circuit's earlier decision in *Greer* that the new retroactive rule announced in *Johnson* does not apply to the mandatory guidelines' residual clause. 913 F.3d at 1284 n.17.

In light of *Pullen*, the government moved for summary affirmance in Mr. Bronson's appeal. Pet. App. 1a. In light of its decisions in *Greer* and *Pullen*, the Tenth Circuit granted the government's motion and affirmed. Pet. App. 1a-2a. In doing so, the Tenth Circuit acknowledged Mr. Bronson's right to petition this Court for a writ of certiorari. Pet. App. 2a. This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve whether, for purposes of 28 U.S.C. § 2255(f)(3), the new retroactive rule announced in *Johnson* applies to the analogous residual clause found 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, for purposes of § 2255(f)(3), 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).

b. In direct conflict with the Seventh Circuit, six Circuits (including the Tenth Circuit here) have held that *Johnson*'s new retroactive right does not apply to the residual clause of the mandatory guidelines. Pet. App. 1a-2a; *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); *see also Pullen*, 913 F.3d at 1284 n.16 (noting 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 (D.D.C. 2018); *United States v. Moore*, 2018 WL 5982017 (D. Mass. Nov. 14, 2018); *Mapp v. United States*, 2018 WL 3716887 (E.D.N.Y. Aug. 3, 2018); *Zuniga-Munoz v. United States*, No. 1:02-cr-134, dkt. 79 & 81 (W.D. Tex. June 11, 2018). What is a 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*, *e.g.*, *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.

And this issue goes beyond the specific context present here. At bottom, the Circuits disagree over how to define the scope of a newly recognized retroactive right. Guidance from this Court is needed. Without such guidance, disagreement is likely to exist with respect to the scope of every newly recognized retroactive right.

2a. Review is also necessary because the majority rule (including the Tenth Circuit's decision below) is wrong. To begin, consistent with the Tenth Circuit's decision in *Greer*, both the Fourth and Sixth Circuit held, pre-*Dimaya*, that *Johnson* does not apply beyond cases involving the exact statute at issue in *Johnson*. *Greer*, 881 F.3d at 1258; *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 (the provision that is effectively at issue here). 138 S.Ct. at 1210-1223. 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, Sixth, and Tenth 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, Sixth, and Tenth 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*[6] retroactivity analysis. 902 F.3d at 882-883. But we already know that *Johnson*'s right applies retroactively to cases on collateral review. *Welch*, 136 S.Ct. at 1265. The question is whether *Johnson*'s right applies to mandatory guidelines, not whether the right is retroactive under *Teague*. That analysis has nothing to do with *Teague* retroactivity.

And finally, the Eleventh Circuit in *Griffin* drew a line between statutes and guidelines (whether advisory or mandatory), and held that the latter could never be

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

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 decision also conflicts with this Court's precedent in ways that will continue to constrain the writ of habeas corpus even beyond the mandatory –guidelines context. 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? In *Pullen*, the Tenth Circuit limited *Johnson* to statutes. 913 F.3d at 1282-1283. And here, the Tenth Circuit summarily affirmed in light of *Pullen*. In two ways, the Tenth Circuit's decision in *Pullen* (and thus here) 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 ignored this portion of *Chaidez*. To the extent that it has relevance, it confirms that *Johnson*'s newly recognized right applies to the mandatory guidelines. After all, we know from *Dimaya* that *Johnson* announced "a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts." *Id.*; 138 S.Ct. at 1210-1223.

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

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

Booker held that the application of the mandatory guidelines violated a defendant's Sixth Amendment right to have a jury find facts "essential to his punishment." 543 U.S. at 232. Because, under a mandatory guidelines scheme, judges

were authorized to find facts "necessary to support a sentence exceeding the maximum authorized by" a defendant's guilty plea or a jury's verdict, the mandatory guidelines violated the Sixth Amendment. *Id.* at 244 (emphasis added).

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

Booker rejected the idea that the availability of departures rendered the guidelines anything less than mandatory and binding laws. "In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range." *Id.* (emphasis added). Indeed, *Booker* acknowledged that, had the district court departed from the mandatory guidelines range in Mr. Booker's case, the judge "would have been reversed." *Id.* at 234-235.

In *Booker*, the government argued that the guidelines did not violate the Sixth Amendment because they "were promulgated by a Commission rather than the Legislature." *Id.* at 237. The Tenth Circuit has drawn the same distinction. *Pullen*,

913 F.3d at 1282. But *Booker* rejected the distinction. "In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance." 543 U.S. at 237. It did not matter "whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission." *Id.* at 239. Rather, "the Commission is an independent agency that exercises policymaking authority delegated to it by Congress." *Id.* at 243.

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

The Tenth Circuit's decision ignores the "commonplace" rule "that the specific governs the general." *NLRB v. SW Gen.*, 137 S.Ct. 929, 941 (2017). Thus, when the

guidelines were mandatory, the mandatory guidelines range controlled over the statutory penalty range for the underlying conviction because the guidelines range "provide[d] more specific guidance." *See Booker*, 543 U.S. at 234-244. This is much like § 924(e)'s application in cases where its provisions apply to trump the general penalty provisions in 18 U.S.C. § 924(a)(2).

Beckles cabins *Johnson*'s right to provisions that "fix the permissible range of sentences." 137 S.Ct at 892. The mandatory guidelines did just that. *Booker*, 543 U.S. at 232-243; *Cross*, 892 F.3d at 306 ("as the Supreme Court understood in *Booker*, the residual clause of the mandatory guidelines did not merely guide judges' discretion; rather, it mandated a specific sentencing range and permitted deviation only on narrow, statutorily fixed bases"); *Moore*, 871 F.3d at 81 (noting *Booker* "essentially resolved" this issue when it ruled that "the Guidelines [were] binding on district judges"). Because the Tenth Circuit's decision is both inconsistent with this Court's precedent, and incorrect on its own terms, review is necessary.

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

The reality is this: unless this Court grants certiorari in a case like Mr. Bronson's, federal prisoners sentenced under the mandatory residual clause will either be eligible for relief or not depending on nothing else but geography. Those defendants

sentenced within the Seventh Circuit and (almost certainly) the First Circuit (and at least some, if not all, in the Second, Fifth, and D.C. Circuits) will be resentenced to much shorter terms of imprisonment, whereas federal prisoners sentenced within the other Circuits will be left to serve the remainder of their unconstitutional sentences behind bars. In Mr. Bronson's case, this difference in geography means another nine years in prison as opposed to immediate release.

This liberty interest is not insubstantial. Even in the *advisory* guidelines context, and even with respect to a plain vanilla guidelines error, this Court has acknowledged "the risk of unnecessary deprivation of liberty," a risk that "undermines the fairness, integrity, or public reputation of judicial proceedings." *Rosales-Mireles*, 138 S.Ct. at 1908. Here, the error is much more than that. The residual clause is unconstitutionally vague; it is "no law at all." *Davis*, 139 S.Ct. at 2323. This Court's decision in *Johnson* acknowledged that the void for vagueness doctrine "serves as a faithful expression of ancient due process and separation of powers principles the Framers recognized as vital to ordered liberty under the Constitution." *Sessions v. Dimaya*, 138 S.Ct. 1204, 1224 (2018) (Gorsuch, J., concurring). The Tenth Circuit's decision ignores those vital liberty interests and effectively condemns prisoners, like Mr. Pullen, to serve unconstitutional sentences. Review is necessary.

4. Finally, for two reasons, this case is an excellent vehicle to resolve this issue. First, the mandatory residual clause at issue here does nothing other than incorporate § 16(b) to define a "crime of violence." USSG § 4B1.2(1). There is no independent definition of "crime of violence"; the provision merely provides that a "'crime of violence' as used in this provision is defined under 18 U.S.C. § 16." *Id.* And

we know that § 16(b)'s residual clause is void for vagueness. *Dimaya*, 138 S.Ct. at 1214-1215. Thus, we know that § 4B1.2(1)'s residual clause is void for vagueness. We also know that this career-offender provision was statutorily authorized in and of itself. 28 U.S.C. § 994(h)(2). And that, when mandatory, sentencing courts were statutorily required to sentence within the career-offender guidelines range. 18 U.S.C. § 3553(b). As in *Dimaya*, this case is nothing more than a "straightforward application" of *Johnson*. 138 S.Ct. at 1213.

Second, Mr. Bronson preserved the issue below, the Tenth Circuit resolved the issue on the merits, and, if successful, Mr. Bronson will undoubtedly be released from prison immediately. Liberty is actually on the line. And it is liberty that Mr. Bronson could obtain if his conviction came about from a different part of the country. This case is compelling. 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 – a later version at issue in *Cross* – is identical to the residual clause struck down in *Johnson* (§ 924(e)(2)(B)(ii)). And the language of § 4B1.2(1)'s residual clause – at issue here – is the identical residual clause struck down in *Dimaya* (§ 16(b)). Courts interpreted these 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(1)'s mandatory residual clause.

In the end, if this Court holds that § 2255(f)(3) authorizes a *Johnson* claim to challenge a sentence imposed under the residual clause of the mandatory guidelines, as it should, this Court should further declare that residual clause void for vagueness.

CONCLUSION

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

Respectfully submitted,

MELODY BRANNON
Federal Public Defender

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 Petitioner

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.

ABELEE BRONSON, a/k/a Abelee Brunson,

Defendant - Appellant.

No. 18-3131
(D.C. Nos. 2:16-CV-02459-JWL and 2:88-CR-20075-JWL-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 Abellee Bronson. The United States moves for summary affirmance of the district court's dismissal of Mr. Bronson'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. Bronson does not dispute that *United States v.*

* 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.

Greer, 881 F.3d 1241 (10th Cir. 2018) 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 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
DISTRICT OF KANSAS

United States of America,

Plaintiff,

v.

Case No. 88-20075-JWL
Civil Case No: 16-2459-JWL

Abelee Bronson,

Defendant.

MEMORANDUM & ORDER

In 1989, following a jury trial, defendant Abelee Bronson was convicted under 18 U.S.C. §§ 2113(a) and (d) of armed robbery. Mr. Bronson was classified as a career offender under § 4B1.1 of the then-mandatory guidelines and was ultimately sentenced to 262 months imprisonment to run consecutive to a like sentence he received in federal court in Missouri for another robbery. Mr. Bronson's classification as a career offender increased his sentencing range from 84-105 months to 262-300 months. *See United States v. Brunson*, 907 F.2d 117, 120 (10th Cir. 1990).

In June 2016, Mr. Bronson filed a § 2255(f)(3) petition seeking relief based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). Shortly thereafter, counsel for the parties agreed to stay the proceedings in this case pending the Supreme Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017). After the Supreme Court issued that decision (and left open the question whether defendants who were sentenced under the mandatory Guidelines—as Mr. Bronson was—may challenge their sentences for vagueness), the court lifted the stay and the parties briefed Mr. Bronson's § 2255 petition. Counsel for Mr. Bronson then notified the court of his intent to file a

supplemental brief after the Supreme Court's opinion in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) on the grounds that *Dimaya* could bear on Mr. Bronson's case. The court, then, essentially stayed the proceedings again pending a decision in *Dimaya* and ordered Mr. Bronson to file his supplemental brief within 21 days of the *Dimaya* opinion.

Mr. Bronson has now filed a status report and a motion requesting a briefing schedule so that the parties may fully address the impact, if any, of *Dimaya* on two Tenth Circuit decisions, *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018) and *United States v. Mulay*, 2018 WL 985741 (10th Cir. Feb. 20, 2018). Both *Greer* and *Mulay* answered the question left open by the Supreme Court in *Beckles* and held that *Johnson* does not apply to mandatory Guidelines cases on collateral review. In those cases, the Circuit reasoned that the right recognized by the Supreme Court in *Johnson*—for purposes of the procedural requirements of the Antiterrorism and Effective Death Penalty Act (AEDPA)—was limited to a defendant's right not to have his sentence increased under the residual clause of the ACCA and, accordingly, a defendant who had been sentenced under the mandatory Guidelines rather than the ACCA had not invoked such a right. In *Dimaya*, the Supreme Court did not limit *Johnson* to the ACCA and, instead, applied the reasoning of *Johnson* to support a finding that the residual clause in a similarly worded statute, 8 U.S.C. § 16(b), was unconstitutionally vague. 138 S Ct. at 1223.

Mr. Bronson contends that *Dimaya* directly contradicts *Greer* and *Mulay* such that those cases have been superseded and he asks this court to find that *Johnson* applies to mandatory Guidelines cases on collateral review and to grant his § 2255 petition on that basis. In the alternative, Mr. Bronson asks the court, if it denies his petition, to grant a certificate of appealability on the issue of whether *Dimaya* has sufficiently undermined *Greer* and *Mulay* to

warrant a retreat from the holding in those cases. Mr. Bronson has advised the court that the government takes no position on whether the court should grant a certificate of appealability.

The court denies Mr. Bronson's motion requesting a briefing schedule and dismisses Mr. Bronson's § 2255 petition as untimely under § 2255(f)(3). As Mr. Bronson candidly admits, the Circuit has settled the issue of whether *Johnson* applies to mandatory Guidelines cases on collateral review and has squarely held that, for purposes of § 2255(f)(3), the right recognized by the Supreme Court in *Johnson* was limited to a defendant's right not to have his sentence increased under the residual clause of the ACCA. Under Circuit precedent, then, Mr. Bronson, who was sentenced under the mandatory Guidelines rather than the ACCA, has not invoked a "right . . . newly recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3). Moreover, the court rejects Mr. Bronson's argument that *Dimaya* contradicts, supersedes or invalidates the Circuit's holding in *Greer* and *Mulay*. *Dimaya* applied the reasoning of *Johnson* to a similarly worded statute outside the context of the AEDPA. In both *Greer* and *Mulay*, the Circuit's review was confined by the AEDPA and its procedural requirement that a habeas petitioner file a claim for relief within one year of a "newly recognized right" to the relief requested. *Dimaya*, then, does not dictate that *Johnson*, for purposes of the AEDPA, recognized a right broader than the right described by the Tenth Circuit in *Greer* and *Mulay*. Because *Dimaya* does not contradict *Greer* and *Mulay*, this court is required to follow those decisions. *See United States v. Spedalieri,* 910 F.2d 707, 709 & n.2 (10th Cir. 1990) (district court is bound by Tenth Circuit precedent); *see also Leatherwood v. Allbaugh*, 861 F.3d 1034, 1042 n.6 (10th Cir. 2017) ("[W]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.") (quoting *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015)). It is not for this court

to read the tea leaves to attempt to determine whether the Circuit would rethink its position. In light of *Greer* and *Mulay*, the court finds that Mr. Bronson's § 2255(f)(3) petition is untimely filed because it does not assert a right recognized by the Supreme Court in *Johnson.*

Because the court is entering a final order adverse to Mr. Bronson, it considers whether to issue a certificate of appealability. "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 believes that a certificate of appealability is appropriate because reasonable jurists would find it debatable whether *Dimaya* sufficiently undermines the Circuit's rationale in *Greer* and *Mulay* to warrant a retreat from the holding in those cases such that Mr. Bronson's petition would be deemed timely filed for purposes of § 2255(f)(3). Whether it did so is better left for the Court of Appeals.

IT IS THEREFORE ORDERED BY THE COURT THAT Mr. Bronson's motion to vacate under 28 U.S.C. § 2255 (doc. 98) is **dismissed** and Mr. Bronson's motion to order briefing schedule (doc. 116) is **denied.**

IT IS FURTHER ORDERED BY THE COURT THAT a certificate of appealability is **granted.**

IT IS SO ORDERED.

Dated this 1st day of May, 2018, at Kansas City, Kansas.

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